IP & ANTITRUST 2020 KNOW HOW

Turkey

Gönenç Gürkaynak and O. Onur Özgümüş
ELIG Gürkaynak Attorneys-at-Law

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GCR INSIGHT

Applicable rules

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

Law No. 4054 on the Protection of Competition (Law No. 4054) applies, to inter alia, the obtainment, grant, acquisition, exercise and transfer of intellectual property rights (IPRs). Paragraph 5 of Guidelines on the Application of articles 4 and 5 of Law No. 4054 on the Protection of Competition to Technology Transfer Agreements (Technology Transfer Guidelines) provides that the fact that legal regulations related to intellectual property grant exclusive rights of exploitation to right holders does not imply that intellectual property rights are immune from the area of application of the competition law. Moreover, articles 4, 5, 6 and 7 of Law No. 4054, which govern restrictive agreements, concerted practices and decisions of association of undertakings; abuse of dominance and merger control respectively, are also applicable to agreements whereby the holder of intellectual property right licenses another undertaking to use its intellectual property rights.

The Board also acknowledged that from a perspective of Turkish competition law, it could be indicated that Law No. 4054 does not include any provision specifically for intellectual property rights under the provisions on purpose and scope and other relevant provisions of Law No. 4054 and thus, it is accepted in the literature that there is no obstacle for the application of Law No. 4054 directly to the legal actions and conducts based on intellectual property rights (Philips, 26 December 2019, 19-46/790-344).

Furthermore, 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, 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 supporting 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 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.

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.

Research and development (R&D) agreements

Block Exemption Communiqué No. 2016/5 on Research and Development 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.

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.

Competent authorities

2 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 (Authority), 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 Authority) 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 Authority consists of the Board, presidency and service departments. As the competent body of the Authority, the Board is responsible for, among other things, investigating or deciding on anticompetitive agreements; abusive conduct and reviewing concentrations 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 Turkish 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 Authority can examine the physical records as well as those in electronic space and IT systems, paperwork and documents of the investigated undertakings and, if need be, take copies of the same and request undertakings to provide written or verbal explanations on specific topics. The Board can also examine personal email accounts if these are used for business correspondences (Askaynak, 26 December 2019, 19-46/793-346) and WhatsApp correspondences (Ege Konteyner, 2 January 2020, 20-01/3-2; and Burdur Akaryakıt, 9 January 2020, 20-03/28-12). 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 or 7 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 31,903 Turkish liras until 31 December 2020.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 results in the significant lessening of effective 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.

Market definition

3 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 Technology Transfer Guidelines. Paragraph 19 of the Technology Transfer 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 Technology Transfer Guidelines, the methodology used for defining the relevant technology markets does not fall far from the general methodology. As set out in the Technology Transfer 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 the standard that applies to the relevant patents (Philips, 26 December 2019, 19-46/790-344),customer choices (NETCAD, 9 May 2012, 12-25/729-209); prices of end products (Arçelik/Sony, 8 December 2010, 10-76/1572-605); demand-side substitutability (Ajan Makina, 19 March 2013, 13-15/229-113; Warner Bros, 8 March 2007, 07-19/192-63), supply-side substitutability (Siemens, 8 January 2015, 15-02/5-3), product characteristics (Bayer/Monsanto, 8 May 2018, 18-14/261-126) and technologies' characteristics (Logo Yazilim, 28 April 2011, 11-26/497-154; Nokia Siemens/Motorola, 16 December 2010, 10-78/1614-618) in its precedents when defining the relevant product market involving intellectual property rights and technologies.

Acquisition and sale

4 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. Such agreements are likely to be deemed anticompetitive where they contain resale price maintenance, regional restraints, quantitative restraints on production or sales and customer allocation (Communiqué No. 2002/2 and Communiqué No. 2008/2).

Licensing

5 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 Technology Transfer 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.

