IN-DEPTH

Private Competition Enforcement

TÜRKIYE

Private Competition Enforcement

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In-Depth: Private Competition Enforcement (formerly The Private Competition Enforcement Review) is a useful overview of the frameworks governing private actions for competition and antitrust law violations in key jurisdictions worldwide. With a focus on recent developments, it examines crucial issues including standing, evidence, collective actions, damages, settlement, alternative dispute resolution and much more. It also provides an outlook for potential future developments in this area.

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Türkiye

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Introduction

The primary competition legislation is Law No. 4054 on Protection of Competition (the Competition Law, as revised). The revisions in June 2020 introduced several new instruments, including settlement and commitment procedures, which were the most significant in terms of private antitrust litigation. These mechanisms were further developed by the pertinent regulations issued by the Turkish Competition Authority (the Authority) in 2021.[2] In that context, in 2022, seven proceedings were ended by the commitment procedure and 34 proceedings ended in settlement.[3] In the first half of 2023 alone, eight proceedings were ended by the commitment procedure and 35 proceedings ended in settlement.[4]

Under the settlement mechanism, either the parties or the Authority may initiate settlement discussions until the investigation report (i.e., the statement of objections) has been issued. This mechanism shortens the investigation process and thus allows injured parties to bring forward their private competition claims without waiting for a long appeal process. This is because, under the settlement mechanism, parties accept the existence of anticompetitive conduct (i.e., the unlawful act that may form the basis of a private damages claim) and waive their rights to litigate any matters included in the settlement process, which results in an immediately finalised decision by the Competition Board (the Board); however, the increasing number of commitment decisions may have deterrent effects on private antitrust litigation in the future, mainly for the following reasons: (1) potential plaintiffs may be discouraged about bringing a claim to court and proving the existence of an infringement themselves, as the courts have historically been reluctant to accept such claims without an infringement decision by the Authority; (2) potential plaintiffs may not be fully aware of the damage in the absence of a detailed and reasoned infringement decision by the Authority; and (3) adverse effects may occur because of uncertainties with regard to procedural issues, such as the statute of limitations.

As for the jurisprudence concerning private antitrust compensation, cases in the banking, the alcoholic beverages and the mobile telecommunications sectors are significant.

In the *12 Banks* case,[5] after the parties to the investigation filed for annulment of the Board's decision, the Council of State overruled the court of first instance on the grounds that the Board had implemented the single continuous violation doctrine incorrectly and should have reviewed the conduct of each investigated party separately and sent the case back to the court of first instance for a new decision. The court of first instance then insisted that the Authority's decision was lawful and refused to comply with the decision of the Council of State. Subsequently, the Council of State's Administrative Judicial Chamber reversed the court of first instance's insistence decision,[6] which the court of first instance then complied with,[7] subject to further appeal within 30 days of the official notification of the judgment. At the time of writing, there is no further public information as to whether the Authority reinitiated an investigation against the banks or the judgment was further appealed by the appellants.

Following the Board's *12 Banks* decision in 2014, many private damages claims were brought against the banks, pursuant to which some parties received compensation.[8-] In 2023, the High Court of Appeals upheld a decision of Ankara Regional Court, which grounded its decision on an expert report that explained the conduct of the defendant

separately, in line with the Council of State's decision above.[9] In another case, Istanbul 8th Commercial Court of First Instance based its decision on an information note provided by the Authority's legal office, which showed the first and last dates of correspondence for each investigated party (including the defendant) in the Authority's decision.[10] In its decision, the Istanbul court rejected the plaintiff's claim for an award since the credit contracts were not signed between the first and last dates of correspondence of the defendant, as indicated in Authority's infringement decision. Last, Antalya Regional Court of Justice upheld an Antalya 4th Commercial Court of First Instance decision, which ruled that the Authority did not indicate a 'base rate' in its decision and, because it did not have the power to do so, the appellant could not seek redress because he had agreed with the defendant regarding its own costs as a prudent merchant within the market conditions throughout the term of the contract.[11]

Another recent development is in respect of treble damages. The case concerned the Board's fining decision against an undertaking operating in the alcoholic beverages sector,[12] pursuant to which other undertakings operating in the sector filed a lawsuit to request treble damages, both pecuniary and non-pecuniary. The First Chamber of Izmir Commercial Court granted the compensation claim; however, this decision was partially overturned by the Regional Court of Justice, which rejected the lawsuit for one of the claimants on the ground that the existence of an unlawful act, which is a prerequisite for private damages claims, did not materialise for that claimant. In 2023, the High Court of Appeals overturned this decision on the ground that the existence of an unlawful act concerning the appellant cannot be associated with the fact whether the appellant had applied to the Authority or not, and emphasised that everyone may claim compensation based on a final decision by the Authority irrespective of whether they applied to the Authority or not.[13] The High Court upheld the remaining parts of the Regional Court's judgment. The decision of the Izmir court is significant for the assessment of future treble damages claims, in particular because it currently constitutes the largest private antitrust damages awarded to a claimant.

