

INTELLECTUAL PROPERTY & ANTITRUST

Turkey



Intellectual Property & Antitrust

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Quick reference guide enabling side-by-side comparison of local insights, including into intellectual property law, the nexus between competition and IP rights, and consideration of industry standards; competition law, including such issues as interactions with copyright exhaustion or first sale doctrines; merger review; specific examples of competition law violations; remedies; economics and application of competition law; recent cases, remedies and sanctions; and other recent trends.

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INTELLECTUAL PROPERTY

Intellectual property law

Under what statutes, regulations or case law are intellectual property rights granted? Are there restrictions on how IP rights may be enforced, licensed or otherwise transferred? Do the rights exceed the minimum required by the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs)?

Turkey has granted intellectual property (IP) rights in a number of legal regulations. These legal regulations consist of:

- Law No. 6769 on the Industrial Property;
- Law No. 5846 on the Intellectual and Artistic Works;
- Law No. 5147 on the Protection of Integrated Circuit Topographies; and
- Law No. 5042 on the Protection of Plant Breeders' Rights for New Plant Varieties.

Within this scope, statutory and non-statutory IP rights can be summarised as patent, trademark, copyright and related rights, utility model, design, geographical indications and traditional product names, integrated circuit topographies, new plant varieties, biotechnological inventions, trade names and company names, domain names, trade secrets, and know-how. In accordance with the relevant legal regulations, IP holders are entitled to exploit the subject of right exclusively, to prevent illegal use of it by third parties and confer the right to use it by licensing it to third parties.

In line with article 148 of the Industrial Property Law, geographical indications and traditional product name rights cannot be the subject of licence, transfer and similar legal transactions. Moreover, legal transactions regarding IP rights are subject to written form and the validity of transfer agreements depends on the fact that they are notarised.

IP rights in Turkey exceed the minimum required by the TRIPs. In literature, they are referred to as 'TRIPs plus', and they mainly focus on two areas: pharmaceutical patents and providing protection to species through breeding animals and plants.

Law stated - 22 November 2021

Responsible authorities

Which authorities are responsible for granting, administering or enforcing IP rights?

The institutions that grant, administer, enforce and protect IP rights by functioning as IP rights register and other institutions that are exclusively authorised in the enforcement of IP rights are listed below:

- Turkish Patent and Trademark Office: Carries out the registration procedures related to patent, utility model, trademark, design, geographical indication and integrated circuit topographies applications. It is affiliated with the Ministry of Industry and Technology.
- Directorate General for Copyright of Ministry of Culture and Tourism: Follows international developments on copyright, works to develop national legislation, deals with necessary measures and practices against infringements of IP rights and engages in public awareness activities. In addition, 'registration', 'banderol' and 'certificate' procedures for intellectual and artistic works are also carried out in this directorate.
- Directorate General for Plant Production of Ministry of Agriculture and Forestry: All registration procedures for new plant varieties are made in this directorate.
- Intellectual and Industrial Property Rights Coordination Board: Established in order to create short, medium and

long-term strategies on intellectual and industrial property rights, to improve coordination and cooperation among relevant institutions, and to ensure effectiveness in practices.

- General Directorate of Security: As a police organisation, carries out the actions specified in law by acting ex officio or upon complaints made regarding copyright and industrial rights infringements in Turkey. It is affiliated with the Ministry of the Interior.
- General Directorate of Customs of Ministry of Commerce: Carries out the procedures stipulated by the law, with the authority to act ex officio or upon application for IP rights infringements at Turkish customs.

Law stated - 22 November 2021

Proceedings to enforce IP rights

What types of legal or administrative proceedings are available for enforcing IP rights? To the extent your jurisdiction has both legal and administrative enforcement options for IP rights, briefly describe their interrelationship, if any?

On 1 January 2019, mediation for commercial disputes concerning receivables and compensation claims became mandatory in Turkey. In this context, article 4(1)(a) of the Turkish Commercial Law considers all disputes arising from the IP legislation as commercial disputes, regardless of the title of parties (whether they are merchants or not). Therefore, the IP holder must complete the applicable mandatory mediation proceedings before filing a lawsuit regarding a commercial payment claim.

Alternatively, parties can take the IP dispute to arbitration as well. However, in Turkish law, disputes arising from contracts regarding IP rights or infringement of these rights are arbitrable, but it is difficult to say the same for registered IP rights.

In terms of disputes that are not subject to arbitration and are outside the scope of mandatory mediation, there are two specialised courts available for cases stipulated in the Industrial Property Law, in line with article 156 of the same law:

- Through the Civil Court of Intellectual and Industrial Rights, an IP holder can file a lawsuit mainly for the infringement actions to be stopped and to be compensated.
- Through the Criminal Court of Intellectual and Industrial Rights, criminal prosecutions and actions are handled, all of which commence with the IP holder initiating a raid action following a criminal complaint with the public prosecutors. It is important to note that criminal actions are not available for patent and industrial design owners.

The amount subject to the dispute is not relevant to the court. Hence, there are no separate enforcement options based on the amount of controversy.

