

ICC COMPENDIUM OF  
ANTITRUST DAMAGES ACTIONS

TURKEY

Court proceedings  
in key jurisdictions

## ICC COMPENDIUM OF ANTITRUST DAMAGES ACTIONS

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International Chamber of Commerce  
33-43 avenue du Président Wilson  
75116 Paris  
France

ICC Publication No. KS10 1E

## Introduction

This chapter is part of the *ICC Compendium of Antitrust Damages Actions* (the “Compendium”) which can be read in full on the ICC website at [www.iccwbo.org](http://www.iccwbo.org).

Designed to provide decision-makers with a comparative overview of the issues most frequently arising in private antitrust litigation in key jurisdictions, the Compendium reflects contributions from leading antitrust law specialists around the world. It does not try to explore the complexity of each legal system but strives to capture a comprehensive picture of the matter, organised around nine topics, and completed in some jurisdictions by an additional chapter highlighting key issues. A collection of decisions issued in the same jurisdictions is also available on the ICC website. This database is the essential complement to the overviews for a comparative approach and will allow a better understanding of the rules presented in the compendium.

With this publication, ICC hopes to help in-house counsels, antitrust practitioners and enforcers, but also judges of the courts and academics, navigate through a new, fast-changing legal environment.

## Glossary

**Appeal:** a proceeding undertaken to have a decision reviewed by a higher authority whose jurisdiction may include (i) an entirely new assessment of the case, (ii) a limited review of manifest errors of law and facts, or (iii) a specific review limited to legal issues.

**Article 101 TFEU:** This provision prohibits as anti-competitive all agreements, decisions, and practices between undertakings and concerted practices which may affect trade between EU Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market.

**Article 102 TFEU:** This provision prohibits any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it. Those behaviours are incompatible within the internal market in so far as it may affect trade between EU Member States.

**Award:** a final judgment or decision, especially one by an arbitrator or by a jury assessing damages.

**Burden of proof:** The responsibility for a party during legal proceedings to prove the facts it asserts; the burden of proof may be shifted to the opposing party once the standard of proof has been met.

**Cartel:** Any horizontal collusion between competitors whose purpose is to fix prices or quantities, allocate markets, while sharing sensitive commercial information.

**Cease-and-desist order:** a court's or agency's order prohibiting a person from continuing a particular course of conduct which is deemed harmful. In competition law proceedings, these orders also include a prohibition from adopting future conducts likely to have the same effects as the one which is prohibited.

**Claimant:** the party who brings a civil suit in a court of law.

**Class action:** a lawsuit where a person or a group seeks damages for a larger group of claimants. Class action proceedings typically include a preliminary stage to define the characteristics of the group, which needs to gather persons with identic cases and who have suffered a prejudice from the same tort.

**Competition authority:** Any public authority, whether independent or forming part of a government administration, whose role is to enforce rules which prohibit unilateral and coordinated behaviours that restrict competition.

**Damages:** money claimed by, or ordered to be paid to, a person as compensation for loss or injury.

**Defendant:** a person sued in a civil proceeding.

**Discovery:** Proceeding whereby a party has to disclose information and documents relating to the litigation upon the request of the opposing party. This procedure is usually implemented during the pre-trial phase of the lawsuit.

**Directive 2014/104/EU:** European Union directive issued on 5 December 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and the EU. The purpose of this text is to set forth common rules among EU Member States in order to enhance private enforcement of Articles 101 and 102 TFEU and full compensation for victims of anti-competitive conducts. The text also provides for specific rules on the interplay between civil lawsuits and enforcement proceedings before competition authorities.

**Follow-on:** A competition law claim for damages where the alleged infringement has previously been found by a final decision of a competition authority.

**Immunity:** Total exemption of fine for a company that is the first to reveal the existence of a competition law infringement to a competition authority.

**Infringer:** Any company that has implemented unilateral or coordinated behaviours infringing competition law, where a competition authority has found such infringement in a decision.

