



## CCIA Comments on the Draft Amendment to Law No. 4054 of the Protection of Competition in Turkey

The Computer and Communications Industry Association (“CCIA”)<sup>1</sup> welcomes the opportunity to comment on the draft amendment to Law No. 4054 on the Protection of Competition (the “Draft Amendment”) proposed by the Turkish Competition Authority (“TCA”).

Online digital services platforms, referred to in the Draft Amendment as “Core Platform Services,” offer innovative and popular services to consumers, and have revolutionized the way consumers and businesses interact with each other. As highlighted by the general preamble of the Draft Amendment, digitalization plays an important role in many areas such as communication, shopping, access to information, and socialization. The Draft Amendment is based on an understanding that there might be market features of Core Platform Services that may impede, distort or restrict competition. CCIA strongly believes that for the TCA to determine whether there is a need to address possible competition concerns in this area, it is important to fully and accurately understand the various business models behind the online intermediation platforms and the industries in which they operate.

When proposing this type of regulation, the TCA should take into account business realities. As such, it is important for the TCA to continue to reexamine its positions detailed in the Draft Amendment to fully reflect the underlying business models of these complex services and revisit its provisional proposals and recommendations accordingly.

Turkey should also consider the risk of a highly prescriptive *ex-ante* regime, targeting select market participants under an ill-defined concept of “significant market power” implicating national treatment and MFN obligations Turkey has undertaken in both the WTO and in Bilateral Investment Treaties. To the extent that these extensive behavioral constraints put the targeted “core platform provider” at a competitive disadvantage vis a vis Turkish or third-country suppliers, Turkey could jeopardize its compliance with its international obligations not to discriminate in favor of domestic or third-country suppliers.

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<sup>1</sup> CCIA is an international, not-for-profit association representing a broad cross section of communications and technology firms. For fifty years, CCIA has promoted open markets, open systems, and open networks. The Association advocates for sound competition policy and antitrust enforcement. CCIA members employ more than 1.6 million workers, invest more than \$100 billion in research and development, and contribute trillions of dollars in productivity to the global economy. For more, visit [www.ccianet.org](http://www.ccianet.org).

CCIA's comments underscore the benefits Core Platform Services provide for consumers and discuss that there are important considerations the TCA and regulators should take into account when designing any proposed regulation for Core Platform Services. Therefore, our comments will (i) express concerns regarding specific suggested modifications to the Turkish competition law (Part 1), and provide some principles and general recommendations that should be considered in response to the TCA's proposed amendments (Part 2).

## **PART 1: Specific Concerns in Relation to the Draft Amendment**

### **1. Concerns Regarding Mandating Platforms to Interoperate, Share Data with Third Parties, and Grant Third Parties Access to Data**

CCIA encourages interoperability as a way to increase 'market contestability' and reduce barriers to entry, and believes that practices such as multi-homing and switching can help keep markets open to entry and expansion. However, the language on interoperability included in the Draft Amendment seems even broader than the one included in the DMA. The Draft Amendment establishes that Undertakings Holding Significant Market Power should "enable the interoperability of core platform services and/or ancillary services and fulfill the technical requirements for this." The above means that the obligation applies across all Core Platform Services and ancillary services and it contains none of the safeguards and requirements of the DMA around preserving the same level of information security and privacy measures that the covered entity currently provides.

It is important for the TCA to consider that forced data sharing poses risks to user privacy: under this obligation, Turkish users would have less control over their data if digital platforms are mandated to share their data with third parties. Even though the Draft Amendment contemplates ensuring that such proposals come with controls to protect privacy, ensuring that any such controls are robust and cannot be reverse-engineered by determined parties would be an ongoing challenge in practice. For example, many platforms interact with their users on the basis of implicit or explicit consent with respect to how data is used, processed, and transferred to third parties; in such cases, it would be extremely burdensome, and in many cases simply infeasible, to obtain consent from all subscribers before transferring data.

This obligation can also affect integrity, security and privacy more broadly, since tools and technologies to fight spam, for example, or scams and other harmful activities would be compromised if third-party apps are not obligated to meet those same standards and allow such tools to work on their networks. In addition, there is the risk of disclosing businesses' confidential information and facilitating collusion. Lastly, and very importantly, forced data sharing could enable even more dramatic harms, such as theft or corruption of data, unauthorized cyber intrusion, widespread disinformation and manipulation.

