

Unfair Competition

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Abstract: In our study, after the honesty rule – the fine line between competition and unfair competition – is discussed based on key provisions, unfair competition situations in the Turkish Commercial Code are briefly considered, and unfair competition cases are examined through the sample decisions that have been subject to the Supreme Court. In the conclusion section, the legal mechanisms provided by the legislator are briefly discussed in case of encountering unfair competition.

Keywords: Unfair Competition - Supreme Court Decisions - Honesty Code.

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I. ITS DEFINITION

Developments in industry and commerce have enabled a broad movement and competition opportunity for entrepreneurs (Güven, 2012: 7). This competition is a right if it is used in the framework of honesty rules (Bilgili/Demirkapı, 2016: 131). The honesty code, expressed in the Turkish Civil Code, puts everyone under the obligation to act honestly and truthfully while exercising their rights and fulfilling their debt obligations. This rule applies to all rights and debts arising from the Public Law, especially the Private Law (Gezder, 2014: 6). The abuse of the right to compete will contradict the principle of honesty, which will lead to the contradiction of the concept of unfair competition (Bilgili/Demirkapı, 2016: 137). The Turkish Commercial Code defines unfair competition as: *Deceptive or other forms of behaviors against good faith that affect relationships between competitors or between suppliers and customers, and trade practices are unfair and unlawful* (Turkish Commercial Code Article 54, Law Number 6102, Acceptance Date: 13/1/2011 Official Gazette: Date: 14/2/2011 Issue No: 27846, Arrangement: 5 Volume: 59).

The unlawful behavior that is mentioned in the definition actually shows us that unfair competition is a kind of tort. The fact that there is an activity aimed at generating profit within the competition environment and the necessity of the existence of a movement contrary to the rules of honesty constitute the conditions of unfair competition. However, because a person can create unfair competition without any misconduct, the elements of misconduct and harm required in the formation of the tort are not searched for in unfair competition (Bozkurt, 2015: 32).

II. UNFAIR COMPETITION CONDITIONS

Although unfair competition conditions are presented one by one in Turkish Commercial Code Article 55, it is stated that these cases which constitute unfair competition are examples and that behaviors that are deceptive or contrary to the honesty rule other than those listed here will also be evaluated within the scope of unfair competition provisions. The following constitute unfair competition conditions that are considered examples in the article: disparagement; bringing himself/herself or a third person to a competitive advantage; using unqualified titles, professions, degrees and symbols; leading to confusion; comparing or prefixing a third person in a similar way; deceiving with claptrap; misleading about true value; restricting freedom of decision making by aggressive sales methods; misrepresenting quantity and quality; unfair competition conditions for consumer protection; directing the contract to infringement or termination; unauthorized utilization of others' products of work; disclosure of production and business secrets; failure to comply with business conditions; using process conditions contrary to the honesty rule.

III. EXAMPLES OF APPLICATIONS RELATED TO UNFAIR COMPETITION CONDITIONS

It is necessary to look at the concrete attitude of the Supreme Court in order to better understand what these unfair competition conditions are, although they are presented in Turkish Commercial Code. However, in cases other than those mentioned in the Code, the attitude of the Supreme Court will again lead us in order to

determine the existence of unfair competition. Although there are many decisions regarding our subject, our study included exemplary decisions:

The firm discredited the raki it claimed to have taken from Tekel. It made explanations in a way to damage the reputation of Tekel's administration. In this action, elements of unfair competition crime were formed (Y.7.CD. 6.17.1998, 3951/5722, www.kazanci.com, 11.12.2017). Beyond the purpose of stimulating the consumer, elements of unfair competition have been realized in the case of making a declaration or organizing a commercial campaign with an offending and derogative quality and purpose to a company (Y. HGK., 04.20.1994., 1994/252, www.kazanci.com, 11.12.2017).

The act of "giving false and misleading information about the activities of the plaintiff partner by reaching beyond the informational nature of the news in the news" constitutes the unfair competition condition, which is committed through the media, (Çetiner/Bozkurt, 2015: 140) "... the fact that the firm does not have the TSE document but uses it as if it has it" is also an unfair competition condition (Y. 11. HD., 05.01.1987, 2844/2614, www.kazanci.com.tr, (11.16.2017) Because of the fact that there is an affinity between the words of Koka-Kola and the words of *ülker kokakola* (Y.11.HD., 24.12.1987, 7265/1067, www.kazanci.com, (16.11.2017) because of the fact that there is an affinity between the icecream brand of Balkaymak and the title of *ballıkaymak* (Y.11.HD., 24.12.1987, 3400/3973, www.kazanci.com, (16.11.2017), these behaviors of the firms that lead the affinity are unfair competition. The decision that is important in practice and is based on the principle of honesty - in other words, objective benevolence rules - in terms of whether or not there is an affinity is important: According to the decision, "In practice, the most common form of unfair competition is, by causing an affinity, to share in the rightful reputation that others have gained with labor and money." For the presence of an affinity, it is generally necessary to determine whether a buyer at a normal or intermediate level will be deceived by the good released to the market.