Finally, in two private cases against a mobile telecommunications operator, key points about limitation periods and treble damages were discussed. The High Court of Appeals confirmed its own decision in the context of a postjudgment relief request that the limitation period was correctly determined as eight years as provided in the Misdemeanours Law. The Court emphasised that the Turkish Law of Obligations (TLO) provides that 'if the compensation arises from an act requiring a penalty for which the criminal law provides for a longer statute of limitations, this statute of limitations applies' and, therefore, the time limit provided in the Misdemeanours Law should be applied instead of the two-year limitation period provided in the TLO, despite the claims by the appellant that the above referral should not be applied with respect to Misdemeanours Law.[14] In another case, the decision of the first instance court was overturned by the Istanbul Regional Court of Justice on the grounds that the court could not justify its decision as to why the compensation was determined on the upper limits (i.e., treble) and there was not any discussion in the decision relating to the case at hand, the scope and gravity of the infringement, or whether the award granted to the plaintiff was fair.[15]

General introduction to legislative framework for private antitrust enforcement

Legal framework

Private antitrust damages claims are considered based on the Competition Law, the TLO, the Code of Civil Procedure (CCP) and the Misdemeanours Law. The regulatory bodies responsible for the implementation and enforcement of competition regulation in Türkiye are the Authority and, as the decisional limb, the Board.

Section 5 of the Competition Law regulates private antitrust actions. First, Article 56 defines the legal nature of the agreements and decisions that are in violation of the Competition Law as invalid. This Article also includes a clear and precise reference to the TLO. Accordingly, it is provided that in terms of reclamation responsibilities arising out of previously fulfilled acts, Articles 63 and 64 of the TLO, which regulate general liability, are applicable; however, it is also stipulated that Article 65 of the TLO (regulating equity liability) is not applicable.

Article 57 of the Competition Law sets forth that any legal or natural person shall compensate for damage to any parties injured by the restriction of competition through its practices, decisions, contracts, agreements or abuse of dominant position in a relevant market. Further, Article 58 regulates the damages that could be requested, stating that if the injured party makes a request, the court may decide the amount and the scope of damages owed to the injured party. More specifically, in practice, courts regard a continuing investigation as a pending matter and act accordingly once the Board decides on a violation, refraining from conducting a competition-related analysis on the merits. As the wrongful act provisions of the TLO are applicable, the burden of proof is on the claimant. Finally, Article 59 sets out the burden of proof for private damages claims arising from antitrust cases (see Section IV).

In addition to the provisions in the Competition Law, the general provisions of the TLO are also relevant where applicable. Accordingly, any TLO provisions that govern liability under unlawful acts are also applicable to competition law violations. One example in this respect is the regulations in terms of the injured parties that may bring forward private damage claims. Accordingly, Article 49 of the TLO states that those who damage other persons through faulty or unlawful acts must compensate for that damage.

Because there are no courts in the Turkish judicial system that specialise in competition law matters, damages claims can be brought before civil, commercial or consumer courts, depending on the specifics of each case. According to Article 118 of the CCP, a lawsuit is deemed as filed on the date and at the time of the lawsuit petition entering the records. Next, pursuant to Article 122 of the CCP, the lawsuit is notified to the opposing party, which will then have two weeks to submit its response. The opposing party may also file a counter lawsuit, pursuant to the conditions stipulated in Article 132 of the CCP. Following the process of exchange of petitions, before delving into the detailed assessments on the merits of the case, the court would conduct a preliminary examination hearing, which is regulated according to Articles 137 to 142 of the CCP. Pursuant to the preliminary examination process, the court would then move on to the official inquiry of the case to review the allegations and the defences submitted by the parties. The different stages of this process are explained in Sections IV, V, VII and XII.