As an alternative, data portability can help drive innovation and competition by enabling consumers to securely switch among services from different providers, empowering them to try new services, and allowing them to choose the offering that best suits their needs. Measures to promote common frameworks and open systems for consumers to move data between services are the best way to achieve such portability, provided that the actual data sharing would be at the consumers' request.

## **2. Concerns Regarding the Self-preferencing Prohibition**

The Draft Amendment establishes that Undertakings Holding Significant Market Power shall, among others, “refrain from discriminating their own goods and services in ranking or in other conditions, compared to the goods or services of business users.”<sup>2</sup>

Under these amendments, it seems that the only clear-cut way for a platform to avoid legal scrutiny may be to stop selling its own products. In that sense, it is crucial to analyze what this specific prohibition would mean for the everyday consumer and what changes a user might see in many of the products that we enjoy and find beneficial. In this regard, CCIA believes that competition authorities should think more broadly and consider if the impact would be on consumers and on the small businesses who have really benefited particularly from the online ecosystems.

CCIA encourages the TCA to distinguish between the pro-competitive effects of self-preferencing as a legitimate self-promotion tool and the anticompetitive effects of self-preferencing as an unjustified exclusionary tool and analyze the implementation of an *ex ante* regulation considering all the possible consequences that it could bring for the consumer, for innovation, and for the economy.

## **3. Risks of Limiting the Ability of Platforms to Share User Data Internally**

Rigid rules to limit or ban cross-service use of data could prevent users from enjoying the benefits that such data use brings. For example, as long as users have transparency, give consents, and maintain control, enabling sharing of data across products allows for information to be properly accessed or controlled centrally by the company across multiple products, rather than needing to separately manage this for each service. In addition, cross-device and cross-product data sharing provides consumers with additional security measures and fraud detection. Introducing measures to limit cross-service data would entail a risk of severely impacting the value that digital platforms offer to the Turkish market and ultimately consumers.

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<sup>2</sup> Article 6/A of the Draft Amendment.

#### **4. Undertakings Should Have the Opportunity to Comment on Specific Rules before the TCA**

Given the significant potential consequences of the introduction of a regulatory regime for Undertakings Holding Significant Market Power, we strongly encourage the TCA to consult extensively with relevant stakeholders before publishing its Final Draft Amendment.

### **PART 2: General Principles and Recommendations**

#### **1. Key Principles to Guide Regulatory Proposals**

Without adopting and complying with some basic principles, an *ex ante* regulation would run the risk of harming consumers, competition, and innovation. Therefore, CCIA offers ten harmonizing principles that the TCA should consider to ensure any proposed regulation in Turkey is effective, proportionate, and does not lead to unintended consequences.

##### **1.1. Protect Consumers and the Economy**

Core Platform Services provide Turkish consumers and businesses tremendous benefits. Numerous studies have confirmed the many ways in which digital services and multi-sided business models reinforce and stimulate competition in the internal market.<sup>3</sup> Given the dynamic and innovative nature of digital markets, any new regulation for platforms needs to take into account wider potential implications for businesses and consumers. Therefore, we encourage that the TCA thoroughly assess whether the benefits of any proposed digital platform regulation would outweigh its potential negative impact for Turkish consumers and the economy in general.

For Turkey to attain its overarching goal of facilitating fair competition, investment, and innovation the proposed regulation should not contradict the competition enforcement framework and focus on enhancing consumer welfare, also taking into account the business models and ecosystems that create value for consumers and the economy as a whole. It is important that measures should ensure continued promotion of customer choice and competition, which are two key components of economic growth and prosperity.

##### **1.2. Protect Innovation**

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<sup>3</sup> See *e.g.* European Commission “Staff Working Document: Evaluation of the Vertical Block Exemption Regulation” (8 September 2020), available [here](#), at 32 (“[A]lternative online distribution models such as online marketplaces have made it easier for retailers to access customers. By using these third-party platforms, small retailers may, with limited investments and effort, become visible to potential customers and sell products to a large customer base and in multiple Member States.”). See *e.g.* Oxera’s study “How platforms create value for their users: implications for the Digital Markets Act” (12 May 2021), available [here](#) at 34 (“The bundling and tying of different features and services by a platform can boost the efficiency of a market by reducing transaction costs, increasing choice for consumers, and helping businesses to achieve scale economies.”).

