IN-DEPTH

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Türkiye

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Summary

Introduction

Türkiye has granted intellectual property (IP) rights through a number of legal regulations. This legislation consists of the following:

1. Law No. 6769 on the Industrial Property;
2. Law No. 5846 on the Intellectual and Artistic Works;
3. Law No. 5147 on the Protection of Integrated Circuit Topographies; and
4. Law No. 5042 on the Protection of Plant Breeders' Rights for New Plant Varieties.

In terms of antitrust issues, the main legal source of competition law in Türkiye is the Law No. 4054 on the Protection of Competition (the Competition Law), which is similar to EU law. In addition, there are some regulations, communiques and guidelines that set out this field in the form of secondary legislation.

Article 129 of the Industrial Property Law governs the interplay between competition law and intellectual property (IP) law. If a patentee carries out activities distorting, hindering or limiting competition while a patent is in use, the potential licensee may request a compulsory licence from the Turkish Competition Authority (TCA).

Other than this provision, there is no law that directly regulates interactions between competition and IP law. Nevertheless, within the scope of competition law, secondary legislation addresses the interaction between competition law and IP law. In this context the following apply.

Block Exemption Communiqué No. 2008/2 on Technology Transfer Agreements (Communiqué No. 2008/2) and Guidelines on the Application of Articles 4 and 5 of the Law No. 4054 on the Protection of Competition to Technology Transfer Agreements (Technology Transfer Guidelines) state that both bodies of law have the same basic objective of promoting consumer welfare and an efficient allocation of resources. While IP rights promote dynamic competition by encouraging undertakings to invest in developing new or improved products and processes, competition law puts pressure on undertakings to innovate. Therefore, they both aim to promote innovation and ensure a competitive benefit thereof.

Block Exemption Communiqué No. 2002/2 on Vertical Agreements and Guidelines on Vertical Agreements contain exemptions for vertical agreements that include the exercising of intellectual rights where provisions concerning intellectual rights are directly related to the use, sale or resale of relevant goods and services, and the other conditions provided in the relevant communiqué are met.

Block Exemption Communiqué No. 2013/3 on Specialisation Agreements extends the exemption to licensing or IP transfer agreements that are directly related to, or necessary for, the functioning of the exempted specialisation agreements.

Block Exemption Communiqué No. 2016/5 on Research and Development Agreements provides an exemption for R&D agreements that include provisions regarding the assignment or licensing of IP rights to conduct joint R&D, paid-for R&D or joint exploitation (as long as those provisions are not the primary object of such agreements).

Guidelines on Cases Considered as a Merger or an Acquisition and the Concept of Control published by the TCA set forth the issue of IP in terms of mergers and acquisitions, where a transfer limited to elements within intellectual property rights, such as brands, patents, designs or copyright, may also be considered to be a transaction under the scope of Article 7 of the Competition Law. The transfer of licences related to intellectual property rights can only be considered under the scope of Article 7 if the licences are exclusive in at least one particular territory and the transfer of these licences allows for the transfer of the activity to which turnover can be attributed. With the recent amendments regarding notifications of mergers and acquisitions, all transactions regarding the acquisition of technology undertakings operating in the Turkish geographical market, having R&D activities, or providing services to users in Türkiye shall be subject to notification to the TCA, regardless of whether the turnover of the target exceeds the turnover thresholds or not.

Within the Guidelines on the Assessment of Abusive Conduct by Undertakings with Dominant Position, refusal to supply goods and services encompasses IP rights, where intangible business input and information, whether or not protected by IP rights, and other assets that undertakings may demand can be counted among the goods, services and inputs that may be subject to the evaluation of a dominant undertaking's refusal to supply.

Year in review

There have not been any developments regarding legislation or policies pertaining to both intellectual property (IP) and antitrust in the past year.

However, some important decisions given by the TCA have been the subject to important evaluations as to how the relationship between IP and antitrust should be interpreted in terms of usage of trademarks for advertisement purposes. For example, the Modanisa-[1] decision of the TCA has analysed granting individual exemption for a settlement agreement related to IP rights. In the relevant decision, a settlement agreement between Modanisa Elektronik Mağazacılık ve Ticaret AŞ (Modanisa) and EST Marjinal Medikal Tanıtım ve İletişim San ve Tic Ltd Şti (Sefamerve) pertaining to the usage and recognition of trademarked keywords and derivatives to prevent confusion in advertisements and announcements on the internet was evaluated. In this decision, the TCA concluded that wide non-brand bidding agreements (within the scope of the bidding agreement, the parties agreeing that they would not use each other’s brand names in their keyword lists on online advertising. This means, for example, Modanisa will not include the 'sefamerve' keyword in its ads keyword lists, and thus, when a user searches specifically 'sefamerve' keyword, Modanisa ads will not be triggered. However, when a user searches for 'sefamerve t-shirt', Modanisa ads may be triggered due to the 't-shirt' keyword. The TCA evaluated that, since 'nisa' and 'sefa' are not registered brand names, restrictions regarding these keywords would exceed the brand name protection) and negative matching obligations (within the scope of negative matching, the parties are adding each other’s brand names in their negative keyword lists; for example, when a user searches the 'sefamerve' keyword, Modanisa ads are prevented from being shown and vice versa) would exceed the scope of the trademark protection granted by intellectual property law and thus, restrict competition.

