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The following communication was initially circulated as a non-paper by the delegation of Turkey at the Working Group's meeting on 28-29 September 1998. It is being issued now as a formal communication at the request of the Permanent Mission of Turkey.

Intellectual Property Rights and Competition

1. Intellectual property rights confer upon their owner exclusive rights (monopolistic in nature) to behave in a particular way. Competition laws, on the other hand, try to establish a functioning competitive environment by opposing monopolisation and the limitation of competition through monopoly power. Although competition laws do not challenge the existence of intellectual property rights, they may be in contradiction with such rights which confer on the licensors monopolistic rights in order to protect them against unfair practices. However, because both competition laws and intellectual property rights have in common the aims of promoting development and sustaining efficient exploitation of resources, it is accepted that competition may be regarded as subordinate to novelty and efficiency which cause monopolistic rights to be granted to licensors.
2. The exploitation of monopolistic rights granted to a licensor by the intellectual property law may be caught by competition law in cases of horizontal and vertical agreements, and abuse of dominant position.
3. Pooling agreements, whereby the firms decide to pool their patents and agree to refuse granting licences to third parties, may be given as an example of horizontal agreements. Via these agreements, the licensors may fix the time and quotas, thereby keeping new entrants out of the market, which may cause excessive profits. Although this seems to be infringing competition laws, it may contribute to the competition in the market when someone else in the market has a superior bargaining power. Moreover, licensing each other to utilise technology may enable the firms to use pieces of information which are complementary more efficiently. As a result, competition authorities should examine the clauses of such pooling agreements carefully and distinguish the detrimental and beneficial features so that a fair decision is given.
4. Similarly, trademark delimitation agreements may be deemed as not violating competition laws provided that their aim is to avoid confusion or conflict.
5. Vertical agreements are those by which the patentee grants a licence to another firm to manufacture the patented goods. It is customary that a royalty is required by the licensor in return for the right; however, a clause requiring the licensee to continue to pay royalties after the expiry date of the patent may be regarded as restraining competition, since such a clause may lead to the extension

of monopoly. Other vertical restraints which are considered as restraining competition, thus violating competition laws, are customer allocation, fixing maximum quantities, vertical price fixing, non-competition clauses, no-challenge clauses and export bans. The examples of vertical restraints that are regarded as permissible may be "field-of-use" restrictions, grant-back clauses on a non-exclusive basis, "tie-in" provisions which are necessary for quality control, and "most-favoured licensee" clauses.

6. The territorial protection granted through licence agreements is an important element in vertical restraints, and should be treated widely. The licensor may agree to grant an exclusive right to manufacture the patented goods in a particular territory, and to refrain from granting similar rights to others. Such a licence which is called a "sole" licence enables the licensor to reserve the right to produce the goods in the territory itself. In an "exclusive" manufacturing licence, the licensor also agrees not to produce the goods in the licensee's territory itself. Such rights may be extended to cover sole or exclusive selling rights as well. From the competition policy viewpoint, when the licensee would not take a licence and incur the risk and expense in producing the patented goods without protection from intra-band competition at the production level in its territory, then the licensor's decision to refrain from granting a licence to anyone else in the licensee's territory may not be caught by the competition law. However, this should be distinguished from absolute territorial protection on the licensee, where parallel imports by free riders are also prevented.

7. A licence granting absolute territorial protection violates competition laws, and is deemed as impermissible by competition authorities. In order to permit free riders to realise parallel imports, and avoid the licensors from ensuring absolute territorial protection, "the doctrine of exhaustion" is utilised as an effective instrument. The doctrine depends on the view that when a patented product is sold, the holder of the patent exhausts its rights in respect of them. For instance, a licensor may grant exclusive rights to two licensees in two different countries, and may require each to refrain from an active sales policy in the other's territory; however, neither the licensor nor the licensees can prevent a free rider to trade the patented goods across the licensees' territories because the sale of them exhausts the exclusive rights granted by the intellectual property law. This doctrine is also adopted in the Turkish statutory decrees on the Protection of Patent Rights, the Industrial Designs and Trademarks together with other competition-related arrangements about the term and scope of an intellectual property right, dependency of subject matters of patents, licensing exploitation of patents or trademarks and compulsory licensing of patents which make Turkish IPR legislation fully compatible with the international standards. As a result, in case the patent rights are granted to parties in different regions of Turkey, third parties cannot be prevented from trading the patented goods sold by the licensees.

8. Apart from the agreements mentioned above, the existence and protection of a trademark in a country may restrict competition by preventing a foreign company from exporting a product bearing the same trademark to the host country. In such a case, both the intellectual property right of the local firm on its trademark and the competition in respect of market access must be maintained. In order to make both products available in the market, providing the trademarks with distinguishing features could be preferred on behalf of consumers and the owners of the trademarks in question.

9. Furthermore, the use of different trademarks for the same products in different countries by the same owner must be carefully examined due to the risk of partitioning markets artificially.

10. The competition law provisions about the abuse of a dominant position may be applied if the intellectual property laws are implemented improperly; thus the mere existence of such rights cannot be caught by these provisions. For example, car manufacturers who have a patented design may prevent third parties from manufacturing or selling as a result of an exclusive right conferred by the intellectual property law and their refusal to grant a licence may not be interpreted as an abuse. However, when such a manufacturer refuses to supply spare parts to independent repairers in an

arbitrary manner, or charges unfair prices for them, then it may be guilty of abusing its dominant position. Other types of abuse are non-exploitation of the patent by the patentee itself together with the refusal to grant a licence to others to manufacture, charging excessive prices for the licence which may mean implicit refusal to grant a licence, a condition in the licence agreement to reserve the right to determine the price of the licence on its own without consulting the other parties, and inserting a provision in the licence agreement which ties the selling of the patented product to that of unpatented products with no reasonable cause.

11. The competition law of Turkey enables individual and group exemptions for the agreements which contain provisions restraining competition provided they satisfy some conditions stated in the law, such as contribution to the promotion of technical and economic progress, allowing customers a fair share of benefit, etc. As the Competition Board of Turkey formerly issued relevant communiqués on the group exemption concerning the exclusive distribution agreements, exclusive purchasing agreements and distribution and servicing agreements in relation to motor vehicles, it is also entitled to issue a group exemption communiqué on the exploitation of intellectual property rights. In this way, exclusive licensing agreements which contain clauses about territorial protection, export bans, prevention of active sales, etc., can be exempted from the application of related articles of the Turkish competition law.

12. Having mentioned the relationship between intellectual property rights and the competition law, Turkey believes that special attention should be paid to the "doctrine of exhaustion" which facilitates the realization of parallel imports among national markets, and alternative ways of supply within a single market in line with the aims of the competition law. Therefore, Turkey emphasises the importance of this doctrine once again, and proposes the adoption of it by all WTO Members, especially by those which do not possess competition law in their legal systems, in order to ensure freer trade, and a more competitive environment.
