THE PRIVATE COMPETITION ENFORCEMENT REVIEW

Fifteenth Edition

Editors
Ilene Knable Gotts and Kevin S Schwartz

THE LAWREVIEWS

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Editors
Ilene Knable Gotts and Kevin S Schwartz

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PREFACE

Private competition litigation can be an important complement to public enforcement in the achievement of compliance with the competition laws. Antitrust litigation has been a key component of the antitrust regime for decades in the United States. The US litigation system is highly developed, using extensive discovery, pleadings and motions, use of experts and, in a small number of matters, trials, to resolve the rights of the parties. The process imposes high litigation costs (both in terms of time and money) on all participants, but promises great rewards for prevailing plaintiffs. The usual rule that each party bears its own attorneys' fees is amended for private antitrust cases such that a prevailing plaintiff is entitled to its fees as well as treble damages. The costs and potential rewards to plaintiffs create an environment in which a large percentage of cases settle on the eve of trial. Arbitration and mediation are still rare, but not unheard of, in antitrust disputes. Congress and the US Supreme Court have attempted to curtail some of the more frivolous litigation and class actions by adopting tougher standards and ensuring that follow-on litigation exposure does not discourage wrongdoers from seeking amnesty. Although these initiatives may, on the margin, decrease the volume of private antitrust litigation in the United States, the environment remains ripe for high levels of litigation activity, particularly involving intellectual property rights and cartels.

Until the last decade or so, the United States was one of the few outliers in providing an antitrust regime that encouraged private enforcement of the antitrust laws. Only Australia had been more receptive than the United States to suits being filed by a broad range of plaintiffs – including class action representatives and indirect purchasers – and to increased access for litigants to information and materials submitted to the antitrust authorities in a cartel investigation. Brazil provided another, albeit more limited, example: it has had private litigation arise involving non-compete clauses since the beginning of the twentieth century, and monopoly or market closure claims since the 1950s. In the past decade, we have seen other regimes begin to provide for private competition litigation in their courts, typically, as discussed below, only after (i.e., as a 'follow on' to) public enforcement. In some jurisdictions (e.g., Argentina, Lithuania, Mexico, Romania, Switzerland and Venezuela), however, private actions remain very rare, or non-existent (e.g., Nigeria), and there is little, if any, precedent establishing the basis for compensatory damages or discovery, much less for arbitration or mediation. In addition, other jurisdictions (e.g., Switzerland) still have very rigid requirements for standing, which limit the types of cases that can be initiated.

The tide is clearly turning, however, with important legislation either recently having been adopted or currently pending in many jurisdictions throughout the world to provide a greater role for private enforcement. In Australia, for example, the government has undertaken a comprehensive review and has implemented significant changes to its private enforcement

law. The most significant developments, however, are in Europe as the EU Member States implement the EU's directive on private enforcement into their national laws. The most significant areas standardised in most EU jurisdictions involve access to the competition authority's file, the tolling of the statute of limitations period and privilege. Member States continue to differ on issues relating to the evidentiary effect of an EU judgment and whether fines should be factored into damages calculations. Even without the directive, many of the Member States throughout the European Union have increased their private antitrust enforcement rights.

The development of case law in jurisdictions also has an impact on the number of private enforcement cases that are brought. In China, for instance, the number of published decisions has increased and the use of private litigation is growing rapidly, particularly in cutting-edge industries such as telecommunications, the internet and standard essential patents. In South Korea, private actions have been brought against an alleged oil refinery cartel, sugar cartel, school uniform cartel and credit card VAN cartel. In addition, the court awarded damages to a local confectionery company against a cartel of wheat flour companies. In contrast, in Japan, over a decade passed from the adoption of private rights legislation until a private plaintiff prevailed in an injunction case for the first time; it is also only recently that a derivative shareholder action has been filed. Moreover, in many other jurisdictions as well, there remain very limited litigated cases. For example, there has been a growing number of private antitrust class actions commenced in Canada; none of them have proceeded to a trial on the merits.