The digital economy is characterized by product, process and service innovation known as dynamic competition. Dynamic competition enhances consumer welfare not only in the form of price reduction but it also brings innovation and service improvement that customers enjoy. An overly burdensome and heavy-handed regulation could significantly hinder innovation and harm economic growth in a country. As the proposed regulation is related to the digital and connected markets, it is closely tied to innovation. In practice, implementing an overly rigid *ex ante* regulation would have enormous repercussions in terms of how the impacted companies would develop their products overtime, as any regulation brings about significant uncertainty and challenges regarding its implementation.

### 1.3. Preserve Business Freedom

Digital economy regulation should preserve business freedom and choice of pro-competitive business models. Business users exercise this right when they choose to accept the terms of dealing with platform operators. These private enterprises should have the freedom to judge the fairness of their agreements.

### 1.4. Prevent Distortive Dependencies

Experience shows that government mandated access conditions lead to long-running government-led renegotiations of terms of service. In dynamic and diverse digitally-enabled markets, imposing new and untested *ex-ante* access conditions risks tying future innovation to ongoing regulatory oversight.

### 1.5. Provide Legal Certainty

*Ex ante* regulation needs a workable and future-proof mechanism for balancing the interests of consumers, suppliers, other ecosystem participants, and the general interest in an open market economy with free competition. To provide legal certainty, this centralized oversight of the digital economy should be based on a coherent, objective, and administrable governance and enforcement framework.

### 1.6. Evaluate the Impact on Other Policy Areas Different from Competition

An overly burdensome and heavy-handed regulation could significantly hinder innovation and harm economic growth. In addition to the impact from a competition enforcement and policy perspective, these regulatory proposals may have a significant impact in areas such as data privacy, national security, cybersecurity, and intellectual property with implications for businesses operating in Turkey. Overly complex, intrusive, or broad regulatory regimes are likely to deter entry and investment from innovative companies. In this regard, a key consideration is whether the existing enforcement frameworks, including competition, consumer

protection, and data privacy already provide more proportionate ways to achieve the desired outcomes. Therefore, clarifying the expected outcomes of a proposed framework is particularly important for consumers and businesses alike.

#### 1.7. Consider an Evidence-based Approach

CCIA also encourages the TCA to review evidence and past experience and focus the proposed framework on the types of conduct that are recognized to be demonstrably harmful for competition, rather than seeking to address theoretical or speculative harm, which would risk overregulation to the detriment of innovation. In addition, it is important to acknowledge that economy-wide harms are better addressed by economy-wide reforms, rather than platform-specific regulation. CCIA's recommendation is for the TCA to embrace a balanced, evidence-based approach.

In addition, CCIA recommends that prior to proposing a new platform regulation, the TCA and policymakers gather evidence through extensive consultation to confirm and justify that there is in fact a need for the rules to be changed or for additional rules to be imposed to Core Platform Services. If the need for new rules is identified and confirmed, those new rules should be proportional to the impact of potential harm and should take into account the chances that such harm may take place. New rules should aim to promote competition and enable continuous innovation in the marketplace, while preventing competitive harm and unfettered regulatory discretion.

#### 1.8. Implement Procedural Protections to Involve Affected Companies

The integrity of a new regime should also be secured by suitable procedural protections and review mechanisms. In particular, full merits review by a court should be available for decisions that have legal consequences for affected companies.

#### 1.9. Analyze the Costs and Benefits of Implementing New Regulation

Additionally, due to the significant economic impacts of regulating Core Platform Services in Turkey, it is crucial that the TCA and the Government play an active role in engaging with relevant stakeholders and market players in the development of any *ex ante* regime. Introducing new regulation for platforms is not costless, especially given the dynamic and innovative nature of digital markets. As a result, the ultimate objective of any new regime should be to promote competition and innovation.

To ensure that the cost of any new regime does not outweigh its benefits, the rules should allow conduct that is clearly pro-competitive or completely benign and recognize justifications for legitimate protections. Without appropriate safeguards an *ex ante* regime may outlaw

legitimate and pro-competitive forms of conduct, to the detriments of consumers and businesses that use these platforms.

#### 1.10. Maintain Competitive Neutrality

Finally, any remedy should endeavor to maintain competitive neutrality.<sup>4</sup> *Ex ante* regulations that blatantly favor or inhibit particular market participants risk delegitimizing both the regulation and its underlying policy goal and may lead to reduced investment and entry into Turkish markets.

