

# Interface between competition law and intellectual property licences in Iran

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*The need to maintain a competitive environment in the market prevents intellectual property owners from committing anticompetitive conducts. Such conducts, whether unilateral or bilateral, have been prohibited by Iranian law. The core Iranian antitrust rules of relevance to intellectual property licences are, essentially, based on articles 101 and 102 of the Treaty on the Functioning of the European Union. In addition there is a need to review these rules in relation to articles 1 and 2 of the Sherman Act in the United States, as the leading country in regulating competition. Given the religious nature of Iranian law, it is necessary to study the opinions stated by Imamia jurists in order to interpret the Iranian competition rules and find solutions where they are silent. The same is true for Iranian general rules on contracts. The results of this article show that the Iranian competition rules regulating intellectual property licences have strengths, such as their being updated, and weaknesses, for example in being too severe, which must be taken into consideration in their probable revision by the Iranian legislator.*

**Keywords:** *competition, intellectual property licence, restrictive clauses, Iranian law*

## 1 INTRODUCTION

The interface between intellectual property and competition law in Iran is quite a new issue, since these two bodies of law, especially the latter, are rather young. The first Iranian law specifically dealing with antitrust matters is called the Act on the Implementation of General Principles of Article 44 of the Constitution, passed in 2008.<sup>1</sup> A number of reasons led the Iranian legislator to enact this law, among which are the inefficiency of state directed economy, the urgent need for privatization, the government's tendency to open the doors of the country to foreign investors and the inevitable process of joining the WTO.<sup>2</sup> In Iran the following IP rights are accorded protection: patents, industrial designs, trademarks and literary and artistic rights.

Intellectual property laws were enacted in Iran many years before the 2008 Act. The first Iranian law on industrial property was passed in 1931. This law was repealed by a modern law called the Act on the Registration of Inventions, Industrial Designs and Trademarks, passed in 2007.<sup>3</sup> Currently, a bill on industrial property is under discussion to replace the 2007 Act, which covers new issues such as trade secrets and unfair competition not dealt with in that act. In the field of literary and artistic rights the Act for the Protection of Authors, Composers and Artists' Rights was enacted in 1970. But

1. Hereinafter the 2008 Act.
2. Behnam Ghaffari Farsani, *Competition Law and its Civil Remedies* (Mizan Publications, Tehran 2014) 72.
3. Hereinafter the 2007 Act.

this act has not dealt with the competition aspects of intellectual property. However, the 2008 Act has a broad scope and is applicable to all types of intellectual property rights. It appears that the Iranian legislator has preferred to pass an omnibus law to deal with all competition law aspects of economic activities including those related to intellectual property rights.

Chapter 9 the 2008 Act is entitled 'Facilitation of competition and prevention of monopoly'. The chapter contains 41 articles dealing with different aspects of competition law. Among these articles, article 51 deals specifically with antitrust regulation of intellectual property rights in general. This article makes reference to articles 44 to 48 of the 2008 Act, of which articles 44 and 45 concern, respectively, bilateral and unilateral anticompetitive practices. Article 46 prohibits anticompetitive acts by directors and other personnel of companies and articles 47 and 48 prohibit anticompetitive acquisitions and mergers. It is clear that only articles 44 and 45 of the 2008 Act are of relevance in this paper, which concerns antitrust aspects of intellectual property licences.

A comparison of articles 44 and 45 of the 2008 Act and articles 101 and 102 of the Treaty on the Functioning of European Union<sup>4</sup> shows that the Iranian legislator has attempted to imitate its European counterpart in establishing a competition law framework for agreements and unilateral acts in the market. Moreover, the above-mentioned articles in the 2008 Act are similar to articles 1 and 2 of the Sherman Act in the United States. Consequently, competition law of the European Union and antitrust law of the United States will be studied in this article as much as necessary in order to have a better understanding of Iranian law in this field. As an Islamic system, the Iranian law is rooted in Imamia jurisprudence, and, according to principle 4 of the Iranian Constitution, all laws must comply with Islamic criteria. Therefore, a review of opinions declared by Imamia jurists<sup>5</sup> will facilitate and enrich our study. Imamia or Twelver is the largest branch of Shia. Imamia's belief is that after the Holy Prophet Mohammad (peace be upon him and his family), the leadership of society lies with the Imam who is appointed by Allah. Imamia believe Ali (peace be upon him and his family) is the successor of the Holy Prophet Mohammad (peace be upon him and his family) and the first Imam. They believe in twelve Imams, of whom the twelfth is Mahdi who is alive and lives in occultation. In the Age of Occultation, Imamia jurists are the Imams' successors. In order to infer theological, jurisprudential, ethical issues, etc. they refer to four sources: the Holy Quran; the Prophet's traditions; the intellect; and Ijma (consensus by Imamia jurists). These sources constitute the basis for inferring legal issues and rules.

In addition, given the fact that antitrust regulation of intellectual property licences is simultaneously related to contract law and property law, these bodies of Iranian law must be studied as well. Such a study has a complementary effect: when the 2008 Act has not provided a solution for a specific problem, this failure must, inevitably, be compensated by reference to Iranian contract law and property law. It should be noted that in addition to ex-post competition law, ex-ante competition regulation is also adopted in some sectors. For instance, the Communications Regulatory Authority (CRA) is in charge of telecommunications in Iran. Under article 6(1) of its charter, entering the telecommunications market is subject to the granting of a licence by the CRA. Moreover, according to article 6(4) of the same document, the CRA is the authority to determine the price of relevant services as well as their minimum and maximum prices in order to ensure safe competition.

4. Hereinafter TFEU.

5. Under principle 12 of the Iranian Constitution: 'The official religion of Iran is Islam and the Twelver Ja'fari school of [shi'i] religion'.

The author of this article intends to answer a group of essential questions regarding the antitrust regulation of intellectual property licences in Iran. First, what kind of competition rules are applied to intellectual property licences, what are the core antitrust provisions in Iranian law, and which conducts are prohibited by those provisions? Second, what remedies and sanctions are available in Iranian law for anticompetitive practices? Third, in comparison to the laws of the European Union and the United States, to what extent have these provisions met the purposes pursued by the Iranian legislator?

## 2 APPLICATION OF NORMAL COMPETITION RULES TO INTELLECTUAL PROPERTY LICENCES

As already mentioned, there is a specific provision related to the general exploitation of intellectual property in the 2008 Act. Article 51 thereof states as follows:

Rights and exclusive privileges derived from intellectual property shall not violate articles 44 to 48 of this Act ...