The English and German courts are emerging as major venues for private enforcement actions. The Netherlands has also become a preferred jurisdiction for commencing private competition claims. Collective actions are now recognised in countries such as Sweden, Finland and Denmark. Italy also recently approved legislation allowing for collective damages actions and providing standing to sue to representative consumers and consumer associations, and France and England have taken steps to facilitate collective action or class action legislation. In addition, in France, third-party funding of class actions is permissible and becoming more common. In China, consumer associations are likely to become more active in the future in bringing actions to serve the public interest.

Differences will continue to exist from jurisdiction to jurisdiction regarding whether claimants must opt out of collective redress proposals to have their claims survive a settlement (as in the UK), or instead must opt in to share in the settlement benefits. Even in the absence of class action procedures, the trend in Europe is towards the creation and use of consumer collective redress mechanisms. For instance, the Netherlands permits claim vehicles to aggregate into one court case the claims of multiple parties. Similarly, in one recent case in Austria, several parties filed a claim by assigning it to a collective plaintiff. Some jurisdictions have not to date had any private damages awarded in antitrust cases, but changes to their competition legislation could favourably affect the bringing of private antitrust litigation seeking damages. Most jurisdictions impose a limitation period for bringing actions that commences only when the plaintiff knows of the wrongdoing and its participants; a few, however, apply shorter, more rigid time frames without a tolling period for the commencement of damages or injunctive litigation. Some jurisdictions base the statute of limitations upon the point at which a final determination of the competition authorities is rendered (e.g., India, Romania, South Africa and Austria) or from when the agency investigation commences (e.g., Hungary). In other jurisdictions, such as Australia and Chile, it is not as clear when the statutory period will be tolled. In a few jurisdictions, it is only after the competition authority

acts that a private action will be decided by the court. Of course, in the UK – a jurisdiction that has been one of the most active and private-enforcement-friendly global forums – it will take time to determine what impact, if any, Brexit will have.

The greatest impetus for private competition cases is the follow-up litigation potential after the competition authority has discovered – and challenged – cartel activity. In India, for instance, as the Competition Commission becomes more active in enforcement investigations involving e-commerce and other high-technology areas, the groundwork is being laid for future private antitrust cases. The interface between leniency programmes (and cartel investigations) and private litigation is still evolving in many jurisdictions, and in some jurisdictions it remains unclear what weight to give competition agency decisions in follow-on private litigation cases and whether documents in the hands of the competition agency are discoverable (see, for example, Sweden). Some jurisdictions seek to provide a strong incentive for utilisation of their leniency programmes by providing full immunity from private damages claims for participants. In contrast, other jurisdictions, such as the Netherlands, do not bestow any benefit or immunity in a follow-on damages action. These issues are unlikely to be completely resolved in many jurisdictions in the near term.

There is one point on which there is almost universal agreement among jurisdictions: almost all have adopted an extraterritorial approach premised on effects within their borders. Canadian courts may also decline jurisdiction for a foreign defendant based on the doctrine of *forum non conveniens* as well as comity considerations. A few jurisdictions, such as the UK, however, are prepared to allow claims in their jurisdictions when there is a relatively limited connection, such as when only one of a large number of defendants is located there. In contrast, in South Africa, the courts will also consider spillover effects from antitrust cartel conduct as providing a sufficient jurisdictional basis.

The litigation system in each jurisdiction to some extent reflects the respective perceptions of what private rights should protect. Most of the jurisdictions view private antitrust rights as an extension of tort law (e.g., Austria, Canada, France, Israel, Japan, the Netherlands, Norway, South Korea and the UK), with liability arising for participants who negligently or knowingly engage in conduct that injures another party. Turkey, while allocating liability on the basis of tort law, will, in certain circumstances, award treble damages as a punitive sanction. Some jurisdictions treat antitrust concerns as a defence for breaching a contract (e.g., Norway and the Netherlands); others (e.g., Australia) value the deterrent aspect of private actions to augment public enforcement, with some (e.g., Russia) focusing on the potential for unjust enrichment by the defendant. In Brazil, there is a mechanism by which a court can assess a fine to be paid by the defendant to the Fund for the Defence of Collective Rights if the court determines the amount claimed as damages is too low compared with the estimated size and gravity of the antitrust violation. Still others are concerned that private antitrust litigation might thwart public enforcement and may require what is, in essence, consent of the regulators before allowing the litigation or permitting the enforcement officials to participate in a case (e.g., in Brazil, as well as in Germany, where the competition authorities may act as amicus curiae).