Statute of limitations

Neither the Competition Law nor the TLO provide specific statute of limitation provisions for private damages claims in antitrust matters. Thus, the prescription period defined

in the Misdemeanours Law becomes relevant, pursuant to the precedents set by the High Court of Appeals.[16] In a decision of 2018,[17] the High Court of Appeals ruled that the anticompetitive conduct in question constituted a misdemeanour, which requires an administrative sanction (i.e., an administrative monetary fine). The Court emphasised that under Article 20(3) of the Misdemeanours Law, the applicable statute of limitations for investigations requiring monetary fines is considered as eight years. However, the Court also referred to the TLO, which provides that if specific legislation stipulates a longer statute of limitations, the longer period shall be applicable instead of the period set forth in the TLO. Accordingly, the statute of limitations applicable to private damages claims in antitrust cases is considered as eight years, starting from the finalisation of the Board's decision.[18]

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In addition to the provisions in the Competition Law, the general provisions of the TLO are also relevant where applicable. Accordingly, any TLO provisions that govern liability under unlawful acts are also applicable to competition law violations. One example in this respect is the regulations in terms of the injured parties that may bring forward private damage claims. Accordingly, Article 49 of the TLO states that those who damage other persons through faulty or unlawful acts must compensate for that damage.

Because there are no courts in the Turkish judicial system that specialise in competition law matters, damages claims can be brought before civil, commercial or consumer courts, depending on the specifics of each case. According to Article 118 of the CCP, a lawsuit is deemed as filed on the date and at the time of the lawsuit petition entering the records. Next, pursuant to Article 122 of the CCP, the lawsuit is notified to the opposing party, which will then have two weeks to submit its response. The opposing party may also file a counter lawsuit, pursuant to the conditions stipulated in Article 132 of the CCP. Following the process of exchange of petitions, before delving into the detailed assessments on the merits of the case, the court would conduct a preliminary examination hearing, which

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Year in review

In three notable cases regarding the banking sector, the courts have rejected compensation claims on the grounds of lack of actual damage. These rulings highlight a trend in both first instance and regional courts to rigorously apply the concept of damage, insisting on concrete proof before considering claims. That said, in a landmark case within the alcoholic beverages sector, which resulted in Türkiye's largest private antitrust damages award, the High Court of Appeals provided significant clarifications about controversial issues. In its appeal review, the High Court considered several factors: the statements (i.e., the reasoning) of the Board's decision, recidivism, the duration of the infringement, the infringer's strong market power and its determining role in the infringement. Furthermore, the High Court clarified that victims do not need to appeal to the Authority before claiming compensation for such infringements.

In a separate case against a mobile telecommunications operator, the High Court of Appeals also affirmed that private antitrust damages actions fall under an eight-year statute of limitations, thereby resolving any uncertainties regarding the time frame. In another case within the telecommunications sector, the Court declared that it is imperative for courts to discuss both the scope and gravity of any infringement. Furthermore, the Court underscored the importance of assessing the fairness of compensation awarded to plaintiffs. This decision indicates a signal that courts may independently evaluate competition violations while determining appropriate compensation.

In addition to these cases, the Constitutional Court published its *Ford Otosan* decision on 20 June 2023.[19] Within the context of an individual application by Ford Otosan, the Constitutional Court, concluded that, inter alia, Article 15 of the Competition Law, which empowers the Authority to conduct on-site inspections without a judge's decision, violates the right to inviolability of domicile and, hence, the Turkish Constitution. The decision may

result in the annulment of decisions already issued by the Authority to the extent that they are based on on-site inspections carried out without a judge's decision, possibly with a retroactive effect, depending on the administrative courts' and the High Court of Appeal's approach in forthcoming cases. Accordingly, the Constitutional Court decision may also affect damages cases with the possible annulment of infringement decisions by the Authority.

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Extraterritoriality

It is possible to initiate private damages claims in Türkiye against real or legal persons from other jurisdictions. There are no exceptions granted within the Competition Law or the TLO.

In this respect, it is important to note that the Competition Law explicitly recognises the effects doctrine in terms of anticompetitive effects in Türkiye under Article 2. Accordingly, the Competition Law covers all anticompetitive conduct that 'affect[s] markets for goods and services within the borders of the Republic of Türkiye'. However, taking into account the

most recent legal precedents, it is still considered unlikely for injured parties to be able to pursue private damages claims in Türkiye based solely on competition violation decisions rendered in foreign jurisdictions.

As an example, based on the European Commission's television and computer monitor tubes cartel decision in which the Commission established the existence of a 'global' cartel,[20] Vestel (namely 11 Vestel group companies established abroad and the Vestel subsidiary in Türkiye) had filed a private damages claim lawsuit in Türkiye. The first instance court rejected the lawsuit owing to the lack of cause of action, stating that (1) the Board had previously reviewed the matter in its decision on colour picture tubes and had decided not to initiate an investigation and (2) the claimants listed in the lawsuit are all foreign and established abroad, except for Vestel Elektronik Sanayi ve Ticaret A , and thus did not fulfil the legal interest condition.[21] The regional court upheld the decision of the court of first instance by also referring to the Board's previous preliminary investigation decision.[22] The regional court also stated that for the injured parties to legally pursue private damages claims in antitrust cases, one of the conditions of the existence of unlawful conduct should be established by the Board as a violation of the Competition Law. The decision of the regional court cannot be subject to further judicial review and, thus, is final.