As the text shows, the same competition rules applied to other property rights are applicable to intellectual property rights. In other words, the special characteristics of intellectual property rights such as ease of their misappropriation do not require the application of fundamental different principles.<sup>6</sup> In addition, the article has a broad scope and covers all kinds of exploitation of intellectual property rights including their licensing. In fact, the article establishes a general ban on anticompetitive exploitation of intellectual property rights. The articles mentioned in article 51 are the core competition provisions in the Iranian legal system. Of those, as was mentioned, only articles 44 and 45 are of importance for this article. Article 44 has prohibited bilateral or multilateral anticompetitive conducts. Article 45 deals, principally, with unilateral conducts.<sup>7</sup> These main antitrust provisions will be discussed respectively in detail below, after an introduction to the competition authority in Iran.

## 3 THE COMPETITION COUNCIL

Under article 62 of the 2008 Act, the Competition Council is the body with exclusive authority to deal with anticompetitive practices in Iran. According to the same article, the Competition Council is obliged, according to its own discretion at any person's request, to initiate an investigation regarding anticompetitive practices and make a decision on the basis of article 61 of the 2008 Act. An appellate authority has been established in article 63 of the 2008 Act to hear appeals from decisions of the Competition Council. The Council may act as plaintiff in all crimes prescribed by the 2008 Act and take action before the competent court for damages suffered by public.<sup>8</sup>

6. U.S. Department of Justice and the Federal Trade Commission, *Antitrust Guidelines for the Licensing of Intellectual Property* (2017) 3 <<https://www.justice.gov/atr/IPguidelines/download>> accessed 31 July 2017.

7. The author used the adverb principally to indicate that article 45 has mentioned a kind of collective conduct as well. For more information see below.

8. Article 67 of the 2008 Act.

## 4 THE CORE ANTITRUST PROVISIONS IN IRAN

### 4.1 Article 44 of the 2008 Act

Article 44 of the 2008 Act (hereinafter article 44) is based on article 101 TFEU and establishes a general antitrust ban. In addition, it has enumerated seven types of conducts as anticompetitive. Unlike article 101 TFEU, the examples included in article 44 are intended to be exhaustive. As another difference, while article 101 TFEU contains an exemption clause, i.e. article 101(3), to exclude certain practices from its scope of application, article 44 has not provided for such exemption. The following is the text of article 44:

Any conspiracy in the form of [a] contract, agreement or understanding (in writing, electronic, oral or by practice) among persons whose consequence is one or more of the following, in a way that its result may be disruption of competition is prohibited:

1. Fixing, directly or indirectly, the purchase or sale prices of goods or services and their determination method in the market;
2. Restricting or controlling the volume of production, purchase or sale of goods or services in the market;
3. Imposing discriminatory conditions on contracting parties in equivalent transactions;
4. Forcing the contracting party to conclude [a] contract with third parties or imposing contract conditions on them;
5. Conditioning the conclusion of [a] contract on the acceptance by other parties of complementary obligations which, according to the commercial usage, are not related to the subject matter of [the] contract;
6. Dividing or allocating the goods or services market between two or more persons;
7. Restricting the access of persons outside the contract, agreement or understanding to the market.

### 4.2 Conditions of applicability of article 44

For a conduct to fall within the scope of article 44 there are two main conditions: conspiracy and disruption of competition.

#### 4.2.1 Conspiracy

First of all, there must be two or more persons and a meeting of minds to commit conspiracy. Obviously, contracts including licence agreements can be the most significant example of anticompetitive conduct.<sup>9</sup> Yet, the Iranian legislator has taken into account the possibility of anticompetitive practices which may not be classified as contracts and applied the general term of conspiracy, and mentioned agreement and understanding in addition to contract as examples. Article 101 TFEU has used the words agreements, decisions and concerted practices. The latter has not been mentioned by article 44. The terms contract, combination and conspiracy have been applied by the American legislator in section 1 of the Sherman Act. Article 44 has not restricted multilateral anticompetitive behaviour to a specific form, and such behaviour may take any form, including written, electronic, oral and even practical conspiracy. The conspiracy must be between two or more persons. 'Persons'

9. Ghaffari Farsani (n 2) 185.

includes both natural and legal persons.<sup>10</sup> Section 1 of the Sherman Act has used the same word. Article 101 TFEU has used the term undertaking which 'describes any entity carrying out economic activity, whether an individual inventor or a company'.<sup>11</sup> From the perspective of Iranian contract law and Imamia jurisprudence, contracts with an illegal purpose are prohibited and void.<sup>12</sup> In fact, people are not allowed to help one another in committing an illegal act.<sup>13</sup> Agreements to restrict competition have an illegitimate purpose and are not valid. But, here the remedies provided for in article 51 of the 2008 Act are applicable and the agreements are not automatically void.

#### 4.2.2 Disruption of competition

As a second condition, the conspiracy must be: 'in a way that its result may be disruption of competition'. Chapter 9 of the 2008 Act is entitled 'Facilitation of competition and monopoly prevention'. Therefore, it is not surprising that the Iranian legislator has declared disruption of competition as a prerequisite of prohibited contracts. Competition is defined in article 1(11) as follows:

a situation in the market in which a number of independent manufacturers, purchasers and sellers operate to manufacture, purchase or sell goods or services in a way that none of the manufacturers, purchasers and sellers has the ability to determine the market price or there is no restriction for undertakings to enter or exit the market.

Disruption of competition is defined in article 1(20) of the 2008 Act as:

those acts which cause monopoly, Ihtikar,<sup>14</sup> corruption in the economy, harm to the public, concentration and circulation of wealth in the hands of certain groups, decline of skill and innovation in the society or foreign economic domination of the country.

Section 1 of the Sherman Act requires the practice to be in restraint of trade. Article 101 TFEU has forbidden agreements which affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market.

As is observed, the 2008 Act has used the term disruption of competition which has a broad meaning, while article 101 TFEU has applied three words, i.e. prevention, restriction or distortion of trade. Additionally, under article 101 TFEU the object or effect of a practice is important. Therefore, article 101 TFEU prohibits two sets of practices: those restricting competition by object and those restricting competition

10. Sayyed Hossein Safaei and Sayyed Morteza Ghasem Zade, *Civil Law, Persons and Persons under Legal Incapacity* (Samt Publications, Tehran 2010) 7.

11. AM Baumgartner, *Antitrust Issues in Technology Transfer: A Comparative Legal Analysis of Patent Licenses in the EU and the U.S.*, Stanford – Vienna TTLF Working Papers No. 18 [2013] 15 <<https://law.stanford.edu/publications/antitrust-issues-in-technology-transfer-a-comparative-legal-analysis-of-patent-licenses-in-the-eu-and-the-u-s/>>.

12. Mahdi Shahidi, *Civil Law 3 Obligations* (Majd Publications, Tehran 2007) 58; Sayyed Hossein Safaei, *Preliminary Courses of Civil Law* (Mizan Publications, Tehran 2002) 139.

13. Mir Abd Alfattah Hosseini Maraghi, *Al Anvin Alfeghhia* (Office for Islamic Publications, Qom 1996) 565; Sayyed Hassan Mousavi Bojnourdi, *Alghavaed Akfeghhia* (Alhadi Publications, Qom 1998) 359; Mola Ahmad Naraghi, *Avaed Alayam* (Office for Islamic Propaganda, Qom 1996) 75.

