



**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

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ROUNDTABLE ON COMPETITION, PATENTS AND INNOVATION

-- Note by Turkey --

This note is submitted by the Turkish Delegation to the Competition Committee FOR DISCUSSION at its forthcoming meeting to be held on 18-19 October 2006.

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1. Introduction

1. Innovation should be regarded as the intersection between competition law and IPR law (mainly patent rules). In the debate whether competition law and IPR law are in direct contrast or not, an agreed position is generally that both systems of law try to achieve the same objective (innovation), via different ways: While the former is based on free competition, the latter is based on the creation of monopoly.

2. However, a proper position to create more innovation is directly dependent upon the balance to be created between competition policy and patent policy in theory and practice.

3. The patent law as well as competition law in Turkey is quite new compared to many other OECD members. While patent law (*Decree Law for Protection of Patent Rights Numbered 551 Dated June 27, 1995*) was adopted in 1995 as part of attempts to have a new law compatible with relevant international rules, the competition law (*The Act on the Protection of Competition No:4054 Dated 13 December 1994*) was adopted in 1994. Therefore, the debate in terms of how to make a balance between competition policy and patent policy, has not been mature enough and needs more time and enforcement of both systems of law in practice. Similarly, the debate on the policy to be followed regarding “patent-innovation relation” has not been also mature.

4. The main point in preparing this contribution is to show how the Turkish Competition Authority (TCA) considered innovation in its decisions and on top of that to give at least an overview of practice on the basis of the TCA cases. despite the premature nature of debate.

2. Patent and Innovation

5. Patent protection is generally justified on the basis of the need to preserve the incentive to innovate. To benefit from patent protection, an invention needs to meet three conditions: inventive step, novelty and industrial applicability. Considering these conditions, it is possible to argue that patent is almost synonymous with innovation. What defines a patent is mainly novelty of the innovation.

6. Here there is no need to discuss what lies behind the rationale for patent protection. However, it might be useful, to provide a brief explanation. The existence of market failure for the creation of knowledge requires the State to take measures. Patent represents one of the most important instruments used in countries with market economy based on free competition and property rights. Patent is a temporary monopoly right. While it envisages an almost 20 year-monopoly for the right-holder, it also ensures the creation of new knowledge and innovation necessary for the economic growth and development. Thus, patent is considered to be a contract between society and right holder: On one side *the need to protect the incentive to innovate* and on the other side *the need to meet the societies’ needs and requirements*.

7. This contract is based on a balance. The main issue is not the existence of contract but who obtains more benefit than the other in this balance.

8. Turkey has a contemporary patent protection system since 1995 when *Decree Law for Protection of Patent Rights Numbered 551* took into force. The adoption and taking into force of this law basically resulted from the obligation of Turkey under TRIPS agreement (and WTO membership) and the Customs Union Decision 1/95 between Turkey and European Union.

9. Since the adoption of patent law, Turkey has not significantly experienced a debate on the issues such as scope of patent, the impact of patentability conditions on innovation and whether there is a need for

reform. The only exception in this regard in terms of the debate for patent protection and competitiveness of the market is the introduction of patent protection in market for pharmaceuticals.

10. The market for pharmaceuticals has been a major sector where the introduction of patent protection was considered a serious parameter to set the direction of competition. On the basis of her liabilities arising from both TRIPS agreement under WTO and Customs Union with the EU, Turkey did introduce patent protection for all products including pharmaceuticals. Before the introduction of patent protection, in particular the generic drug manufacturers did argue that such protection would result in less competition and more concentration and linked to this a sharp increase in drug prices. On the other hand, original drug manufacturers, almost all of whom are foreign firms, argued the lack of patent protection as a serious threat to innovation rate and future development in the market for pharmaceuticals.

11. Linked to the debate about the introduction of patent protection in the market for pharmaceuticals, a major recent debate was on the data exclusivity for pharmaceuticals. Here, the generic manufacturer did raise further their voice by arguing that data protection in this market would further strengthen the position of original pharmaceuticals producers and will eliminate all competition in the market. Considering its international liabilities, Turkey took the necessary initiative to introduce data exclusivity for pharmaceuticals.

12. Following the introduction of patent protection and data exclusivity, it has been seen that original producers introduced new products into the market. In other words, in the absence of proper protection for their products, the original drug producers seemed to be reluctant to introduce new products.

3. The Involvement of Competition Authorities in Patenting Process¹

13. An interesting aspect of interface between competition policy and patent policy is about what advocacy role a competition authority may have. The possible role of competition authority (if any) in designing a proper IPR system in the country can be associated with its advocacy role.

14. The advocacy role of a competition authority in designing an optimum patent policy seems to be a very sensitive issue. There are some questions which might be relevant in understanding and (if necessary) limiting such role. Some of them are whether competition authorities be involved in decisions concerning granting a patent, and whether the competition authorities be allowed to challenge the validity of a patent granted.

15. General conditions observed by the relevant authorities in granting a patent are novelty, inventive step and industrial applicability. And the inventors have to provide detailed information in order to meet these conditions. The process which governs the decision whether the invention is to be granted a protection or not requires a very technical analysis and examination in order to fully evaluate the information provided.