Even the possibility of the danger of affinity it is considered sufficient for an unfair competition.

Football clubs such as Fenerbahçe, Galatasaray, Besiktas and Trabzonspor in Turkey have a reputation that has reached their current state with their successes due to their long history. These recognitions of these sports clubs have also gone abroad.

The mentioned clubs are making license agreements with trade companies to increase their income through this recognition in society. With this agreement, the companies benefit from the reputation of the clubs which are mentioned in the goods and services they produce, by using the logos of the sports club, the sign, the colors associated with the soccer team, the motto of excitement, the symbol, and the brand name. The supporters who support their teams also buy such products by preference. Thus, this preference made by supporters of the sports club increases the sales of the company that makes the contract, and especially helps to reach a new customer environment. The characteristics mentioned above which are cost to the sports club are used to increase the sales of the products, and this image or character which is formed is commercialized so to speak.

The image or brand specified may be used without being identified with a good or service, or may be used without its trademark. The brand here does not need to be registered, and the proof of its reputation is sufficient. It should be noted that in the economic context, it is far from any hesitation that colors alone cannot be the subject of industrial property. Nor is there a law that prohibits the use of colors alone. Even if these colors belong to a sports club with a high level of recognition, it does not change the end result. However, in the presentation of a goods or service put on the market, if it is understood that the composition which is formed by using the phrases "supporters, football, sports club, champion" etc., which reminds, recalls or leaves an impression of this sports club – in addition to use of colors associated with that specific sports club – will cause affinity or the danger of affinity in the mass of the supporters of that sports club, it should be accepted that there is an unfair competition in this case.

When the concrete event is evaluated in the light of the above explanations, it is uncontentious between the parties that the face paint item produced by the defendant Polisan Boya A.Ş. was put into a package in two separate tubes, yellow and red; and the packaging floor in which the tubes were placed was also painted with the same colors in a striped design; and the term "Supporter" was also written on it so as to invite the support of the sports club and was released to the market by the other defendant.

However, in the product that is the subject of the present case, the product was released to the market by not only using the colors, but also the term supporters. ... it is concluded that in this way, the product was produced in the way that was described in terms of its composition, which is reminiscent of the Galatasaray Sports Club and giving the impression that the product belongs to this club; as stated above, the defendants commercialized this image as a result of using the fame that the sports club rightfully inherited, and using the elements evoking this club in their products; thus, it is accepted that has caused the danger of affinity with no compensation by taking advantage of the rightful fame that has been earned with labor and cost for many years – the image belonging to the club of the company.

As a result, the actions of the defendants are "deemed to be unfair competition, contrary to the rules of objective benevolence ..." (Y.11.HD. 2010/396E.-371K.Base T:7.7.2010.,www.kazanci.com, 11.17.2017)

An advertisement is a mass communication that is made for a certain fee, is located in the marketing communication, flows towards the target audience, and tries to inform and convince the target audience. The general aim of advertising is to promote a product or a service, to make a positive in the target group trend towards the product and the brand. The important thing with advertisements is that when introducing a product that advertises a company, it should not come to a point of deceptive advertising, which is misleading for the consumer, and offending the product of another brand (Duran,

<http://danismend.com/kategori/altkategori/reklama-genel-bir-bakis/>, 17.22.1017). Especially in comparative advertising, which is subject to Supreme Court decisions, unfair competition is the case where a business compares the difference between its own product and someone else's product, and this comparison is objectively inaccurate, misleading, exceedingly overdrawn - in short, contrary to the rules of honesty. (Çetiner/Bozkurt Yüksel, 2015: 144). The Supreme Court has accepted the use of expression "Do not lose the A...gaz tubes with the value of gold by believing the imitation and pirate L...gaz tubes" as "unfair competition" (Y. 11. HD., 4.30.1993 day, E: 1992/2724, K:1993/2966, <http://www.hukukmedeniyeti.org/karar/497/haksiz-rekabet-haksiz-rekabette-iyiniyet-kaideleri/>, 11.17.2017).

IV. CONCLUSION

As can be seen in the examples of applications that have been worked out above, the Supreme Court is based on objective benevolence rules in determining whether behavior constitutes unfair competition. With this attitude that we find right, the Supreme Court is trying to create a free but honest, unspoiled competition among the participants in the competition game in the field of economic competition (Güven, 2012: 151). In order to ensure this, the Legislator has given the opportunity to initiate a detection case in order to be able to find out whether the behavior done is unfair (Göle, 1983: 175), actio negatoria to stop the unfair competition that has started and continuing, to intervene in order to end (Karayalçın, 1968: 469) and a case for returning to the previous state for the removal of the material situation that resulted from unfair competition (Bilgili/Demirkapı, 2016: 137). If the conditions are fulfilled, the right to open a pecuniary and non-pecuniary compensation case under the Turkish Code of Obligations is also given. However, the Legislator also gives the right to open a criminal case.

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