14. This is the act of storing essential goods needed by the public (which will be discussed later in this article).

by effect, while article 44 has concentrated on the result of a practice which appears to include both types of practices.

### 4.3 The rule of reason in article 44

Undoubtedly, the rule of reason has been intended in article 44 by the Iranian legislator. Mere restriction is not a reason for prohibition; disruption of competition must be identified as well. In addition, according to article 51 of the 2008 Act ‘Rights and exclusive privileges derived from intellectual property’ – including the right to grant licences – shall not violate the antitrust provisions of the 2008 Act; otherwise, specific remedies would be applicable. These facts show that the Iranian legislator is aware of pro-competitive effects of licensing agreements. Benefits – including pro-competitive effects – of licence agreements have been approved by Iranian authors.<sup>15</sup> Under the European Union Technology Transfer Guidelines: ‘[e]ven restrictive licence agreements often also produce pro-competitive effects which may outweigh their anti-competitive effects’.<sup>16</sup> According to the American Antitrust Guidelines for the Licensing of Intellectual Property such restrictions ‘may serve procompetitive ends by allowing the licensor to exploit its property as efficiently and effectively as possible’.<sup>17</sup> Under the rule of reason as a method developed by US courts to capture unreasonable restraints, which applies to the vast majority of licensing restraints,<sup>18</sup> a number of factors must be taken into consideration:

the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable, as well as the history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, and the purpose or end sought to be attained.<sup>19</sup>

Therefore, the Competition Council must consider the specific facts of each case and compare the pro-competitive and anticompetitive economic effects of a conduct.<sup>20</sup> If the former prevail, the practice is legal. But where the anticompetitive effects of a conduct are more serious than its pro-competitive effects, the conduct will be declared illegal.

The rule of reason is consistent with Iranian general rules of contracts. Article 10 of the Iranian Civil Code recognizes private agreements between persons as valid so long as they are not against law. Therefore, if the parties to a licence agreement are satisfied that a restraint is in their commercial benefits and the restraint is not in contradiction with the other competitors’ ability to operate freely in the market, there is no reason to condemn the restraint and the agreement in which it has been incorporated. Furthermore, the Iranian Civil Code has enumerated void conditions in contracts. Under article 232 of the Iranian Civil Code three types of conditions are void but do

15. Ibrahim Rahbari, *Law of Technology Transfer* (Samt Publications, Tehran 2013) 142–4; Rouh Allah Saberi *License Agreements* (Shahre Danesh Publications, Tehran 2008) 66–72.

16. Communication from the Commission Guidelines on the application of Article 101 of the Treaty on the Functioning of the European Union to technology transfer agreements (2014/C 89/03) (Technology Transfer Guidelines) [2014] OJ L 93/17 para 174.

17. U.S. Department of Justice and the Federal Trade Commission (n 6) 5.

18. Baumgartner (n 11) 132.

19. *Board of Trade of Chicago v United States*, 246 U.S. 238 (1918).

20. Mohammad Mahdi Hassan Pour, *Competition Law and License Agreements* (Majd Publications, Tehran 2017) 215.

not affect the rest of contract: impossible, useless and illegitimate conditions. An illegitimate condition is not only against the law but also against morality and public interests.<sup>21</sup> Article 233 of the same Code has listed two kinds of conditions which are void and make the whole contract void: a condition against the requirements of the contract and a condition with a subject matter unknown to the parties in such a way that this ignorance leads to ignorance of the subject matter of the contract. Consequently, only a few conditions are void. Additionally, according to article 223 of the Iranian Civil Code, 'every transaction concluded is presumed to be valid unless its invalidity is proven'. This is called *Asle Sehat* (prima facie validity of contracts). Therefore, if there is doubt as to the validity or invalidity of an agreement, this presumption applies<sup>22</sup> and the agreement shall be considered as valid.<sup>23</sup> This presumption is a legal means to establish the certainty and predictability of contractual relations in the society.

## 5 ARTICLE 45 THE 2008 ACT

Like article 44, article 45 the 2008 Act (hereinafter article 45) has declared a number of prohibited acts. The article states that 'the following acts which disrupt competition are prohibited'. Many acts have been listed as disrupting competition in article 45. While article 102 TFEU deals with abuse of dominance, such abuse is merely a part of the acts covered by article 45. Monopolizing or attempting to monopolize trade is prohibited and declared as a felony under article 1 of the Sherman Act. Such an attempt has not been dealt with in the 2008 Act nor has it been dealt with by article 102 TFEU. Article 45 has a broad scope and plenty of acts have been prohibited therein. This has been criticized by some Iranian authors on the basis that some of those acts do not belong to competition law.<sup>24</sup> For example, penetration pricing<sup>25</sup> and misleading statements<sup>26</sup> belong to unfair competition law, while the supply of non-standard goods or services<sup>27</sup> must be discussed under consumer law or standard laws.

The main anticompetitive acts which concern the exploitation of any property, including the licensing of intellectual property are as follows:

- (a) *Ihtikar* and refusal to deal<sup>28</sup>
- (b) Discriminatory pricing<sup>29</sup>
- (c) Applying discriminatory conditions<sup>30</sup>

21. Naser Katouzian, *Civil Law, v.3, General Rules of Contracts, Effects of Contract* (Sherkate Sahamie Enteshar, Tehran 1997) 172.

22. Mahdi Shahidi, *Formation of Contracts and Obligations* (Majd Publications, Tehran 2002) 188.

23. Shahide Sani, *Masalek Alafham v.3* (Institution for Islamic Instructions, Qom 1992) 268; Yousof Bin Ahmad Bahrani, *Alhadegh Alnazera v.19* (Islamic Publications Office, Qom 1984) 256; Sayyed Mohammad Javad Hosseini Ameli, *Meftah Alkarama v.16* (Islamic Publications Office, Qom 1998) 378; Mir Abd Alfattah Hosseini Maraghi (n 13); Mohammad Hassan Najafi, *Javaher Alkalam v.23* (House for revival of Arabic heritage, Beirut 1987) 197.

