IP & ANTITRUST 2019 KNOW HOW

Turkey

Gönenç Gürkaynak and Hakan Özgökçen
ELIG Gürkaynak Attorneys-at-Law

OCTOBER 2019

GCR INSIGHT

1 Applicable rules
Does competition law apply to the obtainment, grant, acquisition, exercise and transfer of intellectual property rights?

As a result of the intensive work conducted throughout the years, a united intellectual property law has finally been codified with Industrial Property Law No. 6769 (IP Law) that entered into force on 10 January 2016 and that collectively regulates in detail trademarks, geographical indications, designs and patents, in compliance with European Union regulations. Before IP Law, the entirety of the intellectual property rules was regulated through separate statutory decrees. On the other hand, the competition law in Turkey is regulated under the Law No. 4054 on the Protection of Competition (Law No. 4054) published on the Official Gazette on 13 December 1994.

Following the introduction of IP Law, apart from recognition of the Turkish Competition Authority as the relevant body for compulsory licensing in the case of the licence owners' anticompetitive conducts, the interaction between competition law and intellectual property law in Turkey still remains rather unregulated and both regimes obey separate legislation. The Turkish intellectual property law seeks to protect the owners' exclusive control over their intellectual assets, and the Turkish competition law aims to ensure effective competition in the marketplace and prevent anticompetitive actions such as cartels and abuse of dominance, etc.

Even though there is no specific legislation setting forth the interaction between competition law and intellectual property law in Turkey, the Competition Board (Board) has explicitly dealt the current position of competition law within the intellectual property (IP) cases in Turkey in its recent Turkish Musical Work Owners Society decision (22 August 2017, No. 17-27/451-193). In this regard, the Board has initially stated that (i) the positioning of and the need for competition law within the IP cases have long been a matter of debate, (ii) despite the fact that there are also contrary views, the EU Commission and the Court of Justice of the European Union have acknowledged that competition law should be applied to markets related to intellectual property rights, (iii) indeed, the report titled Intellectual Property Rights Policy, Competition and Innovation published by World Intellectual Property Organization (WIPO) on December 2013 concluded that those two fields of law are developed with a view to support a system of promoting dynamic competition through varied products and encouraging creative processes. The Board also cited the relevant WIPO report, according to which matters such as exclusionary agreements, abuse of dominant position, possibility of horizontal or vertical mergers affecting the competition and the situation of profession associations as the main courses where competition law and IP law may interact.

The fact that the recent Turkish IP Law and other existing legal regulations related to intellectual property grant exclusive rights of exploitation to rightholders does not imply that intellectual property rights (IPR) are immune from the area of application of the competition law. Turkish competition law applies to the obtainment, grant, acquisition, exercise and transfer of IPR in general, within the scope of the direct application of article 4 on restrictive agreements, concerted practices and decisions of association of undertakings, article 6 on abuse of dominance and article 7 of Law No. 4054& on merger control, and, specifically, through communiqués and corresponding guidelines.

The statutory framework for the application of competition law rules to the exercise of IPRs in Turkey is as follows:

General framework

Restrictive agreements, concerted practices and decisions of associations of undertakings

Article 4 of Law No. 4054 is akin to and closely modelled on article 101(1) of the Treaty on the Functioning of the European Union (TFEU). It prohibits all agreements between undertakings, decisions of associations of undertakings, and concerted practices that have (or may have) as their object or effect the prevention, restriction or distortion of competition within a Turkish product or services market or a part thereof. Similar to article 101(3) of the TFEU, article 5 of Law No. 4054 provides that the prohibition contained in article 4 of Law No. 4054 may be declared inapplicable in the case of agreements between undertakings:

- that contribute to improving the production or distribution of products, or to promoting technical or economic progress;
- that allow consumers a fair share of the resulting benefits;
- that do not impose restrictions that are not indispensable to the attainment of these objectives; and
- that do not afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products concerned.

This individual exemption test is done on a case-by-case basis.

Abuse of dominance

The main provision of Law No. 4054, which regulates the behaviour of dominant firms, is article 6, which is similar to article 102 of the TFEU. It provides that any abuse of a dominant position (on the part of one or more undertakings, individually or through joint agreements or practices) in a market for goods or services within the whole or part of Turkey, is unlawful and prohibited. No exemptions as provided under article 5 of Law No. 4054 are applicable for the abuse of dominance.

Merger control

Article 7 of Law No. 4054, which governs mergers and acquisitions, grants the Board the authority to regulate, through communiqués, whether a concentration must be notified and granted approval by the Board, to gain legal validity (see questions 9 and 10).

Specific regulations and provisions

Within the framework of competition law, the secondary law that relates to the interaction between antitrust and IP law is as follows:

Technology transfer agreements

Block Exemption Communiqué No. 2008/2 on Technology Transfer Agreements (Communiqué No. 2008/2) provides for a protective cloak for agreements involving the transfer of IPRs and in particular technology licensing agreements (see question 5).

Research and development (R&D) agreements

Block Exemption Communiqué No. 2016/5 on R&D Agreements (Communiqué No. 2016/5) provides a block exemption for research and development (R&D) agreements, including an exemption for R&D agreements that contain provisions relating to the assignment or licensing of IPRs to carry out joint R&D, paid-for R&D or joint exploitation, so long as those provisions are not the primary object of such agreements, but are instead directly related to and necessary for their implementation.

Standardisation agreements, franchise agreements and contract manufacturing agreements

Block Exemption Communiqué No. 2002/2 on Vertical Agreements (Communiqué No. 2002/2) applies to standardisation, franchise and contract manufacturing agreements to the extent they satisfy the conditions set out in the relevant communiqué (see questions 11, 12 and 13 for more information on standardisation agreements).

Specialisation agreements

Block Exemption Communiqué No. 2013/3 on Specialisation Agreements (Communiqué No. 2013/3) establishes the conditions for granting block exemptions to specialisation agreements between undertakings and extends this exemption to licensing or intellectual property transfer agreements that are directly related to, or necessary for, the functioning of the exempted specialisation agreements.

