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Erin Brockovich turns European : is there an interest for class actions?

Litigation/Antitrust/Distribution law Commissions

Prague, 2014

National Report of Turkey

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15 April 2013

INTRODUCTION

Class actions are often related and associated to the American legal culture, as it is illustrated by several movies including the famous “Erin Brockovich” picture.

However, the class actions or collective redress actions exist also in other jurisdictions, notably in Europe.

Precisely, the European Commission has recently given an accurate definition of collective redress and of its aim in its communication named “Towards a European Horizontal Framework for Collective Redress”¹, accompanying its “Recommendation on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law”²:

“Collective redress is a procedural mechanism that allows, for reasons of procedural economy and/or efficiency of enforcement, many similar legal claims to be bundled into a single court action. Collective redress facilitates access to justice in particular in cases where the individual damage is so low that potential claimants would not think it worth pursuing an individual claim. It also strengthens the negotiating power of potential claimants and contributes to the efficient administration of justice, by avoiding numerous proceedings concerning claims resulting from the same infringement of law.”

Although collective redress and class actions exist in several jurisdictions in the world, there are some differences arising from different legal and procedural cultures, notably between the Common Law and the Civil Law legal systems.

Thus, the purpose of this questionnaire is to identify such differences as well as the common points between the collective redress and class actions in various jurisdictions.

There is also a particular focus on class actions in the anti-trust field, which is one of the main areas for such actions, as shown by the recent proposal for an EU “Directive on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union”³.

¹ COM(2013) 401/2

² C(2013) 3539/3

³ COM(2013) 404 final

1. Existence and scope of class actions/collective redress actions

1.1 In your jurisdiction, is there any specific legislation dealing with class actions/collective redress actions, and is there a specific definition of such actions?

Historically Turkish law has allowed only for multi-party litigation. However, litigation that is similar to a class action and called “collective action” is now available for legal persons and associations under the new Code Of Civil Procedure numbered 6100 which came into force in 2011.

According to article 113 of Turkish Code Of Civil Procedure :

Associations and other legal entities may, within the framework of their statute and on their behalf, initiate a collective action in order to protect the interests of its members or of its associates or of the groups they represent, to determine the rights of the related parties or to remedy the unlawful situation or to prevent the future violation of their rights.

1.2 Are class actions/collective redress actions applicable to any legal action, irrespective of the legal ground and the area of law, or do they have a scope limited to some fields of law (such as consumer law, competition law, environmental law...)?

As Article 113 of Civil Procedure Code is a general provision, if there is no restrictive provision in the other Turkish Codes, collective action is applicable to any legal action. Due to collective action is stated under the new code of civil procedure, in practice it is rare to encounter some cases. Presently in practice, we see examples of this new type of action mostly in Consumer Law.

1.3 Is there any interplay between several statutes, for instance between competition law and consumer law statutes? Is it allowed to bring a class action / collective redress action on the ground of several statutes, or is it mandatory to ground it on either set of statutes?

Due to the jurisdiction organization of Turkish Law, all disputes are not resolved at the same branches of judiciary, there are several branches of judiciary. For this reason disputes which belong to different branches of judiciary have to be resolved separately at their own official court. For instance, disputes regarding competition law have to be resolved at Commercial Court and disputes related to consumer law have to be resolved at Consumer Court.

1.4 Is it allowed to initiate summary/emergency proceedings in class actions / collective redress actions?

In Turkish Law System, there is no such regulation which allows to initiate summary/emergency proceedings in class actions/collective redress actions.

1.5 Through class actions/collective redress actions, is it possible to claim cessation of unlawful practices/behaviors (“injunctive relief actions”) and/or to claim compensation for damage suffered (“compensatory relief actions”)?

As per article 113 of the Civil Procedure Law, associations and other legal entities may commence civil proceedings with respect to their status and on behalf of themselves in order to protect their members’ and associates’ rights. The protection involves claims to establish a right or legal status, to cease unlawful acts and to prevent unlawful acts. Therefore, through class actions/collective redress actions it is possible to claim cessation of unlawful practices/behaviors but it is not possible for the associations or other legal entities to claim compensation for damages suffered by their members or associates.