Accordingly, despite the effects doctrine in Turkish markets stipulated under Article 2 of the Competition Law and the fact that 'any kind of evidence' may be brought forward pursuant to Article 59 of the Competition Law, in practice, the courts require that, as a formal cause of action, the unlawful act (i.e., the anticompetitive conduct) should be established by the Board.

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Standing

Although Article 57 of the Competition Law stipulates that injured third parties may claim damages, the concept of an 'injured party' that has incurred damage as a result of a violation of the Competition Law is not defined within Section 5 or elsewhere in the Law.

In such damages claims, Article 59 of the Competition Law stipulates that the burden of proof falls on the claimant (i.e., the injured party). In fact, the claimant is required to establish the following cumulatively: (1) violations of the Competition Law (the existence of a finalised Board decision on the matter would automatically fulfil this condition); (2) fault; (3) damage; and (4) a causal link between the violation and the damage that the claimant party suffered.

In terms of the ability of indirect purchasers to initiate private antitrust claims, there are no explicit provisions in any relevant legislation and there are opposing views on the doctrine. On the 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, owing to a lack of specification by the relevant legislation. On the other hand, it is also 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. Considering the four conditions, above, that claimants are required to fulfil, indirect purchasers can still establish a causal link between the subject violation and the damage they have suffered; however, it is also considered difficult to establish a causal link for indirect customers and, thus, legal professionals and scholars are of the general view that any damages claims in this respect should be considered on their own merit, as there are no tools in Turkish law to specifically help indirect victims.

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The process of discovery

Under the Turkish legal system, there are no pretrial discovery processes or instruments by which parties may obtain non-privileged material to aid their claim or defence; however, Article 139 of the CCP provides that, during the preliminary examination hearing, the court grants parties two weeks (which is non-extendable) to submit any evidence that they have not included in their initial submissions. Article 145 of the CCP sets forth that parties can submit further evidence after the two-week period lapses only if (1) they do not intend to delay the judiciary process and (2) the relevant party is not at fault for being unable to submit the evidence within the given period.

In essence, the parties may submit any documents, testimonials or other tangible evidence before the courts, as long as the evidence may sufficiently prove or disprove the relevant statements.

As for the nature of admissible evidence, the Competition Law refers to the CCP, which broadly includes evidence in two categories: direct evidence (documents, finalised judgments and decisions, confessions, oaths, etc.) and circumstantial evidence (on-site inspections, witness statements, expert opinions, etc.).

Whether or not Board decisions are considered as direct evidence depends on any appellate requests by the parties. Accordingly, when a real or legal person submits a complaint against the conduct of an undertaking, both parties have the right to initiate appellate proceedings against the Board decision, requesting that the decision be annulled or that a stay of execution be ordered by the relevant court, or both. The Board's decision would become final either when all the available appellate proceedings have been completed or if none of the parties initiates appellate proceedings and the prescribed time for appellate requests lapses. Accordingly, a Board decision may be considered as direct evidence only if it is finalised.

The CCP stipulates certain limitations as to the provision of evidence. Accordingly, as per Article 189 of the CCP:

1. the court would not consider any illegally obtained evidence ('fruit of the poisonous tree' doctrine);
2. if the law required a certain type of evidence to be used in a specific case, parties may not submit any evidence other than that stipulated in the law; and
3. the court is the authorised institution to decide whether any evidence is admissible in each case.

Article 193 of the CCP recognises the concept of 'evidence agreement', whereby parties may decide (1) on the type of evidence to be used in cases for which the law stipulates

certain types of evidence, or (2) to establish that a case may be proved only through a certain type of evidence. These evidence agreements cannot restrict a party's ability to collect and submit evidence to an 'unreasonable' degree (i.e., that makes it impossible or extremely difficult).

If the parties wish to submit evidence that they do not readily possess, Article 195 of the CCP provides that the court may decide either to order the relevant evidence to be brought before the court or to review the relevant evidence where it is located.

Under the Turkish legal system, there are no pretrial discovery processes or instruments by which parties may obtain non-privileged material to aid their claim or defence; however, Article 139 of the CCP provides that, during the preliminary examination hearing, the court grants parties two weeks (which is non-extendable) to submit any evidence that they have not included in their initial submissions. Article 145 of the CCP sets forth that parties can submit further evidence after the two-week period lapses only if (1) they do not intend to delay the judiciary process and (2) the relevant party is not at fault for being unable to submit the evidence within the given period.

