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DIRECTORATE FOR FINANCIAL, FISCAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE

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ROUNDTABLE ON INTELLECTUAL PROPERTY RIGHTS

-- Note by Turkey --

This note is submitted by the Turkish Delegation to the Competiiton Committee FOR DISCUSSION at its forthcoming meeting (8-9 June 2004).

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1. Introduction

1. The Act on the Protection of Competition No:4054 (hereinafter, referred to as the Turkish Competition Act),which was passed by the Parliament on 13th December 1994, is equipped with all necessary tools to deal with all private anticompetitive practices like its modern counterparts. However, it does not contain any specific clauses on Intellectual Property Right (hereinafter, referred to as IPR) issues. Therefore, the Act is applicable with respect to IPRs cases through its existing tools. The Turkish Competition Act establishes a "system of protection for competition" based on both competition enforcement (prohibition of anticompetitive agreements, abuse of dominance and anticompetitive mergers, and an exemption system for anticompetitive agreements) and competition advocacy. The Turkish Competition Authority (TCA), being an independent body, has been implementing Turkish Competition Act since November 1997 with respect to all anticompetitive issues including those of IPR.

2. The TCA has a good deal of experience in the area of competition enforcement (in particular against hard-core cartels and abuse of dominance, regardless of public or private undertakings) and competition advocacy. But, our experience of application in the area of IPR cases is relatively limited. The TCA has dealt with a limited number of licensing and sub-contracting agreements on the basis of an exemption evaluation. This is true for the case of biotechnology industry. The TCA has dealt with a few cases regarding biotechnology and all of them are merger cases. However, with regard to IPR, the TCA has mainly attempted to follow the principles and case-law of the EC competition law as laid down in the Customs Union Decision of the Association Council between Turkey and the EU. Therefore, despite relatively limited number of IPR cases, it is still possible to share our views with regard to the interface of competition policy and IPR in a general perspective, and the biotechnology industry in particular.

2. IPR Protection and Its Economic Rationale

2.1 Characteristics of Knowledge and the Economic Rationale of IPR Protection

3. Being a central factor in the process of economic growth and development, the knowledge has very features that differentiate it from physical materials. Physical objects are typically rival goods. However, knowledge is not a rival good, as the use by someone does not limit or impede the use of the same knowledge by someone else. The other difference between them is the excludability which is basically associated with the property rights over a good. A good is excludable if the owner has the legal power to prevent others from using it. Generally physical goods are excludable and grant the owner an exclusive property right to benefit from them. However, it is generally not the case with the knowledge.

4. Goods with high levels of both excludability and rivalry are private goods. In this case, there are private incentives for production, since producers can fully appropriate the benefits arising from the use of these goods by others. However, goods with low level of both excludability and rivalry are generally regarded as public goods. Knowledge can be considered as being a public good with characteristics of low level of rivalry and excludability. The need to lead private persons or companies to innovate makes it inevitable to treat knowledge as a commodity. These characteristics of knowledge in economic terms are considered a significant source of market failure with regard to knowledge creation needed to increase the social welfare, and the protection provided by a strong system of IPR is an important candidate to cure this problem. In other words, IPRs are a method through which knowledge can be turned into a rival good. As production of an intellectual good requires a lot of resources and such resources have an opportunity cost associated with them, the person producing an intellectual good would need compensation for his/her investment.

5. The choice of whether to have an IPR system or not is indeed a matter of policy. In other words, IPR system can be a substitute for the creation of knowledge by the public for the society. It is up to the government preference to make a choice between doing the job directly and making the job done by private bodies by providing further incentive via IPR protection. And generally, in economic system based on free market rules, the state is expected to withdraw from economic activities and only to create the necessary environment by certain regulations. It is the private sector which would invest in knowledge creation. IPR is one of strong instruments constituting this environment.

6. It is generally intended to prevent the commercial exploitation of intellectual goods without compensating their holders. Like other forms of property rights, IPR grant their holders a defensive right, which allows them to exclude others from using the protected intellectual good. IPR confer a monopoly right to their holders and thereby tempting the production of new knowledge. IPR helps solve a central tension in the development of knowledge—the process of developing knowledge is much more costly for the first person than it is for those that subsequently acquire the knowledge. In this sense, intellectual property rights provide an incentive for someone to want to be first[1].

2.2 IPR as an Agreement between the Right Holder and the Society

7. Contrary to conventional property rights, IPR are temporary rights. As an instrument of economic policy, IPR are used to direct Research and Development (Intellectual Property Rights (hereinafter, referred to as R&D) investments to knowledge-creating sectors. In this way, the right holder is obliged to publicly disclose his work in return for the temporary monopoly right. In doing so, new knowledge enters the public domain and allows subsequent innovators to use this knowledge for new inventions which in turn have to meet the criteria of protection. The dissemination of new knowledge at the marginal costs of transmitting this knowledge leads to a maximisation of welfare, because knowledge is non-rival in nature. Incentives for the creation of new knowledge have to be given by granting a temporary monopoly, because without the prospect of adequate returns, risky R&D investments that produce new knowledge will not be undertaken. It is suggested that IPR are a compromise between preserving the incentive to create knowledge and the desirability of disseminating knowledge at little or no cost. [2]

8. IPR represents a sort of agreement between the right holder (inventor) and the society (consumers). On the one side, *the need to protect the incentive to innovate*, and on the other side *the need to meet the societies' needs and requirement*. This agreement should be based on a balance. The main issue is not the existence of an agreement but who has more benefits from this balance. We must consider this balance as a starting point in any discussions regarding IPR and public interest. As a general proposition, the existence of IPR protection which makes the knowledge a commodity can be acceptable as long as it does not grant a high level of protection which could result in the final creation of a continuous monopoly.

9. It is argued that "stronger IPR provides stronger incentives for innovators, and increases the potential for local spill-overs from R&D. Costs are higher prices due to monopoly power thus created and an increase in the cost of follow-on innovation, which may reduce local R&D due to increasing transaction and other costs of acquiring prior technology. Choosing an optimal national policy depends on weighing these costs and benefits."[3]

10. Here we see that while the IPR protection eliminates the market failures with regard to knowledge creation and production, this tool is source of another market failure by definition: *It grants monopoly over the right in question*. The creation of a relatively right balance is also important to alleviate this resulting market failure. An important way to create this balance is related to how to design the relevant IPRS rules. However, this way is significantly restricted by the existence of international agreements, which force the countries to have minimum standards of IPR protection. In this context, the balance could only be achieved as much as these standards allow. Accordingly, competition policy could

be regarded as an instrument in the creation of a relatively right balance in this agreement. This role of competition policy is directly related to the interface of competition rules with the IPR rules, which will be dealt with below.

3. IPR and Biotechnology Industry

3.1 In General

11. The conclusion of the Uruguay Round negotiations culminated with the signing of the Marrakesh Agreement in April 1994. This Agreement established the World Trade Organisation (Intellectual Property Rights (hereinafter, referred to as WTO). One of the agreements, signed as part of the Marrakesh Agreement, was the Trade- Related Aspects of Intellectual Property Rights (hereinafter referred to as TRIPS). The TRIPS agreement is considered to be the most comprehensive and influential agreement on international intellectual property rights. Unlike most other international agreements on intellectual property rights, it establishes the minimum standards on IPR protection.

12. TRIPS envisages the principle of non-discrimination for any industry. In other words, The Agreement requires WTO Member States to grant patent protection to all inventions in any branch of technology. Article 27 which regulates the patent states that "….*Subject to the provisions of paragraphs 2 and 3, patents shall be available for any inventions, whether products or processes, in all fields of technology, provided that they are new, involve an inventive step and are capable of industrial application.*[4] *(…) patents shall be available and patent rights enjoyable without discrimination as to the place of invention, the field of technology and whether products are imported or locally produced…*". Apart from the exceptions stated in paragraph 2 and 3 of the article, all inventions, products and processes in all fields of technology can benefit from the patent protection, if they meet the necessary conditions of novelty, inventive step and industrial applicability. Interestingly the exceptions contained in this article are related basically to the biotechnology industry.

