COUNTRY COMPARATIVE GUIDES 2023

The Legal 500 Country Comparative Guides

Turkey

COMPETITION LITIGATION

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This country-specific Q&A provides an overview of competition litigation laws and regulations applicable in Turkey.

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TURKEY
COMPETITION LITIGATION

1. What types of conduct and causes of action can be relied upon as the basis of a competition damages claim?

Law No. 4054 on the Protection of Competition ("***Competition Law***") prohibits (i) restrictive agreements and concerted practices, (ii) abuse of dominance, and (iii) mergers and acquisitions that can significantly impede effective competition. Pursuant to Article 57 of the Competition Law, claims for damages based on these violations of the Competition Law can be brought as private antitrust litigation.

In practice, the private antitrust litigation system in Turkey is based on follow-on actions. Technically, it is possible to file a compensation lawsuit without waiting for a decision of the Turkish Competition Board ("***Board***"), or even in the absence of an application or complaint to the Turkish Competition Authority ("***Authority***"), since there is no specific regulation for stand-alone and/or follow-on actions under the Competition Law. However, the courts do require a finalized Board decision before assessing the merits of the compensation case.

2. What is required (e.g. in terms of procedural formalities and standard of pleading) in order to commence a competition damages claim?

The claimant should first initiate mediation proceeding because it is mandatory by law to do so for receivable/compensation requests based on commercial law (such competition damages claim fall under that category). To Wit one cannot bring such claims before a court before pursuing mediation process and if one fails to do so, the lawsuit gets dismissed on procedural grounds. If the parties are unable to reach a settlement at the end of the mediation proceedings, only then the can the claimant apply to the court for initiating a lawsuit. If the parties do settle, the claimant cannot apply to the court for initiating a lawsuit.

If the parties fail to settle under the mediation proceedings, the claimant files a petition with the court and pay the calculated legal fees for the case, which varies based on the amount of damages in question.

3. What remedies are available to claimants in competition damages claims?

Compensatory damages are available under the Turkish competition law regime and their extent and calculation means are set out under Article 58 of the Competition Law.

Damages are calculated as the difference between the price that the injured parties paid for the product / service in question and the price that they would have paid, had competition not been restricted; indicating that the actual losses suffered by the claimant will be compensated (*Article 58/1, Competition Law*). The same Article also allows the competitors of the infringing undertaking(s) to claim compensation for "all of their damages" (*i.e.* actual damages and loss of profits) arising from the violation of the Competition Law.

One of the distinctive features of the Turkish competition law regime is the rule of triple (or treble) damages (*Article 58/2, Competition Law*). This rule entitles any party that suffered harm due to a competition law violation to sue the infringers for three times their actual damages or three times the profits gained or likely to be gained by the infringers, provided that:

- The damage arose due to an agreement or decision of the parties, or their act(s) of gross negligence.
- The claim is for actual material or financial damages (not moral damages) incurred by the injured party.

Interest may also be claimed on the damages arising from competition law violations, to accrue from the date of infringement.

4. What is the measure of damages? To what extent is joint and several liability recognised in competition damages claims? Are there any exceptions (e.g. for leniency applicants)?

Please see Question 3 for general explanation on damages.

The main rule for calculating damages is the difference between the price that the injured parties paid for the product/service in question and the price that the injured parties would have paid if competition had not been restricted. Also known as the "difference theory," this relates to the artificially increased prices resulting from competition law violations. It aims to compensate the consumers for the damage they have suffered by paying more than the regular price for a product, due to the price increase applied by the cartelists.

The courts have not indicated a preference for using a specific economic analysis method to quantify damages for particular competition law violations.

As for the liability, the infringing parties are jointly and severally liable if the damage results from the behavior of more than one person (*Article 57, Competition Law*). There is no provision that provides an exception for leniency applicants/recipients regarding the potential private damages claims.