Some jurisdictions believe that private litigation should only be available to victims of conduct that the antitrust authorities have already penalised (e.g., Chile, India, Turkey and Venezuela). Interestingly, no other jurisdiction has chosen to replicate the United States' system of routinely awarding treble damages for competition claims; instead, the overwhelming majority of jurisdictions take the position that damages awards should be compensatory rather than punitive (Canada does, however, recognise the potential for

punitive damages for common law conspiracy and tort claims, as does Turkey). In Venezuela, however, the plaintiff can obtain unforeseen damages if the defendant has engaged in gross negligence or wilful misconduct, and in Israel, a court recently recognised the right to obtain additional damages on the basis of unjust enrichment law. Finally, in almost all jurisdictions, the prevailing party has some or all of its costs compensated by the losing party, discouraging frivolous litigation.

Cultural views also clearly affect litigation models. Outside the EU and North America, the availability of group or class actions varies extensively. A growing minority of jurisdictions embrace the use of class actions, particularly following a cartel ruling by the competition authority (e.g., Israel). Some jurisdictions (e.g., Turkey) permit group actions by associations and other legal entities for injunctive (rather than damages) relief. Jurisdictions such as Germany and South Korea generally do not permit representative or class actions, but instead have as a founding principle the use of courts for pursuing individual claims. In some jurisdictions (e.g., China, South Korea and Switzerland), several claimants may lodge a collective suit against the same defendant if the claims are based on similar facts or a similar legal basis, or even permit courts to join similar lawsuits (e.g., Romania and Switzerland). In Japan, class actions were not available except to organisations formed to represent consumer members; however, a new class action law came into effect in 2016. In contrast, in Switzerland, consumers and consumer organisations do not currently have legal standing and cannot recuperate damages they have incurred as a result of an infringement of the Competition Act. In Poland, only entrepreneurs, not individuals, have standing to bring claims under the Unfair Competition Act, but the Group Proceedings Act is available if no administrative procedure has been undertaken concerning the same case.

Jurisdictions that are receptive to arbitration and mediation as an alternative to litigation (e.g., Germany, Japan, the Netherlands, South Korea, Spain and Switzerland) also encourage alternative dispute mechanisms in private antitrust matters. Some courts prefer the use of experts and statements to discovery (e.g., in Chile; in France, where the appointment of independent experts is common; in Japan, which does not have mandatory production or discovery except in narrowly prescribed circumstances; and in Germany, which even allows the use of statements in lieu of documents). In South Korea, economic experts are mainly used for assessment of damages rather than to establish violations. In Norway, the Civil Procedure Act allows for the appointment of expert judges and advisory opinions of the EFTA Court. Other jurisdictions believe that discovery is necessary to reach the correct outcome (e.g., Canada, which provides for broad discovery, and Israel, which believes that 'laying your cards on the table' and broad discovery are important). Views towards protecting certain documents and information on privilege grounds also cut consistently across antitrust and non-antitrust grounds (e.g., no attorney–client, attorney–work product or joint work product privileges exist in Japan; pre-existing documents are not protected in Portugal; there is limited recognition of privilege in Germany and Turkey; and extensive legal advice, litigation and common interest privilege exist in the UK and Norway), with the exception that some jurisdictions have left open the possibility of the privilege being preserved for otherwise privileged materials submitted to the antitrust authorities in cartel investigations. Interestingly, Portugal, which expressly recognises legal privilege for both external and in-house counsel, nonetheless provides for broad access to documents by the Portuguese Competition Authority.

Some jurisdictions view settlement as a private matter (e.g., France, Japan and the Netherlands); others view it as subject to judicial intervention (e.g., Israel and Switzerland). The culture in some jurisdictions, such as Germany, so strongly favours settlement that judges will require parties to attend hearings and even propose settlement terms. In Canada, the law has imposed consequences for failure to accept a reasonable offer to settle and, in some jurisdictions, a pretrial settlement conference is mandatory.

