THE PRIVATE COMPETITION ENFORCEMENT REVIEW

Sixteenth Edition

Editors
Ilene Knable Gotts and Kevin S Schwartz

THE LAWREVIEWS

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PREFACE

Private competition litigation can be an important complement to public enforcement in the achievement of compliance with 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 (in terms of both 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, cartels and labour.

Until the past 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. Another example, albeit more limited, is Brazil, where there has been private litigation involving non-compete clauses since the beginning of the twentieth century, and monopoly or market closure claims since the 1950s. In the past decade or so, other regimes have begun 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 (such as in 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 has clearly turned, 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 are in Europe with the EU Member States implementing the EU's damages directive (Directive 2014/104/EU on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union) into their national laws. The most notable 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 damages directive, many EU Member States have increased their private antitrust enforcement rights.

The development of case law in jurisdictions also affects 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. By contrast, in Japan, private antitrust matters have remained rare. Moreover, in many other jurisdictions, there remain very limited litigated cases. For example, a growing number of private antitrust class actions have commenced in Canada but none has 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 has also 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.

There will continue to be differences between jurisdictions regarding whether claimants must opt out of collective redress proposals to have their claims survive a settlement (as in the United Kingdom), 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 had any private damages awarded in antitrust cases to date, 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 on 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, 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, it will take time to determine the effect (if any) of Brexit in the United Kingdom, a jurisdiction that has been one of the most active and accessible global forums for private enforcement.

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 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 (as in Sweden, for example). Some jurisdictions seek to provide a strong incentive for use of their leniency programmes by providing participants with full immunity from private damages claims. 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 United Kingdom, 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. By 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 reflects, to some extent, the respective perceptions of what private rights should protect. Most 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 United Kingdom), 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 award treble damages as a punitive sanction in certain circumstances. 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 (such as 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 that 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 (e.g., Chile, India, Turkey and Venezuela) believe that private litigation should be available only to victims of conduct that the antitrust authorities have already penalised. 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, however, does 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 is compensated for some or all of its costs by the losing party, discouraging frivolous litigation.

Cultural views also clearly affect litigation models. Outside the European Union 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 seek recompense for damage 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. The Norwegian 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 United Kingdom and Norway), with the exception that some jurisdictions have left open the possibility of the privilege being preserved for otherwise covered 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. Under Canadian law, there are 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, from both 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.

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Chapter 13

TURKEY

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I OVERVIEW OF RECENT PRIVATE ANTITRUST LITIGATION ACTIVITY

The primary competition legislation – Law No. 4054 on Protection of Competition (the Competition Law) – was revised in June 2020, thus introducing several new instruments, including the settlement and commitment procedures, which were the most significant in terms of private antitrust litigation. The settlement and commitment mechanisms were further developed by the pertinent regulations issued by the Turkish Competition Authority (the Authority) in 2021.[2] In that context, five lawsuits were ended by the commitment procedure in 2021,[3] while in only the first half of 2022, one lawsuit was ended by commitment and 14 lawsuits through settlement procedures.[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. 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 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.

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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.

3 Competition Authority, Decision Statistics (in Turkish), at https://www.rekabet.gov.tr/tr/Sayfa/Yayinlar/karar-istatistikleri (last accessed 4 January 2023).

4 id.

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

The first is the Board's *12 Banks* decision.[5] 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 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. 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 banks or the judgment was further appealed by appellants.

Following the Board's *12 Banks* decision in 2014, many private damages claims were brought against the banks and some parties received compensation pursuant to these.[8] The Board's decision is not yet final as its judiciary review is continuing. The outcome of the litigation process will affect damages claims in current 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 the 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.[9] Pursuant to this 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 by the Regional Court of Justice, which rejected the lawsuit for one of the claimants on the grounds

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.

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

7 Ankara Second Administrative Court, Decisions Nos. E2022/923 and K2022/874 of 28 April 2022; Ankara Second Administrative Court, Decisions Nos. E2022/920 and K2022/855 of 26 April 2022; Ankara Second Administrative Court, Decisions Nos. E2022/924 and K2022/854 of 26 April 2022.

8 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.

9 Competition Board (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.

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

Private antitrust damages claims are considered based on 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 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. Subsequently, Article 57 of the Competition Law sets forth that any legal or natural person shall compensate for the 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 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 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 in this respect 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 who damage other persons through faulty or unlawful acts shall compensate for this 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. 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 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 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 and the defences submitted by the parties. The different stages of this process are explained in Sections IV, V, VII and XII.

ii 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.[10] In a decision of 2018,[11] the High Court of Appeals ruled 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 emphasised that under Article 20/4 of the Misdemeanour 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 a specific legislation stipulates a longer statute of limitations, 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, starting from the finalisation of the Board's decision.[12]

III EXTRATERRITORIALITY

It is possible to initiate private damages claims in Turkey 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 most recent legal precedents, it is still considered unlikely for injured parties to be able to forward private damages claims in Turkey solely based 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,[13] 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 owing 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

10 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.

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

12 Istanbul Regional Court of Justice, Decisions Nos. E2020/560 and K2021/65 of 27 January 2021.

13 European Commission, Decision No. AT39437 of 5 December 2012.

interest condition.[14] The regional court upheld the decision of the court of first instance by also referring to the Board's previous preliminary investigation decision.[15] 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 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) be established by the Board.

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 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, 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 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. However, Article 139 of the CCP provides that, during the preliminary examination hearing, the

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

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

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 the 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 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 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 either to order the relevant evidence to be brought before the court or to review the relevant evidence where it is located.

VI 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. However, 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.

VII 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. However, 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 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 the party 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 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 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 within the amount paid and the 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. 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 relevant violation and deduct this amount from the total amount of 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 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 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 of the CCP 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 that the parties or third parties[16] submit any documents that may concern the case at hand 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 the confidential information is kept as such, by avoiding using the online judiciary informatics system and submitting the document by hand, 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 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 the protection of legal privilege. Thus, typically, the principle of confidentiality is accepted in terms 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 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 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.

16 Code of Civil Procedure, Articles 195, 216/2 and 221.

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 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 current 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 shall 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.

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 aim of 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 have 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 agencies are solely authorised for consumer dispute resolution:

a borough arbitration boards are responsible for disputes below 10,280 Turkish lira; and

b city arbitration boards are responsible for disputes between 10,280 and 15,430 lira,[17] including disputes within metropolitan cities.

Parties are obliged to apply to these consumer agencies 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 agencies.

17 The values are subject to revaluation by the Ministry of Trade each year.

XIV 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 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 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 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.

XV FUTURE DEVELOPMENTS AND OUTLOOK

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 adoption of these amendments. Having said that, the draft amendments have not been adopted at the time of writing.

On treble damages, 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. The decision of the regional court is not yet final and the parties may appeal the case to higher courts. Whether the final decision will include any assessments – positive or otherwise – on treble damages in private antitrust claims will be significant.

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