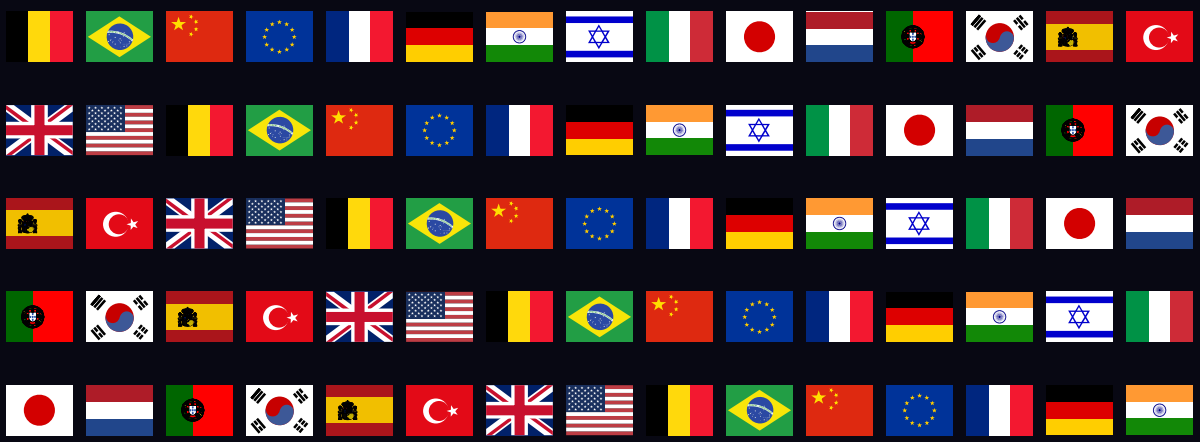
PRIVATE ANTITRUST LITIGATION

Turkey



LEXOLOGY
Getting The Deal Through

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Quick reference guide enabling side-by-side comparison of local insights into development of private antitrust litigation and applicable legislation; availability of private actions; private action procedure; collective actions; remedies; and recent trends.

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LEGISLATION AND JURISDICTION

Development of antitrust litigation

How would you summarise the development of private antitrust litigation in your jurisdiction?

In Turkey, private antitrust litigation has been applicable since Law No. 4054 on the Protection of Competition (the Competition Law) entered into force in 1994. There have been a number of pending cases concerning private enforcement of competition law. The judicial developments have been relatively limited, and there have not been many court precedents in that respect. This is mostly because injured parties are largely unaware of the opportunity for private enforcement and compensation.

Additionally, the lengthy court proceeding period and the rules regarding the limitation period are among the factors preventing private antitrust litigation from becoming attractive to the injured parties. Moreover, the lack of established practice among the civil courts and difficulties encountered in accessing evidence for antitrust practices also constitute obstacles to the development of private antitrust litigation.

However, with the amendment of the Competition Law, mechanisms such as the settlement mechanism, commitment mechanism and SIEC Test, as well as the principle of de minimis have been introduced. With the implementation of the Settlement Communiqué, parties who accept the existence and scope of the violation will be able to settle the case with the Turkish Competition Authority (TCA) until the receipt of the investigation report. The TCA will still fine the parties if an infringement is found, but it can apply a reduction of up to 25 per cent of the administrative monetary fine.

This is expected to generate significant benefits for private antitrust litigation through reducing the lengthy investigation process by enabling the parties to settle without completing the investigation process and deeming the TCA's decision final, as the parties are not granted the right to litigate the terms of the settlement. Thus, at the end of the settlement procedure, there will be a final infringement decision that the claimant can use as the basis for their compensation claim. Therefore, the settlement mechanism is expected to increase parties' applications for compensation claims, based on the final infringement decisions of the TCA, before the competent courts.

In addition, the increasing interest of academics and bar associations encourages future private antitrust litigation. Another promising aspect is the discussion platforms that bring the TCA, the courts, practitioners and academics together to put forward their views and discuss the possible ways to create a tradition of private antitrust litigation. A positive development in that regard is the vast number of actions that have been taken by parties (that have suffered damages) against the banks, which were found to have violated the Competition Law by being involved in an anticompetitive agreement by the TCA's Banks decision dated 8 March 2013 (Board Decision No. 13-13/198-100).

In this context, it should also be highlighted that on the grounds of the inaccurate implementation of the single continuous infringement doctrine, the Council of State (in May 2019) overruled, at the revision of decision stage, the judgment of the court of first instance upholding the TCA's concerned decision. Subsequently, the case was sent back to the 2nd Ankara Administrative Court. The court decided to persist in its previous judgment and stated that the TCA's Banks decision was lawful. The court, by dismissing the appeal in its entirety, stated that the parties concerned have a right to appeal to the Council of State Administrative Judicial Chamber Board within 30 days of receiving the judgment. At the time of writing, these cases are still ongoing, and their outcome is yet to be seen. On this front, it should be noted that the court decisions on the legality of the TCA's Banks decision will affect the ongoing private damage claim lawsuits filed based on said TCA decision. Importantly, as the courts review each private damage claim on its own basis, and not solely based on the underlying TCA decision, if, in the end, one of the courts grants the private damage claim of one of the parties, this would not lead to an automatic positive outcome for other claimants as well.

