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third Edition

Editor

Ilene Knable Gotts

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For further information please email
Adam.Sargent@lbresearch.com

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Editor
Ilene Knable Gotts

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PUBLISHER
Gideon Roberton

BUSINESS DEVELOPMENT MANAGER
Adam Sargent

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CONTENTS

Editor's Preface vii
Ilene Knable Gotts

Chapter 1 AUSTRALIA 1
Trish Henry, Domenic Gatto and Peta Stevenson

Chapter 2 BRAZIL 18
Bruno L Peixoto

Chapter 3 CHILE 31
Paulo Montt and Benjamín Mordoj

Chapter 4 ENGLAND & WALES 41
Peter Scott and Mark Simpson

Chapter 5 EUROPEAN UNION 66
Bernd Meyring

Chapter 6 FRANCE 84
Mélanie Thill-Tayara and Marta Giner Asins

Chapter 7 GERMANY 94
Michael Dietrich and Marco Hartmann-Rüppel

Chapter 8 HUNGARY 114
Alexander Birnstiel and Peter Stauber

Chapter 9 ISRAEL 125
Eytan Epstein, Tamar Dolev-Green and Shiran Shabtai

Chapter 10 ITALY 142
Cristoforo Osti and Alessandra Prastaro

Chapter 11 JAPAN 157
Kozo Kawai and Madoka Shimada

Chapter 12 KOREA 169
Sai Ree Yun, Kum Ju Son, Alexa Oh and Seung Hyuck Han

Chapter 13 LITHUANIA 178
Henrikas Celencevicius

Chapter 14 NORWAY 190
Thomas Nordby and Steinar Eskild Trovåg

Chapter 15 PORTUGAL 202
Joaquim Vieira Peres and Eduardo Maia Cadete

Chapter 16 ROMANIA 212
Silviu Stoica and Mihaela Ion

Chapter 17 SOUTH AFRICA 221
Jocelyn Katz and Lara Zetzer

Chapter 18 SPAIN 233
Alfonso Gutiérrez

Chapter 19 TURKEY 246
Esin Çamlıbel

Chapter 20 UNITED STATES 259
Ilene Knable Gotts, Joseph Simons and Aidan Synnott

Appendix 1 ABOUT THE AUTHORS 281

Appendix 2 CONTRIBUTING LAW FIRMS' CONTACT DETAILS 296

EDITOR'S PREFACE

Private antitrust litigation has been a key component of the antitrust regime for decades in the United States and reflects the societal views generally towards the objectives and roles of litigation. The United States 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. As a result, the process imposes high litigation costs (in time and money) on all participants and 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 has created 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 from the competition authorities. Although these initiatives may, on the margin, decrease the volume of private antitrust litigation in the United States, the environment remains ripe for high litigation activity in the near-term, particularly involving intellectual property rights and cartels.

Most of the other jurisdictions discussed in this book have each sought to initiate or increase the role of private antitrust litigation recently (in the past few years, for instance, in Brazil and Israel) as a complement to increased public antitrust enforcement. In April 2008, the European Commission published a White Paper suggesting a new private damages model for achieving compensation for consumers and businesses who are victims of antitrust violations, noting that 'at present, there are serious obstacles in most EU Member States that discourage consumers and businesses from claiming compensation in court in private antitrust damages actions […]. The model is based on compensation through single damages for the harm suffered'. The key recommendations include collective redress, in the form of representative actions by consumer groups and victims who choose to participate, as opposed to class actions of unidentified claimants; disclosure of relevant evidence in the possession of parties; and final infringement

decisions of Member States' competition authorities constituting sufficient proof of an infringement in subsequent actions for damages. Commissioner Kroes was unable to achieve adoption of the legislation on private enforcement before the end of her term. Commissioner Almunia plans to enter into a new round of consultations and is likely to combine the initiative with forthcoming legislation on consumer protection. Both proposals will likely contain some form of collective redress.

Even in the absence of the issuance of final EU guidelines, however, states throughout the European Union (and indeed in most of the world) have increased their private antitrust enforcement rights or are considering changes to legislation to provide further rights to those injured by antitrust law infringement. Indeed, private enforcement developments in many of these states have supplanted the EU's initiatives. The English and German courts are emerging as major venues for private enforcement actions. 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 are currently also contemplating collective action legislation. Some jurisdictions have not to date had any private damages awards in antitrust cases, but changes to their competition legislation could favourably affect the bringing of private antitrust litigation seeking damages (e.g., Lithuania or Romania).

Almost all jurisdictions 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.. In contrast, some jurisdictions, such as the UK, are prepared to allow claims in their jurisdictions where there is relatively limited connection, such as where only one of a large number of defendants is located. In South Africa, the courts will also consider 'spill-over effects' from antitrust cartel conduct as providing a sufficient jurisdictional basis. Jurisdictions also vary regarding how difficult they make it for a plaintiff to have standing to bring the case. Most jurisdictions impose a limitation period for bringing actions that commences only when the plaintiff knows of the wrongdoing and its actors; a few, however, apply shorter, more rigid time frames without a tolling period for the commencement of damages (e.g., Brazil or Canada with respect to Competition Act claims) or injunctive litigation. Some jurisdictions base the statute of limitations upon when a final determination of the competition authorities is rendered (e.g., Romania or South Africa) or from when the agency investigation commences (e.g., Hungary). In other jurisdictions (e.g., Australia or Chile), it is not as clear when the statutory period will be tolled.