In essence, the parties may submit any documents, testimonials or other tangible evidence before the courts, as long as the evidence may sufficiently prove or disprove the relevant statements.

As for the nature of admissible evidence, the Competition Law refers to the CCP, which broadly includes evidence in two categories: direct evidence (documents, finalised judgments and decisions, confessions, oaths, etc.) and circumstantial evidence (on-site inspections, witness statements, expert opinions, etc.).

Whether or not Board decisions are considered as direct evidence depends on any appellate requests by the parties. Accordingly, when a real or legal person submits a complaint against the conduct of an undertaking, both parties have the right to initiate appellate proceedings against the Board decision, requesting that the decision be annulled or that a stay of execution be ordered by the relevant court, or both. The Board's decision would become final either when all the available appellate proceedings have been completed or if none of the parties initiates appellate proceedings and the prescribed time for appellate requests lapses. Accordingly, a Board decision may be considered as direct evidence only if it is finalised.

The CCP stipulates certain limitations as to the provision of evidence. Accordingly, as per Article 189 of the CCP:

1. the court would not consider any illegally obtained evidence ('fruit of the poisonous tree' doctrine);
2. if the law required a certain type of evidence to be used in a specific case, parties may not submit any evidence other than that stipulated in the law; and
3. the court is the authorised institution to decide whether any evidence is admissible in each case.

Article 193 of the CCP recognises the concept of 'evidence agreement', whereby parties may decide (1) on the type of evidence to be used in cases for which the law stipulates certain types of evidence, or (2) to establish that a case may be proved only through a

certain type of evidence. These evidence agreements cannot restrict a party's ability to collect and submit evidence to an 'unreasonable' degree (i.e., that makes it impossible or extremely difficult).

If the parties wish to submit evidence that they do not readily possess, Article 195 of the CCP provides that the court may decide either to order the relevant evidence to be brought before the court or to review the relevant evidence where it is located.

Use of experts

To establish the existence and extent of damage resulting from anticompetitive actions, the courts seek the existence of a Board decision as the Board is the entity authorised to make competitive assessments on the merits of a case; however, the Competition Law does not include any specific provisions relating to experts or expert opinions in private competition enforcement. Nevertheless, Article 266 of the CCP sets forth that the court may order an expert review either *ex officio* or following a request from either of the parties.

Accordingly, parties may obtain opinions from third-party experts and submit these opinions to the Authority and before the courts, as supporting evidence to establish the existence of a violation and related damages. Article 266 of the CCP stipulates that both the parties and the court, *ex officio*, may request expert review and expert opinion to establish any matters relating to the case at hand.

The CCP explicitly prohibits the court from seeking an expert opinion on matters that the judge may resolve with the reasonable legal knowledge that is expected of a judge. Similarly, if an expert review is ordered, the relevant expert is precluded from issuing any opinions or statements that would go beyond his or her area of expertise and on matters that do not require any special or technical knowledge. Experts may not issue any statements or explanations on legal matters that fall under the duties of the judge.

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Class actions

There are no provisions in the Competition Law specifically regulating possible class actions that may be brought within private competition enforcement; however, Article 113 of the CCP does recognise, albeit to a limited extent, that a group of people comprising an association, or another legal entity, may apply for private enforcement proceedings that affect their current or future rights. That being said, these groups may only forward claims for their members and cannot include other possible injured parties who are not members. To initiate a claim for its members, the relevant association may also demonstrate that the circumstances of the case sufficiently entail the involvement of the association. Further, the subject matter of the claim and the specifics of the relevant dispute must be in line with the aims and purposes of the relevant association.

Accordingly, although the CCP does recognise class actions, the scope of these actions is limited in terms of both participants and subject matter. To date, there have been no group private damages claims based on antitrust cases.

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Calculating damages

i Calculation of damages

The Competition Law stipulates that the amount claimed by an injured party must be between the exact amount that the party actually paid and the amount that the party would have paid in the absence of the violating conduct in question.

The Competition Law extends the scope of the amount of claims for competitors. Accordingly, affected competitors may also request lost profits, including all expected profits of the competitor undertaking, which are calculated based on the balance sheets for the previous year.

The TLO provides that the injured party may claim compensation only for the damage that it has suffered; however, the provisions of the TLO should be read together with the relevant provisions of the Competition Law, which allow treble damages to be claimed to an amount

between what was actually paid and the amount that would have been paid if there were no competition law violations. In 2023, the High Court of Appeals upheld a decision of the Ankara Regional Court,[23] stating that the Court had justified its decision to apply treble damages by taking into account the statements in the Board's decision, recidivism, the duration of the infringement, the powerful position of the infringer in the market and its determining role in the infringement.