1.6 If it is possible to claim compensation, can every type of damage suffered by the victims can be compensated, or only some types of harms (material damages/bodily injuries, death)?

As it is not possible to claim compensation, any type of damage suffered by the victims cannot be compensated.

1.7 Can the compensation awarded to the victims exceed the compensation that would have been awarded if the claim had been pursued by means of individual actions? More particularly, are punitive damages, leading to overcompensation in favour of the claimant party of the damage suffered, allowed and applied in class actions / collective redress actions?

As in Turkish Law System, through a class action/collective redress, compensation cannot be awarded to the victims, the victim has to claim his/her damages by means of individual actions.

1.8 More particularly in the anti-trust field, how does the ‘passing on’ defence (demonstrating that the claimant passed on the whole or part of the overcharge resulting from the infringement) play a role in your country and have such a defence been successful?

It is not found in our jurisdiction.

2. Standing and admissibility to bring class actions/collective redress actions

2.1 In your jurisdiction, may the class actions / collective redress actions be brought by any group of individuals or legal persons claiming to have been harmed by the same alleged infringement (“collective actions”), and/or can they be brought by an authorized representative entity/ ad hoc certified entity/ public authority on behalf and in the name of two or more individuals or legal persons claiming to be victims of the relevant practice (“representative actions”)?

In our jurisdiction, the class actions/collective redress actions may not be brought by any group of individuals or legal persons claiming to have been harmed by the same alleged infringement. Class actions/collective redress may be brought by an authorized representative or public authority on behalf and in the name of two or more individuals or legal persons claiming to be victims of the relevant practice. But according to the article 113 of Code of Civil Procedure, associations and other legal entities may only bring such actions with respect to their status which means that they may only initiate a collective action in accordance with their establishment and operation.

There are some Turkish law regulations that can create an instance of the class actions and which determine authorized representative entity or public authority on behalf and in the name of two or more individuals or legal persons claiming to be victims.

According to the article 56 of Turkish Commercial Code numbered 6102;

Chambers of industry and trade, chambers of artisans, exchange markets and other professional and economical unions, non-governmental organizations and public organizations which are authorized to protect economic interests of their customers pursuant to their bylaws can also bring actions for determination of unfair competition or for prevention of unfair competition or for eliminating the factual situation upon an unfair competition act or if the unfair competition made by false and misleading statements, for correction of those statements.

According to the article 23/4 and the article 24/1 of Turkish Code on Consumer Protection numbered 4077;

The Ministry or consumer organizations can file lawsuits, before consumer courts, relating to issues which are not considered individual consumer problems but are, in general, concern to consumers, in order to eliminate the situation violating this Law.

In the event that a series of goods offered for sale are defective, the Ministry, consumers or consumer organizations can file a lawsuit seeking the production and sale of the defective good to be suspended, and recalled from those who are holding such goods for sale.

2.2 Are there any criteria/rules defining the cases where one or another kind of actions referred to in 2.1 could apply?

There is no specific regulation which states any criteria/rule defining the cases where one or another kind of actions referred to in 2.1 could apply.

2.3 In case of representative actions, are there rules defining the requirements for representative entities (for instance: a non-profit character; a relationship between the main objectives of the entity and the rights that are claimed to have been violated; financial/human resources/legal expertise requirements...), and can the representative entities be sanctioned if they do not comply with such requirements?

As per article 113 of Code of Civil Procedure, the entities which can file a case on behalf of their members or persons that they represent are associations and all other legal entities. In addition, it is also regulated that legal entities may only initiate within the frame of their statute. The article regulated in Code on Consumer Protection also states the entities which are able to file a case on behalf of consumers. If the conditions are not complied, the case will be rejected due to lack of procedure.

2.4 Is the admissibility of a class action / collective redress action examined by the courts at an early stage of the proceedings, or is it ruled together with the merits of the case?