**Joint-and-several liability:** liability that may be apportioned either among two or more parties or to only one or a few select members of a group of infringers upon the decision of a competition authority or a civil court.

**Leniency:** A competition law procedure that rewards companies that adopt anti-competitive conducts with immunity or reduction of fine, if they inform the competition authority of an infringement that it did not previously have knowledge of.

**Limitation period:** a statutory period after which a lawsuit or prosecution cannot be brought in court.

**Passing-on defence:** a competition law defence that relies on the civil law principle of unjust enrichment. During civil proceedings, a defendant may argue that the plaintiff's claim for compensation should be totally or partially denied as it passed the alleged overcharge resulting from a competition law infringement on its own customers.

**SME (Small—and Medium-sized Enterprise):** categories of micro, small and medium enterprises defined based on their staff headcount, and either their turnover or balance sheet total.

**Stand-alone action:** A competition law claim for damages where the alleged infringement has not previously been found by a final decision of a competition authority.

**Standard of proof:** In any legal procedure, the level of evidence that is required to establish with certainty a fact or a liability.

**Tort:** A civil wrong, other than breach of contract, for which a remedy may be obtained, usually in the form of damages; a breach of duty that the law imposes on persons who stand in a particular relation to one another.

## Contributors

Sahin Ardiyok, Partner, BASEAK

Private enforcement is yet to be developed for the Turkish competition regime. The jurisprudence of the judicial authorities has not been settled yet as there is a severe lack of finalised court rulings on action(s) for damages resulting from competition law infringements.

Accordingly, private enforcement of competition law is recognised in a form of antitrust litigation, which is governed by civil procedural rules in Turkey. Considering the extremely limited number of damages actions finalised by the High Court of Appeal in Turkey (due to the untested enforcement trends and difficulties in calculating the damage amounts), the elbowroom for this type of enforcement is rather restricted. However, the ongoing discussions on potential ways to improve private enforcement remain at the forefront among Turkish scholars, enforcers, and practitioners of competition law.

## 1. Jurisdiction

The Turkish Competition Authority (“Authority”) together with its decisional arm the Turkish Competition Board (“Board”) is the competent regulatory body responsible for the public implementation of Law No. 4054 on the Protection of Competition (the “Competition Law”).

When it comes to private enforcement, Article 58 of the Competition Law provides that anyone who has suffered from a competition infringement that has an impact on the Turkish market for goods and services is entitled to seek damages. Actions for such damages can be brought before civil courts, commercial courts, or consumer courts based on the circumstances surrounding the case (such as the merchant status deemed for the parties or the amount of the damages). In other words, the Turkish judicial system does not provide for specialised courts to review cases related to competition law infringements. Considering the high number of cases coupled with the tremendous workload of the judicial system, specific local courts have been seen to gain meaningful experience or particular skills for such cases. However, on the administrative law side, the 13th Chamber of the Council of State has been driving the final review of the appeals concerning Board decisions. Therefore, it would be fair to say that the 13th Chamber, in comparison to the other judicial authorities, has earned more experience with competition law cases.

Under Turkish law, compensation claims arising from competition law violations are pursued in the form of unlawful acts. Hence, this procedure is governed by the Code of Civil Procedure (“CCP”) which provides that the establishment of the unlawful act must fall under the jurisdiction of the court of the geographical district in which (i) the act has been committed, (ii) the damage has arisen, or (iii) the domicile of the claimant is located. The Law on the Protection of Consumers also grants power to adjudicate to the court of the geographic district where the consumer’s domicile is located.

## 2. Relevant legislation and legal grounds

As mentioned above, private antitrust actions are governed under the Competition Law. As per Article 57, any person (legal or natural) responsible for the prevention, distortion, or restriction of competition through practices, decisions, contracts, agreements or abuse of dominance shall be obliged to compensate for any damages of the injured party. Additionally, the general provisions of the Code of obligations on liability for unlawful acts, which are stipulated under Article 49, are also applicable in such instances.

