

Turkey

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Intellectual property

1 Intellectual property law

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

The rights that are protected by registrations are as follows;

- Decree-Law 544/1994 on establishment and functions of the Turkish Patent Institute;
- Decree-Law 551/1995 on patents;
- Decree-Law 556/1995 on trademarks;
- Decree-Law 554/1995 on industrial designs;
- Decree-Law 555/1995 on geographical indications;
- Decree-Law 4128/2004 on the Amending Law on Patents, Designs, Geographical Indications and Trademarks; and
- Decree-Law 5147/2004 on protection of integrated circuits.

IP rights are registered with the related authority and procedures such as transfer of an IP right, granting licences, etc, are regulated by special procedural rules administered by the competent authority (the TPI; see question 2).

In 1994, Turkey and the EU accelerated the negotiations for Turkey becoming a member state of the EU. As a part of this process IP regulations were harmonised with the EU. Therefore, Turkish IP law is fully in line with WTO agreement and TRIPs. Also, the legislator and other related institutions are currently working on a new trademark code.

The rights that are protected without registration of 'copyright' are governed by:

- Law No. 5846 on Intellectual and Artistic Works; non-registered rights such as copyrights are subject to this code; and
- the Turkish Commercial Code; unfair competition provisions can also be applied. However, these are general articles and regulate more than IP rights.

2 Responsible authorities

Which authorities are responsible for administering IP legislation?

The Turkish Patent Institute (TPI) was established in June 1994. It is a financially and administratively independent authority. The TPI is the authorised association for registering trademarks, patents, utility models, industrial designs, geographical indication and integrated circuit topography. The TPI is located in Ankara and any information concerning applications can be found at the website of the TPI (www.turkpatent.gov.tr).

IP courts were established in 2001 with competent judges who have specialised in IP law after intensive education programmes in Turkey and abroad, particularly in Brussels. The aim of establish-

ing specialised IP courts is to solve IP disputes promptly and effectively. These courts have two divisions; IP civil courts and IP criminal courts. Civil courts basically resolve indemnification and other civil claims and criminal courts execute the punitive sanctions related to violations of IP rights. Non-registered and registered IP rights can be brought before the IP courts where there is an infringement. At present, IP courts are located only in Istanbul, Ankara and Izmir.

3 Proceedings for enforcing IP rights

What types of legal or administrative proceedings are available for enforcing IP rights?

Trademarks, patents and similar rights must be registered with the TPI in order to benefit from the protection that is granted by the above-mentioned Decree-Laws. The Decree-Laws can only be applied where these rights are registered with the competent authority. Classification systems that are defined by international agreements are also applied in Turkey when registering trademarks, patents or designs.

The owner of artistic work right does not need to register that right with any administrative institution. In practice, there are professional associations that work according to a membership system where members can submit their artistic work to the association to prove their right over the artistic work. Such associations have the function of protecting their members' rights from any infringement.

4 Remedies for infringed IP rights

What remedies are available to a party whose IP rights have been infringed?

The rights owner should directly apply to IP court to get compensation or other temporary injunctions. If that infringement also establishes a criminal activity then the rights owner can apply to the public prosecutor to start a criminal investigation.

5 IP legislation and competition

Does IP legislation make any specific mention of competition or contain provisions on the anti-competitive or similar abuse of IP rights?

No specific provision on competition in IP legislation exists. However the Turkish Commercial Code, article 56, defines 'unfair competition' and in article 57 illegal or deceptive use of IP rights is defined as a type of 'unfair competition' and is subject to indemnification by the party who abuses the IP right.

6 Remedies for deceptive practices

With respect to trademarks, do competition or consumer protection laws provide remedies for deceptive practices in addition to traditional 'passing off' or trademark infringement cases?

- Law No. 4054 (the Competition Code) has no specific provision about trademarks and other related communiques do not have specific provisions;
- Law No. 4077 (the Consumer Protection Code) does not include any specific article and remedies. However, according to Advertisement Regulation, a trademark owner cannot produce an advertisement that contains deceptive content for the purpose of cheating consumers; and
- Law No. 6762 (the Turkish Commercial Code) article 57/5 defines deceptive use of IP rights as a type of unfair competition.

