The Intellectual Property and Antitrust Review

Sixth Edition

Editor
Thomas Vinje

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THE INTELLECTUAL PROPERTY AND ANTITRUST REVIEW

SIXTH EDITION

Editor
Thomas Vinje

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PREFACE

Intellectual property is taking a more and more central position in the global economy, and this is true not only in highly developed economies, but also in emerging ones. China and India, to take just two examples, are moving rapidly up the value chain and now have world-class technology companies for which intellectual property protection is crucial.

As the significance of intellectual property grows, so too does the relationship between intellectual property and antitrust law. Antitrust law constrains the exercise of intellectual property rights in certain circumstances, and both owners and users of intellectual property rights need to know how the two bodies of law interact and where antitrust draws lines for intellectual property. Intellectual property practitioners need to look beyond intellectual property laws themselves to understand the antitrust limits on the free exercise of rights.

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

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

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

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

Thomas Vinje
Clifford Chance LLP
Brussels
June 2021

Chapter 14

TURKEY

Gönenç Gürkaynak[1]

I INTRODUCTION

As a result of the intensive work conducted throughout the years, a unified intellectual property law has finally been codified in Industrial Property Law No. 6769 (the IP Law), which entered into force on 10 January 2017 and collectively regulates in detail trademarks, geographical indications, designs and patents, in compliance with European Union regulations. Prior to the creation of the IP Law, the entirety of the intellectual property regime was implemented through separate statutory decrees. Competition in Turkey, on the other hand, is regulated by Law No. 4054 on the Protection of Competition (the Competition Law), published in the Official Gazette on 13 December 1994.

Following the introduction of the IP Law, the interaction between competition law and intellectual property law in Turkey still remains unregulated, and both regimes obey separate legislation. Turkish intellectual property law seeks to protect the owners' exclusive control over their intellectual assets, and Turkish competition law aims to ensure effective competition in the marketplace and prevent anticompetitive actions, such as cartels and abuse of dominance.

Moreover, the recent Turkish IP Law and other existing legal regulations related to intellectual property rights (IP rights) confer exclusive rights on the right holders. The owner of intellectual property is entitled under the relevant legal regulations to exploit the subject of the right exclusively, to prevent illegal use of it by third parties and confer the right to use it by licensing it to third parties. The fact that legal regulations related to intellectual property grant exclusive rights of exploitation to right holders does not imply that IP rights are immune from the area of application of the competition law. Article 4 (restrictive agreements), Article 5 (individual exemption conditions) and Article 6 (dominance) of the Competition Law are also applicable to agreements whereby the holder of IP rights licenses another undertaking to exploit its IP rights. Overall, it would be prudent to consider intellectual property law and competition law as complementary rather than contradictory concepts.

As elaborated above, the main legislation for the competition law regime in Turkey is the Competition Law. The Turkish competition law regime consists of three main branches: restrictive agreements, concerted practices and cartels; dominance; and merger control. The national competition authority for enforcing competition law in Turkey is the Turkish Competition Authority (the Authority). Under the current Turkish competition law regime, the general competition law enforcement structure is also applicable for IP rights.

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1 Gönenç Gürkaynak is a founding partner at ELIG Gürkaynak Attorneys-at-Law.

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

a Block Exemption Communiqué No. 2008/2 on Technology Transfer Agreements (Communiqué No. 2008/2), which provides a protective cloak for agreements involving the transfer of IP rights and in particular technology licensing agreements;
b Block Exemption Communiqué No. 2016/5 on R&D Agreements, which 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 IP rights 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;
c 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; and
d Block Exemption Communiqué No. 2013/3 on Specialisation Agreements 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.

In terms of intellectual property law, there are a range of criminal, civil and administrative laws to protect IP rights that cover a range of fields, including copyrights, trademarks, patents and trade secrets. Turkey is a signatory or a party to various international and bilateral agreements, conventions and treaties, such as:

a the Agreement on Trade-Related Aspects of Intellectual Property Rights;
b the Paris Convention for the Protection of Industrial Property;
c the Patent Cooperation Treaty;
d the Strasbourg Agreement Concerning the International Patent Classification;
e the Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks;
f the Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of Registration of Marks;
g the Vienna Agreement Establishing an International Classification of the Figurative Elements of Marks; and
h the European Patent Convention.