The litigation system in each jurisdiction to some extent reflects the perceptions of what private rights should protect. Most of the jurisdictions view private antitrust rights as an extension of tort law (e.g., Canada, France, Hungary, Israel, Japan, Korea, Norway, the Netherlands or the UK), with liability arising for actors who negligently or knowingly engage in conduct that injures another party. Some jurisdictions treat antitrust concerns as a defence for breaching a contract (e.g., Norway or the Netherlands), others (e.g., Australia) value the deterrent aspect of private actions to augment public enforcement, while 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 permit the enforcement officials to participate in the case (e.g., in Germany the President of

the Federal Cartel Office may act as *amicus curiae*). A few jurisdictions believe that private litigation should only be available to victims of conduct that the antitrust authorities have already penalised (e.g., Spain, until legislation loosened this requirement somewhat). Interestingly, no other jurisdiction has chosen to replicate the United States system of treble damages for competition claims, taking 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), neither does any other jurisdiction permit the broad-ranging and court-sanctioned scope of discovery permitted in the United States. Only Australia seems to be 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. Finally, in almost all jurisdictions, the prevailing party has some or all of its costs compensated by the losing party, discouraging frivolous litigation.

Varying cultural views also clearly affect litigation models. Jurisdictions such as Germany or 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 Japan, class actions are not available except to organisations formed to represent consumer members. Jurisdictions that are receptive to arbitration and mediation as an alternative to litigation (e.g., Germany, Hungary, Korea, the Netherlands or Spain), also encourage alternative dispute mechanisms in private antitrust matters. Some courts prefer the use of experts and statements to discovery (e.g., 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 '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, limited recognition of privilege in Germany; 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 to the Portuguese Competition Authority. Some jurisdictions view settlement as a private matter (e.g., France, Japan or the Netherlands); others view it as subject to judicial intervention (e.g., Israel or Switzerland). The culture in some places, 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 pre-trial settlement conference is mandatory.

Private antitrust litigation is largely a work in progress in most parts of the world, with the paint still drying even in the United States several decades after private enforcement began. Many of the issues raised in this book, such as pass-on defence and the standing of indirect purchasers, are 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 proposed legislative changes. The one constant cutting across all jurisdictions is the upwards 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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Chapter 19

TURKEY

*Esin Çamlıbel**

I OVERVIEW OF RECENT PRIVATE ANTITRUST LITIGATION ACTIVITY

Under the Act on the Protection of Competition, No. 4054 ('the Competition Act'),[1] competition rules are enforced primarily by the Turkish Competition Authority ('the TCA'). In addition to public enforcement through the TCA, the Competition Act authorises the civil courts to enforce the competition rules in order to nullify anti-competitive acts and to determine compensation claims. However, Turkish experience suggests that implementation of competition rules by the civil courts needs to be further encouraged.

Several cases have been filed directly before the civil courts claiming compensation due to infringements of competition. However, all compensation claims arising from the infringement of competition have so far been rejected by the courts. In other words, there seems to be little chance of success for persons suffering as the result of anti-competitive acts.

In the first decision of the Supreme Court,[2] it was held that '[…] for the purposes of deciding on compensation, first the Competition Board[3] must determine the existence of an abuse of dominant position. Considering this requirement, the court reached the conclusion that the decision of the trial court had not been appropriate as it failed to seek whether or not the claimant had applied to the TCA; and if no application

* Esin Çamlıbel is of-counsel at Turunç.

1 Official Gazette dated 13 December 1994, No. 22140; however, implementation of the Competition Act commenced three years later in 1997 after the Competition Board was constituted.

2 Supreme Court 19th Civil Chamber, 1 November 1999, No. 1999/3350 E, 1999/6364 K.

3 The decision-making body of the TCA.

was made, the court should suspend the case until an application is made to the TCA and it renders its decision as a preliminary issue'.

In the second case,[4] the trial court decided on compensation in the amount of the damages the claimant incurred as a result of the anti-competitive acts of the defendant that were contrary to Articles 4 and 6 of the Competition Act. However, on appeal, the Supreme Court did not ratify the decision of the trial court. Referring to its first decision, the Supreme Court held that the civil court should have suspended its decision on the compensation claim until a final decision was given by the Competition Board in order to avoid any conflicting decisions.

In its third decision, dated 3 January 2003, the Supreme Court maintained its position, adding that if the TCA completed its investigation and made a ruling, the trial court should dismiss the case instead of waiting for the decision from the Council of State, the highest administrative court.