As suggested above, private antitrust litigation is largely a work in progress in many parts of the world. Change occurs slowly in some jurisdictions, but clearly the direction is favourable to the recognition that private antitrust enforcement has a role to play. Many of the issues raised in this book, such as the pass-on defence and the standing of indirect purchasers, remain unresolved by the courts in many countries, and our authors have provided their views regarding how these issues are likely to be clarified. Also unresolved in some jurisdictions is the availability of information obtained by the competition authorities during a cartel investigation, both from a leniency recipient and a party convicted of the offence. Other issues, such as privilege, are subject to change through both proposed legislative changes and court determinations. The one constant across almost all jurisdictions is the upward trend in cartel enforcement activity, which is likely to be a continuous source for private litigation in the future.

Ilene Knable Gotts and Kevin S Schwartz
Wachtell, Lipton, Rosen & Katz
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Chapter 17

TURKEY

Fevzi Toksoy, Bahadır Balkı, Ertuğrul Can Canbolat, Umay Rona and Sıla Coşkunoğlu[1]

I OVERVIEW OF RECENT PRIVATE ANTITRUST LITIGATION ACTIVITY

In June 2020, the primary competition legislation, Law No. 4054 on Protection of Competition (the Competition Law), was revised, introducing several new instruments, including the settlement procedure, which is the most significant in terms of private antitrust litigation. The settlement mechanism is regulated under Article 43 of the Competition Law and by the pertinent regulation[2] issued by the Turkish Competition Authority (the Authority). Under the settlement mechanism, parties or the Authority may initiate settlement discussions until the official notification of the investigation report (i.e., the statement of objections) has taken place. The settlement 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 for litigating any matters included in the settlement process, which results in an immediately finalised Competition Board (the Board) decision.

As for the jurisprudence related to private antitrust compensation, two cases in the banking sector and the alcoholic beverages sector hold significance.

The first example is the Board's *12 Banks* decision.[3] After the parties to the investigation filed for annulment of the decision, the Council of State overruled the court of first instance on the grounds that in the relevant case, 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 on its decision that the Authority's decision was lawful and refused to comply with the decision of the Council of State. The Council of State's Administrative Judicial Chamber reversed the court of first instance's insistence decision,[4] which was subject to further appeal within 15 days of the official notification of the judgment. At the time of writing, there is no further public information on whether the judgment was further appealed.

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1 Fevzi Toksoy and Bahadır Balkı are partners, Ertuğrul Can Canbolat is a senior associate, and Umay Rona and Sıla Coşkunoğlu are associates, at ACTECON.

2 Entered into force after being published in Official Gazette No. 31542, dated 15 July 2021.

3 *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' deposit, credit and credit card-related conduct were reviewed.

4 Council of State Decisions Nos. E2019/3377 and K2021/1114 of 31 May 2021.

Following the Board's decision, many private damages claims were brought against the banks and some parties received compensation pursuant to these.[5] The Board's decision is not yet final as its judiciary review is ongoing. The outcome of the litigation process will affect damages claims in ongoing private damages cases. Differing court decisions signify that even though many injured parties may bring damages claims based on the same Board decision (i.e., the same anticompetitive act), the courts would always consider the specifics of each case before granting or rejecting compensation claims. That is to say, if the court grants the claim of one or several of the parties, this does not automatically lead to the expectation or the result that claims of all parties will be granted. The court would indeed assess each case based on its specific merits.

Another recent development in terms of private competition enforcement occurred in terms of treble damages. The case concerned the Board's fining decision against an undertaking operating in the alcoholic beverages sector.[6] Pursuant to the Board'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. The First Chamber of Izmir Commercial Court granted the compensation claim. However, this decision was then partially overturned, in terms of one of the claimants, by the Regional Court of Justice, which rejected the lawsuit for one of the claimants on the grounds that the existence of an unlawful act, which is a prerequisite condition for private damages claims, did not materialise for that claimant. The decision of the court of first instance was upheld in terms of the other claimant. In making its assessment, the Regional Court of Justice maintained that the court of first instance's assessment regarding treble damages was correct but it objected to the granting of non-pecuniary damages. The decision of the Izmir court bears significance for the assessment of future treble damages claims. One distinct importance of this decision is that it currently constitutes the largest private antitrust damages awarded to a claimant.