II YEAR IN REVIEW

With respect to relevant legislative changes, the Turkish law regime has not witnessed any specific amendments that relate to both competition law and intellectual property law. Undoubtedly, the major and most recent change in terms of legislation has been the introduction of the IP Law, which consolidates all the separate regulations pertaining to intellectual property law. As for case law, the Turkish Competition Board (the Board) has dealt with certain cases that bear witness to the interaction between IP rights and competition law, some of which are summarised below.

In *BR Mağazacılık/Beymen*,[2] the Board evaluated the request for individual exemption concerning the brand licence agreement executed between BR Mağazacılık and Beymen. The agreement set forth the transfer of the usage rights related to the Beymen Business brand to BR Mağazacılık for the purpose of design, production and sales of certain products. According to this agreement, Beymen cannot operate in the design, production, sales, marketing and distribution of the products that are subject to the agreement and cannot grant the brand licence right to any other undertaking in Turkey. Therefore, the agreement gave exclusivity to BR Mağazacılık. The Board defined this agreement as a vertical agreement executed between competitors, owing to the fact that both undertakings were active in the production and sale of ready-to-wear products. As the agreements executed between competitors may lead to competitive concerns by their nature, the Board determined that the agreement was within the scope of Article 4 of the Competition Law. Regarding the assessment on whether the agreement could benefit from the block exemption set forth under Communiqué No. 2002/2, the Board referred to Article 2 of this Communiqué and stated that BR Mağazacılık and Beymen were both active in the production and distribution of the products subject to the agreement and that the agreements executed between competitors were excluded from the scope of application of Communiqué No. 2002/2. Consequently, the Board evaluated the conditions for individual exemption under Article 5 of the Competition Law. Taking into consideration (1) the increase in the amount and variety of the products that would be offered to the consumers, (2) Beymen Business' low market share in the relevant product market and (3) the duration of the agreement (which was seven years), the Board decided that the cumulative conditions were fulfilled and individual exemption could be granted to the agreement.

In *Gülçiçek*,[3] the Board evaluated the transaction concerning the acquisition of sole control over Gülçiçek by Fragar. Within the scope of the parties' defences related to the buyer's power, a reference had been made to IP rights in terms of the Board's competitive assessment related to the market structure and buyer's power. It has been stated that the scent that is the essential element of a perfume cannot benefit from the protective cloak of IP rights by means of a patent. Therefore, an undertaking can easily produce the same perfume belonging to another, which eliminates consumers' dependency on any supplier in the market.

In *Philips*,[4] the Board assessed whether Philips abused its dominant position by:

a not negotiating in good faith during the licensing process of its standard-essential patents (SEPs) regarding the subtitling technology;

b carrying out actions aimed at the destruction of the complainant's products by filing lawsuits against the complainant;

c demanding excessive royalty;

d imposing no-challenge and termination-upon-challenge clauses in the licence and settlement agreement;

e 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

f preventing Vestel from using its own technology.

2 16 April 2020, No. 20-20/271-130.

3 25 June 2020, No. 20-31/388-174.

4 26 December 2019, No. 19-46/790-344.

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 Competition Law and imposed an administrative monetary fine on Philips.

III LICENSING AND ANTITRUST

i Anticompetitive restraints

Article 4 of the Competition Law is akin to and closely modelled on Article 101(1) of the Treaty on the Functioning of the European Union. 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 service market or a part thereof. Article 5 of the Competition Law (the 'individual exemption mechanism') provides that the prohibition contained in Article 4 may be declared inapplicable in the case of agreements between undertakings:

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

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

The general provisions of Turkish competition law regulating anticompetitive agreements apply in cases of obtaining, granting or transferring IP rights, to the extent they fail to meet the conditions of a block or individual exemption (namely, Block Exemption Communiqués No. 2002/2 and No. 2008/2). 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.

ii Refusals to license

There is currently no specific provision under the Turkish competition regime regulating unilateral conduct or refusal to license in relation to IP rights. Under Article 6 of the Competition Law, all dominant undertakings are bound by the obligation not to abuse their dominant position. Therefore, the general provisions of Article 6 would also apply to refusal-to-license situations.

