



# USE OF HISTORICAL CUSTOMER DATA IN LIBERALIZED ENERGY MARKETS: ENGIE, EDF AND ENEL DECISIONS

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As a result of rapid digitalization, collection of data, use of data and other actions based on data become one of the hot topics in competition law enforcement. We are used to see competition law cases about data related issues such as Google, Facebook, and Amazon. On the other hand, we also recently see some data related competition law cases in liberalized energy markets in Europe. These are ENGIE and EDF decisions in France and Enel decision in Italy.

In the article, I want to discuss those decisions with some details and argue whether those cases can be an example for Turkish competition law enforcement. In this context, I will summarize ENGIE, EDF and Enel decisions. Thereafter, I will discuss those decisions in comparison with Turkish case law.

The first decision, I want to discuss, is ENGIE decision, in which French Competition Authority (FCA) fined ENGIE 100m Euros for abusing its dominant position on the French retail gas supply market. According to the decision, ENGIE used its customer database and business infrastructure that inherited from ENGIE's former monopoly position in past to sell gas and electricity to individuals and small commercial customers at market conditions. FCA stated that it was not possible for ENGIE's competitors to reproduce ENGIE's historical database and business infrastructure at reasonable cost or within a reasonable time. Thus, ENGIE's behavior was abusive<sup>1</sup>.

The other decision is FCA's EDF decision. EDF decision is very similar to ENGIE decision. In fact, FCA fined EDF 300m Euros since EDF used its database and business infrastructure that was dedicated to electricity supply under TRV<sup>2</sup> to make gas supply and energy service offers between 2004 and 2021. FCA stated that human and technical resources associated with TRV were not reproducible for EDF's competitors, so EDF strengthen its position and delayed the development of competition in the market<sup>3</sup>. Moreover, FCA underlined that EDF created confusion amongst consumers between regulated activities and market-based activities<sup>4</sup>.

The last one is Italian Competition Authority's (ICA) decision about Enel. ICA fined Enel 93m Euros, since Enel's group company (Servizio Elettrica Nazionale/SEN) that was active in protected market<sup>5</sup>, collected consent of its customer in protected market to make commercial offers in free market in a discriminator manner<sup>6</sup>. ICA stated that SEN requested consent of customers separately for its another group company and the third parties. The court of first instance annulled the decision partially and reduced the fine to 27.5m Euros. Enel appealed the case in Italian Council of State, asked the Court of Justice for guidance and the Court stated that benefiting from former state monopoly privileges that cannot be replicated by competitors, was not competition on merit<sup>7,8</sup>.

<sup>1</sup> <https://www.vbb.com/insights/competition/abuse-of-dominance/french-competition-authority-fines-engie-100-million-for-abusing-its-dominant-position-on-the-french-retail-gas-supply-market>

<sup>2</sup> It is a kind of regulated regime for electricity supply. If a customer does not want to switch to market offers or cannot find any offers coming from the market, supplier of TRV is obliged to supply electricity to the customer. It is very similar concept to the last resort supply in Türkiye.

<sup>3</sup> e-Competitions Antitrust Case Law e-Bulletin (Concurrences) – Feb 2022.

<sup>4</sup> <https://www.ashurst.com/en/news-and-insights/legal-updates/competition-law-newsletter-april-2022/cn06---french-competition-authority-fines-edf-eur-300-million-for-abuse-of-dominance/>

<sup>5</sup> That can be considered as TRV regime in France.

<sup>6</sup> <https://www.lexology.com/library/detail.aspx?g=87615c83-115c-4e05-9ed6-6f5332b14c5f>

<sup>7</sup> <https://www.houthoff.com/insights/news-update/competition---24-may-2022>

<sup>8</sup> <https://curia.europa.eu/jcms/upload/docs/application/pdf/2022-05/cp220084en.pdf>

As it is seen, European competition authorities had similar decisions in 5-year period. European jurisprudence is referring source for Turkish Competition Authority (TCA), but it is important to grasp the story of liberalization in those countries, otherwise, a slight approach may be misleading. Therefore, I want to discuss the story in detail by comparing with Türkiye's features.

