

Private Enforcement of Turkish Antitrust Law

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Basics of Turkish Competition Law

- Turkish Competition Code (*Act on the Protection of Competition, no:4054*) is enacted in 1994
 - It has been effectively applied since 1997
- Turkish Competition Authority (*TCA*) is established in order to enforce the law
- The Code is based on European competition law.
- Dual enforcement structure;
 - Private enforcement is considered to supplement public enforcement



Enforcement Structure

- TCA is the main enforcement authority
 - Investigative and legislative powers of the TCA
 - TCA is a policy maker
 - Harsh penalties: TCA can impose administrative fines up to the % 10 of the undertaking's (*from all economic activities*) turnover
- Private enforcement has two dimensions:
 - Nullity (art 56)
 - Damage actions (art 57-59), preliminary injunction



Private Enforcement

- Probable benefits of the private (dual) enforcement:
 - Increased deterrence
 - Compensation of the victims
 - Efficient allocation of enforcement resources
 - Greater awareness in competition law
 - Creating competition in enforcement
- Up to date, private enforcement tools has not been effectively utilized
 - Why?



Private Enforcement

- It is not a surprise given similar problems in EU law
- But there are reasons to be more optimistic for Turkish case:
 - National law
 - Explicit legal cause for tort actions
 - Opportunity for punitive damages
 - Lenient enforcement policy of the TCA
 - Rules facilitating burden of proof

Private Enforcement: Damage action

- **Right to compensation (Art 57):** “*Anyone who prevents, distorts or restricts competition via practices, decisions, contracts or agreements contrary to this Act, or abuses his dominant position in a particular market for goods or services, is obliged to compensate for any damages of the injured....*”
- The norm creates a subjective right on the pure economic interests
 - Article 57 of the Code enables victims to recover for *pure economic loss*

Damage actions: Standing

- According to the article 57, anyone injured by the violation can sue for the damages.
 - This includes consumers as well as competitors..
 - *“Competing undertakings affected by the limitation of competition may request that all of their damages are compensated by the undertaking or undertakings which restricted competition.”*
- Consumers as general? Too many suits?
- Competitor’s claims are filtered by the protective purpose of the norm
 - counterpart of *antitrust injury*!!

Damage Action-Punitive damages

- *Art. 58: “If the resulting damage arises from an agreement or decision of the parties, or from cases involving gross negligence of them, **the judge may, upon the request of the injured, award compensation by three fold of the material damage incurred or of the profits gained or likely to be gained by those who caused the damage.**”*
- Victim can claim for three times of his damages or the profits...
- It looks like a good law as it creates incentives for victims to enforce the law!



Damage Action-Punitive damages

- Questions:
 - Under what conditions?
 - Discretionary margins: double? Triple?
 - What about profits?
- Violation should be intentional or negligent
 - No problem with this requirement given antitrust violations are generally intentional
- Draft Code embraced this interpretation
- No limitation regarding the type of violation
 - Vertical restraints? Abuse of dominance?



Damage Action-Punitive damages

- Hard to apply profit based claim..
 - What happens if several claimants sue for extra profits? Risk of duplicative recovery?
- Courts should have discretionary margin
 - Criteria:
 - Likelihood of detection
 - Difference between social cost and the amount of damage
 - Amount of administrative fines imposed for the same violation

Damage Action-Facilitating factors

- **Reversal of burden of proof/concerted practices**
- **Article 59-** *“Should the injured submit to the jurisdictional bodies proofs such as, particularly, the actual partitioning of markets, stability observed in the market price for quite a long time, the price increase within close intervals by the undertakings operating in the market, which give the impression of the existence of an agreement, or the distortion of competition in the market, then the burden of proof is for the defendants that the undertakings are not engaged in concerted practice. The existence of agreements, decisions and practices limiting competition may be proved by any kind of evidence”*



Damage Action-Facilitating factors

- **Article 4/3-4:** *“In cases where the existence of an agreement cannot be proved, that the price changes in the market, or the balance of demand and supply, or the operational areas of undertakings are similar to those markets where competition is prevented, distorted or restricted, constitutes a presumption that the undertakings are engaged in concerted practice. Each of the parties may relieve itself of the responsibility by proving not to engage in concerted practice, provided that it is based on economic and rational facts.”*



Damage Action-Facilitating factors

- Low cost of suits for a claimant
- Proof of negligence:
 - presumption of fault
- Proof of damage:
 - Low standard for proof in relation to damage calculation (Article 42 of the Law of Obligations)



Damage Action-Lack of enforcement

- Underdeterrence in public enforcement
- Despite its wide authority, TCA has been criticized due to its lenient and inconsistent enforcement policy
 - Declining number of cases investigated,
 - Too many comfort letters
 - Small amount of fines..
- Private enforcement (damage action) has been considered as a viable alternative enforcement tool



Private Enforcement

- Several cases have been filed. Nonetheless there have been almost no successful damage awards for breach of antitrust rules
- Why?
 - Various reasons...
 - Informational and institutional problems of the current system
 - Ongoing legislation: Draft Code in the parliament
 - A change in enforcement policy: new regulations regarding leniency and setting the fines

Private enforcement: reasons of underdevelopment

1. Informational problems

- For the courts: New cause of action creates reluctance
 - Technicality of competition litigation
 - Practical solution: remanding the case to TCA and adjourn the case
- For the victim: New law, new cause of action
 - Regarding cartels (overcharge violations), lack of awareness (especially for the consumers)
 - Even punitive damages option would not create sufficient incentives

Private enforcement: reasons of underdevelopment

3. Exclusive authority of TCA to grant exemption decision

- Courts can not render a final judgment on article 4 (art 81) cases
- Decreases the chances of *stand alone cases*.
- Similar situation in merger cases

4. Despite the provisions in the law, problem of proof.

- Coupled with the technicality of competition litigation, establishing a violation can be burdensome
 - Detection of cartels...
- No pre trial disclosure requirement

Private enforcement: reasons of underdevelopment

- One would expect at least **follow on cases** (given the punitive damages)
- There u have: *long litigation process*, uncertainty in Turkish judicial system
- It is unlikely to expect cases from consumers, unless there is a procedural mechanism which mitigates the problems of free riding and coordination
 - No collective action
- Problem *time limitation*



What can be done? Draft Code

- Evolutionary process.. Wait and see
- New enforcement policy in public law
- Lifting the monopoly of TCA on exemption decisions (81/3)
- Cooperation between TCA and the Court system
 - Explicit provision that enables courts to decide without TCA involvement
- Guidelines regarding damage calculation
- Explicit policy choice on the standing issue
- Punitive damages issue
- Time limitation
- Leniency