

UNFAIR COMPETITION PRACTICES AMONG PRIVATE HOSPITALS

Assoc. Prof. Dr. Mustafa YASAN*

Abstract

Since private hospitals have been operating in the health sector from the middle of 1980s, they have been facing with risks arising from the harsh competitive environment. This risk arises from the preference of dishonest competition practices in a matter of public interest such as healthcare services. In order to prevent this, it should be ensured that competition is conducted in accordance with the rules of honesty. For this, the competition practices of private hospitals must be audited with the unfair competition provisions specifically regulated in the TCC. However, considering that there are sources of legislation specific to private hospitals addition to the TCC, a regulation covering private hospitals or the entire the health sector is needed in the field of unfair competition.

Keywords: Unjustified competition, private hospitals, freedom of competition, rule of honesty, prohibition of advertisement

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* Sakarya University Faculty of Law Commercial Law Department,
mustafayasan@sakarya.edu.tr

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Introduction

The subject of this study is unfair competition practices among private hospitals. For this reason, the study will focus on unfair competition practices rather than the protection of competition and prohibition of competition, which is in close similarity with the concept of unfair competition and can be valid for private hospitals. First of all, I would like to make this limitation in terms of the scope of the study. The concept of the advertising ban, which has become valid for private hospitals and in fact, in the entire health service sector, will be among the topics of our study. As a matter of fact, we will include the violation of the advertising prohibition as only one of the competition practices that lead to unfair competition and we will point out unfair competition practices that can occur in addition to the violation of the advertising ban. In other words, the subject of our work is not only the advertising ban and the violation of this prohibition but all unfair competition practices that may occur between private hospitals, including the violation of the advertising ban.

I. Required Conditions for the Occurrence of the Unfair Competition Among Private Hospitals

A. The Regulation of Unfair Competition in Turkish Law

The concept of unfair competition is regulated in three main sources of legislation in Turkish Law. The first of these is the Law No. 3577 on the "Prevention of Unfair Competition in Imports", which is not related to the competition practices of private hospitals¹. Another regulation specific to the unfair competition is the Turkish Code of Obligations (TCO) art.57. TCO art.57 is a regulation in general character that becomes valid for all unfair competition practices, whether commercial or not. According to Article 57 of the TCO, "The person whose customers are reduced or in danger of losing their customers due to spreading of untrue news or making such advertisements or other acts contrary to the rules of honesty, may request that these behaviours be terminated and the damage is remedied in the event of a fault". According to TCO Art.57, it is only the rival entrepreneur who may be

¹ Arkan, p.338.

exposed to unfair competition and who can benefit from the legal protection granted to him by the unfair competition institution². As a specific subject of this study, the claimant may be private hospitals whose customers are decreasing or in danger of decreasing. It is not possible for customers to file unfair competition lawsuits and to direct their demands to the perpetrator of the unfair competitive activities within the framework of TCO art.57³. In TCO art.57/2, it is stated that the provisions of the Turkish Code of Commerce regarding unfair competition in commercial affairs are reserved. The third codification related to the unfair competition is TCC. Unfair competition regulations regarding commercial affairs are located in TCC art.54 et al. The legislator included the purpose and principle provisions in Article 54 of the TCC as first and in the following article, which is the 55th article pointed out unfair competition practices as examples⁴. According to Article 54 of the TCC, the purpose of the unfair competition provisions is to provide an honest and undisturbed competition environment in line with the interests of all participants, in other words, not only for the private hospitals, but also for the customers, in other words, those who benefit from the health services of private hospitals. In the second paragraph of Article 54, the principle provision of unfair competition is included⁵. Accordingly, deceptive or other forms of violation of the integrity rule and business practices that affect the relations between competitors or between suppliers and customers are unfair and illegal⁶. As can be seen in the principle provision, unfair competition does not only occur between rival undertakings and therefore between private hospitals, which are in competition with each other, but also the relations between suppliers and customers, in other words, relations between private hospitals and customers who benefit from health services can also be subject to unfair competition. Although this study is specific to unfair competition practices among private hospitals, it should not be forgotten that it is possible for customers to file lawsuits against private hospitals by taking advantage of unfair competition

² Bozer / Göle, p.215; Poroy / Yasaman, p.308.