These block exemption communiqués and their respective guidelines are all modelled on EU law.

2 Competent authorities
Which authorities are responsible for the application of competition law to intellectual property rights? What enforcement powers do they have? Are there any special procedures for conduct that concerns intellectual property rights?

The national competition authority for enforcing competition law in Turkey is the Turkish Competition Authority (TCA), a legal entity with administrative and financial autonomy. Under the current Turkish competition law regime, there is neither a special authority (or a special unit in the TCA) nor a procedure to enforce competition law principles specifically to IPR. As a result, general competition law enforcement structure, as set out below, is applicable for IPR as well.

The TCA consists of the Board, presidency and service departments. As the competent body of the TCA, the Board is responsible for, among other things, investigating or deciding on anticompetitive agreements; abusive conduct and reviewing the concentrations including the joint ventures that require the Board's approval to gain legal validity. The Board consists of seven members and is seated in Ankara. The service departments consist of five technical enforcement units. There is a "sectoral" job definition of each technical unit. A research department, a leniency unit, a decisions unit, an information management unit, an external relations unit (including the press and public relations) and a strategy development unit assist the five technical divisions and the presidency in the completion of their tasks.

The Board has relatively broad investigative powers. It may request all the information it deems necessary from all public institutions and organisations, undertakings and trade associations. The officials of these bodies, undertakings and trade associations are obliged to provide the necessary information within the period fixed by the Board. Failure to comply with a decision ordering the production of information or failure to produce on a timely manner may lead to the imposition of a turnover-based fine of 0.1 per cent of the turnover generated in the financial year preceding the date of the fining decision (if this is not calculable, the turnover generated in the financial year nearest to the date of the fining decision will be taken into account). Where incorrect or misleading information has been provided in response to a request for information, the same penalty may be imposed.

Article 15 of Law No. 4054 also authorises the Board to conduct dawn raids. Accordingly, the Board can examine the records, paperwork and documents of undertakings and trade associations and, if need be, take copies of the same; request undertakings and trade associations to provide written or verbal explanations on specific topics; and conduct dawn raids with regard to any asset of an undertaking. Hindering or obstructing the dawn raid may lead to the imposition of fines.

Additionally, undertakings and associations of undertakings condemned by the Board for violating articles 4 and 6 of Law No. 4054 may be fined up to 10 per cent of their Turkish turnover generated in the financial year preceding the date of the fining decision (if this is not calculable, in the financial year nearest the date of the fining decision). Employees or members of the executive bodies of the undertakings or association of undertakings that had a determining effect on the creation of the violation would also be fined up to 5 per cent of the fine imposed on the undertaking or association of undertaking. These fines are of administrative, non-criminal nature. Furthermore, the Board may order structural or behavioural remedies, or both, to protect competition and restore it to its state before the violation. During the course of the proceedings, the Board is authorised to order the cessation of the investigated act as well as interim measures, when it foresees irreparable damages.

Pursuant to article 16 of Law No. 4054, if the parties to a transaction requiring the approval of the Board close the transaction without such approval (the violation of the suspension requirement), a monetary fine of 0.1 per cent of the acquirer's (or the both of the merging parties' in case of a merger) Turkish turnover generated in the financial year preceding the date of the fining decision will be applied. This administrative monetary fine will be no less than 26,028 Turkish liras for 2019. It should also be noted that the wording of article 16 of Law No. 4054 does not give the Board discretion on whether to impose a monetary fine in case of a violation of suspension requirement. In other words, once the violation of the suspension requirement is detected, the monetary fine will be imposed automatically. If the Board concludes that the transaction closed before the approval decision also creates or strengthens a dominant position and significantly lessens competition in any relevant product market, the undertakings concerned may also receive administrative monetary fines of up to 10 per cent of their Turkish turnover generated in the financial year specified above. In such a situation, employees or members of the executive bodies of the undertakings or association of undertakings that had a determining effect on the creation of the violation may also be fined up to 5 per cent of the fine imposed on the undertaking or association of undertaking. In any case, a notifiable concentration not notified to and approved by the Board shall be deemed as legally invalid with all its legal consequences.

Final decisions of the Board, including its decisions on interim measures and fines, can be submitted to judicial review before the competent administrative court in Ankara by filing an appeal case within 60 calendar days upon receipt by the parties of the reasoned decision of the Board. Filing an administrative action does not automatically stay the execution of the Board's decision.

3 Market definition
How are markets involving intellectual property rights defined?

The Board's general approach in defining the relevant markets is set out in the Guidelines on the Definition of the Relevant Market (Guidelines on the Relevant Market), which applies to the definition of markets involving IP rights, which is closely modelled after the European Commission's Notice on the Definition of Relevant Market. The Guidelines on the Relevant Market also applies to markets involving IPRs but does not include any provisions specific to IPRs. The Guidelines on the Relevant Market focuses on three main criteria for the definition of the relevant market: demand-side substitutability, supply-side substitutability and potential competition. In defining the relevant product market, the Board also takes into account factors such as evidence of substitution in recent years, specially created quantitative tests for the definition of the relevant market, consumer choices and different customer categories. The Board may also call upon customers or competitors of the undertakings concerned. As for the definition of the relevant geographic market, the Board may resort to information on trade flows or pattern of shipments and geographic pattern of purchases.

The only legislative text providing for a specific methodology for the definition of a relevant market involving IPRs in Turkish competition law is the Guidelines on Technology Transfer Agreements (Guidelines). Paragraph 19 of the Guidelines, again in parallel to the European Commission's Guidelines on Technology Transfer Agreements, provide that technology markets consist of the licensed technology and its substitutes (ie, other technologies that are regarded by the licensees as interchangeable with or substitutable for the licensed technology) by reason of the technologies' characteristics, their royalties and their intended use. In this context, as stated in paragraph 18 of the Guidelines, the methodology used for defining the relevant technology markets does not fall far from the general methodology. As set out in the Guidelines, when defining the relevant technology market, the Board will identify the technologies that the licensees may switch to from the technology commercialised by the licensor, in response to small but permanent increases in the licence royalties. An alternative approach of the Board would be to look at the market for end products comprising the licensed technology.

