The Intellectual Property and Antitrust Review

Seventh Edition

Editor
Dieter Paemen

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THE INTELLECTUAL PROPERTY AND ANTITRUST REVIEW

SEVENTH EDITION

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PREFACE

The task of this book is, with respect to key jurisdictions globally, to provide an up-to-date, concrete and practical overview of developments on the relationship between antitrust and intellectual property laws and regulations. This seventh edition provides an update on recent developments, as well as an overview of the overall existing lay of the land regarding the relationship between the two bodies of law.

Key topics covered in this and future editions include the constraints imposed by antitrust on licensing, the circumstances under which a refusal to license intellectual property rights can be unlawful, the imposition of antitrust obligations on owners of standard-essential patents, the application of antitrust law to cross-border e-commerce, the intense disputes regarding the application of antitrust law on patent settlements in the pharmaceutical industry, and the growing importance of intellectual property issues in merger cases.

As intellectual property continues to gain importance in the world economy and the number, resources and sophistication of antitrust authorities grows across the globe, new battles will be fought over the circumstances in which antitrust constrains intellectual property. Existing differences in the application of antitrust to intellectual property – already significant, and perhaps even greater than in intellectual property laws themselves – may grow, perhaps especially as more net intellectual property-consuming countries devote resources to antitrust enforcement. Future editions of this book will analyse these developments, and we hope the reader will find this to be a useful compilation and oft-consulted guide.

Finally, I would like to thank the team at Clifford Chance LLP for their important contributions to this seventh edition of *The Intellectual Property and Antitrust Review*.

Dieter Paemen
Clifford Chance LLP
Brussels
June 2022

Chapter 12

TURKEY

M Fevzi Toksoy, Bahadir Balki, Caner K Çeşit, Deniz Kivanç and Ulya Zeynep Tan[1]

I INTRODUCTION

Turkey has granted intellectual property (IP) rights through a number of legal regulations. This legislation consists of the following:

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

In terms of antitrust issues, the main legal source of competition law in Turkey is the Law No. 4054 on the Protection of Competition (the Competition Law), which is similar to EU law. In addition, there are some regulations, communiques and guidelines that set out this field in the form of secondary legislation.

Article 129 of the Industrial Property Law governs the interplay between competition law and intellectual property (IP) law. If patentee carries out activities distorting, hindering or limiting competition while a patent is in use, the potential licensee may request a compulsory licence from the Turkish Competition Authority (TCA).

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

a Block Exemption Communiqué No. 2008/2 on Technology Transfer Agreements (Communiqué No. 2008/2) and Guidelines on the Application of Articles 4 and 5 of the Law No. 4054 on the Protection of Competition to Technology Transfer Agreements (Technology Transfer Guidelines) 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.
b Block Exemption Communiqué No. 2002/2 on Vertical Agreements and Guidelines on Vertical Agreements contain exemptions for vertical agreements that include the

1 M Fevzi Toksoy and Bahadir Balki are managing partners, Caner K Çeşit is a senior associate, Deniz Kivanç is a mid-level associate and Ulya Zeynep Tan is an associate at Actecon.

exercising of intellectual rights where provisions concerning intellectual rights are directly related to the use, sale or resale of relevant goods and services, and the other conditions provided in the relevant communiqué are met.

c 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.

d 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 in order 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).

e Guidelines on Cases Considered as a Merger or an Acquisition and the Concept of Control published by the TCA set forth the issue of IP in terms of mergers and acquisitions, where a transfer limited to elements within intellectual property rights, such as brands, patents, designs or copyright, may also be considered to be a transaction under the scope of Article 7 of the Competition Law. The transfer of licences related to intellectual property rights can only be considered under the scope of Article 7 if the licences are exclusive in at least one particular territory and the transfer of such licences allow for the transfer of the activity which the turnover can be attributed to. With the recent amendments regarding notifications of mergers and acquisitions, all transactions regarding the acquisition of technology undertakings operating in the Turkish geographical market, having R&D activities, or providing services to users in Turkey shall be subject to notification to the TCA, regardless of whether the turnover of the target exceeds the turnover thresholds or not.

f Within the Guidelines on the Assessment of Abusive Conduct by Undertakings with Dominant Position, refusal to supply goods and services encompasses IP rights, where intangible business input and information, whether or not protected by IP rights, and other assets that undertakings may demand can be counted among the goods, services and inputs that may be subject to the evaluation of a dominant undertaking's refusal to supply.