Communiqué No. 2008/2 and the Technology Transfer 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 Technology Transfer 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 theTechnology Transfer 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 Communiqué No. 2016/5.

Communiqué No. 2008/2, the Technology Transfer Guidelines and Communiqué No. 2002/2 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.

Market power and dominance

6 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.

Paragraph 240 of the Guidelines on Horizontal Cooperation Agreements provides that "…even if the establishment of a standard can create or increase the market power for those undertakings which hold the intellectual property rights essential for that standard, simply holding the IPR essential for a standard does not necessarily equate to the direct possession or exercise of market power. The question of market power, therefore, can only be assessed on a case by case basis." Moreover, Guidelines on 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 Technology Transfer 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 right holders.

Recently in its Philips decision (26 December 2019, 19-46/790-344), the Board indicated that the fact that an undertaking has standard essential patent (SEP) ownership is not sufficient for that undertaking to be in a dominant position, but it is necessary to conduct a case-based analysis. In this regard, the Board examined whether it was mandatory to comply with the relevant standard and to use Philips' relevant patents in order to comply with the relevant standard in Turkey. When concluding that Philips held a dominant position in the market for subtitling technology for digital video broadcasting due to the SEPs that it owned, the Board took into account among others the fact that complying with the relevant standard was mandatory for television and set top box manufacturers in Turkey and TV manufacturers in Turkey did not have any alternatives than obtaining licence from Philips.

Unilateral conduct

7 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 within 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, 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, 16-20/326-146; Krea İçerik Hizmetleri, 9 September 2015, 15-36/544-176; Surat Basim/Zambak, 19 March 2013, 13-15/230-114; Digital Platform (3 May 2012, 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, 11-26/497-154), rebate systems in the sales of computer software (Microsoft, 13 June 2013, 13-36/481-211) and the provision of cellular phone line services (Turkcell, 6 June 2011, 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 2014, 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, 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 the Siemens Nx Cad/Cam software to Eksa Kalıp and applying discriminatory practices. 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, 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 deal.

The Board indicated that even it is acknowledged that competition law can intervene to the excessive price in terms of the licensing of the intellectual property rights; there are various difficulties in the implementation of the economic value test (EVT) in terms of determining excessive price; such as the problem of how to determine the cost that will be used in price-cost comparison that is used in the first step of EVT, the fact that the extent of the profit that would be considered as excessive would remain uncertain, even when the relevant cost item is determined and that it is difficult to find a past equivalent that could be equal to an intellectual property right due to the genuine nature of intellectual property rights (Philips, 26 December 2019, 19-46/790-344). The Board, in Musical Works Professional Societies decision (21 July 2005, 05-48/683-177), where it assessed the allegation that the musical works royalties applied by four musical works professional societies to broadcasters are excessive, rejected the complaint considering that the methods adopted for the determination of the excessive price cannot be applied in the relevant case. The Board based its assessment on the reason that it is not possible to objectively and concretely determine the costs of the musical works that subject to the royalty, which are produced with idea, creativity and labour.

Patent settlements

8 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.

Merger control (jurisdiction)

9 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 Authority, 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 Law No. 4054 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 there is a change in control on a lasting basis and the turnover attributable to the assets exceeds the jurisdictional 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 Law No. 4054. 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. Accordingly, the transfer of licences related to intellectual property rights can only be considered under the scope of article 7 of Law No. 4054 if the licences are exclusive at least in one particular territory and the transfer of such licences allow for the transfer of the activity to which the turnover can be attributed. 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 to gain validity. In the recent Karsan/Bozankaya decision (18 June 2020, 20-29/368-165), the Board granted approval to the acquisition of Bozankaya's technology related to electric buses and intellectual property rights (except for trademarks) by Karsan.

In FIH Mobile/Microsoft Mobile (Vietnam) (18 August 2016, 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 that 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 that 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.