II GENERAL INTRODUCTION TO THE LEGISLATIVE FRAMEWORK FOR PRIVATE ANTITRUST ENFORCEMENT

i Legal framework

In Turkey, private antitrust damages claims are considered based upon the Competition Law, the Turkish Law of Obligations (TLO), the Code of Civil Procedure (CCP) and the Misdemeanour Law. The regulatory bodies responsible for the implementation and enforcement of competition regulation in Turkey 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

5 Istanbul Seventh Commercial Court of First Instance Decisions Nos. E2017/741 and K2018/1417 of 26 December 2018; and Istanbul First Commercial Court of First Instance Decisions Nos. E2018/698 and K2019/384 of 3 July 2019.

6 Board Decision No. 14-21/410-178 of 12 June 2014. The case concerned whether an undertaking operating in the rakı 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.

TLO. Accordingly, it is provided that in terms of reclamation responsibilities arising due to previously fulfilled acts, Articles 63 and 64 of the TLO, which regulate general liability, are applicable. On the other hand, it is also stipulated that Article 65 of the TLO, regulating equity liability, is not applicable. Subsequently, Article 57 of the Competition Law sets forth that any legal or natural person shall compensate the damage of 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 scope of damages owed to the injured party. More specifically, in practice, courts regard an ongoing 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 provides 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 on this front is the regulations in terms of the injured parties that may bring forward these private damage claims. Accordingly, Article 49 of the TLO states that those that damage other persons through faulty or unlawful acts shall compensate for this damage.

Because there are no courts in the Turkish judicial system that are specialised 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 time of the lawsuit petition entering the records. Subsequently, 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 under Article 132 of 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 under 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 at hand to review the allegations together with defences submitted by the parties. The different stages of this process are explained in Sections IV, V, VII and XII.

ii Statute of limitations

As for the 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 Misdemeanour Law becomes relevant, pursuant to the precedents set by the High Court of Appeals.[7] In a more recent decision,[8] the High Court of Appeals followed that the anticompetitive conduct at hand constituted a 'misdemeanour', which requires an 'administrative sanction' (i.e., an administrative monetary fine). The High Court of Appeals emphasises that under Article 20/4 of the Misdemeanour Law, the

7 The High Court of Appeals 11th Civil Chamber Judgments Nos. E2014/13926 and K2015/4424 of 30 March 2015 and Judgments Nos. E2015/3450 and K2015/11139 of 27 October 2015.

8 The High Court of Appeals General Assembly Judgments Nos. E2017/19 and K2018/1151 of 30 May 2018.

applicable statute of limitations for investigations requiring monetary fines is considered as eight years. However, the High Court of Appeals also refers to the TLO, which provides that if a specific legislation stipulates a longer statute of limitation, the longer period shall be applicable instead of the statute of limitations provisions set forth in the TLO. Accordingly, the statute of limitations applicable to private damages claims in antitrust cases is considered as eight years.

III EXTRATERRITORIALITY

In Turkey, it is possible to initiate private damages claims 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 Turkey under Article 2 of the Competition Law. Accordingly, the Competition Law covers all anticompetitive conduct that 'affect[s] markets for goods and services within the borders of the Republic of Turkey'. However, considering the recent legal precedents, it is still considered unlikely for injured parties to be able to forward private damages claims in Turkey solely based upon competition violation decisions rendered in foreign jurisdictions.

As an example, based upon the European Commission's TV and computer monitor tubes cartel decision in which the Commission established the existence of a 'global' cartel,[9] Vestel (namely 11 Vestel group companies established abroad and the Vestel subsidiary in Turkey) had filed a private damages claim lawsuit in Turkey. The first instance court rejected Vestel's lawsuit due to the lack of cause of action by 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 AŞ, and thus did not fulfil the legal interest condition.[10] The regional court upheld the decision of the court of first instance by also referring to the Board's previous preliminary investigation decision.[11] The regional court also stated that for the injured parties to legally forward private damages claims in antitrust cases, one of the conditions of the existence of an 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, as a formal cause of action, the unlawful act (i.e., the anticompetitive conduct) to be established by the Board.