Refusal to license can be a form of abuse of dominance, as established by the landmark decision of *Turkcell/Telsim*.[5] This decision sets out the basis of the criteria required to establish an abuse of dominance for refusal to supply in IP-related markets. The Board identified the following conditions that are necessary to establish an abusive refusal to supply:

a the access to IP rights is essential to the competitors for entry into the market;
b there exists sufficient capacity to supply the demand;
c the undertaking controlling the essential facility is no longer able to supply the demand on the market or it impedes competition on existing or potential services and products;
d the undertaking requesting access to the IP rights is ready to pay a reasonable and non-discriminatory indemnity for access; and
e there exists no reasonable justification for denial.

Although almost two decades have passed since the *Turkcell/Telsim* case, the Board's most recent decisions on this point reaffirm the position taken; see, for instance, the Board's decisions in *Türk Telekom*,[6] *Krea İçerik Hizmetleri*,[7] *Surat Basim/Zambak*[8] and *Digital Platform*.[9]

The Board also reviewed the abuse of dominance with respect to tying and bundling practices, where the licensing of IP rights was tied to the licensing of other IP rights (*Logo Yazilim*)[10] or rebate systems in the sales of computer software (*Microsoft*).[11] In these cases, the Board applied the general provisions of Article 6 and did not adapt a particular standpoint as regards IP rights.

iii Unfair and discriminatory licensing

As with refusal to license, the general provisions of Article 6 of the Competition Law on the abuse of dominant position would also be applicable to unfair and discriminatory licensing, as there are currently no specific provisions under Turkish competition legislation regulating this area. An undertaking holding a dominant position would risk allegations of abuse of dominant position in the event of discrimination in connection with licensing fees, discrimination in providing the main IP rights required for a certain activity or through offering different terms to purchasers with equal status for the same and equal rights, obligations and acts. Similarly, refusal to license may be found to be abusive where it is discriminatory.

In any event, discriminatory conditions imposed by an undertaking holding a dominant position are governed under Article 6 of the Competition Law.

iv Patent pooling

Patent pooling has been referred to as 'technology pooling' in the Guidelines on Technology Transfer Agreements, which define technology pools as agreements between two or more parties who agree to assemble their technologies to create a pool and license them as a package. The concept of a technology pool also covers arrangements whereby two or more parties agree to license the package of technologies in question to a third party and empower that party

5 9 June 2003, No. 03-40/432-186.
6 9 June 2016, No. 16-20/326-146.
7 9 September 2015, No. 15-36/544-176.
8 19 March 2013, No. 13-15/230-114.
9 3 May 2012, No. 12-24/710-198.
10 28 April 2011, No. 11-26/497-154.
11 13 June 2013, No. 13-36/481-211.

to license the package. However, the Guidelines on Technology Transfer Agreements do not cover such arrangements, and therefore patent pools are subject to the general provisions of Article 4 of the Competition Law. If all the conditions of individual exemption are satisfied, patent pools may also benefit from the individual exemption under Article 5 of the Competition Law.

While there has been no prior case law dealing specifically with patent pooling or technology pooling arrangements, it can be said that the patent pooling arrangements would generally be viewed as creating pro-competitive efficiencies. That said, the patent pooling arrangements should not be used in an anticompetitive manner to fix prices, allocate markets or restrict output, which would be in violation of the Competition Law.

v Software licensing

Provided certain conditions are met, Communiqué No. 2008/2 provides for a protective cloak for agreements involving the transfer of IP rights and in particular technology licensing agreements. 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 sublicensing as well, provided that they are granted to third parties by the licensee solely in relation to the licensed technology.