24. Ghaffari Farsani (n 2).

25. Article 45(d).

26. Article 45(e).

27. Article 45(g).

28. Article 45(a).

29. Article 45(b).

30. Article 45(c).

- (d) Compulsory purchase or sale<sup>31</sup>
- (e) Abuse of dominant economic position<sup>32</sup>
- (f) Limiting the resale price.<sup>33</sup>

Article 45, with its long list of prohibited acts, has been criticized by some Iranian authors as expanding the scope of illegal acts, which is a threat to fundamental principles of private law, especially in the field of contract law and property law converting freedom of contract and property rights into exceptions.<sup>34</sup>

### 5.1 Per se illegality in article 45

There are two different opinions regarding the prohibition declared in article 45. First, given the literal meaning of the first phrase of article 45, the Iranian legislator has presumed the anticompetitive effect of certain acts, i.e. they are per se illegal.<sup>35</sup> The literal interpretation conveys this idea: the legislator expressly prohibits certain acts since they disrupt competition; there is no doubt that the legislator has meant per se illegality. If this interpretation is accepted, prohibition would not depend upon identification of disruption, since the legislator has identified it before and assumed the acts as disruptive of competition.<sup>36</sup> Some authors advocate this opinion as being compatible with the development needs of Iran and argue that since Iran is an importing country of intellectual property, the legislator has preferred competition law and public law interests to intellectual property rights.<sup>37</sup> Still, other authors do not consider the acts listed by article 45 as being necessarily anticompetitive and prohibited and require an assessment of market position and effects of such acts.<sup>38</sup> Even an author believes per se illegality would destruct freedom of contract.<sup>39</sup> Theoretically, this idea is correct; but it is inconsistent with the plain text of article 45, which has expressly considered a group of practices as disrupting competition. The Iranian legislator is recommended to distinguish between different acts listed in article 45 and declare as per se illegal those which have evident negative effects on the market.

## 6 PARTIES EXEMPTED FROM ANTITRUST SCRUTINY

According to article 50 of the 2008 Act, retail sellers are exempted from the scope of that law. As will be mentioned, it would be better for the Iranian legislator to take into

31. Article 45(f).

32. Article 45(i).

33. Article 45(j).

34. Ghaffari Farsani (n 2) 179.

35. Mohammad Hassan Sadeghi Moghaddam and Behnam Ghaffari Farsani, 'The Soul of Competition Law (Comparative Study of Competition Law Objectives)' (2011) 73 *Legal Journal of Judiciary* 139.

36. Hassan Pour (n 20) 215.

37. Mohsen Sadeghi and Sadegh Shamshiri, 'Critique of Act on the Implementation of General Principles of Article 44 of the Constitution (Privatization Act) from an Intellectual Property Aspect' (2010) 33 *Law and Politics Study Journal* 162, 163.

38. Saeid Habiba and Mohammad Hadi Mirshamsi, 'The Status of Competition Law Rules in Industrial Property Assignment and License Agreements (Comparative Study of European Union and Iranian law)' (2009) 14 *Private Law* 61.

39. Hassan Pour (n 20) 217.

account the market shares of parties to licence agreements in order to provide safe harbours with respect to antitrust rules.

## 7 SELECTED ISSUES IN THE ANTITRUST REVIEW OF INTELLECTUAL PROPERTY LICENSES

### 7.1 Definition of market

Under article 1(1) of the 2008 Act ‘market’ is a geographical or virtual environment in which purchasers and sellers exchange similar or close substitute goods or services. Some authors consider this definition as inexact since even virtual transactions inevitably relate to a geographical area.<sup>40</sup> The definition of geographical market given by article 1(1)(l) Commission Regulation (EU) No 316/2014 of 21 March 2014 on the application of article 101(3) TFEU (hereinafter TTBER) confirms this argument:

the area in which the undertakings concerned are involved in the supply of and demand for products or the licensing of technology rights, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those areas.

Therefore, the elements of the relevant product market are a product and a geographic dimension.<sup>41</sup>

### 7.2 No market shares

Given the fact that intellectual property licences often promote innovation and enhance competition, ‘an antitrust safety zone is useful in order to provide some degree of certainty and thus to encourage such activity’.<sup>42</sup> As will be seen, in the European Union and the United States, such an exemption is based on the market shares of the parties to a given agreement. However, there is no market share threshold in Iran for the application of articles 44 and 45. Therefore, it seems that any undertaking with any individual or combined share in the market may be subject to these provisions. In other words, market shares of the parties to a licence agreement are of no importance in their antitrust dealing. The reason behind market shares is to exempt agreements whose parties are not in a position in the market to affect competition adversely. In fact, agreements of this type even if appearing anticompetitive, have no significant negative effect on the market. The only exemption provided for in the 2008 Act involves retailers. Such an exemption is not based on market shares. It is recommended that the Iranian legislator provide for a more reasonable exemption in the probable revision of the 2008 Act.

The criteria used in the European Union and the United States may guide the Iranian legislator in this regard. In the EU, article 101(3) TFEU declares the general ban inapplicable as to certain agreements and establishes a safe harbour for them. It is presumed in paragraph 10 TTBER that where the combined market share of competitors who are parties to a technology transfer agreement does not exceed 20 per cent and the agreement does not contain certain severely anticompetitive restrictions, such agreements ‘generally lead to an improvement in production or distribution and allow consumers

40. Ghaffari Farsani (n 2) 203.

41. Baumgartner (n 11) 65.

42. U.S. Department of Justice and the Federal Trade Commission (n 6) 24.

a fair share of the resulting benefits'. The same is true for agreements between non-competitors where the individual market share of each party does not exceed 30 per cent and the agreement does not contain severely anticompetitive restrictions.<sup>43</sup> In fact, such agreements can generally be presumed to fulfil the conditions of article 101(3) TFEU.<sup>44</sup> In the United States, the antitrust agencies will not normally challenge a restraint in an intellectual property licensing agreement if two conditions are present: '(1) the restraint is not facially anticompetitive and (2) the licensor and its licensees collectively account for no more than twenty percent of each relevant market significantly affected by the restraint'.<sup>45</sup>

### 7.3 Competitive relations

The 2008 Act does not distinguish between licence agreements whose parties are in a competitive relationship and agreements whose parties are not competitors. So, vertical agreements are treated in the same way as horizontal agreements. However, some authors believe that given the undeniable importance of the status of contracting parties in the supply chain and the type of their relationship, the Competition Council would have to distinguish between vertical and horizontal agreements.<sup>46</sup> It is recommended that the Iranian legislator take into account this significant issue in revising the said Act and explicitly distinguish between vertical and horizontal agreements.

### 7.4 Tying clauses

In the EU and US tying, in the context of intellectual property licences, 'refers to the practice of conditioning the license of one patent on the licensee's acceptance to license another technology from the licensor or another product of the licensor'.<sup>47</sup> Tying may have both pro-competitive and anticompetitive effects.<sup>48</sup> Article 101(1)(e) TFEU prohibits tying where the tied product, by its nature or according to commercial usage has no connection with the subject of contract. Such practice is prohibited by article 102(d) TFEU as abuse of dominant position. In the United States, the antitrust agencies would be likely to challenge a tying arrangement if three conditions are present: (1) market power of the seller in the tying product; (2) adverse effect on competition in the relevant market for the tying product or tied product; and (3) absence of enough efficiency justifications for the practice.<sup>49</sup>

In Iran, tying clauses have been prohibited in both articles 44 and 45. Under article 44(5) intellectual property owners may not condition the conclusion of a licence agreement on other parties accepting additional obligations, which, according to trade custom and usage, have no relation with the subject matter of the agreement.