16. At first sight, the above-mentioned questions seem difficult to be answered. However, a closer examination of them demonstrates that the involvement of competition authorities in the patent granting process, and their possession of the right to challenge the validity of a patent (regardless of the industry) should not be allowed for some important reasons.

¹ The information provided under this heading is basically from a previous contribution of the TCA for Roundtable on Intellectual Property Rights (DAFFE/COMP/WD(2004)12). As this part seems to be relevant for the discussion on “competition, innovation and patent”, it was thought useful to insert into this contribution.

17. First of all, these roles bring additional and unnecessary burden on competition authorities. While competition authorities (even those in developed countries) do not have sufficient resources even to deal with the existing anticompetitive issues falling under the main prohibitions of competition law, they may not allocate sufficient resources to be involved in the patent process. In addition to this, any direct role in the patent granting process requires competition authorities to be actively involved in the process which is governed by qualitatively different rules and procedures than those of competition law. The existing resources of competition authorities will not suffice to play this role properly. As is known, it is a significant source of criticism that the patent granting process is very long and painstaking, and the inclusion of competition authorities in the patent process may further complicate the issue and threatens legal certainty needed by the innovators. Therefore, patent offices must be the sole authority in granting patents. With regard to the right to challenge the validity of a patent, it could be argued that this is not the job of competition authorities. Such a role might lead the authority to be lost in complex and technical files, and importantly it prevents competition authority from fulfilling its main duties.

18. The above comment is basically based on the current philosophy underlying behind the existence of competition authorities. And under this approach, the inclusion of competition authorities in the patent process is not a logical option. However, it may be that competition authorities might be expected to fulfill new duties directly related to patent process. This new approach seems to introduce a revolutionary development in competition law enforcement area. And for the time being, it could be argued that competition authorities are not ready for such new duties.

19. With regard to its advocacy role, however, competition authorities are required to have close relations with the patent offices for some important reasons. As is stated above, in particular considering their existing duties, instruments and resources the competition authorities should not be involved in the patenting process. However, that view should not be considered to be absolute. In other words, the competition authorities might still have a role of advocacy in this process.

20. As is known, competition authorities have a good deal of data regarding the markets. Data belonging to competition authorities might be shared with patent offices in granting a patent related to the market in question. In this context, a patent office might take into consideration these data such as market share, concentration level, price level, the existence of anticompetitive practices etc. when exploiting its final discretion whether to grant a patent protection or not. However, it should be admitted that the discretion of the patent offices is very limited and strictly regulated by the patenting criteria by law.

4. Competition and Innovation

4.1 Dominance and Innovation:

21. With regard to the relation between dominance and innovation, the TCA did have some cases in which it considered the innovativeness of the dominant undertakings.

22. **Karbogaz case²:** In Karbogaz case where Karbogaz, the dominant supplier of carbon dioxide (CO₂) was held to infringe competition rules by concluding exclusive dealing agreements with its major customers, the TCA regarded innovative nature of Karbogaz as an asset that would contribute to its market power. Significantly, the TCA did try to differentiate between the position of Karbogaz based on anticompetitive conduct and its position based on its efficiency. In particular, the innovativeness of Karbogaz was considered to be a major trait that would make it more valuable compared to its competitors in the eyes of its customers. Therefore, it was quite difficult to make anticompetitive practice of Karbogaz distinct from its efficiency-based position. In this case, if Karbogaz would not have concluded such

² Dated 23.08.2002 and Numbered 02-49/634-257

exclusive dealing agreements that would threaten its competitors, it would be difficult for the TCA to consider the difficulties faced by its competitors as an infringement of competition, as such difficulties would have been explicable only on the basis of competition on the merit. Here it is important to see that even if the undertaking is in a dominant position, such position is well to be associated with its innovativeness and importantly its behavior and disadvantageous position of its competitors can be understood as a corollary of normal competition in the market.

23. **Frito-Lay case³**: Frito-Lay case was similar in terms of the practices examined as well as the evaluation on the innovativeness of dominant undertaking which is Frito-Lay. In this case, the TCA did examine the allegation that Frito-Lay, the dominant undertaking in packaged chips market, conducted certain exclusionary practices that aimed at driving the main competitor out of the market. While examining this case, the TCA found that the market power of Frito-Lay was to a great extent to be associated with its efficiency and innovativeness compared to its competitors. Significantly, the TCA noticed that the final sale points, the main target of companies in the market, did choose Frito-Lay due to its dynamism and efficiency. In this regard, the TCA did try to make a distinction between the conducts based on competition on the merits and anticompetitive practices. In short the TCA considered the efficiency of the dominant company to a certain extent in favor of that company.

4.2 *Mergers and Innovation:*

24. There are number of merger cases where the TCA did regard the efficiency and innovation related considerations.

25. **Cisco Systems-IBM merger⁴**: In this merger case which included a transaction between Cisco Systems and IBM, the TCA defined two relevant markets which are routing products and switching products. These products are mainly used for data networking purposes. In the competitive analysis of the case, the TCA found that post merger market share would be higher than 70% in routing products market. The TCA noticed that the market has an innovative structure. Therefore the TCA considered this innovative structure as an important pressure for more competition and cleared the merger despite the high market share of the merged entity.