13. According to paragraph 2 of article 27 *"…members may exclude from patentability inventions, the prevention within their territory of the commercial exploitation of which is necessary to protect ordre public or morality, including to protect human, animal or plant life or health or to avoid serious prejudice to the environment, provided that such exclusion is not made merely because the exploitation is prohibited by their law..." and paragraph 3 states that" … Members may also exclude from patentability*:

> *(a) diagnostic, therapeutic and surgical methods for the treatment of humans or animals;*
>
> (b) *plants and animals other than micro-organisms, and essentially biological processes for the production of plants or animals other than non-biological and microbiological processes. However, Members shall provide for the protection of plant varieties either by patents or by an effective sui generis system or by any combination thereof. The provisions of this subparagraph shall be reviewed four years after the date of entry into force of the WTO Agreement…*"

14. Article 27 (3) of TRIPS allows exclusion from patenting of plants and animals and essentially biological processes for their production, even if such inventions are otherwise eligible for patents. It does however require the patenting of eligible inventions covering "micro organisms" and "microbiological" or "non-biological" processes and products thereof. TRIPS also requires the institution of an effective sui generis law for the protection of plant varieties. Unlike the case of other IPR, TRIPS does not oblige compliance with the pre-existing international treaty on the protection of plant varieties, UPOV, nor does it lay down in any further detail the scope or duration of such protection.

15. As is seen from the above-mentioned clauses, while TRIPS allows the member states to be free about the patentability of most of biotechnological innovations, it at least requires the members to provide protection for plant varieties either by patent or a sui generis system such as plant breeders' rights.

3.2 Biotechnology Industry

16. Article 2 of The Convention on Biological Diversity (CBD)[5] defines the "*Biotechnology*" as including any technological application that uses biological systems, living organisms, or derivatives thereof, to make or modify products or processes for specific use.

17. Biotechnology has in recent years attracted a significant amount of attention, as it is considered to be a solution for many emerging problems in particular in terms of health and agricultural industries. The so-called green revolution can be regarded as a candidate to solve the problem of hunger in least developed countries particularly. The fashionable concept here is the transgenic organisms or Genetically Modified Organisms (known as GMO).

18. As is stated above, regarding the economic rationale of IPR, the main argument put forward is the need to give further incentive to innovate for those private companies which risk their money in R&D activities. The nature of the incentive is basically based on the grant of a temporary monopoly for the exploitation of invention. When closely examined, market failure problems associated with the creation and diffusion of the knowledge can be observed in the biotechnology industry.

19. Being a very disputed issue, biotechnology is one of the leading industries which may benefit from the globally enforceable IPR rules. Biotechnology is one of the high-technology fields that have undergone an exceptionally strong rise in new innovations and experienced rapid growth in recent years. Using new biological tools, researchers have developed a wide range of possibilities for using living organisms, or parts of living organisms, to produce new products or processes. Biotechnology has applications in many sectors, including healthcare, agriculture, environmental protection[6]. However, the granting of IPR protection for biotechnological invention has leaded a big disagreement in particular between the so-called north and the south. In this context, the application of the IPR rules in this area is controversial issue. The fact that biotechnology is directly related to the health of human beings in many ways, makes the issue more complicated.

20. According to Lehman, together with pharmaceutical and chemical industries, the biotechnology industry is a technology-based industry in which the patent virtually equals the product. This is a very important point while discussing any issue related to IPR within these three industries. These three industries are much different than other patenting industries such as computers and electronics. While responsible for many patent filings the computer and electronics industries are characterised by extensive use of other techniques for managing inventions, including the use of trade secrecy and the pooling of patents with those of competitors to accommodate government and industry technical standards.

21. Lehman makes a further comment for the pharmaceutical industry, which can also be regarded as valid for the biotechnology industry as follows:

> "*...Most importantly, unlike industries which produce products requiring expensive and complex manufacturing infrastructures, the main issue with regard to pharmaceutical industry is that the patented products of pharmaceutical companies can be easily and cheaply replicated by generic producers without facing any significant cost of investment. As the investment cost in the pharmaceutical industry disproportionately is directed to laboratory research and clinical trials rather than the manufacture of the final product, patent exclusivity is the only effective way to protect and receive a return on that investment*[7]*. Therefore, patent protection is generally*

considered to be the only effective way of preserving the incentives of innovating pharmaceutical companies to invest in new drug development and production."

22. Apart from the environmental and ethical concerns which are not the subject matter of this roundtable, an important aspect of this controversy is related to some anticompetitive concerns associated with this industry. These concerns are the main reason why we discuss the interface between competition policy and IPR in biotechnology industry. At first sight, there should not be any difference among industries with regard to this interface. In this context, it could be argued that Competition Authorities might employ the tools within its reach with regard to anticompetitive practices related to IPR regardless of the industry. This proposition is generally right, and existing rules and case-law must be applicable for all industries. However, that should not prevent Competition Authorities from taking into consideration some sui generis conditions of certain markets either in favour or against the companies under investigation. The biotechnology industry is a good example for the markets with such sui generis characteristics.

3.3 IPR and Biotechnology in Turkey

3.3.1 IPR in Turkey: Generally[8]

23. Turkey is one of the countries, which signed and ratified the Agreement Establishing the WTO. As it is clearly known that developed countries had a 1-year transition period for adoption of national legislation to make them compatible to TRIPS Agreement. Developing countries including Turkey had 4 more years for reflecting the provisions of TRIPS to their national legislation. This period would end in January 1, 2000.

24. Turkey has adopted its national industrial and intellectual property legislation for patents However, (***Decree Law*** for Protection of Patent Rights Numbered 551 Dated June 27, 1995), trademarks (***Decree Law*** for Protection of Trademarks Numbered 556 Dated June 27, 1995), industrial designs (***Decree Law*** for Protection of Industrial Designs Numbered 554 Dated June 27, 1995) and geographical signs (***Decree Law*** for Protection of Geographical Indications Numbered 555 Dated June 27, 1995) in June 1995. All elements of this legislation are not only compatible to with the TRIPS standards but also contain many better and more effective provisions. This progress shows that Turkey is the first developing country, which amended its national legislation according to the TRIPS Agreement. When the situation in all other developed countries has been analysed, it will easily be understood that Turkey has adopted new legislation compatible to the TRIPS Agreement earlier than most of the developed and all of developing countries. Additionally, when the content and age of the previous legislation are considered this progress can be named as "revolution in the industrial property protection".

25. In addition to TRIPS, the Customs Union with European Union where obligations have been stated in the Association Council Decision numbered 95/1 and dated 06.03.1995 includes some provisions for establishment equal, strong and efficient protection of industrial property rights in all member states. These are based on;

- Accession to International Agreements related to intellectual property protection,
- Updating the national legislation to make them compatible to Community Directives and International Agreements,
- Updating the legislation for efficient enforcement of the laws.

26. Turkey has completed all necessary legislative and administrative studies, and established a well-functioning infrastructure for efficient and strong protection of industrial property rights. All these studies have created a very good environment for investment and technology transfer.

3.3.2 The Legislative Framework of IPR for the Biotechnology Industry in Turkey

27. The relevant legal document with regard to the patentability of biotechnological inventions is the Patent Decree (Decree Law No.551, Pertaining to the Protection of Patent Rights). Article 6 provides the subject-matters which are not patentable. The second paragraph of this article is as follows:

> " *…Patent shall not be granted for inventions in respect of the following subject matter.*
>
> *a) Inventions whose subject matter is contrary to the public order or to morality as is generally accepted.*
> *b) Plant and animal varieties/species or processes for breeding/plant or animal varieties/species, based mainly on biological grounds…"*

28. The above-mentioned clause in article 6 regarding the patentability of biotechnological innovations has been considered to present certain ambiguities. Hence in order to clarify the content of this clause, an additional legislative work has been needed. This clarification is also important with a view to harmonize the IPR legislation with the Acquis Communautaire of the EC. To this end, the Turkish Patent Institute has recently initiated a work on the preparation for a secondary legislation to make further clear the position of biotechnological innovations vis-à-vis the Patent Decree Law. Actually this work will result in the inclusion of a new chapter into existing Regulation on Patent. The new chapter to be added is argued to make the Regulation compatible with the EU Parliament and the EU Council Directive of 98/44EC which envisages the common rules regarding the patentability of biotechnological inventions. This amendment to the Patent Regulation makes rules, which govern the patentability of the biological inventions further clear. It classifies the biotechnological inventions as those patentable and non-patentable. The details of which what is patentable or not are directly the issue of this roundtable. However, the coverage of the patentability might be relevant when considering the policy design for an optimum patent protection system.

