

Turkey

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Intellectual property

1 Intellectual property law

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

Turkish IP rights are granted by various statutory decrees and laws, depending on the subject.

Copyright and neighbouring rights are protected by Law No. 5846 on Intellectual and Artistic Works (the Copyright Law). This law protects literature, music and artworks in general. Artworks consist of all kind of arts such as cinema, science, architecture, maps, handicrafts, computer programs, database and software. Authors' rights regarding music and cinema need to be registered before the Turkish Ministry of Culture, but is optional to register other copyrights. Any financial and moral rights can be used by the author throughout his or her lifetime. Financial rights are granted for 70 years after the death of the author. Protection for the legal entities is also 70 years, which begins from the publication of the work. Moral rights belong exclusively to the author, and because of the nature of moral rights, they are not assignable or alienable. Only some of the moral rights can be used by the relatives of the author depending on the closeness of the relationship.

Concerning industrial property rights, each right has been protected by a separate decree law or act. Turkish industrial property legislation includes Decree Law No. 556 on Protection of Trademarks, Decree Law No. 551 on Protection of Patents, Decree Law No. 554 on Protection of Industrial Designs, Decree Law No. 555 on Protection of Geographical Signs, Law No. 5147 on Protection of Semiconductor Topographies and Law No. 5042 on Protection of Breeders' Rights on New Plant Varieties.

Industrial property rights must be registered with the Turkish Patent Institute in order to benefit from the protection of the above-mentioned laws. Non-registered rights are protected under the provisions of the Turkish Commercial Code concerning unfair competition.

The period of patent protection that is given upon examination is 20 years. If there is no examination, this period is only seven years. The protection period for utility models is 10 years. These periods can not be extended.

The registration of a trademark is valid for 10 years from the application date and this can be renewed by every 10 year according to article 40 of Decree Law on the Protection of Trademarks. Where trademarks are not renewed within six months of the end of the protection date, trademarks will be deemed invalid.

Industrial design rights are protected if they are new and have a distinctive character under the Decree Law on the Protection of Industrial Property. The registered industrial designs are protected for five years from the application date and can be renewed every five years. However, after 25 years, the design will not benefit from the protection, and becomes free to the public.

Turkey is bound by the WTO agreement on TRIPs and Turkish IP law frequently exceeds the minimum requirements of the TRIPs agreement. Although Turkey has a modern and comprehensive IP legislation, there remain problem in the area of enforcement of the laws.

2 Responsible authorities

Which authorities are responsible for administering IP legislation?

The Turkish Patent Institute (TPI) is responsible for registering trademarks, patents, industrial designs and geographical indications. The TPI is also responsible for hearing any opposition to the registrations. Trade and business names along with literary and artistic works are outside the jurisdiction of the TPI.

In general, there is no authority in charge of administering authors' rights. According to the Regulation on Inspection of Cinema, Video and Music Works of Art, works that are subject to production and importation should be registered with the Turkish Ministry of Culture; however, this obligation merely acts as proof of the rights. This provision was issued to prevent pirate publishing, otherwise, there is not such entitled entity to deal with the subrogation of the rights, issuance of licences or any kind of legal proceedings.

3 Proceedings to enforce IP rights

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

Civil and criminal proceedings in Turkey are available for enforcing IP rights depending on the infringement. An author can demand the determination of rights, the prevention of the infringement and compensation for financial and moral rights before Turkish courts.

In the case of a refusal of registration trademarks, patents or industrial designs, it is possible to raise an objection to the Higher Council of Examination and Evaluation (the TPI's appeal body) within two months of the notification of the refusal. A lawsuit may also be commenced within two months of the finalised decisions of the Higher Council of Examination and Evaluation.

In general, cases are examined before the specialised courts of intellectual and industrial property rights, which were established due to the intense need for protection of IP rights.

After the amendment to Turkish Customs Code and other regulations in conformity with the TRIPs Agreement, customs authorities also have the right to suspend customs procedures of counterfeit products. Rights holders must file a criminal or civil infringement lawsuit within 10 days of the notification of the suspension in order not to release the counterfeits.