Another notable example in private antitrust litigation in Turkey was focused on treble damages and concerned the TCA decision regarding an undertaking operating in the alcoholic beverages sector (Board Decision No. 14-21/410-178 of 12 June 2014). After the TCA's fining decision, other undertakings operating in the alcoholic beverages sector filed a

lawsuit to request treble damages, including both pecuniary and non-pecuniary damages. Even though the First Chamber of İzmir Commercial Court granted the compensation claim, the Regional Court of Justice overturned this decision regarding one of the claimants, ruling that one of the prerequisites of private damage claims (ie, an unlawful act) did not occur. Importantly, the Regional Court of Justice in fact upheld the assessments on treble damages but challenged the ruling on non-pecuniary damages. This decision is significant as it is an important precedent regarding treble damages, and also because the claimants in this case received the largest private antitrust damages to date.

As for the commitment mechanism, its impact is arguably more ambiguous in nature than the Settlement Communiqué. Pursuant to the Commitment Communiqué of the TCA, the parties can offer commitments to bring the investigation to an end during the preliminary investigation or investigation phase. Nonetheless, the parties must submit their commitments to the TCA within three months after the receipt of the investigation notice.

If the TCA deems the commitments offered sufficient to remedy the competition problems, it shall render the commitments binding and bring the investigation to an end. However, this decision of the TCA will not include a determination on whether the agreement, decision or practice raises any competition problems amounting to a competition law violation. In this regard, in practice, courts usually wait until the decision of the TCA is finalised before delving into the merits of the compensation claim. However, if the TCA deems the commitments offered sufficient to remedy the competition problems, it will no longer pursue the case and will render an infringement decision. This might put the parties who may have been harmed by the practices of the undertaking previously under investigation into a precarious state. Indeed, under the scenario that the claimant is harmed by the practices of an undertaking previously under investigation, it will not be able to present an infringement decision rendered by the TCA because the TCA will close the investigation pursuant to commitments remedying the competition problems. The commitment mechanism has already been applied several times since its introduction. The TCA published several of these examples on its website. However, from public records, it is not yet clear whether any one of these commitment decisions have led to any private antitrust claims. Therefore, for the time being, the effect of the commitment mechanism over private antitrust claims is still uncertain, and since there are still no court decisions on this front, it is also not clear whether the courts will delve into the merits of the case or dismiss the case in its entirety regarding compensation claims.

Finally, another significant development that may have serious effects in private antitrust litigation was the TCA's decision dated 28 October 2021 and numbered 21-53/747-360, in which a total of six undertakings (five retailers and one supplier) were fined over hub and spoke and resale price maintenance practices. Since the decision of the TCA was highly publicised, it may affect consumers' reactions to high prices in markets, and it is anticipated that this case will pave the way for multiple private antitrust claims. However, since the decision is not yet finalised, any such effects may occur late into the future.

Law stated - 21 June 2022

Applicable legislation

Are private antitrust actions mandated by statute? If not, on what basis are they possible? Is standing to bring a claim limited to those directly affected or may indirect purchasers bring claims?

The rules regulating private antitrust actions are set forth under the Competition Law. Although it grants injured third parties the right to claim damages, section 5 of the Competition Law does not provide any definition of an injured party (or parties) that has suffered harm as a result of a breach of the Competition Law. For example, it is still controversial whether indirect purchasers can claim damages.

The greatest difficulty that indirect purchasers may encounter in the process of private enforcement is to satisfy the conditions of being a 'plaintiff' in the relevant antitrust actions since they would have to prove a causal link between the competition infringement and the damages incurred under the Turkish law. On one hand, it is argued that because of

the lack of an official definition of an 'injured party', indirect purchasers should also be able to claim damages due to a lack of specification by the relevant legislation. On the other hand, it is argued that allowing indirect purchasers to claim private antitrust damages would lead to an extreme increase in court cases, which may in turn result in several different parties submitting the same claim for the same damage. Therefore, due to the difficulty of establishing a causal link, potential claims of indirect purchasers are likely to be dismissed by the court.

Law stated - 21 June 2022

If based on statute, what is the relevant legislation and which are the relevant courts and tribunals?

In the case of a breach of the Competition Law, section 5 grants a right for the injured party (or parties) to claim treble damages before the civil courts, which have exclusive jurisdiction in those matters. The civil courts apply general principles of torts regulated under the Code of Obligations No. 6098 (the Code of Obligations). The procedural rules set out in the Code of Civil Procedure are applicable to private antitrust litigation. At the same time, both parties may lodge an appeal against the civil court judgments.

In addition, under the Consumer Protection Act, the Arbitration Committee for Consumer Problems has the power to hear consumer disputes below a certain threshold. This applies to disputes arising out of the Competition Law, and the consumers must bring their disputes before this Committee so long as the dispute is below the concerned thresholds. The current thresholds range is from 4,000 to 6,000 Turkish lira, depending on the municipality status of the city where the dispute arose:

- borough arbitration boards are responsible for disputes below 4,000 Turkish lira; and
- city arbitration boards are responsible for disputes between 4,000 and 6,000 lira, including disputes within metropolitan cities.

The above thresholds are also applicable to private antitrust claims.

Law stated - 21 June 2022

PRIVATE ACTIONS

Availability

In what types of antitrust matters are private actions available? Is a finding of infringement by a competition authority required to initiate a private antitrust action in your jurisdiction? What is the effect of a finding of infringement by a competition authority on national courts?

In the case of a breach of any rule under Law No. 4054 on the Protection of Competition (the Competition Law), private actions can be taken in accordance with article 57 of the Law. Those who prevent or restrict competition by way of anticompetitive concerted practices, decisions or agreements as well as by abusing their dominance must compensate the injured parties.