In Turkish Law System, the admissibility of a lawsuit is examined by the court at the first stage of the proceedings named preliminary examination. If the lawsuit does not meet the conditions required by the law, the court will not proceed to the investigation stage.

2.5 Is it possible for third parties to bring actions? If so, are indirect purchasers able to bring actions with respect to antitrust infringements?

According to the Turkish Code of Civil Procedure, only parties whose interests are violated are entitled to bring an action. However in a limited number of circumstances which are stated by the law, third parties may be allowed to file an action in respect of violation of an interest belonging to a third party. (such as in Code on Consumer Protection allows consumers' associations to file lawsuits in respect of the consumer) On the other hand, the Civil Procedure Law No. 6100 introduced a new provision which, under certain circumstances and conditions, allows third party legal entities such as associations to file lawsuits, on behalf of themselves, but for the protection of the interests of their members and associates.

2.6 How may claims be aggregated? For example, is it possible for multiple plaintiffs to file a complaint jointly?

In Turkish civil procedure law, it is possible to voluntarily bundle individual claims by way of assignment. In such cases, the claims of the different claimants will still continue to exist as individual claims; to the extent that they depend on common factual circumstances. In the event these individual claims are bundled, they can be litigated together. The courts are also entitled to request the mandatory bundling of individual claims if a specific right arising from substantive law is exercised by more than one claimant.

2.7 More generally, what procedural defences are available for defendants short of trial and therefore before the national court decides on the merits of a collective action?

It is not found in our jurisdiction.

3. “Opt-in” vs “Opt-out” systems and information on the class action/collective redress action

3.1 In your jurisdiction, is the claimant party/group formed on the basis of express content of the natural or legal persons claiming to have been harmed (“opt-in” principle), or is it composed of all individual belonging to the defined group and claiming to have been harmed by the same of similar practice unless they actively opt out of the group (“opt-out” principle)?

In our jurisdiction the natural or legal person claiming to have been harmed cannot become the claimant party without expressing their claim. The claimant party is formed on the basis of express content. In Turkish Law system opt-out principle exist in certain circumstances (such as consumer law disputes), the claim is brought on the opt-out basis.

In Turkish Code of Civil Procedure, there is a procedural mechanism named “intervention to case” that allows third parties who will have an effect at the end of the case, to participate in the case by submitting a petition of intervention. However, they do not become a party of the case.

3.2 What are the effects of the judgment on the victims in the “opt-in” or “opt-out” system chosen in your jurisdiction?

The judgment of a collective action will have an effect on the victims claiming to have been harmed. They will benefit from the judgment, which means, they do not have to bring a several action. However, the collective action brought for instance by a consumer organization, will not constitute an obstacle to bring another action by a consumer for compensation of damages. The judgment may then be used in lawsuits which will be brought by the victims. If there is no more need to file a several action within the frame of the result obtained at the end of the collective action, this kind of case brought after the judgment shall be rejected due to lack of legal benefit. In summary, not only the legal person but also all individuals within this collective group shall benefit from and shall be influenced by the result of the lawsuit. The decision rendered in the end of collective action shall also be used as a precedent judgment in future individual lawsuits that may be taken.

3.3 May a member of the claimant party be free to leave the claimant party at any time before the final judgment is rendered or the case is otherwise settled, and if he/she/it may, on which conditions?

As per article 307 of Code of Civil Procedure, the claimant party may withdraw the lawsuit until the order is finalized. The waiver has to be unconditional. In our jurisdiction, there is a procedural mechanism named “joinder of parties”. In discretionary joinder of parties, each member acts separately, therefore a member may waive separately from others until the order is finalized. However, in the compulsory joinder of parties, each member act together, which means they may not waive separately.

Articles 57-59 of Code Civil of Procedure

Discretionary joinder of parties:

Article 57- Under following circumstances, more than one party can file a suit or become defendants together:

- a) If the privilege or debt between co-plaintiffs or codefendants, is common due to a reason out of tenure.
- b) If a privilege arisen for multiple person by common transaction or, with this manner, they enter into obligation themselves.
- c) If the legal facts and legal reasons which are the basis of the lawsuit are same or similar.