43. Commission Regulation (EU) No 316/2014 on the application of article 101(3) of the Treaty on the Functioning of the European Union to categories of technology transfer agreements OJ L 93/17 Rec.11.

44. Technology Transfer Guidelines para 79.

45. U.S. Department of Justice and the Federal Trade Commission (n 6) 24 (note omitted).

46. Ghaffari Farsani (n 2) 319.

47. Baumgartner (n 11) 262.

48. Technology Transfer Guidelines paras 222–5; U.S. Department of Justice and the Federal Trade Commission (n 6) 28.

49. U.S. Department of Justice and the Federal Trade Commission (n 6) 28–9.

Article 45(i)5 has prohibited such clauses with a different language: conditioning the sale of a good or service on buying another good or service or vice versa. As is observed, this article is absolute: it is not necessary to see if the tied and tying items have a relation according to commercial custom and usage. This provision does not seem reasonable from two aspects. First, tying agreements may have pro-competitive effects;<sup>50</sup> in some circumstances the tying and tied products may be necessarily linked in such a manner that the licensed patent does not allow for exploitation without the tied product.<sup>51</sup> Second, such absolute prohibition may be considered against freedom of contract. In addition, the above said article has, merely, mentioned the sale contract. However, licence agreements are not sale contracts. It is recommended that the Iranian legislator replace ‘conditioning the sale’ with a phrase used by article 11 TFEU: making ‘the conclusion of contracts subject to acceptance by the other parties of supplementary obligations’. This will make a conciliation between Iranian competition law and contract law. For, under article 357 of the Iranian Civil Code anything not considered by custom and usage as part or accessory of the object sold is not included in the sale unless explicitly stipulated in the contract. As is clear, the Iranian Civil Code has declared custom and usage as criteria to identify the goods included in the sale.

### 7.5 Price fixing

Under a price fixing clause, the licensee is obliged to follow the licensor’s pricing policies and loses its ability to compete with the former or even with other licensees.<sup>52</sup> In the United States, fixing a licensee’s resale price of a product incorporating the licensed intellectual property is per se illegal; the same is true for fixing minimum prices, but maximum prices are evaluated under the rule of reason.<sup>53</sup> In the European Union, article 101(1)(a) TFEU has prohibited direct and indirect price fixing. Such practice has been prohibited by article 102(a) TFEU as abuse of dominant position.

According to article 44(1) of the 2008 Act, direct or indirect price fixing is prohibited. Clearly, the rule of reason must be applied to assess this conduct. Under article 45, this clause is an example of abuse of dominant position. Therefore, regulation of price including its fixing, maintaining and changing is prohibited only if it is committed by a dominant undertaking. In addition, according to the same article, such acts must be unreasonable. Therefore, the Competition Council must assess the effects of such conduct. Here, despite the begging sentence of article 45 which implies per se illegality, the legislator has required the Competition Council to apply the rule of reason in this special case.

### 7.6 Limitation of production

Limitation of production or output restriction is ‘a limitation on how much a party may produce and sell’.<sup>54</sup> Such agreement has been prohibited in article 101(1)(b) TFEU.

50. Saberi (n 15) 116.

51. Baumgartner (n 11) 252.

52. Hassan Pour (n 20) 80.

53. Lex Mundi Intellectual Property Practice Group, *Intellectual Property and Competition Law* (Lex Mundi 2012) 143.

54. Technology Transfer Guidelines para 103.

Output restriction to the prejudice of consumers has been prohibited in article 102(b) TFEU. In the United States, horizontal output restrictions are per se illegal under article 1 of the Sherman Act, but vertical output restrictions are assessed under the rule of reason.<sup>55</sup> An agreement between two or more undertakings to limit the production of goods or services is prohibited under article 44(1) of the 2008 Act. Obviously, the Competition Council must identify disruption of competition before it declares that the agreement is prohibited. Surprisingly, article 45 has not dealt with such a clause. It is recommended that the Iranian legislator insert output limitation as abuse of dominant power in the probable revision of the 2008 Act.

### 7.7 Exclusive licensing

Generally, license agreements are divided into three categories: exclusive, non-exclusive and sole licenses,<sup>56</sup> of which exclusive and sole licenses may raise antitrust issues. In an exclusive license 'the licensor itself is not permitted to produce on the basis of the licensed technology rights, nor is it permitted to license the licensed technology rights to third parties, in general or for a particular use or in a particular territory'.<sup>57</sup> In a sole licence the licensor preserves for itself the right to exploit the subject matter in the licensee's exclusive territory, but is not permitted to grant a licence to third parties.<sup>58</sup> In the European Union, 'the amount of antitrust scrutiny attributed to exclusive licenses will usually depend on the competitive relationship of the parties'.<sup>59</sup> In the United States, exclusive licensing may raise antitrust issues if the licensees or the licensor and its licensees are in a horizontal relationship.<sup>60</sup> The 2008 Act has not dealt directly with exclusive licenses.<sup>61</sup> Rather, it has prohibited market allocation or sharing between two or more persons,<sup>62</sup> because both allocation and sharing agreements have adverse effects on the market. While horizontal agreements are more suspicious than vertical ones, as explained above, the competitive relationship between parties is of no significance in the 2008 Act.

### 7.8 Grant back clauses

Exclusive grant back is an exclusive licensing back to the licensor of the licensee's improvements or assignments to the licensor of improvements of the licensed technology.<sup>63</sup> The main antitrust concern raised by grant back licences is that they reduce the licensee's motive to innovate since any improvements must be granted back to the licensor and the licensee may not exploit them.<sup>64</sup> Under article 5(1)(a) TTBER the block exemption in article 2 thereof does not apply to such clauses. Given the pro-competitive effects of the grant back obligation, the rule of reason is the appropriate

55. Baumgartner (n 11) 237–8.

56. Saberi (n 15) 61.

57. Technology Transfer Guidelines para 37.

58. Rahbari (n 15) 145.

59. Baumgartner (n 11) 152.

60. *Ibid.*, 170.

61. Mostafa Bakhtiarvand and Hamid Baradaran, 'Exclusive Licenses of Industrial Property' (2015) 3 *Legal Studies* 48.

62. Ghaffari Farsani (n 2) 232.

63. Technology Transfer Guidelines para 129.

64. *Ibid.*

standard to be applied in the course of their antitrust analysis.<sup>65</sup> This clause has not been expressly mentioned in the 2008 Act. Some authors have suggested considering it as an unfair clause prohibited by article 45(i)(2).<sup>66</sup> As already mentioned, under article 233 of the Iranian Civil Code, a condition with a subject matter unknown to the parties in a way that this ignorance leads to the ignorance of the subject matter of the contract is void. It may be argued that a grant back clause is of this kind and therefore void since its subject matter is not identified at the time it is agreed upon. In other words, the parties do not know which improvements will be made to the invention under licence; this means that the parties are not aware of the exact subject matter of the agreement as a whole. Yet, this opinion must be modified. Detailed knowledge as to the subject matter of a condition is not necessary in all cases. In fact, if ignorance as to the subject matter of a condition or agreement is not so serious as to make it economically risky, the condition or agreement is valid.<sup>67</sup> Article 216 of the Iranian Civil Code, after conditioning the validity of a contract on the knowledge as to its subject matter, has excluded the cases where such knowledge is not necessary. Usage determines such cases.<sup>68</sup> As far as grant back clauses are concerned, trade usage and custom recognizes them and they entail no significant economic risk for parties to a licence agreement.

