

THE PRIVATE
COMPETITION
ENFORCEMENT
REVIEW

ELEVENTH EDITION

Editor
Ilene Knable Gotts

THE LAWREVIEWS

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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. For example, 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 20th 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 is undertaking a comprehensive review and is now considering the implementation of significant changes

to its private enforcement law. The most significant developments, however, are in Europe as the EU Member States prepare legislative changes to implement the EU's directive on private enforcement into their national laws. The most significant areas to be 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 are likely to 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 this 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 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 have 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 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 (e.g., Brazil, Canada and Switzerland, although Switzerland has legislation pending to toll the period) 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 – an EU jurisdiction that has been one of the most active and private-enforcement friendly fora – 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 litigation private cases and whether documents in the hands of the competition agency are discoverable (see, e.g., Germany and Sweden). Some jurisdictions, such as Hungary, 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 ‘spill-over 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, Hungary, Israel, Japan, Korea, Norway, the Netherlands 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 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 get 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 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, 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 Claims 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, Hungary, Japan, Korea, the Netherlands, Switzerland and Spain) 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 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 in Japan; pre-existing documents are not protected in Portugal; limited recognition of privilege in Germany and Turkey; and extensive legal advice, litigation and common interest privilege 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 both through proposed legislative changes as well as 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

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TURKEY

*H Ercüment Erdem and Mert Karamustafaoglu*¹

I OVERVIEW OF RECENT PRIVATE ANTITRUST LITIGATION ACTIVITY

Since 2016, private competition law enforcement has been a popular topic in Turkey. Until recently, private competition law enforcement was relatively underused; public enforcement of the competition rules by the Competition Authority prevailed. Private competition law enforcement in Turkey is regulated under Article 57 et seq. of the Protection of Competition Act (Competition Act).²

There has been no recent amendment to the Competition Act; however, the Court of Cassation rendered several decisions in late 2015 and in 2016 that may affect the future implementation of private competition law enforcement provisions of the Competition Law. A decision dated 27 October 2015³ concerns a compensation claim in an abuse of dominant position case in which the Court of Cassation dealt with a statute of limitations question. As the Competition Act does not include a provision stipulating a statute of limitations for compensation claims arising from competition law infringements,⁴ the issue of the limitation period is currently being debated, and has yet to be resolved through Turkish doctrine and jurisprudence (see Section II). In the above-mentioned Court of Cassation decision, the statute of limitations for such compensation claims is set at eight years, as stipulated under the Misdemeanours Act⁵ commencing on the date upon which the claimant became aware of the infringement and submitted a complaint to the Competition Authority.

Further, in a decision dated 8 March 2016,⁶ the Court of Cassation ruled that a prior Competition Authority decision sanctioning an infringement will not constitute a cause of action for compensation claims; however, the finalisation of such Competition Authority decision will be a preliminary point for the court awarding the compensation.

1 H Ercüment Erdem is founder and senior partner and Mert Karamustafaoglu is a competition and compliance expert at Erdem & Erdem Law Office.

2 Protection of Competition Act No. 4054.

3 Decision of the Court of Cassation 11th Civil Chamber numbered 2015/3450 (E) 2015/11139 (K) dated 27 October 2015.

4 Up until 8 February 2008, the Competition Act, Article 19 stipulated a five-year statute of limitations starting from the date of the infringement. Such provision was abolished by Act No. 5728 dated 23 January 2008, published in the Official Gazette dated 8 February 2008 and numbered 26781.

5 Misdemeanours Act No. 5326.

6 Decision of the Court of Cassation 11th Civil Chamber numbered 2015/5134 (E) 2016/2543 (K) and dated 8 March 2016.

Finally, in a decision dated 29 March 2016,⁷ the Court of Cassation applied the five-year limitation period stipulated under the abolished Turkish Criminal Code,⁸ starting from the date upon which the claimant became aware of the infringement, and submitted a complaint to the Competition Authority with reference to the fact that the Misdemeanours Act was not yet in force on the date of the infringement.