26. **Sabancı-Du Pont Joint Venture⁵**: In this case the two companies created a joint venture. The TCA did clear the joint venture on the basis of certain reasons. One of the important reasons that the TCA did take into account was the fact the joint venture would create a structure which is conducive to more innovation in the market. It was seen that the joint venture promised to introduce more R&D activity which would result in more innovation in the market. Therefore, the innovative aspect of the transaction was an important element in convincing the TCA that the transaction would not cause any competitive concern.

27. **Pfizer Inc-CSL Limited case⁶**: The case is related to the acquisition of animal health division of CSL Limited by Pfizer. In this case, the TCA examined a non-compete obligation imposed on CSL Limited. Following the examination of the case facts, the TCA regarded this obligation an ancillary restraint considering the fact that innovation is a backbone for animal health market and therefore the protection of technology is needed by a non-compete obligation. Therefore the transaction was cleared without any condition.

³ Dated 04.05.2004 and Numbered 04-32/377-95.

⁴ Dated 02.05.2000 and Numbered 00-16/160-82

⁵ Dated 09.11.1999 and Numbered 99-51/556-349

⁶ Dated 25.03.2004 and Numbered 04-22-248-53

28. **DSM-Roche case⁷:** In this case, the vitamins division of Roche was taken over by DSM⁸. During the examination of the case, the TCA found that the merger would result in less innovation in the market in one of the sub markets, which is animal food enzymes. The aggregate market shares of the parties concerned in phytase market and NSP divisive enzymes were deemed as anticompetitive.

29. On the other hand, parties concerned applied for the European Commission and presented a commitment. In its decision, the Commission concluded that by the commitment the parties would remove serious doubts on the concentration's compliance with the Common Market.

30. In 1994 DSM signed an agreement with BASF AG on R&D, production, marketing, sale and distribution of animal food enzymes. On the other hand, in 1998 RV&FC, a subsidiary of Roche Group, signed an R&D agreement with Novozymes A/S on developing new animal food enzymes. In this context, the Commission added that as a result of concentration between DSM and RV&FC, there is a structural connection between DSM/BASF and Novozymes/RV&FC alliances, and an intersecting area between parties' operations on production and distribution activities occurs.

31. Taking into account that after the acquisition DSM would have an important position in both alliances, the Commission pointed out that the acquisition would abolish competition between Novozymes/RV&FC and DSM/BASF. Therefore, DSM undertook to terminate the DSM/BASF alliance on animal food enzymes and divest animal food enzymes operations to a third party. DSM and BASF agreed on divestiture of the alliance, and the Commission accepted the commitment.

32. Similarly, the TCA approved the acquisition transaction subject to DSM's divestiture of its animal food enzyme operations with BASF.

4.3 *Reasons for Innovating:*

33. In the note prepared for the purposes of this roundtable, certain factors are mentioned in relation to what motivates for more innovation. These are endurance of market power, keeping the advantage of first mover and survival against fierce competition. These factors should not be considered as being in sharp contrast to each other. In many cases, it is possible to see them interlinked.

34. Examination of the cases concluded by the TCA shows that companies have differing reasons to conduct R&D with a view to creating more innovation. In some markets, the final product is almost the same as innovation. In other words, competition is based on the introduction of continuously new products. In particular, the main parameter in information and communication technologies (ICTs) is innovation. In such markets, the companies mainly innovate to survive and keep their existing positions. As the technology develops and improves very quickly, then those lagging behind are prone to lose and to be driven out of market. Similar to ICTs, the innovation has become a key parameter in GSM market in addition to the parameter of network externality. In this regard, while the incumbent operator is in the expectation of enduring its market power, the other two competitors have tried to gain a market position both to survive as well as to get more power in the market.

35. In the markets which are relatively mature like cigarette market and the spirit market, the companies' main motivation for innovation is to create sub-markets in order to attract the demand towards these sub-markets with a view to enduring their market position.

⁷ Dated 11.09.2003 and Numbered 03-60-730-342

⁸ This case was previously mentioned in the contribution by Turkey on "Cross Border Merger Remedies" (DAF/COMP/WP3/WD(2005)11)

36. In the market for pharmaceuticals, mainly the original product producing firms conduct R&D and introduce new products. In some cases where they introduce a new drug for existing markets, their main motivation is to protect their market position. However, in cases where they introduce a new product for an illness for which no equivalent drug is produced, their main motivation is to get a first mover advantage in this newly created market.

5. Conclusion

37. Innovation is a critical aspect for economic growth and development. It is also a key term for both competition policy and patent policy. Regarding policy debate for innovation and patent policy, Turkey has not extensive experience and therefore the discussion to be provided by other contributions will be quite useful at least to get a view for possible direction of such debate in Turkey. In terms of discussion on “competition and innovation”, despite its almost 10 year-experience, the TCA has shown a record-track that it has attached importance on innovative aspects in both merger and infringement cases.