³ Şener, p.606; Ayhan / Özdamar / Çağlar, p.277.

⁴ Sumer, p.74.

⁵ Bahtiyar, p.138.

⁶ Kayar, p.197; Yasaman, p.33; Arkan, p.341.

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provisions. So, it is possible for customers to file a lawsuit against private hospitals based on the unfair competition provisions of the TCC, not the TCO⁷.

Regarding the unfair competition practices between private hospitals, there are also regulations in the legislation specific to private hospitals. The main ones of these regulations can be listed as follows:

Law No.6502 on Consumer Protection,

Law No. 1219 on the Practice of Medicine and Medical Sciences

Commercial Advertising and Unfair Commercial Practices Regulation,

Medical Professional Ethics Rules,

Medical Deontology Statute

Private Hospitals Regulation

Regulation on Private Health Institutions Providing Outpatient Diagnosis and Treatment

B. The Examination of Unfair Competition Concept in case of Private Hospitals

1. The Issue of the Description of Unfair Competition

In TCC Art.54 et al., contrary to the revealed commercial code, the definition of unfair competition is not clearly included. On the other hand, it is possible to reach the definition of unfair competition by interpreting the purpose and principle provision regulated in article 54th of TCC. As stated in Article 54/2 of the TCC, deceptive or other forms of contrary to the rules of honesty and commercial practices that affect the relations between competitors or between suppliers and customers

⁷ Cihangirođlu, p.182; Aslan, ap.122; Çeker, p.152.

constitute unfair competition⁸. To put it more clearly, all kinds of competition practices that affect the relations between the competing parts with each other or between the suppliers and customers and that are against the rule of honesty can be qualified as unfair competition⁹. In order for unfair competition to take place, the practice of competition is both required and sufficient to be against the rule of honesty, regardless of the means of occurrence¹⁰. Compliance with the law and legislation, ensuring compliance with the truth does not prevent the application of competition from being qualified as unfair competition in the event that the condition of violation of the integrity rule is met. In other words, even if the practice of competition is in accordance with the reality or the legislation, but it is against the rule of honesty, it is possible to accept this competition practice as unfair competition¹¹.

2. The Possibilities of Unfair Competition Practices according to TCC

The rule of honesty is regulated in the Turkish Civil Code (TCiC) art.2. According to the principle of honesty, which can also be expressed as the objective goodwill rule, “Everyone has to obey the rules of honesty while exercising their rights and fulfilling their obligations”. If the rule of integrity is violated, in other words, if a right is clearly abused, this violation cannot be protected by the legal order¹². At this point, we come across a question mark. What are the competition practices that are against the rule of honesty? The legislator has answered this question by regulating the TCC Art.55. In Art.55 of the TCC, unfair competition possibilities, which are exemplary, are listed in six main sub-headings and twenty-one sub-clauses. This count is not a finite count but an exemplary count. In other words, we can state that if a practice of competition is contrary to the rule of honesty, unfair competition takes place, although that practice is not indicated

⁸ Kendigelen, p.80; Bahtiyar, p.139; Sumer, p.75; Ayhan / Özdamar / Çağlar, p.278.

⁹ Bozer / Göle, p.223; Şener, p.609; Poroy / Yasaman, p.319.

¹⁰ Arkan, Conference, p.47; Uzunallı / Şener, p.84.

¹¹ Bilgili / Demirkapı, p.150; Arkan, p.342.

¹² Kayar, p.199; Yasaman, p.33.

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within the twenty-one examples in Art.55 of the TCC. Although this choice of the legislator for the regulation of the definition of unfair competition is considered appropriate, it must be admitted that it is excessive in the counting of exemplary unfair competition possibilities. In other words, the legislator has counted so many examples of the possibility of unfair competition that the principle provision in Article 54 of the TCC was overshadowed by the possibilities of unfair competitions in twenty-one examples¹³.

