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COMMENTS OF ITIF

Before the

Turkish Competition Authority (Rekabet Kurumu)

Ankara, Republic of Türkiye

In the Matter of: Proposal on Amending the Law on Protection of Competition (Act No. 4054, 1994)	)	Public Comment

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SQUEEZING OUT INNOVATION: CONCERNS WITH TURKEY'S PROPOSED DIGITAL COMPETITION BILL

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INTRODUCTION

On June 7, 2024, the Turkish Competition Authority (TCA) issued a call for consultation about proposed amendments to Act No. 4054 on the Protection of Competition. The bill's central purpose is to modify Turkish competition law to enable the TCA to more adequately address concerns about antitrust enforcement in the digital economy.

The Schumpeter Project on Competition Policy of the Information Technology and Innovation Foundation (ITIF) appreciates the opportunity to comment on the bill. ITIF is a nonprofit, nonpartisan research and educational institute that has been recognized repeatedly as the world's leading think tank for science and technology policy. ITIF's comment proceeds in four parts:

1. **Turkey must avoid implementing de facto ex-ante regulation while its digital markets are at such a nascent stage.** Indeed, especially in digital markets, market power is not at all an indicator of market power, but rather the Schumpeterian competition that can drive dynamic competition. Additionally, Turkey's existing and robust ex-post law enforcement regime is more than sufficient to address competition concerns.

2. **The bill will chill pro-competitive conduct by introducing a number of per se bans for conducts that very often benefit consumers.** For example, self-preferencing is common across the digital economy as a key way to improve user experience, and leveraging of third-party data is a key tool to meet consumer needs. And behavior like tying, both in and outside the digital economy, has long been recognized as having efficiency benefits.

3. **The bill does not appear to make a firm having entrenched market power a condition for being a gatekeeper, which risks an overbroad application that imposes high costs on firms that pose no risk to Turkey's digital economy.** Moreover, the ambiguous and open-ended nature of the qualitative threshold creates tremendous uncertainty for firms who fear being targeted by the bill even if they do not meet the more objective qualitative thresholds. Additionally, new remedial provisions in the bill, such as its seeming tolerance of structural relief even where behavioral remedies are not

shown to be inadequate, risk adding insult to injury in a competition regime already characterized by steep penalties.

4. **Accordingly, ITIF recommends that Turkey step back from the proposed amendment** and continue to allow competition and innovation to flourish to help grow its economy using existing tools.

TURKEY DOES NOT NEED DIGITAL REGULATION

Ex-ante digital regulation should be a response to market failure. However, Turkey's digital markets exhibit no signs of market failure. In fact, as ITIF has previously explained, "Turkey's tech sector grew in recent years at an impressive rate: by 2021, it was 67 percent larger than in 2012—outpacing overall GDP growth of 49 percent over the same period. By 2022, Information and Communications Technology (ICT) industries represented about three percent of Turkey's GDP. Recognizing the key importance of these industries, the Turkish government has made securing ICT investment a key economic priority."[1]

Importantly, even where market power exists, that does not mean there is market failure. Specifically, in digital markets, competition often takes the form of Schumpeterian "gales of creative destruction,"[2] where firms compete for the market by creating a new product, only to be challenged by additional "leapfrog competition" that supplants the formerly dominant firm with a still newer product that dazzles consumers.[3] As such, market power in these dynamic markets is often a feature, not a bug, of competition: size, scale, and scope create the appropriability incentives that allow firms to make the necessary investments in a dynamic competition that makes digital markets work.

Moreover, even in cases of market failure, ex-ante regulation only makes sense if existing ex-post law enforcement is inadequate. However, Turkey has a robust competition regime able to investigate and address possible anti-competitive practices by digital firms.[4] For example, just a few weeks ago, the TCA fined Google on the grounds that it failed to comply with measures related to its search services.[5] Indeed, just days ago, the

[1] Hadi Houalla: Turkey's DMA Spinoff Is Another Threat to Global Innovation, https://itif.org/publications/2024/02/26/turkeys-dma-spinoff-is-another-threat-to-global-innovation/.

[2] JOSEPH A. SCHUMPETER: CAPITALISM, SOCIALISM, AND DEMOCRACY 81 (1942).

