Badmouthing—Abuse under Turkish Competition Law?

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In recent years, competition authorities around the world have been scrutinising new types of behaviour that might be deemed abusive within the context of antitrust laws. Although those relating to digital markets receive the most attention, not a day passes by without a surprising decision announced by the authorities or competent courts. The decision of the Ankara 7th Administrative Court of First Instance[1] ("**CFI**" or the "**Court**") requiring the Turkish Competition Authority ("**TCA**") to investigate allegations of denigration and deceptive practices can be considered one of them. In this blog post, we examine the TCA's case law to illustrate its general approach towards such allegations in previous decisions. Before delving into the details of the mentioned case, it must be stressed that in line with the approaches adopted by several competition authorities in the EU, the TCA highlights in its decisions that denigration and deceptive practices by dominant companies actually can be a concern of competition law.

Background of the Case

In 2019, a busbar system producer in Turkey submitted a complaint to the TCA alleging that the other producer, EAE Elektrik A.Ş. ("**EAE**") was in a dominant position in the busbar system market. According to previous TCA decisions, EAE had been found to have abused its dominant position through pricing strategies in tenders and campaigns denigrating other brands. Accordingly, the TCA initiated a preliminary investigation.

During the preliminary investigation, the TCA (i) carried out several conversations with the undertakings active in project making as well as the purchasers of busbar systems referred to in the complaint, (ii) conducted a dawn raid at the premises of EAE, and (iii) issued information requests (RFI) to EAE.

As regards the assessment of dominance, it should be noted that the decision only refers to the dominance determination made against EAE in the TCA's previous preliminary investigations and the estimated market share information provided by EAE in response to the TCA's RFI. Considering these, the TCA concluded that there had not been any circumstance that might have led to a change in its determination in its past decisions and moved to the evaluation of the behaviours.

The TCA highlighted the approach adopted in the case law in Turkey and the EU for predatory pricing. It based its analysis on a comparison of the sales prices and average variable costs of the busbars, which are used in almost every order and have the same features as those of other busbar

manufacturers. The TC stated that in the proposals given by EAE during the respective period, the sales prices of the products in question had been above the average variable cost. Accordingly, no predatory pricing practice could be claimed within the scope of the case at hand.

The TCA further investigated the allegation that EAE had applied low-price proposals in tenders in which the complainant had participated and had applied high-price proposals in the tenders in which the complainant did not participate. The Authority stated that considering that undertakings are able to gain information about each other's offers through customers, it was expected that EAE, with the motive of meeting competition, had responded to the price competition behaviour of its competitor to win over the respective customers.

In this sense, the decision states that within the framework of all the projects examined, including the projects put forward in the complaint, no document or finding had been found to show that EAE had followed a below-cost pricing strategy. On the contrary, it had made a profit in all of the examined projects. Accordingly, as a result of the information and documents obtained during the dawn raid at EAE and the price-cost analysis of the projects, the TCA concluded that it could not determine that EAE had excluded its competitors by applying a predatory pricing strategy.

The complainant also alleged that in a private sector tender, the project company had submitted a brand list during the construction phase, but the complainant, as a producer, had not been included. The project company, in response to the TCA's inquiry, stated that it had no organisational ties with EAE and that the complainant had not been included in the list because the quality of its products had been evaluated as inferior to those of EAE. An official from the project company's corporate investor also stated that they had worked with the complainant on another project and the project engineers and employees had not been satisfied. As a result of these statements, the TCA established that they had not faced any pressure regarding the product/brand choice by EAE and concluded that EAE had not violated the competition rules.

It should be noted that the TCA's assessments, which took place in relation to the allegations of abusive denigration within the scope of the case, were limited to a single paragraph within the 33-page decision. The TCA stated in its decision, however, that the statements indicated that (**i**) EAE had denigrated its competitors and tried to advantage itself, stating that the competitor could handle the scope of the respective project since they were a new company, and its products and posed a fire hazard; and (**ii**) EAE itself had led the electric project designers not to include the competitor's name in the brand lists. The TCA included contrary statements in the decision, among them that they had not witnessed any denigrating or deceptive statements made by EAE concerning the competitor products and that any busbar producer, including EAE, can bear against project companies or contractors in the market.