29. For designing a good IPR policy for biotechnology industry, It can be argued that apart from those subject-matters which are explicitly stated not eligible for patentability, those allowed as patentable should be examined carefully with regard to the three conditions which are novelty, inventive step (non-obviousness) and industrial applicability. Here in particular, the condition of inventive step is considered as important and therefore it should be analyzed for the purposes of quest whether the claimed invention introduces certain useful knowledge, which has the potential to contribute to the knowledge base and the social welfare. In this context, the examination of this criterion requires a good technical expertise to verify the condition is met.

30. Another important legislative development on the IPR protection of biotechnological innovations is the entry into force of the Act No: 5042 on the Protection of Plant Breeders' Rights of New Plant Varieties. This Act envisages a protection system of Plant Breeders' Rights regarding the innovation of new plant varieties. The passage of this Act by the Parliament fulfilled the condition envisaged within article 27/3 of TRIPS on the introduction of a patent protection or a sui-generis protection regime for the protection of plant varieties. The Ministry of Agricultural took into consideration the UPOV Convention 1991 as a model. Also it is argued that this Act is in harmony with the Acquis Communautaire of the EC.

31. The Act No: 5042 envisages conditions of granting protection for plant breeders' right in line with those introduced within the UPOV Convention[9]. The protection duration is in between 25-30 years according to the type of the plant. It includes an article which envisages exception for farmers[10], However this privilege is subject to certain limitations. Importantly it introduces the possibility of compulsory licensing[11] based on specific conditions. At the end of third year of registration of the breeders' right, the right can be subject to a compulsory licensing where it is deemed necessary for public interests. Here, for

purposes of compulsory licensing, the national defence and the need for the protection of public health are considered as public interests. When the system of compulsory licensing is closely examined, it can be seen that the system is based on strict limitations with a view to encourage innovators.

32. Considering these legal documents, Turkey can be accepted as being, to a great extent, in harmony with the international standards of IPR protection regarding the Biotechnology industry.

3.3.3 Importance of Biotechnology and IPR in Turkey

33. Turkey is still a developing country which is a net technology importer. No need to say that the technology is the key driver of economic growth and development. The position of Turkey as technology importer has important implications for the country. In this regard, the technology transfer is an important means of establishing a technology base in Turkey. In scientific terms, this is a significant way of creating for a knowledge base in Turkey.

34. Biotechnology is among the most important technologies for the Turkish economy. In particular, it promises to introduce certain challenges as well as opportunities for the agriculture industry which is still an important aspect of the Turkish economy. Up until now, traditional agricultural methods have dominated the Turkish agriculture industry. And as in the case of many developing countries relying on the agricultural industry for their economic growth, public research agencies have had a significant place in agricultural innovations. However, in parallel to the global trend, biotechnology has begun to dominate the Turkish agricultural industry in recent years. The above-mentioned Act No:5042 can be considered as directly related to this domination.

35. Together with revolutionary developments within the biotechnology industry, agriculture is not any longer a traditional industry. It has been transformed into a technology-based industry.

36. Turkey equipped with a richness of natural plant varieties is intended to benefit from the biotechnological innovations to boost its economy. The combination of its rich natural resources with biotechnological technologies can present Turkey important opportunities.

37. However, in grasping these opportunities to be provided by biotechnology, Being ready against the challenges of this transformation is crucially important for a sustainable agricultural industry.

38. An important aspect of these challenges is a global issue which might also impact Turkey. That is the issue of domination of the biotechnology industry by a few firms. In particular, the seed industry is argued to be subject to that domination. In particular certain seeds which have significant economic value are possessed by a limited number of firms.

39. At first sight, it can be argued that this is a global issue which should be treated globally. Correspondingly, there is a huge literature on biotechnological innovations in the agricultural industry with a view to evaluate the impact on developing countries. And an important aspect of the discussion is the protection of these innovations by IPR tools.

40. Generally it is argued that the global system of IRP protection as established by TRIPS works against the interests of developing countries, and it makes these countries dependent on technologies of the developed world. This argument can be supported or criticized depending on what is understood from IPR protection. However, it is a matter of policy choice. In other words, whether we accept or not, the introduction of TRIPS standards has become a preliminary condition to become a part of the global economy.

41. Being a developing country which is also a candidate country for the EU membership, Turkey has chosen to introduce an IPR protection without any discrimination of industry as laid down by TRIPS. In other words, Turkey is in favour of introducing IPR protection for all industries. The IPR legislation of Turkey is mainly in line with major international agreements. What is important is that the Turkish legislation is strictly disciplined not only by TRIPS standards but also by the liabilities arising from harmonization with the legislation of the EU as laid down in Customs Union Decision 1/95.

42. In this regard, the existence of IPR protection in Turkey is a given information for us for the purposes of these roundtables. In this context, to deal with the issues of market power or domination in the biotechnology industry, Turkey has two ways to follow. The first is the application of flexibilities allowed by TRIPS, and the other is the application of competition rules in curing the problems associated with anticompetitive practices.

4. The Interface of Competition Policy with the IPR Rules

4.1 General Considerations

43. It is a general and fashionable proposition that competition rules are in direct contradiction with the IPR rules. The main idea behind this approach is related to the argument that while the competition rules encourage competition and outlaw monopoly, the IPR rules by definition grant monopoly over the right in question. On the basis of this general proposition, at first sight, there seems to be a contradiction. However, a closer examination of the main philosophies behind these two legal systems demonstrates that rather than a contradiction, there is parallelism in terms of their objectives. The main purpose of competition policy is the protection of competition process, which betters off the social welfare. In this equation, the preservation of competition process is a tool in order to achieve the final objective of increasing the well-being of the society. In this juncture, the competition policy has the same objective with IPR rules. However, competition rules and IPR rules pursue their objectives in different ways.

44. Both seek to promote economic efficiency and growth and to enhance social welfare. IP rules do this by creating limited monopoly rights so that value of creating IP is increased as an incentive to invent and to the subsequent commercial development of an invention in the form of new products. Hence, IP rules are a part of a long-run strategy for dynamic efficiency. On the other hand, competition rules seek to promote economic efficiency, thereby raising output and benefiting from lower prices for existing products. Thus, two sets of rules (IPR and competition) have a common objective of greater economic welfare and social well-being. The tension comes from the fact that the IPR rules are part of a long run strategy to produce wealth and prosperity, whereas competition rules focus on short run objectives[12].

45. On the other hand, with regard to the interface of competition policy with IPR, competition policy has a relatively more functional role in particular with regard to the need for the above-mentioned balance. This role of competition policy should be realised by Competition Authorities very carefully. Here designing correct competition policy requires the Competition Authorities to perceive the rationale behind the IPR protection well and to intervene in cases related to a right protected by IP rules where actually necessary. The experience demonstrates that the over-jealous application of competition rules in particular in the area of IPRs may bring some sort of short-run benefits for the society, however it may significantly harm the long-run welfare of the society by chilling the incentive to innovate and invent.

46. This point is particularly important for industries where the innovation requires a great amount of investment cost for the basic research and product development with the possibility of failure to make the innovation marketable. The biotechnology, pharmaceutical and chemical industries are such kind of industries, which are dependent on IPR protection. Explanation for why patents are more important to these industries in appropriating the benefits from innovation follows directly from the characteristics of

R&D process. In essence, it takes several hundred million dollars to discover, develop, and obtain regulatory approval for a new medicine. Absent patent protection, or some equivalent barrier, imitators could free ride on the innovator's necessary regulatory approval and duplicate the compound for a small fraction of the originator's costs.[13]

47. In this context, with regard to the interface of the competition policy and IPR the distinction between the existence and exercise of the right should be significantly observed. The competition policy deals with the exercise and does not *per se* condemn the existence. Being aware of the "tension" between IPR and competition policy, the European Court of Justice (hereinafter referred to as ECJ) distinguished the existence (or specific subject-matter)[14] of such rights from the exercise of them, and treated the existence as falling outside competition rules, whereas the exercise, an issue which may be caught by competition rules.