[3] Timothy J. Muris & Joseph V. Coniglio, W*hat Brooke Group Joined Let None Put Asunder: The Need for the Price-Cost and Recoupment Prongs in Analyzing Digital Predation*, THE GLOBAL ANTITRUST INSTITUTE REPORT ON THE DIGITAL ECONOMY 1328–29 (November 11, 2020), http://dx.doi.org/10.2139/ssrn.3733758.

[4] See more details about investigations: ELIG Gürkaynak Attorneys-at-Law: Turkish competition law in 2023: a comprehensive overview, https://www.lexology.com/library/detail.aspx?g=ac5ad2af-d7bd-4c7d-93cb-ac756c95c503#Investigations.

[5] Reuters: Turkish competition board fines Google over failure to comply with regulation, https://www.reuters.com/technology/turkish-competition-board-fines-google-over-failure-comply-with-regulation-2024-05-16/.

TCA opened an investigation into Apple for potential competition violations.[6] As such, with law enforcement and investigations ongoing, there is simply no basis to think additional ex-ante regulation is needed.

THE DRAFT WILL CHILL PROCOMPETITIVE BEHAVIOR

The per se bans put forward in the bill are very likely to condemn conduct that often admits of strong procompetitive justifications. For example, the bill appears to include a ban on self-preferencing, a firm favoring its own products or services over those offered by third-party businesses, as well as related product design decisions. This type of behavior is not only ubiquitous across the digital economy but can almost always lead to a better user experience by integrating various products and services and increasing the platform's competitiveness.[7] For example, Google integrates its search and Maps products to give users more information more seamlessly. It utilizes search defaults on Android to improve user experience, enhance the quality of its search product through increased scale, and increase inter-brand competition with rivals like Apple's iOS.

Next, the bill includes several data-related prohibitions, including data misappropriation, a charge commonly leveled at vertically integrated digital platforms like Amazon, which offer third-party sellers a marketplace where they can sell to millions of consumers, but who are also both a first-party retailer as well as seller of many individual products. However, especially in the case of aggregated data, using data across multiple markets is a crucial way to correct information asymmetries and better understand consumer demand. Doing so allows firms like Amazon to offer more relevant products and services to users, which is a practice that is not only endemic to modern brick-and-mortar retailers as well, but perhaps as old as commerce itself. That is a good business practice that firms try to give customers what they want and not something that should be banned per se.

The bill also seems to identify tying as behavior that will be treated as per se illegal. But this type of conditioning, whether contractual (tying), price-based (bundling), or by design (technological tying), is usually not anticompetitive and can admit of strong procompetitive justifications that benefit consumers. As has long been understood, tying, bundling, and technological integration not only play an important role in preventing inefficiencies associated with free riding, but can benefit consumers through increased convenience and introducing consumers to new offerings, better value, and a more integrated product ecosystem. For digital markets especially, the latter form of technological tying, while found to be anticompetitive in cases like *United States v. Microsoft*, it is ever-present throughout the digital economy and typically beneficial for consumers, who benefit from a seamless user experience.[8]

Other provisions in the bill appear to involve interoperability and data portability, as well as require gatekeepers to provide fair, reasonable, and non-discriminatory access to certain of their services. However, this sort of openness does not necessarily foster competition. Rather, it can often dampen it: refusals to deal are almost always procompetitive, with the U.S. Supreme Court making clear that gains from increased access

[6] Reuters: Turkey launches probe into Apple on limitations over payment systems, https://www.reuters.com/technology/turkey-launches-probe-into-apple-limitations-over-payment-systems-2024-06-06/.

[7] *See, e.g.*, Trelysa Long: History Shows How Private Labels and Self-Preferencing Help Consumers | ITIF (Nov. 2022).

[8] United States v. Microsoft, 253 F.3d 34 (D.C. Cir. 2001).

are unlikely to outweigh the costs of diminished innovation, which are particularly acute in digital markets.[9] For example, while it has long been argued that Meta should share its data assets with applications that use its platform and allow for data portability, requiring firms like Meta to deal with their rivals in this way diminishes not only Meta's incentives to invest, but also the incentives for rivals to create new platforms compete with Meta—chilling the dynamic platform competition that is key for digital markets to work.