5. What are the relevant limitation periods for competition damages claims? How can they be suspended or interrupted?

The Competition Law does not contain any specific provisions on the statute of limitations that apply to claims for damages arising from competition law violations. Therefore, the general provisions in the statute of limitations set out under Article 72 of the Code of Obligations No. 6098 ("***Code of Obligations***") will apply. There are three different limitation periods that apply to compensation claims:

- Two years from the time the claimant becomes aware of the damage and the identity of the person(s) liable for the damage.
- Ten years from the date of the infringement.
- Longer, if a longer limitation period is provided under the provisions of Turkish criminal law, for the relevant unlawful behaviour.

There is an academic debate whether the ten-year limitation period under Article 146 of the Code of Obligations should apply in cases where there is a contract between the parties (the claimant and the infringing party) and the liability arises from the contract itself. However, in practice, the 11th Civil Chamber of the Court of Appeals has adopted that the eight-year limitation period under Law No. 5326 on Misdemeanours should apply to limitation periods for competition law damages claims within the scope of Article 72 of the Code of Obligations (*see* its decisions dated 30 March 2015 and numbered 2014/13296 E, 2015/4424 K and 1 July 2019 and numbered 2019/1672 E, 2019/5015 K).

The limitation period will start to run when the claimant becomes aware of the damage and the identity of the person(s) liable for it. The limitation period cannot be extended.

6. Which local courts and/or tribunals deal with competition damages claims?

Actions for damages are heard in the civil courts. Under Article 2/2 of the Civil Procedure Law No. 6100 ("***Civil Procedure Law***"), the general competent courts for competition law damages claims are the civil courts of first instance. In addition, an action for damages can fall under the jurisdiction of specialized courts with regard to the subject matter in dispute and the legal status of the claimant. For example, a damages action in which the claimant is qualified as a "merchant" must be filed at the commercial courts of first instance. In this respect, High Court of Appeal is also authorized as the authority of appeal in compensation cases arising from competition law.

7. How does the court determine whether it has jurisdiction over a competition damages claim?

Claimants can bring follow-on actions against legal entities that are domiciled in Turkey. Pursuant to Article 16 of the Civil Procedure Law, claimants can bring actions in:

- The place where the tort is committed.
- The place where the damage occurred, or where it could possibly occur.
- The domicile of the injured party.

As a general jurisdictional rule, the claimants can bring an action in the courts where the defendant is domiciled at the date the action is brought (*Article 6/1, Civil Procedure Law*).

8. How does the court determine what law will apply to the competition damages claim? What is the applicable standard of proof?

Pursuant to Article 38/1 of the Private International and Procedural Law No. 5718, all the infringements directly affecting the Turkish market are subject to Turkish law even if they originate from a foreign country.

Standard of proof

The applicable standards of proof are those for tortious liability. Therefore, a claimant seeking compensation based on harm stemming from a competition law violation must prove the existence of the following four cumulative elements, as per Article 49 of the Code of Obligations:

- Existence of an unlawful act (*g.* violation of the Competition Law in antitrust cases).
- Fault (whether intentional or negligent) of infringers in committing the unlawful act.
- Occurrence of harm/damage.
- Appropriate causal link between the competition law violation and the harm/damage suffered as a result thereof.

Indeed, a person, who causes damage and loss to another person by culpable and unlawful action, is obliged to compensate such damage or loss. The claimant (i.e. the injured party) bears the burden of proving the unlawful act, the resulting damages, the defendant's fault, and the causal link between the act and the damages (*Articles 49 and 50/1, Code of Obligations*).

9. To what extent are local courts bound by the infringement decisions of (domestic or foreign) competition authorities?

Board decisions are a relatively "veiled" pre-requisite for filing a private antitrust litigation compensation lawsuit in accordance with the case law. Courts tend to dismiss compensation lawsuits that are filed before a final Board decision is rendered, or they halt the civil proceedings and only proceed with them after the relevant decision is finalised.