In its judgment dated 30 March 2015 (2014/13296 E and 2015/4424 K), the Court of Cassation ruled that the injured parties may claim their damages as soon as they become aware of the person who violated the Competition Law and the existence of the injury. In addition, the court also stated that a decision of the Turkish Competition Authority (TCA) is not a prerequisite for bringing a compensation claim. Therefore, it is suggested to bring an action for damages as soon as possible after submitting the complaint to the TCA.

However, even though a decision by the TCA is not a prerequisite for bringing a compensation claim, the Court of Cassation stated that the final decision of the TCA, which cannot be appealed, is considered as a prerequisite for requesting compensation claims. Indeed, according to the Court of Cassation, the parties have the ability to bring a compensation claim before the final judgment of the TCA. However, the court will make it a preliminary issue and wait until the TCA's decision is final before ruling on the merits of the compensation claim (Decision of the Court of Cassation 11th Chamber Dated 8 March 2016 and numbered 2015/5134 E and 2016/2543 K; Decision of the Court of Cassation 11th Chamber Dated 5 October 2009 and numbered 2008/5575 E and 2009/10045 K, dated 21 December 2011 and numbered 2011/14714 E and 2011/17389 K, dated 12 September 2014 and numbered 2013/7687 E and 2014/13657 K).

Furthermore, in a lawsuit based on competition law infringement without a previous application to the TCA, it is certain that the civil court would request the plaintiff to make its complaint to the TCA first so that it can determine whether there is a breach of competition law and whether there are legal grounds for the alleged competition law violation. On the other hand, the civil court only evaluates whether the applicant has suffered harm as a result of the competition law violation and does not take into consideration arguments of the defendants against the decision of the TCA. In other words, the civil courts do not have the power to evaluate whether the TCA's decision is against the law.

However, the parties that are engaged in the violation of the competition rules may appeal the TCA's decision finding the violation before the administrative courts. If a private enforcement action is brought to a civil court before the decision of the administrative court becomes final, the civil court may, under article 165 of the Code of Civil Procedure (CCP), decide to wait until the administrative court becomes final.

Law stated - 21 June 2022

Required nexus

What nexus with the jurisdiction is required to found a private action? To what extent can the parties influence in which jurisdiction a claim will be heard?

The competent court in private antitrust litigation is determined in accordance with the CCP. The CCP authorises the local courts of the geographic district in which the damage has arisen or the court located in the domicile of the claimant. As for the general principle of jurisdiction, the court of the place where the illicit act or competition infringement has occurred shall be defined as the place where the essential elements of the illegal act have taken place. As to the location where the damage has arisen, this will likely be linked to the place where the claimant has incurred damages from the infringement. Taking into account that the TCA defines the relevant geographical market as 'Turkey', in most cases the court of the domicile of the claimant is competent to hear the case.

Law stated - 21 June 2022

Restrictions

Can private actions be brought against both corporations and individuals, including those from other jurisdictions?

Yes. Private actions can be brought against both corporations and individuals, including those from other jurisdictions.

Law stated - 21 June 2022

PRIVATE ACTION PROCEDURE

Third-party funding

May litigation be funded by third parties? Are contingency fees available?

In Turkey, there are no litigation financing companies that fund litigation costs, bear financial risks or receive a certain percentage in the case of success. Under Turkish law, only attorneys-at-law are eligible to represent and act on behalf of clients in legal processes and litigation cases before the courts, whereas antitrust investigations and filings before the Turkish Competition Authority (TCA) can be conducted by representatives who are not attorneys-at-law.

With regard to fees, according to article 164 of the Attorneys' Act, the attorneys' fee may be agreed as a certain percentage of the money to be litigated or adjudicated, not exceeding 25 per cent.

Contingency fees are available under Turkish law. In the event of a successful outcome of the proceeding, the attorneys may receive a certain percentage of the proceeds recovered by the claimant, provided that the claimant and representatives (attorneys) agreed on this beforehand.

Law stated - 21 June 2022

Jury trials

Are jury trials available?

No. Jury trials have been recognised in neither civil nor criminal cases under Turkish law.

Law stated - 21 June 2022

Discovery procedures

What pretrial discovery procedures are available?

There are no pretrial discovery instruments that enable parties to obtain discovery regarding any non-privileged matter that is relevant to any party's claim or defence. However, pursuant to article 16 of the CCP, during the preliminary examination hearing, the court will grant a two-week period, which is not extendable, to submit any evidence that has not yet been included within their initial submissions.

There are some discovery proceedings, such as requesting declaratory decisions for the breach of trademark and the recording of evidence; however, these are not within the scope of antitrust private litigation.

Law stated - 21 June 2022

Admissible evidence

What evidence is admissible?

In general, any testimonial, documentary, or tangible evidence, is admissible provided that it is enough to prove or disprove any statement made in the course of the court proceedings. As with the Code of Civil Procedure (CCP) that Law No. 4054 on the Protection of Competition (the Competition Law) refers to, evidence may be divided into:

- direct evidence (ie, confession, documents, oath and definitive judgment); or
- circumstantial evidence (ie, witness or expert opinions and on-the-spot inspections).

Consequently, according to the CCP, any kind of evidence is admissible in private antitrust actions.

Whether a decision of the TCA may constitute direct evidence is a controversial question; however, the opinion in this regard is mostly that the TCA's decision cannot be considered as direct evidence until it becomes final. The investigation may be initiated by the TCA, either by a complaint or ex officio.

In cases where an undertaking or individual puts forward its complaint regarding the practices of another undertaking, both parties are entitled to make an appeal and claim the annulment of the TCA's decision or issue of a stay order before the administrative courts, or both. If none of the parties submits an appeal within the envisaged time period or if the relevant courts uphold the TCA's decision, it becomes final. Only then may the TCA's decision be referred to as direct evidence in the private antitrust litigation. In other words, if none of the parties to the TCA's decision appeals it or the decision imposing a fine has been affirmed by the courts, the claimant may also use this as direct evidence to prove that the behaviour in question is against the competition law.

