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Chapter 23

TURKEY

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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, experience suggests that further implementation of competition rules by Turkey's civil courts is desirable.

The Supreme Court encourages trial courts to consider the competition rules and tries to raise the awareness of judges regarding the implementation of competition legislation. In fact, since the enactment of the Competition Act, several cases have been filed directly by private parties before the civil courts claiming compensation due to alleged infringements of competition. However, all private 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 alleging damages as the result of anti-competitive acts of other persons.

In the first such 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 decided that if no

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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.

application was made to the TCA, the court should 'suspend the case until an application is made to the TCA and render 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 such decision,[5] 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 alleged breaches of non-compete clauses in agreements.

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, relating to the prevention of monopolisation and cartelisation. The Competition Act has been amended several times, most recently in July 2005.[6] In compliance with the requirements of Decision 1/1995,[7] which established the Customs Union between Turkey and the EU, the Act is influenced by EU competition rules. As a result, Turkey's competition laws are aligned with the principles of Articles 101 and 102 of the Treaty on the Functioning of the European Union ('the TFEU')[8] and the EU Merger Regulation.[9] The scope of the Competition Act is outlined in Article 2, pursuant to which it applies to agreements, decisions and practices of undertakings, either operating in Turkey or having effects on Turkish markets for goods and services and which aim to prevent, distort or restrict competition or result in the same. The Competition Act 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 Supreme Court, 19th Civil Chamber, 3 January 2003, No. 2002/2827 E, 2002/7580 K.

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

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

8 Formerly Articles 81 and 82 of the EC Treaty.

9 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 towards 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 of the TCA 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.[10] 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). Furthermore, the right of 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 of the Competition Act, any agreements or decisions of associations of undertakings contrary to Article 4 of the Competition Act are invalid. Article 56 does not refer to concerted practices; this is a conscious choice by the legislator, as according to Articles 101 and 102 of the TFEU,[11] only legal transactions (i.e., agreements or decisions) are subject to invalidation, not actions.[12] Article 56 has been criticised by commentators due to lack of any reference to Article 6 relating to the abuse of a dominant position.[13] However, it should be taken into account that in the case

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

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

12 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.

13 İnan, 'A Critical Look at Provisions regarding Civil Law of the Act on the Protection of Competition No. 4054', Symposium on Current Developments in Competition Law II, 9 April 2004, Kayseri, p45.

of abuse of a dominant position, invaliding a contract or agreement may cause harm to the other party to the legal transaction, who may not be involved in the anti-competitive 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 from those applying to restrictive agreements or decisions under Article 4.[14]

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 ('the CO').[15] 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 the suspension of the implementation of a concentration that exceeds certain specified 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 contained in that agreement. However, if an obligation emerging from an unenforceable agreement was fulfilled, a request can be made by affected parties for compensation due to the invalidity of acts fulfilled (Competition Act, Article 56). Such 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 a competition infringement are covered by this Article.[16]

14 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.

15 İnan, p45; Aksoy, p48.

16 Topçuoğlu, p303; Eğerci, 'Legal Nature of the Competition Board Decision and Judicial Supervision', Competition Authority, Series of Graduate Theses, No. 12, p275; Aslan, *Competition Law*, 3rd ed., Bursa 2005, p792.

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

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 existence of fault;
c existence of injury, and damages arising out of the violation; and
d existence of a causal 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. Having said that, and 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[17] for a wider application of the competition rules based on the effects doctrine – extraterritorial application of the Competition Act is rather limited.[18]

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 specify whether claims for damages may be filed by persons that are either directly or indirectly affected.

17 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.

18 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 objections 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 of Decision 1/95 for providing the required framework for cooperation.

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 rules.[19] Accordingly, in compliance with general principles of tortious liability, a natural or legal person that proves a causal link between the nature of its damages and the scope of the provision that is violated has the right to a claim. However, it is not easy to provide a conclusive answer with regard to the protective scope of the competition rules since their extent and scope have 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[20] and consumers to sue.[21] 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, Turkish courts have accepted decisions brought by contractors against co-contractors for damages.[22]

V THE PROCESS OF DISCOVERY

Under the Turkish Civil Procedure Law ('the 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 evidence 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 certain 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

19 Referring to 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).

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

21 Gürzumar, 'From a Private Law Perspective the Act on Protection of Competition No. 4054 and the Draft for the Amendment of this Act' (Symposium Papers), Bank and Commercial Law Research Institute, Ankara 2006, p161; Kortunay, Reforms in EU Competition Law for Compensation Claims and Thoughts De Lege Ferenda about Turkish Law, *Competition Journal*, Vol. 10; No. 1 January 2009 p125 (Kortunay (2009)).

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

case, provided 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 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 such 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 prescribed 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 provide 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 contained 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 or 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.[23] 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.[24] 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 relevant 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 question of the infringement of competition. 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 to be 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 the Turkish Commercial Code allows professional and economic associations to protect their members' rights and interests. The right of such associations 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.[25] 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

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

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

25 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.

they have common interest and common strategy during the proceedings. However, under Turkish law such joint action is quite different from a class action. As each co-litigant is, in principle, deemed to be an independent litigant, the result of the litigation may not be the same for each co-litigant. Furthermore, a joint action is not necessarily cost-effective as each co-litigant must pay its costs separately from the other co-litigants, as if it has filed an independent case.