Merger control (substantive)

10 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, 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 would result in the significant impediment of effective 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, 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 the sole transfer of IPRs (25 August 2009, 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 no other 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 Authority 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 Authority in Mergers/Acquisition Transactions). The Board is familiar with cases where the remedies partly involve divestiture of IPRs such as certain trademarks and brands (eg, Mey İçki, 17 August 2011, 11-45/1043-356).

In WME/Perform (14 December 2017, 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 a joint venture under the merger control regime. Consequently, the Board granted approval to the relevant transaction.

Standardisation

11 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 Authority 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 Authority'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, 03-56/650-298) for the same approach).

In Digiturk (10 February 2016, 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.

In Philips (26 December 2019, 19-46/790-344), the Board pointed out to potential competition law concerns that may arise from standard setting and SEPs. Accordingly, standardisation might have some anticompetitive effects such as decrease in price competition, foreclosure of the market to innovation technologies and exclusion of or discrimination against certain undertakings by prevention of effective access to the standard. First, if undertakings were to engage in discussions in the context of standard-setting, this could reduce or eliminate price competition in the relevant markets, thereby may lead to a collusive outcome in the market. Second, in the event that a technology is determined as a standard, the alternative undertakings and technologies competing with each other for participating in the standard might face a barrier to entry and might be excluded from the market and thereby, standards can restrict technical development and innovation. Lastly, the competition might be restricted by effect in the event that an undertaking is prevented from accessing to a standard completely or access to the standard is subject to prohibitive or discriminatory conditions.

The Board also acknowledged the main benefits of standardisation that can be listed as; decreasing costs by enabling economies of scale and scope, increasing incentives of the undertakings to invest for innovation, increasing the diversity of the consumer choices by assuring the interoperability or matching of the complementary or "component products" owned by different producers and thus, decreasing product prices.

In terms of SEPs, the Board indicated that exclusionary practices could occur in the event that the SEP holder excludes other undertakings from the market by using its patented technology to prevent the application of the relevant standard. Accordingly, these practices can occur in the form of "refusal to license", "hold up" and "court injunction". The SEP holder's refusal to license its SEP may raise competitive concerns specifically in case the producers using SEP in its products are currently "locked-in" to the relevant standard and made investments specific to this standard, since this may lead to exclusion of the producers from the market. On the other hand, the SEP holders may use the hold-up mechanism by using their powers, which arises from the fact that there are no competitive alternatives, through excessive royalties or some other unreasonable licence clauses to the detriment of the standard appliers.

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 IPR 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.

Standardisation and anticompetitive agreements

12 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 Authority'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.

In Turkish Steel Manufacturers Association (30 April 2014, 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.

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.

Standardisation and unilateral conduct

13 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. On 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.

In Philips (26 December 2019, 19-46/790-344), the Board assessed several allegations against Philips with respect to its unilateral practices in relation to its SEPs. In this respect, the Board assessed whether Philips abused its dominant position by (i) not negotiating in good faith during the licensing process of its SEPs regarding the subtitling technology, (ii) carrying out actions aimed at the destruction of the complainant's products by filing lawsuits against the complainant, (iii) demanding excessive royalty, (iv) imposing no-challenge and termination-upon-challenge clauses in the Licence and Settlement Agreement, (v) excluding Vestel from the market and/or placing Vestel in disadvantageous position against its competitors due to discrimination through the high royalty paid for Philips' SEPs, and (vi) preventing Vestel from using its own technology.

The Board indicated that SEP owners' conduct of seeking an injunction can be assessed under abuse of dominance. Subsequently, it is concluded that given that Philips and Vestel did not enter into a licence agreement despite negotiations between them that lasted over two years, an independent "third party" must have been referred for determination of the amount of the royalty at first, and for this reason, the fact that Philips resorted to file a lawsuit can be considered as abuse of dominance.