II YEAR IN REVIEW

There has not been any developments regarding legislation or policies pertaining to both intellectual property (IP) and antitrust.

In terms of any decisions that have been rendered that incorporate both IP and competition matters, while the TCA has referred to IP issues within individual exemption and merger clearance decisions, these statements have merely been mentions that IP rights were involved, and no further evaluations or explanations were provided on how IP rights were affected and incorporated into the analysis of competition law.

The only investigation decision relating to standard essential patents, which was passed in 2019, was when the TCA investigated whether Koninklijke Philips NV (Philips) violated the Competition Law by not complying with its commitment to the relevant standard-setting organisation that it would license its essential patents related to subtitling technology for digital video broadcasting (DVB) in fair, reasonable and non-discriminatory (FRAND) terms.

The TCA deemed that standard essential patents held by Philips grant monopolistic power to Philips, and Philips' practices led to an abuse of dominance, under Article 6 of the

Competition Law. Upon investigation, through its decision dated 26 December 2019 and numbered 19-46/790-344, the TCA set forth that Philips was engaged in anticompetitive practices by not acting in accordance with FRAND principles, and, consequently, issued the company with a fine of 0.75 per cent of its turnover generated in the financial year preceding the date of the decision.

The Competition Board's reasoning in finding a violation was as follows:

a Philips resorted to a court decision without applying to an independent third party to determine a royalty fee, which is in violation of the European Court of Justice's *Huawei–ZTE* decision.[2]

b Philips violated the transparency principle by not announcing its royalty fees on its website, and thus engaged in discriminatory practices.

c Philips reversed the burden of proof with its licence agreement, in violation of FRAND terms.

d Philips forced a termination clause in the form of non-challenge clause onto Vestel Elektronik Sanayi AŞ (Vestel).

Recently, the Ankara 11th Administrative Court accepted Philips' appeal to the case and annulled the TCA's decision with its decision numbered E 2020/1525, K 2021/1121. The Court annulled the decision by drawing the following conclusions:

Philips resorting to a court decision cannot be regarded as an abuse of dominant position, as Philips had only filed a lawsuit to protect its IP rights after negotiation attempts came to no avail, and that as per the *Huawei–ZTE* decision,[3] it has been understood that applying to a third party is left to the discretion of both parties.

While in some instances a non-challenge clause may lead to competitive concerns, Philips incorporating a non-challenge clause and reversing the burden of proof was not a violation, bearing in mind the history of events between Philips and Vestel.

As per Article 44 of the Competition Law setting forth that the TCA may not base its decisions on issues about which the parties were not previously informed of and granted the right to defence to, the Court found that the parties were not previously directed that the transparency principle would be a pillar for evaluating whether practices are abusive, therefore Philips was not granted a right to defence.

Upon the annulment of the TCA's decision, the case has been carried over to regional court for an appeal, therefore the judicial process is pending.

III LICENSING AND ANTITRUST

i Anticompetitive restraints

Under the Competition Law, obtaining, granting and transferring IP rights are regulated under the general provisions of anticompetitive agreements (i.e., 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

2 Case C-170/13 *Huawei Technologies Co. Ltd v. ZTE Corp., ZTE Deutschland GmbH.*

3 ibid.

object or effect, or likely effect, the direct or indirect prevention, distortion or restriction of competition in a particular market for goods or services are illegal and prohibited. Such cases are, in particular, as follows:

a 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;
b partitioning markets for goods or services, and sharing or controlling all kinds of market resources or elements;
c controlling the amount of supply or demand in relation to goods or services, or determining them outside the market;
d 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;
e except exclusive dealing, applying different terms to persons with equal status for equal rights, obligations and acts; and
f 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.