7 Technological protection measures and digital rights management

With respect to copyright protection, is WIPO protection of technological protection measures and digital rights management enforced in your jurisdiction? Does legislation or case law limit the ability of manufacturers to incorporate TPM or DRM protection limiting the platforms on which content can be played? Could TPM or DRM protection be challenged under the competition laws?

Turkey is a party to the international agreements concerning TPMs and DRMs; however, the local legislation concerning such protection measures are not enacted yet. The Ministry of Culture now has the duty of enacting new legislation concerning DRM. Apart from these developments, Law No. 5846 has a broad definition about the rights owner being able to use any kind of technological measures to protect his or her artistic rights over his or her artistic work. However, being a very broad definition, the enforcement of this is not well known and not exercised. Therefore for the time being precise legislation for DRM enforcement is anticipated in order to enable the enforcement thereof.

8 International standards

What consideration has been given in legislation or case law to the impact of proprietary technologies in international standards?

There are no requirements to keep the standards of invention available to third parties.

Competition

9 Competition legislation

What legislation sets out competition law?

Law No. 4054, Protection of Competition, is the main code in Turkish Competition Law. This Code is regulated on the basis of EU competition rules. Therefore, it is in line with the EU law. Three basic competition disputes are regulated with the Code; abuse of dominant position, mergers and acquisitions (including full function joint venture), and concerted practises. The Competition Authority issued communiques time to time on different issues (for example, a new decree is on its way to amend the current merger communique).

10 IP rights in competition legislation

Does the competition legislation make specific mention of IP rights?

There is no special provision in Law No. 4054, Protection of Competition Code. However, the Competition Authority published Communique No. 2008/2 'Block Exemption Communique on Technology Transfer Agreements' on 23 January 2008, which regulates the com-

patibility of IP right licence agreements with the Competition Code. The Competition Authority determines the conditions of technology transfer agreements that are not against the Competition Code.

11 Review and investigation of competitive conduct

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

The Turkish Competition Institution (the Competition Authority) was established on 27 February 1997, 27 months after the enactment of Law No. 4054 on Protection of Competition. All kinds of competition violations can be investigated by Competition Board, which is the authorised committee of the Competition Authority, upon complaint or notification. Also, the Competition Board has the power to start investigation ex officio. In light of foregoing, the competitive effects of IP rights are investigated by Competition Board.

12 Competition-related remedies for private parties

Do private parties have competition-related remedies if they suffer harm from the exercise, licensing or transfer of IP rights?

Third persons and private parties have the right to complain to the Competition Board. Upon that complaint, the Competition Board starts a preliminary investigation. Upon such investigation, if the complaint is found to be serious then the main investigation shall be commenced by the Competition Authority.

13 Competition authority guidelines

Has the competition authority issued guidelines or other statements regarding the overlap of competition law and IP?

The Competition Authority issues communiqués that contain the conditions and standards, the Competition Journal and other such publications. Those publications have several articles in relation to any overlap between IP rights and competition. However, there are no specific documents published by Competition Authority on this issue.

14 Exemptions from competition law

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

First we must note that Code No. 4054 does not have specific rules concerning IP laws in relation to competition. In addition to this, the legislation concerning competition has come into force very recently and the Competition Authority has been operating for a relatively short 10 years. In this respect it is also crucial to mention that there does not exist a variety of court or Competition Board precedents concerning the overlapping of IP rights and competition.

Under all these circumstances, considering the general rules concerning anti-competitive activities there are no specific exemptions from the application of competition law related to IP rights and the contents of the transactions related to IP rights (such as licences, trade, etc) shall be subject to the interpretation of the Competition Authority under these general rules.

15 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, for example with regard to efforts to contract out of the doctrine, to control pricing of products sold downstream and to prevent 'grey marketing'?

The 'first sale' doctrine is applied in Turkish practice.

The Turkish Supreme Court fixed conditions of legal 'grey mar-

keting' and the Competition Authority has several precedents. The conditions are as follows: Imported goods have to be original (not IP infringed); all customs and duties procedures must be handled legally; and imported goods have to be sold in the Turkish market via legal distributors. If those conditions are met by the grey-market practitioner, the Competition Authority does not intervene for the reason of grey marketing.