Furthermore, the Board remarked that the no-challenge clauses set forth by the dominant undertaking can be assessed within the context of article 6 of Law No. 4054 and if a termination-upon-challenge clause leads to equivalent anticompetitive effects with no-challenge clauses, the relevant clause should be analysed by considering it as a type of no-challenge clause. Eventually, the Board concluded that the termination-upon-challenge clause in the agreement between Philips and Vestel that has the characteristics of a no-challenge clause violated the required conditions to be complied to avoid abusing a dominant position.

With respect to the excessive royalty allegations, the Board rendered that the royalty paid by Vestel to Philips is not excessive, taking into account that the ratio of the royalty to average TV selling price and Vestel's average unit costs is low. The Board also considered whether the high royalty paid for Philips' SEPs could exclude Vestel from the market and/or place Vestel in disadvantageous position against its competitors due to discrimination. In this respect, it was concluded that Philips not publishing royalties was not in compliance with the principle of transparency, and thus caused exclusionary practice.

Finally, the Board assessed allegation that Vestel was prevented from using its own technology. In this respect, the Board pointed out that the SEP owner has the burden of proving that the undertakings that are claimed to violate the SEP has violated the SEP, in other words, that the SEP is used in a way that leads a violation. To that end, the Board concluded that, the burden of proof has passed to Vestel by the agreement, and that this is contrary to the FRAND terms.

Recent cases and other developments

14 Provide details of recent noteworthy cases and other developments.

In Philips (26 December 2019, 19-46/790-344), the Board assessed whether Philips abused its dominant position by:

- not negotiating in good faith during the licensing process of its SEPs regarding the subtitling technology;
- carrying out actions aimed at the destruction of the complainant's products by filing lawsuits against the complainant;
- demanding excessive royalty;
- imposing no-challenge and termination-upon-challenge clauses in the Licence and Settlement Agreement;
- excluding Vestel from the market or placing Vestel in disadvantageous position against its competitors owing to discrimination through the high royalty paid for Philips' SEPs; and
- preventing Vestel from using its own technology.

The Board determined that Philips did not follow the necessary step to "apply to an independent third party in determination of the royalty", to be followed by the SEP owner to exercise its right to refer to court in compliance with competition law, it was not transparent in determination of the royalty, it imposed a reversal of burden of proof and added a no-challenge clause into the agreement, in violation of FRAND terms. As a result, the Board concluded that Philips, which enjoyed a dominant position in the relevant market, abused its dominant position within the scope of article 6(2)(b) of Law No. 4054 and imposed an administrative monetary fine on Philips.

A relatively recent acquisition decision that deals with IPR is the Board's Bayer/Monsanto decision (8 May 2018, 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 licences 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, 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 within the scope of article 4 of 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 a 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, 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 (excessive pricing, price discrimination and 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.

Gönenç Gürkaynak

ELIG Gürkaynak
Attorneys-at-Law

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 LLM degree from Harvard Law School and is qualified to practise 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 counselling 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 European Commission competition law topics.

Mr Gürkaynak frequently speaks at conferences and symposia on competition law matters. He has published more than 200 articles in English and Turkish with various international 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.

O. Onur Özgümüş

ELIG Gürkaynak
Attorneys-at-Law

O. Onur Özgümüş is a counsel at the competition law and regulatory department of ELIG Gürkaynak Attorneys-at-Law. He graduated from Koç University School of Law in 2008. He has been a member of the Istanbul Bar since 2009. He has been working in the competition law and regulatory department of ELIG Gürkaynak Attorneys-at-Law since 2014. He has extensive experience in areas of merger control, compliance to competition law rules, cartel agreements and abuse of dominance cases. He has represented various multinational and national companies before the Turkish Competition Authority and before Administrative Courts. He is fluent in English.

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 ever-changing needs of our clients in their international and domestic operations. Our competition law and regulatory department is led by partner Gönenç Gürkaynak, with three partners, four 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.

During 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 on a wide range of business transactions that almost always involve 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

O. Onur Özgümüş
onur.ozgumus@elig.com