## **2. Concerns Regarding the Categorization of Undertakings Holding Significant Market Power and the Potential Scoping of New Rules to Specific Companies**

The Draft Amendment identifies specific companies as Undertakings Holding Significant Market Power, which the Draft Amendment classifies based on the following conditions that need to be satisfied cumulatively: (i) having a certain scale in terms of one or more Core Platform Services; (ii) operating in a way that has a significant impact on access to end users or on the activities of business users; and (iii) having the power or being foreseen to be able to reach the power to maintain this impact in an established and permanent manner. The principles regarding the implementation of this article are determined by the communiqué issued by the TCA Board.

In this regard, CCIA encourages the TCA and its Board to avoid arbitrary scoping of new rules to specific online intermediation platforms. Proposed remedial actions and recommendations should be rules of general applicability and should not be designed and enforced only against a few companies. CCIA suggests implementing guidance and/or regulations if any at a *principle-level* rather than targeting and scoping particular companies.

Given the complexity of these markets, CCIA believes that an exhaustive analysis of each one of the markets, products, and services is needed to determine, based on evidence, which are the undertakings that should be subject to the prohibitions listed in the Draft Amendment and why these online digital services platforms should be subject to more regulation than others also participating in the markets.

More importantly, CCIA believes that the TCA should carefully analyze if categorizing a few companies as Undertaking Holding Significant Market Power and implementing additional and costly rules to such leading platforms is in fact the best for the Turkish economy.

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<sup>4</sup> “It is a fundamental principle of competition law and policy that firms should compete on the merits and should not benefit from undue advantages for example due to their ownership or nationality.” OECD, Competitive Neutrality in Competition Policy, <https://www.oecd.org/competition/competitive-neutrality.htm>.

In conclusion, CCIA cautions against relying on speculation or hypothetical situations to define which undertakings are considered Undertaking Holding Significant Market Power that warrant further regulation. As mentioned above, CCIA believes that an exhaustive analysis is crucial and therefore encourages the TCA to gather evidence through extensive consultation to confirm and justify that there is, in fact, a need to regulate even potential leading online intermediation platforms.

### **3. The TCA Should Be Cautious in Relying on Untested International Regulatory Experiments**

The Draft Amendment mirrors relevant developments and findings in other major competition jurisdictions, which may help to inform some of the conclusions and recommendations. In fact, in the general preamble, the Draft Amendment states that “in addition to the United Kingdom and the United States, countries such as Australia, Japan and India have accelerated their regulatory efforts, and it is known that these efforts have been finalized in the European Union and Germany.” While it may be useful to study certain jurisdictions that are leading the charge towards regulation of the digital economy, it is important that the TCA not assume that the first mover or most active jurisdiction is making the best choice for Turkish consumers.

In this regard, CCIA strongly recommends avoiding relying on international regulatory experiments in this area. Digital reforms are being considered in various jurisdictions. However, as of today, only one jurisdiction – Germany – has in fact introduced an *ex ante* regulatory framework, and the results of this reform are not yet available. While it is clearly useful to understand international proposals, CCIA is concerned that the context to those reforms is often lost. For example, some proposed reforms are the result of particular political dynamics and there are emerging concerns about the impact of digital-specific reforms. Also, other international reforms are approaching implementation, which will introduce further issues and challenges as those reforms take effect.

For example, the Digital Markets Act (“DMA”) has been plagued with concerns about implementation, complementarity with existing regulations and competition authority mandates, and reliance on broad and untested new concepts (such as “fairness”).

CCIA urges the TCA to avoid rushing to adopt reforms potentially reflecting international regulatory experiments, without first allowing some time to gauge how those are working or whether the reforms are harming consumers and innovation. Rather than play “follow the leader” (which, given the lack of similar implementation in other jurisdictions, may actually reveal the leader as the outlier), the TCA should continue to focus on developing its understanding of the unique dynamics of the Turkish market and tailoring its proposals

accordingly. The TCA and the Government's role is to ensure that the Turkish competition regime is fit for purpose and supports the domestic economy, promotes innovation, and delivers benefits to consumers.

CCIA is pleased to provide this input on the Draft Amendment and welcomes any questions from the TCA.