The Court of Cassation clarified whether the TCA's final decision will be considered mandatory for bringing a legal action for damages in antitrust litigation. The court of first instance in this case rejected the claims for treble damages as the TCA's decision was not final. In other words, the court of first instance ruled that only the TCA's final decision is a condition to bring a treble damages action to court. Nevertheless, the Court of Cassation annulled the ruling of the court of first instance and stated in its judgment that the TCA's final decision will be considered as a preliminary issue rather than a condition to bring a legal action for damages.

Law stated - 21 June 2022

Legal privilege protection

What evidence is protected by legal privilege?

The concept of legal privilege for lawyer–client communications exists in Turkey. The claimant is not entitled to request the defendant to present evidence that relates to communications between the defendant and its in-house counsel or lawyers. However, during the court proceedings, the court will be guided by provisions of the CCP as opposed to the procedural rules of the TCA.

Pursuant to the general rules of law or the CCP, the judges must ensure that there are appropriate measures to protect legal privilege, including the documents and electronic communications. At the same time, the courts may order one of the parties or a third party to submit any relevant documents regarding the case or request any of those documents from the TCA's file. Should this be the case, the parties are not allowed to refrain from implementing the court's order to submit the evidence based on the reason that the information constitutes a trade secret.

In practice, parties may take additional precautions to ensure that the documents they submit are kept confidential. As this is not formally recognised by the CCP, parties may prefer various proceedings including (1) refraining from using the online judiciary informatics system and submitting the documents by hand or (2) if possible, making the submission along with a confidentiality request. However, in any case, none of these methods would guarantee confidentiality since parties to the lawsuit and their official representatives may review any document within the case file with proper authorisation.

Law stated - 21 June 2022

Criminal conviction

Are private actions available where there has been a criminal conviction in respect of the same matter?

In accordance with Turkish law, competition law infringements are not subject to criminal law. But if the action or behaviour that constitutes an infringement from the viewpoint of the Competition Law also constitutes a crime under the criminal law or other areas of law (ie, public procurement law), then the perpetrators will be penalised under both laws.

Law stated - 21 June 2022

Utilising of criminal evidence

Can the evidence or findings in criminal proceedings be relied on by plaintiffs in parallel private actions? Are leniency applicants protected from follow-on litigation? Do the competition authorities routinely disclose documents obtained in their investigations to private claimants?

Competition law infringements are not subject to criminal law.

Leniency applicants are not protected from follow-on litigation. According to the administrative procedure of the TCA, where the undertaking involved in a cartel informs the TCA about the cartel, it may be immune from a fine or benefit from a reduction of a fine under certain circumstances. However, there are currently no rules on leniency during private enforcement procedures, and, in practice, leniency applicants may not be protected from follow-on litigation and can be severally and jointly liable for the damages.

With regard to the disclosure of the documents to claimants, the Communiqué on the Right of Access to the File and Protection of Trade Secrets provides some guidance. Within the scope of the right to access to the file, the parties can have access to any document that has been drawn up and any evidence that has been obtained by the TCA, except for correspondence among the TCA's departments and information that constitutes trade secrets or other undertakings' confidential information. Request for access to the file is evaluated by the TCA (the investigation committee of the case). As a result of the evaluation, the TCA may deny the request if it is not convinced about legitimacy. If the request for access to the file is denied, the reason thereof is notified to the requesting party.

Nevertheless, if the court requests the documents regarding the investigation file from the related parties or the TCA with its formal decision, both the parties and the TCA must submit any and all requested documents to the court without having any right to deny the disclosure based on arguments in respect of trade secrets or confidential information.

Law stated - 21 June 2022

Stay of proceedings

In which circumstances can a defendant petition the court for a stay of proceedings in a private antitrust action?

Under article 57 of the Competition Law, a private action does not depend on the TCA's enforcement decision that is pending or at the stage of the appeal. Therefore, it is possible, de jure, to bring a private action even if no administrative proceedings (ie, investigations or preliminary investigations) have been initiated or no final decision has been adopted by the TCA. However, the TCA's decision is, de facto, required.

The Court of Cassation ruled in its judgment that if there is no TCA decision that constitutes the basis for the action for

damages under the competition law, the court of first instance dealing with the private enforcement case must wait for the TCA's decision before proceeding with the hearing of the case. Therefore, if the TCA has already launched an investigation regarding the infringement of competition law that has the same subject as the case before the court of first instance, notwithstanding the fact that no imperative legislation provides this, the court will usually prefer to wait until the TCA's investigation is finalised before continuing the litigation proceedings or adopting a decision.

In addition to this, if the TCA has not launched any investigation related to the private action case before the national court, the national court will request the plaintiff to apply to the TCA to obtain an administrative decision regarding the alleged competition law violation.

Although there are no direct legal obstacles to bringing a private action relating to competition law infringements before the courts in Turkey, the courts of first instance normally prefer to wait for the TCA's final decision (which is in line with the court's practice) before proceeding with the file.

Law stated - 21 June 2022

Standard of proof

What is the applicable standard of proof for claimants? Is passing on a matter for the claimant or defendant to prove? What is the applicable standard of proof?