Separately, Block Exemption Communiqué No. 2008/2 on Technology Transfer Agreements (Communiqué No. 2008/2) also stipulates restrictions that render technology transfer agreements out of the scope of the block exemption. In that sense, in the event that a technology transfer agreement incorporates a hardcore restriction of competition, the agreement as a whole will fall outside the scope of the block exemption. A point that is specific to technology transfer agreements, is that hardcore restrictions cannot be separated from the rest of an agreement.

Furthermore, Articles 6(2) and 6(3) of Block Exemption Communiqué No. 2008/2 on Technology Transfer Agreements (Communiqué No. 2008/2) are applicable to agreements between competitors and agreements between non-competitors, respectively. In this regard, directly or indirectly, in isolation or in combination with other factors under the control of the parties, should either type of agreement have as their object any of the restrictions stipulated within their respective articles, these agreements would fall outside of the scope of Communiqué No. 2008/2.

For agreements between competitors, these restrictions are as follows:

a the restriction of a party's right to determine its sales prices;
b the restriction of production and sales volumes of contract products;
c the allocation of markets and customers, subject to exceptions; and
d the restriction of a licensee's right to use its own technology or the restriction of a party's right to carry out research and development activities, unless such restriction is necessary in order to prevent the disclosure of the licensed know-how to third parties.

For agreements between non-competitors, these restrictions are as follows:

a Restriction of a party's right to determine its sales prices. However, it is possible to determine the maximum sales price or recommend a sales price, provided that it does not develop into a fixed or minimum sales price as a result of pressure or incentive from any of the parties.

b The restriction of the territory into which, or of the customers to whom, the licensee may passively sell the contract products, subject to exceptions.
c Restriction of active or passive sales to end users by a licensee carrying out activities at the retail level without prejudice to the right to prohibit a member of a selective distribution system from carrying out activities at an unauthorised place.

However, Article 7 lists the restrictions that cannot benefit from the block exemption and therefore require individual exemption assessments. According to Article 7, where a technology transfer agreement contains any of the restrictions laid down in that article and the related restriction is separable from the rest of the agreement, only that restriction shall not benefit from the block exemption, and the rest of the agreement shall continue to be covered. In case any of the restrictions laid down in this article cannot be separated from the rest of the agreement, the whole agreement shall not benefit from the block exemption. These restrictions are as follows:
a Any direct or indirect obligation on the licensee to grant an exclusive licence to the licensor or a third party designated by the licensor in respect of its own severable improvements on or new applications of the licensed technology.
b Any direct or indirect obligation on the licensee to assign, partly or completely, to the licensor or a third party designated by the licensor the rights related to its own severable improvements on or new applications of the licensed technology.
c The obligation on the licensee not to challenge the validity of the related intellectual property rights that the licensor owns in Turkey. However, the right of the licensor to terminate the technology transfer agreement in case the licensee challenges the validity of one or more of the related licensed intellectual property rights is reserved.

Moreover, Article 7 sets forth that where the parties are not competitors, the block exemption would not be applicable for any obligation which directly or indirectly restricts:
a the licensee's right to use its own technology; and
b research and development activities of any of the parties to the agreement, unless it is necessary to prevent the disclosure of the licensed know-how to third parties.

ii Refusals to license

In the eyes of the TCA, non-IP related conduct is not distinguishable from IP-related conduct. The 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. The Guidelines on the Assessment of Abusive Conduct by Undertakings with Dominant Position elaborate on refusal to supply as a form of abuse, and under Paragraph 43 of the Guidelines, it has been stated that three cumulative conditions are sought by the TCA in the evaluation of such a claim:
a the refusal should relate to a product or service that is indispensable to be able to compete in a downstream market;
b the refusal should be likely to lead to the elimination of effective competition in the downstream market; and
c the refusal should be likely to lead to consumer harm.