The remaining decisions by the civil courts have not been directly related to competition infringements, but have been related to compensation claims due to unfair termination of vertical agreements or failure of non-compete clauses in the agreements. The Supreme Court encourages the trial courts to consider the competition rules and to try and raise the awareness of judges regarding the implementation of competition legislation.

II GENERAL INTRODUCTION TO THE LEGISLATIVE FRAMEWORK FOR PRIVATE ANTITRUST ENFORCEMENT

The Competition Act was enacted in 1994 based on Article 167/I of the Turkish Constitution, which describes the prevention of monopolisation and cartelisation. The Competition Act has been amended several times, most recently on July 2005.[5] In compliance with the requirements of Decision 1/1995,[6] which established the Customs Union between Turkey and the EU, the Act is influenced by EU competition rules. As a result, Turkey's competition law is aligned with the principles of Articles 101 and 102 of the Treaty on Functioning of the European Union ('the TFEU') (formerly Articles 81 and 82 of the EC Treaty) and the EU Merger Regulation.[7] The scope of the Competition Law is outlined in Article 2, pursuant to which it applies to agreements, decisions or practices of undertakings, either operating in Turkey or having effects on Turkish markets for goods and services, which aim to prevent, distort or restrict competition or result in the same. The Competition Law prohibits three kinds of practices that are presumed to distort competition:

a agreements, decisions and concerted practices that prevent, distort or restrict competition in goods and services markets (Article 4);

4 Supreme Court, 19th Civil Chamber, 29 November 2002, No. 2002/2827 E, 2002/7580 K.

5 Amendment on 2 July 2005, Law No. 5388.

6 Decision No. 1/95 of the EC–Turkey Association Council of Implementing the final phase of the Customs Union (22 December 1995).

7 Council Regulation (EC) No. 139/2004 of 20 January 2004 on the control of concentrations between undertakings.

b the abuse, by one or more undertakings, of a dominant position in a market for goods or services within the whole or a part of the country on its own or through agreements with others or through concerted practices (Article 6); and

c merger by one or more undertakings, or acquisition by any undertaking or person from another undertaking of its assets or all or a part of its partnership shares, or of means that confer thereon the power to hold a managerial right, with a view to creating a dominant position or strengthening a dominant position that would result in significant lessening of competition in a market for goods or services within the whole or a part of the country (Article 7).

The TCA is the competent governmental body enforcing the Competition Act. The Competition Board is made up of seven members, and is able to impose the administrative fines set out in the Competition Act on undertakings, associations of undertakings and their managers and employers who restrict or eliminate competition in a relevant market.[8] However, Section 5 of the Competition Act also includes other provisions for private law consequences of limiting competition. Any agreements or decisions by associations of undertakings that restrict or prevent competition are invalid, and the parties to an invalid agreement or decision may not request the performance of acts arising out of such (Article 56). The right to compensation is granted to injured persons as a result of restrictive agreements, practices and decisions (Article 57 and 58). Lastly, Article 59 of the Competition Act includes a provision concerning burden of proof.

i Invalidity of agreements, decisions, abusive practices, and mergers and acquisitions

In accordance with Article 56, any agreements or decisions of associations of undertakings contrary to Article 4 of the Competition Act are invalid. Such article does not refer to concerted practices; this is a conscious choice by the legislator, as according to Articles 101 and 102 of the TFEU,[9] only legal transactions (i.e., agreements or decisions) are subject to invalidation, not actions.[10] Such article has been criticised by commentators due to lack of any reference to Article 6 relating to abuse of dominant position.[11] However, it should be taken into account that in a case of abuse of a dominant

8 The decisions of the Competition Board are accepted a quasi-judicial decisions and subject to appeal before the State Council.

9 According to Article 101 and 102, '[a]ny agreements or decisions prohibited pursuant to this article shall be automatically void'.

10 Sanlı, 'Prohibitive Prohibitions in the Act on Protection of Competition and Invalidity of Agreements and Decisions of Associations of Undertakings', Ankara (2000), p397; Akıncı, 'Horizontal Restrictions of Competition', Ankara (2001), p329; Topçuoğlu, 'Anti-competitive Collaboration Agreements Between Undertakings and Legal Consequences', Ankara (2001), p287; Aksoy, 'Consequences of Violation of the Act on Protection of Competition in Private Law', Ankara (2004), pp28-31; Sayhan, 'Illegality Under the Competition Law for the Provisions regarding Protection of Competition Order', *Competition Journal*, No.17, 2004, pp28-29.