Apart from this jurisprudential activity, private competition law enforcement recently gained importance with regard to the increasing number of compensation claims brought against 12 Turkish banks, each of which was sanctioned with an administrative fine by the Competition Authority in 2013.⁹

II GENERAL INTRODUCTION TO THE LEGISLATIVE FRAMEWORK FOR PRIVATE ANTITRUST ENFORCEMENT

Private competition law enforcement in Turkey is regulated under Article 57 et seq. of the Competition Act. In accordance with Article 57, anyone who prevents, distorts or restricts competition via practices, decisions, contracts or agreements that are contrary to the Competition Act, or abuses its dominant position in a particular market for goods or services, is required to provide compensation for any damage suffered. This provision further stipulates joint and several liability upon the infringers, given that the damage has resulted from the behaviour of more than one person, and they are responsible for the damage, jointly. Article 58 determines the method through which the damages will be calculated, and defines the scope of damages for private enforcement of competition law. Lastly, Article 59 stipulates the burden of proof in cases of concerted practices, mostly to be used in instances when the Competition Authority did not render a prior decision on a given competition law infringement.

It is generally accepted in Turkish doctrine and jurisprudence that the basis of compensation claims is tort liability.¹⁰ Therefore, the general provisions of the Turkish Code of Obligations¹¹ (TCO) are applicable with regard to the conditions of liability, the scope of damages to be claimed and the statute of limitations, etc., which are not stipulated by the Competition Act. Article 49 of the TCO determines the conditions for tort liability, which are illegal act, fault, damage and causal link. All of these conditions must be cumulatively fulfilled for liability to arise. Thus, an anticompetitive practice that was not implemented, nor caused damage, will not result in the liability of those who intended to engage in such activity. In this vein, both Articles 57 and 58 of the Competition Act point to the impact of anticompetitive practices in the market, and the damages that arise thereof (see Section VIII). Consequently, anticompetitive practices with an anticompetitive objective cannot result in

7 Decision of the Court of Cassation 11th Civil Chamber numbered 2015/7405 (E) 2016/3442 (K) and dated 29 March 2016.

8 Turkish Criminal Code No. 765.

9 See Decision of the Competition Board dated 8 March 2013 and numbered 13-13/198-100.

10 İlhan Yiğit, *Rekabet İhlallerinden Doğan Tazminat Sorumluluğu*, İstanbul 2013, p. 213. See also Orhan Sekmen, *Rekabet Hukukunda Tazminat Sorumluluğu*, Ankara 2013, p. 61. In the same vein, the Court of Cassation acknowledged that these claims are grounded upon tort liability in several of its decisions, such as Decision of the 11th Civil Chamber numbered 2015/7405 (E) 2016/3442 (K) and dated 29 March 2016, and decision of the 11th Civil Chamber numbered 2015/842 (E) 2015/6338 (K) and dated 5 May 2015.

11 Turkish Code of Obligation No. 6098.

damages claims unless they cause harm to others. If the illegal act is committed by more than one undertaking, such as a cartel agreement, all of the infringers are jointly and severally liable (see Section XIV).

As compensation claims are based on tort liability, the infringer must be at fault. However, as per Article 58 of the Competition Act, the degree of fault has a significant effect on the amount to be awarded. Accordingly, in cases of intentional or gross negligence, the judge may award compensation amounting to treble damages. Therefore, Turkish law stipulates punitive damages for private enforcement of competition laws (see Section VIII).

With regard to the statute of limitations, as the Competition Act does not include any provision in this regard, the provisions of the TCO are applicable. In accordance with Article 72 of the TCO, claims arising from tort liability are subject to a two-year statute of limitations, starting from the date upon which the damaged party becomes aware of the damage and the infringer (short statute of limitations) and, in any case, a 10-year statute of limitations starting from the date upon which the illegal act is committed (long statute of limitations). Furthermore, given that the damage has arisen as a result of an act punishable by criminal law, and such laws foresee a longer statute of limitations, the longer statute of limitations will be applicable (extraordinary statute of limitations). Further, as joint and several liability is in question for Competition Act infringements committed by more than one undertaking, a separate statute of limitations commences after each of the infringers is identified, as well as the damage.