Examples of unfair competition practices in TCC Art.55 can be examined under six main headings. These competitive practices can be considered as competitive practices that can lead to unfair competition among private hospitals as well. Accordingly,

1. Advertisements and sales methods that are against the rule of honesty and all actions which are illegal,
 2. Directing the parties to breach or terminate the contract,
 3. Unauthorized use of others' business products,
 4. Unlawfully disclosing production and business secrets,
 5. Not complying with business terms and
 6. Using standard transaction terms that violate the integrity rule
- are the main competitive practices and behaviours that constitute unfair competition¹⁴.

3. Examples of unfair competition practices regarding Private Hospitals

We can evaluate the exemplary unfair competition practices in TCC art.55 in terms of private hospitals. In this possibility, we can count the following examples among unfair competition situations.

¹³ Arkan, Conference, p.47; Bozer / Göle, p.228; Aslan, p.123; Ayhan / Özdamar / Çağlar, p.281.

¹⁴ Bilgili / Demirkapı, p.151; Bahtiyar, p.141; Sumer, p.76; Arkan, p.343; Poroy / Yasaman, p.321-343; Çeker, p.164.

-It constitutes unfair competition when private hospitals denigrate each other, health services of each other, and the fees of health services with false, misleading or unnecessarily hurtful statements. Whether the statements are truthful or unnecessarily hurtful, it is sufficient to constitute unfair competition practice for private hospitals.

-To make false or misleading statements about the private hospitals themselves, the advertising signs they use in trade, the health services they perform, the health personnel they employ, the equipment used, the fees of the services they perform, the prices and conditions of the campaigns they carry out, their relations with other health institutions or government institutions and organizations or putting another health institution ahead of its competitors through the same means may constitute unfair competition.

-When private hospitals act as if they receive awards although they don't, make promotions as if their personnel have titles it constitutes unfair competition. In addition to that when private hospitals promote themselves as if they receive quality awards, show themselves as if they have an excellence award it constitutes unfair competition as well. As a last sample in this possibility, if private hospitals pretend to be accredited despite not being it also constitutes unfair competition practice. , despite not being accredited, in all these promotional activities, the customer even trying to create suspicions on the part of the party constitutes unfair competition. It is unfair competition for a private hospital to use the same or similar symbol of a well-established state university, or to include the name of another institution that has an image dating back to years in the name of a private hospital.

-It is unfair competition for a private hospital to use the same or a similar symbol of a well-established state university, or to include the name of another private or state institution that has an image dating back to the years in the name of a private hospital.

-If private hospitals use phrases that can be confused with the promotional tools of other private hospitals in their commercial titles and business names, put phrases such as new, large, etc. in front of the hospital's names it results in unfair competition. Addition to this, if private hospitals use the phrases that will create the impression that they are a part of the chain of hospitals in their promotional tools, if they

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prefer the external frame, architectural landscape and an image that causes confusion in terms of design, unfair competition is realized.

-Comparison of private hospitals alone does not constitute unfair competition. However, when making comparisons, it is necessary to act in accordance with the rule of honesty. When making a comparison, it is unfair competition to benefit from the efforts of well-known institutions in the health sector, which have a long history in that field, without spending any effort and paying a price by making a comparison.

-If private hospitals offer certain health services (laser eye surgery, check-up, skincare, liposuction, skin removal, stomach reduction, hair transplantation) in a way contrary to market conditions, and emphasize the campaign directly or indirectly in the advertisements, these practices constitute unfair competition.

-If private hospitals provide misleading information about the prices of healthcare services by concealing additional costs, this is an unfair competition practice. Similarly, if they introduce the campaign by stating the unit price of the lowest quality transplantation regarding hair transplantation, if they do not specify the price of the services such as control, additional examination and care, etc., in their campaigns or promotions, an unfair competition will again arise. If private hospitals show the conditions of the campaign in a way that is not readable at the bottom of the campaign announcement against the rule of honesty, unfair competition may be mentioned. It is again unfair competition to demand additional fees for care and supervision in single rooms without indicating that this health service is the equivalent of care and supervision in double rooms in the hospital, just below the price of the health service.