9 European Commission Decision No. AT39437 of 5 December 2012.

10 Istanbul Third Commercial Court of First Instance Decisions Nos. E2014/1425 and K2019/14 of 16 January 2019.

11 Regional Court of Justice 45th Civil Chamber Decisions Nos. E2020/1974 and K2020/312 of 14 December 2020.

IV STANDING

Although Article 57 of the Competition Law stipulates that injured third parties may claim damages, the concept of an 'injured party' that incurred damage as a result of a violation of the Competition Law is not defined within Section 5 or elsewhere in the Competition 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). Indeed, the claimant is required to cumulatively establish the following: (1) violations of the Competition Law (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 bring forward private antitrust claims, there are no explicit provisions in any relevant legislation and there are opposing views on the doctrine. 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 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 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.

V 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. On the other hand, Article 139 of the CCP provides that during the preliminary examination hearing, the court grants parties two weeks of non-extendable time 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 aim 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 courts, as long as this 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/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 the decision to be annulled or a stay of execution to 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 initiate 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:

a the court would not consider any illegally obtained evidence (fruit of the poisonous tree doctrine);

b 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

c 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.

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

VI USE OF EXPERTS

To establish the existence and extent of damages 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. On the other hand, Article 266 of the CCP sets forth that the court may order an expert review either *ex officio* or following a request from either one of the parties.

Accordingly, parties may obtain opinions from third-party experts and submit these opinions as supporting evidence to establish the existence of a violation and related damages, before the Authority and before courts. 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 consulting an expert opinion on matters that the judge may resolve with the reasonable legal knowledge that is expected of him or her. Similarly, if an expert review is ordered, the relevant expert is precluded from issuing any opinions or statements that would go beyond their 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.

VII CLASS ACTIONS

There are no provisions in the Competition Law specifically regulating possible class actions that may be brought within private competition enforcement.

On the other hand, 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. However, these groups may only forward claims for their members and cannot include other possible injured parties that are not members. To initiate a claim for its members, the relevant association may also demonstrate that the circumstances of the case indeed sufficiently entail the involvement of the association. Further, the subject matter of the claim and the specifics of the relevant dispute shall 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 not only in terms of participants but also in terms of subject matter. At the time of writing, there have been no group private damages claims based on antitrust cases.

VIII CALCULATING DAMAGES

i Calculation of damages

The Competition Law sets forth that the amount claimed by an injured party shall be between the exact amount that they paid and the amount that they 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 their loss of profit, which includes all expected profits of the competitor undertaking, which are calculated based on the balance sheets of the previous year.

The TLO provides that the relevant injured party may claim compensation only for the damages 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 within the amount paid and amount that would have been paid if there were no competition law violations.

In accordance with the TLO, the court will determine the amount of compensation. In doing so, the court considers the specific circumstances of the case at hand and the level of fault on the defendant's part. While determining the compensation amount, the court will also take into account any possible benefits that the injured party may have received because of the relevant violation and deduce this amount from the total damages.

ii Attorney fees

There are no provisions regulating which party will incur the attorney fees specifically in private competition enforcement cases. However, the CCP does include provisions regarding the judiciary expenses, which include attorney fees. Accordingly, the court decides 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 do not cover any additional, individual amounts discussed between a party and its attorney. This amount would only cover a minimum attorneyship fee determined by the state and published within the tariff.

IX PASS-ON DEFENCES

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

X 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 on 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 the undertaking is granted full immunity, the injured parties may still claim damages from it.

XI 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 stipulates the possibility for the court to decide to keep certain documents pertaining to the litigation process confidential. 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 shall only be provided pursuant to the approval of the court.

As for the ability of the parties or intervening parties to review the case file, Article 161/2 sets forth that confidential documents and transcripts may only be reviewed by the parties upon approval from the court.

The court has the power to request the parties or third parties[12] to submit any documents that may relate to the case at hand or request the relevant documents from the Authority's file. In this case, 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 the confidential information is kept as such: avoiding using the online judiciary informatics system and submitting the document by hand; or submitting the relevant documents along with a request of confidentiality and 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.