The main rationale of this approach stems from the fact that the Board has indisputable expertise and competence with respect to competition law issues and practice, therefore, waiting to see how it will assess and decide on the alleged anticompetitive act(s) is the only effective way of eliminating the risk of discrepancies arising between the judgments of the courts and the decisions of the Board.

10. To what extent can a private damages action proceed while related public enforcement action is pending? Is there a procedure permitting enforcers to stay a private action while the public enforcement action is pending?

It is widely accepted that it is prudent for a court to delay hearing a case that has been filed after an alleged violation of the Competition Law, until the Board renders its decision (and it has become finalised, in case of an appeal). The judgments of the Court of Appeals are consistent with this approach. Therefore, as a general practice, a stand-alone action will remain pending if there is an ongoing competition law investigation.

Therefore, the courts tend to accept the parties' request to suspend proceedings until the issuance of the Board's decision on the alleged competition law infringement and its finalisation.

In addition, if there are criminal proceedings based on the competition law infringement, the civil court can decide to stay its proceedings until the criminal court renders its decision.

11. What, if any, mechanisms are available to aggregate competition damages claims (e.g. class actions, assignment/claims vehicles, or consolidation)? What, if any, threshold criteria have to be met?

The concept of a class action does not exist in Turkey.

As for collective actions, associations and other legal entities can have legal standing of their own and bring an action to protect the interests of their members or the people they represent; petitioning the court for determination of their rights, elimination of a breach of law, or prevention of the violation of any future rights. More specifically, pursuant to Article 113 of the Civil Procedure Law, associations and other legal entities may initiate a group action to "protect the interest of their members", "to determine their members' rights", and "to remove the illegal situation or prevent any future breach". However, it is not possible to request compensation through such action, as the law only allows for a "determination of illegality" type of claim. Moreover, group actions do not cover actions for damages. A group action can be brought before the court as a single lawsuit only. The verdict shall

encompass all individuals within the group.

12. Are there any defences (e.g. pass on) which are unique to competition damages cases? Which party bears the burden of proof?

The Competition Law and judicial precedents do not specifically recognise a "passing-on" defence in civil damages claims. It is yet to be tested under the Turkish competition law enforcement regime and there is no publicly available action or decision in which the courts have examined the "passing-on defence".

There are, however, no barriers preventing a defendant from putting forward a "passing-on" defence in a civil damages claim. The issue requires a case-by-case analysis since the admissibility of the defence will depend on the particular position of the claimant and the specific features of the claim.

13. Is expert evidence permitted in competition litigation, and, if so, how is it used? Is the expert appointed by the court or the parties and what duties do they owe?

Expert evidence is considered as "discretionary" evidence and is admissible. An appointed expert must convey the results of their research and inform the court about the matter at hand either verbally or in writing, at the discretion of the court. Experts may be appointed by the court, generally ex officio and sometimes with the request of the parties, from among the court's registry of sworn-in professionals. The parties can also offer expert opinions/reports; however, in comparison with the experts appointed by the court, the court generally tends to rely on the reports of the court-appointed experts.

14. Describe the trial process. Who is the decision-maker at trial? How is evidence dealt with? Is it written or oral, and what are the rules on cross-examination?

In Turkey, the decision maker is the judge at trial and there is no jury system. Depending on the relevant provisions of the criminal or civil process rules, one judge or a panel of three judges may be appointed to the case.

There is "free evidence" rule in Turkish civil litigation *i.e.* the evidence is accepted as long as it is obtained legally.

As a rule of thumb, the parties are required to submit and present their evidence to the case file given that the judges do not *de facto* conduct further evidence check on their own and they reach a verdict solely based on the evidence submitted by the parties.

The types of evidence generally include written or physical evidence, witness statements, expert reports, oath, and on-site examination. While legal oath, definitive judgement and deed are considered as conclusive evidence, testimonies of witnesses, expert reports and on-site examinations are deemed as discretionary evidence, since judge(s) can exercise their discretion to take them into account for assessment of merits.