Under the CCP, the burden of proof is on the person claiming that the acts of the other party constitute the competition law infringement. Actions for damages in private enforcement of competition law are subject to general evidence rules applicable to the illicit acts under the civil law. In this respect, as proof of damage suffered, the claimant must provide the court with sufficient evidence of a breach by the defendant of the competition rules, the existence of damage and the causal link between the unlawful act and the damage incurred.

The CCP does not define the standard of proof as the 'balance of probabilities' or 'beyond reasonable doubt'. Proof of the relevant facts is sufficient. Moreover, under Turkish law, the judge has discretionary power to assess the evidence and decide whether it is sufficiently convincing. In accordance with article 59 of the Competition Law, it is sufficient to provide evidence that illustrates the existence of agreements, decisions and practices restricting competition.

There is an exception to the above-mentioned general rule. If certain conditions are satisfied, the burden of proof passes to the defendant. In particular, if the injured party (or parties) submits to the court evidence (eg, of the actual sharing of markets, stability of the market price for a long period of time or price increases within close intervals by the undertakings operating in the market) that gives the impression of the existence of an agreement, or the distortion of competition in the market, then the burden of proof (that the undertakings are not engaged in concerted practice) lies with the defendant.

On this note, there has been an important court decision regarding the standard of proof required for resale price maintenance cases in particular. In the TCA's Henkel decision, the Board found that Türk Henkel Kimya Sanayi ve Ticaret A.Ş. (Henkel) had violated competition law rules, and imposed an administrative monetary fine upon the undertaking. Subsequently, Henkel initiated annulment proceedings against the board's decision. The administrative court of first instance and the regional administrative court rejected the annulment request by Henkel as they found that the board's decision was compliant with the law. The case was then brought before the Council of State, which has reversed the regional administrative court's decision by finding the Board's Henkel decision to be against the law. Regarding the standard of proof, the TCA provided that to establish the existence of a resale price maintenance, there must be 'a pressure/force or incentive towards implementing the recommended price as a resale price' and 'the use of price monitoring systems'. The court also required that the TCA must rely on concrete and serious data to support its findings. Although the courts' assessments do not provide mandatory rules for the review of private antitrust claims, these assessments may still serve as a guideline for private antitrust claims since the Henkel decision raises the

standard of proof for establishing resale price maintenance conduct as an unlawful act, which is the pre-requisite for private antitrust damage claims.

Law stated - 21 June 2022

Time frame

What is the typical timetable for collective and single party proceedings? Is it possible to accelerate proceedings?

Collective party proceedings had not been specifically recognised in antitrust litigation proceedings in Turkey; however, the new CCP that entered into force in 2011 (unlike the Competition Law) recognises collective action proceedings, although they are very limited in scope. In terms of single-party enforcements, however, there are no standard timetables for the court proceedings. The Court of Cassation is the last instance for reviewing judgments rendered by lower instance courts upon an appeal in cassation. It is also entitled to modify and revise its own rulings upon request.

The parties have no explicit rights to accelerate proceedings. Each party has the possibility of accelerating the proceedings through its own conduct; that is, by not requesting an extension of time limits. The duration of court proceedings is relatively lengthy, and the total length of proceedings including all instances is approximately two-and-a-half to three years.

According to articles 184 and 186 of the CCP, following the legal examination, the court shall summon the parties to a hearing only after the evidence has been evaluated. In other words, the hearing does not take place until all evidence has been examined. This practice has been in force since the enactment of the CCP in 2011.

In addition, to achieve uniformity in cases, the Court of Cassation's opinions and judgments are considered as precedents for the lower instance courts. It is also possible for the parties to include references to precedents in their applications to accelerate the court review proceedings.

Law stated - 21 June 2022

Limitation periods

What are the relevant limitation periods?

The Competition Law does not set forth any rules regarding time limitation for bringing treble damages compensation claims. The question of whether a private action is time-barred has always been arguable, and there have been attempts to make the calculation of limitation periods clearer by applying the principles of the Code of Obligations.

According to article 72 of the Code of Obligations, the limitation period for a private claim is two years, but in any case, the ability to claim damages expires in 10 years. As for the starting dates of the limitation period, the two-year period for general or intangible damages resulting from tort liability under competition law starts running from the date when the party becomes aware of it. The 10-year period starts running from the date when the act resulting in the damages took place.

Customising these rules of the Code of Obligations and applying them by analogy to competition cases requires a comprehensive interpretation. The Competition Law does not have any provision regarding limitation periods for private enforcement. Therefore, if the provisions of the Code of Obligations were to be applied, the general two-year limitation period for private actions in antitrust litigation would start running from the date when the injured party became aware of the competition law infringement and of the perpetrator.

However, in 2015, the Court of Cassation revised its precedent regarding lapse of time regulations and clarified the principles governing the implementation of time limitations with regard to private antitrust actions. In particular, it ruled

that the time limitation of eight years, as regulated under article 20 of the Misdemeanor Act No. 5326, shall be applicable for bringing private antitrust claims. In determining the lapse of time, the Court of Cassation put emphasis on the penal characteristics of the administrative fines imposed by the TCA. According to the second sentence of article 72 of the Code of Obligations, longer limitation periods are considered if a right to claim damages arises from conduct prohibited under the criminal law. Therefore, the court set out the two-year time period to claim compensation owing to anticompetitive behaviour (it used to be one year according to the former Code of Obligations) and extended the limitation period to claim treble damages to eight years. Moreover, the judgment of the Court of Cassation provided more legal certainty by acknowledging that the limitation period shall start running from the date of submitting a complaint to the TCA, namely becoming aware of the infringement.

