
A Look at TCA's Approach to Abuse of Dominance through the Lens of AG Rantos's Opinion

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Introduction:

In recent weeks, highly praised opinion ("**Opinion**") of the Advocate General Rantos, which was originally published in French, is released in English.[\[1\]](#) In this article, we summarized the opinion of the Advocate General in four short sections and, supplemented each section with the decisional practice of the Turkish Competition Authority (the "**TCA**") as a comparison benchmark.

A. Background of the Case:

By way of background, the conduct at issue in the proceedings, investigated by the Autorità Garante della Concorrenza e del Mercato ('the **AGCM**'), took place against the backdrop of the opening up of the market for the supply of electricity in Italy and took the form of an alleged complex abusive strategy implemented by the three companies of the ENEL SpA Group (the incumbent operator) seeking, in essence, arguing that the incumbent acted to make it more difficult for competitors to enter the liberalized market. More specifically, that strategy allegedly consisted in the discriminatory use of data relating to customers of the protected market which, prior to the liberalization, were available only to Servizio Elettrico Nazionale SpA ('**SEN**'), one of the companies of the Enel Group, in its capacity as the market operator. The objective pursued was allegedly to use those data to issue commercial offers to the customers of that market in order to transfer those customers within the Enel Group, namely from SEN to the subsidiary of the group active on the free market, namely Enel Energia SpA ('**EE**'). That was allegedly to prevent the large-scale departure of SEN customers to third-party suppliers, in view of the abolition of that protected market.[\[2\]](#)

A.1. Legality Under Civil Law

By the first part, the referring court asked whether, for the purposes of Article 102 TFEU, an abuse of dominant position may be found in respect of conduct which is lawful under branches of law other than competition law. The question stemmed from the fact that the methods used to obtain consent for the inclusion on the SEN lists[\[3\]](#) were unquestionably lawful under civil law.[\[4\]](#)

Advocate General have stated that the concept of abuse is founded on the objective assessment of the capacity of particular conduct to restrict competition, without the legal classification of that conduct under other branches of the law being decisive. In other words, a conduct may be legal

under other disciplines of law but can be considered an abuse under competition law and vice versa.

The TCA also followed a similar route in its *Tüpraş* decision^[5], where it stated, by relying also on the hierarchy of norms, that a contract which can be deemed lawful as per the Turkish Law of Obligations may nevertheless constitute an abuse under the Law No 4054 On the Protection of Competition (“**Turkish Competition Law**”).^[6] Therefore, it is self-evident, as stated by the TCA that when Turkish Competition Law and other branches of civil law collide in terms of legality, Turkish Competition Law will continue to apply.

A.2. Market Structure or Consumer Welfare

The second question submitted for a preliminary ruling consisted of two parts:

- the first part seeks to establish what interest is protected by Article 102. Two possibilities are contemplated here which the referring court presents as alternatives, namely ‘the maximization of consumer protection’ or ‘the preservation of the structure of competition in the market’
- the second part seeks to determine the consequences in terms of evidence of the relationship between the two objectives of Article 102.

In its analysis regarding the first part of this question, the Advocate General arrives to the conclusion that the object of Article 102 is to protect consumers. In the first place, Advocate General observes that according to the Court’s settled case law Article 102, like Article 101, covers not only abuse which may directly harm consumers but also abuse which indirectly harms them by impairing effective competitive structure. Accordingly, the ultimate purpose of the rules that seek to ensure that competition is not distorted in the internal market, is to increase the well-being of consumers. Consequently, there is no logical reason to protect the competitive market in the abstract, if there is no (actual or potential) risk of harm to consumers.^[7]

In other words, when as a result of the competition, “less-efficient competitors” are eliminated from the market, this will not be detrimental to the consumers and the competition authorities need not intervene with driving out such competitors. On the other hand, if competitors which are as efficient are driven out from the market, the competition authority may step in to protect the market structure and by proxy, protect consumers. Indeed, in *Intel*, which is also referenced by the AG Rantos in his opinion, the Court have stated that “*competition on the merits may... lead to the departure from the market or the marginalisation of competitors that are less efficient.*”^[8]