Any party who has suffered from an unlawful act (e.g. a competition law infringement) has to cumulatively establish the following four conditions: (i) infringement of the Competition Law (which can automatically be fulfilled if there is a finalised Board decision on the infringement), (ii) fault, (iii) damage, and (iv) causation between the infringement and the damage suffered.

The burden of proof falls on the claimant for such claims. Although the Competition Law does not explicitly provide that indirect customers may raise claims, they can do so as long as there is a sufficient causal link between the infringement and the damages they have suffered. However, considering the difficulties in linking the damages to the infringement for indirect customers, the general opinion among practitioners and legal literature is that such claims are unlikely to prevail under Turkish law. As such, the Turkish law does not provide special tools to help the indirect victims in demonstrating the damages. However, there is no tangible example in case law on these issues.

As to stand-alone claims, according to the jurisprudence of the High Court of Appeal, a final Board decision (*i.e.* a decision that has gone through the administrative judicial review) is required to determine that there is an infringement of the Competition Law. In other words, civil, commercial and/or consumer courts do not rule on the violation of competition rules and the High Court of Appeals only recognises finalised Board decisions for the establishment of such violation. On this basis, even if an injured party intends to raise a stand-alone claim, such procedure will eventually evolve into a follow-on claim due to the jurisprudential requirement of a settled Board decision to establish the infringement. Hence, the theoretic ability to raise stand-alone claims is not thoroughly enforceable in practice.

## 3. What types of anti-competitive conduct are damages actions available for?

Anti-competitive agreements and abuse of dominant position are explicitly deemed by Article 57 of the Competition Law as infringements which allow their victims to seek compensation. With that said, the possibility to claim compensation for infringement of the Competition Law by way of creating or reinforcing a dominant position via mergers and acquisitions, failure to notify, or gun-jumping types of violations is also a topic of discussion within the Turkish doctrine. Considering that the concept of private enforcement of antitrust law violations is not very developed in Turkey, subsections such as damages by way of gun-jumping have not been fully discovered.



#### 4. What forms of relief may a private claimant seek?

The Turkish Code of obligations, as a general rule, does not provide for any punitive damages and limits the amount of compensation that the injured party is entitled to obtain to the actual amount of the damages incurred (material damages).

Accordingly, the Code of obligations provides that the court will determine the amount of compensation by taking into consideration the level of fault on the defendant and the circumstances surrounding the case. The “level of fault” element is used for determining what portion of the damages the damaging parties will be responsible for. In other words, if the applicant or any other party also has a fault in the damages, then the court may distribute the level of fault among the parties at fault and determine a corresponding level of compensation. Therefore, the “level of fault” element does not lead up to the application of punitive damages. Instead, it is used to allocate the responsibility within the amount of actual (non-punitive) damages.

In parallel with the foregoing principles, the Competition Law determines the amount of compensation for antitrust related damages as the difference between the price the victims have paid and the price they would have paid had the infringement not taken place. The Competition Law also sets forth that competitors suffering from the infringement can claim compensation for all damages incurred by them.

Furthermore, private enforcement of competition rules—with the application of treble damages—grants an exception to the non-punitive compensation principle. Accordingly, if the infringement under consideration results from an agreement or decision of the infringing parties or the gross negligence thereof, the court—upon request—can determine a compensation amount up to three times the loss suffered by the claimant or the profits gained (or may be gained) via the infringing acts. The wording of this provision (*i.e.* Article 58) may be interpreted broadly to argue that all competition law violations include gross negligence and therefore warrant treble damages. However, Article 58 designates separate provisions for requesting compensation and for requesting treble damages (*i.e.* Article 58(1) and Article 58(2), respectively). Considering that only the treble damages provision refers to gross negligence, we may argue that the law attributes a somewhat higher level of negligence for such cases. Additionally, the treble damages provision also refers to the concept of agreement/decision, which seems to exclude bilateral violations and violations where the multilateral decision aspect is not present. Due to the lack of case law examples and jurisprudential guidance on the issue, we cannot fully anticipate the potential enforcement trends. On another note, fines imposed by the Board at the end of the investigation are not contingent on private enforcement processes and are not considered by the courts.