In addition to these legal proceedings, there are auxiliary actions that can be taken to the administrative court, which are recommended to be combined with civil and criminal action. In this context:

- Oppositions can be filed before the Turkish Patent and Trademark Office, which are available for trademarks, patents and industrial designs as there is no registration system for copyright in Turkey.
- The recording of IP rights with customs is one of the administrative proceedings that would lead to the confiscation of counterfeit or pirated goods by customs officers. Following the recording of the rights, the customs authorities detain the suspected products and inform the IP holder. However, the detainment of goods is temporary, and the IP holder has to initiate legal proceedings (civil or criminal) in order to have the counterfeit or infringing goods permanently confiscated and subsequently destroyed.

As to the interrelationship between legal and administrative enforcement options for IP rights, parties are not precluded from arguing in one venue when choosing one enforcement option first. On the contrary, it is recommended to combine an administrative enforcement option with a civil or criminal action for an effective action plan.

Law stated - 22 November 2021

Remedies

What remedies are available to a party whose IP rights have been infringed? Do these remedies vary depending on whether one utilises judicial or administrative review or enforcement?

In accordance with article 149 of the Industrial Property Law, a party whose IP rights have been infringed may ask the court to:

- determine the infringement;
- stop the infringing acts;
- rule on compensation for material and moral damages;
- confiscate or destroy the infringing products as well as the equipment and machinery used to produce the products; and
- publicise its decision.

In addition, preliminary injunctions are available before or during the substantive proceedings in line with article 159 of the Industrial Property Law. In this regard, the claimants must prove that they are the right holder, their rights are being infringed or it is highly likely for the rights to be infringed, and they may suffer irreparable harm or damages.

There are no criminal remedies for design and patent infringements, but for trademark and copyright infringements, criminal remedies, including imprisonment and fines, are available.

These remedies vary depending on whether one utilises judicial or administrative review or enforcement. Except for the confiscation of infringing products, all remedies are available if judicial review or enforcement is utilised (and it should be noted that the confiscation of infringing products is temporary if one utilises administrative review or enforcement).

Law stated - 22 November 2021

Nexus between competition and IP rights

Do any statutes, regulations or case law in your jurisdiction address the interplay between competition law and IP law?

Article 129 of the Industrial Property Law governs the interplay between competition law and IP law. If the patentee carries out activities distorting, hindering or limiting the competition while the patent is used, a compulsory licence shall be requested from the Turkish Competition Authority (TCA).

Other than this provision, there is no law that regulates the interaction between competition law and IP law. Nevertheless, within the scope of competition law, the secondary legislation addresses the interaction between competition law and IP law. In this context:

- 'Block Exemption Communiqué No. 2008/2 on Technology Transfer Agreements' and 'Guidelines on the Application of articles 4 and 5 of Law No. 4054 on the Protection of Competition to Technology Transfer Agreements' state that both bodies of law have the same basic objective of promoting consumer welfare and an

efficient allocation of resources. While IP rights promote dynamic competition by encouraging undertakings to invest in developing new or improved products and processes, competition law puts pressure on undertakings to innovate. Therefore, they both aim to promote innovation and ensure a competitive benefit thereof.

- 'Block Exemption Communiqué No. 2002/2 on Vertical Agreements' and 'Guidelines on Vertical Agreements' contain an exemption for vertical agreements that include the exercise of intellectual rights where provisions concerning intellectual rights are directly related to the use, sale or resale of the relevant goods and services, and other the conditions provided in the relevant communiqué are met.
- 'Block Exemption Communiqué No. 2013/3 on Specialisation Agreements' extends the exemption to licensing or IP transfer agreements that are directly related to, or necessary for, the functioning of the exempted specialisation agreements.
- 'Block Exemption Communiqué No. 2016/5 on Research and Development Agreements' provides an exemption for R&D agreements that include provisions regarding the assignment or licensing of IP rights to conduct joint R&D, paid-for R&D or joint exploitation (as long as those provisions are not the primary object of such agreements).

Law stated - 22 November 2021

Patent cooperation treaties and other agreements

Does your jurisdiction participate in any patent cooperation treaties or other similar agreements?

Turkey is a participant (as a signatory or party) of various international and bilateral agreements, conventions and treaties, such as the TRIPs, the WIPO Patent Cooperation Treaty, the WIPO Copyright Treaty, the Paris Convention for the Protection of Industrial Property, the Strasbourg Agreement Concerning the International Patent Classification, the Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks, the Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of Registration of Marks, the Vienna Agreement Establishing an International Classification of the Figurative Elements of Marks, the Berne Convention for the Protection of Literary and Artistic Works, the Hague Agreement Concerning the International Registration of Industrial Designs, and the European Patent Convention.

Law stated - 22 November 2021

Remedies for deceptive practices

With respect to trademarks, do competition or consumer protection laws provide remedies for deceptive practices?

No, there are no remedies in competition or consumer protection laws for deceptive practices regarding trademarks. That said, consumer protection law in Turkey has remedies concerning deceptive advertising.

