

PANORAMIC
**INTELLECTUAL
PROPERTY &
ANTITRUST**

Türkiye

 LEXOLOGY

Intellectual Property & Antitrust

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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)?

Türkiye has granted IP rights in a number of legal regulations. These legal regulations consist of:

- Law No. 6769 on Industrial Property;
- Law No. 5846 on 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 Türkiye exceed the minimum required by the TRIPs Agreement. In literature, they are referred to as 'TRIPs plus'.

Law stated - 5 Kasım 2024

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 registers and other institutions that are exclusively authorised in the enforcement of IP rights are as follows:

- 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 to 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 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 Türkiye. It is affiliated with the Ministry of Interior; and
- 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 - 5 Kasım 2024

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 Türkiye. 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) and the amount in dispute. 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 article 156 of the Industrial Property 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; and
- 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 dispute is also not relevant to the court. Hence, there are no separate enforcement options based on the amount in dispute.

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 is available for trademarks, patents and industrial designs; and
- 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) 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 - 5 Kasım 2024

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.

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.

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 the 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 the 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 - 5 Kasım 2024

Patent cooperation treaties and other agreements

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

Türkiye is a participant (as a signatory or party) of various international and bilateral agreements, conventions and treaties, such as the TRIPs Agreement, 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 - 5 Kasım 2024

Remedies for deceptive practices

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

The Turkish Commercial Code considers untruthful, misleading and deceptive commercial acts as 'unfair competition' and provides for various remedies for the persons who are subjected to such acts. However, there are no remedies in competition or consumer protection laws for deceptive practices regarding trademarks. That said, consumer protection law in Türkiye has remedies concerning deceptive advertising.

Law stated - 5 Kasım 2024

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. Türkiye does not have a law in force with regard 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 - 5 Kasım 2024

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 article 129 of the Industrial Property Law, a compulsory licence may be given if there is public interest. As per article 132 of the same law, public interest may arise upon the wide adoption of proprietary technologies due to public health and national security.

On the other hand, the Guidelines on Horizontal Cooperation Agreements 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 intellectual property rights (IPR) protection incorporated in a standard is accessible to the users of that standard on a FRAND 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 into a standard.

Law stated - 5 Kasım 2024

COMPETITION

Competition legislation

What statutes set out competition law?

The main legal source of competition law in Türkiye 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 - 5 Kasım 2024

IP rights in competition legislation

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

There is no specific provision that relates to IP rights in the Competition Law. That said, Block Exemption Communiqué No. 2008/2 on Technology Transfer Agreements (Communiqué)-regulates the compatibility of 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 the 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 the distinction of whether the agreement is between competitors or not 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 the 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 the licensee and their buyers.

Among the other agreements to which the Communiqué shall not apply are also the licence agreements made through a pooling of technologies to grant licences 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 - 5 Kasım 2024

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 the competitive effect of conduct related to the exercise of IP rights falls within the scope of the Competition Law, the Turkish Competition Authority (TCA) may review or investigate the relevant conduct.

Law stated - 5 Kasım 2024

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 person, 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 damage 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 a damage the difference between the cost they paid and the cost they would have paid if competition had not been limited from the civil court. Competing undertakings affected by the limitation of competition may request that all of their damages be compensated by the undertaking or undertakings that limit 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 compensation threefold of the material damage incurred or of the profits gained or likely to be gained by those who caused the damage.

Law stated - 5 Kasım 2024

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 contain 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 an 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 - 5 Kasım 2024

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 - 5 Kasım 2024

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 Türkiye. In that sense, the enforceability of the 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 is sold.

Law stated - 5 Kasım 2024

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 in this matter. With the amendments made to the Industrial Property Law in 2017, Türkiye 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.

Articles 4(d) and 6(a) of the Competition Law prohibit behaviour that prevents competitors from entering the market and restricts their activities. In this context, as the prevention of

parallel importation is regarded to bear these effects, it is also evaluated to be within the scope of the Competition Law. 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.

Law stated - 5 Kasım 2024

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 regard 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 would 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 - 5 Kasım 2024

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, the Turkish Competition Authority has the same authority with respect to reviewing mergers involving IP rights as it does with respect to any other merger.

Law stated - 5 Kasım 2024

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. However, the Turkish Competition Authority may claim an innovation-based theory of harm while analysing a merger involving IP rights.