### 7.9 Non-compete clauses

A non-compete obligation is ‘an obligation on the licensee not to use third party technologies which compete with the licensed technology’.<sup>69</sup> To the extent that a non-compete obligation covers a product or an additional technology supplied by the licensor, such obligation is governed by the rules on tying.<sup>70</sup> Non-compete obligations may lead to significant foreclosure effects, in which case they clearly have the effect of restricting competition and are therefore caught by article 101(1) TFEU.<sup>71</sup> In the United States, non-compete obligations are known as ‘exclusive dealing’<sup>72</sup> and dealt with under the rule of reason.<sup>73</sup> This obligation, although frequently used in licence agreements concluded in Iran, has not been specifically dealt with in the 2008 Act. Yet, articles 44(4) and 45(a)(2) and 45(f)(3) of the 2008 Act may apply to non-compete clauses.<sup>74</sup> Article 44(4) has prohibited agreements which may lead to forcing the other party to contract with third parties. Article 45(a)(2) deals with forcing other parties to refuse to deal with competitors, and, finally, article 45(f)(3) prohibits dealing with the other party on condition that it refuses to deal with competitors. In addition, there are general articles in

65. Baumgartner (n 11) 271.

66. Mostafa Bakhtiarvand and Majid Sarbazian, ‘Grant Back Clause in Patent Licenses’ (2016) 13 *Private Law Study* 55.

67. Najafi (n 23) 202.

68. Safaei (n 12) 134.

69. Commission Regulation (EU) No 316/2014 on the application of article 101(3) of the Treaty on the Functioning of the European Union to categories of technology transfer agreements OJ L 93/17, article 5(1)(b); Technology Transfer Guidelines para 226.

70. *Ibid.*

71. Baumgartner (n 11) 243.

72. *Ibid.* 245.

73. U.S. Department of Justice and the Federal Trade Commission (n 6) 29.

74. Mir Ghasem Jafar Zade and Ibrahim Rahbari, ‘Suspicious Restrictions in Technology Licenses’ (2011) 55 *Legal Researches* 269.

the Iranian Civil Code which govern these clauses. According to article 959 of the Iranian Civil Code, 'No one may totally waive the enjoyment or exercise of whole or part of their civil rights'. Furthermore, article 960 thereof states that 'Nobody can dispossess himself of his liberty or forgo the enjoyment of his liberty so long as it is within the limits of decency and his action is not contrary to the law'.<sup>75,76</sup>

### 7.10 Non-challenge clauses

In the European Union, a non-challenge clause concerns 'any direct or indirect obligation on a party not to challenge the validity of intellectual property rights which the other party holds in the Union'.<sup>77</sup> Normally, such an obligation is accompanied by the possibility for the licensor to terminate the licence agreement in the case of non-compliance.<sup>78</sup> Non-challenge obligations have been excluded from the exemption provided for in article 2 TTBER. 'The reason for excluding non-challenge clauses from the scope of the block exemption is the fact that licensees are normally in the best position to determine whether or not an intellectual property right is invalid'.<sup>79</sup> In the United States, non-challenge obligations are unenforceable.<sup>80</sup> This clause has not been dealt with in the 2008 Act. Some Iranian authors have suggested leaving it to the discretion of the court to decide on its validity,<sup>81</sup> that is, to assess it as applying a rule of reason analysis. This opinion has been criticized by one author on the basis that Iran is an importing country of technology and such a clause may deprive the country of probable rights derived from the invalidity of a foreign company's intellectual property.<sup>82</sup> That author concludes that such clauses are absolutely prohibited,<sup>83</sup> that is, per se illegal.

### 7.11 Sales restrictions

The European Commission defines sales restrictions as 'restrictions on the sale of products incorporating the licensed technology into a given territory and to a given customer group'.<sup>84</sup> Under article 4(1)(c) TTBER, different rules apply to sales restrictions depending on the competitive relationship between the parties and whether the agreements are reciprocal or non-reciprocal. 'In the U.S., customer and territorial restrictions in licenses constitute a violation of antitrust law when they form part of [a] broader anticompetitive agreement among undertakings that would have been horizontal competitors in the absence of the license restrictions'.<sup>85</sup> Such an obligation has not been dealt with specifically in the 2008 Act. Consequently,

75. For a detailed discussion on the interpretation of these articles see. Safaei (n 12) 33 et seq.

76. The rules declared in articles 959 and 960 of the Iranian Civil Code are consistent with the opinions stated by Imamia jurists. For example, see Naraghi (n 13) 146; Mirza Mohammad Hossein Naeini, *Monya Altaleb v.2* (Muhammadiyah Library, Qom 1953) 105.

77. Technology Transfer Guidelines para 133.

78. Ibid.

79. Ibid para 134.

80. Baumgartner (n 11) 278.

81. Mir Ghasem Jafar Zade and Ibrahim Rahbari, 'Prohibited Restrictions in Technology License Agreements' (2012) 1 Private Law Study 86.

82. Hassan Pour (n 20) 352.

83. Ibid 353.

84. Technology Transfer Guidelines para 189.

85. Baumgartner (n 11) 193.

the rules applicable thereto are quite vague.<sup>86</sup> However, if this restriction is considered a type of allocation or sharing of the market, it can be prohibited under article 44 (6) if between competitors. But if sales restriction is agreed upon in a vertical arrangement, recourse must be made to the general rules of contract.

### 7.12 Field of use restrictions

'Under a field of use restriction the licence is either limited to one or more technical fields of application or one or more product markets or industrial sectors'.<sup>87</sup> The European Commission distinguishes between asymmetrical and symmetrical field of use restrictions between competitors and declares the latter unlikely to be caught by article 101(1).<sup>88</sup> Some field of use restrictions between non-competitors 'limit intra-technology competition between licensees in the same way as exclusive licensing and are analysed in the same way'.<sup>89</sup> In the US, field of use restrictions are generally lawful unless they go beyond the patent grant, in which case, the rule of reason must be applied.<sup>90</sup> In Iran, the 2008 Act has not specifically dealt with field of use restrictions. However, some authors believe such obligations are covered by article 44(6), that is, allocating or sharing the market, and consequently must be analysed under the rule of reason.<sup>91</sup> But when such restrictions are agreed upon in a vertical relationship, their legal status is not clear.