Similarly to the Modanisa decision, in its recent investigation, the TCA has also examined negative matching practices between Arabam Com, Vava Cars, LetGo Otoplus and Araba Sepeti, which are online marketplaces in the automotive sector. The investigation was regarding the allegation that the advertising agreements or practices of these undertakings involved adding the brand name or derivatives to a negative keyword list, thus preventing competitors' advertisements from appearing when consumers do an online search. The investigation recently concluded with a settlement for Arabam Com, LetGo and Araba Sepeti, and the TCA imposed monetary fines of 2,726,850.04 Turkish lira, 24,467.52 lira and 191,433.80 lira on these undertakings respectively. On the other hand, Vava Cars's application for commitment had been rejected on the grounds that the undertaking's practices may be considered as naked and hardcore infringement. The investigation is still ongoing for Vava Cars.

The significance of this investigation is that, in its decisions,[2] the TCA had evaluated that negative keyword lists have an effect of customer and market allocation agreements between competitors and that these practices exceed the limits of the brand right protected under Law No. 6769.

The most recent decision evaluating the antitrust implications of advertising bans is the Obilet decision,[3] in which the TCA analysed for the first time an advertisement prohibition in vertical agreements. In the investigation initiated against Obilet that is operating in the field of bus and flight ticket price comparison and online ticket sales, one of the allegations was regarding advertising restrictions.

Withing the scope of the investigation, Obilet's agreements in vertical and horizontal relationships evaluated differently. Regarding advertisement ban in vertical relationships, the TCA evaluated that Law No. 6769 does not grant the trademark right holder the same level of trademark protection and thus, advertisement ban may violate Article 4 of the Competition Law, at least in terms of effect. Regarding advertisement bans in horizontal relationships, the TCA evaluated that narrow prohibitions for competitors to prevent them using 'only the trademark name' in their ads is not within the scope of Article 4 of the Competition Law since it is protected under Law No. 6769; while the wide advertisement ban imposed by Obilet on its competitors to prevent them using 'phrases containing the trademark name' in their ads may violate Article 4 of the Competition Law in terms of its effect

The only investigation decision relating to standard essential patents (SEP), which was passed in 2019, was when the TCA investigated whether Koninklijke Philips NV (Philips) violated the Competition Law by not complying with its commitment to the relevant standard-setting organisation that it would license its essential patents concerning subtitling technology for digital video broadcasting (DVB) in fair, reasonable and non-discriminatory (FRAND) terms.

The TCA deemed that standard essential patents held by Philips grant monopolistic power to Philips, and Philips' practices led to an abuse of dominance, under Article 6 of the Competition Law. Upon the investigation, through its decision dated 26 December 2019 and numbered 19-46/790-344, the TCA set forth that Philips was engaged in anticompetitive practices by not acting in accordance with FRAND principles, and, consequently, issued the company with a fine of 0.75 per cent of its turnover generated in the financial year preceding the date of the decision, corresponding to 6,697,413.13 lira. The TCA's reasoning in finding a violation was as follows:

1. Philips resorted to a court decision without applying to an independent third party to determine a royalty fee, which is in violation of the European Court of Justice's Huawei v. ZTE decision;[4]
2. Philips violated the transparency principle by not announcing its royalty fees on its website, and thus engaged in discriminatory practices;
3. Philips reversed the burden of proof with its licence agreement, in violation of FRAND terms; and
4. Philips forced a termination clause in the form of non-challenge clause onto Vestel Elektronik Sanayi AŞ (Vestel).

Following this, the Ankara 11th Administrative Court accepted Philips' appeal to the case and annulled the TCA's decision with its decision numbered E 2020/1525, K 2021/1121. The court annulled the decision by drawing the following conclusions:

1. Philips resorting to a court decision cannot be regarded as an abuse of dominant position, as Philips had only filed a lawsuit to protect its IP rights after negotiation attempts came to no avail, and that as per the Huawei v. ZTE decision,[5] it has been understood that applying to a third party is left to the discretion of both parties;
2. while in some instances a non-challenge clause may lead to competitive concerns, Philips incorporating a non-challenge clause and reversing the burden of proof was not a violation, bearing in mind the history of events between Philips and Vestel; and
3. as per Article 44 of the Competition Law setting forth that the TCA cannot base its decisions on issues about which the parties were not previously informed of and granted the right to defence to, the court found that Philips was not previously directed that the transparency principle would be a pillar for evaluating whether practices are abusive, therefore Philips was not granted a right to defence.

Upon the annulment of the TCA's decision, the case has been carried over to regional court for an appeal. In its decision numbered E 2021/1111, K 2022/554 the Ankara Regional Administrative Court 8th Administrative Chamber rejected the appeal, stating that the decision of the administrative court subject to the appeal was in compliance with the law and that the allegations raised by the TCA and Vestel were not of a nature to ensure the annulment of the first instance court's decision.