Communiqué No. 2008/2 is 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 in the affected technology market. The threshold is 40 per cent in the case of licensing agreements between non-competing undertakings. Hardcore restrictions, such as the restriction of a party's ability to determine the prices it charges third parties (i.e., resale price maintenance), territory or customer restrictions, or both, and non-compete obligations are also listed in Article 6 of Communiqué No. 2008/2 as clauses that exclude the application of the block exemption.

vi Trademark licensing

The Guidelines on Technology Transfer Agreements 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. That said, under Article 6 of the Competition Law, all undertakings holding a dominant position are bound by the obligation not to abuse their dominant position. The abuse of dominant position can occur in cases of discrimination in connection with trademark licensing fees, discrimination in providing the trademark licence and offering different terms to purchasers with equal status for the same and equal rights, obligations and acts, and if found to be abusive, in cases of refusal to license the trademark. Therefore, the general provisions of Article 6 of the Competition Law would also apply to the licensing of trademarks.

In *Toshiba/Vestel*,[12] the Board evaluated an exemption request regarding the 'brand licence agreement', which concerns the trademark-use licence granted to Vestel by Toshiba for the production and distribution of Toshiba-branded televisions. In its evaluation, the Board held that the relevant agreement was a production and distribution agreement concluded among competitors, which falls within the scope of Article 4 of the Competition Law. As Communiqué No. 2002/2 does not apply to such horizontal agreements, the Board proceeded to an individual exemption analysis under Article 5 of the Competition Law and decided to grant an individual exemption on the basis that the agreement contributed to the promotion of improvement of technical or economic progress with regard to consumers.

IV STANDARD-ESSENTIAL PATENTS

i Dominance

SEPs can provide substantial market power to their holders. Any abuse by an undertaking that is in a dominant position in a market for goods or services within the whole or part of Turkey is considered as abuse of dominant position under Article 6 of the Competition Law regardless of whether it is on the part of one or more undertakings, individually or through joint agreements.

The Board considered the issue of standardisation as well as its intersection with SEPs and abuse of dominant position claims for the first time in *Philips*. The Board pointed out the potential competition law concerns that may arise from standard-setting and SEPs. Accordingly, standardisation might have some anticompetitive effects, such as a 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, which may thereby lead to a collusive outcome in the market. Second, if 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; thereby, standards can restrict technical development and innovation. Lastly, the competition might be restricted by effect if an undertaking is prevented from accessing a standard completely or access to the standard is subject to prohibitive or discriminatory conditions. The Board also acknowledged the main benefits of standardisation: decreasing costs by enabling economies of scale and scope; increasing incentives of the undertakings to invest for innovation; and 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.

ii Injunctions

Pursuant to Article 389 of the Turkish Civil Procedure Law, in the event of a suspicion that it would be very difficult or totally impossible to earn a right because of a change in the existing circumstances, or that a drawback or severe losses may arise because of a delay, an injunction may be established in connection with the issue under dispute. Requests for injunctions may be addressed to the competent courts.

12 24 November 2016, No. 16-41/666-299.

In addition, pursuant to Article 9(4) of the Competition Law, where the occurrence of serious and irreparable damage is likely until the final decision is taken, the Board may take interim measures that maintain the situation as it was before the infringement and that shall not exceed the scope of the final decision.

Seeking an injunction on the basis of SEPs and its interplay with competition law has been recently considered by the Board in *Philips*. The Board stated that the injunction generally refers to the judicial decision that forces the defendant to refrain from the conduct of certain behaviour and to aim to eliminate the damages arising from the violation related to SEPs. The injunction mainly includes measures such as ceasing patent right infringements, seizing the products that have been produced or imported by means of patent right infringement as well as the tools used in their production, taking measures to prevent patent infringement and destructing the products and tools used in the production.

iii Licensing under FRAND terms

As standardisation generally occurs as a result of coordinated actions made by several undertakings, the issues would therefore fall within the scope of Article 4 of the Competition Law. As there is no specific legislation applicable to industrial standards as far as competition law is concerned, the Guidelines on Horizontal Cooperation Agreements would be relevant for determining the propriety of the industrial standards.