4 Remedies

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

Any party whose IP rights have been infringed can commence a lawsuit before the Turkish courts. In accordance with the Copyright

Law, the party can demand compensation in case of an infringement of financial and moral rights. It is possible to demand reversal of the infringement in part by collection of the unauthorised copies or destruction of the devices for making copies. Also, delivery of the devices to the author is another option to prevent the infringement.

In addition, there are criminal proceedings for the protection of authors' rights. If someone copies a work without permission and publishes it, the author can demand a penalty against the person committing the unlawful actions. A preliminary judgment is also possible to protect the rights before or during a lawsuit.

The aforementioned procedures also exist for trademarks and patents. A party can commence a case for the compensation for lack of profit or other damage that occurred, confiscation of products and related equipment, injunctive measures for preventing continuing infringements, annulment of the trademark and determination of the infringement.

5 IP legislation and competition

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

Turkish IP legislation makes no specific mention of competition and does not contain provisions on the anti-competitive or similar abuse of IP rights.

6 Remedies for deceptive practices

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

Referring directly to consumer protection law, there are no specific provisions relating to trademarks. Deceptive practices are deemed against the principle of goodwill as stated in article 56 of the Turkish Commercial Code. Unfair competition rules regulated in the Commercial Code also provide remedies against deceptive actions with respect to all industrial property goods including non-registered trademarks.

7 Technological protection measures and digital rights management

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

Turkey joined the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty, effective 28 November 2008. The 2001 amendments to the Law No. 5846 implemented many of the requirements of these treaties into Turkish Copyright Law. However, the law needs further amendments to fully comply with the WIPO treaties and EC Directives.

8 Industry standards

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

Neither legislation nor case law makes any mention of the impact of the adoption of proprietary technologies in industry standards.

Competition

9 Competition legislation

What legislation sets out competition law?

Turkish competition law is set out in the Act No. 4054 on the Protection of Competition (the Competition Act), which was enacted

in 1994. The Turkish Competition Authority was created by this Act as an autonomous antitrust enforcement agency. The purpose of the the Competition Act is to prevent agreements, decisions and practices preventing, distorting or restricting competition in markets for goods and services, and the abuse of dominance by undertakings dominant in the market, and to ensure the protection of competition. Articles 4, 6 and 7 of the Competition Act are the foundations of the implementation of the Act, which include the main prohibitive provisions. Article 4 regulates agreements, practices and decisions between all kinds of undertakings, article 6 is about abuse of dominance and article 7 deals with mergers and acquisitions.

10 IP rights in competition legislation

Does the competition legislation make specific mention of IP rights?

The Competition Act does not make any specific mention of IP rights. However, Block Exemption Communiqué on Technology Transfer Agreements (Communiqué No. 2008/2) expressly refers to IP rights as secondary legislation in line with European Commission Regulation No. 772/2004. Communiqué No. 2008/2 defines 'technology transfer agreements' as 'licensing agreements in which the relevant intellectual property rights and know how are licensed severally or jointly' and regulates the conditions that are exempt. IP rights are defined in the Communiqué as 'patent, utility model, industrial design, integrated circuit topography and breeders' rights, applications thereof and rights on software'. Know-how is also defined separately as a practice-oriented, confidential, substantial and specified information package resulting from experience and experiments.

Another secondary legislation that mentions IP rights is Communiqué No. 2003/2 on Block Exemptions relating to Research and Development Agreements. This Communiqué also regulates the conditions of exemptions regarding R&D agreements whose object is to obtain IP rights as a result.

11 Review and investigation of competitive effect

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

The Turkish Competition Authority is competent to review or investigate the competitive effect of conduct and agreements related to IP rights. The Competition Board is the decision-making body of the Competition Authority and decisions of the Board are appealable before the State Council.

The ordinary courts may also enforce the Competition Act in an action for damages as a result of anti-competitive conduct.

12 Competition-related remedies for private parties

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

Any private party that suffers harm from the exercise, licensing or transfer of IP rights may file a complaint before the Competition Authority, provided that there is an anti-competitive agreement or concerted practice according to article 4 of the Competition Act and there is no exemption under article 5 of the Act or other secondary legislation.