Thereupon, the decision was appealed to the Council of State by the TCA and Vestel. In its decision numbered E 2022/2966, K 2022/4240, the 13th Chamber of the Council of State partially quashed the decision of the Regional Court and returned it for a further decision. Although the Council of State found that the decision of the first instance court had been lawful in terms of the application to an independent third party, the transparency principle and the reversal of the burden of proof, the following deliberations were established in the overturning of the decision:

1. having made a FRAND commitment to license its standard essential patents under fair, reasonable and non-discriminatory terms, and arising from its dominant position, Philips has a special responsibility in the sense of competition law;

2. considering that the agreement containing the non-challenge and termination clause was signed following the issuance of a court order, it was understood that the agreement preventing Vestel from suing over the validity of the patent was signed upon Philips' intimidation of Vestel through a court order; and
3. in light of these considerations, because it was concluded that the clause that functions to prevent challenging validity and the termination-upon-challenge clause in the agreement signed between Philips and Vestel constitutes abuse of dominance, there is no violation of law in the decision of the TCA regarding the imposition of an administrative fine on Philips.

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

Licensing and antitrust

Anticompetitive restraints

Under the Competition Law, obtaining, granting and transferring IP rights are regulated under the general provisions of anticompetitive agreements (i.e., Article 4 of the Competition Law), provided that they do not satisfy the block or individual exemption conditions. According to Article 4 of the Competition Law, agreements and concerted practices between undertakings, and decisions and practices of associations of undertakings that have as their object or effect, or likely effect, the direct or indirect prevention, distortion or restriction of competition in a particular market for goods or services are illegal and prohibited. Such cases are, in particular, as follows:

1. fixing the purchase or sale price of goods or services, elements such as cost and profit that form the price, and any terms of purchase or sale;
2. partitioning markets for goods or services, and sharing or controlling all kinds of market resources or elements;
3. controlling the amount of supply or demand for goods or services, or determining them outside the market;
4. complicating and restricting the activities of competing undertakings, or excluding firms operating in the market by boycotts or other behaviour, or preventing potential new entrants to the market;
5. except exclusive dealing, applying different terms to persons with equal status for equal rights, obligations and acts; and
6. contrary to the nature of the agreement or commercial usages, obliging to purchase other goods or services together with a good or service, or tying a good or service demanded by purchasers acting as intermediary undertakings to the condition of

displaying another good or service by the purchaser, or putting forward terms as to the resupply of a good or service supplied.

Separately, Block Exemption Communiqué No. 2008/2 on Technology Transfer Agreements (Communiqué No. 2008/2) also stipulates restrictions that render technology transfer agreements out of the scope of the block exemption. In that sense, in the event that a technology transfer agreement incorporates a hardcore restriction of competition, the agreement as a whole will fall outside the scope of the block exemption. A point that is specific to technology transfer agreements, is that hardcore restrictions cannot be separated from the rest of an agreement.

Furthermore, Articles 6(2) and 6(3) of Communiqué No. 2008/2 are applicable to agreements between competitors and agreements between non-competitors, respectively. In this regard, directly or indirectly, in isolation or in combination with other factors under the control of the parties, should either type of agreement have as their object any of the restrictions stipulated within their respective articles, these agreements would fall outside of the scope of Communiqué No. 2008/2.

For agreements between competitors, these restrictions are as follows:

1. the restriction of a party's right to determine its sales prices;
2. the restriction of production and sales volumes of contract products;
3. the allocation of markets and customers, subject to exceptions; and
4. the restriction of a licensee's right to use its own technology or the restriction of a party's right to carry out research and development activities, unless such restriction is necessary to prevent the disclosure of the licensed know-how to third parties.

For agreements between non-competitors, these restrictions are as follows:

1. restriction of a party's right to determine its sales prices; however, it is possible to determine the maximum sales price or recommend a sales price, provided that it does not develop into a fixed or minimum sales price as a result of pressure or incentive from any of the parties;
2. the restriction of the territory into which, or of the customers to whom, the licensee may passively sell the contract products, subject to exceptions; and
3. restriction of active or passive sales to end users by a licensee carrying out activities at the retail level without prejudice to the right to prohibit a member of a selective distribution system from carrying out activities at an unauthorised place.

However, Article 7 lists the restrictions that cannot benefit from the block exemption and therefore require individual exemption assessments. According to Article 7, where a technology transfer agreement contains any of the restrictions laid down in that article and the related restriction is separable from the rest of the agreement, only that restriction shall not benefit from the block exemption, and the rest of the agreement shall continue to be covered. When any of the restrictions laid down in this Article cannot be separated from the rest of the agreement, the whole agreement shall not benefit from the block exemption. These restrictions are as follows:

1. any direct or indirect obligation on the licensee to grant an exclusive licence to the licensor or a third party designated by the licensor in respect of its own severable improvements on or new applications of the licensed technology;
2. any direct or indirect obligation on the licensee to assign, partly or completely, to the licensor or a third party designated by the licensor the rights related to its own severable improvements on or new applications of the licensed technology; and
3. the obligation on the licensee not to challenge the validity of the related intellectual property rights that the licensor owns in Türkiye. However, the right of the licensor to terminate the technology transfer agreement in the event the licensee challenges the validity of one or more of the related licensed intellectual property rights is reserved.

Moreover, Article 7 sets forth that where the parties are not competitors, the block exemption would not be applicable for any obligation which directly or indirectly restricts:

1. the licensee's right to use its own technology; and
2. research and development activities of any of the parties to the agreement, unless it is necessary to prevent the disclosure of the licensed know-how to third parties.