According to these Guidelines, fair, reasonable and non-discriminatory (FRAND) commitments are designed to ensure that any essential technology under IP rights protection incorporated in a standard is accessible to the users of that standard on a FRAND basis. Furthermore, according to the Guidelines, these commitments can prevent IP rights holders from making the implementation of a standard difficult by refusing to license or by requesting unfair or unreasonable (excessive), or discriminatory, fees after the industry has been locked into a standard (see, for example, the Board's decision in *Yonga Levha*[13] for the same approach). The assessment of whether the agreement restricts competition must be based on the issue of access to the standard.

In *Digiturk,*[14] where the Board assessed whether the agreement between the Turkish Football Federation and Digiturk satisfies the conditions for an individual exemption within the meaning of Article 5 of the Competition Law, the Board explicitly referred to FRAND terms for the first time. The Board provided that, in licensing agreements, the parties would need to comply with FRAND terms. Without proceeding to an assessment as to whether FRAND terms were satisfied in the case at hand, the Board decided to grant an individual exemption to the agreement on the grounds that it allows the licensees' platforms to access several technical developments and provides a customer benefit.

In *Philips,* the Board stated that the rules set by a standard-development organisation need to ensure effectiveness and FRAND access to the standard. In cases where the standard involves IP rights, a clear and balanced IP rights policy should be adapted based on the specific industry. This means the implementers of the standard should grant effective access to the standards. The decision stated that applying FRAND terms does not mean imposing the same price to every undertaking, but it requires being transparent and able to explain

13 14 August 2003, No. 03-56/650-298.

14 10 February 2016, No. 16-04/82-36.

any difference based on objective reasons. The Board determined that Philips included a no-challenge clause into the agreement in violation of FRAND terms and abused its dominant position.

iv Anticompetitive or exclusionary royalties

Under the Turkish competition regime, there is no regulation on the royalty rates or the calculation elements of the royalty calculation. Nevertheless, according to the Guidelines on Horizontal Cooperation Agreements, the assessment as to whether the fees charged for access to IP rights in the standard-setting context are unfair or unreasonable would be based on whether there is a reasonable relationship between these fees and the economic value of the IP rights. Licensing fees charged for the same IP rights within the context of similar standards may also be used as an indicator for FRAND licensing fees. However, the Guidelines do not include an exhaustive list of appropriate methods to assess whether licensing fees are excessive. In addition, an independent expert analysis may be requested, stating that the relevant IP rights portfolio is objectively important and essential for the standard at issue. In certain cases, it may also be possible to refer to *ex ante* disclosures concerning licensing terms in relation to a specific standard-setting process.

In conclusion, where the royalty is so excessive as to be contrary to FRAND commitments, then this could raise an issue under Article 6 of the Competition Law.

V INTELLECTUAL PROPERTY AND MERGERS

i Transfer of IP rights constituting a merger

Concentrations that result in a permanent change of control (either sole or joint control) are subject to the Board's approval, provided they exceed the applicable turnover thresholds.

A transaction that involves the acquisition of IP rights such as brands, patents, designs or copyrights would be deemed a merger or an acquisition within the meaning of the Turkish merger control regime so long as the relevant IP rights constitute a business with a market turnover. For instance, in *Mey/Anadolu Efes*,[15] the transaction concerned the acquisition of a certain trademark in the beer sector. In this decision, the Board deemed the transaction an acquisition within the scope of the merger control regime and approved it.

Most recently, in *Karsan/Bozankaya*,[16] the Board evaluated the transaction concerning the acquisition of Bozankaya's certain IP rights by Karsan. The transferred rights consisted of the technology related to Bozankaya's electric buses and their IP rights, except for trademarks. Consequently, the Board granted approval to the relevant transaction.

ii Remedies involving divestitures of intellectual property

The Board is likely to challenge concentrations that create or strengthen a dominant position, which would result in a significant lessening of competition in a market for goods or services within the whole or a part of Turkey. The acquisition of IP rights would not be an exception to this rule, and thus would be evaluated under the same test to assess whether the competitive problems arise from a market position gained as a result of the relevant IP rights.