16 Import control

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

The legal conditions of grey market imports are, according to the Turkish Supreme Court, as follows: imported goods have to be original (not IP infringed); all customs and duties procedures must be handled legally; and imported goods have to be sold in the Turkish market via legal distributors. If grey-market sales secure those conditions, the Turkish courts can not stop such imports and marketing.

17 Competition authority jurisdiction

Are there circumstances in which the competition authority may have its jurisdiction ousted by, or will defer to, an IP-related authority, or vice versa?

The Turkish Competition Authority has no particular authority over IP-related matters. The Authority investigates IP rights issues in the context of an M&A permit or an investigation that is based on abuse of dominant position and concerted action. Therefore, IP rights can be partly subject to an investigation. In accordance with the above, the Competition Authority does not defer or hand over its powers to other institutions related to IP rights. Also, IP-related authorities do not defer jurisdiction to the Competition Board, because the Competition Board has no special department and special law or procedure for IP rights other than its general execution of competition law.

Merger review

18 Powers of competition authority

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

The Turkish Competition Authority mainly inspects and focuses on two main issues of merger control: market share and turnover. IP rights are not of special interest to the Competition Authority during a merger transaction. In Turkish practice, all merger transactions involve transferring IP rights. Therefore, the Competition Authority has the same power in those kinds of transactions.

19 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?

As mentioned above, the Turkish Competition Authority applies the same procedures to merger control. Therefore, the procedure does not differ for merger control procedures, whether IP rights are involved or not.

20 Challenge of a merger

In what circumstances might the competition authority challenge a merger involving the transfer or concentration of IP rights?

There is no past experience or precedent concerning challenging a merger involving the transfer or concentration of IP rights. How-

ever, it would not be wrong to mention that, as long as the IP rights involved in the merger transaction have an effect on the two main factors (namely market share and turnover), then it will be subject to detailed investigation of the Competition Authority for merger control purposes.

21 Remedies to alleviate anti-competitive effect

What remedies are available to alleviate the anti-competitive effect of a merger involving IP rights?

Merger control cases are considered as a whole by the Competition Authority under the general terms and conditions of Law No. 4054. There is no sample merger case that was challenged by the Competition Authority due to IP rights. The conditions of a mandatory licensing are explained in question 27. Because of the few examples of IP clashing with competition, there are no certain remedies at present, but such instances will occur and practice will develop in the future.

Specific competition law violations

22 Cartels and conspiracies

Describe how the exercise, licensing or transfer of IP rights can relate to cartel or conspiracy conduct.

The Turkish Competition Authority regulates Communiqué No. 2008/2, the Block Exemption Communiqué on Technology Transfer Agreements (covering know-how, patents, utility models, industrial design, integrated circuit topography, plant breeders' rights and related applications and software rights), which regulates the conditions of such agreements for the purposes of competition law. According to the Communiqué, IP-right transfer agreements must contain conditions basically as follows:

- the exemption shall continue to apply for as long as the protection granted to the intellectual property right regarding the licensed technology is valid and, in case of know-how, as long as the know-how remains secret;
- where the undertaking parties to the agreement are competitors, the exemption provided for in Communiqué shall apply on condition that the total market share of the parties does not exceed 30 per cent on the affected relevant technology and product market; and
- where the undertaking parties to the agreement are not competitors, the exemption provided for in the Communiqué shall apply on condition that the total market share of the parties does not exceed 40 per cent on the affected relevant technology and product market.

Parties can agree within the context of above-mentioned communiqué, and such agreement shall not be subject to Competition Authority challenge. If the parties do not follow above-mentioned rules and form a cartel or perform a concerted action, an investigation shall be commenced by the Competition Authority.

23 (Resale) price maintenance

Describe how the exercise, licensing, or transfer of IP rights can relate to (resale) price maintenance.

Price fixing is a usual illegal activity under the Competition Law. Communiqué 2008/2 sets forth the following regulations:

- the restriction of a party's right to determine its sales prices is prohibited; but
- 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.

Update and trends

Turkey being in the process of accession to the EU, the most important topic for the legislature is to enact legislation that is in line with EU legislation. Although most of our legislation is already harmonised with the EU, there is still work being done with the committees. Considering that there is no trademark code and trademark protection is subject to a regulation that is only enacted by a Decree, the legal community is expecting a Code where the terms and conditions of trademark protection are clearly identified and fully harmonised with the related EU legislation.