Consequently, the AG Rantos concludes that it seems to be incorrect to interpret the Court’s existing case-law as merely indicating that, in order to establish an abusive exclusionary practice, it is sufficient to establish that the practice in question is capable of affecting the structure of the market. Indeed, an adverse effect of the competitive structure of the market does not necessarily or automatically translate into a potential decrease in consumer well-being. While such a presumption of harm does exist in the case of cartels, it does not in the case of abuses of a dominant position.^[9]

The Authors of this article also concur with the AG Rantos that the ultimate aim of competition law is to protect consumer welfare. Thereby, we believe that the TCA also should only intervene with the market structure where alteration of the market structure (e.g., forcing a competitor out of the market) will lead to consumer harm. To us, this aim is also evident from the wordings of Article 6 of the Turkish Competition Law prohibiting abuse of dominance.

As for Article 6 of the Law, sub paragraph (e) explicitly mentions once again the consumers and states that restricting production, marketing or technical development to the prejudice of consumers is prohibited. Note that AG Rantos also states in his opinion that the interests of consumers are expressly referred to in point (b) of the second paragraph of Article 102, in connection with practices associated with abusive exclusionary conduct, namely ‘limiting production, markets or technical development to the prejudice of consumers’. Article 6 and Article 102 are identical in wording (this being no surprise considering that Turkish Competition Law is modelled after EU Competition Law). Consequently, we are of the opinion that, the analogy made by AG Rantos is directly applicable to the Turkish Competition Law.

Lastly, it seems that this view also finds support when the TCA’s case law is examined. In its decision dated 19.07.2017 and numbered 17-23/384-167; the TCA have stated that[\[10\]](#);

“The protection of consumer welfare is undoubtedly one of the most fundamental objectives of Competition Law. However, protection of consumer welfare does not translate into protecting competitors active in the market. The consumer interest protected here is to prevent the reduction of consumer welfare, which will arise due to effective competition, to be lessened via anti-competitive measures. In other word, exit of competitors from the market will not result in the reduction of consumer welfare per se; but driving out competitors which contribute, or which have a potential contribute to the effective competition with anti-competitive measures will decrease consumer welfare.”

, In light of the foregoing, we believe that, Turkish Competition Law’s ultimate is to protect consumers, in parallel with AG Rantos’s view that competition laws aim is to protect consumers By proxy, the TCA may intervene with a practice which force as-efficient competitors out from the market to protect the consumers since, ousting of such competitors may be detrimental to the welfare of consumers.

A.3. Potential Effects or Actual Effects

By its third question, the referring court asked, in essence, whether the purposes of establishing the existence of an infringement of Article 102, evidence adduced by a dominant undertaking which establishes that the conduct at issue, despite its abstract ability to produce restrictive effects, did not cause any actual harm should be treated as relevant and, if so, whether the competition authority is required to examine the evidence produced by the undertaking in relation to the actual ability of that conduct to produce the effects in question.[\[11\]](#)

In the first place the AG Rantos recalls that it is not necessary, in order to establish an abuse under

Article 102, to show that the conduct in question actually produced anticompetitive effects and it is sufficient to show that the conduct is capable of producing such effects. According to the AG Rantos a competition authority is solely required to demonstrate the harmful potential of the conduct complained of, irrespectively of whether anticompetitive effects actually materialized. Indeed, it would be contrary to the rationale of that provision, which is also preventive and forward-looking in nature, if it were necessary to wait for the anticompetitive effects to occur in the market before a finding of abuse could lawfully be made.^[12]

To that end, the Advocate General cites several case laws of the Court, in support of his view. For example, in *TeliaSonera*, the Court expressly stated that “*the fact that the desired result, namely the exclusion of those competitors, is not ultimately achieved does not alter its categorization as abuse within the meaning of Article 102 TFEU.*” Similarly, in *Tomra*, it is held that “*for the purposes of proving an abuse of a dominant position within the meaning of Article 102 TFEU, it is sufficient to show that the abusive conduct of the undertaking in a dominant position tends to restrict competition or that the conduct is capable of having that effect.*”^[13]

In this connection, the Advocate General also observes that the Court has not established in its case-law what degree of probability of an anti-competitive exclusionary effect is required or, in other words, the nature of the foreclosure capability. According to the Advocate General, this will obviously depend on the legal, economic and factual context of each case, but he considers that foreclosure capability must rest on hard facts, such as sufficient duration and sufficient coverage of the relevant market.^[14]