-If private hospitals use aggressive marketing techniques and use frightening visuals in their promotions that the health service will not compensate for the treatment, unfair competition occurs. If private hospitals prevent those who intend to benefit from health services from making decisions freely, and if they constantly call them for information about health services, unfair competition arises. Unfair competition occurs if private hospitals declare that if there is no urgent intervention related to health services there will be irreparable results and that tests, analyses should be performed. Another unfair

competition practice is to declare that more costly plaster treatment is a must while it is possible to be satisfied with cheaper equipment such as arter.

-If private hospitals use contract formulas that include incomplete, inaccurate or misleading information about the fees of health services, what service this fee covers, payment terms, the patient's right of withdrawal, and the right to terminate, unfair competition occurs. Although the base price is shown in the promotion in the realization of the health service, it can be regarded as unfair competition to show that a different fee will be paid in the contract text if the health service is received from an associate professor or a professor.

-If private hospitals follow an aggressive policy on the customers of other private hospitals which are their rivals in order to gain customers, if they provide them to make a contract with them by offering them against the rules of honesty, if they lead the customers to violate or terminate the existing contracts, unfair competition may occur.

-If private hospitals make offers against the rules of honesty in order to transfer the personnel of other private hospitals, if they try to seduce their personnel and thus cause disruption in the health services of the competitors, the unfair competition will occur. Private hospitals' efforts to attract their private customers to their own hospitals by means of personnel transfers from each other also constitute unfair competition.

-If private hospitals cause each other's business secrets to be disclosed by providing or undertaking benefits for each other's staff, if they share information and contact information about each other's customers, unfair competition will occur.

-Private hospitals' failure to comply with business terms also constitutes unfair competition. Failure of private hospitals to comply with the business terms in contradiction with the legislation, professional rules, ethical codes and business terms are written by professional organizations lead to unfair competition. Failure to comply with the tariffs determined by the professional organizations, in case a campaign is to be carried out, the campaign is carried out against the terms determined by the professional organizations, constitute unfair competition.

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-Although it is legally possible for private hospitals to use general transaction terms in the contracts signed by their customers, it is possible to include provisions contrary to the rule of honesty in these general transaction terms, and if these provisions differ significantly from the provisions of the law, it is possible to mention about unfair competition.

II. Legal Consequences of Unfair Competition for Private Hospitals

A. Legal Liability

1. Lawsuits that can be Sued

In case of unfair competition between private hospitals, the first of its legal consequences is about legal liability. At this point, it is possible to list the lawsuits that can be filed with regard to legal liability as determination lawsuit, prohibition lawsuit, action for elimination of results, lawsuit for pecuniary damage and lawsuit for non-pecuniary damages¹⁵.

There is no need to arise damages as a result of unfair competition in order to sue cases other than compensation lawsuits. The presence of the danger of harm is sufficient. Additionally, there is no need for unfair competition to arise as a result of fault for cases other than compensation cases either. Violation of the honesty rule is also sufficient¹⁶.

2. Persons who may be Plaintiffs

We can examine those who may be on the plaintiff party under 3 headings. These are competitors of private hospitals, in other words, other private hospitals, customers of private hospitals and professional organizations including private hospitals.

¹⁵ Kendigelen, p.83; Bahtiyar, p.147; Kayar, p.213; Bozer / Göle, p.245.

¹⁶ Uzunallı / Şener, p.84; Sumer, p.82; Aslan, p.135; Şener, p.659-668; Arkan, p.351.

Other private hospitals or other private health institutions can file a lawsuit as a competitor exposed to unfair competition. Customers can also sue unfair competition lawsuits. Violation of the integrity rule is sufficient for customers to file a lawsuit too. The only difference that emerges as a plaintiff in terms of customers is this: While competitors may request the destruction of the goods subject to the unfair competition when they file a case for the elimination of the results, customers cannot demand the destruction of the goods that are the subject of unfair competition¹⁷.