Similar to expert evidence, witness statements are admissible but considered as "discretionary" evidence. They are not binding on the court. In the cross-examination of witness, the judge(s) will interrogate the witness themselves, and will not allow any other person (such as an expert) to do so. The parties' attorneys can address their questions directly to the witness, as long as the questions do not disrupt the order of the courtroom. The parties themselves can only ask questions to the witness through the judge. (*Article 152, Civil Procedure Law*)

In the Turkish legal system, the court cases mostly proceed through written petitions and oral hearings (trials).

15. How long does it typically take from commencing proceedings to get to trial? Is there an appeal process? How many levels of appeal are possible?

The preliminary hearing takes approximately three months after the proceedings commence, however, the estimated period might be extended depending the dynamics of the case, especially if one of the parties are domiciled abroad.

After the preliminary hearing, the court proceeds to the examination phase, which is the stage where the court collects all the evidence, have experts examine certain matters if necessary and obtain reports. After collection of all the documents and information, the court makes a final assessment on the disputed matter and renders its decision. This whole process might take about 1.5 – 2 years, depending on the status of the Board decision on which the case is based. If the judicial review of the relevant Board decision is not yet finalized, the first instance court waits for its finalization, which would prolong the whole process.

It is possible to appeal the judgment of the relevant court if the monetary value is above a certain threshold. Under Turkish law, the appellate court system consists of two tiers: (i) the Regional Court of Appeals and (ii) the High Court of Appeals (the ultimate judicial authority in the appeal process). First instance court judgments can initially be appealed before the relevant Regional Court of Appeals. In turn, the decisions of the Regional Courts of Appeals can be appealed before the High Court of Appeals. The appeal thresholds (revised annually) are TRY 17,830 for Regional Courts of Appeal and TRY 238,730 for the High Court of Appeal in 2023.

16. Do leniency recipients receive any benefit in the damages litigation context?

There is no provision under Turkish law for the beneficial treatment of leniency applicants/recipients with regard to the potential private damages claims and/or for gaining any sort of advantage on procedural matters.

17. How does the court approach the assessment of loss in competition damages cases? Are "umbrella effects" recognised? Is any particular economic methodology favoured by the court? How is interest calculated?

The Competition Law does not include any specific provision; nor do the precedents of the courts and the High Court of Appeals provide any insight on "umbrella effects." All in all, one could argue that claiming damages under "umbrella effects" would require the claimant to concretely prove the link between its losses and the prices applied by the undertakings that did not participate in the anti-competitive conduct.

18. How is interest calculated in competition damages cases?

Please see Question 3 and Question 4 on the assessment of loss and interest.

19. Can a defendant seek contribution or indemnity from other defendants? On what basis is liability allocated between defendants?

Pursuant to Article 57 of the Competition Law undertakings will be jointly and severally liable on the condition that they engage in a collective misconduct.

When losses and damages are prorated among multiple infringers who are liable for the same loss or damage, all relevant conditions and circumstances will be taken into consideration, especially the degree and significance of the fault that can be attributed to each of them and the gravity of the danger caused by their actions. As each several infringer is fully liable for the damages claim brought by the claimant, in case one of them has paid more than their share of the fault attributed to them, this defendant has the right of recourse against the other infringers for the excess amount paid (*Article 62, Code of Obligations*).

20. In what circumstances, if any, can a competition damages claim be disposed of (in whole or in part) without a full trial?

The civil procedure rules do not provide a "strike-out" mechanism, under which the court can review the case on its merits in the pre-trial stage. The court will only begin to review the merits of the case during the examination period. Also, the parties can always agree on an out-of-court settlement and any court permission is not required.

Indeed, the concept of a "summary judgment" does not exist. Therefore, a defendant cannot apply for one, or to dispose of all or part of an action before a full trial.

21. What, if any, mechanism is available for the collective settlement of competition damages claims? Can such settlements include parties outside of the jurisdiction?

Please see our responses to Question 11 above.