11 İnan, '4054 Sayılı Rekabetin Korunması Hakkında Kanun'un Özel Hukuka İlişkin Hükümlerine Eleştirisel Bir Bakış', Rekabet Hukukunda Güncel Gelişmeler Sempozyumu II, 9 April 2004, Kayseri, p45.

position, invaliding a contract or agreement may cause harm to the other party to the legal transaction, who may not be involved in the unfair conduct. Therefore, some commentators have suggested that legal transactions that abuse a dominant position, such as tie-ins or excessive pricing, should be subject to special conditions different to those applying to restrictive agreements or decisions under Article 4.[12]

Although there is no reference in the provisions of the Competition Act to the invalidation of legal transactions that are within the scope of Article 6, in principle, agreements that contravene the mandatory provisions of any legislation are invalid and not binding under Articles 19 and 20 of the Turkish Code of Obligations ('CO').[13] The Competition Act does not include any wording specifying that invalidity relates only to the anti-competitive provisions in the agreement rather than the agreement in the whole. In accordance with the general principles of the CO, the court may sever the anti-competitive clauses and leave the remainder of the agreement enforceable, provided that the parties to such agreement are objectively expected to enforce the remainder of the agreement.

The Competition Act provides for suspension of implementation of a concentration that exceeds the market share and turnover thresholds until clearance is received by the Competition Board. A notifiable merger or acquisition is not legally valid unless and until the approval of the Competition Board is obtained.

ii Unjust enrichment

There is no doubt that the parties to an unenforceable agreement need not fulfil their obligations in an agreement. However, if an obligation emerging from an unenforceable agreement was fulfilled, a request can be made for the compensation due to the invalidity of acts fulfilled (Competition Act, Article 56). Accordingly, the reciprocal obligation of the parties is based on Articles 63 and 64 of the CO regarding unjust enrichment.

iii Damages

Under the Competition Act, anyone who prevents, distorts or restricts competition by way of practices, decisions, contracts or agreements, or abuses its dominant position in a particular market for goods or services, is obliged to compensate the injured parties for any material or moral damages (Article 57). Although Article 57 states that any type of damages may be compensated, there is disagreement over whether the damages of a party indirectly injured but connected to the directly injured person suffered due to competition infringement are covered by this article.[14]

Provisions for liability under the CO do not allow excessive claims. In this context, and parallel to the decisions of the Supreme Court, only the party that is injured directly due to tortious act (i.e., competition infringement) may claim compensation.

12 Sanlı, 'Assessment of Amendments in the field of Private Law suggested by the Draft Act concerning the Act of Protection of Competition', *Competition Journal*, vol 30, pp14-16.

13 İnan, p45; Aksoy, p48.

14 Topçuoğlu, p303; Eğerci, 'Legal Nature of the Competition Board Decision and Judicial Supervision', Competition Authority, Series of Graduate Theses, No. 12, p275; Aslan, p792.

The Competition Act is silent on the conditions of the liability for damages. Such silence in the Competition Act is filled by the provisions of the CO regarding liability arising out of tort. Accordingly, the following conditions are required to claim compensation for damages arising from a violation of the competition rules.

a existence of an illegal action;
b the existence of fault;
c existence of injury, and damages arising out of the violation; and
d existence of the casual link between the unlawful action and the damage.

III EXTRATERRITORIALITY

Article 2 of the Competition Act details the applicability of the competition rules to all restraints of competition having an effect within Turkey, regardless of whether the offending undertaking is located in Turkey or abroad. Based on the wording of the said article, it can be suggested that the 'effects doctrine' is accepted under the Competition Act.

Despite the fact that Turkey has entered into free trade agreements with a number of countries, as well as into a customs union with the EU – which includes competition-related provisions[15] for a wider application of the competition rules based on the effects doctrine – extraterritorial application is rather limited.[16]

IV STANDING

Any natural or legal person who suffers a loss as a result of an infringement of competition may claim compensation from an undertaking that prevents, distorts or restricts competition by way of an anti-competitive act. As previously noted, the Competition Act does not specifiy whether claims for damages may be filed by persons that are either directly or indirectly affected.

It is suggested that the parties having the right to file claims for compensation must be determined by taking into consideration the protective scope of the competition

15 Furthermore, Turkey has signed two memorandums of understanding with the Republic of Korea's Fair Trading Commission and the Romanian Competition Council on soft cooperation.

16 See Turkish Competition Board decision dated 25 July 2006 File No. 2003-1-85, No. 06-55/712/202; the undertakings under the investigation were subject to the Act on the Protection of Competition, the head offices of some of these undertakings were situated in EU countries. The TCA requested cooperation from the relevant authorities based on the competition rules of Decision 1/95 (Custom Union). No cooperation was achieved. The objection raised to the request were the lack of implementation rules for competition rules of Decision 1/95, concerns on confidentiality issues and insufficiency of Article 43 for providing the required framework for cooperation.

rules.[17] Accordingly, in compliance with general principles of tortious liability, a natural or legal person that proves a causal link between nature of its damages and the scope of the provision that is violated has the right to claim. However, it is not easy to provide a conclusive answer with regard to the protective scope of the competition rules since the extent and scope has not been tested by the courts. Many commentators argue that Article 57 of the Competition Act allows rival undertakings, undertakings within the same distribution chain[18] and consumers to sue.[19] However, some consider that although, in theory, the legislation allows consumers to claim for damages, in practice, it is unlikely that they would be able to make any such claims. It is expected that the courts will interpret the extent of persons entitled to claim damages based on the general principles of the CO regarding tortious liability. Accordingly, many commentators are of the opinion that indirect injury will not fall within the scope of the competition rules.