Law stated - 22 November 2021

Technological protection measures and digital rights management

With respect to copyright protection, is WIPO protection of technological protection measures (TPMs) and digital rights management (DRM) enforced in your jurisdiction? Do statutes, regulation or case law limit the ability of manufacturers to incorporate TPM or DRM protection limiting the platforms on which content can be played? Has TPM or DRM protection been challenged under the competition laws?

No. Turkey does not have a law in force with regards to the circumvention of technological protection measures and digital rights management. However, the Intellectual and Artistic Works Law has a broad definition concerning the rights owner being able to use any kind of technological measures to protect their artistic rights.

Law stated - 22 November 2021

Industry standards

What consideration has been given in statutes, regulation or case law to the impact of the adoption of proprietary technologies in industry standards?

As per Industrial Property Law, the compulsory licence may be given in the presence of at least one of the following conditions stipulated within article 129:

- notwithstanding other provisions, if the invention subject to the patent is not used;
- if the dependence of patent issues is in question;
- if there is public interest;
- if the conditions specified in the protocol amending Agreement on Trade Related Aspects of Intellectual Property Rights are present, if exportation of pharmaceutical products comes into question due to public health issues in other countries;
- if the breeder fails to develop a new plant variety without infringing on a previous patent; and
- if patentee carries out activities distorting, hindering or limiting the competition while patent is used.

Pursuant to the same article, as per the last condition above, if the patentee disturbs competition, a compulsory licence is requested from the TCA.

On the other hand, the Guidelines on Horizontal Cooperation Agreements contain explanations regarding access to the standard on fair, reasonable and non-discriminatory (FRAND) terms. According to paragraph 258, FRAND commitments are designed to ensure that any essential technology under IPR protection incorporated in a standard is accessible to the users of that standard on a fair, reasonable and non-discriminatory basis. In particular, these commitments can prevent IPR holders from making the implementation of a standard difficult by refusing to license or by requesting unfair or unreasonable (excessive) fees or discriminatory fees after the industry has been locked-in to a standard.

There is no case law in Turkey dealing with 'patent hold-up', 'patent ambush', 'reverse patent hold-up' or 'royalty-stacking'.

Law stated - 22 November 2021

COMPETITION

Competition legislation

What statutes set out competition law?

The main legal source of competition law in Turkey is Law No. 4054 on the Protection of Competition (Competition Law) akin to EU law. It aims to ensure the protection of competition in the market and to prevent anticompetitive actions such as preventing, distorting or restricting competition in markets for goods and services and the abuse of dominance, etc. In addition, there are some regulations, communiques and guidelines that set out this field as secondary legislation.

Law stated - 22 November 2021

IP rights in competition legislation

Do the competition laws make specific mention of any IP rights?

There is no specific provision that relate to IP rights in the Competition Law. That said, Block Exemption Communiqué No. 2008/2 on Technology Transfer Agreements (Communiqué) regulates the compatibility IP rights licence agreements with the Competition Law. This Communiqué provides for the conditions whereby the provisions, contained in technology transfer agreements, which are restrictive of competition under article 4 of the Competition Law, are granted exemption when they are accepted to satisfy the requirements under article 5 of the Competition Law.

In determining whether technology transfer agreements that are restrictive of competition satisfy the requirements of exemption, the power, held especially by those undertakings that are party to such agreements, within the relevant product and technology market, must be taken into account. In other words, the existence of substitutable technologies and substitutable products at the disposal of the competitors of the aforementioned undertakings gains importance.

In the assessment of technology transfer agreements, paying attention to whether or not the agreement is between competitors is quite important. It is less likely for technology transfer agreements between non-competitors to affect competition adversely than those that are between competitors. Therefore rules to be applied to technology transfer agreements between competitors and between non-competitors, and especially factors such as market share thresholds and limitations that would exclude the agreement from the coverage of block exemption needed to be differentiated.

Where the market shares of the undertakings that are party to technology transfer agreements exceed the market share thresholds set forth under the Communiqué, a detailed examination needs to be made so that it can be determined whether the said agreements are caught by article 4 of the Competition Law and whether they satisfy the requirements of exemption under article 5. In making this assessment, all of the legal and economic factors related to the agreements, particularly the structure of the relevant technology and product market must be taken into account.

This Communiqué aims at the protection of competition within the market and provision of legal certainty to undertakings. To that end, the Communiqué gives the general conditions of block exemption for technology transfer agreements and enumerates the provisions that would prevent the said agreements from qualifying for the block exemption. In addition to these, rather than the approach whereby an agreement is excluded from the scope of the block exemption as a whole in relation to certain obligations, it would be appropriate to adopt the practice whereby the relevant obligations only are disqualified from block exemption and thus the agreements containing these continue to qualify for the block exemption. Whereas the existence of issues such as market share thresholds, obligations that leave the agreement out of the scope of the block exemption and obligations that are unable to qualify for block exemption is generally sufficient to protect competition within the market, the exemption will be withdrawn where it is established that an agreement or networks of agreements that qualified for exemption under this Communiqué still do not satisfy the requirements under article 5 of the Competition Law.