Any agreement between private parties that is considered anti-competitive by the Competition Board is deemed to be invalid as it is contrary to the mandatory provisions of law, especially article 4 of the Competition Act.

The Competition Board may impose monetary penalties on private parties. Substantive, procedural and periodic fines are regulated in articles 16 and 17 of the Competition Act.

Private parties may also file a lawsuit before the ordinary civil courts for damages occurred from a conduct or agreement violating the Competition Act according to article 57.

13 Competition guidelines

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

The Turkish Competition Authority issued a Guideline on the implementation of articles 4 and 5 of the Competition Act. This is the only guideline regarding the overlap of competition law and IP that sets out the implementation of the terms and conditions of the Communiqué No. 2008/2 on Block Exemptions relating to Technology Transfer Agreements.

The Turkish Competition Authority has also enacted a Communiqué on Block Exemptions relating to Research and Development Agreements. This Communiqué (No. 2003/2) can be considered as a Competition Authority issuance covering competition law and IP.

There are many other Communiqués and Guidelines issued by the Competition Authority on different subjects.

14 Exemptions from competition law

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

Communiqué No. 2008/2 specifically exempts technology transfer agreements from the application of competition law. The said exemption continues as long as the protection granted to the IP right regarding the licensed technology is valid and the know-how remains secret, according to article 5 of Communiqué No. 2008/2.

Communiqué No. 2003/2 on Block Exemptions relating to Research and Development Agreements also exempts R&D agreements from the application of competition law under the conditions of article 5 of the Communiqué.

15 Copyright exhaustion

Does your jurisdiction have a doctrine of, or akin to, 'copyright exhaustion' (EU) or 'first sale' (US)? If so, how does that doctrine interact with competition laws, for example with regard to efforts to contract out of the doctrine, to control pricing of products sold downstream and to prevent 'grey marketing'?

In Turkish law, the national exhaustion doctrine is accepted by the Supreme Court and the Competition Board implementing the regulations in the Decree Laws and Acts on trademarks, patents, designs, copyright and other IP rights. The Competition Act does not have specific regulations regarding parallel import and exhaustion of IP rights. However, the Competition Board determines that prevention of parallel import is not legally possible after entry of the goods into the Turkish market according to articles 4 and 6 of the Competition Act, which prohibits practices and agreements that eliminate or prevent the competitors' entry into the market.

16 Import control

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

As mentioned in the previous question, it is not possible to prevent the 'grey market' if the goods are sold by the IP right owner in Turkey before.

According to Decree-Law No. 556, the trademark owner may oppose further commercialisation of the goods, especially where the conditions of the goods is changed or impaired after they have been put on the market.

The Turkish Copyright Act was amended in accordance with Decision 1/95 of the EC-Turkey Association Council and Council Directive 92/100. According to the amendment to the article, distribution rights of the author are exhausted after first sale, but the renting and lending rights is not exhaustion.

17 Competent authority jurisdiction

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

Turkish Competition Authority has sole administrative power on competition issues and its jurisdiction cannot be ousted by any other authority.

Merger review**18 Powers of competition authority**

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

The Competition Authority has the same powers with respect to reviewing mergers involving IP rights as it has with respect to any other type of merger.

19 Analysis of the competitive impact of a merger involving IP rights

Does the competition authority's analysis of the competitive impact of a merger involving IP rights differ from a traditional analysis in which IP rights are not involved? If so, how?

The Competition Authority makes traditional analysis of a merger in which IP rights are involved.

20 Challenge of a merger

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

According to article 7 of the Competition Act, along with Communiqué No. 1997/1, the Competition Authority may challenge a merger creating or strengthening a dominant position that significantly impedes competition. Such a merger will be deemed illegal and prohibited by the Competition Authority.