12 CCP, Articles 195, 216/2 and 221.

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 attorney–client privilege.

In addition to the treatment of documents that include particularly confidential information on the parties, the handling of communications and documents between a client and its attorney is of particular significance. Turkish courts and regulatory bodies indeed recognise the privileged nature of attorney–client documents and communications. The CCP requires judges to implement adequate measures to ensure protection of legal privilege. Thus, normally, the principle of confidentiality is accepted in terms of communications and documents covered by attorney–client privilege (i.e., forbidding third parties from reviewing their content). However, the Board has demonstrated a limiting approach to the coverage of attorney–client privilege, particularly recently. In its numerous decisions regarding documents collected during on-site inspections, the Board stated that the purpose of the principle of attorney–client privilege is to ensure the full and proper usage 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 indeed 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 only follow the relevant guidance of the CCP's provisions.

XII SETTLEMENT PROCEDURES

In 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 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 ongoing case and base their settlement decision upon 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 shall decide in accordance with the intention of the parties.

In terms of the legal implications, Article 315 of the CCP provides two options: (1) parties may either request the court to decide in accordance with their settlement agreement; or (2) 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.

XIII ARBITRATION

The Competition Law does not include regulations on alternative dispute resolution (ADR) mechanisms; however, these provisions have been introduced in recent years in Turkish law. The purpose for the introduction of ADR methods such as mediation and arbitration was

to encourage claimants to resolve their conflicts by way of a more economic and time-saving method. Parties may resort to an arbitration proceeding only if they had previously agreed on an applicable arbitration clause.

Although not directly related to competition regulations, Turkish consumer law includes a specific form of ADR method 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, the following consumer committees are solely authorised for consumer dispute resolution:

a borough arbitration boards are responsible for disputes below 4,000 Turkish lira; and

b city arbitration boards are responsible for disputes between 4,000 and 6,000 lira, including disputes within metropolitan cities.

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

XIV INDEMNIFICATION AND CONTRIBUTION

While there are no provisions in the Competition Law on indemnification or contributions from third parties, co-defendants or cross defendants, the TLO provides joint and several liability provisions. Accordingly, these provisions will be applicable in cases where 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 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 compensation total 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 shall 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 parties that were held jointly responsible 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 case, 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 compensation total, the court will again assess the level and severity of the defendant's error in determining the amount of recourse payment.

XV FUTURE DEVELOPMENTS AND OUTLOOK

Significantly, with its decision of 7 May 2021, the Board tasked the Authority's strategy development department with overseeing matters relating to digital markets. The Authority is also currently working on a regulation specifically tailored to the need to regulate digital markets, similar to the EU's Digital Markets Act. Although the form or scope of the Authority's planned legislation is not yet clear, it will likely lead to further, and a more tailored, competition enforcement on undertakings operating in digital markets.

As for the effect of the planned legislation upon private competition enforcement, although it may be considered as unlikely, any specific provisions on private competition enforcement would help facilitate damages claims in this sector. A possible indirect effect could also be that legislation that specifically targets digital markets could lead to the initiation of further investigations and the rendering of further infringement decisions on conduct that could have gone undetected otherwise. Accordingly, if this is the case, there would potentially be more injured parties that could legally forward their damages claims. Considering the Authority's recent investigations into large digital companies and its increasing focus on a specialised regulatory approach to digital markets, it is likely to maintain this approach in the future, based on an even stronger and more detailed legal footing.

On an important note regarding treble damages, in November 2021 a regional justice court upheld a local court's decision in calculating treble damages for the claimant in a case involving undertakings in the alcoholic beverages sector. While the regional court considered that non-pecuniary damages could not be claimed in this case, it considered that the local court's decision and its calculation of treble damages was lawful. The decision of the regional court is not yet final and the parties may file for a further appeal before higher courts. Whether the final decision will include any assessments, positive or otherwise, on treble damages in private antitrust claims will be significant.

Appendix 1

ABOUT THE AUTHORS

FEVZİ TOKSOY

ACTECON

Fevzi Toksoy, PhD, is an EU law specialist and an economist with master's degrees on European Union law and economics and a PhD in EU competition law. Mr Toksoy focuses on EU and Turkish competition law and international trade remedies. He is the founding partner of ACTECON and offers solutions to clients in competition investigations, merger clearances and preventive competition compliance programmes.