In accordance with the TLO, it is for the court to determine the amount of compensation. In doing so, the court considers the specific circumstances of the case in question and the level of fault on the defendant's part. When determining the amount of compensation, the court will also take into account any possible benefits that the injured party may have received because of the violation and deduct this amount from the total amount of damages.

ii Attorney fees

There are no provisions specific to private competition enforcement cases for regulating which party will incur the attorney fees; however, the CCP does include provisions regarding judiciary expenses, which include attorney fees. Accordingly, the court will decide that the losing party is liable for all judiciary expenses unless both parties are found partially right, in which case the total expenses are divided between the parties. The court determines the attorney fees according to the Minimum Attorneyship Fee Tariff, which is updated every year. It should be noted that the attorney fees determined pursuant to the Minimum Attorneyship Fee Tariff would cover a minimum attorneyship fee determined by the state and published within the tariff only, and not any additional, individual amounts discussed between a party and its attorney.

Pass-on defences

To the best of the authors' knowledge, there are no High Court of Appeal precedents on pass-on defences.

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Follow-on litigation

The Board is the competent body to render an infringement decision that is recognisable by the High Court of Appeals. This is also recognised in the Competition Law, which designates the Board as the relevant authority to render decisions on merits pursuant to allegations of antitrust violations. Accordingly, other courts may review private competition enforcement claims but cannot decide on the merits of a competition law matter. In other words, courts cannot render an infringement or acquittal decision on potentially anticompetitive conduct. Accordingly, because parties cannot meaningfully raise stand-alone claims, these actions may be pursued as follow-on claims.

An important matter to discuss in terms of follow-on litigation concerns the circumstances of the leniency mechanism. Under Turkish competition law, an undertaking that was part of an anticompetitive cartel may apply to the Authority for leniency by way of a reduced fine by providing information and documents about the relevant conduct; however, even if the Authority grants full immunity to the leniency applicant, the immunity will only be valid for that specific case before the Authority and will not extend to any possible private competition enforcement claims. Accordingly, even if full immunity is granted, the injured parties may still claim damages from the undertaking.

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Privileges

Article 28 of the CCP details the principle of publicity in terms of the litigation process and the court's decisions; however, according to the Article, parties may also request confidentiality, which the court would consider by way of a confidential hearing.

Further, the CCP also provides for the possibility for the court to decide to maintain the confidentiality of certain documents pertaining to the litigation process. Article 154(3)(c) provides that the court would specify in the transcripts whether the hearings were held publicly or under confidentiality. In this context, in providing a copy of the court transcript or any attached documents, any documents that fall within the scope of confidentiality must only be provided pursuant to the approval of the court.

Article 161(2) of the CCP sets forth that confidential documents and transcripts may only be reviewed by the parties or intervening parties following approval from the court.

The court has the power to request that the parties or third parties[24] submit any documents that may concern the case or request the relevant documents from the Authority's file. In these circumstances, parties cannot claim legal privilege to avoid submitting the requested evidence; however, although it is not a recognised procedure in the CCP, in practice, while submitting the requested documents, the parties may follow certain steps to ensure, to the best of their ability, that any confidential information is kept confidential, either by submitting the information by hand to avoid using the online judiciary informatics system, or

by submitting the relevant documents along with a request for confidentiality and a request that the court keep the document in its vault, if applicable. Importantly, this is simply an approach that is followed by certain parties in practice and does not guarantee that the submitted information would not be disclosed.

Importantly, the legal privilege is only applicable to documents from or to, or communications with, an independent attorney. Communications and documents pertaining to an in-house attorney would not be covered by the attorney–client privilege.

In addition to the treatment of documents that include particularly confidential information about the parties, the handling of communications and documents between a client and an attorney is of particular significance. Turkish courts and regulatory bodies recognise the privileged nature of attorney–client documents and communications. The CCP requires judges to implement adequate measures to ensure the protection of legal privilege. Thus, typically, the principle of confidentiality is accepted in respect of communications and documents covered by the attorney–client privilege (i.e., forbidding third parties from reviewing their content); however, the Board has demonstrated a limiting approach to the coverage of the attorney–client privilege, particularly in recent years. In its numerous decisions regarding documents collected during on-site inspections, the Board has stated that the purpose of the principle of the attorney–client privilege is to ensure the full and proper use of the right to defence and the attorney–client privilege only covers documents and communications that directly pertain to the exercising of the client's right to defence. Accordingly, any documents or communications that do not directly relate to the defence principles and strategies of the defendant may be collected and reviewed by the Authority and the Board. In any case, during the judicial proceedings, the court may or may not follow the approach of the Authority and the Board and may follow only the relevant guidance of the CCP's provisions.