Although this Communiqué covers only those technology transfer agreements between a licensor and a licensee, the provisions not constituting the main purpose of the agreement, however, directly relating to the implementation of the technology concerned by the agreement, which are contained in these agreements, shall also be covered by the exemption. This Communiqué shall also apply where technology transfer agreements cover issues related to more than one level of trade such as the obligations the licensee must impose on resellers, for example, in relation to setting up of a certain distribution system. However, in such a case, such obligations need to be in conformity with the relevant regulations. This Communiqué shall not apply to supply and distribution agreements between licensee and their buyers.

Among the other agreements to which the Communiqué shall not apply are also the licence agreements made through pooling of technologies in order to grant licence to third parties as a package. Licence agreements drawn up for the purpose of having an undertaking carry out research and development activities shall not be dealt with under this

Communiqué either.

Law stated - 22 November 2021

Review and investigation of competitive effects from exercise of IP rights

Which authorities may review or investigate the competitive effect of conduct related to exercise of IP rights?

When obtaining, granting, licensing or transfer of IP rights is subject to agreements and these agreements contain provisions on resale price maintenance, regional restraints, quantitative restraints on production or sales, or customer allocation, they may be considered to have an anticompetitive effect on the market and thus, the provisions of the Competition Law regulating anticompetitive agreements apply (if they fail to meet the conditions of a block or individual exemption). In such a case, since activities or legal transactions prohibited by the Competition Law will be in question, they will fall under the duties and powers of the Turkish Competition Authority (TCA) in accordance with article 27 of the Competition Law. Consequently, the TCA may review or investigate the competitive effect of conduct related to exercise of IP rights.

Law stated - 22 November 2021

Competition-related remedies for private parties

Can a private party recover for competition-related damages caused by the exercise, licensing or transfer of IP rights?

Yes. Anyone who prevents, distorts or restricts competition via practices, decisions, contracts or agreements contrary to the Competition Law, or abuses its dominant position in a particular market for goods or services, may be obliged to compensate for any damages of the injured. If the damage has resulted from the behaviour of more than one people, they are responsible for the damage jointly.

In this regard, it is not important whether the person claiming compensation for the damage is a private party or not; anyone can recover the damages and whether the damage is caused by the exercise, licensing or transfer of IP rights does not matter as long as it causes competition-related damages. Those who suffer as a result of the prevention, distortion or restriction of competition, may claim as damages the difference between the cost they paid and the cost they would have paid if competition had not been limited. Competing undertakings affected by the limitation of competition may request that all of their damages are compensated by the undertaking or undertakings that limited competition. In determining the damage, all profits expected to be gained by the injured undertakings are calculated by taking into account the balance sheets of the previous years as well. If the damage arises from an agreement or decision or gross negligence of the parties, the judge may, upon the request of the injured, award threefold compensation of the material damage incurred or of the profits gained or likely to be gained by those who caused the damage.

Law stated - 22 November 2021

Competition guidelines

Have the competition authorities, or any other authority, issued guidelines or other statements regarding the overlap of competition law and IP?

Guidelines on the Application of articles 4 and 5 of Law No. 4054 on the Protection of Competition to Technology

Transfer Agreements issued by the TCA contains statements regarding the overlap of competition law and IP. Indeed, it is stated in paragraph 5 that legal regulations related to IP grant exclusive rights of exploitation to right holders do not imply that IP rights are immune from the area of application of the competition law. Articles 4, 5 and 6 of the Competition Law are also applicable to agreements whereby the holder of IP right licences another undertaking to exploit its IP rights. However, the grant of exclusive right to use to right holders does not imply that there is an absolute conflict between IP rights and competition rules. Indeed, both bodies of law have the same basic objective of promoting consumer welfare and an efficient allocation of resources. As is known, innovation constitutes an essential and dynamic component of an open and competitive market economy. Within this scope, while IP rights promote dynamic competition by encouraging undertakings to invest in developing new or improved products and processes, competition protected by competition law puts pressure on undertakings to innovate. Therefore, the common objective of IP rights and competition is to promote innovation and ensure a competitive exploitation thereof.

Law stated - 22 November 2021

Exemptions from competition law

Are there aspects or uses of IP rights that are specifically exempt from the application of competition law?

There are no aspects or uses of IP rights that are specifically exempt from the application of competition law.

Law stated - 22 November 2021

Copyright exhaustion

Does your jurisdiction have a doctrine of, or akin to, 'copyright exhaustion' (EU) or 'first sale' (US)? If so, how does that doctrine interact with competition laws?

Yes, 'copyright exhaustion' is also applicable in Turkey. In that sense, the enforceability of copyrights of a product is exhausted after the first sale or other means of transfer of ownership. Once it is exhausted, this allows for free movement across borders all over the world, thus facilitating competition. Moreover, with the principle of exhaustion, the copyright holder is prevented from taking control or influencing the distribution and creating a monopoly. Within this context, the copyright owner cannot control prices depending on the country in which the copyrighted product sold. Additionally, once an IP owner or authorised seller places a product on the market, a third party's parallel import of that product cannot be restricted, even by the exclusive distributor, unless the third party changes or impairs the product. As a result, effective competition can take place and consumers can take advantage of price differences.

