

Turkey-U.S. Business Council, Session III

Topic 6.

Trade and investment in US-Turkey intellectual property (IP), information technology and communications (IT/C)

The US is the undisputed leader in information technology/communications and bio-pharmaceuticals.

Turkey, with its large, young, educated workforce, is one of the most promising markets for the industry's expansion of the digital economy in Europe, the CIS and the Middle East, with the potential to become a regional hub for US IT/C and other digitally-enabled companies. This potential, however, has not been fully utilized due to several impediments to growth in the sector in Turkey.

The Government of Turkey has made significant investments in its healthcare sector over the past decade, resulting in impressive improvements in health outcomes. However, it's ranking on key pharmaceutical and healthcare indicators still barely meets the global average. Turkey is the 16th largest pharmaceutical market in the world, but ranks only 35th in share of pharmaceutical R&D and manufacturing; it also lags compared to other similar sized markets in FDI for R&D and manufacturing.

To position itself as a major player in the life sciences, especially in pharmaceuticals, and to secure a greater share of global pharmaceutical investments, Turkey should consider recalibrating its policies especially in the area of intellectual property, a key component of the eco-system of innovation needed to create and support the life sciences industry.

The following are steps which the Turkish government could take to encourage increased bilateral trade and investment to develop Turkey's IP and IT/C capacity to host companies and operations that depend on internet and on other forms of advanced information and communications technologies:

1. IP and Data Protection

Draft "Law on Industrial Property"

As has been well-publicized, Turkey has suffered from a chronic weakness in the protection of intellectual property rights, particularly for trademarks, patents and industrial designs from the time these rights were first regulated by various decrees (*Kanun Hükmünde Kararname*) adopted in 1995.

Turkey has now prepared a single, comprehensive law to replace Turkey's patchwork of decrees governing the intellectual property. The final draft of the "Law on Industrial Property" was submitted on April 6, 2016 to the Turkish Parliament. The draft would substantially strengthen the protection of intellectual property rights in Turkey but also needs to address some outstanding important IP issues.

For example, while some of the draft provisions represent welcome advances in aligning Turkey's intellectual property laws and practices with the European Convention on Patents (EPC) and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), the draft law lacks provisions for patent term extensions to balance what appears to be intended as a Bolar exception. Article 87 may be interpreted as excluding from patent rights the right to exclude others from certain activity. One such activity is experimental acts related to registration of a medicine and relevant tests and experiments in Art. 87(4)(c). This cutback in the property right of a patent must be balanced with similar provisions that provide patent term extension (or supplemental certificate) for a patent term that was lost during the time that a medicine was undergoing testing and review for regulatory approval. This is a significant gap in Turkey's law, which we believe is the sole member of the European Patent Conventions (EPC) lacking such provisions.

Art. 87(4)(c) enumerates another apparent exclusion from the patent right related to medicines prepared without mass production. While certain exceptions from patent infringement may be available when they involve the treatment of patients, the current language, which refers to the activity of pharmacies rather than an individual pharmacist and suggests that products that are not under

"mass production" would be excluded, is ambiguous presents a risk that the provision will be used for circumventing the rights of patent holders.

Art. 135(2) suggests that for patents that are important to public health, the government is mandated to "make an offer" for the invention. Although this provision suggests that no compulsory license may be granted, but only an offer made, the provision is part of the section on compulsory licensing; this may create some ambiguity. Compulsory licensing for patents related to medicines should only be utilized as an extreme measure to address matters of public health urgencies or emergencies.

Article 153, which is directed to enforcement matters, lacks provisions to enable the granting of preliminary injunctions in advance of a final ruling to protect the rights of a patent holder.

Regulatory test data for biopharmaceuticals

In addition to the IP issues outlined above, Turkey should also take steps to improve protection of regulatory test data for biopharmaceuticals. For example, Turkey does not provide an effective mechanism for resolving patent disputes before the marketing of follow-on products. Further, Turkey inappropriately ties the regulatory data protection period (RDP) to the patent term, and the lack of RDP for combination products is still an unresolved issue. Finally, the combination of an RDP term that starts with first marketing authorization in the European Union and regulatory approvals delays results in a severe restriction on the actual period of RDP provided. Consistent with Turkey's international obligations, the RDP term should begin when a product receives marketing authorization in Turkey. Turkey should clarify in its laws that RDP applies to all medicines, including biologics.

Notice and Takedown Procedures for Copyright Infringement

The notice and takedown procedure for copyright infringement on the internet is vague and, in practice, not applied consistently. Although the Law on Intellectual and Artistic Works specifies the procedure for notice and takedown for online copyright infringement, intellectual property courts are often unfamiliar with these rules. Additionally, despite detailed rules in the Internet Law on notice and

takedown, judges do not uniformly consider infringement of intellectual property rights to be a violation of personal rights and, as a result, the rules are often not applied.

Implementing Regulations for New Data Protection Law

Turkey enacted its comprehensive Data Protection Law on April 7, 2016. Secondary implementing regulations are expected to be issued by April 7, 2017, and the Data Protection Authority established by October 7, 2016.