Although the majority view under Turkish doctrine finds that the extraordinary statute of limitations does not apply in cases where the Competition Act is violated, the Court of Cassation rendered a number of the above-mentioned rulings to the contrary. According to the majority view, compensation claims arising from competition law infringements are subject to a two-year short statute of limitations, and a 10-year statute of limitations. Scholarly debate revolves around the fact that competition law infringements do not constitute crimes, because Competition Act, Article 16 refers to the Misdemeanours Act, consequently defining such infringements as misdemeanours rather than crimes. Therefore, the extraordinary statute of limitations that is applicable when the illegal act also constitutes a criminal act should not be applicable. However, in its recent decisions, as stated above, the Court of Cassation accepted the applicability of the extraordinary statute of limitations, which, in this case, is eight years starting from the date upon which the damage and the infringer are learnt.¹² However, such decisions (both yet to be finalised) of the Court of Cassation are currently being debated on other grounds as well to determine whether the Misdemeanours Act, which sets out the commencement date of the (extraordinary) statute of limitations as the date of the misdemeanour – contrary to the Court of Cassation practice, which has employed the date of awareness of the damage and the infringer as the commencement date – applies.

III EXTRATERRITORIALITY

Article 2 of the Competition Act accepts an ‘effects-based principle’. This is applied to all anticompetitive practices (including concentrations) that produce effects in the territories of Turkish markets. In that sense, so long as the infringement creates effects in Turkey, the

12 Decision of the Court of Cassation 11th Civil Chamber numbered 2015/3450 (E) 2015/11139 (K) and dated 27 October 2015, and decision of the Court of Cassation 11th Civil Chamber numbered 2015/7405 (E) 2016/3442 (K) and dated 29 March 2016.

Competition Authority's jurisdiction would not be limited by the parties' nationalities, whether they have subsidiaries or affiliated entities in Turkey, or the location of the anticompetitive activity. In contrast, the Competition Board (Board) accepted jurisdiction in a foreign-to-foreign concentration in which both of the parties did not have production facilities in Turkey, since the transaction may create anticompetitive effects in Turkey through the parties' export activities.¹³ In addition, in an international cartel investigation regarding the import lump coal market, the Board stated that undertakings that are established outside of Turkey are within the Competition Authority's jurisdiction, regardless of the generation methods or channels of their Turkish turnovers.¹⁴ Furthermore, in a very recent decision involving the railway freight services and block train freight intermediation services markets, the Board accepted the Competition Authority's jurisdiction, stating that the Competition Act is applicable to those cases that create effects in the Turkish market within the meaning of Article 2, regardless of whether the relevant undertakings have subsidiaries in Turkey.¹⁵

In accordance with Article 6 of the Civil Procedural Code¹⁶ (CPC), with regard to cartel damages claims with foreign undertakings, the Turkish courts have jurisdiction over disputes wherein the defendant has a domicile in Turkey or the legal entity defendant has its business centre in Turkey, unless otherwise stated in its establishment documents. As per the CPC, Article 7, if there is more than one defendant, so long as one is domiciled in Turkey, all of the others may be jointly sued in Turkey. If the defendant's residence is uncertain, the defendant's habitual residence in Turkey should be used. Moreover, pursuant to the CPC, Article 16, if the lawsuit arises from a tort claim, the Turkish courts have jurisdiction at the place wherein the act has been committed, or where the damage occurred or may occur. The lawsuit may be filed in Turkey under any of the above conditions, regardless of the nationality of the parties.

IV STANDING

Any person, whether a real person or a legal entity, who has suffered damages as a result of a competition law infringement, can bring an action for damages. Accordingly, such actions can be brought by competitors, potential competitors, purchasers, indirect purchasers and consumers who have suffered damages. However, it is important to recognise that the claimant must prove the causal link between the damage suffered and the anticompetitive conduct of the defendant. In addition, the Competition Act does not grant the right to claim indirect damages (reflected damages), as indirect damages fall outside the scope of competition law. Under Turkish law, indirect damages may only be claimed if foreseen by law.

Further, the purchasers of the competitors of the parties to the agreement may potentially be able to bring an action against such parties (umbrella effect) if they prove the damage suffered and the causal link. However, the Court of Cassation has not yet rendered a decision on this subject.

13 Decision of the Competition Board numbered 99-3/24-6 and dated 28 January 1999.

14 Decision of the Competition Board numbered 10-57/1141-430 and dated 2 September 2010.

15 Decision of the Competition Board numbered 15-44/740-267 and dated 16 December 2015.

16 Civil Procedural Code No. 6100.

V THE PROCESS OF DISCOVERY

Turkish law does not contain discovery rules as found in Anglo-American legal systems. Rather, the main stages of a typical private enforcement proceeding are:

- a* exchange of petitions;
- b* preliminary proceedings;
- c* examination phase;
- d* oral proceedings;
- e* decision; and
- f* legal remedies, such as an appeal in the regional courts of appeals, or in the Court of Cassation in cases where a decision of a regional court of appeal is appealable.