48. This principle of distinction is transposed from the case-law of the ECJ into the Turkish application and carefully pursued by the Turkish Competition Authority. The main philosophy behind this distinction is directly related to arguments which support IPR protection. The existence of IPR is not on its own merit a competition infringement. However, the competition policy has a "right to say" with regard to the exercise of IPR. This fact shows that the right granted to the inventor is not absolute, and subject to certain limitations. The application of competition policy should pursue its pathway taking into consideration these limitations. Apart from the limitations inserted directly or indirectly into rules regulating the right in question, competition rules by definition may bring certain limitations over the exploitation.

49. Before applying competition policy to any IPR-related case, it is a logical proposition that there must be an existing IPR. Without any prior innovation, there is no ground for the application of competition rules. This understanding explains why Competition Authorities should be careful enough in the application of competition rules. IPR has an important role in the creation, marketing and dissemination of new knowledge. The competition policy has a role only after new knowledge is created and marketed. Competition authorities should be concerned with not only short run economic efficiency but also with long-run economic efficiency, which can be termed as dynamic efficiency. Short run efficiency is generally associated with the so-called static efficiency related to the level of prices. However, the so-called dynamic efficiency is about the introduction of new products and processes. Therefore, the competition authorities cannot ignore the need for dynamic efficiency. IPRs are generally related to this dynamic efficiency.

4.2 Competition Policy and IPR: Advocacy Role

50. Comments under the title "advocacy role" will have a general nature for the purpose of this roundtable and therefore can be considered to be applicable for the biotechnology industry as well. An interesting aspect of interface between competition policy and IPR is about what advocacy role a competition authority may have. As is known, advocacy is a very broad concept, and may cover many issues not directly related to the enforcement of competition rules. The possible role of competition authority (if any) in designing a proper IPR system in the country can be associated with its advocacy role. Advocacy may be based on either a direct clause or legal rules or else the sprit of competition law and policy.

51. 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 of competition authorities. 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.

52. 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.

53. 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.

54. 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, the 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.

A Competition Authority has to respect the distinction between the existence and exercise of the patent right. The above-mentioned roles for a competition authority might further complicate the line in between. The primary expertise of competition authority is not related to the process of granting patents and there is no point in its allocating its limited resources in order to have an expertise with regard to the patent process. Therefore, the competition authority should avoid any direct role in the process of patent granting.

55. 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 fulfil 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.

56. With regard to its advocacy role, however, Competition Authority is 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.

57. As is known, Competition Authorities have a good deal of data regarding the markets. Data Competition Authorities have 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. Despite this fact, the patent offices might still exploit the flexibility allowed by TRIPS, and probably available within their patent laws.

58. An important area of cooperation is related to the problem of anticommons. This problem cannot be solved by Competition Authorities alone. And also Patent Offices might fail to deal with this problem adequately via the resources within their reach. Therefore, it is important to deal with this problem by the cooperation of patent office with the competition authorities.

4.3 Competition Policy and IPR: Competition Enforcement Issues

4.3.1. General Overview

59. The Turkish Competition Act does not contain any clause directly dealing with IPR cases. And there is no clause which excludes IPR issues from the application of competition rules. Therefore, the existing competition rules are applicable to deal with the anticompetitive practices related to IPR.

60. Article 4 of the Turkish Competition Act, which aims at preventing the distortion of competition because of the agreements or concerted practices among undertakings or decisions of associations of undertakings preventing, restricting or distorting competition within the markets for goods and services, and article 6 of the same Act which aims at preventing the abuse of dominant position by undertakings holding dominant position in the relevant markets are parallel with the articles 81 and 82, respectively, of the Rome Treaty. And article 7 aims at controlling the concentrations which create or strengthen the dominant position of one or more undertakings as a result of which, competition is significantly impeded in the market for goods and services. The Competition Board adopted a Communique on the Mergers and Acquisitions (No: 1997/1) which regulates the notification and evaluation of the concentrations. The concentration control system based on article 7 and

61. The Communiqué no: 1997/1, is in line with the Council Regulation of 4064/89 of the EC on the control of concentrations.

62. In addition to these substantial rules, the Act envisages an exemption system (article 5) based on certain conditions. Article 5 of the Act allows the Board to exempt an agreement, concerted practice or decision restricting competition from the provisions of article 4 subject to the existence of certain conditions and upon the application of the parties concerned, and authorises the Board to issue group exemption communiques for the agreements of a particular category.

63. Any anticompetitive practice of IPR can be prohibited and may be sanctioned under the Turkish Competition Act.

64. Up until today, the number of IPR related cases dealt with by the TCA is relatively limited. The existing case-law are related to whether to exempt or nor certain licensing and sub-contracting agreements. However, Some problems mentioned in the document for the preparation of this roundtable have not been considered as an issue in Turkey. The issues such as “anticommon problem” and “reach-through agreements” have not been dealt in any case by the TCA. Therefore, it is not possible to make a specific comment based on an experience. However, it is understood that these issues cannot be dealt with only on the basis of individual cases and rather they require the formation of a comprehensive policy to be followed by the TCA. In particular, the issue of “anticommon” seems to be important for Turkey, which strives for the development of its technology base. In other words, this problem might be an impediment to the innovation policy of Turkey.

65. Granting patent protection for inventions, Turkey has expected to exploit all benefits of IPR system. An important aspect as mentioned above is the dissemination of knowledge and contribution to the knowledge base of the country. If the problem of “anticommon” has the potential of significantly impeding the achievement of this objective, then it might be necessary to find out reasonable solutions to cure this problem. The biotechnology industry is very important for Turkey. In particular, the biotechnological

innovations in agricultural sector should be approach carefully, because agriculture has an important share in the Turkish economy. However, as is stated above, the TCA should be in cooperation with the Turkish Patent Institute to deal with this issue.

4.3.2 Exemption System

66. Exemption system is available within the Turkish Competition Act. At the moment, the TCA has not adopted a block exemption communique on certain licensing practices which might be anticompetitive. However, this should not be considered as a deficiency as there is the possibility of individual exemption.

67. The TCA has yet dealt with limited number of IPR related agreement for the purposes of exemption. These are licensing and sub-contracting agreements. When these decisions of the TCA are examined closely, it is seen that these cases are not sufficient to demonstrate the policy of the TCA regarding some vertical anticompetitive licensing practices, such as "grant back clauses", absolute territorial exclusivity, resale price maintenance and some horizontal licensing issues such as patent pools and cross licensing. However, here it is possible to refer to the principles of the EC Competition Law as an important source of guidance for the TCA[15].

68. Correspondingly, at the moment, there is no licensing agreement related to a biotechnological innovation, brought before the TCA for exemption purposes. Therefore, it is not possible to make a specific comment for this industry. On the other hand, the principles of the EC Competition Law in this specific area can be referred to. In addition to this, however, the general policy tendency of the TCA might shed some lights over the licensing practices regarding this industry.

69. As is known, Turkey is mainly a technology importing country. Therefore, when a licensing agreement is mentioned in any technology-intensive industry, it generally meant a technology transfer agreement with a foreign undertaking. The TCA, being aware of the role of the technology transfer for the Turkish economy, has followed an industry-friendly policy. By definition, the TCA has considered the transfer of technology itself an important development and benefit, which will be shared by consumers. In this context, the TCA does generally not obstruct the anticompetitive clauses within the agreements, which will introduce new technologies unless they have the potential of significantly restricting competition. Here, for the evaluation of these restrictive practices, the structure of the market in question is very important. If the market is concentrated, then the approach might be stricter. However, with regard to competitive markets, the approach might be flexible. In other words, the TCA has followed a case-by-case approach. Importantly as is stated before, in the evaluation of technology transfer agreements and sub-contracting agreements, which again bring technology, the EC competition law has provided the guiding principles for Turkish application. However, the TCA is well aware of the fact that the EC law is a supranational law with the purpose of strengthening the single market. Therefore, the TCA attach great importance on making a differentiation between the rules serving the EC's general purposes and the rules serving for the protection of competition process.