Claimants are also entitled to seek interim measures if there is an immediate risk arising from a delayed decision, and to seek specific performance where the court orders the defendant to perform certain actions (e.g. supply certain goods to the claimant). The “interim measure” or the “specific performance” options are used in cases where, for example, the damaging party continues its harmful conduct. In such cases, if the court is convinced of the fact that the applicant will suffer severe damage until the final verdict, it may order the defendant to act in a certain way or not to take certain actions until the trial is over. This is a general protective option granted to the courts. Therefore, if the infringement damaging the applicant is still going on (despite the Board decision, as the case may be) the court reviewing the damages action will be entitled to put the damaging



actions on hold over the course of the trial. As explained above, there are no legal obstacles against issuing a stand-alone claim. By extension, there are no legal obstacles against requesting interim measures in a stand-alone claim. However, the High Court of Appeals has consistently ruled that there should be a finalised Board decision for a damages action to proceed. Accordingly, if the damaged party asks for an interim measure from the court in a damages action (without a finalised Board decision), the court would be expected to treat the issue as a prejudicial question and wait for the Board's decision before rendering a judgment on the matter.

In case of a collective infringement, the participants in the infringement can be held jointly and severally liable. In other words, the claimant is entitled to request and collect the total amount of compensation from any of the defendants. In such a case, if the defendant—from whom the compensation is collected—is of the view that it has overpaid, it can initiate a recourse proceeding before the court to recover such extra amount from the other defendants, based on the unjust enrichment principles. During the recourse process, the court will distribute the compensation liability proportionally based on the level of fault concerning the damages for each of the infringing parties.

Lastly, infringing parties who were leniency applicants during the investigation of the Authority are not protected from the follow-on litigations and neither the Code of obligations nor the Competition Law provides for any beneficial treatment for such parties.

## 5. Passing-on defence

Under the CCP, the burden of proof is on the claimant in actions for private antitrust litigations. Subject to the general evidence rules of civil law applicable to unlawful acts, the claimant has to establish the infringement of the Competition Law (via the finalised decision of the Board, which also fulfils the element of fault), the damages, and a causal link between the damage and infringement.

The decisional practice of the High Court of Appeal has not yet recognised the concept of passing-on defence. Therefore, if invoked during the court proceedings, the passing-on defence would be subject to the general provisions of the Code of obligations and the defendant raising the passing-on defence would have to bear the burden of proof pursuant to Article 50.

## 6. Pre-trial discovery and disclosure, treatment of confidential information

The Turkish system does not contain any pre-trial discovery instruments as US civil law does. However, some of the discovery proceedings under the Turkish system are of similar nature with the common law jurisdictions' pre-trial discoveries.

At any rate, the pre-trial discovery process is deemed irrelevant for private antitrust litigations in Turkey because there is a jurisprudential requirement to obtain a Board decision prior to initiating an action for competition law related damages.

In general, testimonials, documentaries or any other kind of tangible documents are accepted as means of evidence in the court proceedings. On that basis, such evidence

of tangible nature shall be relevant and shall be deemed sufficient to prove or disprove a fact in connection with the merits of the case. Confession, oath, documents, and definitive judgment are classified as direct means of evidence while witness reports, expert opinions and viewing are referred to, by the CCP, as circumstantial means of evidence. Both direct and circumstantial means of evidence are admissible during private antitrust litigation. As court judgments constitute direct evidence, decisions of the Board in which an infringement of the Competition I law has been established will have the same effect. The parties are also entitled to request submission of evidence at the third parties' disposal to the court. The court, should it deem necessary, may also request evidence from third parties or governmental institutions.