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Settlement procedures

Under Turkish law, parties to a dispute are allowed to settle outside court. Accordingly, if the parties would like to reach an out-of-court settlement, there is no requirement to obtain authorisation from the judicial body for the settlement to move forward. Further, as also explained in Section XIII, parties may also pursue an arbitration process to settle before initiating a formal lawsuit before the Turkish courts.

Article 313 of the CCP explicitly recognises settlement as one of the acts by the parties to the suit that could terminate the case before the court. Accordingly, parties may also decide to settle by covering matters that are not included in the relevant case and base their settlement decision on certain conditions.

It is stipulated under Article 314 of the CCP that parties may decide to settle any time before the decision of the court is finalised. If the parties decide to settle during the judicial review process, the upper court reviewing the case must decide in accordance with the intention of the parties.

In terms of the legal implications, Article 315 of the CCP provides two options. Parties may either request the court to decide in accordance with their settlement agreement or, in the absence of this request by parties, the court would decide that there is no need to render a decision on the merits of the case. Parties may request annulment of the settlement action in cases of invalid intent or inordinate benefits.

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Arbitration

The Competition Law does not include regulations in respect of alternative dispute resolution (ADR) mechanisms; however, these provisions have been introduced in recent years in Turkish law. The aim of the introduction of ADR methods, such as mediation and arbitration, was to encourage claimants to resolve their conflicts in a more economical and time-saving way. Parties may resort to an arbitration proceeding only if they have previously agreed on an applicable arbitration clause.

Although not directly related to competition regulations, Turkish consumer law includes a specific form of ADR applicable to consumer rights-related disputes. Pursuant to the relevant provisions under Section 2 of the Consumer Protection Act, the authorised body to hear and rule on consumer disputes falling within certain thresholds is the Arbitration Committee for Consumer Problems. For lower-value disputes (up to 66,000 Turkish lira[25]), borough or city arbitration boards are solely authorised to deal with consumer dispute resolutions.

Parties are obliged to apply to these consumer agencies for claims that fall within the specified thresholds. This obligation is also valid for competition law-related disputes. It is prohibited to bring claims that exceed these specified thresholds to consumer agencies.

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Parties are obliged to apply to these consumer agencies for claims that fall within the specified thresholds. This obligation is also valid for competition law-related disputes. It is prohibited to bring claims that exceed these specified thresholds to consumer agencies.

Indemnification and contribution

Although there are no provisions in the Competition Law regarding indemnification or contributions from third parties, co-defendants or cross defendants, the TLO stipulates provisions for joint and several liability. Accordingly, these provisions will be applicable if the damage in question was caused by multiple persons or if different conduct by multiple persons led to the same damage. Thus, an injured party may claim for damages against one or several defendants for the entire amount of the claimed damages in competition cases that involve multiple undertakings.

As for the division of the total compensation determined by the court between multiple defendants, the TLO does not provide any blind rate, such as an equal division clause. Pursuant to the relevant provisions of the TLO, the court must divide the total compensation based on the specifics of each case, such as the level and weight of the error attributable to each party. If the payment made by any of the jointly responsible parties exceeds the actual amount for which the party is responsible, the defendant has recourse for the excess amount against the other defendants that were held jointly and severally responsible. In this situation, the court is authorised to decide whether a defendant has recourse against other defendants and, if so, the amount in question. As with the initial division of the total compensation, the court will again assess the level and severity of the defendant's error in determining the amount of recourse payment.

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Outlook and conclusions

Draft amendments to the Competition Act specifically tailored to the need to regulate digital markets, similar to the European Union's Digital Markets Act, were revealed in 2022. Although there were no specific provisions on private competition enforcement in the draft text, assuming that the draft will enter into force as it is, general provisions on damages will also apply to 'undertakings holding significant market power'. In this context, heightened private enforcement may be expected for undertakings active in the digital markets following the adoption of these amendments. That being said, the draft amendments have not been adopted as yet.

In November 2021, a regional justice court upheld a local court's decision that accepted treble damages for the claimant in a case involving undertakings in the alcoholic beverages sector. Although the regional court considered that non-pecuniary damages could not be claimed, it considered that the local court's decision and its calculation of treble damages were lawful. It is also important to note that the High Court of Appeals upheld the decision of the Ankara Regional Court in 2023, stating that the Court justified its decision to apply treble damages by taking into account the statements in the Board decision, recidivism, the duration of the infringement, the powerful position of the infringer in the market and its determining role in the infringement.