In line with the Technology Transfer Guidelines, the Board has taken into account customer choices (NETCAD, 9 May 2012, No. 12-25/729-209); prices of end products (Arçelik/Sony, 8 December 2010, No. 10-76/1572-605); demand-side substitutability (Ajan Makina, 19 March 2013, No. 13-15/229-113; Warner Bros, 8 March 2007, No. 07-19/192-63), supply-side substitutability (Siemens, 8 January 2015, No. 15-02/5-3), product characteristics (Bayer/Monsanto, 8 May 2018, No. 18-14/261-126) and technologies' characteristics (Logo Yazilim, 28 April 2011, No. 11-26/497-154; Nokia Siemens/Motorola, 16 December 2010, No. 10-78/1614-618) in its precedents when defining the relevant product market involving intellectual property rights and technologies.

4 Acquisition and sale
Does competition law apply to the obtainment or grant and transfer or assignment of intellectual property rights?

General provisions of Turkish competition law regulating anticompetitive agreements apply in cases of obtainment, granting or transfer of IPRs, to the extent they fail to meet the conditions of a block or individual exemption. (For merger control cases, see questions 9 and 10.) Such agreements are likely to be deemed anticompetitive where they contain resale price maintenance, regional restraints, quantitative restraints on production or sales, customer allocation, and selective distribution systems (Communiqué No. 2002/2 and Communiqué No. 2008/2).

5 Licensing
How does competition law apply to technology transfer and licensing agreements?

The application of competition law to technology transfer and licensing agreements is regulated under Communiqué No. 2008/2 and the Guidelines. In parallel to the EU regime, for the purposes of Turkish competition law, a technology transfer agreement is an agreement where a licensor authorises another party (licensee) to use its technology (patent, know-how, software licence) for the production of goods and services subject to the licence agreement. The exemption applies to sub-licensing as well, provided that they are granted to third parties by the licensee solely in relation to the licensed technology.

In accordance with Communiqué No. 2008/2 and the Guidelines, the provisions of article 4 of Law No. 4054 do not apply to the technology transfer agreements entered into by two undertakings for the production of products specified in the agreement.

Communiqué No. 2008/2 and the Guidelines are applicable only if certain market share thresholds are not exceeded: for licensing agreements between competing undertakings, the aggregate market share of the parties should not exceed 30 per cent (as opposed to 20 per cent in the European Commission's Regulation No 772/2004) in the affected technology market. The threshold is 40 per cent in the case of licensing agreements between non-competing undertakings (as opposed to 30 per cent in the European Commission's Regulation No 772/2004). Hard-core restrictions, such as the restriction of a party's ability to determine its prices when selling products to third parties (ie, resale price maintenance), territory or customer restrictions and non-compete obligations, are also listed under article 6 of Communiqué No. 2008/2.

Communiqué No. 2008/2 and the Guidelines provide that a licensor may authorise a licensee to use its trademark on the products incorporating the licensed technology, as this trademark allows consumers to make an immediate link between the product and the characteristics imputed to it by the licensed technology. However, if the value of the licensed technology is limited because the licensee already uses the same or similar technology and the main objective of the agreement is the trademark, then the licensing agreement will not benefit from the block exemption provided under Communiqué No. 2008/2.

Furthermore, Communiqué No. 2008/2 and the Guidelines do not cover collective licensing agreements, such as patent pools. Collective licensing agreements are subject to the general provisions of article 4 of Law No. 4054 and may also benefit from the individual exemption under article 5 of Law No. 4054, provided that they satisfy all the conditions of individual exemption. While there is no precedent dealing specifically with patent pooling or technology pooling arrangements, these arrangements can potentially be considered as creating pro-competitive efficiencies. That said, the patent pooling arrangements should not be used in an anticompetitive manner so as to fix prices, allocate markets or restrict output, which would be in violation of competition law.

Licensing agreements in scope of R&D agreements are regulated under Block Exemption Communiqué No. 2016/5.

Communiqué No. 2008/2, the Guidelines and the Block Exemption Communiqué No. 2002/2 on Vertical Agreements are simultaneously applicable to technology licensing agreements, as the sale by the licensee of contracted products to third parties will constitute a vertical supply relationship and thus may fall under the block exemption provided under Communiqué No. 2002/2.

Under Turkish competition law, there is no regulation on the royalty rates or the calculation elements of the royalty calculation.

6 Market power and dominance
In what circumstances is the possession of intellectual property rights deemed to confer substantial market power on the holder such that the rules on unilateral conduct will apply?

Rules on unilateral conduct are mainly regulated under article 6 of Law No. 4054 for the abuse of a dominant position cases. There exists no provision of the legislation specifying the manner in which the owner of an IPR may increase its market power and even be placed in a dominant position. The market power in relation to IPRs is discussed in secondary legislation, although the discussion is limited and relates mainly to the assessment of the effects of agreements on competition and does not directly relate to the application of rules on unilateral conduct. Guidelines on Horizontal Cooperation Agreements, which resemble the European Commission's Guidelines on the applicability of article 101 of the Treaty on the Functioning of the European Union to horizontal cooperation agreements, provide in section 3.3.1 in relation to R&D agreements that exclusive exploitation of the end results of an R&D agreement by a party with a significant market power may result in market foreclosure. A similar approach is reflected in section 4.3.3 of the Guidelines on Horizontal Cooperation Agreements as regards specialisation agreements where potential market closure is linked to high market power of the parties and a concentrated market structure. Meanwhile, the same section also relates market power of the parties to the number of specialisation agreements entered into by competitors on the relevant market. The Guidelines maintain that the market share of a licensor should be calculated based on the sales of end products incorporating the licensed technology and that this market share is usually an accurate reflection of market power (paragraph 112), followed by the statement that the undertakings with high market shares are likely to have a significant market power and as regards technology markets, being the market leader, owning essential patents and superior technologies grant a competitive advantage to the rightholders.