22. What procedures, if any, are available to protect confidential or proprietary information disclosed during the court process? What are the rules for disclosure of documents (including documents from the competition authority file or from other third parties)? Are there any exceptions (e.g. on grounds of privilege or confidentiality, or in respect of leniency or settlement materials)?

Turkish law recognizes and respects the principle of attorney-client privilege. In addition, the Legal Practitioners' Act No. 1136 ("***Legal Practitioners' Act***") prohibits attorneys from disclosing any information obtained within the scope of business relationships

between attorneys and their clients.

If the documents provided by another party are confidential, it is possible for the parties to submit a request to the court to keep the confidential documents in the court's designated secure lockers to protect them. Confidential documents can only be accessed or examined with the explicit permission of the court (*Article 161/2, Civil Procedure Law*). In practice the court are conservative about deeming documents as confidential and rendering them non-accessible by the other parties of the case in order to not prejudice these parties` rights to defence; then again as a rule it is possible to ask for a confidentiality cloak for such documents for the purpose of protection of commercial secrets.

23. Can litigation costs (e.g. legal, expert and court fees) be recovered from the other party? If so, how are costs calculated, and are there any circumstances in which costs recovery can be limited?

The unsuccessful party will bear the litigation costs except where statutes provide otherwise (*Article 326/1, Civil Procedure Law*). In case of a partial win/loss though, the litigation courts are imposed on the unsuccessful party pro rata the value of the claim that the court has rejected. The court decides on the litigation costs, which will include the judgment fee and the court expenses based on the annual tariffs, as well as the attorneys' fees (the only amount which belongs to attorneys) based on the Minimum Fee Schedule set out by the Turkish Bar Association each year.

24. Are third parties permitted to fund competition litigation? If so, are there any restrictions on this, and can third party funders be made liable for the other party's costs? Are lawyers permitted to act on a contingency or conditional fee basis?

There are no provisions prohibiting third party funding of legal actions in Turkey. Therefore, although it is not common in practice, bringing an action funded by a third party is theoretically possible. That said third party funders cannot be held liable for other party's costs, as it is only the parties of the case that could be liable against one another in relation to the costs borne from the case.

Legal Practitioners' Act provides that attorneys' fees can be freely determined in the contract between the attorney and the client. Therefore, it does not prohibit entering into a "conditional" fee arrangement. The attorneys' fees can be determined and agreed as a percentage of the claimed amount, up to a limit of 25%. It is widely accepted that the parties can decide on a "conditional" fee arrangement, as long as the fee does not exceed the 25% limit. However, attorneys' fees cannot be less than the amounts specified in the Minimum Fee Schedule set out by the Turkish Bar Association. These amounts differ based on the type of the lawsuit or transaction and are determined annually. Therefore "no win-no fee" arrangements would not be possible.

25. What, in your opinion, are the main obstacles to litigating competition damages claims?

The excessive delays in the litigation process and lack of precedents in Turkish law are the most significant obstacles.

Furthermore, as indicated above, class-action lawsuits do not exist in Turkey. Accordingly those end-users who have suffered damages and cannot initiate a joint action against the undertakings that infringed the competition law, might not have the resources to litigate against big corporations on their own. This is one of the reasons why competition damages claims are still underdeveloped in Turkey, as such cases are usually brought by the competitors who have the resources to litigate.

26. What, in your opinion, are likely to be the most significant developments affecting competition litigation in the next five years?

It is expected that the number of antitrust damages lawsuits may increase in the next five years if the investigations related to consumer products result in administrative penalties, similar to the practices of the EU where there are many such examples.

Furthermore, the Amendment to the Competition Law which entered into force on June 24, 2020, introduced, among others, two new mechanisms inspired by the EU law, namely the commitment and settlement procedures. These particular amendments aim to enable the Board to end its investigations early, without running the full course of pre-investigation and investigation processes.