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Endnotes

1 Fevzi Toksoy and Bahad r Balk are managing partners, and Ertu rul Can Canbolat and Safa Uygur are counsel at ACTECON. ^ Back to section

2 Communiqué On The Commitments To Be Offered In Preliminary Inquiries And Investigations Concerning Agreements, Concerted Practices And Decisions Restricting Competition, And Abuse Of Dominant Position (Communiqué No. 2021/2), which entered into force after being published in Official Gazette No. 31425, dated 16 March 2021. Subsequently, Regulation on the Settlement Procedure entered into force after being published in Official Gazette No. 31542, dated 15 July 2021. ^ Back to section

3 Competition Authority, Decision Statistics (in Turkish), available at https://www.rekabet.gov.tr/tr/Sayfa/Yayinlar/karar-istatistikleri. ^ Back to section

4 ibid. ^ Back to section

5 *12 Banks* Decision No. 13-13/198-100 of 8 March 2013. The case concerned whether 12 banks violated Article 4 of the Competition Law through anticompetitive agreements or concerted practices, or both. The investigated parties' conduct in respect of deposits, credits and credit cards was reviewed. ^ Back to section

6 Council of State, Decisions No. E2019/3377 and No. K2021/1114 of 31 May 2021. ^ Back to section

7 Ankara Second Administrative Court, Decisions No. E2022/923 and No. K2022/874 of 28 April 2022; Ankara Second Administrative Court, Decisions No. E2022/920 and No. K2022/855 of 26 April 2022; Ankara Second Administrative Court, Decisions No. E2022/924 and No. K2022/854 of 26 April 2022. ^ Back to section

8 Istanbul Seventh Commercial Court of First Instance, Decisions No. E2017/741 and No. K2018/1417 of 26 December 2018; and Istanbul First Commercial Court of First Instance, Decisions No. E2018/698 and No. K2019/384 of 3 July 2019. ^ Back to section

9 High Court of Appeals, 3rd Civil Chamber, Judgments No. E2022/2995 and No. K2023/606 of 14 March 2023 ^ Back to section

10 Istanbul Eight Commercial Court of First Instance, Decisions No. E2017/857 and No. K2023/597 of 17 July 2023 ^ Back to section

11 Antalya Regional Court of Justice, Decisions No. E2021/474 and No. K2023/1210 of 19 June 2023. ^ Back to section

12 Competition Board (Board), Decision No. 14-21/410-178 of 12 June 2014. The case concerned whether an undertaking operating in the rak market violated Articles 4 and 6 of the Competition Law through abuse of dominance and otherwise anticompetitive conduct. The Board reviewed whether the investigated party prevented sales of the competitor's products by way of exerting pressure over sales points, implemented exclusivity practices to benefit its own products, and restricted the activities of its competitors. ^ Back to section

13 High Court of Appeals, 11th Civil Chamber, Judgment No. E2022/495 and No. K2023/3224 of 24 May 2023. ^ Back to section

14 High Court of Appeals, 11th Civil Chamber, Judgment No. E2022/6165 and No. K2023/893 of 16 February 2023. ^ Back to section

15 Istanbul Regional Court of Justice, Decisions No. E2022/1579 and No. K2022/1512 of 28 December 2022. ^ Back to section

16 High Court of Appeals, 11th Civil Chamber, Judgments No. E2014/13926 and No. K2015/4424 of 30 March 2015 and Judgments No. E2015/3450 and No. K2015/11139 of 27 October 2015. ^ Back to section

17 High Court of Appeals, General Assembly, Judgments No. E2017/19 and No. K2018/1151 of 30 May 2018. ^ Back to section

18 Istanbul Regional Court of Justice, Decisions No. E2020/560 and No. K2021/65 of 27 January 2021. ^ Back to section

19 Application number 2019/40991, dated 23 March 2023. ^ Back to section

20 European Commission, Decision No. AT39437 of 5 December 2012. ^ Back to section

21 Istanbul Third Commercial Court of First Instance, Decisions No. E2014/1425 and No. K2019/14 of 16 January 2019. ^ Back to section

22 Regional Court of Justice, 45th Civil Chamber, Decisions No. E2020/1974 and No. K2020/312 of 14 December 2020. ^ Back to section

23 High Court of Appeals, 3rd Civil Chamber, Judgment No. E2022/2995 and No. K2023/606 of 14 March 2023. ^ Back to section

24 Code of Civil Procedure, Articles 195, 216/2 and 221. ^ Back to section

25 The value is subject to revaluation by the Ministry of Trade each year. ^ Back to section

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