Furthermore, it should be emphasised that the parties to an illegal horizontal agreement cannot bring an action in tort or in restitution for compensation for any damages suffered. However, the Turkish courts have accepted actions brought by contractors against co-contractors for damages.[20]

V THE PROCESS OF DISCOVERY

Under the Turkish Civil Procedure Law ('CPL'), the parties to a proceeding submit documents, written responses and information, including testimony from opposing and third parties, required to prove their allegations. In principle, a case must be prepared by the parties; the judge cannot collect the evidences by his or her own initiative. There is no process that allows the court to discover the facts before the trial.

i Submission and gathering of the documents and information

Pursuant to Article 75 of the CPL, apart from the exceptions, a judge is not allowed to take into consideration anything or any grounds on which the allegation is based that is not submitted to the court by one of the parties; nor can the judge prompt the parties to submit their allegations. The judge, however, is entitled to ask for clarification or explanation regarding matters that seem ambiguous. Furthermore, at any stage of the litigation, the judge may order the submission of evidence required to evaluate the case, providing that such evidence is within the scope of and related to the allegations or defence of the parties (CPL, Article 75/III). In addition to letters, emails or other communications received from the other party related to the case, documents created for

17 Referring the rule on the protectional intent of the norm, Sanlı (2003), p203; see, for details of the concept, Atamer, 'Restriction of Liability Arising From Tort' Istanbul (1996).

18 It is acceptable if the loss and damage is incurred by the distributor. Sanlı is the opinion of that in the case of price fixing many times there is no damage for distributors; Sanlı (2003), p237.

19 Akıncı, 356; Gürzumar (2006), p161; Kortunay, p125; Aksoy, p.47; Sayhan is the opinion of that consumer loss cannot be compensated as consequential loss (p61, footnote 67).

20 Supreme Court, 19th Civil Chamber, 1 January 1999 No. 1999/3350-6364; Supreme Court, 19th Civil Chamber, 29 November 2002, No. 2002/2827-7580.

common transactions and the interests of both parties are also required to be produced before the court (CPL, Article 326/2 and 3).

In the event that any document ordered to be provided to the court is not in possession of the party bearing the burden of proof, the court may order the defendant (opponent) or third party to submit the documents (CPL, Article 242/II, 333). Pursuant to Article 332 of the CPL, if the party requested to provide such documents to the court fails to do so within the period allowed by the court, the court may accept the statement of the opposing party regarding the content of the document.

ii The right to refuse submission of documents

In accordance with Article 38/5 of the Constitution, no one can be forced to make a statement or providing evidence incriminating him or herself or certain relatives specified by law. The obligation imposed on merchants to provide their commercial books and records to the court upon the order of the judge is, however, an exception to such Constitutional right (TCC, Article 80 and CPL, Article 327). If a party refuses to provide its books and records as required by a court order, the allegations made by the requesting party may be considered proven.

iii Burden of proof

The claimant bears the burden of proof in compliance with the general principle in Article 6 of the Civil Law. Accordingly, the claimant must prove the existence of the conditions for tortious liability, otherwise, the case is rejected. The existence of agreements, decisions and practices limiting competition may be proved by any kind of evidence (Competition Act, Article 59/II). However, the judge is required to review whether the transaction or the act that is alleged to be anti-competitive falls under any exemptions under Article 5 of the Competition Act. The claimant has to prove not only its loss or damages, but also that its loss and damage is compensable. The claimant may use balance sheets from previous years to indicate any decrease in its sales or profit, although the court does not expect the claimant to prove the exact amount of its loss or damages. The actual amount of loss or damages of the claimant will be determined by the judge at his or her own discretion, according to Article 42 of the CO.

Article 59 of the Competition Act provides a reversal of the burden of proof in the case of a concerted practice, parallel to Article 4 of the Competition Act. Accordingly, the claimant may submit evidence to the court, such as the actual partitioning of markets, long periods of price stability observed in the market and price increases in quick succession by the undertakings operating in the market, that gives the impression of the existence of an agreement or a distortion of competition in the market. Here, the defendants must prove that they are not engaged in concerted practice.

VI USE OF EXPERTS

Specialist knowledge is often required in order to reach a conclusion as to whether damages have been incurred as a result of a breach of the competition rules. The CPL allows judges to assign experts to cases requiring such specific or technical knowledge to resolve disputes (Article 275). The judge may consult with the parties to select the expert,

but if the parties cannot agree on the selection of the experts, the judge may select and appoint them;[21] however, if either party has concerns regarding the independence and impartiality of the experts appointed, it may object against their appointment (CPL, Article 277). The experts usually provide their opinion to the court in the form of a written report within the period granted by the judge.[22] Pursuant to Article 279, the judge may invite the experts to the hearing to be examined regarding any required clarification or questionable issues contained in the report.