The Court of Cassation is very consistent with its practice and the court consistently ruled that the applicable limitation period is eight years instead of the two-year period envisaged under the Code of Obligations (Decisions of the Court of Cassation 11th Chamber dated 1 July 2019 and numbered 2019/1672 E and 2019/5015 K, dated 30 March 2015 and numbered 2014/13296 E and 2015/4424 K, dated 27 October 2015 and numbered 2015/3450 E and 2015/11139 K). Additionally, with its very recent decision dated 24 September 2020 and numbered 2015/208 E and 2020/433 K, Izmir Commercial Court of First Instance 1st Chamber stated that the limitation period applicable for bringing private antitrust claims is eight years pursuant to the Misdemeanor Act No. 5326. Thereby, it rejected a time-out claim brought forth by the defendant based on the two-year limitation period stipulated under the Code of Obligations.

The Court of Cassation also clarified the question of whether the TCA's decision becoming final shall be considered as a mandatory condition for bringing the treble damages action. The court of first instance in this case rejected the claims for treble damages on the grounds that the TCA's decision was not final, but the Court of Cassation annulled the ruling and stated in its judgment that the TCA's decision becoming final shall be considered as a preliminary issue rather than a condition to bringing a legal action for damages.

Law stated - 21 June 2022

Appeals

What appeals are available? Is appeal available on the facts or on the law?

The judgment of the court of first instance may be appealed on substantive or factual grounds and procedural errors. Under the CCP, the rulings of courts of first instance may be appealed to the Regional Courts of Appeal and then to the Court of Cassation. Appealing a judgment before the Regional Court of Appeal may be based on all grounds, including errors of law, facts or procedures.

Law stated - 21 June 2022

COLLECTIVE ACTIONS

Availability

Are collective proceedings available in respect of antitrust claims?

There were no provisions regarding collective actions under the previous Code of Civil Procedure (CCP). However, the new CCP, which entered into force in 2011, recognises collective action proceedings, although they are very limited in scope. A 'class' comprises a group of people who are members of an association or another legal entity, and it is not possible to widen the scope of this class to other persons who have suffered damages as a result of the same action but who are not the members of the association or legal entity. In other words, it is not possible to define the class on a case-by-case basis, but the class is predefined as the members of the association or legal entity whose rights have been violated. Therefore, under the CCP, collective proceedings are available in respect of antitrust claims, although

with a very limited scope.

Law stated - 21 June 2022

Applicable legislation

Are collective proceedings mandated by legislation?

Collective proceedings are not mandated by the Competition Law, only by the CCP. Additionally, some associations have the right to commence collective proceedings within the scope of the Consumer Protection Law. Consumer organisations are allowed to represent consumers regardless of their memberships. However, the scope of this right is limited to violations of the Consumer Protection Law and does not cover disputes arising from competition law. Therefore, consumer organisations cannot commence collective action and claim damages in regard to an antitrust injury.

Law stated - 21 June 2022

Certification process

If collective proceedings are allowed, is there a certification process? What is the test?

Because collective proceedings are not specifically envisaged for private enforcement of competition law, the certification process is not available. According to article 113 of the CCP, only an association or a legal entity may commence collective proceedings to protect the rights of its members. The same article also dictates that the legal entity must act in accordance with its statute (eg, its articles of association) and must not exceed the limits set by that statute. Accordingly, this article may be used by way of analogy for the certification process for antitrust injury.

Law stated - 21 June 2022

Have courts certified collective proceedings in antitrust matters?

No. The courts have not yet certified collective proceedings in antitrust matters since the legislation for collective proceedings is relatively new under the CCP. Moreover, the law does not specifically envisage such an option for private enforcement of competition law.

However, considering that consumer law allows consumer organisations to launch collective proceedings in certain issues, as well as the CCP provisions, it is arguable before the court that these organisations will also be allowed to use such a right in antitrust issues.

Law stated - 21 June 2022

Opting in or out

Can plaintiffs opt out or opt in?

According to article 57(c) of the CCP, the claimants are able to opt in as long as their claims have common legal basis or facts. They may also opt out if they wish to do so. However, by opting out, the claimants may lose the right to raise the same claims again in the future.

Law stated - 21 June 2022

Judicial authorisation

Do collective settlements require judicial authorisation?

As a general rule, disputing parties are allowed to reach an out-of-court settlement and collective settlements are not mandated by the Competition Law in Turkey. If the parties decide to settle out of court, authorisation from the judicial body is not required for the settlement to be valid. Settlement effectively terminates the formal lawsuit before the court, as recognised by article 313 of the CCP.

Pursuant to article 314 of the CCP, parties may decide to settle any time before the court renders its final decision. In cases where parties opt to settle during the judicial review process, the upper court reviewing the case shall decide in line with the will of the parties.

Law stated - 21 June 2022

National collective proceedings

If the country is divided into multiple jurisdictions, is a national collective proceeding possible? Can private actions be brought simultaneously in respect of the same matter in more than one jurisdiction?

This is not applicable to Turkey, since it is not divided into multiple jurisdictions.

Law stated - 21 June 2022

Collective-proceeding bar

Has a plaintiffs' collective-proceeding bar developed?

No. A plaintiffs' collective-proceeding bar has not yet developed in Turkey because collective proceedings is a relatively new institution for the Turkish legal system, given that it was recognised for the first time under the CCP in 2011.

Law stated - 21 June 2022

REMEDIES

Compensation

What forms of compensation are available and on what basis are they allowed?

Under the Code of Obligations, normally the injured party is only entitled to claim compensation amounting to the damages suffered. However, the treble damages practice in Turkish competition law is an exception to this rule. The Competition Law specifically provides that the injured party has the right to claim damages, which is the difference between the cost it paid and the cost it would have paid if competition had not been limited. Also, treble damages are available in Turkish competition law where the damages arise from an agreement or a decision of the parties, or from cases involving gross negligence of them, including abuse of dominance cases.