Chambers of commerce and industry and other professional and economic associations authorized to protect the economic interests of their members according to their statutes, non-governmental organizations that protect the economic interests of consumers according to their statutes and institutions of public nature can also file unfair competition cases¹⁸. However, professional and economic organisations cannot file a lawsuit for pecuniary and non-pecuniary damages¹⁹. When an unfair competition practice related to the private hospitals takes place, the professional and economic organizations that have the authority to sue case in Turkey can be listed as:

Turkish Medical Association

Healthcare and Social Workers Union

Revolutionary Health Business Union

Turkish Dentists Association

Association of Midwives

Healthcare Class Employees Association

Association of Health Offices

Health Technicians and Technicians Association

Health and Social Service Employees Union

¹⁷ Kayar, p.216; Cihangiroğlu, p.188.

¹⁸ Bahtiyar, p.148; Yasaman, p.43.

¹⁹ Uzunallı / Şener, p.84; Arkan, p.356.

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Social Services Experts Association

All Radiology Technicians and Technicians Association

Turkish Nurses Association

Turkish Psychologist Association

Turkish Medical Radiotechnology Association

Turkish Dietetic Association

Consumer Protection Association

Patient and Patient Relatives Association

Universal Patient Rights Association

3. Persons who may be Defendants

Those who may be defendants in legal liability cases in the unfair competition are identified under three headings. The first of these is the staff of private hospitals, general managers, customer representatives, public relations managers, etc. those who personally perform an act or transaction that constitutes unfair competition²⁰.

Private hospitals that employ perpetrators who commit the act or transaction of unfair competition may also take part in the defendant party in unfair competition cases.

When the act of unfair competition is committed through press, broadcasting and communication, unfair competition cases are sued against the editor-in-chief, program producer, person who put the image, sound, message into the broadcast, communication and information tools and the announcement service chief²¹. If these cannot be demonstrated, unfair competition lawsuits may also be sued against the business or organization owner. However, some conditions must be fulfilled for these to happen. These conditions are:

²⁰ Bilgili / Demirkapı, p.156.

²¹ Bahtiyar, p.150; Bozer / Göle, p.248; Arkan, p.358.

-If the broadcast program, content, image, sound or message was published without the knowledge of their owners or advertiser or against the approval of the advertiser,

-If the owner or advertiser of the announcement, program, video, sound or message published in the print media is avoided,

-If, for other reasons, it is not possible to uncover the owner of the broadcast, program, image, sound, message or advertiser or to file a lawsuit against them in a Turkish court.

4. Period of Limitation

Legal liability lawsuits arising from unfair competition expire by 1 year from the moment the party with the right to litigation learns the rise of these rights, and in any case 3 years from the moment of occurrence of unfair competition. However, if the act of unfair competition is also an act requiring a penalty that is subject to a longer legal period in accordance with the Turkish Penal Code (TPC), this period is also valid for cases of legal liabilities.

B. Criminal Liability

1. Criminal Character of Unfair Competition

Unfair competition offence is committed if unfair competition acts, which are explicitly stated only as examples in TCC Art.55, are committed only intentionally. For this reason, criminal liability arises for unfair competition against a private hospital personnel, directors, managers, and doctors who deliberately commit such unfair competition acts. In addition, the acts listed in article 62 of the TCC are also considered among the unfair competition crimes. Accordingly,

-Those who deliberately provide false or misleading information about their personal situation, products, business products, commercial activities and businesses in order their own demands and offers to be preferred to those of their competitors,

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-Those that deceive employees, agents or other assistants in order to ensure that the employer or their clients gain production or trade secrets,

-Employees or clients who learn that their workers or employees or their representatives have committed an unfair act of competition that requires punishment while performing their job, and those who do not prevent this act or correct false statements shall be committed unfair competition offences²².

2. Criminal Liability of Private Hospitals' Legal Personalities

Criminal sanction for unfair competition is imprisonment of up to two years or a judicial fine. The criminal prosecution of these crimes depends on the complaint and the right to file a complaint belongs to those who are authorized to file a legal action case. In other words, competitors, customers and professional and economic associations have the right to complain²³.