In addition to any experts assigned by the court, the parties themselves may submit opinions rendered by experts selected by themselves. However, such opinions shall not be deemed as 'evidence', but may support the allegations of the relevant party.

As previously mentioned, the experience of courts in Turkey on the private enforcement of competition rules has been quite limited. Based on the consistent decisions of the Supreme Court in its three cases, one may conclude that the courts are not entitled to determine whether or not the infringement has indeed occurred, as the Supreme Court is of the opinion that a case should not proceed without first obtaining a decision from the TCA on the competition infringement. In view of the foregoing, there appears in practice to be no point in referring the issue to an expert, as the TCA is considered the main 'expert' by the Supreme Court.

VII CLASS ACTIONS

Class actions are not available under Turkish law. There are, however, two options for collective actions. Article 58/III of Turkish Commercial Code allows professional and economic associations to protect their members' rights and interests. The right of such associations to claim is limited only to seeking action to prevent anti-competitive practices or for avoiding the consequences of an infringement; they are not entitled to file lawsuits as representatives of their members to claim compensation for damages.

According to Article 43 of the Turkish Civil Procedure Law, when rights and liabilities for an action are common or the same for more than one person, or they are based on the same facts or laws, such persons may sue as co-litigants. Accordingly, if various persons are affected by the same anti-competitive practice, they may sue jointly for their damages.[23] In a joint action, as co-litigants, each party may individually represent itself, or may also be represented jointly by the same legal representatives, provided that they have common interest and common strategy during the proceedings. However, under Turkish law such joint action is quite different to a class action. As each co-litigant is, in principle, deemed an independent litigant, the result of the litigation may not be the same for each co-litigant. The litigation costs for a joint action is not cost-effective: each co-litigant must pay its costs seperatly fom the other co-litigants, as if it has filed an independent case.

21 Article 276/III of CPL restricts the number of the experts to three.

22 Under Article 281/II, the period of time granted to provide an expert report can not exceed three months.

23 This kind of joint action has been used for a relatively small number of parties in Turkey such as joining of debtor and guarantor disputes between inheritors.

VIII CALCULATING DAMAGES

Pursuant to Article 58 of the Competition Act, there is a distinction between the scope of the right to compensation of purchasers and competitors.

Article 58/I empowers purchasers to recover only their actual losses. Accordingly, persons who suffer damages as a result of the prevention, distortion or restriction of competition may claim the difference between the actual cost they incurred and the cost they would have paid had competition not been limited.

Article 58/I(2) grants the right to compensation to competing undertakings and competitors affected by the limitation of competition. They may claim for all their damages from the undertakings that limited competition,[24] which includes recovery of both their actual loss and loss of profit. In determining damages, all profits expected to be gained by the injured undertakings are calculated, also taking into account the balance sheets of the previous years (Article 58/1(3)).

Article 58/II allows the injured person to claim treble damages.[25] According to such article, if the damage occurs as a result of a restrictive and unlawful agreement or decision of undertakings,[26] or the cases involve gross negligence by the undertakings, the judge is empowered to award triple compensation:

a of the material damage incurred; or

b of the profits gained; or

c of the profits likely to be gained by those who caused the damage.

Needless to say, the judge may award treble damages provided that one of these options is requested by the injured person. However, the judge may reject the claim for treble damages and at his or her discretion, decide on an appropriate amount of compensation taking into account the principles in Article 42 of the CO such as degree of fault, the amount of the loss and damages, the financial situation of the parties and any contributory negligence of the claimant.

Triple compensation goes beyond the basic principle of the law of liability, which aims to compensate the injured for any damages incurred. Under the general principles of tortious liability and the approach of the Supreme Court, the amount of compensation in actions for damages should not exceed the damage suffered and must not cause unjust enrichment. Treble compensation is regarded more as a punitive sanction rather than compensation.

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24 This provision has been criticised since it refers only 'competitors', even though there is also a possibility that undertakings with no competitive relationship with the undertaking limiting competition may also have suffered due to the unlawful restrictive practices. See İnan, p50.

25 The right to claim treble damages under the Competition Act occurs only in exceptional circumstances.

26 In the literature, it is suggested that 'agreement or decision of the undertakings' means agreements and decisions that are deliberately entered into to restrict or to prevent the competition by the undertakings or associations of undertakings. İnan, p52; Sanlı (2003), p270; Kortunay, p124.

IX PASS-ON DEFENCES

Under Turkish law, there are no specific provisions regarding whether or not a pass-on defence is permissible. According to the general principles on the recovery of damages in Turkish law, it may be suggested that the defendants and parties to an anti-competitive act may argue for the reduction of the claimant's damages that were passed on to third parties through resale of the goods or any other business transaction; otherwise, compensation of the exact damages incurred would cause unjust enrichment to the injured party. The party alleging that the damage has been passed on bears the burden of proof, in compliance with Article 6 of the Civil Law.