If the court requests documents in the investigation file from the parties or the Authority during the litigation process, the requested party and/or the Authority are under the obligation to fully comply with this request and submit all documents without having the opportunity to omit any trade secrets or confidential information. As the leniency applicants are not protected from follow-on actions, the disclosure requirement shall also be applicable for the leniency applicants.

## 7. Statute of Limitation

The Competition I law does not regulate the statute of limitation for private antitrust litigation. Therefore, such claims are subject to the statute of limitation that applies to unlawful acts. Under CCP, the statute of limitation to request compensation is two years. This term starts from the date the claimant became aware of the damages and the responsible party. The general lack of case law guidance also continues here, however, and considering that the Board decisions are published in the public domain, it may be taken into account in determining the statute of limitation.

At any rate, the statute of limitation shall not exceed a total term of ten years, from the date of the act subject to compensation. In other words, the ten-year limitation—as of the date of the act—serves as a longstop date to bring the relevant claims.

## 8. Appeal

In civil law, decisions of the court of first instance are subject to a dual legal remedy mechanism. After the court of first instance renders its final decision, the parties might appeal the ruling before the Regional Court of Appeal. The Regional Court of Appeal is authorised to examine the procedural grounds of the ruling and its merits. Such review will include procedural and factual errors as well as any errors of law.

Once the Regional Court of Appeal passes its judgment, the parties may appeal this decision at the High Court of Appeal. High Court of Appeal is the third instance within the judicial review and is the last authority to render a judgment in civil procedure. The High Court will only review the procedural issues. Lastly, if the subject of the case (e.g. the amount of damages subject to compensation claim) is less than a certain monetary value, parties are not entitled to appeal the judgment. The appeal threshold is renewed periodically. Cases with a monetary value under approximately US\$ 650 do not qualify for the first stage of the appeal process (*i.e.* the Regional Court of Appeals), while cases with a

monetary value under approximately US\$ 10,000 do not qualify for the second stage of the appeal process (*i.e.* the High Court of Appeals).

## 9. Class actions and collective representation

The CCP provides that associations and other legal entities of similar content are entitled to initiate an action for determination concerning the rights of its sole members. Associations may also file to cure a breach of law or to prevent the breach of future rights. The context of the lawsuit and the content of the dispute must be connected with the objectives of the relevant association and there must be sufficient grounds to demonstrate the interest of the association members. The question of whether the Articles of Association grant the ability to launch a lawsuit is also a topic of discussion while assessing the standing of associations in such lawsuits.

However, a class action that would include any potential claimant is not available under Turkish law.

## 10. Key issues

The key issue preventing the private enforcement of antitrust in Turkey may be singled out as the lack of tangible jurisprudential guidance. This issue not only decreases the associated degree of certainty among the ranks of antitrust practitioners but also presents a discouraging impact on the potential applicants that have suffered from a competition law violation.

In most cases, parties suffering from a competition law violation are reluctant to even initiate a damages action despite the existence of a Board decision establishing the unlawful act. The primary reasons for such reluctance emerge as the length of lawsuit before reaching a finalised ruling (three to five years on average), as well as the uncertainty of the case law and final outcome. due to the general lack of case law examples, we cannot anticipate the practicality of settlements in antitrust related damages actions. Similarly, another important factor is the lack of guidance for the calculation of the damages and, in certain cases, the fear of commercial retaliation from the infringing party.


on the other hand, the above issue also indicates that Turkish practice for antitrust damages is open to developments. Accordingly, as the number of cases increases and the courts are, in one way or another, finalising their rulings; an increase in the number of new applications is believed to be seen in an array of applicants ranging from ordinary customers to large conglomerates in competition with the accused infringer.

# ICC COMPENDIUM OF ANTITRUST DAMAGES ACTIONS

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33-43 avenue du Président Wilson, 75116 Paris, France  
T +33 (0) 149 53 28 28 E [icc@iccwbo.org](mailto:icc@iccwbo.org)  
[www.iccwbo.org](http://www.iccwbo.org)  [@iccwbo](https://twitter.com/iccwbo)

ICC Publication: KS10 1E