In a recent decision, the Board has acknowledged that intellectual property rights constitute a major factor in analysing the potential dominance and market power of an undertaking within a given market (Türk Telekomünikasyon, 9 September 2017, No. 17-36/579-253). In this regard, along with other considerations, the Board evaluated the intellectual property rights as a sub-factor when deciding on whether there are barriers to entry to the market or not.

7 Unilateral conduct
In what circumstances may unilateral conduct involving the exercise of intellectual property rights be deemed to be anticompetitive (monopolisation, abuse of dominance, etc)?

There are currently no specific provisions under Turkish competition legislation regulating the unilateral conduct in the scope of IPRs, therefore the general provisions of article 6 of Law No. 4054 apply. The issue has been raised before the Board numerous times in the context of abuse of dominance. In its landmark Roaming decision (9 June

2003, No. 03-40/432-186), the Board identified the conditions of abusive refusal to supply (in the scope of IPRs) as follows:

- access is essential for competitors to enter the market;
- there is sufficient capacity to supply the demand;
- the undertaking controlling the essential facility is no longer able to supply the demand on the market or impedes competition on existing or potential services and products;
- the undertaking requesting access to the IPR is ready to pay a reasonable and non-discriminatory indemnity for access; and
- there exists no reasonable justification for denial.

Although over a decade has passed since the Roaming decision, the Board has reaffirmed its position in its recent decisional practice (Türk Telekom, 9 June 2016, No. 16-20/326-146; Krea İçerik Hizmetleri, 9 September 2015, No. 15-36/544-176; Surat Basim/Zambak, 19 March 2013, No. 13-15/230-114; Digital Platform (3 May 2012, No. 12-24/710-198) decisions). The Board also reviewed the abuse of dominance with respect to tying and bundling practices, where the licensing of IPRs were tied to the licensing of other IPRs (Logo Yazilim, 28 April 2011, No. 11-26/497-154), rebate systems in the sales of computer software (Microsoft, 13 June 2013, No. 13-36/481-211) and the provision of cellular phone line services (Turkcell, 6 June 2011, No. 11-34/742-230). In these cases, the Board applied the general provisions of article 6 of Law No. 4054 and did not adapt a particular standpoint as regards IPRs.

In Siemens Medical Devices (20 August 2015, No. 14-29/613-266), the Board reassessed the allegations against Siemens in the markets for services and spare parts for Siemens branded medical diagnosis and imaging devices regarding its alleged discriminatory and exclusionary practices through encrypting application and supply of spare parts. The Board imposed an administrative monetary fine on Siemens for discriminating against the other technical services companies without having an objective reason and intending to tie the sales of spares parts to the sale of technical services, thus abusing its dominant position and violating article 6 of Law No. 4054. Another noteworthy decision is Siemens (8 January 2015, No. 15-02/5-3), where it was alleged that Siemens and its distributors in Turkey (Boğaziçi Yazılım and BCC Yazılım) violated articles 4 and 6 of Law No. 4054 by refusing to supply and applying discriminatory practices the Siemens Nx Cad/Cam software to Eksa Kalıp. The Board ruled that Eksa violated Siemens' IPRs through using unlicensed software and could, therefore, not be deemed equal with other Siemens customers to conclude that not providing the relevant software to Eksa does not constitute a discriminatory practice. Consequently, the Board dismissed the allegations and found that Siemens did not violate Law No. 4054.

Recently, the Board has once again emphasised on the fact that intellectual property rights, along with others, are one of the factors that can cause a potential case of refusal to supply in its Kaptan Demir Çelik Endüstri decision, (7 September 2017, No. 17-28/481-207). In this regard, considering that a refusal to supply happens where the dominant undertaking refuses to provide the goods, services or input that it generates to another undertaking, intangible business inputs or information protected or unprotected by intellectual property rights may as well be considered among these abovementioned goods, services and input. Indeed, according to the relevant decision, the refusal of the licensing of an intellectual property right may originate a case of refusal to supply (ie, refusal to make an agreement). In addition, in its Lüleburgaz Şoförler ve Otomobilciler Esnaf Odası decision (7 September 2018, 17-28/477-205), while referring to the Cine5 decision (3 May 2012, 12-24/710-198) the Board has also directly considered refusal of licensing an intellectual property right as a sub-categorisation of refusal to make an agreement.

8 Patent settlements
In what circumstances may patent settlements be deemed to infringe competition law?

Turkish competition and IP laws are yet to witness the practice of patent settlements.

9 Merger control (jurisdiction)
In what circumstances will the transfer of intellectual property rights constitute a merger for the purposes of competition law?

As the competent decision-making body of the TCA, the Board is responsible for, inter alia, reviewing and resolving merger and acquisition notifications as well as joint ventures that require the Board's approval to gain legal validity. The relevant legislation on merger control is Competition Law along with Communiqué No. 2010/4 on Mergers and Acquisitions Requiring the Approval of the Competition Board (Communiqué No. 2010/4). The Board has also issued guidelines to supplement and provide guidance on the enforcement of Turkish merger control rules.

The Board has the power to review the acquisition of assets so long as the turnover attributable to the assets exceeds the thresholds stated under article 7 of Communiqué No. 2010/4.