The Modanisa decision of the TCA, where IP rights have been scrutinised, is important for analysing the TCA's approach in granting individual exemption for agreements concerning IP rights. In the relevant decision, Modanisa and Sefamerve requested the TCA to grant a negative clearance or an individual exemption to the settlement agreement concluded between the parties. Within the scope of the relevant settlement agreement, Sefamerve would be adding the word 'Modanisa', which is the registered trademark of Modanisa and the phrase 'nisa'; Modanisa will add the word 'Sefamerve', which is the registered trademark of Sefamerve, and the phrases 'sefa merve' and 'sefa' as negative keywords in mobile applications or desktop platforms for all internet channels in Türkiye or abroad, search engines and all social media channels; and will not perform advertisement targeting for these trademarks and phrases in online advertising environments. Thus, Modanisa and Sefamerve agreed to recognise each other's trademarks and derivatives to prevent confusion in advertisements and announcements on the internet.

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

In the individual exemption assessment, the TCA stated that the agreement of the undertakings not to use each other's registered trademarks in their advertisements would be sufficient to prevent misleading consumers. Restrictive obligations beyond this will not provide any additional benefit to consumers; on the contrary, they may harm consumers by reducing the visibility of advertisers and competition between undertakings. However, the

TCA stated that if the settlement agreement is amended in a way to eliminate the obligation not to target the keywords 'nisa' and 'sefa', which are not registered as trademarks, and the negative matching obligation, it will fulfil all the conditions required for individual exemption under Article 5 of the Competition Law and thus can benefit from the individual exemption.

In another recent decision rendered by the TCA regarding license agreements, an exclusive licence agreement between Easysnap Technology SRL (Easysnap) and Altıparmak Gıda San ve Tic AŞ (Altıparmak) was reviewed,[6] where the former has granted exclusive rights to the latter in Türkiye. Within the scope of its evaluation, it was concluded that the vertical and exclusive licence agreement between the parties cannot benefit from block exemption stipulated under Communiqué No. 2008/2 as the applicable market share threshold of 40 per cent was exceeded. However, the decision sets forth that the relevant agreement could benefit from individual exemption.

In the investigation filed with the allegation that the undertakings operating in the online marketplaces in the automotive sector restricted competition through agreements between the parties concerning the 'negative matching' function of the text advertisements displayed in Google search results, while the commitment application of Vava Cars was rejected by the TCA earlier, the investigation was terminated with the settlement procedure regarding Arabam Com, LetGo and Araba Sepeti.

The settlement is a procedure introduced into the Turkish antitrust law framework in the middle of 2020 through an amendment to the Competition Law, which offers a streamlined process for concluding investigations. Under this scheme, the TCA can initiate the settlement process, either upon request or ex officio, in light of the procedural benefits derived from expediting the investigation process and considering any differences in opinion regarding the existence or extent of the violation. Within this framework, the undertakings under investigation can submit a settlement statement admitting to the violation and its scope, among other relevant issues, enabling the TCA to conclude the investigation for these undertakings and apply a reduction in administrative fines ranging between 10 per cent and 25 per cent. Undertakings that conclude their cases through settlement are precluded from legally appealing the administrative fines and the contents of the settlement text. The intricacies of the settlement procedure are elaborated in the Settlement Regulation.[7]

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

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

Within the context of the decisions, it has been evaluated that, the mutual addition of each other's brands to the negative matching function by undertakings has been deemed a breach of competition by the TCA. This is because, as in the case at hand, requesting non-branded words to be included in the negative keyword list exceeds the limits of the brand right protected under Law No. 6769. While the investigation is still ongoing for the remaining undertaking (Vava Cars), the Arabam Com, LetGo and Araba Sepeti decisions are the first application resulting in a fine of the TCA's approach set out in the Modanisa decision,[8] stating that agreements whereby undertakings mutually include their brands in negative matching in Google search ads would be evaluated as anticompetitive under Article 4 of the Competition Law.

On the other hand, the most recent decision evaluating the antitrust implications of advertising bans is the Obilet decision.[9] This decision analyses for the first time an advertisement prohibition in vertical agreements.

Within the scope of the investigation initiated against Obilet, which operates in the field of bus and flight ticket price comparison and online ticket sales, the TCA accepted the undertaking's commitments and concluded the investigation. In the investigation, one of the allegations was regarding advertising prohibitions included in Obilet's agreements. In the decision, it was examined whether the wide advertising prohibitions imposed in Obilet's B2B agreements (Obilet provides the service of distribution of timetable data (B2B) to B2Cs, which are its competitor in the ticket sales platform market; in the decision, the B2B service was used to correspond to the service of distributing bus timetable data to platforms), in terms of Obilet's brands can be evaluated within the scope of the Competition Law or not.