If the TCA deems an IP right as an essential facility and finds an infringement by way of refusal to deal, mandatory licensing is a possible remedy.

iii Unfair and discriminatory licensing

The Guidelines on Horizontal Cooperation Agreements published by the TCA contains 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 IP rights holders from making the implementation of a standard difficult by refusing to license or by requesting unfair, unreasonable (i.e., excessive) or discriminatory fees after the industry has been locked in to a standard.

iv Patent pooling

While Communiqué No. 2008/2 mentions patent pooling, it is set forth that the Communiqué shall not apply to the licence agreements made through pooling of technologies in order to grant licences to third parties as a package. With this, Article 4 of the Competition Law is applicable to patent pooling matters.

Moreover, the Technology Transfer Guidelines state that patent pools may cause the restriction of competition. In this regard, patent pools are referred to more broadly as 'technology pools', and in addition to reducing competition between the parties, technology pools may also, in particular when they support an industry standard or establish a de facto industry standard, resulting in a reduction of innovation by foreclosing alternative technologies. The existence of the standard and a related technology pool may make it more difficult for new and improved technologies to enter the market.

v Software licensing

The Communiqué No. 2008/2 is applicable to software licensing matters, provided cumulative conditions are met. The TCA has also ruled in its *Bilsa* decision dated 21 March 2007 and numbered 07-26/238-77, that Bilsa abused its dominant position by disrupting competition in the market for school software. In this earlier decision, the TCA found that Bilsa took advantage of the technological and commercial benefits of encryption and did not let customers to change service providers by refusing to provide encryption keys that would decode the data the schools stored within its software. This way, the schools which were not satisfied and wanted to change software were unable to choose the products of another company as they could not risk losing data. In this regard, the TCA did not find the encryption defences by Bilsa to be essential to protect their IP rights, but rather prevented schools from terminating contracts by hindering their ability to access their data after agreements with Bisla were terminated.

vi Trademark licensing

As per the Technology Transfer Guidelines and the Communiqué No. 2008/2, a licensor may authorise a licensee to use its trademark on the products incorporating licensed technology, as this trademark allows consumers to make an immediate link between the product and the characteristics imputed to it by the licensed technology. However, if the value of the licensed technology is limited because the licensee already uses the same or similar technology and the main objective of the agreement is the trademark, the Communiqué will not apply.

Furthermore, with regards to tying practices that are normally either not restrictive on competition or covered by exemption, as per Article 5 of the Competition Law, where the licensees use the licensor's trademark or brand name or where it is otherwise obvious to consumers that there is a link between the product incorporating the licensed technology and the licensor, the licensor has a legitimate interest in ensuring that the quality of the products is such that it does not undermine the value of its technology or its reputation as an economic actor.

In terms of undertakings under the obligation to not abuse their dominant position, the general conditions stipulated under Article 6 of the Competition Law apply to trademark licensing.

Within the TCA's *Toshiba–Vestel* decision,[4] a brand licensing agreement between the relevant undertakings was evaluated in terms of an exemption application. The relevant agreement was concerning the trademark use of Toshiba in favour of Vestel, where the TCA found that it would fall within the scope of Article 4 of the Competition Law. Within its analysis of whether the Communiqué No. 2008/2 was applicable, the TCA stated that the agreement was horizontal in nature, and therefore the Communiqué was not applicable. With this, an analysis in terms of Article 5 of the Competition Law was conducted, and an individual exemption was granted by the TCA.

IV STANDARD-ESSENTIAL PATENTS

i Dominance

In its *Philips* decision of 26 December 2019 and numbered 19-46/790-344, the Turkish Competition Authority (TCA) recognised that holding standard essential patents (SEPs) grant a certain market power in the relevant product market. It has been stated that once a patent is announced as a standard by the relevant standard-setting organisation, the holder holds effective market power and may even become a monopoly most of the time. While making this statement, the TCA also references the Treaty on the Functioning of the EU, where it indicates that a SEP grants significant market power to its holder and may lead to severe competitive issues.