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 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, the 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. As of 4 May 2022, the TCA has amended the relevant legislation, stating that transactions regarding the acquisition of technology undertakings operating in the Turkish geographical market or having R&D activities or providing services to users in Türkiye shall be subject to notification to the TCA regardless of the turnover thresholds of the turnover of the acquired undertaking. In this context, the turnover of the acquiring undertaking still must exceed the relevant thresholds just as stipulated for regular mergers and acquisitions. 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.

Regardless of whether the transaction is IP rights related or not, the merger control test in Türkiye 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 strengthen the dominant position in any given relevant product market.

Law stated - 5 Kasım 2024

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 behavioural remedies involve the arrangement of the future market behaviours of the parties. 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 materials 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 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. Further, 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 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, the use of certain IP rights may lead to the 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 problem may be eliminated by a commitment to grant licences on the same basis and 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 not to impede the effective implementation of such remedy. An alternative may be granting royalty-free licences.

Law stated - 5 Kasım 2024

SPECIFIC COMPETITION LAW VIOLATIONS

Conspiracy

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

Yes, under the Competition Law, obtaining, granting or transfer of IP rights are regulated under the general provisions of anticompetitive agreements (namely, 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 direct or indirect 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; and
- 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 - 5 Kasım 2024

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?

Settlement agreements are considered within 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 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 the case where there are technically substituted 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 listed 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 the impact of the agreement on the parties' incentive to innovate. 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 the TCA's *Modanisa* decision, 21-57/789-389, 25 November 2021, the TCA emphasised its way of scrutiny with regard to the granting of individual exemptions for a settlement agreement, which addresses the TCA's concerns regarding wide non-brand bidding restrictions and specifically negative matching obligations. Besides, in its investigation against undertakings operating in the online marketplaces in the automotive sector (*Arabam Com* decision, 23-32/630-212, 20 July 2023, *LetGo* decision, 23-32/629-211, 20 July 2023 and *Araba Sepeti* decision, 23-31/589-199, 13 July 2023) and investigation against Obilet (*Obilet* decision, 23-27/521-177, 15 June 2023), the TCA evaluates 'negative matching' obligations and advertisements bans between the relevant undertakings. Lastly, upon ETS Tur's negative clearance and individual exemption application, the TCA examined (*ETS Tur* decision, 23-61/1189-424, 28 December 2023) ETS Tur's agreements within the scope of the restrictions regarding commercial and advertisement usage of intellectual property rights. Therefore, it would be suitable to state that the TCA has framed the scope of trademark protection considering competition-restricting effects.

Law stated - 5 Kasım 2024

Reverse payment patent settlements

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

In Türkiye, there is no reverse payment patent settlement agreement subjected to the TCA's scrutiny because it aims to delay the entry of a potential competitor.

(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 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. However, according to the same communiqué, it is possible to determine a maximum selling price or recommend a selling price, provided that it does not turn into a fixed or minimum selling price as a result of pressure or incentive of any of the parties.

Law stated - 5 Kasım 2024

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, 11-26/497-154, 28 April 2011, 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.

Law stated - 5 Kasım 2024

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, 19-46/790-344, 26 December 2019, the TCA deemed that standard-essential patents held by Philips grant monopolistic power to Philips, and Philips' practices led to abuse of dominance in terms of article 6 of the Competition Law.

The TCA also ruled in its *Bilsa* decision, 07-26/238-77, 21 March 2007, that Bilsa abused its dominant position by disrupting the 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 change service providers by refusing to provide encryption keys that would decode the data the schools stored within the software. This way, the schools who were not satisfied and wanted to change computer 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 was terminated.

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?

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:

- the refusal should relate to a product or service that is indispensable to be able to compete in a downstream market;
- the refusal should be likely to lead to the elimination of effective competition in the downstream market; and
- the refusal should be likely to lead to consumer harm.

In the case where the TCA deems an IP right as an essential facility and finds an infringement by way of refusal to deal, mandatory licensing might be a possible remedy.