X FOLLOW-UP LITIGATION

Articles 56 to 59 of the Competition Act set out the civil aspects of anti-competitive acts and practices. The Competition Act does not grant any priority regarding administrative measures or civil actions. In principle, quasi-judicial actions implemented and administrative sanctions imposed by the TCA and private enforcement by the courts are different paths to be followed. Accordingly, regarding the compensation of claims and invalidation of anti-competitive agreements and decisions, the courts are entitled to enforce the provisions of the Competition Act. The administrative decisions of the Competition Board do not have binding effect on the courts, but constitute *prima facie* evidence in any legal proceedings before them.

However, the Supreme Court has decided that the Competition Board's decision is a pre-condition for the courts to begin trial in compensation claims arising from anti-competitive acts. According to the decisions of the Supreme Court, the claimant must first apply to the TCA by notifying any anti-competitive agreements, decision and practices. Under the decision of the Supreme Court, the trial court will have no option other than to follow up actions following Competition Board decisions. This approach of the Supreme Court has been sharply criticised by many commentators due to its lack of legal grounds. Furthermore, the Supreme Court's decision is contrary to Article 36 of the Constitution, which secures the right of action.

There is no doubt that if there has been a final decision of the Competition Board, regarding whether or not a competition infringement has occurred, obtained before the compensation claim is filed, it will be of relevance to the court. However, as long as no final judgment has been given by the Council of State on appeal of the Competition Board's decision under the Turkish legal system, the decision taken by the Competition Board does not have a binding effect on the matters before the courts. Moreover, a civil court need not suspend any action filed for compensation arising out of a crime until a criminal court decides on the criminal aspects. A final judgment taken by the criminal court regarding the matters before the civil court is binding on the civil court (CO, Article 53).

It should be emphasised that even though the judge must follow the Competition Board's decisions regarding whether or not a competition infringement exists, the judge is entitled to consider existence of other conditions required for compensation such as fault, damage and causation.

There are concerns as to the ability of the courts, which are not specialised enough to deal with aspects of competition. Many commentators who criticised the Supreme Court's approach are also of the opinion that colloboration and close cooperation between the TCA and courts is required and could be very useful in resolving some potential problems. According to the Turkish civil procedure, until a final decision of the Competition Board is given, the judge may regard the Board's final decision as a preliminary issue and suspend the case. However, if there is no other application to or any investigation made by the TCA on the matter before the court, contrary to the Supreme Court's decisions, the judge may proceed with the case under Turkish civil law.

XI PRIVILEGE

Under the Competition Act, the TCA may access any document regarding a competition investigation unless the document is not within the scope of the lawyer–client privilege clearly mentioned in Article 36 of the Attorneyship Law[27] and Article 130 of the Criminal Procedure Code. Furthermore, Article 16 of the Regulation on Attorneyship Law ('the Regulation')[28] sets out that any points made during the settlement negotiations regarding a dispute cannot be disclosed by the lawyers of the parties; accordingly the contents of the settlement negotiations benefit from the lawyer–client privilege.

Article 130 of the Turkish Criminal Procedure Code also states that if a document found during a search-warranted investigation at an lawyer's office is claimed as classified information within the scope of the lawyer–client privilege, it must be legally sealed and taken to a civil court judge who will decide whether this is the case. If it is decided that the document falls within such scope, it shall be returned to the attorney.

XII SETTLEMENT PROCEDURES

The parties to a dispute may at any time reach a settlement agreement before the court or out of the court. In Turkish law, there is no a special settlement procedure to be followed, and parties may settle the dispute at any stage of the litigation. If a settlement agreement is reached before the court, it has the same effect as the court's final decision, provided that it is signed by the parties and approved by the court. This settlement ends the litigation procedure without a court decision.

An out-of-court settlement between parties does not have the effect of a judicial ruling and as a result of this it cannot be executed without a court order, for which the parties to the settlement must apply to the court.

In accordance with Article 35/A of the Attorneyship Law,[29] lawyers may direct the negotiations for settlement in actions and cases entrusted to them provided that such settlement pertains exclusively to matters that the parties decide of their own free will. The offer of settlement by the lawyer and client may be lodged before a suit has

27 Attorneyship Law, No.1136 dated 19 March 1969, Official Gazette, 7 April 1969-13168.

28 Official Gazette, 19 June 2002, No. 24790.

29 This article was added to the Attorneyship Law on 2 May 2001, No. 4667, Article 23.

been filed or before hearings have commenced for a suit already filed. During settlement negotiations, the lawyers will brief the parties on their respective status, offer solutions, and encourage the parties to come to an agreement. Lawyers are required to act in an unbiased manner towards the parties and to reconcile them without allowing themselves to be influenced by either party.

The lawyer proposing settlement will communicate the time and place for the settlement negotiations to the opposite party. These will be conducted with the exclusive participation of the parties and their lawyers unless otherwise agreed.

The statements and acknowledgements made by the parties or their lawyers in the course of the settlement negotiations will not remain valid in the event of failure to reach settlement, and may not be used as evidence against either party in lawsuits already under litigation or to be filed in the future.