However, the TCA also mentions the Guidelines on Horizontal Cooperation Agreements, Paragraph 240 of which sets forth that even if the establishment of a standard can create or increase the market power for those undertakings which hold the intellectual property (IP) rights essential for that standard, simply holding the IP rights essential for a standard does not necessarily equate to the direct possession or exercising of market power. The question of market power, therefore, can only be assessed on a case-by-case basis. In this regard, the TCA evaluated the following when determining that Philips held a dominant position:

a As per the minimum requirements set by the Turkish Standards Institution, compliance with standard numbered ETSI 300 743 which corresponds to digital video broadcasting (DVB) subtitling standards is mandatory for television and set-top box manufacturers in Turkey.

4 The Turkish Competition Authority's decision dated 24 November 2016 and numbered 16-41/666-299.

b The DVB Project consortium has accepted and announced that Philips' patents numbered EP 307 and EP 393 with regards to the subtitling functionality of television products bears SEP properties in order to comply with the ETSI standard.

c television manufacturers in Turkey do not have any alternative but to obtain licences from Philips. In other words, it is impossible to manufacture and trade, and therefore compete, in the panel television market in coherence with the ETSI standard without Philips' patented technology, hence it is indispensable.

d Philips committing to licensing under FRAND terms has motivated licensees to invest and endure sunk costs, strengthening the indispensability factor.

ii Injunctions

In its *Philips* decision, the TCA has also followed the systematic of the *Huawei–ZTE* decision[5] with regards to its evaluation of abuse of dominant position. The TCA has stated that injunction requests that do not follow the conditions set forth within the *Huawei–ZTE* decision would constitute an abuse of dominant position. The conditions to adhere by in order to utilise the right to an injunction in coherence with competition law has been set forth as follows:

The proprietor of the SEP in question, should first alert the alleged infringer of the infringement complained about by designating the SEP and specifying the way in which it has been infringed.

After the alleged infringer has expressed its willingness to conclude a licensing agreement on FRAND terms, it is for the proprietor of the SEP to present a specific, written offer for a licence on FRAND terms to the alleged infringer, in accordance with the undertaking given to the relevant standardisation body, specifying, in particular, the amount of the royalty and the way in which that royalty is to be calculated.

It is for the alleged infringer to diligently respond to that offer, in accordance with recognised commercial practices in the field and in good faith, a point which must be established on the basis of objective factors and which implies, in particular, that there are no delaying tactics.

Should the alleged infringer not accept the offer made to it, it may rely on a claim that an action is of an abusive nature to secure a prohibitory injunction or for the recall of products, only if it has, promptly and in writing, submitted a specific counteroffer that corresponds to FRAND terms to the proprietor of the SEP in question.

Where the alleged infringer is using the teachings of the SEP before a licensing agreement has been concluded, it is for the alleged infringer, from the point at which its counteroffer is rejected, to provide appropriate security, in accordance with recognised commercial practices in the field (e.g., by providing a bank guarantee or by placing the amounts necessary on deposit). The calculation of that security must include, among other things, the number of the past acts of use of the SEP. Also, the alleged infringer must be able to render an account in respect of those acts of use.

Where no agreement is reached on the details of the FRAND terms following the counteroffer by the alleged infringer, the parties may, by common agreement, request that the amount of the royalty be determined by an independent third party, by decision without delay.

5 See footnote 2.

An alleged infringer cannot be criticised either for challenging, in parallel to the negotiations relating to the granting of licences, the validity of those patents or the essential nature of those patents to the standard in which they are included, or their actual use; or for reserving the right to initiating such a challenge in the future.

iii Licensing under FRAND terms

The Guidelines on Horizontal Cooperation Agreements published by the TCA contains explanations regarding access to the standard on FRAND terms. According to Paragraph 258 of the Guidelines, FRAND commitments are designed to ensure that any essential technology under IP rights protection incorporated in a standard is accessible to the users of that standard on a FRAND basis. In particular, these commitments can prevent IP rights holders from making implementing a standard difficult by refusing a licence or by requesting unfair, unreasonable (i.e., excessive) or discriminatory fees after the industry has been locked in to a standard.

With regards to any case law relating to FRAND terms, while there are three cases overall where the Competition Board has referred to FRAND terms, only the *Philips* decision has evaluated the matter in depth. Within its *Digiturk*[6] and *Turkish Football Federation/Digiturk*[7] decisions, FRAND terms were only mentioned when defining what each letter of the acronym stands for.