4.3.3 Research and Development Agreements Between the Competitors

70. As the biotechnology industry requires a great amount of capital which may not be afforded by a single firm, the firms might need a cooperation for the purposes of R&D studies. Being aware of the importance of such cooperation, the TCA adopted an important Communiqué on "Research and Development Agreements" No:2003/2, which determines the conditions of exemption for R&D agreements between competitors. The Communiqué adopted by the TCA has an important role in creating legal certainty with regard to joint R&D activities between the competitors. Agreements whose subject are research and development (R&D) studies, and the joint use of R&D results by the participation of more than one undertaking often increase the speed of dissemination of technical information between parties,

prevent the concurrence of R&D studies to the same end, and lead to new developments through the mutual exchange of complementary technical information. The contribution of such agreements to technological and economic development arises particularly when there exist the launching of new products in a market and the implementation of advanced production techniques. Owing to the spread and efficiency of R&D, it is expected that consumers would benefit from the market entry of new or developed products or services and/or price falls which occur as a result of new or developed production techniques. The acquisition of the expected benefit in terms of parties and consumers may sometimes be possible via certain limitations of competition. However, not limiting competition more than what is compulsory is an important condition for being able to obtain the targeted goals and sustain economic efficiency. Therefore, it is required to determine limitations in the said agreements, which may mean the infringement of competition rules.

71. The types of agreements to fall under block exemption are specified in article 2 of the Communiqué. Those agreements which do not encompass industrial practice, and which concern jointly conducting research studies or jointly developing research results are usually not caught by article 4 of the Act No: 4054. However, in some cases, for instance in the event that parties agree not to make R&D in the same area, the said agreements are included in the relevant articles of this Communiqué, since they may be caught by article 4 of the Act.

72. On the other hand, agreements which encompass the joint use of R&D results often involve competition-limiting provisions and are caught by article 4 of the Act as they provide parties with the opportunity of jointly determining how to produce developed products, or how to apply developed production processes, and how to use intellectual rights or know-how. Due to the fact that cooperation between parties is extended to the stage of industrial practice, block exemption granted to such agreements which also involve the joint use of results is limited to five years, commencing from the date of initial launching, in a market within the borders of the Turkish Republic, of products which are the subject of agreement, or products produced by employing production techniques which are the subject of agreement.

73. The joint use of results may be evaluated as a natural consequence of an R&D activity. In order to be able to obtain the goals and benefits expected from such agreements, and in order for undertakings to be able to benefit from the exemption regime, this joint use should be related to products and production processes which are the subject of R&D. Those developments achieved within the framework of agreements that have another fundamental goal such as licence of intellectual rights, joint production or specialization and that only contain subsidiary provisions concerning R&D, rather than within the framework of an R&D program may not be accepted as the joint use of R&D results. Agreements involving the joint sale of products or production techniques which are the subject of agreement are also excluded from the block exemption granted by this Communiqué.

74. When the likelihood is taken into account that cooperation between parties may become not caught by an agreement aimed at R&D, there emerges the obligation to clearly define the goals of the said agreement, and the area where research and development studies would be performed. In case the scope, goals and study areas of an agreement are ambiguous, the said agreement shall become not caught by block exemption.

75. With this Communique, it is intended that besides an effective protection of competition, legal hesitations of undertakings which engage in R&D cooperation be relieved. It gains importance that in practices and regulations aimed at the realisation of these goals, an administrative supervision as simple as possible and a legal framework as clear as possible be ensured. Therefore, in this Communique, instead of adopting the approach of also including seemingly reasonable limitations of competition (white list), the approach of only including necessary prerequisites for enabling undertakings to benefit from a block exemption, and limitations of competition which shall render an agreement not caught by a block

exemption (blacklist) has been adopted. In this manner, it would be partially possible to preclude that certain undertakings engaged in cooperation in particular issues consider provisions as to limitations of competition under block exemption as the elements to be present in an agreement, thus precluding that sometimes parties involve in agreements obligations limiting competition more than what is needed. Determining those limitations which may not be deemed reasonable in terms of competition law, and granting freedom to undertakings in other arrangements aimed at cooperation are also compatible with the recent approach that priority and weight should be given to the assessment of economic effects that agreements between undertakings would create on the relevant market. Within this framework, listed in article 6 are the cases which render agreements of the types mentioned in the Communiqué not caught by block exemption.

4.3.4 Refusals to Deal and Compulsory Licensing

Article 31 of TRIPS

76. As is known, a compulsory license is an involuntary agreement between a willing investor and an unwilling innovator imposed and enforced by the state. Article 31 of the TRIPS Agreement has publicly recognized the option of compulsory licensing for the Member countries under some certain conditions and limitations. This represents maybe the most important flexibility introduced by the TRIPS Agreement as it significantly reduces the monopoly power of the right-holder over a certain patent. Under article 31, compulsory licenses are granted on the grounds of public interest, dependency, and insufficient exploitation of the patent or to remedy anticompetitive practices.

77. However, the application of compulsory licensing is one of the most controversial issues under competition law. It can be considered as a significant intervention into the patent protection. Being an industry sensitive to strong patent protection, the biotechnology might be significantly influenced by this tool.

Compulsory Licensing in Turkish Patent Decree Law

78. Turkish Patent Decree Law has a chapter on "compulsory licensing". The chapter 7 section 1 envisages the conditions for compulsory licensing. Article 99 states that " Compulsory license is (to be) granted where no offer for licensing offer has been made and where any one of the following situations/conditions materialises:

1. Failure to put to use/work the patented invention in accordance with article 96;

2. Dependency of subject matter of patents as mentioned in article 79.

3. On grounds of public interest as mentioned in article 103.

79. When examined closely, the system of compulsory licensing introduced in Turkish Patent Decree is in line with the European Patent Convention and the TRIPS. Therefore, it could be argued that the compulsory licensing as envisaged within the Patent Decree Law might be solution to curb the monopoly of patent holder over the innovation in question. However, it should be kept in mind that the application of this tool under Patent Law is subject to certain limitations.

80. However, the Patent Law Decree has a specific article (article 93) on abuse of competition. Article 93 is as follows: "Where a patentee commits an act in violation of the general provisions on unfair competition while putting his patent (application) to use, the court may condemn the patentee to offer his patent for licensing."

81. The meaning of "unfair competition" is generally interpreted as anticompetitive practices falling under competition laws. Article 93 enshrined within the Patent Decree Law can be regarded as an instrument which can be used against some unfair competition practices. However, It is important to stress on the fact that what is falling under competition law is mainly a business of competition authority. At the moment it is not clear how to apply the article 93. At least it could be argued that the existence of article 93 does not rule out the application of competition rules. Rather it is possible to regard the competition rules as giving more discretion in deciding whether it is suitable to apply as remedy a compulsory licensing.

Refusals to License and Compulsory Licensing under the Turkish Competition Law

82. Refusal to license is a very sensitive issue under competition law and therefore it might be useful to examine this issue in further detail in compare to other anticompetitive practices related to IPR. The main issue is that the acceptance of a refusal to deal as an abuse cause an encroachment with the specific subject matter protected under Patent Law. As is stated before, what is protected by the Patent Law is the existence of IPR, not the exercise of them. This distinction is very important in dealing with anticompetitive issues. And overzealous application of competition rules might distort this line.

83. Generally the refusals to license is an issue related to abuse of dominant position. Therefore- it is important not to forget that an undertaking which owns a patent or other intellectual property right is not necessarily in a dominant position and does not necessarily have market power, because the product or process to which the right applies may not constitute a market separate from other products. In other words, the patented product of an undertaking might be in fierce competition with the substitute patented products of competitors. Therefore the proposition of "patent grants monopoly over the right" should not be automatically associated with a situation of monopoly under competition law.