Firstly, it is also evident that the TCA can and should be able to intervene in scenarios where it shows that the alleged potential effects will materialize. Restricting TCA’s ability to intervene only when the alleged effects are already materialized would run counter to the aims of Turkish Competition Law. However, the TCA must be able to base its analysis on hard facts. Indeed, even though the case concerned an exploitative abuse (i.e., excessive pricing) by the digital platform *Sahibinden*, the Administrative Court annulled the TCA’s decision by stating that the TCA’s findings based on observation while lacking concrete data cannot be regarded as sufficient and that a conclusion cannot be made without relying on concrete evidence obtained in an undisputed and certain manner^[15] :

*In the cases filed against the administrative fines imposed by the Competition Board; The Council of State, usually seeks the standard of proof in the form of “**beyond reasonable doubt supported by clear and precise evidence**”.*

*Again, it is determined that conclusions such as “... even though the difference between the market shares is not high due to the network effects and being present under multiple platforms is free of charge, the platform, which is advantageous in terms of market share, is expected to dominate the market in the long term. This situation is also observed in the case at hand.” **are based on observation and do not contain concrete data. It has not been revealed that which observations that constitute basis of the defendant administration’s conclusion, are reached in light of concrete data or the***

results observed in similar markets.

(...)

the determinations and evaluations in this manner should be made clear and precise; in a way that does not create hesitation, as required by the standard of proof, "almost exactly what happened" should be revealed, it is judicially insufficient to reach a conclusion based on suspicion; it is understood that the proof of the event is sought by law; in such cases, suspicion should be justified by demonstrating concrete evidence; thus, it has been concluded that the 01/10/2018 dated and 18-36/584-285 numbered Board Decision and the 02/05/2019 dated and 19-17/239-108 Board Decision regarding the rejection of the objection against the first Decision are established on the observation, without relying on the concrete evidence obtained precisely and indisputably thus, are not in compliance with law."

Therefore, the TCA must establish that the foreclosure effects or alleged exploitation has or will have potential detrimental effects to the prejudice of consumers.

Secondly, it is also hard to detect a threshold, where the foreclosure will be considered abusive under Turkish Competition Law. For example, in its *Algida* decision dated 15.05.2008 and numbered 08-33/421-147, the TCA have stated that[\[16\]](#);

"Thereby, a high degree of actual foreclosure is not necessary to demonstrate that, competition is eliminated in a significant part of that market due to the features of the aforementioned market. In other words, even if Algida foreclosed 10% of the market, the foreclosure ratio may strengthen the dominant position of Algida and further mean the restriction of ineffective competition for potential and active competitors"

We are of the opinion that it is hard to detect a set threshold which would be said to foreclosure competition and that foreclosure ratio will be evaluated by the TCA case-by-case.

In conclusion the Advocate General have stated that *"having regard to all of the foregoing considerations, I suggest that the Court's answer to the third question should be that Article 102 TFEU must be interpreted as meaning that, in order to establish the existence of an abuse of a dominant position, a competition authority is required to demonstrate, in the light of all the relevant circumstances and taking into account, inter alia, the evidence adduced by the dominant undertaking, that the conduct of that undertaking was capable of restricting competition. Where appropriate, it must analyse, to that end, any evidence that the conduct in question did not produce anticompetitive effects in the relevant market."*[\[17\]](#)

Driving from the AG Rantos's final remarks to 3rd question, we believe that the indications of an abuse must be observed more thoroughly so that competition authorities refrain from stepping in to protect less-efficient competitors and thereby, harm the competitive process and consumers.

A.4. Intention of the Undertaking to restrict competition

By its fourth question, the referring court asked, whether an intention on the part of the dominant undertaking to restrict competition is relevant to the assessment of whether conduct is abusive.