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

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

1. Vertical relationship – advertisement restrictions regarding carrier company brands: In the decision, it was evaluated that in an online advertising prohibition agreement between competitors and a vertical online advertising prohibition

agreement, Law No. 6769 does not grant the trademark right holder the same level of trademark protection. While the trademark protection right is granted to the registered trademark right holder for competing undertakings, there is no trademark protection offered to the trademark right holder for an undertaking at the vertical level within the legitimate connection. Within this scope, considering the data collected from B2Cs on the distribution of their advertising budgets in 2021 and 2022, it was determined that while the expenditures on offline advertising cover a very limited portion of the total advertising budget, and even some B2Cs do not spend at all in this channel, mainly the online advertising activities were mainly carried out by B2Cs. In the assessment made, it is stated that in the online advertising prohibitions imposed by the provider on the buyer in vertical relationships, restrictions that prohibit the buyer from using an entire online advertising channel, such as search engines, are seen as severe restrictions by the European Commission and the provision that the provider's trademark cannot be used as a search word in the search engine is seen as a restriction that indirectly prohibits an entire online advertising channel. This prohibition will arise due to the restriction of the relevant B2C's capacity to target customers searching for the carrier’s brands, to inform these customers about its offer and to attract them to its online channel or another sales channel. In light of these findings, the TCA concluded that the search engine advertisement ban imposed on B2Cs with respect to the brands of the carrier companies may violate Article 4 of the Competition Law, at least in terms of effect.

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

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

TCA found relevant commitments to be sufficient to eliminate the competitive concerns and concluded the investigation.

Refusals to license

In the eyes of the TCA, non-IP-related conduct is not distinguishable from IP-related conduct. The essential facility doctrine is accepted by the TCA, therefore a simple refusal to license by a dominant undertaking does not automatically result in a violation of Article 6 of the Competition Law. The Guidelines on the Assessment of Abusive Conduct by Undertakings with Dominant Position elaborate on refusal to supply as a form of abuse, and under Paragraph 43 of the Guidelines, it has been stated that three cumulative conditions are sought by the TCA in the evaluation of such a claim:

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

If the TCA deems an IP right as an essential facility and finds an infringement by way of refusal to deal, mandatory licensing is a possible remedy.

Unfair and discriminatory licensing

The Guidelines on Horizontal Cooperation Agreements published by the TCA contains explanations regarding access to the standard on FRAND terms. According to Paragraph 258, FRAND commitments are designed to ensure that any essential technology under IPR protection incorporated in a standard is accessible to the users of that standard on a fair, reasonable and non-discriminatory basis. In particular, these commitments can prevent IP rights holders from making the implementation of a standard difficult by refusing to license or by requesting unfair, unreasonable (i.e., excessive) or discriminatory fees after the industry has been locked in to a standard.

Patent pooling

While Communiqué No. 2008/2 mentions patent pooling, it is set forth that the Communiqué shall not apply to the licence agreements made through pooling of technologies to grant licences to third parties as a package. With this, Article 4 of the Competition Law is applicable to patent pooling matters.

Moreover, the Technology Transfer Guidelines state that patent pools may cause the restriction of competition. In this regard, patent pools are referred to more broadly as 'technology pools', and in addition to reducing competition between the parties, technology pools may also, in particular when they support an industry standard or establish a de facto industry standard, resulting in a reduction of innovation by foreclosing alternative technologies. The existence of the standard and a related technology pool may make it more difficult for new and improved technologies to enter the market.

Software licensing

The Communiqué No. 2008/2 is applicable to software licensing matters, provided cumulative conditions are met. The TCA has also ruled in its Bilsa decision dated 21 March 2007 and numbered 07-26/238-77, that Bilsa abused its dominant position by disrupting competition in the market for school software. In this earlier decision, the TCA found that Bilsa took advantage of the technological and commercial benefits of encryption and did not let customers change service providers by refusing to provide encryption keys that would decode the data the schools stored within its software. This way, the schools that were not satisfied and wanted to change software were unable to choose the products of another company as they could not risk losing data. In this regard, the TCA did not find the encryption defences by Bilsa to be essential to protect their IP rights, but rather prevented schools from terminating contracts by hindering their ability to access their data after agreements with Bilsa were terminated.

Trademark licensing

As per the Technology Transfer Guidelines and the Communiqué No. 2008/2, a licensor may authorise a licensee to use its trademark on the products incorporating 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, the Communiqué will not apply.

Furthermore, with regard to tying practices that are normally either not restrictive on competition or covered by exemption, as per Article 5 of the Competition Law, where the licensees use the licensor's trademark or brand name or where it is otherwise obvious to consumers that there is a link between the product incorporating the licensed technology and the licensor, the licensor has a legitimate interest in ensuring that the quality of the products is such that it does not undermine the value of its technology or its reputation as an economic actor.

In terms of undertakings under the obligation to not abuse their dominant position, the general conditions stipulated under Article 6 of the Competition Law apply to trademark licensing.

Within the TCA's Toshiba/Vestel decision,[10] a brand licensing agreement between the relevant undertakings was evaluated in terms of an exemption application. The relevant agreement was concerning the trademark use of Toshiba in favour of Vestel, where the TCA found that it would fall within the scope of Article 4 of the Competition Law. Within its analysis of whether the Communiqué No. 2008/2 was applicable, the TCA stated that the agreement was horizontal in nature, and therefore the Communiqué was not applicable. With this, an analysis in terms of Article 5 of the Competition Law was conducted, and an individual exemption was granted by the TCA.