84. The Turkish Competition Act does not directly introduce an infringement such as refusal to license and accordingly, a remedy such as compulsory licensing. However, article 6 of the Turkish Competition Act prohibits abuse of dominant position and the list of abuse examples is not exhaustive. Therefore, even if the refusal to licence is not counted directly, it is still possible to consider it as an abuse and importantly the competition authority may decide on a compulsory licensing to cure the problem.

Compulsory Licensing under the EC Competition Law

85. Here it is important to summarise the EC case-law on compulsory licensing under article 82, as Turkey has followed the principles established within the EC competition law. The issue of compulsory licensing has been handled via the case-law on refusal to deal or supply (refusal to license) as an example of abuse of dominant position under the EC competition law.

86. The origin of compulsory licensing in the EC competition law can be founded in the case-law on refusal to supply. However, the "refusal to deal" as an example of abuse, is not mentioned in the list provided by article 82. And it has therefore developed as a product of case-law, based on the judgments of the ECJ and CFI. There are two important cases in the EC competition law, which have established the basic principles regarding the refusal to deal by dominant undertakings. The most prominent of these is *Commercial Solvents*[16], which was decided by the ECJ in 1974. *Commercial Solvents* involved a classic market-leveraging situation. In *United Brands*[17], the ECJ dealt with a refusal to deal in the vertical context. According to the principle accepted in the *Commercial Solvents*, it is an infringement of article 82 for an undertaking in a dominant position to refuse to supply a competitor in a downstream market, where the effect of doing so would be to eliminate all competition in the downstream market. According to the principle accepted by the ECJ in the *United Brands*, it is recognized that dominant undertakings are under a positive duty to sell to a long-standing customer unless objective reasons justify the decision not to. In

other words, a dominant undertaking is accepted to be under a general duty to deal with its long-standing customers and cannot stop to deal unless it has an objective justification.

87. These principles together constitute the basis of the case-law, which has been developed by later decisions of the ECJ and CFI. In particular the principle accepted in Commercial Solvent has become the basis for the emergence of an essential facilities doctrine in EC competition law[18]. The issue of compulsory licensing has been since Magill case considered associated with the doctrine of essential facilities[19].

88. According to the essential facilities doctrine; a company which controls facilities which are essential for another market, abuses its dominant position, where without objective justification, it refuses access to those facilities. This doctrine has been traced back to the formative years of the Sherman Act in the USA. It is considered by many commentators as being a significant restriction on the freedom of contract and private property of the undertakings. It is feared that it will chill the incentive to innovate and invest by the private undertakings. It therefore is argued that the doctrine should be disciplined by clear rules.

89. The doctrine holds that a company holding an important input for its competitor is under an obligation to deal with them. As an extension of this logic in the field of IPR, a company which own an IPR which is essential or indispensable for its other undertakings (probably its own competitors) to compete, can not without objective justification refuse to license and can be obliged under certain circumstances to license its competitors. In other words, there is a duty to compulsory licensing imposed on the undertaking in favour of its competitors. Here the abusive behaviour is the refusal to license by the undertaking (which is dominant) and the discovered remedy is compulsory licensing and forcing the undertaking to share its IPR with other undertakings.

90. The application of essential facilities doctrine in IPR cases, has been very controversial issue under EC competition law. The main problem is under what conditions a refusal to license can be considered as an abuse and in this context a final compulsory licensing be inferred as a remedy. In this context, it is important to see whether the rules governing the applications of article 82 with regard to refusal to license and compulsory licensing should be relax or strict to shift the balance between the IPR and competition law in favour of one against the other.

91. Regarding the issue, the basic principles in some landmark decisions of the European Courts can be examined to see the position of compulsory licensing under EC law. As is known, the ECJ established a basic rule that there must be a distinction between the existence and exercise of the IPR and competition rules can only intervene into the exercise of IPR. However, it is not an easy task to make this distinction in practice. With regard to this distinction the ECJ can be argued to be successful in delivering its judgment in Volvo v. Veng, by trying to make a clear distinction between the substance and exercise of IPR and as well as between the legitimate and abusive exercise of IPR. However, following the reasoning in *Volvo v. Veng*[20] the ECJ has established the so-called Magill doctrine, which states that only in exceptional circumstances, can the exercise of an IPR be a considered as abusive. The Magill doctrine requires the establishment of a three-part test to decide for a compulsory licensing (prevention of emergence of a new product, no justification for refusal and indispensability). The test in *Magill case*[21] has been strictly applied later in *Tierce Ladbroke*[22] and *Oscar Bronner*[23] cases by the European Courts.

92. In particular the constructive views of Advocate General in *Oscar Bronner* case are very important with regard to forcing a company to deal with its competitors. He focused on three points. First of all, the freedom of contract was not to be interfered with lightly[24]. Secondly, there should be a presumption in favour of allowing undertakings to retain facilities, which they have developed. If access to a facility, was allowed too easily, there would be no incentive for a competitor to develop competing facilities and also the incentives for a dominant undertaking would be reduced[25]. Thirdly, the Advocate

General stressed that the primary purpose of article 82 is to prevent distortion of competition and not to protect the position of particular competitors.[26]

93. Correspondingly, the ECJ probably influenced by the Advocate General's views has determined very strict rules to prevent discretionary interventions in particular where the asset in question is a result of high cost activities by private undertakings.

94. As seen by the case law concerning compulsory licensing, the ECJ seeks to achieve a balance between national laws that grant exclusive rights to protect creative effort and EC competition law that aims to prevent the abusive conduct via the use of such rights. It could be argued that while doing that, the Court do not attempt to establish a per se approach to stamp out abusive behaviour involving IPRs. As a result, the Court prefers to scrutinize the facts of each case and seek whether the circumstances of the case leads to prevention of competition. By stating that the circumstances should be exceptional, it assures the right owners that the competition authorities would not interfere with the use of IPRs unless a certain conduct contrary to article 82 occurred. However, it warns the dominant undertakings that use of IPRs in an abusive manner may lead even to require a compulsory license, which has always been considered as the basic means of exploitation.

95. However, it could be argued that all of the above-mentioned cases failed to bring exact rules to determine the possible justifications to be put forward by the proprietors of IPR. Despite some strict rules on what constitutes an abuse in the field of IPR, the lack of clear rules regarding the justifications seems to be a dark hole, which can shift the balance against the IPR. And considering the fact that each case has its own sui-generis conditions to be considered under article 82, it could be argued that the Commission and the undertakings who wants a free ride on their competitors assets can intentionally or negligently attempt to benefit this hole by interpreting it in their own favour.

96. The grant of intellectual property rights involves a balancing of the public interest in free competition with providing an incentive for research and development and for creativity. Any application of the compulsory licensing should not be inconsistent with the exclusivity, which is intended to preserve the incentive to create. If the article 82 could be used to impose a duty to license intellectual property rights to competitors on the market to which the rights primarily relate (if the firm is dominant, and the rights create a sufficiently important competitive advantage), it would have the most profound implications, both for competition law and for intellectual property.[27]

Compulsory Licensing under Turkish Competition Law

97. The status of compulsory licensing under the Turkish Competition Law is not clear enough. Up to now there is no direct decision by the Competition Board ordering a compulsory licensing. However, there are two cases in which the Competition Board ordered the undertaking with dominant position to deal with a view to remove entry barriers.

98. In the cases[28] on Newspapers distribution market, it ordered the incumbent distributors to allow their competitors to access to the final sale points, as it considered the access to this sale point as indispensable for competitors to survive. Here, the issue of access was evaluated on the basis of the criteria of essential facilities doctrine.

99. In Roaming Case, the Competition Board decided the refusal to deal by the two GSM operators with the newly entering IşTIM. The Turkish Competition Board has imposed administrative fines on Turkcell and Telsim for abusing their dominant position in the telecommunications market via refusing to comply with their obligation to make roaming agreements with Aria, the third leading Turkish mobile operator. The main reason of the Competition Board was the barrier to entry created by the refusal to deal.

And therefore, the Board ordered a compulsory dealing. Again in this case, the GSM infrastructure of the investigated undertakings was considered to be an essential facility by the competition board.