According to paragraph 17 of the Guidelines on Cases Considered as a Merger or Acquisition and the Concept of Control, transfer of a turnover attributable to IPRs such as trademarks, patents, designs and copyrights falls within the scope of article 7 of Communiqué No. 2010/4. IPRs are part of the commercial activities of an undertaking and play an important role in the activities in gaining market share and generating turnover. Since the IPRs are considered the assets of an undertaking, acquiring IPRs are considered an acquisition within the meaning of article 5 of Communique No. 2010/4. In the event that the thresholds set forth under article 7 of Communiqué No. 2010/4 are exceeded, the transaction should be notified and is subject to the approval of the Board in order to gain validity. In the recent Yıldız Holding/Hero decision (16 April 2014, No. 14-15/288-121), the Board granted approval to the acquisition of 50 per cent shares in Hero Gıda Sanayi ve Ticaret AŞ, jointly controlled by Yıldız Holding AŞ and Hero Nederland BV, by Hero Beteiligungen AG, the termination of intellectual property licences and the agreements regarding the baby biscuits business as the Board considered that the transaction would not create or strengthen a dominant position, which would result in significant lessening of competition in a market. Also, in the ACC Austria decision (27 September 2013, No. 13-55/758-318), the Board cleared acquisition of tangible and intangible assets of ACC Austria by Secop GmbH. The Board evaluated the transaction as an acquisition transaction since it involves the acquisition of assets of ACC Austria and stated that the transaction would not create or strengthen a dominant position, which would result in significant lessening of competition in a market. (See question 10 for information on the Board's Tekel Birası decision, which includes sole transfer of IPRs.)

More recently, in FIH Mobile/Microsoft Mobile (Vietnam) (18 August 2016, No. 16-28/472-211), the Board approved the transaction regarding the acquisition by FIH Mobile of the entire share capital of Microsoft Mobile (Vietnam) and other assets related to the operation of the feature phone business which imply the transfer of IPRs. The Board proceeded to an examination as to whether the transfer of IPRs could be considered as a separate transaction which would require a separate merger control filing. To that end, based on the information provided by the parties that no turnover can be attributed to the relevant IPRs, the Board considered the acquisition of share capital and assets as one single transaction.

10 Merger control (substantive)
In what circumstances will a merger involving intellectual property rights be deemed anticompetitive? Are there any special considerations for mergers involving intellectual property rights or innovation markets?

The Board's approach to the concentrations involving IPRs is similar to its general approach to merger control. In addition, it is worth noting that the Board does not appear to have found the opportunity to comprehensively analyse and discuss potential arguments on a concentration with anticompetitive effects based on intellectual property related matters.

That said, the Board is likely to challenge the concentrations that create or strengthen a dominant position, which would result in significant lessening of competition in a market for goods or services within the whole or a part of Turkey. Even though there are not any specific rules as regards the acquisition of IPRs, the Board takes the specific characteristics of the sectors that the IPR is related, into consideration as it does with every transaction. In the recent Vodafone Holding clearance decision (31 March 2010, No. 10-27/386-141), the Board considered the complementary nature of the electronic communication sector and focused on the technical improvements in the sector and hand down a decision based on this consideration.

In Tekel Birası, which includes sole transfer of IPRs (25 August 2009, No. 09-38/925-218), the Board cleared the acquisition of the Tekel Birası brand by Anadolu Efes. When evaluating the acquisition of the Tekel Birası trademark and the registered shape of the bottle, the Board considered the transaction as an acquisition since the transaction involves the transfer of trademark, an asset of the undertaking. The Board primarily based its reasoning to the fact that intangible assets are not currently active, there is currently not another potential buyer and there will not be a change in the market share of Anadolu Efes. This case demonstrates that the Board considers that IPRs can confer market shares to its owner.

In addition to the above-mentioned, in (exceptional) cases where the competitive problems arise from a market position based on the superiority of owning a certain technology or IPR, the divestiture of the said technology or IPR may be considered as a suitable remedy (Guidelines on Remedies that are Acceptable by the TCA in Mergers/Acquisition Transactions). A divestiture package that includes trademarks alone and relevant production and/or distribution assets may only be accepted as a suitable remedy if sufficient proof is adduced showing that at the hands of a suitable purchaser the said package would turn into a competitive and viable asset immediately (Guidelines on Remedies that are Acceptable by the TCA in Mergers/Acquisition Transactions). The Board is familiar with cases where the remedies partly involve divestiture of IP rights such as certain trademarks and brands (eg, Mey İçki, 17 August 2011, No. 11-45/1043-356).

More recently, in WME/Perform (14 December 2017, No. 17-41/644-283), the Board evaluated the transaction on the creation of a joint venture that is planned to be active in the sale of commercial broadcastings, sponsorships and rights as well as the sale and marketing of commercial licensing of these rights. In its evaluation, the Board defined the licensing of football broadcasting rights as a horizontally affected market and deemed the relevant transaction as an acquisition by way of joint venture under the merger control regime. Consequently, the Board granted approval to the relevant transaction.

11 Standardisation
How, in general, does competition law treat the development of standards in standard-development organisations (SDOs), and the exercise of intellectual property rights for technology that may be essential to a standard?

Together with its limited precedents, the Guidelines on Horizontal Cooperation Agreements published by the TCA which is parallel to Guidelines on the applicability of article 101 of the Treaty on the Functioning of the European Union to horizontal cooperation agreements gives hints as regards the TCA's approach to development of standards in SDOs. According to the Guidelines on Horizontal Cooperation Agreements, the standard-settings where the participation is unrestricted, transparent and does not contain obligation to comply with and provide fair reasonable and non-discriminatory (FRAND) access to the standard, are not expected to restrict competition within the meaning of article 4 of No. 4054 (see the Board's decision in Yonga Levha (14 August 2003, No. 03-56/650-298) for the same approach). In the course of evaluating the standardisation agreement, the Board also considers the purpose of the standardisation agreement that plays a key role in the Board's decision most of the time. In Fig Exporters (12 November 2008, No. 08-63/1047-406), and in Turkish Pharmacists' Association (15 November 2007, No. 07-86/1088-422), the Board considered the purpose of the standardisation agreement and handed down a decision accordingly.