Standard-essential patents

Dominance

In its Philips decision of 26 December 2019 and numbered 19-46/790-344, the TCA recognised that SEPs grant a certain market power in the relevant product market. It has been stated that once a patent is announced as a standard by the relevant standard-setting organisation, the holder holds effective market power and may even become a monopoly most of the time. While making this statement, the TCA also references the Treaty on the Functioning of the EU, where it indicates that a SEP grants significant market power to its holder and may lead to severe competitive issues.

However, the TCA also mentions the Guidelines on Horizontal Cooperation Agreements, Paragraph 240 of which sets forth that even if the establishment of a standard can create or increase the market power for those undertakings that hold the IP rights essential for that standard, simply holding the IP rights essential for a standard does not necessarily equate to the direct possession or exercising of market power. The question of market power, therefore, can only be assessed on a case-by-case basis. In this regard, the TCA evaluated the following when determining that Philips held a dominant position.

As per the minimum requirements set by the Turkish Standards Institution, compliance with standard numbered ETSI 300 743, which corresponds to DVB subtitling standards is mandatory for television and set-top box manufacturers in Turkey.

The DVB Project consortium has accepted and announced that Philips' patents numbered EP 307 and EP 393 with regard to the subtitling functionality of television products bears SEP properties to comply with the ETSI standard.

Television manufacturers in Türkiye do not have any alternative but to obtain licences from Philips. In other words, it is impossible to manufacture and trade, and therefore compete, in the panel television market in coherence with the ETSI standard without Philips' patented technology, hence it is indispensable.

Philips committing to licensing under FRAND terms has motivated licensees to invest and endure sunk costs, strengthening the indispensability factor.

Injunctions

In its Philips decision, the TCA has also followed the systematic of the Huawei v. ZTE decision with regard to its evaluation of abuse of dominant position. The TCA has stated that injunction requests that do not follow the conditions set forth within the Huawei v. ZTE decision would constitute an abuse of dominant position. The conditions to adhere by to utilise the right to an injunction in coherence with competition law has been set forth as follows.

The proprietor of the SEP in question, should first alert the alleged infringer of the infringement complained about by designating the SEP and specifying the way in which it has been infringed.

After the alleged infringer has expressed its willingness to conclude a licensing agreement on FRAND terms, it is for the proprietor of the SEP to present a specific, written offer for a licence on FRAND terms to the alleged infringer, in accordance with the undertaking given to the relevant standardisation body, specifying, in particular, the amount of the royalty and the way in which that royalty is to be calculated.

It is for the alleged infringer to diligently respond to that offer, in accordance with recognised commercial practices in the field and in good faith, a point that must be established on the basis of objective factors and that implies, in particular, that there are no delaying tactics.

Should the alleged infringer not accept the offer made to it, it may rely on a claim that an action is of an abusive nature to secure a prohibitory injunction or for the recall of products, only if it has, promptly and in writing, submitted a specific counteroffer that corresponds to FRAND terms to the proprietor of the SEP in question.

Where the alleged infringer is using the teachings of the SEP before a licensing agreement has been concluded, it is for the alleged infringer, from the point at which its counteroffer is rejected, to provide appropriate security, in accordance with recognised commercial practices in the field (e.g., by providing a bank guarantee or by placing the amounts necessary on deposit). The calculation of that security must include, among other things, the number of the past acts of use of the SEP. Also, the alleged infringer must be able to render an account in respect of those acts of use.

Where no agreement is reached on the details of the FRAND terms following the counteroffer by the alleged infringer, the parties may, by common agreement, request that the amount of the royalty be determined by an independent third party, by decision without delay.

An alleged infringer cannot be criticised either for challenging, in parallel to the negotiations relating to the granting of licences, the validity of those patents or the essential nature of those patents to the standard in which they are included, or their actual use; or for reserving the right to initiating such a challenge in the future. Within the Council of State's recent decision regarding Philips' abusive practices regarding its SEPs, the licensee's ability to challenge the validity of the patents has been emphasised, and preventing the licensee from challenging the patents was deemed to constitute abuse.

Licensing under FRAND terms

The Guidelines on Horizontal Cooperation Agreements published by the TCA contains explanations regarding access to the standard on FRAND terms. According to Paragraph 258 of the Guidelines, 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. In particular, these commitments can prevent IP rights holders from making implementing a standard difficult by refusing a licence or by requesting unfair, unreasonable (i.e., excessive) or discriminatory fees after the industry has been locked into a standard.

With regard to any case law concerning FRAND terms, while there are three cases overall where the TCA has referred to FRAND terms, only the Philips decision has evaluated the matter in depth. Within its Digiturk[11] and Turkish Football Federation/Digiturk[12] decisions, FRAND terms were only mentioned when defining what each letter of the acronym stands for.

On the other hand, Article 129 of Law No. 6769 on Industrial Property titled 'Compulsory License' indicates circumstances in which compulsory licences may be granted. In this regard, a compulsory licence may be given in cases where the patent owner engages in preventative, abusive or restrictive practices in terms of competition.

Anticompetitive or exclusionary royalties

The Competition Law does not bear any provision that relates the royalty rates to any kind of competition violation. However, even though the TCA found the royalty rates to not be excessive within its Philips decision, it is seen that the royalty rates may be subject to review in terms of abuse of dominance. In this regard, royalty rates can be regarded within the scope of excessive pricing.