15 25 August 2009, No. 09-38/925-218.

16 18 June 2020, No. 20-29/368-165.

In (exceptional) cases where competition problems arise from a market position based on the superiority of owning a certain technology or IP right, the divestiture of this technology or IP right may be considered a suitable remedy.[17] A divestiture package that includes only trademarks and relevant production 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 this package would turn immediately into a competitive and viable asset.[18] The Board is familiar with cases where the remedies partly involve divestiture of IP rights such as certain trademarks and brands (e.g., *Mey İçki*).[19]

VI OTHER ABUSES

i Sham or vexatious IP litigation

While there has been no prior case law under the Turkish competition law practice dealing specifically with sham or vexatious IP litigation cases and competition law intersection, such arrangements and practices would be closely scrutinised under the applicable provisions of Turkish competition laws.

ii Misuse of the patent process

While there has been no prior case law under the Turkish competition law practice dealing specifically with a misuse of the patent process (e.g., misleading patent offices or misusing the patent system to gain a competitive advantage) and competition law intersection, such arrangements and practices would be closely scrutinised under the relevant applicable provisions of Turkish laws, especially under Article 6 of the Competition Law dealing with abuse of a dominant position.

iii Anticompetitive settlements of IP disputes

Turkish competition law is yet to witness the practice of manipulation of the patent process and its interaction with competition law, or other practices such as artificially extending the term or geographical scope of patent protection, or enforcing patents obtained through fraud or anticompetitive settlements of intellectual property disputes or pay-for-delay arrangements. Nevertheless, such arrangements and practices would be closely scrutinised under the relevant applicable provisions of Turkish laws.

VII OUTLOOK AND CONCLUSIONS

After rounds of revisions and failed attempts of enactment over a span of several years, the proposal for an amendment to the Competition Law (the Amendment Proposal) has finally been approved by the Turkish parliament. On 16 June 2020, the amendments passed through Parliament and entered into force on 24 June 2020 (the Amendment Law).[20] According to the recital of the Amendment Proposal, these amendments aim at reflecting in the

17 Guidelines on Remedies Acceptable by the Turkish Competition Authority in Mergers/Acquisition Transactions, Paragraph 34.

18 ibid, Paragraph 35.

19 17 August 2011, No. 11-45/1043-356.

20 The Amendment Law was published on the Official Gazette dated 24 June 2020 and numbered 31165.

Competition Law, the Authority's experience in over 20 years of enforcement and bringing Turkish competition law closer to the EU law. The Amendment Law essentially (1) clarifies certain mechanisms in the Competition Law that might have led to legal uncertainty in practice to a certain extent; and (2) introduces new mechanisms as to the selection of cases for the Authority to focus on, a new substantive test for merger control, behavioural and structural remedies for anticompetitive conduct and procedural tools enabling the Board to end its proceedings in certain cases without going the whole nine yards when the parties opt for commitments or settlement. The Amendment Law also includes certain provisions concerning the organisational structure and personnel of the Authority.

The most prominent changes introduced by the Amendment Law consist of the introduction of the *de minimis* principle; the significant impediment of effective competition test; behavioural and structural remedies for anticompetitive conduct; settlement and commitment mechanisms; changes in the on-site inspection process and self-assessment procedure; and time extensions for the Authority's additional opinion in investigations.

As for 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 new IP Law does not regulate the intersection between the intellectual property rules and competition law, the Board's case law will be of importance for further clarification with respect to the competition law standards that apply to intellectual property matters.

ABOUT THE AUTHORS

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 LLM degree from Harvard Law School, and is qualified to practise in Istanbul, New York and Brussels, as well as in England and Wales, where he is 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, approximately 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 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.

ELIG GÜRKAYNAK ATTORNEYS-AT-LAW

Çitlenbik Sokak No. 12
Yıldız Mahallesi
Beşiktaş
34349 Istanbul
Turkey
Tel: +90 212 327 1724
Fax: +90 212 327 1725
gonenc.gurkaynak@elig.com
www.elig.com

an LBR business

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