In Digiturk (10 February 2016, No. 16-04/82-36), where the Board assessed as to whether the agreement between Turkish Football Federation and Digiturk satisfies the conditions for an individual exemption within the meaning of article 5 No. 4054, the Board explicitly referred to "FRAND" terms for the first time. The Board ruled in its decision that parties would need to comply with FRAND terms in their licensing agreements. Without proceeding with an assessment on whether in the case at hand the FRAND terms were satisfied, the Board decided to grant an individual exemption to the relevant agreement on the ground that the agreement allows the licensees' platforms to access to several technical developments and provides a customer benefit.

The Guidelines on Horizontal Cooperation Agreements emphasise that the rules set by an SDO need to ensure effective and FRAND access to the standard. In cases where the standard involves an IPR, a clear and balanced Intellectual Property Rights policy should be adapted based on the specific industry and the needs of the SDO. By this means the implementers of the standard would grant effective access to the standards determined by that SDO.

From a competition law perspective, standardisation agreements are essentially deemed to be pro-competitive activities since they tend to create a positive effect on economy by increasing competition and lowering the output and sales costs. Furthermore, standards could also increase value for consumers by enhancing quality, providing information and ensuring interoperability and compatibility. However, standardisation agreements could also be anticompetitive (see question 12).

12 Standardisation and anticompetitive agreements
How do competition law rules on agreements, concerted practices, etc, apply to the standardisation process?

The Guidelines on Horizontal Cooperation Agreements reveal how similar the TCA's approach is to the EU approach in terms of standardisation agreements. While the Guidelines on Horizontal Cooperation Agreements state that, as a general rule, standardisation agreements can contribute to the economy by fostering competition and reducing the cost of production and sales, they also acknowledge that standardisation agreements could also reduce competition by providing a platform for the competitors to exchange information and by limiting the technical development and innovation. The Guidelines on Horizontal Cooperation Agreements also find the cases where one undertaking owns an IPR in the standard risky in terms of competition law, since that undertaking can indirectly control the standard and thus might allow this undertaking to behave in anticompetitive ways, for example, by preventing users' effective access to the standard after the adoption of the standard either through refusing to license the necessary IPR or through extracting excessive royalty fees.

As the Board has not considered standard-essential patents and competition law intersection (or IPRs in the standardisation process in general) so far, the Board's approach on standardisation agreements may be considered by analogy. In Yonga Levha (14 August 2003, No. 03-56/650-298), the Board evaluated the application of a negative clearance in regard to standardisation decision made by Turkish Particle Board Industrialists Association concerning setting a standard of particle boards which are subject to numerous patents registered to the Turkish Patent Institute. The Board considered the agreement as a standardisation agreement and evaluated the application pursuant to article 4 of Law No. 4054. The Board decided to grant a negative clearance for the application of the association. This decision can be considered as the first decision that the Board has ever evaluated concerning the concept of standardisation under the Turkish competition law regime.

In Turkish Pharmacists' Association (15 November 2007, No. 07-86/1088-422), the Board evaluated from a competition law perspective, the conformity certification issued by the Turkish Pharmacists' Association and granted to pharmacies which regulates the formal standards that pharmacies' signboards should satisfy. The Board rejected the complaint subsequent to its evaluation on the conformity certification in view of its purposes and decided that it is proportionate under the Turkish competition law regime.

More recently, in Turkish Steel Manufacturers Association (30 April 2014, No. 14-16/304-133), the Board evaluated the request for negative clearance or exemption for the standards planned to be applied to waste purchases from abroad pursuant to articles 4 and 5 of Law No. 4054. The Board mentioned the purchase conditions contained fair, reasonable and non-discriminatory provisions that are unlikely to raise competitive concerns within the relevant markets to conclude that the standard conditions met the requirements of individual exemption.

As indicated above, there are only few instances where the Board evaluated standardisation agreements. It is fair to say that the application of standardisation is not as common in Turkey as it is in other jurisdictions such as the EU.

In terms of mitigating the potential anticompetitive effects of standardisation agreements containing IPR essential to the standard, the Guidelines on Horizontal Cooperation Agreements state that the participants wishing to have their IPR included in the standard should provide an irrevocable FRAND commitment to license their essential IPR to all third parties. These commitments should be formed in a way that in case the IPR owner transfers its right the buyer should also be bound by that commitment. Furthermore, for the industry to make an informed choice of technology and for an effective access to the standard, the participants should disclose on a good faith their IPR that might be essential for the implementation of the standard under development.

13 Standardisation and unilateral conduct
How do competition rules on unilateral conduct apply to the exercise of intellectual property rights for technology that may be essential to a standard?

The Guidelines on Horizontal Cooperation Agreements also give hints in terms of the competition rules on unilateral conduct. According to the Guidelines on Horizontal Cooperation Agreements, a participant holding intellectual property rights that are essential to the standard could thereby control the standard. In cases where the standard constitutes a barrier to entry, the participant could control the product market and exclude others by excessive pricing or refusing to license the essential IPR. However, possessing an IPR essential to a standard does not always mean that the possession of market power and the market power issue could only be evaluated on a case-by-case basis. As it is stated above the Guidelines on Horizontal Cooperation Agreements stated that the participants wishing to have their IPR included in the standard should provide an irrevocable FRAND commitment to license their essential IPR to all third parties. In this point, the Guidelines on Horizontal Cooperation Agreements also state that the price charged for an IPR in the standard-setting context could be deemed unfair or unreasonable in case the fee is not close to the economic value of the IPR.

14 Recent cases and other developments

A recent acquisition decision that deals with IPR is the Board's Bayer/Monsanto decision (8 May 2018, No. 18-14/261-126) concerning the acquisition of sole control over Monsanto Company by Bayer Aktiengesellschaft. Within the scope of its preliminary review (Phase I), the Board considered that the transaction would result in various affected markets in Turkey in which the parties had relatively high market shares and thus, decided to initiate a Phase II review. In terms of its IPR-related assessment, the Board indicated that the transaction might raise competition law concerns in the cotton seeds market, taking into account the parties' aggregate market share as well as the limited number of competitors and their market shares within the previous three years. Within the scope of its analysis, the Board deemed third parties' activities conducted via licences granted by the parties as part of the parties' activities in terms of the cotton seeds. Accordingly, the Board attributed third parties' activities that are conducted via the licenses granted by the parties to the market share of the parties. Further to its Phase II review, the Board conditionally approved the transaction based on the commitments submitted by Bayer to the European Commission resolving that the commitments also address Turkey-specific competition law concerns.