Paragraph 260 of the Guidelines on Horizontal Cooperation Agreements provides clarification with regards to licence fees (royalty) in exchange for IP rights. In the case of a dispute, the assessment of whether fees charged for accessing IP rights in the standard-setting context are unfair or unreasonable should be based on whether there is reasonable relationship between these fees and the economic value of the IP right. In principle, cost-based methods are not suitable because of the difficulty in assessing the costs attributable to the development of a particular patent. Instead, it is possible to compare the licensing fees charged by the undertaking in question for the relevant patents in a competitive environment before the sector has been locked into the standard (ex-ante) with those charged after the sector has been locked in (ex post). This method may be applied where the comparison can be made in a consistent and reliable manner. 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.

Intellectual property and mergers

Transfer of IP rights constituting a merger

As per Article 7 of the Competition Law, the TCA governs mergers and acquisitions, including those concerning IP, if the relevant transaction leads to a change of control on a lasting basis. Accordingly, mergers and acquisitions exceeding the turnover thresholds stipulated within Communiqué No. 2010/4 Concerning the Mergers and Acquisitions Calling for the Authorisation of the Competition Board are subject to the TCA's review and approval to gain validity.

Communiqué No. 2010/4 was amended in March 2022. Along with several other revisions, the new amendments stipulate that as of 4 May 2022, the turnover thresholds for transactions that require TCA approval increased. Within this scope, transactions regarding the acquisition of technology undertakings operating in the Turkish geographical market, having R&D activities or providing services to users in Türkiye shall be subject to notification to the TCA regardless of the turnover thresholds applicable to the target stipulated within the Communiqué. In this regard, technology entities are defined as undertakings or related assets operating in the fields of digital platforms, software and gaming software, financial technologies, biotechnology, pharmacology, agrochemicals and health technology under the relevant communiqué.

Remedies involving divestitures of intellectual property

Proposed remedies aimed at eliminating competition problems created by a concentration transaction may be structural or behavioural. Proposed structural remedies generally involve the divestiture of a certain business, while proposed behavioural remedies involve the arrangement parties' future market behaviours. The main purpose of the proposed remedies is to protect the competitive structure that existed in the market prior to the transaction. Therefore, due to their characteristics of bringing about a sustainable result in the short term in terms of eliminating competition problems and not requiring supervision after being implemented, structural remedies – particularly those causing structural changes in the market, such as the divestiture of a business – more properly fit within the purpose expected from proposed remedies. However, it is not disregarded that proposed behavioural remedies, such as ensuring access to important infrastructure and raw materials in a non-discriminatory manner, are also likely to solve competition problems caused by a transaction.

As regards to divestiture packages, the parties shall be asked to waive all of the rights relating to intangible assets included in a divestiture package. For instance, granting a limited-time licence concerning IP rights falls short of eliminating the anticompetitive effects of the transaction, because sometimes the licensee is not able to compete effectively with the parties following the expiry of the licence period. Furthermore, due to the fact that a licence – because it requires an ongoing relationship between the two parties – allows the licensor to affect the behaviours of the licensee in the market and conflict arises between the licensee and the licensor with regard to the scope and conditions of the licence, proposed remedies involving the granting of a licence concerning the rights pertaining to intangible assets instead of divesting those assets are not considered as suitable remedies, save for exceptional cases.

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 the said technology or IP right may be considered as a suitable remedy.

As regards access to remedies, remedies foreseeing the granting of access to key infrastructure and network technologies, such as patent, know how or other IP rights, and essential inputs may be accepted as an appropriate remedy in some cases to facilitate market entry by competitors.

In addition, use of certain IP rights may lead to foreclosure of competitors that depend on those technologies as an essential input in downstream markets. For instance, this may be the case where competition problems about the transaction arise as the parties withhold information necessary for the interoperability of different equipment. Similarly, in certain sectors where undertakings must cooperate by licensing patents to each other, the possibility of the parties introducing licensing behaviour with different terms than those in the past may lead to competition problems. This type of competition problem may be eliminated by a commitment to grant licences on the same basis and on reasonable conditions after the transaction. In those cases, the proposed remedies should give non-exclusive access to the licence or confidential information for the IP right in question to the third parties concerned. Moreover, the remedy must clearly determine the conditions under which the licence is given and the licence charge or fee in order not to impede effective implementation of such remedy. An alternative may be granting a royalty free licence.

The Mey İçki[13] decision is an example of a divestiture decision taken by the TCA, where Diageo committed to divest all IP-related rights of the Saga and Hare brands during its acquisition of Mey İçki.

Other abuses

Sham or vexatious IP litigation

There have been no cases where a sham IP litigation proceeding has commenced incorporating competition law matters. In the case of such a misuse, the TCA would evaluate the matter as applicable.

On the other hand, though not directly relating to sham or vexatious litigation, within its evaluation of Altıparmak's practices on whether its behaviour arising from the alleged patent infringement based on its licence agreement, the TCA has examined whether Article 6 of the Competition Law regulating abuse of dominance was infringed. With competitor SBS Bilimler Bio Çözümler San ve Tic AŞ's (SBS) complaint on Altıparmak's practices to exclude them from the market, in terms of the licence agreement, it was found that Altıparmak had determined an alleged infringement committed by SBS, and while a court decision is still awaited, Altıparmak has notified a chain retail store of the infringement and requested the store to cease the sale of SBS products that allegedly infringed Altıparmak's exclusive rights on single-dose packages.