100. It is not possible to have a clear idea of how the TCA can treat the issue of the refusals to license. However, the existing decisions ordering to deal, can be argued to be parallel with the case-law in EC competition law (despite some consider the Roaming decision as a wrong application of the essential facilities doctrine). And therefore, it could be applied in a case of refusal to license. Whereas, in this application, it is important to bear in mind the need to establish a balance between the rationale of IPR protection and the objectives of competition law. This will probably be dependent on the main priorities of the competition policy to be determined by the TCA regarding the specific cases. It could be argued that the case-law of the EC which attempts to bring clear and strict rules (despite of the existence of some criticisms), can be a good example for the practice of the TCA.

Compulsory Licensing and Biotechnology

101. It is important for Competition Authorities to have a tool the compulsory licensing in order to apply where it is deemed necessary. However, an overjealous application of this tool might be in contradiction with the underlying objectives of competition policy in addition to those objectives of IPR. This is the case, in particular for industries, which require a significant level of investments. And generally in these industries the operating firm might face a significant risk of failing to make a marketable product following the investment. Therefore, patent protection in these industries is crucially important. Compulsory licensing as a tool to cure an anticompetitive practice might be considered as a significant intervention in the patent protection provided by the patent law. Therefore, it is important for Competition Authorities to be very careful in applying this tool. In this context, it can be argued that strict rules must govern the application of compulsory licensing as a remedy. Biotechnology like the pharmaceutical industry is one of these industries which are highly sensitive to patent protection.

102. Contrary to other industries, the biotechnology industry has some sui-generis characteristics, which should be examined very carefully by Competition Authorities before ordering compulsory licensing. First of all it should be accepted as a proposition that this industry is crucially important in meeting certain crucial needs of the society and will probably have an increasing importance as compared with many traditional industries. It has introduced revolutionary changes in many so-called traditional industries and turned them into technology-intensive industries. In particular, its increasing importance in pharmaceutical and agricultural industries makes the industry a priority area for investment purposes. This increasing importance of the industry should be accompanied with certain incentives for private undertakings in considering it as profitable area. And here again we see the situation of contract between the society and investors. Compulsory licensing might be a very harsh instrument in changing the balance in favour of the society. The short-run vision might hamper the long-run efficiency by both chilling the incentive to invest by the forced undertaking and by allowing a free ride for its competitors.

103. Actually the issue of chilling the incentive to innovate and allowing free ride is relevant for all industries. However, it should be regarded for industries such as biotechnology very carefully. Here it is important not to forget that the Patent Law envisages a compulsory licensing mechanism for certain situations. Therefore, the application of this tool under the competition policy should be considered in this perspective.

4.3.5 The Issue of Parallel Trade

104. The issue of parallel import is not directly mentioned in the document prepared for this roundtable. However, as with the case of pharmaceuticals, the biotechnology should be an industry of

focus in evaluation the parallel trade issue as an important dimension of interface between competition policy and IPR.

105. As is known, exhaustion regime is a concept closely related to the issue of parallel trade. According to the exhaustion regime (national, regional or international) adopted by the country, the issue of parallel trade becomes further clear. Exhaustion is one of the basic principles of IPR throughout the world. It means that once goods produced under the IPR are put on the market by the owner or with his consent, the owner is no longer allowed further to control the distribution of those goods. He has "exhausted" his distribution right by the first sale of the goods.

106. Here it might be useful to define different exhaustion regimes shortly. *National Exhaustion* means that the right is exhausted only with respect to the countries on the market of which the goods were put. If the applicable law recognises only national exhaustion, a parallel importer (i.e. an importer of genuine goods) would infringe the relevant Law in the country of importation. *International Exhaustion* means that the trade mark right is exhausted by putting the goods on any market anywhere in the world. If a jurisdiction international exhaustion, the right owners in the jurisdiction cannot stop parallel imports into the jurisdiction by reliance on IP rights alone. *Regional Exhaustion* means that the exhaustion relates only to a market that is broader than the purely national market but is nevertheless limited to specific countries as in the case of the European Union[29].

107. The issue of parallel trade was discussed during the negotiations for TRIPS. However, it was impossible to find out a solution, and therefore the resulting consensus was article 6 of TRIPS. Article 6 is titled as "exhaustion" and is follows:

> "*For the purposes of dispute settlement under this Agreement, subject to the provisions of articles 3 and 4 nothing in this Agreement shall be used to address the issue of the exhaustion of intellectual property rights.*"

108. Article 6 does not envisage any uniform standard for the issue of parallel import and leaves the countries free in formulating their policy of exhaustion.

109. Generally views regarding whether to allow parallel trade or not are based on strong arguments. Those advocating parallel trade, have the following arguments[30]:

- Virtues of free trade and elimination of artificial segmentation of the markets
- Parallel trade can harden some anticompetitive practices
- Parallel trade is not an IP but a competition policy issue

110. Those advocating a ban on parallel trade has the following arguments[31]:

- International Price Discrimination by IPR Holder increases the global welfare.
- Negative effects regarding piracy and counterfeiting might be endorsed.
- Free Riding can chill the incentive for investment by licensee where the goods are imported.
- Issues related to safety and consumer confusion might occur

111. With regard to the exhaustion regime followed by Turkey, article 76 of the Patent Decree Law adopted a national exhaustion regime. According to this article " *Rights conferred by a patent shall not extend to acts committed with regard to a product under patent protection after said product has been put to sale in Turkey by the right holder of the patent or with his consent.*" On the other hand, article 13 of Decree Law on Trademark has envisaged the same regime with the Patent Decree Law.

112. The exhaustion regime adopted for the IPR policy in Turkey is based on national exhaustion. Despite the fact that the regime is based on national exhaustion, the Court of Appeal in the *Police case*[32] held that the exhaustion regime for Turkey is based on international exhaustion and therefore, the right-holder can not prevent parallel import of the goods in question from abroad, as its right is exhausted. Correspondingly, the TCA followed the line of reasoning formed by the Court of Appeal, and decided in two cases[33] that any restrictive clause within the licensing agreement which restricts parallel import of the same brand were against the Turkish Competition Act. It could be argued that the adoption of line of reasoning of the Court of Appeal by the TCA is in line with the main spirit of competition law and the idea of protection of competitive process.

113. Exhaustion is an issue of intra-brand competition rather than competition between different brands. Therefore, it may be considered as a secondary issue as compared with competition which should be existing between competitors producing different brands. However, with regard to industries in which inter-brand competition is almost in absence, the issue of exhaustion regime and parallel trade might be relevant to be considered by Competition Authorities.

114. Considering the fact that most of the markets in Turkey is generally associated with the structure of oligopoly and/or monopoly, the preservation of intra-brand competition is very important in Turkey. Therefore, the policy-option chosen by the TCA regarding the parallel trade should be considered reasonable.

115. Despite this general policy option based on specific exhaustion regime, an important proposition might be that instead of choosing a certain policy, the regime must be based on specific market conditions of the industry in question. In other words, the market structure and the market conditions should be considered as a benchmark in choosing the right policy of exhaustion. In this regard, the responsible authority in deciding the exhaustion regime must be competition authorities. But the competition authorities can cooperate with the patent office in finding the optimal solution. However, the application of that proposition requires a significant effort of applied research by Competition Authorities conducting based on practical market data.

116. In particular with regard to biotechnology, case-by-case approach in choosing the exhaustion regime might be very useful. In this regard, together with specific conditions of the market, sui generis characteristics of the biotechnology industry (or sub-relevant markets within this industry) might be taken into consideration.

5. Conclusion

117. In a report on Technology Transfer Regulation prepared by the EC Commission, there is an important evaluation regarding the application of competition rules against the anticompetitive practices of IPR:

> "In reviewing the current rules and devising a future regime, account has to be taken of the fact that innovation in new products and technologies are the ultimate source of substantial and major competition over time. Undue emphasis on short-term allocative efficiency may therefore create a socially unfavourable trade-off between static and dynamic efficiency"[34]

118. The above excerpt from the EC Commission might be considered sufficient as being final words in explaining how to treat the interface of competition policy with IPR. Importantly, it is highly relevant for the application of competition rules regarding the interface for biotechnology industry.