During the exchange of petitions stage, the parties submit their evidence, and may request the court to order third parties to submit specific evidence.

During preliminary proceedings, the court sets forth the process for the submission and collection of evidence. The court will also order the parties to submit undelivered documents that have been requested by other parties, or provide an explanation with regard to the lack of submission of the evidence, within a period of two weeks. As per the CPC, Article 140(5), if the parties do not comply with the court's order within the defined period, this is deemed as a waiver from that evidence. In principle, parties cannot submit any other evidence after this stage unless the court consents for them to do so under certain conditions. However, evidence that comes into play after the exchange of petitions stage is not considered within the scope of this prohibition. Furthermore, in accordance with the CPC, Article 196, once evidence is provided it cannot be excluded unless there is express permission by the opposing party. If a document that is in the possession of a third party is considered to be indispensable evidence to prove an allegation made by the parties, the court may order the third party to submit the relevant evidence.

The Turkish legal system also regulates the evidence determination process as one of the interim measures. Accordingly, a party may request a site visit, expert analysis or witness statement to determine a specific fact prior to the initiation of the proceeding, or in the evaluation process of the proceeding, if it has a legal interest in the immediate determination of the evidence. The legal interest will be deemed present if it is likely that the evidence will be lost, unless it is determined at the current stage that its assertion will be significantly difficult later in the proceeding.

VI USE OF EXPERTS

It is common to appoint experts in private enforcement proceedings, since the proceedings usually require technical and specific knowledge, beyond legal knowledge, and the calculation of the amount of damages necessitates such economic analysis.

Pursuant to the CPC, Article 266, the judge may decide to appoint a third party expert *ex officio*, or upon a party's request, if specific or technical information is needed to resolve a dispute. Expert reports are discretionary proof, and therefore are not binding upon the court. On the other hand, in practice, court-appointed expert reports carry significant evidentiary value for the courts. The mission of court-appointed experts is specified in the court's order, and the expert cannot provide an opinion beyond what is delineated in the order. The cost of the expertise is borne by the parties according to the tariffs established for expert fees that are determined by the Ministry of Justice each year.

The majority of Turkish doctrine supports the regulation of the Competition Authority's expertise in compensation lawsuits, since compensation lawsuits require technical and specific knowledge regarding competition law. According to these views, the Competition Authority can serve as an expert in compensation lawsuits with regard to the 'determination of the economic facts that need to be realised to support the presence of the infringement'. The Competition Authority's expertise was also regulated in the Draft Competition Law in 2013, which has become obsolete.^{17, 18}

Furthermore, the parties can provide specialist opinions that are not binding on the court. The cost of the specialist report is borne by the providing party.

VII CLASS ACTIONS

Turkish law does not include a general class action model of any kind that enables collective damages claims.

However, a class action model aimed at elimination of illegality is stipulated under Article 73(6) of the Protection of the Consumers Act¹⁹ (Consumers Act). Accordingly, consumers' organisations, related public bodies and the Ministry of Customs and Trade must file a lawsuit before consumer courts to obtain a preliminary injunction against conduct that violates the Consumers Act, as well as request a determination, prevention or cessation thereof (cease-and-desist order).

Further, as per the CPC, Article 113, associations and other legal entities, within the boundaries of their statutes, may file lawsuits to determine or protect their members' or related persons' current or future rights, or to eliminate illegal conduct. None of the above-mentioned lawsuits, however, give the claimant the right to claim damages.

VIII CALCULATING DAMAGES

In accordance with Article 58 of the Competition Act, those who incur damages as a result of the prevention, distortion or restriction of competition may claim as damages the difference between the cost they paid and the cost they would have paid had the competition not been limited. Competing undertakings affected by the limitation of competition may request that all of their damages are compensated by the undertaking or undertakings that restricted competition. In determining damages, all profits expected to be gained by the injured undertakings are calculated by taking into account the balance sheets of previous years, as well. This method of calculating damages is aimed at calculating the damages suffered by the purchasers of products who purchased at a higher price as a result of the anticompetitive conduct. In one of its decisions,²⁰ the Court of Cassation compared the claimant's net profits

17 The Draft Law has not been enacted in the relevant legislative term of the Turkish parliament. Therefore, the current status of the Draft Law became obsolete.