On the other hand, Article 129 of Law No. 6769 on the Industrial Property titled 'Compulsory License' indicates circumstances in which compulsory licences may be granted. In this regard, a compulsory licence may be given in cases where the patent owner engages in preventative, abusive or restrictive practices in terms of competition.

iv Anticompetitive or exclusionary royalties

The Competition Law does not bear any provision that relates the royalty rates to any kind of competition violation. However, even though the Competition Board found the royalty rates to not be excessive within its *Philips* decision, it is seen that the royalty rates may be subject to review in terms of abuse of dominance. In this regard, royalty rates can be regarded within the scope of excessive pricing.

Paragraph 260 of the Guidelines on Horizontal Cooperation Agreements provides clarification with regards to licence fees (royalty) in exchange for IP rights. In the case of a dispute, the assessment of whether fees charged for accessing IP rights in the standard-setting context are unfair or unreasonable should be based on whether there is reasonable relationship between these fees and the economic value of the IP right. In principle, cost-based methods are not suitable because of the difficulty in assessing the costs attributable to the development of a particular patent. Instead, it is possible to compare the licensing fees charged by the undertaking in question for the relevant patents in a competitive environment before the sector has been locked in to the standard (*ex ante*) with those charged after the sector has been locked in (*ex post*). This method may be applied where the comparison can be made in a consistent and reliable manner. Licensing fees charged for the same IP rights within the context of similar standards may also be used as an indicator for FRAND licensing fees.

6 The Competition Board's decision dated 20 December 2018 and numbered 18-48/751-364.

7 The Competition Board's decision dated 10 February 2016 and numbered 16-04/82-36.

V INTELLECTUAL PROPERTY AND MERGERS

i Transfer of IP rights constituting a merger

As per Article 7 the Competition Law, the TCA governs mergers and acquisitions, including those related to IP, 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.

Communiqué No. 2010/4 was amended in March 2022. Along with several other revisions, the new amendments stipulate that as of 4 May 2022, the turnover thresholds for transactions that require TCA approval will increase. Within this scope, transactions regarding the acquisition of technology undertakings operating in the Turkish geographical market, having R&D activities or providing services to users in Turkey shall be subject to notification to the TCA regardless of the turnover thresholds stipulated within the Communiqué. In this regard, technology entities are defined as undertakings or related assets operating in the fields of digital platforms, software and gaming software, financial technologies, biotechnology, pharmacology, agrochemicals, and health technology under the relevant communiqué.

ii Remedies involving divestitures of intellectual property

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 behavioural remedies involve the arrangement parties' future market behaviours. The main purpose of the 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 behavioural 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 to divestiture packages, the parties shall be asked to waive from all of the rights relating to intangible assets included in a 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 expiration 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 a licence concerning the rights pertaining to intangible assets instead of divesting those assets are not considered as suitable remedies, 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 to access to remedies, remedies foreseeing the granting of access to key infrastructure and 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 which 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 introducing 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 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 the licence charge or fee in order not to impede effective implementation of such remedy. An alternative may be granting a royalty free licence.

The *Mey İçki*[8] decision is an example of a divestiture decision taken by the Competition Board, where Diageo committed to divest all IP-related rights of the Saga and Hare brands during its acquisition of Mey İçki.

VI OTHER ABUSES

i Sham or vexatious IP litigation

There have been no cases where a sham IP litigation proceeding have commenced incorporating competition law matters. In case of such a misuse, the TCA would evaluate the matter as applicable.

ii Misuse of the patent process

There have been no cases where an undertaking has used the patent process to gain any kind of advantage in terms of competition law matters. In case of such a misuse, the TCA would evaluate the matter as applicable.

iii Anticompetitive settlements of IP disputes

There have been no cases where an undertaking has attempted to settle IP disputes in an anticompetitive manner. In case of such a misuse, the TCA would evaluate the matter as applicable.