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 as 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 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 a decisive influence on the violation may be subject to 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 factors (such as provision of assistance to the examination beyond the fulfilment 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 articles 4, 6 or 7 of the Competition Law, then it shall notify in its final decision the behaviours that the relevant undertaking or associations of undertakings must carry out or refrain from to re-establish competition, and any structural remedies in the form of undertakings transferring certain businesses, partnership shares, IP rights or assets. Behavioural 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 behavioural remedies imposed have been ineffective. If the final decision finds that behavioural remedies have been unsuccessful, relevant undertakings 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 for damages incurred as a result of the violation.

Law stated - 5 Kasım 2024

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, which governs compulsory licence.

Law stated - 5 Kasım 2024

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 where competition economics played a role. However, it is seen in the *Philips* decision, 19-46/790-344, 26 December 2019, that the complainant Vestel submitted a reasonable royalty valuation report to the Turkish Competition Authority.

Law stated - 5 Kasım 2024

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's (TCA) *Philips* decision, 19-46/790-344, 26 December 2019, 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 granted dominance to Philips, and Philips' conduct in licensing the patents was regarded as exclusionary and discriminatory; hence, it was abusing its dominant position. The TCA found that Philips was engaged in anticompetitive practices, by not acting in accordance with fair, reasonable and non-discriminatory (FRAND) principles, and was consequently fined as per 0.75 per cent of its turnover generated in the financial year preceding the date of the decision. However, this decision was annulled by the Ankara 7th Administrative Court on 3 June 2021, with the Ankara Regional Administrative Court 8th Administrative Law Chamber upholding the decision on 29 April 2022. Thereupon, the decision was appealed to the Council of State by the TCA and Vestel. In its decision E 2022/2966, K 2022/4240, the 13th Chamber of the Council of State partially quashed the decision of the Regional Court and returned it for a re-decision. Although the Council of State found that the decision of the first instance court had been lawful in terms of the application to an independent third party, the transparency principle, and the reversal of the burden of proof, the following deliberations were established in the overturning of the decision:

- having made a FRAND commitment to licence its standard essential patents under fair, reasonable and non-discriminatory terms, and arising from its dominant position, Philips has a special responsibility in the sense of competition law;
- considering that the agreement containing the non-challenge and termination clause was signed following the issuance of a court order, it was understood that the agreement preventing Vestel from suing the validity of the patent was signed upon Philips' intimidation of Vestel through a court order; and
- in light of these considerations, because it was concluded that the clause that functions as a not to challenge the validity and the termination-upon-challenge clause in the agreement signed between Philips and Vestel constitutes abuse of dominance, there is no violation of law in the decision of the TCA regarding the imposition of an administrative fine on Philips.

Subsequent to the return of the case to the Ankara Regional Administrative Court 8th Administrative Chamber, with its decision E 2023/192, K 2023/267, the regional court complied with the Council of State's decision, thereby annulling Ankara 11th Administrative Court decision E 2020/1525, K 2021/1121 and deciding to reject the case. Philips has not appealed to the decision, finalising the judgment.

In the Modanisa decision of the TCA, the TCA has analysed granting an individual exemption for a settlement agreement related to IP rights. In the relevant decision, a settlement agreement between Modanisa Elektrnoik Mağazacılık ve Ticaret AŞ (Modanisa) and EST Marjinal Medikal Tanıtım ve İletişim San ve Tic Ltd Şti (Sefamerve) pertaining to the usage and recognition of trademarked keywords and derivatives to prevent confusion in the advertisements and announcements on the internet were evaluated. Within the scope of the relevant settlement agreement, Sefamerve would be adding the word 'Modanisa', which is the registered trademark of Sefamerve and the phrases 'sefa merve' and 'sefa' as negative keywords in mobile applications or desktop platforms, all internet channels in Türkiye or abroad, search engines and all social media channels; and will not perform advertisement targeting for these trademarks and phrases in online advertising environments. Thus, Modanisa and Sefamerve agreed to recognise each other's trademarks and derivatives to prevent confusion in advertisements and announcements on the internet.

The TCA first evaluated the case in terms of negative clearance and stated that narrow non-brand bidding restrictions may fall within the scope of trademark protection, but wide non-brand bidding agreements and negative matching obligations would exceed the scope of trademark protection provided by IP law. Accordingly, the TCA concluded that a negative clearance cannot be granted on the grounds that the settlement may have a restricting effect on competition.