Firstly, all of three decisions and the approach of the Court of Justice mention privileges of former monopoly and non-replicability of customer database and business infrastructure. Such an approach may make sense in French and Italian energy markets since there was no auction for privatization of abovementioned utility companies. ENGIE, EDF and Enel just went public in the process of liberalization. In this context, there was no "in advance" cost for those companies to have customer base and relevant infrastructure. Therefore, replicability of customer database and infrastructure with reasonable time and cost become a matter for France and Italy. When we look at privatization process in Türkiye, we see huge upfront auction fees for utility companies. Those upfront fees can be considered as the cost that is required to build up a customer database and business infrastructure to have market-based activities. In other words, incumbent utility companies bear the cost in advance, whereas alternative suppliers bear the cost after they enter the market. Thus, it will not be just to adopt the approach of FCA/ICA in Türkiye's gas and electricity markets.

Secondly, current jurisprudence gives us some clues about TCA's attitude since TCA has evaluated similar issues before. For example, in the process of privatization of electricity distribution companies, TCA argued that the gas company in a region is the most important potential competitor of the electricity company in the same region, since the gas company has same scale customer database with electricity company has and thanks to that a gas company can leverage its customer base to enter electricity market. As shown from those decisions, TCA sees the use of historical data as pro-competitive factor, not an anti-competitive one<sup>9</sup>. In Enerya case<sup>10</sup>, the complainant claimed that Enerya, gas incumbent in 9 cities, used its customer database to make electricity supply offers. TCA did not pay attention to use of customer database since it was assumed as competitive. TCA focused on behavior of bundling electricity and gas and its potential exclusionary impact of the behavior. To sum up, TCA has discussed the use of historical data by incumbent utility companies, but TCA has not reached conclusion of violation.

Herein, I just want to make a distinction between "the use of supplier's historical data by supplier companies" and "the use of distribution company's historical data by supplier companies". As known, while electricity and gas supply activities are liberalized, electricity and gas distribution activities are still monopoly. In this context, if a supplier company benefits from the database and business infrastructure of distribution company (under the same undertaking), such a behavior will be a violation, because the distribution company sees and controls whole data on the network and distribution activities are closed to competition and financed by all suppliers, so when a supply company (entity under the same undertaking) has access to database of distribution company, it means leveraging distribution company's assets and data to have competition advantage in free supply market. On the other hand, suppliers under the same undertaking may have access to others' database<sup>11</sup> and business infrastructure, such an access should not be considered as "non replicability of former monopoly's privileges" due to different liberalization process in Türkiye.

<sup>9</sup> <https://www.rekabet.gov.tr/Karar?kararId=c758a183-07a8-4cd1-bb53-30ca6c48ad1f> – page 26 and 30.

<sup>10</sup> <https://www.rekabet.gov.tr/Karar?kararId=bb05bfa2-1f88-4089-9024-bb06de13c260>

<sup>11</sup> In the framework of competition law, such an access is not a violation. Data protection rules are saved for exceptions.

Therefore, CK Akdeniz<sup>12</sup>, Enerjisa<sup>13</sup> and Gediz/Aydem<sup>14</sup> cases are different from ENGIE, EDF and Enel cases.

In conclusion, ENGIE, EDF and Enel cases should be an example for TCA, since Turkish electricity and gas markets have completely different story of liberalization, in this context, incumbent utility companies already bear the cost of having customer database and business infrastructure via auction fees. Moreover, TCA has evaluated similar claims in various cases and considered “the use of historical data” as a source of competition relying on the background abovementioned. In the framework of competition law, there should not be any obstacle before incumbent electricity and gas companies to utilize their customer database and business infrastructure for energy services, EVs, distributed generation and energy storage activities that are competitive markets.

<sup>12</sup> <https://www.rekabet.gov.tr/Karar?kararId=537b366a-8bd7-4821-8760-43592452b711>

<sup>13</sup> <https://www.rekabet.gov.tr/Karar?kararId=b6989e2e-27ce-4ded-8591-05b0b23c86c1>

<sup>14</sup> <https://www.rekabet.gov.tr/Karar?kararId=7276e920-23a5-4d66-9b0f-c5d9381d7c88>