As the licence agreement establishes a barrier of entry into the market for honey and honey mixture products in single-dose packages, the TCA has reviewed whether Altıparmak was in the dominant position and whether it had abused this dominance. While determining that Altıparmak may be in a dominant position in the market under the assumption that the market is narrowly defined as 'honey and honey mixture products in single-dose packages', even though the TCA has referred to the balance between intellectual property law and competition law, as well as their interaction, it was ultimately decided that Altıparmak's practices were not abusive as its actions were arising from the protection of rights under patent legislation and it is under the purview of intellectual property law.

Misuse of the patent process

There have been no cases where an undertaking has used the patent process to gain any kind of advantage in terms of competition law matters. In the case of such a misuse, the TCA would evaluate the matter as applicable.

Anticompetitive settlements of IP disputes

There have been no cases where an undertaking has attempted to settle IP disputes in an anticompetitive manner. In the case of such a misuse, the TCA would evaluate the matter as applicable.

Special considerations

The relationship of competition law with different branches of law is developing day by day due to the requirements of commercial life. The TCA’s approach to online advertising and negative matching includes important considerations and lessons for the implementation of trademark rights without breaching competition rules. It remains to be seen how this approach will be assessed under the judicial review.

Outlook and conclusions

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

Finally, pursuant to the Obilet decision, the TCA set standards on how to evaluate advertising ban agreement with regard to wide/narrow restrictions and horizontal/vertical relationships. In the case of an online advertising ban in a horizontal agreement between competitors, while narrow advertising restrictions are not covered by the Competition Law since they enjoy the protection granted with Law No. 6769, the wide advertising restrictions may violate Article 4 of the Competition Law in terms of effect. On the other hand, it is now concluded that in the eyes of the TCA, vertical online advertising bans are evaluated as vertical restrictions that should be evaluated in terms of their effects.

With regard to recent court proceedings, the Philips decision was concluded, which was the pending court proceeding concerning intellectual property. Upon the Council of State's decision to overrule and return the decision to the regional court, the regional court complied with the Council of State's decision and annulled and rejected Ankara 11th Administrative Court's decision by making an evaluation consistent with the evaluations of the Council of State. The Council of State's decision is of utmost importance as it confirms the special responsibility arising from the FRAND commitments of SEP holders, and that non-challenge and termination-upon-challenge clauses constitute abuse as it will not be possible to control the validity of SEPs by preventing the licensee from questioning the validity of the patent, while third parties who do not actually use the patent have no economic justification for filing a lawsuit on patent validity. This will set a precedent for all future disputes concerning SEPs and FRAND terms, especially with regard to the special responsibility of SEP holders. Accordingly, SEP holders should be aware of competition law risks while conducting licence negotiations and licence agreements with potential licensees in Türkiye.

Together with the fact that the European Commission has been foreseeing policy developments with regard to standard essential patents, and since the TCA closely follows the activities of the European Commission, there might be emerging trends in the intersection of IP and antitrust policy. The policies adopted within the European Commission, and even their frameworks, will undoubtedly be utilised in Türkiye within the scope of possible future disputes, which will affect the Turkish case law on this matter from here on. This would inevitably enrich the Turkish stance on the intersection between IP and competition law. In particular, the TCA delving into the specifics of an IP matter may be an indicator that the TCA may choose to examine more cases where competition law and IP law coincide. An increasing number of cases that incorporate both areas of law may prompt guidelines to be published in the future that regulate the coinciding areas; currently, this is only carried out by comparing general provisions of the Competition Law.

Endnotes

1 The TCA's decision dated 25 November 2021 and numbered 21-57/789-389. ^ Back to section

2 The TCA’s decisions dated 20 July 2023 and numbered 23-32/629-211, dated 20 July 2023 and numbered 23-32/630-212 and dated 13 July 2023 and numbered 23-31/589-199. ^ Back to section

3 The TCA’s decision dated 15 June 2023 and numbered 23-27/521-177. ^ Back to section

4 Case C-170/13 Huawei Technologies Co Ltd v. ZTE Corp, ZTE Deutschland GmbH. ^ Back to section

5 ibid. ^ Back to section

6 The TCA's decision dated 21 October 2021 and numbered 21-51/715-356. ^ Back to section

7 Regulation on The Settlement Procedure Applicable In Investigations on Agreements, Concerted Practices and Decisions Restricting Competition and Abuses Of Dominant Position. ^ Back to section

8 https://www.rekabet.gov.tr/Karar?kararId=90d45d88-a8ae-4f40-9ff6-888581a2a0b6. ^ Back to section

9 The TCA's decision dated 15 June 2023 and numbered 23-27/521-177. ^ Back to section

10 The TCA's decision dated 24 November 2016 and numbered 16-41/666-299. ^ Back to section

11 The TCA's decision dated 20 December 2018 and numbered 18-48/751-364. ^ Back to section

12 The TCA's decision dated 10 February 2016 and numbered 16-04/82-36. ^ Back to section

13 The TCA's decision dated 17 August 2011 and numbered 11-45/1043-356. ^ Back to section

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