Mergers and acquisitions are subject to a priori control before the Competition Board for concentrations where total share of the undertakings exceed 25 per cent of the relevant product market, or their total turnover exceeds 25 million Turkish liras. The Competition Board authorised the acquisition of some patent rights along with other assets on the grounds that it would not result in the creation or strengthening of a dominant position as described under article 7 of the Act No. 4054 and Communiqué No. 1997/1 (*Flextronics*, 2008)

21 Remedies to alleviate anti-competitive effect

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

According to article 11 of the Competition Law, if a concentration creates or strengthens a dominant position that significantly impedes competition in the market, the Competition Board is authorised to take all necessary measures to terminate the transaction, remove all legal consequences of every action that has been taken unlawfully, return all shares and assets to the previous holders, and to take any other necessary measures.

Specific competition law violations**22 Conspiracy**

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

The Competition Act does not specially include a definition for hard-core cartels. Article 4 of the Act generally prohibits anti-competitive agreements, concerted practices and decisions. However, the

Regulation on Active Cooperation for Detecting Cartels, which was recently enacted on 15 February 2009, defines cartels as 'competition restrictive agreements and/or concerted practices between competitors for fixing prices; allocation of customers, providers, territories or trade channels; restricting the amount of supply or imposing quotes and bid rigging'.

Agreements between competitors including the exercise, licensing or transfer of IP rights shall not benefit from the block exemption provided in Communiqué No. 2008/2 if the parties intend to restrict another party's right to determine its sales prices, to restrict production and sales volumes of contract products and to allocate markets and customers, except in some cases that were described in the Communiqué. In this context, such an agreement between competitors may be deemed illegal and prohibited by the Competition Authority.

Patent pool establishment agreements, especially including non-compulsory technologies, fall outside the exemption and under article 4 of the Competition Act according to the Guideline on Technology Transfer Agreements. On the other hand, licensing agreements between the pool and third parties may benefit from the block exemption and be deemed as legal provided that other general requirements are covered.

23 (Resale) price maintenance

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

According to the Communiqué 2008/2 on Block Exemptions relating to Technology Transfer Agreements and its Guideline, an agreement including the restriction of sales prices cannot benefit from the block exemption. In this regard, the Competition Authority may prohibit an agreement setting minimum resale prices for licensors according to article 4 of the Competition Act. The Guideline of Communiqué No. 2008/2 expressly indicates that the intention of all price agreements between competing parties is to establish the restriction of the competition, therefore all agreements including fixed, minimum, maximum or recommended prices will be considered as determination of prices and will not benefit from the block exemption.

24 Exclusive dealing, tying and leveraging

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

Article 4 of the Competition Act prohibits applying different terms to persons with equal status for equal rights, obligations and acts except exclusive dealing. In this regard, exclusive dealing and exclusive licensing is considered legal as a rule. However, it has to be evaluated on a case-by-case basis if there is a violation contrary to article 4 and if there is an exemption under article 5 to determine the legality of exclusive dealing, tying and leveraging. The Competition Board decided that the subsidiary of the biggest Turkish media group would cease any kind of act that meant to directly or indirectly tie the sale of media products to the purchase of non-media products (*Dogan*, 2008).

25 Abuse of dominance

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

A firm in a dominant position using its IP right does not constitute an abuse in itself. On the other hand, actions that aim to distort competitive conditions in another market by means of technological advantages created by dominance in a particular market may be considered as an abuse of dominance by exercising of IP rights pursuant to article 6 of the Competition Act. Agreements including tying obligations cannot benefit from the block exemption if the relevant technology and product market share exceeds 30 per cent for competitors and 40 per cent for non-competitors. Furthermore, a licensor may also have anti-competitive effects in the tied product sector if it has a dominant position on tying product market.

26 Refusal to deal and essential facilities

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

There is no provision on the essential facilities doctrine in the Competition Act. However, the doctrine has been applied by the Competition Board in some cases of 'refusal to deal'. In the *McDonald's* case (2006), where a prestigious shopping mall refused to rent a shop in the food court to McDonald's, the Competition Board discussed the conditions of the doctrine and refused the complaint on the grounds that the mentioned shopping mall was not an essential facility regarding fast food restaurants market. The doctrine is evaluated under article 6 of the Competition Act, which regulates the 'abuse of a dominant position'.