The status of voluntary joinder of parties during the lawsuit :

Article 58- In the discretionary joinder of parties, lawsuits are independent. Each one of the discretionary joinder of parties act independently.

Compulsory joinder of parties:

Article 59- According to substantive law, if a privilege is used together by many persons or used against to many persons and, in circumstances in which it needs to decide for fullest extent , it is mandatory to be joinder of parties.

The status of mandatory joinder of parties during the lawsuit:

Article 60- Compulsory joinder of parties, they can only bring a lawsuit together or a lawsuit can only be brought against them together. In this type of joinder of parties, it is mandatory for joinders to act together.

3.4 May a natural or legal person claiming to have been harmed in the same mass harm situation be able to join the claimant party at any time before the judgment is rendered or the case is otherwise settled?

According to the article 66 of Turkish Code of Civil Procedure which states the mechanism of ‘intervention to case’;

A third person, may participate in the proceedings next to the defendant or claimant party until the expiry of the investigation as an intervening party.

3.5 Is the defendant informed about the composition of the claimant party, and in which conditions?

As in our legal system, the claimant party is the one who submits a lawsuit petition, there is no need to inform the defendant about the composition of the claimant party. The victims who will benefit from the decision do not become a party of the case. If a natural or legal person requires to participate in the proceedings, it is obligatory to submit a petition regarding the procedural mechanism of ‘intervention to case’. When a lawsuit petition or petition of intervention is submitted, it is notified to the

defendant. Therefore, the defendant will automatically be informed about the composition without any other operation.

3.6 Are there any provisions regulating the way the victims of the practice are informed about a possible or actual class action / collective redress action? More particularly, are there safeguards regarding the protection of the reputation or the company value of the defendant before (and after) its responsibility for the alleged infringement is established by the final judgment?

There is not such provision in our jurisdiction.

3.7 Is there any registry of class actions / collective redress actions in your jurisdiction? If there is such a registry, how is it possible to access it?

No, in our jurisdiction there is no registry of class actions/collective redress actions.

4. Interplay of class actions / collective redress actions and public enforcement

4.1 In your jurisdiction, do class actions / collective redress actions have to follow on from infringement decisions adopted by public authorities in regulated policy areas like competition law (“follow-on actions”) or is it possible to start a stand-alone action (ie, without a prior finding of infringement of any applicable antitrust laws by a national court or competent authority)?

In our jurisdiction, class actions/collective redress actions do not have to follow on from infringement decisions, it is possible to start a stand-alone action.

4.2 Are such stand-alone and/or follow-on actions available for both bilateral antitrust infringements (eg, a cartel) as well as unilateral antitrust infringements (eg, an abuse of a position of dominance)?

It is not found in our jurisdiction.

4.3 In such cases, are there rules regulating access by claimants to documents obtained or produced by the public authority in the course of the investigation? What kind of devices to obtain evidence are available for plaintiffs? Is, for example, discovery possible in your country?

In our jurisdiction, the investigation is executed by court not by a public authority. Besides, all documents used in case are brought by parties, and notified to the parties. Therefore, the claimant and defendant party of the case may access all documents obtained for the case.

4.4 Are there rules on limitation periods allowing potential claimants to wait with class actions until the public authority takes its decision as regards the infringement?

There is no such rule in our jurisdiction.

4.5 Does a decision of the national competition authority or national court create a rebuttable presumption of proof? For EU jurisdictions, how does the judgment of the Court of Justice EU in *Masterfoods* (20 September 2001, C-344/98) play a role in your country with respect to actions based on cartel damages?

A decision of the national competition authority or national court may constitute a precedent but it is not binding, which means the other national authorities may not follow the precedent decision, however it may be used in several cases.

5. Funding of the class actions / collective redress actions, attorney's fees

5.1 In your jurisdiction, is it possible to have class actions financed by third parties who are not parties to the proceedings?