18 The Second Symposium on the Recent Developments in Competition Law, 9 April 2004, Kayseri, p. 65; 'The Evaluation of the Draft Competition Law's Amendments in the Private Law Field', Dr Kerem Cem Sanli, *Competition Journal*, Volume 30, Ankara 2007, p. 54.

19 Consumers Act No. 6502.

20 Decision of the Court of Cassation 11th Civil Chamber numbered 2015/842 (E) 2015/6338 (K) and dated 5 May 2015.

for the previous years, and found that the decrease in the net profits also occurred during the years in which the defendant did not engage in the abuse of dominant position, and ruled that the claimant cannot claim any damages as a result thereof.

As the Competition Act stipulates that competitors may claim all of their damages, such undertakings can seek compensation for both their actual loss (*damnum emergens*) and for loss of profits (*lucrum cessans*), as well as the accrued interest. However, indirect damages cannot be claimed. In line with our explanations in Section II, damages must be proved by the claimant.

If the resulting damage arises from an agreement or decision of the parties, or from cases involving gross negligence thereof, the judge may, upon request of the injured party, award compensation equal to treble the material damage incurred, or of the profits gained or likely to be gained by those who caused the damage. Thus, there is an exception to the principle of Turkish law regarding the prohibition of punitive damages.

In accordance with the CPC, Article 323, expenses for proceedings, including attorneys' fees to be determined pursuant to the relevant law, are also included in the compensation to be paid by the defendant, if awarded.

IX PASS-ON DEFENCES

Under Turkish law, pass-on defences and the issue of indirect purchasers are determined by the TCO. As referred to in Section II, the conditions for tort liability are illegal act, fault, damage and causal link, which must be proven by the claimant.

After the initial sale, the purchasers (i.e., indirect purchasers) must prove the causal link between the damage and the anticompetitive conduct even though they can prove that they have purchased the products at a price higher than normal. Although difficult in practice, such proof is theoretically possible. Under Turkish law, the damages of indirect purchasers are not considered to be indirect damages, and therefore can be claimed if the above conditions are proven.

The applicability of the pass-on defence shows similar traits with the issue of indirect purchasers. In other words, for the pass-on defence to be recognised, the defendant must prove that the increase in prices applied by the claimant, the direct purchaser and the anticompetitive product are linked. If proven, such defence is permitted under Turkish law.

X FOLLOW-ON LITIGATION

The Competition Act does not include a provision regarding follow-on litigation. However, the established case law of the Court of Cassation suggests that the decision of the Board ruling that an infringement occurred under the Competition Act will satisfy the preliminary question for damages claims.²¹

21 Decision of the Court of Cassation 19th Civil Chamber numbered 1999/3350 (E) 1999/732 (K) and dated 17 September 1998, decision of the Court of Cassation 19th Civil Chamber numbered 1999/1948 (E) 1999/3745 (K) and dated 10 May 1999, decision of the Court of Cassation 19th Civil Chamber numbered 1999/3350 (E) 1999/6364 (K) and dated 1 November 1999, decision of the Court of Cassation 19th Civil Chamber numbered 2002/2827 (E) 2002/7580 (K) and dated 29 November 2002, decision

In one of its recent decisions,²² the Court of Cassation confirmed that although the existence of a Board decision is not a condition for an action, it provides the preliminary basis for the court action. Therefore, even though there is no legislation in this regard, compensation for damage may only be awarded after the Board's finding of an infringement has been made, even though an action may have been commenced beforehand.

XI PRIVILEGES

Turkish law does not provide a specific statutory basis for legal privilege. Legal privilege is instead generally provided for in different laws, such as the Legal Profession Code²³ (LPC), the CPC and the Banking Code²⁴ (BC).

The LPC regulates the attorney's duty of confidentiality, and provides a non-disclosure privilege to attorney–client communications. According to the relevant provision: 'Attorneys are prohibited from disclosing information that has been entrusted to them, or that come to light in the course of performing their duties, both as attorneys, and as members of the Union of Bar Associations of Turkey and various bodies of bar associations.' Attorneys can testify regarding privileged information if the client approves of such disclosure. On the other hand, the LPC, Article 36 provides attorneys the right to refuse to testify regarding such information, even if the client approves such disclosure.