Recommendation:

The Council recommends that the Turkish government obtain input from leading players in multiple sectors, public institutions and academics during the regulation drafting process. We also recommend that the Turkish government take steps to ensure that the Data Protection Authority is formed as an independent, autonomous authority.

e-Commerce Law and Regulations

Turkey enacted the e-Commerce Law and adopted its secondary regulations in 2015. Although we welcome this development, some of the rules are not consistent with international standards and practices, such as those found in the EU and US. This creates barriers to entry into the Turkish market and to limits the ability of US companies to target Turkish consumers.

Turkish Collecting Societies

One of the major barriers to market entry for providers of online content in Turkey is the strong position of Turkish collecting societies, which have the exclusive right to collect royalties on behalf of artwork owners and publishers. Their bargaining position is especially apparent where internet content providers negotiate royalties for content delivered into Turkey.

2. Cross-Border Data Flows

The growth of the digital economy is being significantly shaped by the shift to cloud computing and the wealth of new applications and services now being delivered over the internet thanks to cloud computing technologies. For cloud computing to be technically and economically viable, a global data flow between data centers both inside and outside Turkey is essential. Recent legislative developments in Turkey have allowed businesses to move some of their operations onto the internet and to develop creative electronic services, such as electronic invoicing, electronic general assembly and executive board meetings, electronic bookkeeping, and new payment and e-money services. The potential of these services and Turkey's ability to maximize the benefit is currently limited as regulatory barriers in certain sectors in Turkey, such as payment systems, prevent effective management of international data flows.

3. High-Speed Broadband Access

The unequal access to and utilization of information and communication technologies is a significant problem in Turkey. To overcome this "digital divide", competition at network and service levels and targeted subsidies could help to connect underserved areas where the market fails to do so.

4. Tax and Customs

Permanent Establishments

Given the extraterritorial nature of IT/C services, the issue of taxable "permanent establishments" in Turkey is particularly important for the sector. Turkish law uses a "fixed place of business" standard which is not sufficiently flexible to handle the IT/C services, and leaves Turkey without an objective legal basis to assess PE questions for this sector. This approach creates an environment of uncertainty and leads to subjective enforcement that discourages new market entry. In addition, while Turkey's double tax treaties include the international standard definition of permanent establishment, Turkey uses a more expansive interpretation than most other countries.

VAT and SCT on Certain Electronic Devices

Equipment and broadband penetration are prerequisites to the development of a strong and vibrant IT/C sector. Broadband penetration can be boosted by increasing penetration rates for IT equipment such as computers and smart phones. Improved broadband penetration could help increase tax revenues from related services, and so would be a useful economic stimulus for Turkey. IT equipment is not included in the list of “reduced or zero-rated” goods and services under the Turkish VAT law. Expanding the reduced/zero-rated list to include this equipment would encourage IT investment and market entry in Turkey.

Recommendations:

The Council recommends that the Turkish government accelerate enactment of the draft "Law on Industrial Property", with the proposed revisions specified above, to establish a workable legal framework, provide a greater protection of intellectual and industrial property rights consistent with international standards with a few important changes to the law.

The Council recommends that the Turkish government seek to implement a regulatory data protection period (RDP) framework that implements its existing international commitments.

The Council also recommends increasing R&D on biopharmaceuticals, collaboration between US and Turkey should be increased by means of scientist exchange between countries. As hands-on-training and expert experience is very important in R&D in bio-pharmaceuticals, Turkish scientists should spend time in US companies for hands-on-training to increase their know-how and US scientists should be hosted in Turkish companies to share their experience in biopharmaceutical production. Cross-collaboration between US and Turkey and developing new biopharmaceuticals should also be supported.

The Council recommends that the Turkish government establish clear and comprehensive rules for online copyright infringement remedies, and educate judges on the proper application of these rules.

The Council recommends that the Turkish government align its e-commerce rules with international standards.

The Council recommends that the Turkish government limit the right of Turkish collecting societies to negotiate royalties for the online use, sale and distribution of content and, specifically, that collecting societies be required to set royalties on non-discriminatory terms and publish the royalties charged.

The Council recommends that the regulatory barriers to the international transfer of data and its storage be removed to support the development and use of cloud computing services in Turkey and to enable Turkey to become a hub for not only the provision of such services but also for business operations using these services.

The Council recommends that the Turkish government create tools to promote further investment in Turkey's next-generation "backbone" and access communications networks with national and regional tax incentives and exemptions, at least at the early stages of operation.

The Council recommends that the Turkish government adopt legislative changes to provide an internationally accepted objective standard for assessing the existence of PEs for all companies, including those in the IT/C sector, that it adheres more strictly to OECD international standards of interpretation, and that it adopt clear objective guidance on the attribution of profits to PEs consistent with these standards. The Council also recommends that the Turkish government continue and expand local incentives available to all companies to facilitate development of intellectual property and technology skills in the Turkish market.

The Council recommends that the Turkish government add IT equipment such as computers and smart phones to the list of reduced or zero-rated CAT and SCT goods.