According to Article 17 of the Regulation, upon an agreement being reached as a result of the settlement negotiations, the issue under settlement and the details of the agreement should be recorded in a document, to be prepared in duplicate and signed by the parties to the dispute and their lawyers. The original document must be kept by the lawyers who prepared it and copies given to the parties. This document has the same effect as a final court order[30] and is executed without the need for any court order.

XIII ARBITRATION

The Competition Act does not contain any provision regarding whether the private enforcement of competition rules may be subject to alternative dispute resolution.

Under Turkish law,[31] disputes regarding property located in Turkey and disputes that fall outsise the boundaries of the principle of freedom to contract cannot be subject to arbitration.[32] Provided that the parties conclude a written arbitration agreement, they may choose to bring their disputes before arbitrators in matters that are not subject to public policy.

Taking into account that competition rules cover issues relating to both public and private law, it could be argued that compensation claims related to private enforcement of sanctions for competition infringements may be pursued before arbitrators within the scope of the general principles of the International Private Procedural Law. As such, the injured party may claim damages arising from competition infringements; it is also possible one can allege that an agreement or practice breaches the competition rules during an arbitration process initiated for other reasons.

30 Within the meaning of Article 38 of Execution and Bankruptcy Law No.2004, Official Gazette 19 June 1932, No. 2128.

31 International Arbitration Law No. 4686, Official Gazette 5 July 2001, No. 24453; The Act on International Private Law and Procedure Law No. 5718, Official Gazette 12 December 2007, No. 26728.

32 For instance, a dispute on cancellation of a trademark from the Trademark Office cannot be the subject of an arbitration procedure.

In theory, although compensation claims under the private enforcement of competition law may be resolved through arbitration, this has not yet been tested in practice.

XIV INDEMNIFICATION AND CONTRIBUTION

According to Article 57(2) of the Competition Act, where several persons have jointly caused damage, they shall be jointly and severally liable for damage to the injured party.

Under joint and several liability, the injured person may recover all its damages from any of the defendants regardless of their individual share of the liability. The other parties are also released from the liability to the extent that any jointly and severally liable defendant satisfies the injured party in terms of payment.

The defandant that has paid the total award has the right to recoup its loss from its co-defendants. Each defendant's contribution to the award will be determined according to the degree of fault. However, if the injured party brings an action against only one of the infringors, an award upheld by the court shall be binding on such defendant. In this case, the person who has paid the award may need to file a seperate lawsuit against the co-defendants.

The claim for damages is barred by a statute of limitations one year from the date when the damaged party knew of the damage and of the identity of the person liable, but no later than 10 years after the date when the act causing the damage took place (CO, Article 60).

XV FUTURE DEVELOPMENTS AND OUTLOOK

Turkey made further progress in its harmonisation of its competition law with EU law and administrative implementation of competition rules. As part of the ongoing effort to align Turkish competition law more closely with EU law, the Competition Board published two Regulations on 15 February 2009. The Regulation on Fines to Apply in Cases of Agreements, Concerted Practices and Decisions Limiting Competition, and Abuse of Dominant Position, and the Regulation on Active Cooperation for Detecting Cartels are designed to guarantee transparent procedures and concrete principles regarding the assessment of fines and immunity. Furthermore, the TCA has now acquired sufficient experience to enforce the competiton rules in such a way as to create a more competitive Turkish market; in this context, it has tried to raise awareness on competition policy and competition law. However, although progress has been made in the public enforcement of the competition rules, private enforcement has not developed in quite the same way. The rigid approach of the Supreme Court to the authorisation of trials dealing with compensation claims arising from anti-competitive acts has not encouraged injured parties to bring actions for infringement of competition. It is hoped that the training of judges in the fields of competition law and policy may help raise awareness and implementation of competition rules in the field of private law.

ESIN ÇAMLIBEL

Turunç

Esin Çamlıbel is an assistant professor at Dokuz Eylül University and head of the commercial law branch of the business administration department in the faculty of economics and administrative sciences, and deputy head of the graduate department of EU studies. She received a PhD in private law in 2000. Her thesis was on parallel import and trademark issues. Her research has focused on competition law, intellectual property law (particularly trademarks), regional trade agreements and WTO law. She has taught commercial law, competition law and policy in EU and international trade law. She is currently of-counsel to the law firm Turunç.

Dr Çamlıbel deals with all aspects of competition law and practice, including drafting contracts in compliance with competition law, drafting pleadings in the event of an investigation, making pre-merger and pre-acquisition notifications, starting, proceeding and finalising all transactions, preparing and submitting applications to the Competition Board for individual exemption and negative clearances, preventive advice, training employees and representing clients before the Competition Board at hearings. She has published books and articles, and contributed to international publications on M&A and vertical agreements as co-author with Noyan Turunç.

TURUNÇ
Cumhuriyet Bulvarı 140/1
Alsancak 35210 İzmir
Turkey
Tel: +90 232 463 49 07
Fax: +90 232 463 49 09
info@turunc.av.tr
www.turunc.av.tr