In the individual exemption assessment, the TCA stated that the agreement of the undertakings not to use each other's registered trademarks in their advertisements would be sufficient to prevent misleading consumers. Restrictive obligations beyond this will not provide any additional benefit to consumers; on the contrary, they may harm consumers by reducing the visibility of advertisers and competition between undertakings. However, the TCA stated if the settlement agreement is amended in a way to eliminate the obligation not to target the keywords 'nisa' and 'sefa', which are not registered as trademarks, and the negative matching obligation, it will fulfil all the conditions required for individual exemption under article 5 of the Competition Law and thus can benefit from individual exemption.

In another recent decision rendered by the TCA (21-51/715-356, 21 October 2021) regarding license agreements, an exclusive licence agreement between Easysnap Technology SRL (Easysnap) and Altıparmak Gıda San ve Tic AŞ (Altıparmak) was reviewed, where the former has granted exclusive rights to the latter in Türkiye. Within the scope of its evaluation, it was concluded that the vertical and exclusive license agreement between the parties cannot benefit from block exemption stipulated under Communiqué No. 2008/2 as the applicable market share threshold of 40 per cent was exceeded. However, the decision sets forth that the relevant agreement could benefit from individual exemption.

In the investigation filed with the allegation that the undertakings operating in the online marketplaces in the automotive sector restricted competition through agreements between the parties concerning the 'negative matching' function of the text advertisements displayed in Google search results, while the commitment application of Vava Cars was rejected by

the TCA earlier, the investigation was terminated with the settlement procedure regarding Arabam Com, LetGo and Araba Sepeti.

The settlement is a procedure introduced into the Turkish antitrust law framework in the middle of 2020 through an amendment to the Competition Law, which offers a streamlined process for concluding investigations. Under this scheme, the TCA can initiate the settlement process, either upon request or ex officio, in light of the procedural benefits derived from expediting the investigation process and considering any differences in opinion regarding the existence or extent of the violation. Within this framework, the undertakings under investigation can submit a settlement statement admitting to the violation and its scope, among other relevant issues, enabling the TCA to conclude the investigation for these undertakings and apply a reduction in administrative fines ranging between 10 per cent to 25 per cent. Undertakings that conclude their cases through settlement are precluded from legally appealing the administrative fines and the contents of the settlement text. The intricacies of the settlement procedure are elaborated in the 'Regulation On The Settlement Procedure Applicable In Investigations On Agreements, Concerted Practices and Decisions Restricting Competition and Abuses Of Dominant Position' (Settlement Regulation).

In the *Arabam Com*, *LetGo* and *Araba Sepeti* decisions of the TCA within the same investigation, an overall evaluation of negative matching has been mentioned and to what extent the scope of the protection provided to the trademarks of the undertakings by intellectual property law legislation can be extended through negative matching agreements is assessed.

It is understood from the findings in the decisions that, Vava Cars sent warning (cease-and-desist) letters to other undertakings to stop their usage of 'Vava Cars' brand name in their Google Ads keyword lists and the undertakings responded that there is no such usage. Then, the parties communicated that, although they are not using each other's brand names in their Google Ads keyword lists, when they do not put others' brand names in their negative keyword lists, Google may suggest ads of one brand while a user searching for another brand with generic keywords in that sector. Thereby, the undertakings agreed to put each other's brand names to their negative keyword lists.

Within the context of the decisions, it has been evaluated that, the mutual addition of each other's brands to the negative matching function by undertakings has been deemed a breach of competition by the TCA. This is because, as in the case at hand, requesting non-branded words to be included in the negative keyword list exceeds the limits of the brand right protected under the Law No. 6769. While the investigation is still ongoing for the remaining undertaking (Vava Cars), the *Arabam Com*, *LetGo* and *Araba Sepeti* decisions are the first application resulting in a fine of the TCA's approach set out in the *Modanisa* decision, stating that agreements whereby undertakings mutually include their brands in negative matching in Google search ads would be evaluated as anticompetitive under article 4 of the Competition Law.

On the other hand, another decision evaluating the antitrust implications of advertising bans is the TCA's *Obilet* decision. This decision analyses for the first time an advertisement prohibition in vertical agreements.