As part of its assessments in Association of Steel Guard Rails and Road Safety Systems (22 November 2018, No. 18-44/702-344), the Board evaluated the horizontal cooperation agreements executed among the members of the Association of Steel Guard Rails and Road Safety Systems fell within the scope of article 4 of the Law No. 4054 due to the coordination risks. The Board considered that the parties had significant market power, the market solely constituted of tenders and there is high-level of cooperation due to joint participations to the tenders in the form of joint ventures/business partnerships, and the cooperation was among competitors to conclude that these agreements could not benefit from the protective cloak of the block exemption provided within the scope of Communique No. 2016/5. Further to its assessments, the Board ruled that cooperation on R&D would lead to product innovation and cost reduction resulting in consumer benefit and would not eliminate competition in a significant part of the relevant market as the agreements would not prevent undertakings to act independently, especially in terms of price-setting and tender participation processes. The Board further noted that the agreements do not include any non-compete or exclusivity clauses. The Board also held that horizontal cooperation agreements allow undertakings to perform activities that would cost considerably more if carried out individually by the undertakings for reasons such as limited technical means to conclude that the said agreements would not restrict competition more than necessary. In light of the foregoing, the Board granted these agreements an individual exemption.

In Turkish Musical Work Owners Society (22 August 2017, No. 17-27/451-193) cited above, the Board evaluated the allegations that music associations violated articles 4 and 6 of Law No. 4054 by concluding restrictive agreements on the use of musical pieces to be broadcasted in public places and radio and television institutions. In the relevant decision, the Board provided detailed explanations on the relationship between competition law and intellectual property law. To that end, the Board stated that it is accepted by the European Commission, Court of Justice of the European Union and WIPO that competition law should be applied to the markets involving intellectual works. In this regard, the Board also referred to WIPO's report on "Copyright, Competition and Development" and listed the exemplary situations set forth in the relevant report to show how competition law and intellectual property law may interact with each other. For instance, the Board stated that intermediaries in the areas of distribution and licensing of copyrights may abuse their dominant position by way of excessive pricing and similar practices. Accordingly, the Board concluded that these two practice areas support each other. In its substantive assessment, the Board evaluated the allegations involving the use of intellectual property rights within the categories of (i) excessive pricing, (ii) price discrimination and (iii) exemption. As a result of its assessment on the allegations, the Board decided not to impose an administrative monetary fine on the relevant music associations due to the lack of evidence on the allegations and granted individual exemption to the protocols concluded between the relevant music associations on the distribution of music pieces.

In Tuborg/ECOCAPS (18 May 2016, No. 16-17/282-125), the Board evaluated the application brought by Anadolu Efes Biracılık ve Malt Sanayi A.Ş (Anadolu Efes) alleging that the Board's previous decision where it granted the exemption to the supply agreement between Türk Tuborg Bira ve Malt Sanayi A.Ş (Tuborg) and ECOCAPS's SRL Socio Unico (Ecocaps), was issued based on missing and false information and thus the exemption should be withdrawn. To that end, Anadolu Efes claimed that the exclusive agreement concluded between Tuborg and Ecocaps regarding the supply of beverage cans protection system does not provide any technical improvement and innovation and thus the agreement does not benefit from individual exemption. In its evaluation, the Board concluded that the beverage can protection system that Tuborg supplies from Ecocaps brings a new method providing hygienic solutions and impermeability for beverage packages and in this sense, it promotes an innovation that is protected within the scope of intellectual property rights. Moreover, the Board stated that, Tuborg brings an innovation for consumers by using this new technology in its products through making considerable investments. In this scope, as a result of its evaluation, the Board rejected Anadolu Efes' request for withdrawal of exemption granted to the relevant agreement.

In ArcelorMittal (21 January 2016, No. 16-03/54-19), the Board evaluated the individual exemption request regarding the production agreement between ArcelorMittal Flat Carbon, ArcelorMittal Tailored Blanks, Bamesa Aceros, Bamesa Çelik and BAMI Çelik. The relevant agreement concerned the production of welding plates used in the automobile industry. In its evaluation, the Board took into consideration the fact that the relevant agreement is a horizontal cooperation agreement concluded between undertakings all operating in the same market. Moreover, the Board noted that the agreement contains certain technology transfer (licence and knowhow) between the parties and thus assessed on whether the exemption provided under Communiqué No. 2008/2 applies to the relevant agreement. In this regard, the Board stated that, for benefiting from the protective cloak of Communiqué No. 2008, the primary purpose of the agreement needs to be licensing of intellectual property rights and knowhow. This condition is not satisfied in the case at hand as the main purpose of the agreement at stake is the joint production of welding plates, the transfer of certain know-how and technology being solely an ancillary element of the agreement. This led the Board to evaluate the agreement within the scope of Communiqué No. 2013/3 applying to specialisation agreements, and to decide that the relevant communiqué does not apply either in the case at hand due to the market shares of the relevant undertakings. Finally, the Board evaluated the application of the general individual exemption regime to the agreement and decided to grant an individual exemption due to the efficiencies which derive from the agreement (eg, increase in the quality and cost reductions, benefit to consumers, etc).