Law stated - 22 November 2021

Import control

To what extent can an IP rights holder prevent 'grey-market' or unauthorised importation or distribution of its products?

The principle of exhaustion of rights plays an important role on this matter. With the amendments made to the Industrial Property Law in 2017, Turkey adopted the principle of 'international exhaustion', meaning that the rights of the IP holder are exhausted once the products are offered to the market anywhere in the world, and the world is regarded as a single market or 'one country'. Therefore, the IP holder can no longer claim any right to control over a third party who offers these products to the market again and cannot prevent 'grey-market' or parallel import.

Similarly, in terms of preventing the distribution of these products, the rights of the IP holder are subject to exhaustion after the first sale of the product or transfer of ownership. Accordingly, once the IP rights holder sells the product or transfers its ownership, no permission is needed for its disposition or movement. As a result, the IP rights holder can prevent 'grey-market' or unauthorised importation or distribution of its products until the first sale.

Law stated - 22 November 2021

Jurisdictional interaction between competition laws and IP rights

Are there authorities with exclusive jurisdiction over IP-related or competition-related matters?

For example, are there circumstances in which a competition claim might be transferred to an IP court to satisfy subject matter jurisdiction? Are there circumstances where the resolution of an IP dispute will be handled by a court of general jurisdiction?

Claims and damages arising with regards to competition law are not exclusively overseen by a certain authority, and these claims could be asserted within a civil lawsuit filed accordingly with the Commercial Courts in general. However, IP claims are overseen by the Civil Court of Intellectual and Industrial Rights and the Criminal Court of Intellectual and Industrial Rights. These courts have the duty and power to decide upon IP-related matters. If a claim is filed with the wrong authority, this would not be transferred to the relevant authority but rather be rejected, and the claimant would have to file their claim once again within the correct jurisdiction. While all IP-related disputes are overseen by exclusive courts, courts with general jurisdiction would step in for the cities where a special court is not established.

Law stated - 22 November 2021

MERGER REVIEW

Powers of competition authority

Does the competition authority have the same authority with respect to reviewing mergers involving IP rights as it does with respect to any other merger?

Yes. As per article 7 of the Competition Law, the Turkish Competition Authority (TCA) governs mergers and acquisitions including IP-related ones if the relevant transaction leads to a change of control on a lasting basis. Accordingly, mergers and acquisitions exceeding the turnover thresholds stipulated within the Communiqué No. 2010/4 Concerning the Mergers and Acquisitions Calling for the Authorization of the Competition Board are subject to the TCA's review and approval to gain validity.

Law stated - 22 November 2021

Analysis of the competitive impact of a merger involving IP rights

Does the competition authority's analysis of the competitive impact of a merger involving IP rights differ from a traditional analysis in which IP rights are not involved? If so, how?

Under the Competition Law, the same general merger control analysis is applicable for transactions involving IP rights.

Law stated - 22 November 2021

Challenge of a merger

In what circumstances might the competition authority challenge a merger involving the transfer or concentration of IP rights? Does this differ from the circumstances in which the competition authority might challenge a merger in which IP rights were not a focus?

For transactions exceeding the turnover thresholds set forth under the Communiqué No. 2010/4 Concerning the Mergers and Acquisitions Calling for the Authorization of the Competition Board; as part of the notification phase of the merger control procedure, TCA gives a special focus to transactions in which one of the transaction parties has more than 25 per cent market share and another one of the transaction parties holds important IP rights for that market.

Regardless of the transaction is IP rights related or not, the merger control test in Turkey evaluates transactions not only from the creating or strengthening a dominant position perspective, but also identifies transactions that may significantly impede competition in the relevant markets even if they do not create a dominant position or strengthens the dominant position in any given relevant product market.

Law stated - 22 November 2021

Remedies to address the competitive effects of mergers involving IP

What remedies are available to address competitive effects generated by a merger when those effects revolve around the transfer of IP rights?

Proposed remedies aimed at eliminating competition problems created by a concentration transaction may be structural or behavioural. Proposed structural remedies generally involve the divestiture of a certain business, while proposed behavioral remedies involve the arrangement of the future market behaviors of the parties. The main purpose of proposed remedies is to protect the competitive structure that existed in the market prior to the transaction. Therefore, due to their characteristics of bringing about a sustainable result in the short term in terms of eliminating competition problems and not requiring supervision after being implemented, structural remedies – particularly those causing structural changes in the market such as the divestiture of a business – more properly fit within the purpose expected from proposed remedies. However, it is not disregarded that proposed behavioral remedies such as ensuring access to important infrastructure and raw material in a non-discriminatory manner are also likely to solve competition problems caused by a transaction.

