
New Footprints in the Framework of SEPs and FRAND Terms

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The intersection between intellectual property and competition law is always on the agenda of lawmakers. Since there is an imbalance between the exclusivity rights ensured by intellectual property law and anti-competitive practices that the competition law protects, the notion of standard-essential patents (SEP) and a commitment to license these patents on a fair, reasonable and non-discriminatory (FRAND) basis are accepted to preserve the competitive landscape with regard to licensing issues. However, licensors and licensees still have discrepancies on the FRAND terms, and this keeps authorities and courts busy with handling each party's requests. While it is nearly impossible to satisfy both parties' demands, recently, we observed that there are footprints of significant regulatory initiatives that would likely shape the nexus between intellectual property and competition law. Indeed, the most influential jurisdictions, the European Union (EU) and the United Kingdom (UK) have launched fresh inquiries concerning the framework of SEP and FRAND. Below we discuss these developments and then elaborate on the Turkish stance related to the matter.

European Commission's New Framework for Standard-Essential Patents

The European Commission (EC) commenced the evidence and public consultation phase on February 14, 2022 which will last until May 9, 2022, in relation to the new proposed framework regarding SEPs. The EC had previously adopted an intellectual property action plan in November 2020, which gave rise to the need to establish a new framework on SEPs to strike a balance between the protection of intellectual property rights and the promotion of innovation, and not hindering companies' access to intellectual property.

Right now, the patent law of the EU is rather limited and fragmented, which has led to the development of a three-fold package on supplementary protection certificates, compulsory licensing and SEPs, aiming to increase legal certainty and transparency which will inherently strengthen the EU patent system. This goes hand-in-hand with the FRAND terms and conditions, where any person or company claiming SEP on its patents commits to license the patents on a FRAND basis. Three pillared packages are as follows:

- Requiring the disclosure and update of information to improve publicly available information to increase transparency and to establish a system where an independent third party assesses the essentiality of SEPs.
- Developing guidelines or processes to help clarify FRAND terms such as the concept itself, and the negotiation process.
- Proving the effectiveness and efficiency of enforcement by incentivizing mediation, arbitration, etc.

With the above steps, the new framework is essentially supporting and complementing the existing the SEP framework of the EU, leading to a more transparent, predictable, and efficient process. This regulatory initiative will probably improve competition and the legal certainty in the SEP-related issues.

Standard-Essential Patents and Innovation: UK Intellectual Property Office’s Call for Views

The UK Intellectual Property Office (“**IPO**”) has held meetings with the industry and academics within the scope of its consultation process commenced in December 2021, which has ended on March 1, 2022, where it has called for views to understand the current SEP framework with regards to innovation and competition and to set a future framework. It has also been stated that the IPO has been working with the UK Competition and Markets Authority within the scope of the review, along with the participation of the UK Department for Media, Culture and Sports and the British Standards Institute. Now, the government is assessing the responses it has received and will publish a summary of responses. The inquiry is covered the below-mentioned topics:

- The relationship between SEPs, innovation and competition,
- Competition and market functioning,
- Transparency in the system,
- Frameworks (patents, licensing, and litigation),
 - Patent infringement and remedies,
 - Licensing of SEPs,
 - SEP litigation.

Considering the coverage of the inquiry, we believe that the UK’s regulatory initiative will be highly important and may influence the other jurisdictions.

Turkish Stance on the Framework for Standard-Essential Patents

Turkey usually prefers to carefully follow the EU’s approach before adopting a new regulatory framework. This assumption is also true in relation to the framework of SEPs. However, the Turkish Competition Authority (TCA) does not hesitate to enforce the competition rules, even if there are novelty issues at stake. Indeed, the TCA has investigated SEPs for the first time within its investigation on whether Koninklijke Philips N.V. (Philips) has violated the Law No. 4054 on the Protection of Competition (Competition Law) by not abiding its commitment to the relevant standard-setting organization that it would license the SEPs related to subtitle technology for digital video broadcasting on FRAND terms. Upon the investigation, the TCA rendered its final decision dated December 26, 2019 and numbered 19-46/790-344:

- It was unanimously decided that Philips is dominant in the market for subtitles for digital video broadcasting during the relevant period examined.
- It was decided by the majority that Philips had violated Article 6 of the Competition Law (akin to Article 102 TFEU), and an administrative monetary fine of TRY 6,697,413.13

amounting to 0.75% of the annual revenues accrued at the end of the financial year 2018 was imposed on Philips.

The Board's reasoning for finding a violation was as follows:

- i. Philips has resorted to a court decision without applying to an independent third party to determine the royalty fee which violates the European Court of Justice's Huawei-ZTE decision^[1];
- ii. Philips has violated the transparency principle by not announcing its royalty fees on its website, and thus engaged in discriminatory practices;
- iii. Philips has reversed the burden of proof with its License Agreement, in violation of FRAND terms; and
- iv. Philips has forced a termination clause in the form of a non-challenge clause onto Vestel.

That said, the Ankara 11th Administrative Court ("**Court**") has accepted Philips' appeal to the case and has annulled the Board's decision with its decision dated June 3, 2021 and numbered E. 2020/1525, K. 2021/1121. The Court annulled the decision by drawing the following conclusions:

- i. Philips resorting to a court decision cannot be regarded as an abuse of its dominant position as Philips had only filed a lawsuit to protect its intellectual property rights after negotiation attempts to no avail and as per the Huawei-ZTE decision, it has been understood that applying to a third party is left to both of the parties' discretion;
- ii. While in some instances a non-challenge clause may lead to competitive concerns, bearing in mind the history of the dispute between Philips and Vestel, there is no violation in incorporating a non-challenge clause and reversing the burden of proof;
- iii. As per Article 44 of the Competition Law setting forth that the Board may not base its decisions on issues about which the parties have not been informed and granted the right to defense, it has been found that the transparency principle being a pillar for abusive practices has not been previously directed and that Philips was not granted a right to defense.

Upon the annulment of the TCA's decision, the case has been carried to regional court for an appeal and is still pending.

As assessing SEPs and FRAND terms in Turkey is fairly new and there is no established doctrine and precedents on the matter, the EC and the UK inquiries and their future frameworks will undoubtedly be utilized in Turkey within the scope of possible future disputes, which will affect the Turkish case law on this matter from here on. It is possible to benefit from these developments in the ongoing clash between the TCA and Philips if the outcome of the initiatives is published in a timely manner. This would inevitably enrich the Turkish stance on the intersection between intellectual property and competition law.

^[1] Case C-170/13 Huawei Technologies Co. Ltd v ZTE Corp., ZTE Deutschland GmbH.