THE BILL'S SCOPE AND REMEDIES WILL CREATE UNCERTAINTY

Rather than rely solely on a quantitative threshold, the bill includes an additional and more subjective qualitative test for companies to qualify as gatekeepers even if quantitative thresholds are not met. Specifically, the bill lists a number of general factors that the TCA will consider, and which will likely make it extremely difficulty for firms to know if they are subject to regulation even if they do not trigger the quantitative test. This overall lack of clarity opens the gateway to regulatory capture, if not also serious due process concerns, including the TCA having too much discretion and using regulation to pick winners and losers in the market. Moreover, the bill does not make clear that a firm having entrenched market power will be a requirement for a firm to be a gatekeeper, which risks an overbroad application not tied to addressing market failure.

With respect to remedies, Turkey's existing laws already provide for high penalties in the case of offenses. As ITIF has previously explained, "[t]he bill's proposed sanctions also stand out as some of the highest worldwide. While current regulations already allow massive fines of up to 10 percent of annual turnover, the draft bill pushes this one step further, allowing the government to fine up to 20 percent of annual turnover in cases of repeated infringements. In addition to steep financial penalties, the Turkish government can ban mergers and acquisitions for up to five years in cases of repeated infringements."[10]

The bill creates new concerns by appearing to countenance additional fines that accrue on a daily basis for noncompliance with its provisions. Furthermore, and crucially, the bill notes that structural remedies may be applied even if there has not been first a showing that behavioral remedies are inadequate. Typically, behavioral remedies are the default mechanism to address the types of exclusionary conduct that are prohibited in the bill, with structural relief only applied in extremely extraordinary circumstances. Indeed, structural relief can be particularly problematic in digital and platform markets driven by network effects, which provide benefits to users from increased scale. As such, the bill raises the specter of unnecessary breakups, which could seriously damage Turkey's digital environment—as well as raise serious geopolitical concerns to the extent that breakups involve foreign technology giants.

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[9] *See* Verizon Comm'cs v. Law Offices of Curtis V. Trinko, 540 U.S. 398, 407–8 (2004) ("Firms may acquire monopoly power by establishing an infrastructure that renders them uniquely suited to serve their customers. Compelling such firms to share the source of their advantage is in some tension with the underlying purpose of antitrust law, since it may lessen the incentive for the monopolist, the rival, or both to invest in those economically beneficial facilities.").

[10] Hadi Houalla: Turkey's DMA Spinoff Is Another Threat to Global Innovation, https://itif.org/publications/2024/02/26/turkeys-dma-spinoff-is-another-threat-to-global-innovation/.

RECOMMENDATIONS

ITIF recommends that the TCA strongly consider staying the course with its current competition law regime and avoid implementing digital regulation in its growing digital markets.

- **Ex-ante regulation is unnecessary:** Turkey should avoid rushing into regulation. Instead of following the path of the EU's experimental DMA regime, Turkey should take a wait-and-see approach. Indeed, it has robust competition laws that continue to apply in the digital space, making ex-ante regulation especially premature at this time.
- **Digital regulation will chill innovation:** Turkey's top priority should be fostering an innovation-friendly business environment. This will encourage the growth of its digital economy. Unfortunately, the per se bans in the bill will only chill behavior that benefits consumers. Procompetitive self-preferencing, refusals to deal, tying, and the efficient use of data are all essential practices not just in digital markets, but in the economy as a whole.
- **The bill will increase uncertainty:** If Turkey does decide to move forward with digital regulation, it should avoid subjective and qualitative designation criteria, which will create uncertainty. This uncertainty is exacerbated not just by the existing high penalties under existing Turkish competition law, but the availability of structural relief even if behavioral remedies are not shown to be inadequate.

CONCLUSION

Turkey's digital bill comes at a time when it needs to be focused on continuing to foster a digital market driven by innovation, not regulation. Ex-ante regulation is not only unnecessary in view of Turkey's growing digital markets, but likely to chill the very innovation it seeks to promote. Through a number of per se bans for behavior that is very often pro-competitive, consumers will be harmed—a fact that is already happening in Europe with its own DMA. Rather than follow the European path of regulation, Turkey should look toward the American model of market driven innovation that has proven so successful at creating the world's leading digital firms.

Thank you for your consideration.

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