As regards the divestiture packages, the parties shall be asked to waive from all of the rights relating to the intangible assets included in the divestiture package. For instance, granting a limited-time licence concerning IP rights falls short of eliminating the anticompetitive effects of the transaction because sometimes the licensee is not able to compete effectively with the parties following the expiry of the licence period. Furthermore, due to the fact that a licence – because it requires an ongoing relationship between the two parties – allows the licensor to affect the behaviours of the licensee in the market and conflict arises between the licensee and the licensor with regard to the scope and conditions of the licence, proposed remedies involving the granting of licence concerning the rights pertaining to intangible assets instead of divesting those assets are not considered as a suitable remedy save for exceptional cases.

In exceptional cases where the competitive problems arise from a market position based on the superiority of owning a certain technology or IP right, the divestiture of the said technology or IP right may be considered as a suitable remedy.

As regards the access remedies, remedies foreseeing the granting of access to key infrastructure, network, technologies such as patent, know-how or other IP rights and essential inputs may be accepted as an appropriate remedy in some cases to facilitate market entry by competitors.

In addition, use of certain IP rights may lead to foreclosure of competitors who depend on those technologies as an essential input in downstream markets. For instance, this may be the case where competition problems about the transaction arise as the parties withhold information necessary for the interoperability of different equipment. Similarly, in certain sectors where undertakings must cooperate by licensing patents to each other, the possibility of the parties to introduce licensing behaviour with different terms than those in the past may lead to competition problems. This type of competition problems may be eliminated by a commitment to grant licences on the same basis and on reasonable conditions also after the transaction. In those cases, the proposed remedies should give non-exclusive access to the licence or confidential information for the IP right in question to the third parties concerned. Moreover, the remedy must clearly determine the conditions under which the licence is given and licence charge or fee in order not to impede effective implementation of such remedy. An alternative may be granting royalty-free licences.

Law stated - 22 November 2021

SPECIFIC COMPETITION LAW VIOLATIONS

Conspiracy

Can the exercise, licensing or transfer of IP rights create price-fixing or conspiracy liability?

Under the Competition Law, obtaining, granting or transfer of IP rights are regulated under the general provisions of anticompetitive agreements (ie, article 4 of the Competition Law), provided that they do not satisfy the block or individual exemption conditions. According to article 4 of the Competition Law, agreements and concerted practices between undertakings, and decisions and practices of associations of undertakings that have as their object or effect or likely effect the prevention, distortion or restriction of competition directly or indirectly in a particular market for goods or services are illegal and prohibited. Such cases are, in particular, as follows:

- fixing the purchase or sale price of goods or services, elements such as cost and profit that form the price, and any terms of purchase or sale;
- partitioning markets for goods or services, and sharing or controlling all kinds of market resources or elements;
- controlling the amount of supply or demand in relation to goods or services, or determining them outside the market;
- complicating and restricting the activities of competing undertakings, or excluding firms operating in the market by boycotts or other behaviour, or preventing potential new entrants to the market;
- except exclusive dealing, applying different terms to persons with equal status for equal rights, obligations and acts; an
- contrary to the nature of the agreement or commercial usages, obliging to purchase other goods or services together with a good or service, or tying a good or service demanded by purchasers acting as intermediary undertakings to the condition of displaying another good or service by the purchaser, or putting forward terms as to the resupply of a good or service supplied.

Law stated - 22 November 2021

Scrutiny of settlement agreements

How would a settlement agreement terminating an IP infringement dispute be scrutinised from a competition perspective? What are the key factors informing such an analysis?

Agreements where the licensor allows the licensee to make production for instance under a patent and will not use its patent-based rights as well as settlement agreements are under the scope of the Block Exemption Communiqué No. 2008/2 on Technology Transfer Agreements (Communiqué).

Licensing may serve as a means of settling disputes or avoiding that one party exercises its IP rights to prevent the other party from exploiting its own technology rights. Licensing, including cross-licensing, in the context of settlement agreements is generally not as such restrictive of competition since it allows the parties to exploit their technologies after the agreement is concluded. However, some of the terms and conditions of such agreements may be caught by article 4 of the Competition Law. Licensing in the context of settlement agreements is treated in the same way as other licence agreements. Therefore, in case there are technically substitute technologies, to what extent those technologies are in a one-way or two-way blocking position should be analysed. If a blocking position exists, the parties will not be considered competitors.

The block exemption applies as long as the agreement does not include the hardcore competition restrictions listed in article 6 of the Communiqué. The hardcore competition restrictions list in article 6(2) of the Communiqué will apply to cases where the parties clearly know that there is not a blocking position between their technologies and as a result they are competitors. In such cases, settlement is a means to restrict the competition present at the time of the conclusion of the agreement.

Settlement agreements whereby the parties cross-license each other and impose restrictions on the use of their technologies, including restrictions on the licensing to third parties, may be caught by article 4 of the Competition Law. Where the parties have a significant degree of market power and the agreement imposes restrictions that go beyond what is required to unblock, the agreement is likely to be caught by article 4 of the Competition Law even if a mutual blocking position exists.