In addition, the CPC regulates search and seizure of an attorney's office, and provides the attorney with the right to object to the confiscation of a document provided during the course of client–attorney privilege. In such a situation, the document will be placed into a separate envelope or a package, sealed and sent to the court for a determination of whether the document enjoys attorney–client privilege. If the court decides that the document is protected under attorney–client privilege, such document will be immediately returned to the attorney, and the official reports, including the relevant document, will be destroyed. As per Article 13(2) of the Criminal Procedural Code,²⁵ the relevant court decisions will be rendered within 24 hours.

Separately, the BC, Article 73, regulates the attorney–client privilege for a bank's in-house attorneys. The BC provides that in-house attorneys and all other employees of banks shall not disclose any confidential information regarding the bank to any person other than those who are authorised by the BC, and those who are authorised under private law; and shall not use such information for their own or another's benefit. Persons who do not follow these requirements will be sentenced to imprisonment from one to three years, and a judicial fine of 1,000 to 2,000 days.²⁶ The same punishment will also be applied to third persons who disclose the confidential information or documents of the clients of banks. In cases where confidential information and the documents are disclosed with a view to acquiring

of the Court of Cassation 19th Civil Chamber numbered 2006/2809 (E) 2006/10346 (K) and dated 6 November 2006, and decision of the Court of Cassation 19th Civil Chamber numbered 2011/330 (E) 2011/1771 (K) and dated 14 February 2011.

22 Decision of the Court of Cassation 11th Civil Chamber numbered 2015/5134 (E) 2016/2543 (K) and dated 8 March 2016.

23 Legal Profession Code No. 1136.

24 Banking Code No. 5411.

25 Criminal Procedural Code No. 5271.

26 The Turkish Criminal Code No. 5237 determines the fines as imprisonment and judicial monetary fines. Judicial monetary fines appear in two ways: they can be determined as the only sanction for the crime or

a benefit, the penalties will be increased and, depending on the importance of the offence, the responsible persons will be prohibited from working at these institutions temporarily or permanently.

The Board's approach with regard to legal privilege was clear until its recent *Enerjisa* decision.²⁷ That said, in its *Dow* decision the Board set forth the following criteria for the evaluation of attorney–client privilege: written communications must be made between the client and an independent lawyer who is not bound to the client through a relationship of employment; and written communications must be made for the purposes and in the interests of the client's rights of defence.²⁸ On the other hand, the *Enerjisa* decision elaborated on the Board's approach toward legal professional privilege by highlighting that any legal opinion provided by an attorney to an enterprise as to how the Competition Act could be breached will not be afforded any legal protection. According to the *Enerjisa* decision, any attorney and client attempting to evade the law will not benefit from the legal burden of proof of the Board. In that scenario, if they claim that their correspondence should be deemed as privileged and confidential, the legal burden of proof will fall upon the attorney and client engaged in the correspondence.

XII SETTLEMENT PROCEDURES

Turkish law encourages parties to consider settlement. Accordingly, under the CPC, Article 140(2) and 140(3), the judge will encourage the parties to work towards settlement or mediation in the preliminary examination hearing. If the parties cannot resolve the dispute through settlement or mediation procedures, the tribunal will determine the unsolved matters through minutes, and an examination shall be made of the listed matters.

Moreover, as per the Code of Mediation for Civil Law Conflicts No. 6325, Article 13, the parties may decide to mediate prior to filing a lawsuit or during a lawsuit pending before the court. A party may request application to a mediator. If an affirmative answer to this request is not obtained within 30 days, the request shall be deemed to be rejected.

According to the CPC, Article 314, the parties are free to settle the dispute until the decision is final. The settlement will be made by the claimant and the defendant as a bipartisan agreement. Furthermore, the settlement can be conditional. The settlement before the court will be made in compliance with the formal conditions that are determined under the law. If the parties settle out of court, they shall deliver the settlement agreement to the court, and inform the court of the settlement in the hearing. After that, the fact that the parties have delivered the settlement agreement to the court will be included in the hearing minutes. The settlement agreement will be read to the parties, and the parties will sign the agreement. All of the proceedings will be written into the hearing minutes. In some exceptional cases, the parties' disposition power is limited and, accordingly, settlement agreements cannot be made on the following matters: divorce suits, paternity suits and suits with regard to title deed registrations of immovable property.

they can be determined as an option instead of imprisonment. Article 52 of the Turkish Criminal Code No. 5237 stipulates that the judicial monetary fines are calculated through the multiplication of the determined number of full days with a determined amount of fine.