Mr Toksoy has broad experience in the EU Customs Union based on issues such as parallel trade, customs duties and anti-dumping. He has contributed to a variety of anti-dumping investigations conducted by Turkish and other anti-dumping authorities within various industries, including steel, pipes, ball bearings, polyvinyl alcohol, tyre chains, TVs, air conditioners and tyres.

Mr Toksoy advises multinational companies in the Turkish element of M&A transactions, and is particularly renowned for his experience in complicated merger control cases. He has successfully negotiated remedies with the Turkish Competition Authority in many complex merger cases. He has practical experience in public and private sector competition law-related commercial problems in Turkey, such as subcontracting, licensing, distribution schemes and intellectual property rights.

Mr Toksoy lectures in EU and Turkish competition law at Marmara University EU Institute and also occasionally lectures on mergers and acquisitions, international trade remedies and competition law aspects of EU and Turkish environmental law.

BAHADIR BALKI

ACTECON

Bahadır Balkı is known for his excellent work discipline together with his intriguing and effective defences. In the past 10 years, he has been involved in virtually every significant cartel and abuse of dominance investigation launched by the Turkish Competition Authority, within various sectors, including insurance, banking, iron and steel, automotive, cement, telecommunications, broadcasting rights, FMCG, alcoholic beverages, media audits and port services. Clients have also benefited from Mr Balkı's extensive experience in global merger cases, especially in Phase II procedures, in a variety of industries.

He is a guest lecturer in competition law on Istanbul Bilgi University's LLM programme and a lecturer in the corporate ethics and compliance management programme organised by the Ethics and Reputation Society of Turkey.

Mr Balkı is recommended as a leading global competition lawyer by *Who's Who Legal: Competition 2019*.

ERTUĞRUL CAN CANBOLAT

ACTECON

Ertuğrul Can Canbolat leads the trade remedies practice at ACTECON. He has extensive experience in defending international clients in trade defence investigations and has extensive knowledge of, and experience in, all aspects of competition law, antitrust and international trade remedies. Mr Canbolat provides advisory services on day-to-day competition and regulatory compliance, investigations initiated by the Turkish Competition Authority, merger control issues related to both domestic and cross-border mergers, exemption applications and judicial review proceedings.

He also provides advisory services to companies wishing to carry out their activities in compliance with internationally accepted principles and customs rules.

Mr Canbolat is fluent in English and German.

UMAY RONA

ACTECON

Umay Rona provides advice on all matters of competition law covering merger control procedures and risk management strategies related to both domestic and cross-border transactions. Ms Rona advises a wide range of clients in preliminary and fully fledged cartel and abuse of dominance investigations initiated by the Turkish Competition Authority. She also conducts follow-on competition litigation.

Ms Rona assists local and multinational clients with their day-to-day competition and regulatory compliance matters, provides advice during on-the-spot inspections and prepares compliance programmes such as competition law training.

Ms Rona is fluent in English and French.

SILA COŞKUNOĞLU

ACTECON

Sıla Coşkunoğlu advises a wide range of clients in preliminary and fully fledged cartel and abuse of dominance investigations initiated by the Turkish Competition Authority. She also conducts follow-on competition litigation and provides advice on all matters of competition law covering merger control procedures and risk management strategies related to both domestic and cross-border transactions.

Ms Coşkunoğlu assists local and multinational clients with their day-to-day competition and regulatory compliance matters, provides advices during on-the-spot inspections and prepares compliance programmes such as competition law training.

Ms Coşkunoğlu is fluent in English and French.

ACTECON

Çamlıca Köşkü
Tekkeci Sokak
No. 3–5 Arnavutköy, Beşiktaş
34345 İstanbul
Turkey
Tel: +90 212 211 50 11 / 64 44
fevzi.toksoy@actecon.com
bahadir.balki@actecon.com
ertugrul.canbolat@actecon.com
umay.rona@actecon.com
sila.coskunoglu@actecon.com
www.actecon.com

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