Where under the agreement the parties are entitled to use each other's technology and the agreement extends to future developments, it is necessary to assess what the impact of the agreement on the parties' incentive to innovate is. In cases where the parties have a significant degree of market power, the agreement may be caught by article 4 of the Competition Law where the agreement prevents the parties from gaining a competitive lead over each other. Agreements that eliminate or substantially reduce the possibilities of one party to gain a competitive lead over the other reduce the incentive to innovate and thus adversely affect an essential part of the competitive process. The achievement of the objective of the agreement, namely to ensure that the parties can continue to exploit their own technology without being blocked by the other party, does not require that the parties agree to share future innovations. However, the parties are unlikely to be prevented from gaining a competitive lead over each other where the purpose of the licence is to allow the parties to develop their respective technologies and where the licence does not lead them to use the same technological solutions. Such agreements merely create freedom of movement by preventing future infringement claims by the other party.

In Turkey, there is no patent settlement agreement subjected to the Turkish Competition Authority (TCA)'s scrutiny because it aims to delay the entry of a potential competitor. The objective of pay for delay agreements can be achieved by such types of agreements in which an IP right owner might give a licence to the other party in one market so that it does not enter another one. It is important to evaluate the contract terms carefully to understand the intention kept in the background.

Law stated - 22 November 2021

Reverse payment patent settlements

How have the competition laws been applied to reverse payment patent settlements in your jurisdiction?

No. Turkish competition law is yet to witness a case of reverse payment patent settlement, no relevant decision was concluded by the TCA.

Law stated - 22 November 2021

(Resale) price maintenance

Can the exercise, licensing, or transfer of IP rights create liability under (resale) price maintenance statutes or case law?

Yes. Resale price maintenance is considered to be a hardcore restriction of competition and accordingly prohibited under the Competition Law. Specifically, according to article 6(3)/a of the Block Exemption Communiqué No. 2008/2 on Technology Transfer Agreements, restriction of a party's right to determine its sales prices is defined as a hardcore restriction. In the eyes of the TCA, non-IP related conducts are not distinguishable from IP-related conducts.

Law stated - 22 November 2021

Exclusive dealing, tying and leveraging

Can the exercise, licensing, or transfer of IP rights create liability under statutes or case law relating to exclusive dealing, tying and leveraging?

Yes. In its Logo Yazılım decision dated 28 April 2011 and numbered 11-26/497-154, the TCA also reviewed the abuse of dominance with respect to tying and bundling practices, in which the licensing of IP rights was tied to the licensing of other IP rights, and applied the general provisions set forth under article 6 of the Competition Law. It should be noted that, in the eyes of the TCA, non-IP related conducts are not distinguishable from IP-related conduct.

Law stated - 22 November 2021

Abuse of dominance

Can the exercise, licensing, or transfer of IP rights create liability under statutes or case law relating to monopolisation or abuse of dominance?

Yes. In its Philips decision dated 26 December 2019 and numbered 19-46/790-344, the TCA has deemed that standard essential patents held by Philips grant monopolistic power to Philips, and Philips' practices lead to abuse of dominance in terms of article 6 of the Competition Law. In the eyes of the TCA, non-IP related conducts are not distinguishable from IP-related conduct.

The TCA has also ruled in its Bilsa decision dated 21 March 2007 and numbered 07-26/238-77 that Bilsa has abused its dominant position by disrupting the competition in the market for school software. In this earlier decision, the TCA has found that Bilsa took advantage of the technological and commercial benefits of encryption and did not let customers change service provider by refusing to provide encryption keys that would decode the data the schools stored within the software. This way, the schools that were not satisfied and wanted to change programs were unable to choose the products of another company as they could not risk losing their data pool. In this regard, the TCA did not find the encryption defences by Bilsa to be essential in protecting their IP rights, but rather to prevent schools from terminating their contracts by hindering their ability to access their data after the agreement is terminated.

Law stated - 22 November 2021

Refusal to deal and essential facilities

Can the exercise, licensing, or transfer of IP rights create liability under statutes or case law relating to refusal to deal and refusal to grant access to essential facilities?

Essential facility doctrine is accepted by the TCA, therefore a simple refusal to license by a dominant undertaking does not automatically result in a violation of article 6 of the Competition Law. Contrary, in case the TCA deems an IP right as an essential facility and finds an infringement by way of refusal to deal, mandatory licensing might a possible remedy. In the eyes of the TCA, non-IP related conducts are not distinguishable from IP-related conduct.

Law stated - 22 November 2021

REMEDIES

Remedies for violations of competition law involving IP

What sanctions or remedies can the competition authorities or courts impose for violations of competition law involving IP?

As per article 16(3) of the Competition Law, to those who commit behaviour prohibited in articles 4, 6 and 7 of the Competition Law, an administrative fine shall be imposed up to 10 per cent of annual gross revenues of undertakings and associations of undertakings or members of such associations to be imposed a penalty, generated by the end of the financial year preceding the decision, or generated by the end of the financial year closest to the date of the decision if it would not be possible to calculate it and which would be determined by the Turkish Competition Authority (TCA).