According to the AG Rantos, the subjective motive of the dominant undertaking is not among the factors which are taken into consideration while reaching to a conclusion on the abuse and, consequently, a competition authority is not required to prove the motive in order to establish the existence of an abuse. The Court's have stated that, while it cannot be sufficient in itself, intent can constitute a fact that may be taken into account in order to determine that a dominant position has been abused.[\[18\]](#)

That being said, the intention to exclude must also translate into a capability to exclude and the analysis of intention cannot, therefore, supplant the analysis of the effects. Accordingly, if such an undertaking adopts a strategy with a view to excluding its competitors from the market or marginalizing them, where there is evidence in support of that fact, it may logically be deduced that such conduct is capable of producing such effects.[\[19\]](#)

Some decisions of the TCA seem to be in parallel to the Advocate General's opinion. In its decision dated 23.05.2019 and numbered 19-19/283-121 ("**TIRSAN Decision**"), the TCA have stated that; intent should be taken into account if it is concluded that the practice under investigation may result in actual or potential foreclosure effect. Solely taking intent into consideration as a sufficient factor in adopting a violation decision will significantly increase the chance of erroneous intervention. Therefore, it will be appropriate to consider intent as an additional tool for investigated practices which are determined to be abusive as a result of their actual or potential effects.[\[20\]](#)

In its *Frito Lay* decision, which is cited in the TIRSAN Decision, the TCA also arrived at the conclusion that it is sufficient for the dominant undertaking to restrict competition on the relevant market, without it intending to do so and that the intention of the undertaking can be taken into consideration during the evaluation of the administrative fine. The TCA did not impose administrative fines to Frito Lay even though the undertaking carried out individualized actions in excluding its competitors because of the minimal effects of these actions and that it did not find market-wide application. [\[21\]](#)

However, the TCA also has decisions where the intent was used in finding an abuse. For example, in *Doğan Decision*, the TCA stated that the rebate system had an exclusionary intent. However, even though the actions of the undertaking had no anti-competitive exclusionary effect, there was undertakings entering the market despite the rebates and competitors increasing their market shares; the TCA, by considering that the undertaking is an unavoidable trading partner, rendered a violation decision stating that the rebates would increase the potential of exclusion.[\[22\]](#)

In our opinion there is no restriction by object under Article 6 of the Competition Law. Therefore, the TCA should not take into account the exclusionary intention of the parties *per se* but solely base

its decision in the concrete or potential exclusionary effects of the practice (of course the TCA still should take into account the intent in determining the ratio of the fine or a supplementary tool in concluding on the facts). If the practice has no exclusionary or foreclosure effect, the TCA should not render a prohibition decision.

A.5. As Efficient Competitor Test

By the fourth part of the first question, referring court asked the Court, in essence, to draw a clear line between practices which come within the scope of so-called ‘normal’ competition and those which do not. This question thus goes to the heart of what constitutes abuse within the meaning of Article 102 TFEU and seeks to determine whether the conduct at issue in the main proceedings constitutes such abuse.

AG Rantos seems to be endorsing a more efficient usage of “as-efficient competitor test” for a more effect-based approach. Indeed, according to the AG Rantos, the case-law of the Court, in his view, confirms that exclusionary conduct of a dominant undertaking which can be replicated by equally efficient competitor does not represent, in principle, conduct that may lead to anticompetitive foreclosure and therefore comes within the scope of the competition on the merits.[\[23\]](#)

On this point the AG Rantos briefly considers the application of the test for price-based and non-price based practices. In the context of price-related exclusionary conduct- such as loyalty rebates, low pricing practices in the form of selective prices or predatory pricing and margin squeeze- such a possibility of replication is assessed, as a general rule, but not necessarily, on the basis of the so-called “*equally efficient competitor test*”. The particular modalities of that test vary depending on the type of practice in question, but the common factor consists in examining whether a pricing practice is economically viable for the competitor of a dominant undertaking, using as a point of reference, primarily and as a general rule, the dominant undertaking’s price/cost ratio.[\[24\]](#)

For exclusionary practices not related to pricing, such as refusal to supply, according to the AG Rantos the case-law seems to confirm the relevance of the test as regards the possibility of replication, inasmuch as a dominant undertaking’s decision to reserve for itself its own distribution network does not constitute a refusal to supply contrary to Article 102 when a competitor is able to create a second distribution network of a comparable size. In other words, there is no abuse if inputs refused by the dominant undertaking can be duplicated by equally efficient undertakings by purchasing them from other suppliers or developing them themselves. Similarly, in the context of tying and bundling practices, whether it is possible to replicate a product is particularly relevant in establishing whether there is potential or actual anti-competitive foreclosure.[\[25\]](#)