According to the Competition Law, the amount of damages that the injured party (or parties) may claim is the difference between the amount that the party actually paid and the amount that it would have paid had there been no restriction or violation of competition in the market. On the other hand, competitors that are affected by the restriction in the market may request for compensation for all their damages, including the lost profit; that is, all profits the

competitors expected to gain are calculated. Previous years' balance sheets are considered for calculation purposes. In accordance with the Code of Obligations, the amount of compensation is determined by the court, depending on the nature of the situation and the level of the defendant's fault. If the injured party had any benefits as a result of the infringement, these benefits are deducted from the amount of damages.

Law stated - 21 June 2022

Other remedies

What other forms of remedy are available? What must a claimant prove to obtain an interim remedy?

The claimant may also seek interim measures from the court if he or she is harmed by anticompetitive behaviour. In the event of an immediate risk arising from the potential delay of the judgment, the claimant may request the court to seize the assets of the defendant. Furthermore, the courts may issue interim measures ordering the defendant to perform a certain action, such as supplying the claimant with certain goods under circumstances in which the claimant would otherwise lose important customers.

Law stated - 21 June 2022

Punitive damages

Are punitive or exemplary damages available?

Upon the claimant's request, the court may order compensation in favour of the claimant amounting to treble the amount of the material damages suffered. Treble damages are intended to serve a purely punitive function.

The current treble damages clause of the Competition Law, amended in accordance with the Competition Law, is optional for the judge, so damages corresponding to the actual harm may be granted to the claimant.

Law stated - 21 June 2022

Interest

Is there provision for interest on damages awards and from when does it accrue?

There is no specific provision regarding interest on damages awarded. On the other hand, there is a precedent of the Assembly of Civil Chambers of the Court of Cassation in 2005 in respect of interest on damages arising from torts that reads as follows: 'The defendants are also liable for the interest on compensation from the date of the occurrence of the illicit act'.

However, in some cases, damages may occur after the competition infringement has emerged. In that respect, injured parties are entitled to indemnity as of the date when the damage from the competition infringement arose. Under Turkish law, the claimant must explicitly claim the interest and specify the date of the damage in the petition. If the claimant does not specify the date when the damage arose, the judge will rule for interest on damages from the date of the judgment.

Law stated - 21 June 2022

Consideration of fines

Are the fines imposed by competition authorities taken into account when setting damages?

Fines imposed by the Turkish Competition Authority (TCA) are not taken into account in setting damages by the courts. Even if the TCA imposes the highest fine, the damaged party is not deprived of the right to request compensation.

Law stated - 21 June 2022

Legal costs

Who bears the legal costs? Can legal costs be recovered, and if so, on what basis?

The legal costs, including litigation costs and attorneys' fees, are allocated depending on the outcome of the case. Normally, the party that loses the case will bear those legal costs. Attorneys' fees are calculated on the basis of statutory fees.

Law stated - 21 June 2022

Joint and several liability

Is liability imposed on a joint and several basis?

In principle, the person exposed to damages is entitled to claim the compensation from one of or all the defendants who severally or jointly caused the damages. This principle is also stipulated under article 57 of the Competition Law.

According to article 61 of the Code of Obligations, joint and several liability is only applicable if the defendants 'sustained the damages severally'. Each defendant is liable for the total damages of the claimant, regardless of its contribution to the total damage.

Law stated - 21 June 2022

Contribution and indemnity

Is there a possibility for contribution and indemnity among defendants? How must such claims be asserted?

In cases where several defendants are involved in the anticompetitive behaviours, any of the defendants can be held liable for the entire scope of damages caused by all the defendants. In this regard, the Code of Obligations regulates that if several persons have together caused damage or are responsible for the same damage for different reasons, the provisions regarding joint and several liability shall be applied accordingly. Therefore, the claimant may recover full damages from any of the defendants, and it is not for the claimant to bring its claims against every person contributing to the damages caused.

However, the Code of Obligations also provides that the determined compensation shall be divided among the defendants who are jointly and severally liable by taking into consideration all the circumstances, the gravity of the fault and the intensity of the characteristic risk imputable to each of them. A jointly and severally liable person who has paid more than his or her share has a right of recourse against the others, and, to this extent, he or she is subrogated to the rights of the injured person. In other words, the civil courts will decide whether a defendant who has paid more than his or her part of injury may recover partial reimbursement from the other defendants, and if the defendant has the right to

recourse, then the court will also determine the amount for which each defendant is liable. In determining these amounts, the court takes into consideration the degree of seriousness of the fault committed by each defendant and its ultimate effect. Therefore, the defendants may put forward their contribution and indemnity arguments in the same proceedings as the principal claims.

Law stated - 21 June 2022

Passing on

Is the 'passing-on' defence allowed?

To the best of our knowledge, there is no precedent on this matter as yet.

Law stated - 21 June 2022

Other defences

Do any other defences exist that permit companies or individuals to defend themselves against competition law liability?

There is no special defence that would permit companies or individuals to defend themselves against competition law liability. However, if anticompetitive behaviour results from an obligation under a different area of law, the undertaking concerned may avoid the liability by putting forward the provision of law leading to liability for the breach of competition law.

Law stated - 21 June 2022

Alternative dispute resolution

Is alternative dispute resolution available?