When an act of unfair competition is committed while private hospitals carry out their activities, the rules applicable to criminal liability are applied to the members or partners of the body acting or required to act on behalf of the private hospital. In the event that unfair competition is committed within the framework of the activities of a private hospital, security measures specific to their structures may also be applied against private hospitals²⁴.

Conclusion

The health sector has become the subject of the competition after private enterprises are allowed. As long as competition is sustainable, the quality of services provided by private hospitals increases and costs decrease. Both possibilities are in the interest of health care users and the public interest. However, this competition should be carried out with honesty rules. Otherwise, unfair competition occurs. When unfair competition occurs between private hospitals, the competitiveness of private hospitals in the sector weakens and as a result, the health sector becomes a monopoly of economically strong private hospitals. This is

²² Kendigelen, p.85; Bilgili / Demirkapı, p.158; Yasaman, p.44; Poroy / Yasaman, p.355.

²³ Bahtiyar, p.151; Bozer / Göle, p.251; Arkan, p.360.

²⁴ Kayar, p.220.

a handicap. In order to prevent this handicap, the provisions regarding the prevention of unfair competition in both the TCC and the legislation on private hospitals should be implemented effectively. At this point, both the judicial body and the public authority that are responsible for implementing the specific legislation to private hospitals have important duties.

REFERENCES

Abuzer Kendigelen, Türk Ticaret Kanunu Değişiklikler, Yenilikler ve İlk Tespitler, 3rd Edition, Oniki Levha Publish House, İstanbul, 2016.

Ali Bozer / Celal Göle, Ticari İşletme Hukuku, 6th Edition, Banka ve Ticaret Hukuku Araştırma Enstitüsü, Ankara, 2020.

Ayşe Sumer, Ticaret Hukuku Ders Kitabı, 3rd Edition, Beta Publish House, İstanbul, 2020.

Celal Cihangiroğlu, Ticari İşletme Hukuku, İzmir, 1996.

Fatih Bilgili / Ertan Demirkapı, Ticaret Hukuku Bilgisi, 13th Edition, Dora Publish House, Bursa, 2018.

Hamdi Yasaman, “Haksız Rekabet”, Yeni Türk Ticaret Kanunu’nun Ticari İşletme Hukuku Alanında Getirdiği Yenilikler Sempozyumu, İstanbul, 2012, p.33-44.

İ. Yılmaz Aslan, Ticaret Hukuku Dersleri, 6th Edition, Ekin Publish House, Bursa, 2012.

İsmail Kayar, Ticaret Hukuku, 3rd Edition, Seçkin Publish House, Ankara, 2015.

Mehmet Bahtiyar, Ticari İşletme Hukuku, 13th Edition, Beta Publish House, İstanbul, 2013.

Mustafa Çeker, Ticaret Hukuku, 6th Edition, Karahan Publish House, Adana, 2013.

Oruç Hami Şener, Ticari İşletme Hukuku, Seçkin Publish House, Ankara, 2016.

Reha Poroy / Hamdi Yasaman, Ticari İşletme Hukuku, 14th Edition, Vedat Publish House, İstanbul, 2012.

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Rıza Ayhan / Mehmet Özdamar / Hayrettin Çağlar, Ticari İşletme Hukuku Genel Esaslar, 5th Edition, Yetkin Publish House, Ankara, 2012.

Sabih Arkan, Ticari işletme Hukuku, 24th Edition, Banka ve Ticaret Hukuku Araştırma Enstitüsü, Ankara, 2018.

Sabih Arkan, “Türk Ticaret Kanunu Tasarısına İlişkin Değerlendirmeler”, Türk Ticaret Kanunu Tasarısı Konferansı, Banka ve Ticaret Hukuku Araştırma Enstitüsü, Ankara, 2005, p.42-60. (Conference)

Sevilay Uzunallı / Oruç Hami Şener, Uygulamalı Ticari İşletme Hukuku, 4th Edition, Seçkin Publish House, Ankara, 2017.