In our opinion, and as discussed above by referencing the AG Rantos’s opinion above, competition law aims ultimately to protect consumers. To achieve this aim, a competition authority might either look for a direct harm to consumers or indirect harm, through driving out as efficient competitors from the relevant market. Thereby, only the forcing out as-efficient competitors will be relevant for

the aim of protecting the market structure. [26]

What the AG Rantos seems to endorse is a form of analysis which takes the benefit of consumers to heart and simultaneously provide legal certainty to the dominant undertakings. Indeed, according to the AG Rantos, a test based on the logic of as-efficient competitor would consist in assessing whether, on the basis of information presumed to be known to the dominant undertaking, competitors could have had access, in an economically viable way, to lists that are comparable as regards their usefulness to the SEN lists. That approach also coincides with the significance attributed to the ability-to-replicate test in the context of eviction practices not related to pricing[27].

Consequently, the AG Rantos concludes that irrespective of its lawfulness under branches of law other than competition law, may not be characterized as abusive within the meaning of Article 102 solely on the basis of its exclusionary effect in the relevant market, since such conduct should not be equated with a restrictive effect on competition unless it is shown that the undertaking has employed methods or means different from those which come within the scope of competition on the merits. In principle, an exclusionary practice which can be replicated by competitors in an economically viable way does not represent conduct that may lead to anticompetitive foreclosure and thus comes within the scope of competition on the merits[28].

Conclusion:

In conclusion, the Advocate General seems to promote for a more effect-based and clear approach to exclusionary practices. Indeed, Advocate General's view that as-efficient competitor test may be used for both price-based and non-price based practices seems to stem out of his view that the law should be more clear towards exclusionary practices. This way, dominant undertakings can assess their conduct on the market more precisely. Furthermore, since Advocate General believes that the ultimate goal of competition law is to protect consumer welfare, application of as-efficient competitor test could be a means to that end. Because the consumer welfare test would not care if less-efficient competitors are eliminated from the market (because only keeping the as-efficient competitors will ultimately for the benefit of consumers) this test may separate "lawful" and "unlawful" elimination.

We see that, many features discussed under the AG Rantos's opinion is applied by the TCA in its decisional practice. In the future, we would of course be delighted if the TCA relies on the as efficient competitor test more often to determine anti-competitive foreclosure.

Time is for is to wait and see what the Court will do and to what degree it will take into consideration its Advocate General's view.

[1]
<https://curia.europa.eu/juris/document/document.jsf?text=&docid=250885&pageIndex=0&doclang=EN&mode=req&dir=&occ=firs>

[t&part=1&cid=2765009](#) (accessed 13.01.2022).

[2] Opinion, para. 2.

[3] The names of the customers of the protected market who consented to receiving commercial offers were entered on special lists (the “SEN lists”)

[4] Opinion, para. 33.

[5] Decision of the Competition Board dated 17.01.2014 and numbered 14-03/60-24.

[6] Ibid, para. 158.

[7] Opinion, para. 96.

[8] Ibid para. 93.

[\[9\]](#) Ibid, para. 106.

[\[10\]](#) Ibid, para. 128.

[\[11\]](#) Ibid, para. 109.

[\[12\]](#) Ibid, para. 110.

[\[13\]](#) Ibid, para. 112, for more judgements cited under the opinion please see the referenced paragraph.

[\[14\]](#) Ibid, para. 118.

[\[15\]](#) Ankara 6th Administrative Court's decision dated 18.12.2019 and numbered E: 2019/946 - K: 2019/2625, p. 5.

[\[16\]](#) Opinion, para. 2860.

[\[17\]](#) Opinion, para. 121.

[\[18\]](#) Ibid, paras. 127-128.

[\[19\]](#) Ibid, paras 132-133.

[\[20\]](#) Ibid, para. 62.

[\[21\]](#) Ibid, para. 58.

[\[22\]](#) Ibid, para. 59. For more decisions cited please see TIRSAN Decision para. 60.

[\[23\]](#) Ibid, para. 69.

[\[24\]](#) Ibid, para. 70.

[\[25\]](#) Ibid, para. 71.

[\[26\]](#) Ibid, para. 74, the Advocate General seems to also make this point by stating that impossibility for competitors to replicate exactly the same strategy does not preclude an examination of the actual ability of equally efficient competitors to replicate said lists.

[\[27\]](#) Ibid, para. 73.

[\[28\]](#) Ibid, para.81.