### 7.13 Refusal to deal

'Monopolization rules do not deal directly with refusals to share intellectual property rights: antitrust liability for those cases in the European Union and in the United States is solely based on the judge-made law'.<sup>92</sup> Market power does not impose any liability on the owner of intellectual property to license its use to others,<sup>93</sup> that is, 'as a matter of principle, IP owners have no duty to share their intangible assets, unless specific conditions occur and provided no objective justifications may be relied upon'.<sup>94</sup>

Refusal to deal has been prohibited by article 45(a)(1) of the 2008 Act. Although article 45 deals mainly with unilateral acts, here the legislator has prohibited both individual and collective acts of refusal. It is pertinent to mention that under Taslit Rule, as a general rule in the Iranian property law and Imamia jurisprudence, an owner of a property, including intellectual property, is free to treat their property in any way at their own discretion.<sup>95</sup>

86. Jafar Zade and Rahbari (n 74) 238.

87. Technology Transfer Guidelines para 208.

88. Ibid para 213.

89. Ibid para 215.

90. Baumgartner (n 11) 202.

91. Hassan Pour (n 20) 367.

92. Rita Coco, 'Antitrust Liability for Refusal to License Intellectual Property: A Comparative Analysis and the International Setting' (2008) 1 Intellectual Property L. Rev. 10.

93. U.S. Department of Justice and the Federal Trade Commission (n 6) 4.

94. Coco (n 92) 10.

95. Ibn Idris Helli, *Saraer v.2* (Office for Islamic Publications, Qom 1989) 453; Allame Helli, *Mokhtalaf Alshia v.6* (Office for Islamic Publications, Qom 1992) 79; Fakhr Almohagheghin Helli, *Izah Alfavaed v.2* (Ismaelian Institute, Qom 1966) 594; Mohaghegh Karaki, *Jami Almaghased v.6* (Alalbait Institute, Qom 1993) 77; Mohammad Bagher Parsa Pour, *A Concise Treaty on Property Law* (Shahre Danesh Publications, Tehran 2010) 56.

But this rule is not absolute,<sup>96</sup> and in certain circumstances its scope is restricted. Article 30 of the Iranian Civil Code has declared this rule and its exception: the treatment of a property is permitted in any way, unless excluded by law. The exception is based on another rule in Iranian contract law and Imamia Jurisprudence called *La zarar Rule*. According to this rule, it is forbidden to harm others and any damage sustained must be compensated.<sup>97</sup> Therefore, refusal to deal to the detriment of society is forbidden.

The Iranian legislator has absolutely prohibited any refusal to deal, while according to *Taslit Rule* the owner must be able to choose whether to make a contract and with whom to deal. Therefore, a revision of this article is recommended. In addition, refusal to deal is a cause of compulsory licensing in the 2007 Act. Under article 17 of the 2007 Act, in exceptional circumstances such licenses may be issued – that is, compulsory licensing is a remedy for refusal to deal. On the other hand, article 51 of the 2008 Act has provided for specific remedies for anticompetitive practices, including refusal to deal prohibited by article 45(a)(1). A question arises as to what remedy must be enforced in case of refusal to license a patent. It seems that a distinction must be made between refusal to license patents related to issues such as public health and security mentioned in article 17 of the 2007 Act and other patents. In other words, in the former case, compulsory licensing is the remedy of refusal to deal, while in the latter case, remedies provided for in article 51 of the 2008 Act apply.

Refusal to deal is related to another practice prohibited by article 45(a)(1) – *Ihtikar*. This is a specific term in Islamic jurisprudence. It has been defined as hoarding food in expectation of inflation.<sup>98</sup> The famous opinion among some Imamia jurists is that *Ihtikar* is restricted to certain foods.<sup>99</sup> However, other Imamia jurists consider *Ihtikar* to have a broad scope and believe that it encompasses everything needed by the public.<sup>100</sup> The second opinion seems more reasonable as it takes into account the public's benefit. If this opinion is accepted, intellectual property rights would be covered by *Ihtikar*, and it is an anticompetitive practice to hoard such rights in the hope of inflation while they are needed by the public.

## 7.14 Patent pools

'Pooling arrangements are agreements of two or more owners of different items of intellectual property to license one another or third parties'.<sup>101</sup> Such arrangements may harm competition in a number of ways and may come within the scope of article 101(1) TFEU, in the EU, or depending on the circumstances, violate articles 1 or 2 of the Sherman Act in the US. Hence, the necessity of their antitrust scrutiny.<sup>102</sup> However, this practice has not been dealt with in the 2008 Act.

96. Katouzian (n 21) 108.

97. Akhond Khorasani, *Kefaya Alosoul* (Alalbait Institute, Qom 1988) 380; Sheikh Morteza Ansari, *Almakaseb* (World Congress in Honor of Sheikh Ansari, Qom n.d.) 533; Sayyed Ali Sistani, *La Zarar va La Zerar Rule* (Ayat Allah Sistani's Office, Qom 1993) 9.

98. Hosseini Ameli (n 23) v.12, 351.

99. Sheikh Tousi, *Almabsout v.2* (Mortazavia Library, Qom 1966) 195; Allame Helli, *Tazkera Alfoghaha* (Alalbait Institute Qo,m 1997) 166; Naraghi (n 13) 48.

100. Mohammad Hossein Kashef Algheta, *Soal va Javab* (Kashef Algheta Institute, Najaf n.d.) 132; Mohammad Javad Moghnie, *Fegh Al Imam Alsadegh v.3* (Ansarian, Qom 2000) 144–5; Sayyed Abolghasem Khoei, *Mesbah Alfeghaha* (Davari, Qom 1998) 498–9; Sayyed Abd Alala Sabzevari, *Mohazzab Alahkam v.16* (Almenar Institute, Qom 1992) 34.

101. U.S. Department of Justice and the Federal Trade Commission (n 6) 28.

102. Baumgartner (n 11) 304.

### 7.15 Abuse of dominant position

Abuse of dominant position is forbidden under article 102 TFEU. In the United States, monopolization of trade is forbidden by article 2 of the Sherman Act. As stated earlier, abuse of dominant position has been prohibited in article 45 of the 2008 Act. Dominant position is defined in article 1(15) as ‘a position in the market in which one or more natural or legal persons have the ability to determine the price, good or service supply or demand volume or contract terms’. Having dominant position is not in itself anticompetitive, but its abuse is prohibited.<sup>103</sup> Abuse of dominant position has not been defined in the 2008 Act and article 45(i) has only listed typical examples of such abuse. Some Iranian commentators consider such enumeration as insufficient and offer a definition thereof: ‘Any illegal use of dominant economic position and undue exercise of power in the market’.<sup>104</sup> The list in article 102 TFEU is non-exhaustive.<sup>105</sup> There is disagreement among Iranian authors on the nature of the list in article 45. While a group of authors believe it to be exhaustive,<sup>106</sup> others consider it as non-exhaustive.<sup>107</sup> Given the plain text of article 45(i), the author of this article prefers the first opinion. Principle 40 of the Iranian Constitution has prohibited abuse of any right including dominant position. In addition, as was observed, under article 30 of the Iranian Civil Code, an owner may treat their property in any way unless excluded by law. Evidently, this rule is applicable to an owner of intellectual property with dominant position in the market.