The commitment procedure will allow the undertakings or associations of undertakings to voluntarily offer

commitments during a preliminary investigation or full-fledged investigation, in order to eliminate the Authority's competitive concerns in terms of Articles 4 and 6 of the Competition Law, except for hard-core violations such as price fixing between competitors, territory or customer sharing, and the restriction of supply. On March 16, 2021, the Authority issued the Communiqué No. 2021/2 on Commitments for Preliminary Investigations and Investigations on Anticompetitive Agreements, Concerted Practices, Decisions and Abuse of Dominant Position. The relevant Communiqué brings a conclusive list of excluded types of infringement. The relevant Communiqué also sets forth a so-called preliminary examination stage upon the submission of the request to offer commitment, where the request will be assessed in terms of type of infringement and other necessary issues.

In an effort to take one step further in harmonizing the Turkish competition law with the EU legislation, the Authority has introduced the settlement mechanism under Article 43 of the Competition Law and the relevant Draft Regulation on Settlements ("***Draft Regulation***") on March 18, 2021. The public consultation for the Draft Regulation was concluded on April 19, 2021 and Regulation on the Settlement Procedure Applicable in Investigations on Agreements, Concerted Practices and Decisions Restricting Competition and Abuses of Dominant Position ("***Settlement Regulation***") is enacted on July 15, 2021. The settlement procedure, where the parties admit the infringement, is applicable only in full-fledged investigations. The Board may initiate this procedure *ex officio* or upon the parties' request until the investigation report is officially served. Based on this, the Board may initiate the settlement process, in view of the procedural efficiencies and any differences of opinion regarding the existence or scope of the violation. Aside from some notable differences as to scope (limited to cartels for the EU as aside to "no scope restriction"), reduction ratio and appealability of the settlement decision, the Settlement Regulation does correspond with the settlement mechanism in the EU, in general.

Another amendment has been enacted on the Block Exemption Communiqué on Vertical Agreements ("***Communiqué No: 2002/2***") on November 5, 2021 with the amendment communiqué ("***Communiqué No: 2021/4***"); lowering the threshold for protective cloak of block exemption from 40% to 30%. The amendment is in force as of May 5, 2022. Prior to the new amendment, the supplier's market share(s) for the market(s) for the contract goods should have not exceeded 40% for the vertical agreement to benefit from the block exemption mechanism. The same threshold applied to exclusive supply clauses also, where the block exemption mechanism was applicable provided that the market share of the buyer did not exceed the 40% threshold. These thresholds have now been lowered to 30%, similar to the market share thresholds applicable under the EU competition law rules.

The market shares are calculated by using the data of the previous year and on the basis of all goods and services provided to the affiliated distributors for sale. The block exemption will remain valid; (i) for the period of two years starting from the year when the threshold was first exceeded, provided that the relevant market share exceeds the 30% threshold yet remains below 35%, and (ii) for a period of one year starting from the year when the threshold was first exceeded, provided that the relevant market share exceeds 35%.

Finally, on 4 March 2022, the Authority published Communiqué No. 2022/2 on the Amendment of Communiqué No. 2010/4 on the Mergers and Acquisitions Subject to the Approval of the Competition Board (the Amendment Communiqué). The Amendment Communiqué introduced certain new rules concerning the Turkish merger control regime, which fundamentally affect merger control notifications submitted to the Authority. Pursuant to article 7 of the Amendment Communiqué, the changes introduced by the Amendment Communiqué became effective as of 4 May 2022. One of the most significant developments that the Amendment Communiqué entails is the increase of the applicable turnover thresholds for the concentrations that require mandatory merger control filing before the Authority. In addition, the Amendment Communiqué introduced a threshold exemption for undertakings active in certain markets or sectors. Pursuant to the Amendment Communiqué, special thresholds will be applicable for the acquired undertakings active in or assets related to the fields of digital platforms, software or gaming software, financial technologies, biotechnology, pharmacology, agricultural chemicals and health technologies, if they operate in the Turkish geographical market, conduct research and development activities in the Turkish geographical market, or provide services to Turkish users.

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