VII OUTLOOK AND CONCLUSIONS

Currently, there are no pending TCA investigations that relate to IP rights. In terms of the court proceedings that are currently pending with regards to challenged decisions by the Competition Board, the *Philips* case is the only one concerning intellectual property. Right now, the Ankara Administrative Court has annulled the TCA's decision stipulating

8 The Competition Board's decision dated 17 August 2011 and numbered 11-45/1043-356.

an infringement and an administrative monetary fine, and this ruling was been appealed to the Regional Courts. The appeal decision is expected before the end of 2023. The Regional Court's decision may be submitted to the Council of State for a final appeal, however the Council may take two or more years to issue its decision.

Together with the fact that the European Commission has been foreseeing policy developments with regards to standard essential patents, and since the TCA closely follows the activities of the European Commission, there might be emerging trends in the intersection of IP and antitrust policy. The policies adopted within the European Commission, and even their frameworks, will undoubtedly be utilised in Turkey within the scope of possible future disputes, which will affect the Turkish case law on this matter from here on.

This would inevitably enrich the Turkish stance on the intersection between IP and competition law. Especially with the TCA delving into specifics of an IP matter may be an indicator that the TCA may choose to examine more cases where competition law and IP law coincide. An increasing number of cases that incorporate both areas of law may prompt guidelines to be published in the future that regulate the coinciding areas; currently, this is only carried out by comparing general provisions of the Competition Law.

Appendix 1

ABOUT THE AUTHORS

M FEVZI TOKSOY

Actecon

M Fevzi Toksoy, PhD is an EU Law specialist and also an economist with master degrees from Istanbul and Brussels on European Union law and economics and a PhD in EU Competition Law. Mr Toksoy specialises in EU and Turkish competition law and international trade disputes. He is the founding partner of Actecon and offers solutions to clients in competition investigations, merger clearances and preventive competition compliance programmes.

Mr Toksoy has broad experience in Customs Union-based issues, such as parallel trade, customs duties and anti-dumping. He was a contributor to a variety of anti-dumping investigations conducted in different industries by anti-dumping authorities in Turkey, the European Union, United States, India, Indonesia, Singapore, China and the Gulf Cooperation Council.

Since 1997, he has focused on EU and Turkish competition law and advised clients in majority of investigations conducted by the Turkish Competition Authority. Mr Toksoy also prepared many successful merger notifications and negative clearance and individual exemption applications in a variety of industries.

Mr Toksoy combines his competition law knowledge with his broad experience in economic aspects of antitrust matters across a wide range of industries, particularly in mergers and joint ventures, restrictive practices, distribution systems and abuse of dominant position, in sectors including automotive distribution, information technology, environment, energy, fast-moving consumer goods, chemicals, pharmaceuticals, manufacturing, telecommunications, airlines, financial services, sports, media, entertainment, computer software, electrical equipment, chemicals and engineering.

Mr Toksoy has advised multinational companies regarding the Turkish part of M&A transactions and is especially renowned for his experience in complicated merger control cases. He has successfully negotiated remedies with the Turkish Competition Authority in many complex merger cases. He has practical experience in public and private sector competition law related commercial problems in Turkey such as subcontracting, licensing, distribution schemes and intellectual property rights. He currently conducts projects on this area with large multinationals in Turkey.

Mr Toksoy conducts competition compliance programmes in different industries and leads and designs workshops and training sessions in multinationals from different industries. He also serves as an expert member of the Competition Law and WTO Committees of the

Turkish Businessmen and Industrialists Association, and is an associate member of the ABA and a member of the ABA's Antitrust and M&A Committees and is national reporter for its International Antitrust Committee.

Mr Toksoy has been the guest of round tables on the legislative amendments of the Turkish Competition Law hosted by the Turkish Competition Authority. He lectures on EU and Turkish Competition Law M&A, international trade remedies and competition law aspects of EU and Turkish environmental law at Marmara University's European Union Institute.