In addition to the foregoing, the new Code of Civil Procedure,[26] which will come into effect on 1 October 2011, includes a provision (Article 113) regarding group actions. Accordingly, associations and other legal entities will be enabled to file lawsuits in their own name in order to protect the rights of their members, or persons whom they represent, for the determination of the legal rights of such persons, remedying violations of law or preventing future infringements of those rights.

However, the said provision does not allow for group actions for compensation. So, the lack of a legal ground for class actions to compensation is a significant deficiency that impedes having effective private rights of action under competition laws.[27] A scholar has assessed that whether the collective transfer of compensation claims to a third party by referring to the *German Zementkartell* case[28] might be an alternative to class actions and is suitable for Turkish law.[29] Turkish law allows the establishment of legal entities that assume the claims of injured persons by fiduciary assignment. Therefore, it is argued that fiduciary assignment of claims may be a temporary solution in Turkish law.[30]

VIII CALCULATING DAMAGES

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

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26 Official Gazette dated 4 February 2011, No. 27836.

27 Article 26 of the Draft for Amendment of the Competition Act suggests that Article 57/3 of the current Act should be changed to 'reserve the right of persons affected or persons that may be affected by infringement to bring an action before the civil court for ceasing the ongoing infringement or preventing imminent infringement'. However, such Draft does not include any right to compensation (a copy of the draft can be found at www.basbakanlik.gov.tr/docs/kkgm/kanuntasarilari/101-1605.doc, accessed 27 July 2011).

28 In the spring of 2002, the German Federal Cartel Office ('FCO') uncovered a hardcore cartel in the cement sector. According to FCO, cement producers agreed on sales quotas and fixed prices. As a result, the customers of the cartel members were substantially damaged. The customers raised the question of whether and how they could get compensation for the damages sustained. CDC affiliate, CDC Cartel Damage Claims SA, purchased the cartel-related claims of 28 damaged companies and began proceedings to enforce damage claims against the ringleaders of the cement cartel in 2002. OLG Dusseldorf, (14.05.2008), VI U (Kart) 14/7. Judgment of the Federal Court of Justice of 7 March 2009; Case No. KZR 42/08 GRUR 2009, p892.

29 Kortunay, 'Can a Model Which Enables Asserting Collective Damage Claims through Assignment of the Claim Be Developed?' *Competition Journal*, Vol. 12, No. 3, July 2011, pp179-204 (Kortunay (July 2011)).

30 Kortunay (July 2011), p200.

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 amount 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 all of their damages from the undertakings that limited competition,[31] 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.[32] According to such Article, if the damage occurs as a result of a restrictive and unlawful agreement or decision of undertakings,[33] 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 the 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.

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

31 This provision has been criticised since it refers only to '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.

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

33 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 competition by the undertakings or associations of undertakings. İnan, p52; Sanlı (2003), p270; Kortunay (2009), p124.

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 the 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 handle actions only after the Competition Board has rendered a decision on the matter. 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. A good analogy is that a Turkish civil court need not suspend any action filed for compensation arising out of a crime until a criminal court decides on the criminal aspects of the matter. Furthermore, a final judgment taken by the criminal court regarding the matters before the civil court is not binding on the civil court, even in the calculation of damages (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 to deal with competition law matters as they are not specialised enough. Many commentators who criticise the Supreme

Court's approach are also of the opinion that collaboration and close cooperation between the TCA and courts is required and could be very useful in resolving some potential problems. According to the rules of 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 within the scope of the lawyer-client privilege clearly mentioned in Article 36 of the Attorneyship Law[34] and Article 130 of the Criminal Procedure Code. Furthermore, Article 16 of the Regulation on the Attorneyship Law ('the Regulation')[35] stipulates 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 a 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 privilege applies. 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 court. In Turkish law, there is no 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,[36] 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 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

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

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

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

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 other 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 a 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[37] and is executed without the need for any court order. Unless this procedure for out-of-court settlement adopted by the Attorneyship Law and the Regulation is implemented, 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.

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,[38] disputes regarding property located in Turkey and disputes that fall outside the boundaries of the principle of freedom to contract cannot be subject to arbitration.[39] Other than these exceptions and 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 for one to allege that an agreement or practice breaches the competition rules during an arbitration process initiated for other reasons.

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

38 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.

39 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 of 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.

A defendant 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 their respective degree of fault. However, if the injured party brings an action against only one of the infringers, an award upheld by the court shall be binding only on such defendant. In this case, the person who has paid the award may need to file a separate lawsuit against the co-defendants.

The claim for damages is barred by a statute of limitations that ends the right to such claim one year from the date when the damaged party knew of the damage and of the identity of the person liable, and in any case 10 years from the date when the act causing the damage took place (CO, Article 60).

XV FUTURE DEVELOPMENTS AND OUTLOOK

Turkey has recently made further progress in its harmonisation of its competition laws with EU law and administrative implementation of competition rules. As part of the ongoing efforts to align Turkish competition laws 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 competition rules in such a way as to create a more competitive Turkish market; in this context, it has also 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 regarding the authorisation of private causes of action dealing with compensation claims arising from anti-competitive acts has not encouraged injured parties to bring actions for infringements of competition. It is hoped that the training of judges in the fields of competition law and policy may help raise awareness and enhance the implementation of competition rules in the field of private law.

Appendix 1

ABOUT THE AUTHORS

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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 competition law-related transactions, preparing and submitting applications to the Competition Board for individual exemptions and negative clearances, providing preventive advice, training employees and representing clients before the Competition Board at hearings. She has published various books and articles, and she has also contributed to international publications on M&A and vertical agreements as co-author with Noyan Turunç.

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