Turkish law does not provide any specific regulations regarding third-party funding. It must be noted that third parties may be allowed in a limited number of circumstances, which are specifically provided by the law, to file an action in respect of violation of an interest belonging to a third party. (such as Code on Consumer Protection which allows consumers' associations to file lawsuits in respect of the consumer but it should be noted that in this situation consumers' association become the claimant party) Claimants may receive funding from third parties as long as the third parties do not participate to the lawsuit as claimants.

Besides, in Turkey there is a legal aid which provides all trial expenses be paid by the State. The victim who cannot afford to finance the proceedings may request a legal aid from The Turkish Bar Association .But in this situation also, in case the victim lose the case, he/she will be asked to pay those amounts.

5.2 Is the claimant required to declare to the court, notably at the outset of the proceedings, the origin of the funds that it is going to use to support the legal action?

No, the claimant is not required to declare to the court, the origin of the funds that it is going to use to support the legal action.

5.3 Can the court stay the proceedings for any reason relating to the funding of the action (for instance: conflict of interest between the financing third party and the claimant and/or its members; the third party has insufficient resources in order to meet its financial commitments to the claimant party; the claimant party has insufficient resources to meet any adverse costs should the collective procedure fail; the fund provider is a competitor of the defendant)?

Article 120 of the New Procedural Law introduces a new institution, named the advance expense fee. As per the relevant article, the plaintiff has to pay the litigation fees and the amount as stipulated annually by the Ministry of Justice, while initiating a lawsuit. In case it is seen that the advance expense fee is not paid, either partially or in whole, the plaintiff is granted with a two-week term to realize the payment. If the amount is not paid until the expiry of the term, The Court decides the file as non filed.

Besides, for instance, if a party of the lawsuit request the file to be sent to an expert examining, it is obligatory to pay expenses. Nonpayment of a legal fee(such as witnesses, experts, investigation etc.) arising from the parties claims during the trial, shall be deemed a waiver of such claim.

5.4 Do public funds providing financial support for potential claimants in collective redress/ class actions exist in your jurisdiction?

In Turkish Law system, there is no specific regulation regarding public funds.

5.5 Are contingency or success fees for legal services that cover not only representation, but also preparatory action, gathering evidence and general case management allowed in your jurisdiction?

Yes

5.6 Does the losing party of a class action / collective redress action have to reimburse necessary legal costs borne by the winning party (“loser pays principle”), and in which proportion?

Turkish procedural legislation accepts the main principle where the loser pays for the legal costs of all parties, and other types of costs. Therefore the defeated party must bear all costs arising from trial including the court costs and attorney fees. This principle is preserved within Article 326 of the New Procedural Law. It should be noted that there is a tariff setting a cap on the attorney fees which is annually issued by the Union of Turkish Bar Associations and the defeated parties are not responsible to cover any attorney fees above the tariff.

5.7 More generally, are there any rules and/or safeguards aimed at avoiding incentives to abuse the collective redress systems?

There is not such regulation under Turkish Law.

5.8 Are the parties to an action able to insure against the cost risks?

There is not such regulation under Turkish Law.

5.9 Is a defendant able to apply for an order for security of costs? If so, what are the difficulties to obtain such an order?

There is not such regulation under Turkish Law.

5.10 Are there (other) ethical of Bar rules in your country relevant with respect to class actions?

There is not ethical of Bar rules in our country.

6. Cross-border cases

6.1 In your jurisdiction, are there specific international private law rules (conflict of law and of jurisdiction rules) applicable to class actions / collective redress actions, or do the general international private law rules apply to such actions?

In our jurisdiction, there is no specific international private law rules applicable to class actions/collective redress actions.

6.2 Are there rules prohibiting a single collective action to take place in a single forum?

In our jurisdiction, there is no rule regarding prohibition of a single collective action to take place in a single forum

6.3 Can a representative entity designated by a foreign country have legal standing to bring representative actions in your jurisdiction?

The entities which may initiate a collective action are determined in the law, therefore a representative entity designated by a foreign country do not have legal standing to bring such actions.