Article 16(4) of the Competition Law provides that managers or employees of undertakings or associations of undertakings who are found to have had decisive influence on the violation may be imposed fines up to 5 per cent of the fine given to the undertakings or associations of undertakings pursuant to paragraph 3.

In determining the percentage of the fine to be imposed, the TCA takes the characteristics of the violation into account and thus the consequences of an infringement vary depending on the facts of the specific behaviour. However, the Regulation on Fines to Apply in Cases of Agreements, Concerted Practices and Decisions Limiting Competition, and Abuse of Dominant Position sets forth that the TCA is entitled to impose a base fine:

- between 2 per cent and 4 per cent for cartels; and
- between 5 and 3 per cent for other violations of the undertaking's turnover.

Reviewing the mitigating (such as provision of assistance to the examination beyond the fulfillment of legal obligations, existence of encouragement by public authorities or coercion by other undertakings in the violation, voluntary payment of damages to those harmed, termination of other violations, and occupation of a very small share by practices subject to the violation within annual gross revenues.)and aggravating factors (such as recidivism of the violation, maintaining cartel after the notification of the investigation decision, not meeting the commitments made for the elimination of the competition problems within the scope of article 4 or 6 of the Competition Law, providing no assistance with the examination, coercing other undertakings into the violation), the TCA is entitled to increase the fine percentage up to 10 per cent of the company's turnover achieved within the previous year.

On the other hand, as per article 129 of the Intellectual Property Law, a compulsory licence may be granted by the TCA if the patent holder engages in anticompetitive practices during the use of the patent. Additionally, if the TCA determines that there is an infringement of article 4, 6 or 7 of the Competition Law, then it shall notify in its final decision the behaviors that the relevant undertaking or associations of undertakings must carry out or refrain from in order to re-establish competition, and any structural remedies in the form of undertakings transferring certain businesses, partnership shares, IP rights or assets. Behavioral and structural remedies must be proportionate to the infringement and necessary to bring the infringement effectively to an end. Structural remedies such as divestitures shall only apply where previous behavioral remedies imposed have been ineffective. If the final decision finds that

behavioral remedies have been unsuccessful, relevant undertaking or associations of undertakings shall be given at least six months to comply with the structural remedy.

Moving back to damages, the civil courts may also order compensation of damages occurred as a result of the violation.

Law stated - 22 November 2021

Competition law remedies specific to IP

Do special remedies exist under your competition laws that are specific to IP matters?

Under the Competition Law, there are no special remedies that directly address IP-related considerations, except article 129 of the Intellectual Property Law that governs compulsory licence.

Law stated - 22 November 2021

ECONOMICS AND APPLICATION OF COMPETITION LAW

Economics

What role has competition economics played in the application of competition law in cases involving IP rights?

There is no specific case law involving IP rights in that competition economics played a role.

Law stated - 22 November 2021

RECENT CASES AND SANCTIONS

Recent cases

Have there been any recent high-profile cases dealing with the intersection of competition law and IP rights?

In the Turkish Competition Authority (TCA)'s Philips decision dated 26 December 2019 and numbered 19-46/790-344, standard essential patents held by Philips and their relevant practices while licensing these patents were assessed by the TCA. The TCA concluded that the standard essential patents grant dominance to Philips, and Philips' conducts in licensing the patents have been regarded as exclusionary and discriminatory, hence abusing its dominant position. The TCA has set forth that Philips was engaged in anticompetitive practices, by not acting in accordance with FRAND principles, and consequently fined with 0.75 per cent of its turnover generated in the financial year preceding the date of the decision. That said, this decision is annulled by the Ankara 7th Administrative Court on 3 June 2021. The judicial review of the case is still ongoing.

Law stated - 22 November 2021

Remedies and sanctions

What competition remedies or sanctions have been imposed in the IP context?

In the TCA's Philips decision dated 26 December 2019 and numbered 19-46/790-344, the TCA has set forth that Philips was engaged in anticompetitive practices, by not acting in accordance with FRAND principles, and consequently

fined with its 0.75 per cent of its turnover generated in the financial year preceding the date of the decision. That said, this decision is annulled by the Ankara 7th Administrative Court on 3 June 2021.

Law stated - 22 November 2021

UPDATE AND TRENDS











Key developments

Are there any emerging trends or hot topics in the law of IP and antitrust policy? Have changes occurred recently or are changes expected in the near future that will have an impact on the application of competition law to IP rights?

There might be emerging trends in the intersection of IP and antitrust policy depending on the European Commission's policy developments as the Turkish Competition Authority closely follows the activities of the European Commission.

Law stated - 22 November 2021

Jurisdictions

	Germany	Meissner Bolte
	India	Chadha & Chadha Intellectual Property Law Firm
	Indonesia	SSEK Legal Consultants
	Japan	Anderson Mōri & Tomotsune
	Kazakhstan	Baker McKenzie
	Mexico	Calderón & De La Sierra
	Portugal	PLMJ
	Turkey	ACTECON
	United Kingdom	Arnold & Porter
	USA	Crowell & Moring LLP