Within the scope of the investigation initiated against Obilet that is operating in the field of bus and flight ticket price comparison and online ticket sales, the TCA accepted the undertaking's commitments and concluded the investigation. In the investigation, one of the allegations was regarding advertising prohibitions included in Obilet's agreements. In the

decision, it was examined whether the wide advertising prohibitions imposed in the Obilet's B2B agreements (Obilet provides the service of distribution of timetable data (B2B) to B2C's which are its competitor in the ticket sales platform market. In the decision, the B2B service was used to correspond to the service of distributing bus timetable data to platforms.), in terms of Obilet's brands can be evaluated within the scope of the Competition Law or not.

Within the scope of the vertical relationship between Obilet and B2C's, the timetable data of the carrier companies are made available to the ticket sales platforms through the integration provided, and the platform can sell tickets based on the timetable data it accesses. Therefore, advertisement restrictions imposed regarding carrier company brands are considered as a restriction made within the scope of vertical relationship between Obilet and B2Cs. On the other hand, Obilet and B2C's are competitors in the ticket sales platform market and therefore, advertisement restrictions regarding Obilet's own brand names are considered as a restriction made within the scope of horizontal relationship between Obilet and B2Cs.

When the contracts signed by Obilet with ticket sales platforms are examined, it has been determined that different types of search engine/Google Adwords advertisement bans have been imposed regarding different types of relationships/undertakings (some of them has a vertical relationship with Obilet while others are both have vertical and horizontal relationship with Obilet). Therefore, since the assessment to be made in terms of the protection of Law No. 6769 and the scope of advertisement (narrow, wide, negative match) varies depending on whether the parties are competitors of each other or parties in a vertical relationship operating at different levels of the market, the TCA evaluated the advertising prohibitions introduced by the agreements in terms of the level at which the parties are active in the market.

- Vertical Relationship – Advertisement Restrictions Regarding Carrier Company Brands: In the decision, it is evaluated that in an online advertising prohibition agreement between competitors and a vertical online advertising prohibition agreement, the Law No. 6769 does not grant the trademark right holder the same level of trademark protection. While the trademark protection right is granted to the registered trademark right holder for competing undertakings, there is no trademark protection offered to the trademark right holder for an undertaking at the vertical level within the legitimate connection. Within this scope, considering the data collected from B2Cs on the distribution of their advertising budgets in 2021 and 2022, it was determined that while the expenditures on offline advertising cover a very limited portion of the total advertising budget, and even some B2Cs do not spend at all in this channel, mainly the online advertising activities are carried out by B2Cs. In the assessment made, it is stated that in the online advertising prohibitions imposed by the provider to the buyer in vertical relationships, restrictions that prohibit the buyer from using an entire online advertising channel, such as search engines, are seen as severe restrictions by the European Commission and the provision that the provider's trademark cannot be used as a search word in the search engine is seen as a restriction that indirectly prohibits an entire online advertising channel. This prohibition will arise due to the restriction of the relevant B2Cs' capacity to target customers searching for the carrier's brands, to inform these customers about its offer and to attract them to its online channel or another sales channel. In the light of these findings, the TCA concluded that the search engine advertisement ban imposed on B2Cs in respect of the brands of the carrier companies may violate article 4 of the Competition Law, at least in terms of effect.

- Horizontal Relationship - Advertisement Restrictions Regarding Obilet's Own Brands: In the investigation, it is determined that the advertising bans imposed on B2Cs had different scopes. For example, in one agreement, the advertisement ban was imposed for OBİLET brand words and signs in all search engines, while in another agreement, the advertisement ban was limited to Google Adwords and covered BİLETALL brand words and derivatives, whereas in another agreement, there was a ban on advertisements in all search engines for carrier companies and/or OBİLET's brands, words and signs, including 'obilet', 'o bilet', 'obilet.com' and phrases containing these words. Hence, while the first two agreements that target 'only the trademark name', provide for a narrow prohibition of advertisement, whereas the third agreement that includes 'phrases containing the trademark name', provides for a wide prohibition of advertisement. With these assessments, the TCA has concluded that narrow prohibitions for competitors to prevent them using 'only the trademark name' in their ads is not within the scope of article 4 of the Competition Law since it is protected under the Law No. 6769. On the other hand, the wide advertisement ban imposed by Obilet on its competitors to prevent them using 'phrases containing the trademark name' in their ads may violate article 4 of the Competition Law in terms of its effect.