6.4 What are the rules where there are several actions regarding the same facts and practices brought in different jurisdictions? Is it for example possible to bring an action against a company and/or individual domiciled outside of the jurisdiction (e.g., against a parent company domiciled outside of the jurisdiction which has a subsidiary within the jurisdiction)?

The Foreign Court Orders shall not be binding Turkish Courts unless they are duly recognized and enforced under Turkish International Private Law.

7. Alternative dispute resolution

7.1 In your jurisdiction, is there any specific mechanism of collective alternative dispute resolution allowing the settlement of class actions / collective redress actions? If so, are the parties required to engage in alternative dispute resolution prior to trial and are the implications for refusing?

In our jurisdiction, there is not such a specific mechanism of collective alternative dispute resolution allowing the settlement of class actions/collective redress actions. In general, in our jurisdiction there are arbitration and mediation procedure as alternative dispute resolution.

Parties in a dispute can freely decide whether to mediate or to arbitrate or litigate the dispute in question. According to the Law, parties may apply mediation during or before the legal proceedings. Parties can always freely withdraw from mediation process at any time. Although it is at the complete discretion of parties to decide on how to settle their disputes, during the litigation process the judge may encourage and guide parties to try mediation.

7.2 Are the parties encouraged to settle the dispute out of court in any way, and is it a usual practice in your jurisdiction?

Alternative dispute resolution does not form part of court procedures and applies only if the parties voluntarily agree to settle a dispute through ADR

methods. The courts do, however, encourage parties to resolve their disputes through settlement.

As per article 35/A of Attorney's ACT

In actions and cases that have been entrusted to them, attorneys, together with their clients, may invite the other party to conciliation before a suit has been filed or before hearings have commenced for an already filed suit, provided that such conciliation pertains exclusively to matters that the parties may elicit of their own will.

Therefore mediation cannot be executed by persons who did not receive a law education, settlement which is stipulated under Article 35/A of the Attorney Law already fulfills the need for mediation

Mediation and Arbitration are not a usual practice in our jurisdiction.

7.3 Are limitation periods applicable to the claims suspended during the period when the parties try and negotiate a settlement through collective alternative dispute resolution mechanisms or any other means?

Limitation periods applicable to the claims are not suspended during the period when the parties try and negotiate a settlement.

7.4 Can a seller of a good or any contracting party insulate himself/herself/itself from a class action by including, in the terms of use or in a purchase agreement, a mandatory arbitration clause, thus prohibiting the consumer from bringing a class action in court?

With the new code on consumer protection, consumers are widely protected. Therefore, clauses which restrict rights of consumers are deemed as invalid.

8. Enforcement of the court decision

8.1 Are there any provisions regulating the way the victims of the practice are informed about decision rendered in a class action / collective redress action concerning them? If there are such provisions, who is in charge of such information (the court/ an independent entity/ the claimant/the defendant)?

There are not any provision regulating the way the victims of the practice are informed about decision. The court decision is notified only to the parties of the case.

8.2 Are there any provision regulating the way the court order is enforced and the possible compensation paid by the defendant? If there are such provisions, who is in charge of the enforcement, notably of the payment of the damages (a public authority/ an independent entity/ the claimant/the defendant)?

As the collective action are brought as a declaratory action and not as an action for performance, the decisions are not subject to the enforcement proceedings. In our jurisdiction, after the court order, the defeated party is in charge of the enforcement, notably of the payment of the damages. The prevailing party of the case has to start the enforcement proceedings with an order issued by an enforcement office.

8.3 In relation to injunctive orders, are there rules ensuring their effective compliance by the losing defendant (for instance: payment of a fixed amount for each day's delay or any other amount provided)?

Injunctive order differs regarding the subject of the case. In some circumstances, it is not possible to have an injunctive order. The court is free to give any injunctive order. However, there is no rule regarding ensuring their effective compliance by the losing defendant. The article 398 of code civil of procedure, prescribes a penalty in case a person does not comply with the injunctive order.

Article 398

A person who does not comply with the order of the application of injunctive order or who contravenes the injunctive order, shall be punished with imprisonment from one month up to 6 months.