27 Decision of the Competition Board numbered 16-42/686-314 and dated 6 December 2016.

28 Decision of the Competition Board numbered 15-42/690-259 and dated 2 December 2015.

XIII ARBITRATION

Article 1(4) of the International Arbitration Act²⁹ provides that solely those disputes that are freely disposable by the parties shall be arbitrable. Turkish doctrine is unclear about the arbitrability of competition law disputes due to its mandatory nature and the Competition Authority's expertise on the issue. Accordingly, claims falling within the exclusive powers of the Competition Authority, such as implementation of administrative fines – in other words, public competition law enforcement – are not arbitrable, whereas claims having a civil nature, such as compensation claims, are deemed arbitrable.

Furthermore, with regard to the *ex officio* application of competition law by the arbitral tribunals, and due to the statutory character of competition law, the arbitral tribunal should assess whether the relevant contract has anticompetitive implications or repercussions. Upon such assessment, given that the case at hand requires the application of competition rules, the arbitral tribunal should address this issue as a preliminary question and await the decision of the Board in this regard (see Section X). After the Board decision is submitted as evidence, the tribunal will render its decision on the case, ensuring that the award is enforceable. Note that the arbitral tribunal's ruling does not affect the Competition Authority's power to initiate an investigation and to apply measures within the scope of its exclusive powers.

XIV INDEMNIFICATION AND CONTRIBUTION

Under the TCO, Article 61, the parties involved in a tort are jointly and severally liable for damage arising from such unlawful act. Moreover, the Competition Act, Article 57, accepts the joint and several liability of the competition law infringers, and provides that if the damage has resulted from the behaviour of more than one person, they are responsible for such damage, jointly. Accordingly, in such a case, an injured party may claim its total damages from one cartel member.

A cartel member who is held liable as a co-debtor may seek a contribution for the damage payments that exceeds its own share from the other co-debtors. As per the TCO, Article 62(2), the respective contribution of each cartel member shall be determined according to all of the facts and conditions, in particular, each cartel member's degree of fault and the damages that have occurred therein.

As provided by the TCO, Article 73(1), a contribution claim will be time-barred within two years of the date upon which the compensation is paid in full, and the paying party becomes aware of other jointly liable parties or, in any case, 10 years from the date upon which the compensation is paid in full. Pursuant to the TCO, Article 73(2), the party who is required to pay damages should inform other jointly liable parties of such order. If the relevant party fails to fulfil this obligation, the limitation period starts from the date when such notification could have been made in good faith.

XV FUTURE DEVELOPMENTS AND OUTLOOK

In Turkey, private claims for competition law infringements have not been made very frequently in recent years. On the other hand, this field is a fast-developing area and, in the near future, we expect a significant increase in private party damage claims. For instance,

29 International Arbitration Act No. 4686.

consumer associations are very interested in Board decisions that may affect consumers and, in line with this interest, consumers have started to bring compensation claims against defendants. One recent example for this trend is the compensation claims brought against 12 Turkish banks that had administrative fines imposed on them by the Competition Authority in 2013.³⁰

The Competition Authority issued a Draft Competition Act and Draft Regulation on Administrative Monetary Fines in 2013. The Draft Act was not enacted in the relevant legislative term of the Turkish parliament; therefore, the current status of the Draft Act became obsolete. However, the Competition Authority's 2016 Annual Report states that the Authority has requested the reinitiation of the legislative process of the Draft Act in the 26th legislative session to:

- a* make the Competition Act more explicit and comprehensible;
- b* increase legal certainty for enterprises;
- c* decrease bureaucracy; and
- d* implement provisions that are parallel to the provisions in the EU and developed countries.

The work on the Draft Competition Act is being carried out within the Prime Ministry.

30 Decision of the Competition Board numbered 13-13/198-100 and dated 8 March 2013.

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