Remedies

27 Remedies for violations of competition law involving IP

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

The Competition Authority may impose substantive, procedural and periodic fines, which are regulated in articles 16 and 17 of the Competition Act. Monetary fines may reach up to 10 per cent of the undertaking's turnover in case of abuse of dominant position.

In addition to the monetary sanctions, the Competition Board is authorised to take interim measures until the final resolution on the matter where there is a possibility for serious and irreparable damages, to take all necessary measures to terminate the restrictive agreement, and to remove the consequences of unlawful actions.

Along with the administrative sanctions of the Competition Authority, private parties may also file a lawsuit before the ordinary civil courts for damages incurred as a result of conduct or an agreement violating article 57 of the Competition Act.

28 Competition law remedies specific to IP

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

No special remedies exist related to IP matters in competition law.

29 Remedies and sanctions

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

Authorisation of mergers and acquisitions involving IP rights has been imposed several times by the Competition Authority. For instance, in the *Akbank Inc/Citibank Inc* case, the Competition Board decided, upon the request for negative clearance certificate or individual exemption for the 'Citi-Axess Credit Card Cooperation and Brand License Agreement' concluded between the parties, that the agreement:

- should not be granted a negative clearance certificate since some of its provisions violated article 4 of the Competition Act;
- should not benefit from a block exemption under the Block Exemption Communiqué No. 2002/2 on Vertical Agreements since the parties to the agreement were competitors in the relevant product market; but
- should be given individual exemption as of its signing date, 12 May 2008, since it met all of the conditions specified in article 5 of the Competition Act.

30 Scrutiny of settlement agreements

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

A settlement agreement terminating an IP infringement dispute must be evaluated like the other agreements involving IP rights as the Competition Act does not make any distinction between agreements. Therefore, all anti-competitive agreements may be challenged by the

Competition Authority in the case of a violation of the articles of the Competition Act.

Economics and application of competition law

31 Economics

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

Economics has played a big role in the application of competition law in general, including cases involving IP rights.

32 Recent cases

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

The biggest case including both competition law and IP rights is the *Dogan* case (March 2008) in which the Competition Board granted conditional authorisation for the acquisition of the sole control of the *Vatan* newspaper by accepting a 'failing firm defence'. The Board cleared the acquisition of *Vatan* by Dogan (the biggest media group in Turkey) on condition that it transfer the trademark and royalty of *Vatan* to a third party within two years of the Board's clearance decision. The Board imposed further conditions such as not registering or using any identical or similar trademark to *Vatan*, taking legal measures in order to prevent the registration of such trademarks, etc.

Although there are not a lot of high-profile cases directly dealing with the intersection of competition law and IP rights, the Turkish Competition Authority has recently imposed record fines that may affect future anti-competitive agreements including IP rights.

Update and trends

The most recent development in Turkish Competition law involving IP rights is the enactment of the Block Exemption Communiqué No. 2008/2 on Technology Transfer Agreements and its Guideline in line with EC Regulation No. 772/2004.

In February 2009, the Turkish Competition Board enacted two regulations on leniency and calculation of fines. After the amendment of article 16 of the Competition Act in 2008, this leniency procedure has been introduced and implemented by the Regulation.

Turkey will continue to adopt international competition legislation along with that of the EU in order to align itself with the European Union legislation as a candidate country.

In June 2009, the Competition Board determined anti-competitive conduct according to article 4 of the Competition Act and imposed a fine over 20 million Turkish liras (approximately US\$13.6 million) on Ereğli Demir ve Çelik Fabrikaları TAŞ, one of the largest steel manufacturers in Turkey.

The *Turk Telekom* case (November 2008) is also one of the highest-profile cases, in which the Competition Board imposed a fine of over 12 million Turkish liras against Turk Telekom and TTNNet for abusing their dominant positions in the wholesale broadband internet access market and retail broadband internet access market by charging anti-competitive tariffs for access to the local networks.

Currently, the Competition Authority is seriously investigating many sectors such as banking, automotive, pharmaceutical, etc and more fines are foreseen in view of the Authority's large remit against cartels, along with any other anti-competitive conduct.

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