The latest development in the legislation is the adoption of Communiqué No. 2016/5, which replaces the previous relevant legislation (ie, Block Exemption Communiqué No. 2003/2 on R&D Agreements (Communiqué No. 2003/2)). In line with the EU Regulation on R&D Agreements, the terms "know-how" and "trade secrets", which were not included within the scope of Communiqué No. 2003/2, have been defined in Communiqué No. 2016/5. Also parallel to the EU Regulation on R&D Agreements, excluded restrictions under Communiqué No. 2016/5 include (i) restricting the right to challenge the validity of the related IPRs after completion of the R&D; and (ii) restricting the right to grant licences to third parties to manufacture the contract products or to apply to contract technologies, where the agreement does not provide for the joint exploitation of R&D results or such exploitation does not in fact take place. Under Communiqué No. 2003/2, both of these restrictions were considered as hard-core restrictions, which would have excluded the entire agreement from the benefit of the block exemption, whereas under the current regulation, if they are included in an R&D agreement, while the exemption would not apply to these obligations the block exemption may still be applied to the rest of the agreement.

As for the intellectual property law, the enactment of the IP Law is expected to bring a more solid framework for the application of the intellectual property rules. As the recent IP Law does not regulate the intersection between the IP rules and the competition law, the Board's decisional practice will be of importance for further clarifications with respect to the competition law standards that apply to intellectual property matters.

Gönenç Gürkaynak

ELIG Gürkaynak
Attorneys-at-Law

Mr. Gönenç Gürkaynak is a founding partner of ELIG Gürkaynak Attorneys-at-Law, a leading law firm of 90 lawyers based in Istanbul, Turkey. Mr. Gürkaynak graduated from Ankara University, Faculty of Law in 1997, and was called to the Istanbul Bar in 1998. Mr. Gürkaynak received his LL.M. degree from Harvard Law School, and is qualified to practice in Istanbul, New York, Brussels and England and Wales (currently a non-practising Solicitor). Before founding ELIG Gürkaynak Attorneys-at-Law in 2005, Mr. Gürkaynak worked as an attorney at the Istanbul, New York and Brussels offices of a global law firm for more than eight years.

Mr. Gürkaynak heads the competition law and regulatory department of ELIG Gürkaynak Attorneys-at-Law, which currently consists of 45 lawyers. He has unparalleled experience in Turkish competition law counseling issues with more than 20 years of competition law experience, starting with the establishment of the Turkish Competition Authority. Every year Mr. Gürkaynak represents multinational companies and large domestic clients in more than 35 written and oral defences in investigations of the Turkish Competition Authority, about 15 antitrust appeal cases in the high administrative court, and over 85 merger clearances of the Turkish Competition Authority, in addition to coordinating various worldwide merger notifications, drafting non-compete agreements and clauses, and preparing hundreds of legal memoranda concerning a wide array of Turkish and EC competition law topics.

Mr. Gürkaynak frequently speaks at conferences and symposia on competition law matters. He has published more than 150 articles in English and Turkish by various inte rnational and local publishers. Mr. Gürkaynak also holds teaching positions at undergraduate and graduate levels at two universities, and gives lectures in other universities in Turkey.

Hakan Özgökçen

ELIG Gürkaynak
Attorneys-at-Law

Mr Hakan Özgökçen joined the firm in 2007. He graduated from Marmara University Law School in 2003 and received an LLM degree from Istanbul Bilgi University during 2010. Mr Özgökçen has been a member of the Istanbul Bar since 2005.

Mr Özgökçen became a partner within the competition law and regulatory department of ELIG Gürkaynak in 2015 and has extensive experience in competition law, mergers & acquisitions, contracts law, administrative law and general corporate law matters. Mr Özgökçen has represented defendants and complainants in complex antitrust investigations concerning all forms of abuse of dominant position allegations, along with merger notifications and clearances, and cartel legislation and enforcement. He has also represented various multinational and national companies before the Turkish Competition Authority and Turkish courts.

In addition, Mr Özgökçen is active in writing and speaking on competition law matters, having authored and co-authored many articles and essays and spoken at several conferences and symposia.

ELIG GÜRKAYNAK Attorneys at Law

ELIG Gürkaynak Attorneys-at-Law is committed to providing its clients with high-quality legal services. We combine a solid knowledge of Turkish law with a business-minded approach to develop legal solutions that meet the everchanging needs of our clients in their international and domestic operations. Our competition law and regulatory department is led by our partner, Mr Gönenç Gürkaynak, along with four partners, two counsel and 40 associates.

In addition to unparalleled experience in merger control issues, ELIG Gürkaynak has vast experience in defending companies before the Turkish Competition Board in all phases of antitrust investigations, abuse of dominant position cases, leniency handlings and before courts on issues of private enforcement of competition law, along with appeals of the administrative decisions of the Turkish Competition Authority.

ELIG Gürkaynak represents multinational corporations, business associations, investment banks, partnerships and individuals in the widest variety of competition law matters, while also collaborating with many international law firms. Over the past year, ELIG Gürkaynak has been involved in over 85 merger clearances by the Turkish Competition Authority, more than 35 defence projects in investigations, and over 15 antitrust appeals before the administrative courts. ELIG Gürkaynak also provided more than 75 antitrust education seminars to employees of its clients.

ELIG Gürkaynak has an in-depth knowledge of representing defendants and complainants in complex antitrust investigations concerning all forms of abuse of dominant position allegations and all forms of restrictive horizontal and vertical arrangements, including price-fixing, retail price maintenance, refusal to supply, territorial restrictions and concerted practice allegations.

In addition to significant antitrust litigation expertise, the firm has considerable expertise in administrative law and is well equipped to represent clients before the High State Court, both on the merits of a case and for injunctive relief. ELIG Gürkaynak also advises clients on a day-to-day basis in a wide range of business transactions that almost always contain antitrust law issues, including distributorship, licensing, franchising and toll manufacturing issues.

Çitlenbik Sokak No:12
Yıldız Mahallesi, Besiktas
34349 Istanbul
Turkey
Tel: +90 212 327 1724
Fax: +90 212 327 1725

www.elig.com

Gönenç Gürkaynak
gonenc.gurkaynak@elig.com

Hakan Özgökçen
hakan.ozgokcen@elig.com