NOTES

1. *McCALMAN, P. (2002) "The Doha Agenda and Intellectual Property Rights"*

   www.adb.org/Economics/pdf/doha/McCalman.pdf p.1

2. ALKER D. and F. HEIDHUES, "Farmers' Rights and Intellectual Property Rights- Reconciling Conflicting Concepts". www.uni-hohenheim.de/i3v/00068900/23347041.htm

3. Hall B. H. "The Global Nature of Intellectual Property: Discussion" http://emlab.berkeley.edu/users/bhhall/papers/BHH%20toronto501%20disc.pdf

   Toronto IP Conference 2001, p.1

4. For the purposes of this Article, the terms "inventive step" and "capable of industrial application" may be deemed by a Member to be synonymous with the terms "non-obvious" and "useful" respectively.

5. The "Convention on Biological Diversity (CBD)" was adopted at the 1992 Earth Summit in Rio de Janeiro, Brazil. This Convention sets out commitments for maintaining the world's ecological underpinnings as we go about the business of economic development. The Convention establishes three main goals: the conservation of biological diversity, the sustainable use of its components, and the fair and equitable sharing of the benefits from the use of genetic resources. http://www.biodiv.org/doc/publications/guide.asp

6. HIRSHHORN, R and J.LANGFORD, (2001) "Intellectual Property Rights in Biotechnology: The Economic Argument Prepared for The Canadian Biotechnology Advisory Committee Project Steering Committee on Intellectual Property and the Patenting of Higher Life Forms",

   http://cbac-cccb.ic.gc.ca/epic/internet/incbac-cccb.nsf/vwapj/EcoArgument_Hirshhorn_Langford_e.pdf/$FILE/EcoArgument_Hirshhorn_Langford_e.pdf p.14

7. LEHMAN, B. (2003) "The Pharmaceutical Industry and the Patent System"

   www.earthinstitute.columbia.edu/ cgsd/documents/lehman.pdf p.10

8. The information in section 4.1. regarding the IPR legislation in Turkey is compiled from the Web Page of the Turkish Patent Institute. www.turkpatent.gov.tr

9. Act of 1991 International Convention for the Protection of New Varieties of Plants.

10. Article 17 entitled "Farmer Privilege" of the Act. No:5042

11. Articles from 18 to 30 of the Act. No:5042

12. Charles River Associates (CRA) "The European Commission's draft Technology Transfer Block Exemption Regulation and Guidelines: A significant departure from accepted competition policy principles", CRA Competition Policy Discussion Papers No:8, March 2003, p.4-6

13. GRABOWSKI, H. (2002) "Patents, Innovation and Access to New Pharmaceuticals"

    www.dklevine.com/archive/grabow-patents_innov.pdf p.4-5

14. Centrafarm v. Sterling Drug, Case 15-74, [1974] ECR 1147.

15. Evaluating the licensing agreements, the TCA has taken into considerations the principles within the Regulation of 240/96 on "the Application of Article 85 (3) of the Treaty to Certain Categories of Technology Transfer Agreements". With regard to subcontracting agreements, which might have some

anticompetitive licensing clauses, "the Commission Notice of Subcontracting Agreements in relation to Article 85(1)" has been regarded significantly.

16. Commercial Solvents v. Commission, Cases 6, 7/73 [1974] ECR 223.

17. United Brands v. Commission, Case 27/76 [1978] ECR 207.

18. The European Commission stated its understanding of the general essential facility principle as follows: "….An undertaking which occupies a dominant position in the provision of an essential facility and itself uses that facility (*i.e.* a facility or infrastructure, without access to which competitors cannot provide services to their customers), and which refuses other companies access to that facility without objective justification or grants access to competitors only on terms less favorable than those which it gives its own services, infringes Article 86 if the other conditions of that Article are met. An undertaking in a dominant position may not discriminate in favor of its own activities in a related market. The owner of an essential facility which uses its power in one market in order to protect or strengthen its position in another related market, in particular, by refusing to grant access to a competitor, or by granting access on less favorable terms than those of its own services, and thus imposing a competitive disadvantage on its competitor, infringes Article 86.." (Commission's decision in *Sea Containers-Stena Sealink*, O.J. No L 15/8, 18 January, 1994.

19. For further information on essential facilities doctrine see the following resources: (i) ANDERMAN, S. (1998) EC Competition Law and Intellectual Property Rights, ,*Oxford: Clarendon Press*., (ii) ANDERMASN, S. (2001) "Microsoft in Europe", www.ftc.gov/opp/intellect/020522anderman.pdf (iii) FINE, F. "NDC/IMS: A Logical Application Of Essential Facilities Doctrine", www.ftc.gov/os/comments/intelpropertycomments/ finefrank.pdf, (iv) FORRERSTER, I.S. (2002) "Compulsory Licensing in Europe: A rare cure to aberrant intellectual property rights ?", www.whitecase.com/ article_competition_ip_law_forrester.html (v) FREDRIKSSON, S. (2001) "When the refusal to deal becomes an abuse of a dominant position: A study of how article 82 EC Treaty limits the freedom of action for undertakings in a dominant position", Faculty of Law, Lund University. www.kkv.se/epdf/uppsats2002_fredriksson.pdf, (v) LANG, J.T. (2002) "Compulsory Licensing of Intellectual Property in European Community Antitrust Law", for the Department of Justice/Federal Trade Commission Hearings, Washington D.C. www.ftc.gov/opp/intellect/020522langdoc.pdf

20. Case 238/87: Volvo v. Veng, [1988] E.C.R. 6211

21. Joined Cases C 241& 242/91P, RTE and ITP v. E.C. Commission: [1995] E.C.R. I-743

22. Case T-504/93, Tierce Ladbroke v. E.C. Commission: [1997] E.C.R. II

23. Oscar Bronner v. Mediaprint, Case C-7/97, [1998] ECR I-7791

24. Oscar Bronner v. Mediaprint, Case C-7/97, [1998] E.C.R. I-s.779, par.56

25. Oscar Bronner v. Mediaprint, Case C-7/97, [1998] E.C.R. I-s.779, par.57 and par.62

26. Oscar Bronner v. Mediaprint, Case C-7/97, [1998] E.C.R. I-s.779.

27. LANG, J.T. (2002) "Compulsory Licensing of Intellectual Property in European Community Antitrust Law", for the Department of Justice/Federal Trade Commission Hearings, Washington D.C.

www.ftc.gov/opp/intellect/020522langdoc.pdf p.22

28. Decision of the TCA, No: 00-26/292-162 and Date: 17.7.2000 (Biryay-I), and Decision of the TCA No: 00-49/529-291 and Date: 14.12.2001 (Biryay II)

29. HARWOOD, S. (1999) "Parallel imports and the exhaustion of rights: the world focus" Tibor Gold. www.shlegal.com/docs/parallelimports.pdf

30. For a detailed information regarding the views supporting parallel trade, see: FINK, C. (1999) "Entering the Jungle of Intellectual Property Rights: Exhaustion and Parallel Imports"

www1.worldbank.org/wbiep/trade/ c_papers/fink-parallel.pdf

31. For a detailed study on the views supporting a ban on parallel trade see: OECD, (2002) "Synthesis Report on Parallel Import" Joint Group on Trade and Competition. COM/DAFFE/COMP/TD(2002)18/FINAL

32. Decision of Court of Appeal 11. Legal Department, No: 1998/7996 -Date: 12.3.1999 (Yargıtay 11. Hukuk Dairesi'nin 12.3.1999 tarih ve 1998/7996 Esas sayılı kararı).

33. Sesa Decision of the TCA, No: 00-44/47257 and Date: 11.06.2000, Armada Decision of the TCA, No: 01-25/238-61 and Date: 29.5.2001 (Rekabet Kurulu Sesa Kararı ve Armada Kararı)

34. EC Commission (2001) "Evaluation Report on the Transfer of Technology Block Exemption Regulation No: 240/96" http://www.europa.eu.int/comm/competition/antitrust/technology_transfer/en.pdf , para:190, p.43