The TCA decided, *inter alia,* that EAE was dominant in the busbar systems market. However, no evidence supported the claims that the company had abused its dominant position by making deceptive or denigrating statements about the complainant's products. Consequently, it rejected these claims and did not initiate an investigation regarding such allegations. The complainant took

the case for review before the Court, seeking to annul the TCA's decision.

Evaluation by the CFI

The Court disagreed with the TCA on the finding that no information or document in support of the allegations relating to denigration and deceptive statements by EAE had been provided. To that effect, the Court highlighted the existing correspondence between EAE's employees and potential clients obtained during the dawn raid. In this context, the following points stood out:

- The competitor did not have the required certifications;
- The competitor did not provide a quality certificate from an independent laboratory;
- The competitor's products were not fire-resistant, and:
- Their busbars were not painted.

Moreover, the Court relied on the statements of certain competitors alleging that EAE denigrated its competitors, for example, by claiming that competitors' products might burn and explode. As a result, the Court concluded that the TCA should have initiated an investigation against EAE, instead of rejecting the complaints based on a lack of evidence, as the case file provided sufficient evidence, and annulled the respective part of the TCA decision.

Previous Case Law

Overall, the TCA tends to evaluate this concept of denigration as beyond the scope of the Competition Law, as can be seen in its other decisions. For example, in a decision published on 15 October 2020 and numbered 20-46/618-270, regarding allegations of denigration by an undertaking operating in the automotive glass renewal sector against competing firms, the TCA indicated that as the allegations consisted of elements of behaviour that could mislead consumers, denigrate products, and included slander and threats, the case fell within the purview of the Turkish Commercial Code ("**TCC**") and the Turkish Penal Code.[2]

In another TCA decision, dated 27 December 2007 and numbered 07-92/1175-459, the complainant, who operated as a collecting society, alleged that other collecting societies had denigrated it to customers by making misleading statements, including claims that the repertoire of albums produced by the complainant did not include popular artists and thus were not in demand. The TCA noted that the fact that the act of denigrating competing undertakings, commercial activities, goods, and services incorrectly or unnecessarily carried out by undertakings or undertaking associations that had the power to determine the market conditions in the relevant market unilaterally did not by itself make it possible to consider the issue within the framework of abuse of dominance.[3] Hence, the TCA decided that a preliminary inquiry or within the scope of competition law regarding the allegations in question was not warranted and concluded that an action for the alleged damages could be filed with the TCC.[4]

An earlier decision in 2006, dated 6 April 2006 and numbered 06-24/304-71, came as a result of a

TCA investigation into abuse of dominance allegations against Frito Lay Gıda Sanayi ve Ticaret A.Ş. ("**Frito Lay**"). One of the allegations was that Frito Lay's fieldmen had tried to convince the sales points to enter into an exclusivity agreement with Frito Lay by means of praising their own products and denigrating to praise their its own products and direct consumers to buy them. It emphasized that although the denigration of the competitor to increase sales was within the scope of unfair competition, it was possible to consider this as abusive behaviour aimed at hindering the activity of the competitor, provided that the undertaking carrying out the aforementioned policy was in a dominant position.[5] During the investigation, no systematic company policy to persuade sales points by denigrating competing products had been determined. The TCA concluded that Frito Lay's behaviour could not be considered as abusive against other undertakings in the market.[6]

A New Standard for Abusive Denigration?

Upon the CFI's annulment decision of an investigation it the Authority had originally initiated, the TCA launched a new investigation on 18 May 2022 against EAE to re-evaluate the case in terms of the part the alleged abusive denigration behaviour by the undertaking to ensure that the requirement of the Court Decision is fulfilled within the scope of its decision.

We look forward to seeing whether the prospective decision of the TCA will shed light on these questions, what further analyses will be made, and to what extent the findings or evidence will be required to determine the existence of abusive denigration and deceptive practices as a violation within the scope of competition rules. The Court Decision will carry some importance on the TCA's future approach towards the concept of abusive denigration and possibly will influence the TCA's standard of proof in later decisions on the same issue.

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[1] Ankara 7th Administrative Court's decision dated 03 March 2022 and numbered E. 2020/1318, K. 2022/488.

[2] TCA decision, dated 15 October 2020 and numbered 20-46/618-270, fn. 2.

[3] Ibid., para. 150.

[4] TCA decision, dated 27 December 2007 and numbered 07-92/1175-459, para. 140.

[5] Ibid., fn. 18.

[6] Ibid., paras. 1540, 2840.