BAHADIR BALKI

Actecon

Bahadir Balki is known for his excellent work discipline and his intriguing and effective defences. In the last 10 years, he has been involved in virtually every significant cartel and abuse of dominance investigations launched by the Turkish Competition Authority concerning sectors including insurance, banking, iron & steel, automotive, cement, telecommunications, broadcasting rights, roll on, roll off (RoRo) transportation, fast-moving consumer goods (FMCG), alcoholic beverages, media audits, port services. Clients have also benefited from Mr Balki's extensive experience in global merger cases, especially in Phase II procedures, in a variety of industries (i.e., eye-wear and lenses, titanium dioxide, crop protection business, iron & steel, FMCG, ground handling, aviation, port management services, RoRo transportation, cement and movie theatres).

Beyond successfully leading the leniency applications, Mr Balki's experience is above the rest in terms of leniency enforcement. He contributed to the creation of the first precedent in the Turkish competition law practice for leniency in non-cartel cases, whereby a leniency applicant represented by Actecon retained immunity even if the nature of the violation was not considered a cartel by the Turkish Competition Authority. He conducts comprehensive competition compliance programmes focusing on details of the relevant market structure and provides legal consultancy services on day-to-day business for his clients, which come from a wide range of industries. He is regarded as a pragmatic and client-focused advisor connected to the business facts and is acknowledged and welcomed by other institutions in the area of antitrust law.

Mr Balki was invited to the ICN Annual Meeting 2014 as a 'resource person' on 'Remedies, Commitments, and Cooperation'; is a member of drafting team for ICN Unilateral Conduct Workbook chapters on 'Tying and Bundling'; co-authors the Turkey chapters of *Lexology Getting the Deal Through Private Antitrust Litigation* and *Competition Compliance*; and is listed as a leading competition lawyer in *Who's Who Legal's Competition 2019*.

Mr Balki is a guest lecturer in competition law courses at Istanbul Bilgi University's LLM programme and a lecturer for the Corporate Ethics and Compliance Management Programme organised by the Ethics and Reputation Society of Turkey.

CANER K ÇEŞIT

Actecon

Caner K Çeşit assists national and multinational clients in all matters of competition law and regulatory projects. Mr Çeşit specialises in advising clients on investigations, negative clearance and exemption applications, merger control filings, and day-to-day competition law issues, and conducts follow-on competition litigation.

Mr Çeşit has assisted clients in a variety of sectors, including automotive, banking, consumer electronics, energy, e-commerce, fast-moving consumer goods, iron and steel, logistics, meal card and telecommunications, during investigations initiated by the Turkish Competition Authority. He has also dealt with merger control proceedings across a wide range of sectors, with a particular focus on high-profile complex merger control transactions, and competition compliance programmes for clients in sectors including aviation, media, health, mining, port management, smart cards, shopping mall management.

DENIZ KIVANÇ

Actecon

Deniz Kivanç has been providing competition law advice across many sectors since her graduation. Ms Kivanç has extensive knowledge of and experience with all aspects of competition law, antitrust and public policy.

Throughout her career Ms Kivanç has assisted clients with mergers, infringements disputes, individual exemptions and negative clearance cases, and has participated in many investigations (including commitment and settlement processes) conducted by the Turkish Competition Authority and merger control proceedings in a wide range of sectors including fast-moving consumer goods, e-commerce, agriculture, pharmaceutical, energy, ticketing, optics, fertilisers and finance. She has also taken an active role in many companies' compliance programmes – including multinationals – operating in various sectors.

Ms Kivanç graduated with an honours degree from Istanbul Bilgi University in Law and Economics. She participates as a professional in several seminars about competition law with different universities.

Ms Kivanç currently provides advisory services to clients regarding day-to-day competition and compliance related matters, and all steps of proceedings before Turkish Competition Authority. She also assists clients in preparing competition compliance programmes and provides services with all aspects of competition law in various sectors.

ULYA ZEYNEP TAN

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Ulya Zeynep Tan provides advice to Turkish and multinational companies regarding competition law, international trade and regulatory projects.

Ms Tan assists clients on investigations initiated by the Turkish Competition Authority and with merger controls, and with trade defence instruments with respect to anti-dumping investigations initiated by the Turkish Ministry of Trade.

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