In order to address the relevant competitive concerns, Obilet firstly waived the provision regarding wide advertising restrictions in its contracts. In addition, it has undertaken that Obilet will not include any provision that can be considered as a wide advertising restriction or vertical online advertising ban in the new agreements to be concluded, and furthermore, it will not engage in any *de facto* or contractual practice in this direction. The TCA found relevant commitments to be sufficient to eliminate the competitive concerns and concluded the investigation.

The most recent decision evaluating the antitrust implications of advertising bans is the *ETS Tur* decision, in which the TCA examined the restrictions regarding commercial and advertisement usage of intellectual property rights (narrow prohibitions which only include intellectual property rights and registered brand names) provided in the ETS Tur's agreements with travel agents (ETS Tur is both supplier and competitor of the travel agents). The TCA concluded that these restrictions are narrowly designed in accordance with the Law No. 6769 and thus, are not within the scope of article 4 of the Competition Law.

Law stated - 5 Kasım 2024

Remedies and sanctions

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

In the TCA's *Philips* decision, 19-46/790-344, 26 December 2019, the TCA found that Philips was engaged in anticompetitive practices, by not acting in accordance with FRAND principles, and was consequently fined 6,697,413.13 Turkish lira per 0.75 per cent of its turnover generated in the financial year preceding the date of the decision.

In the TCA's *Bilsa* decision, 07-26/238-77, 21 March 2007, the TCA ordered that Bilsa should take the necessary measures to supply the data belonging to schools in an unencoded, correct, understandable, secure and complete manner if a school, whose agreement with

Bilsa is expired, requests the relevant data along with the imposition of a fine of 246,457.67 Turkish lira per 3 per cent of its turnover generated in 2005.

In the *Arabam Com* decision, 23-32/630-212, 20 July 2023, *LetGo* decision, 23-32/629-211, 20 July 2023 and *Araba Sepeti* decision, 23-31/589-199, 13 July 2023, the TCA imposed 2,726,850.04 Turkish lira, 24,467.52 Turkish lira and 191,433.80 Turkish lira respectively to the relevant undertakings.

In the *Obilet* decision 23-27/521-177, 15 June 2023, the investigation is concluded with the commitments submitted by Obilet in order to address the relevant competitive concerns, which includes Obilet's waiver of the provision regarding wide advertising restrictions in its contracts, not inclusion of any provision that can be considered as a wide advertising restriction or vertical online advertising ban in the new agreements to be concluded, and not engaging in any *de facto* or contractual practice in this direction.

Law stated - 5 Kasım 2024

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 may be emerging trends in the intersection of IP and antitrust policy depending on the European Commission's policy developments as the Turkish Competition Authority (TCA) closely follows the activities of the European Commission. In particular, there may be substantial developments in terms of the nexus between competition law and standard essential patents.

On the other hand, in terms of the TCA's *Modanisa* decision, the TCA has set standards for online advertising mechanisms and has demonstrated the interaction between competition law and intellectual property, effectively establishing that negative matching obligations are against competition law as they may constitute customer and market allocation. As per the TCA's recent decisions on *Arabam Com*, *LetGo* and *Araba Sepeti*, there is no doubt that the *Modanisa* decision is the basis for the assessments made in IP-antitrust related decisions in terms of usage of trademarks for advertisement purposes. With this landmark decision, practices to the same effect may, and most probably would, be classified as competition law infringements. Indeed, within the scope of the investigation relating to IP rights where four undertakings operating as online marketplaces in the automotive sector have been investigated with regard to their practices of negative keywords, while the investigation has been finalized for Arabam Com, LetGo and Araba Sepeti with the settlement procedure, the alleged negative keyword practice has been deemed naked and hardcore restriction, resulting in the TCA rejecting a commitment application by Vava Cars.

Finally, pursuant to the *Obilet* decision, the TCA set standards on how to evaluate advertising ban agreement with regards to wide/narrow restrictions and horizontal/vertical relationships. In the case of online advertising ban in a horizontal agreement between competitors, while narrow advertising restrictions are not covered by the Competition Law

since they enjoy the protection granted with Law No. 6769 (as this precedent also applied in the *ETS Tur* decision), the wide advertising restrictions may violate article 4 of the Competition Law in terms of effect. On the other hand, it is now concluded that in the eyes of the TCA, vertical online advertising bans are evaluated as vertical restrictions that should be evaluated in terms of their effects.

Law stated - 5 Kasım 2024