## 8 REMEDIES AND SANCTIONS

According to article 51 of the 2008 Act, in the case that articles 44–48 of the 2008 Act are violated, the Competition Council may adopt one or more of the following decisions in its discretion:

- A) The interruption of activity or non-application of privileges including limitation of application period thereof;
- B) preventing the other party to the contract, agreement or conspiracy relating to privileges from fulfilling all or part of conditions or obligations thereof;
- C) In case the measures provided for in sub-articles a and b are not effective, cancellation of contracts, agreements or understandings related to privileges.

It should be noted that the Iranian legislator has established two sets of remedies: general and specific. General remedies are provided for in article 61 of the 2008 Act<sup>108</sup> and concern anticompetitive practices other than those committed in the field of intellectual property rights. The remedies in article 51 are specific to intellectual property rights. It would be better for the Iranian legislator to declare the general remedies in an earlier article and then declare these specific remedies. In addition, while article 61 has provided

103. Ghaffari Farsani (n 2) 536; Mohammad Hassan Sadeghi Moghadam and Mohammad Mahdi Ghamami, ‘Market Order; Comparative Study of Iranian and French Laws’ (2012) 1 *Comparative Law Studies Journal* 83.

104. Ibrahim Abdi Pour, ‘Abuse of Dominant Position’ (2008) 21 *Islamic Law* 135.

105. Baumgartner (n 11) 17.

106. Ghaffari Farsani (n 2) 537.

107. Abdi Pour (n 104) 135.

108. It should be noted that article 61(12) has provided for a fine in the case that article 45 is violated.

for fines, no criminal sanctions have been established for violation of antitrust rules by intellectual property owners.

In addition to the remedies provided for in the 2008 Act for anticompetitive practices, as previously mentioned, compulsory licensing has been declared as a remedy in certain circumstances. According to article 17(a) of the 2007 Act, compulsory licences are granted if:

in the discretion of the minister or the highest authority of the concerned governmental body, the preservation of public interests including national security, nutrition, health or development of other vital sectors of the country necessitates the exploitation of the invention by government or a third party; or the exploitation by the owner or a person authorized by it contradicts with free competition and the above said authority determines that the exploitation of the invention resolves the problem.

## 9 PRIVATE ENFORCEMENT

Private enforcement is important and recognized in Iranian law: under article 66 of the 2008 Act, proof of an anticompetitive practice is necessary. According to article 66, natural and legal persons injured by anticompetitive practices may take action for damages. Such action must be taken in competent courts within a year from the date when the decisions of the Competition Council or the appeal authority have become final.<sup>109</sup>

Private actions to demand damages for anticompetitive practices are governed by the same rules as other civil liability actions. Therefore, only actual losses are compensated. But in the European Union, article 3 Directive 2014/104/EU provides for full compensation for harm caused by competition law infringement. Full compensation, under article 3(2) thereof, covers 'the right to compensation for actual loss and for loss of profit, plus the payment of interest'. In the United States, under section 4(a) of the Clayton Act, a person injured in his business or property by reason of antitrust laws infringement 'shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee'. It is clear that the legislators in the EU and the US better protect persons against anticompetitive practices. Therefore, it is recommended that the Iranian legislator adopts similar mechanisms to encourage private competition law enforcement actions in the country.

## 10 CONDUCT OUTSIDE IRAN

Antitrust laws in the United States are extraterritorial in their scope and are applicable to conduct outside the United States that has anticompetitive effects within the territories of the country.<sup>110</sup> The same is true for articles 101 and 102 TFEU. In Iran, neither article 44 nor article 45 of the 2008 Act have specified the place where an anticompetitive conduct occurs as a criterion for their application. In the absence of such specification, one may say that the Iranian legislator has intended the 2008 Act to encompass the listed anticompetitive practices regardless of the place of their commission. Therefore, if an agreement is made outside Iran but causes adverse effects on competition inside Iran, the 2008 Act would apply.

109. Article 66 of the 2008 Act.

110. Baumgartner (n 11) 19.

## 11 CONCLUSIONS

In Iran, under article 51 of the 2008 Act, intellectual property licence agreements are, generally, governed by the same antitrust rules as other forms of property. Article 44, referred to by article 51, has attempted to list agreements which are suspicious in terms of harming competition. For article 44 to apply, a number of conditions must be present. At least two persons must agree to restrict competition or the effect of their agreement must be the restriction of competition. The main point is that disruption of competition is not presumed in article 44. Therefore, the potential pro-competitive and anticompetitive effects of a practice must be compared. This analysis resembles the rule of reason in the United States antitrust law. On the other hand, article 45 has dealt with unilateral acts harmful to competition. The Iranian legislator has adopted a severe approach towards the practices enumerated therein. In other words, the acts listed in article 45 are presumed to harm competition and no analysis is required as to their purpose or effects. Such an approach evokes per se illegality in the United States anti-trust literature. Abuse of dominant position is among the acts prohibited in article 45, and its examples have been listed therein. Article 45 has mentioned other acts, such as disseminating misleading information, which are normally considered as unfair practices. In addition, a number of acts prohibited by this article belong to consumer law or standard rules, and it is recommended that the Iranian legislator eliminate these acts from the 2008 Act and determine their legal status in other specific Acts, such as the Consumer Protection Act or standard rules. The Iranian legislator has provided for different remedies for anticompetitive practices in relation to intellectual property rights, including their licensing. Despite prescribing fines for anticompetitive conducts in general, the Act has, merely, provided for civil remedies for anticompetitive conducts with respect to such rights. In sum, the 2008 Act must be reformed from two aspects: first, the long list of anticompetitive acts needs to be modified, the conditions leading to their commitment must be further clarified and the Iranian legislator must take a more flexible approach towards different conducts in the market. It is recommended that the rule of reason prevail in the 2008 Act in order to assess suspicious conduct by undertakings including intellectual property holders. A safe harbour with clear and reasonable criteria is needed to exempt those undertakings whose behaviour does not have appreciable effects on competition. Second, in addition to civil remedies, criminal sanctions must be prescribed for violation of the 2008 Act provisions by intellectual property holders. It is recommended that the Iranian legislator refer to the antitrust rules in the United States and the European Union in any probable revision of the 2008 Act. However, the requirements of Iranian contract law and Imamia jurisprudence must be taken into account when the reform is made.