24 Exclusive dealing, tying and leveraging

Describe how the exercise, licensing, or transfer of IP rights can relate to exclusive dealing, tying and leveraging.

The owner of a well-known trademark may use the methodology of selling the well-known trademarked product with unknown branded other products and illegally tie them together. That firm must be the dominant firm in the related market. Otherwise tying can not be classified as illegal. Such investigations have been performed by the Competition Authority on the carbonated drinks market in the past.

25 Abuse of dominance

Describe how the exercise, licensing, or transfer of IP rights can relate to abuse of dominance.

Abuse of dominance may occur in different ways. Basic occurrences in Turkish practice are as follows:

- trying to block grey marketing based on an IP right;
- conditions in licence agreements that are against competition rules;
- refusal to issue a licence or selling the products with a particular IP registration;
- overcharging for products that are protected by IP registration; and
- tying products, one of which has IP protection and the other has not.

26 Refusal to deal and essential facilities

Describe how the exercise, licensing, or transfer of IP rights can relate to refusal to deal and refusal to grant access to essential facilities.

As explained above, Turkish competition legislation has no particular regulations concerning IP rights. Therefore, the general competition rules will be applicable and the enforcement will not be beyond competition law.

There are a few cases where refusal to deal has been evaluated. The Competition Authority always investigates whether a dominant firm exists in a related market. If there is a dominant firm and that firm refuses to deal in the context of IP rights, the Competition Authority can decide to give mandatory licensing because of that firm's dominance in the market.

Remedies**27 Remedies for violations of competition law involving IP**

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

As mentioned above, we do not have a variety of Competition Authority precedents concerning such cases. Therefore it is not easy

to give a generalised opinion or statement about the approach of the Competition Authority in this respect. The Competition Authority should apply the general provision of the Competition Code on fines and other damages when an activity in breach of competition rules does occur. Apart from the general rules there is not a specific sanction related to IP under competition legislation.

Compulsory licensing is only applied to patent rights according to Decree-Law 551. Reasons for compulsory licensing are: Unused patents; bounded invention; and public interest.

28 Competition law remedies specific to IP

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

There are no specific remedies for IP matters in the competition legislation. The remedies are determined in general in the Competition Code.

29 Remedies and sanctions

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

As explained above, we do not have a rich history of precedents on sanctions concerning the IP aspect of competition. We have only good examples concerning parallel trading and grey market for the products with the 'Dexter' and 'Police' trademarks. In those precedents of the Supreme Court it was determined that the opinion of the Supreme Court concerning the grey market is that the first-sale doctrine shall be applied. Apart from those particular cases, the Competition Authority is applying general rules of competition and IP rights are evaluated in that context, which means if there is an abuse of dominance or a merger does not meet the minimum conditions, the Competition Authority investigates the case as a whole without considering the IP portion as a separate issue.

30 Scrutiny of settlement agreements terminating an IP infringement dispute

How will a settlement agreement terminating an IP infringement dispute be scrutinised from a competition perspective?

This would again be subject to the general rules. If such an agreement causes one of the breaches of competition designated within the Competition Code, then such agreement will be subject to the sanctions mentioned in the same code. For example, if an agreement whereby one party agrees not to compete with respect to the patented product leads to abuse of dominant position, then it will definitely be considered a violation of the competition laws.

Economics and application of competition law**31 Economics**

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

Economic parameters are one of the main factors used to help improve competition and IP legislation and practise. Considering the Turkish market's sustained growth within the past 10 years and Turkish companies creating valuable trademarks, some of which are even worldwide, this is enlivening the IP and antitrust practice day by day.

32 Recent cases

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

There have been no recent high-profile cases dealing with the intersection of competition law and IP rights. In 2000 the Competition Authority enacted its verdict concerning grey-market activities about products with the 'Police' trademark, which was parallel to the precedents of the Supreme Court.

33 Recent changes

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?

The Turkish legislature is working on a new trademark code, which is due to be finalised by 2009.

The Ministry of Culture is working on legislation concerning enforcement of DRM.

The Competition Authority has enacted the Block Exemption Communiqué relating to Technology Transfer Agreements which involve intellectual property rights – referring to patents, utility models, industrial designs, integrated circuit topographies, plant breeders' rights or software rights – and know-how.

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