In recent years, some amendments to Turkish law were introduced to encourage alternative dispute resolution, such as arbitration and mediation. Therefore, alternative dispute resolution is available to create a time- and cost-efficient way to solve conflicts. Those proceedings are only admissible if an arbitration clause has been agreed between the parties.

However, in terms of damages claims owing to a breach of competition rules, it is not clear whether alternative dispute resolution is possible, as there is no relevant precedent as yet. The need for a precedent stems from the existing public interest in competition law violations. Issues such as granting exemption and merger controls are among the exclusive powers of the TCA.

Law stated - 21 June 2022

UPDATE AND TRENDS

Recent developments

Are there any emerging trends or hot topics in the law of private antitrust litigation in your country?

One of the hottest topics in Turkey in respect of damages claims within the scope of Law No. 4054 on the Protection of Competition (the Competition Law) is the question of whether the provision on damages claims grants a right to treble damages or 'up to treble damages'. The response to this question still seems to be uncertain.

In this context, the letter of the concerned provision provides that 'if the damage arises from an agreement or decision or gross negligence of the parties, the judge may, upon the request of the injured party, award a compensation equal to three times the material damage incurred or of the profits gained or likely to be gained by those who caused the damage'.

On the other hand, the 12th Istanbul Consumer Court decided, on 9 May 2017 (E 2016/152, K 2017/172), that the injured party is entitled to compensation that is equal to twice the amount of damages. In its reasoning, the court emphasised that the defendant (bank) should pay an amount as an economic sanction in addition to the damage caused to the injured party. The court ruled that the economic sanction should be equal to the actual damage caused in the relevant case by taking into account the economic importance of the defendant as a bank and to prevent excessive harm to the shareholders of the banks, who took no part in the violation. However, in another case (E 2015/1008, K 2017/1325), the Fourth Commercial Court of First Instance held, on 12 December 2017, that the amount paid to the defendant (bank) should be reimbursed to the plaintiff with interest and, in accordance with article 58(2) of the Competition Law, double the amount of damages of the plaintiff with interest should be compensated.

That being the case, based on the very recent decision of the 1st Chamber of Izmir Commercial Court of First Instance (Izmir Court) dated 24 September 2020 and numbered 2015/208 E and 2020/433 K, the answer seems to be positive for receiving treble damages. To provide a background to the dispute, Efe Alkollü İçecekler Ticaret Anonim Şirketi and Efe İçecek Sanayi ve Ticaret A.Ş (EFE) filed a lawsuit against Mey İçki Sanayi ve Ticaret A.Ş (Mey İçki) on the basis of the Turkish Competition Authority (TCA) decision dated 12 June 2014 and numbered 14-21/410-718, which ruled that Mey İçki infringed article 6 of the Competition Law which prohibits abuse of dominance. EFE's compensation request for up to treble damages from the Izmir Court has been granted. Based on the Izmir Court's decision, it seems so that parties can be awarded compensation up to treble damages and regardless of whether the subject of the infringement decision is a cartel infringement or abuse of dominant position case.

In TCA's decision dated 29 August 2013 and numbered 13-49/711-300, the TCA evaluated whether Frito Lay Gıda San. Tic. A.Ş (Frito Lay) infringed the Competition Law by excluding rivals and exclusivity practices and held that Frito Lay did infringe the Competition Law. Pursuant to the decision, Doğuş Yiyecek ve İçecek Üretim San. Tic. A.Ş (KRAFT) filed a compensation lawsuit on the basis of the aforementioned TCA decision. The parties settled the case.

In this regard, the 6th Istanbul Commercial Court of First Instance's decision (E 2017/642, K 2018/250) with respect to 'treble damages' is also worth mentioning. In March 2018, the court held that the injured party is solely entitled to the amount corresponding to the damage incurred owing to the anticompetitive conduct and is not entitled to treble damages. In its reasoning, it underlined that the purpose of the provision laying down the possibility of granting treble damages is, rather than to enrich one party, to compensate the plaintiff in situations where the damage cannot be precisely proved. The amount of damages can be increased up to threefold depending on the nature of the anticompetitive behaviour and the nature of the fault (if any). The court went on to point out that the possibility of awarding treble damages is intended to deter. Although the court rejected the plea relating to the provision stipulating the possibility of granting treble damages, it awarded material and non-pecuniary damages to the plaintiff.

The actions brought by the injured parties against the banks, which were found to have violated the Competition Law by being involved in anticompetitive practices, are still not final. Therefore, the approach to be adopted by the appellate jurisdiction (ie, the Court of Cassation) is expected to further shape the application of treble damages or 'up to treble damages' in Turkey.

Additionally, the TCA's recent Retail Decision (dated 28 October 2021 and numbered 21-53/747-360) and the Council of State's Henkel Decision (dated 6 July 2021 and numbered E 2021/969, K 2021/2654) may have serious effects in private antitrust litigation since the decisions are highly publicised, which may affect consumers' reactions to high prices in markets and pave the way for multiple private antitrust claims.

Law stated - 21 June 2022

Jurisdictions

Belgium	Gil Robles
Brazil	Araújo e Policastro Advogados
China	DeHeng Law Offices
European Union	Hogan Lovells
France	Fréget Glaser & Associés
Germany	Milbank LLP
India	Anant Law
Israel	Tadmor Levy & Co
Italy	Gianni & Origoni
Japan	Anderson Mōri & Tomotsune
Netherlands	Pels Rijcken
Portugal	Gomez-Acebo & Pombo Abogados
South Korea	Ejelaw
Spain	Ramón y Cajal Abogados
Turkey	ACTECON
United Kingdom - England & Wales	Clifford Chance
USA	Simpson Thacher & Bartlett LLP