

Turkey's position on SEPs: navigating the technology-driven world

Özge Atılğan Karakulak and Beste Turan of [Gün + Partners](#) considers how technological advancement supports the creation of SEPs in Turkey

Standard essential patent (SEP) appears to be the new buzzword of patent law considering the upward trend in patent litigation arising from SEPs. Indeed, the continuous technological advancement supports the creation of SEPs so this trend is likely to continue in the near future.

SEPs is a concept arising from the interaction between patent rights, which provides exclusive use of an invention and 'standards' aimed at the widespread and mandatory use of this innovation in the relevant market.

Licensing SEPs: FRAND terms

Standard developing Organisations (SDOs) determine the technical specifications and standards that are a set of technical specifications in the relevant industry and aim to make such standards accessible to all players in the industry. As part of their governing rules, SDOs typically publish policies regarding IP rights (IPR).

The IPR policies include asking the SDO members to identify their patents that may be essential to the SDO's standards. When a member identifies a potential SEP, it is also asked to declare whether it will agree to license the patent on fair, reasonable, non-discriminatory (FRAND) terms and conditions.

The precise terms of FRAND declarations vary across different SDOs and may vary from declarant to declarant. In this regard, SDOs do not impose rigid IPR

policies on their members as their main goal is to increase the number of members and make SEPs available to as many industry players as possible.

The SEP holder has a power over the party who wants to implement the standard considering that, the person will not be able to implement the standard in case the SEP holder does not want to license the patent.

To balance this power of SEP owners and prevent monopolisation, SDOs require SEP owners to accept the FRAND terms in their agreement with the SDOs which means that the SEP owners undertake to provide licenses in FRAND terms to anyone who wants to implement the relevant standard in its business.

SEP licensing

As the number of SEPs increased over time, patent litigations arising from SEPs also increased. Although SEP litigators suffer from a lack of detailed laws regulating the implementation of FRAND licensing, there are a number of decisions from different jurisdictions guiding the litigators including the widely known *Huawei Technologies v ZTE* and *Nokia v Daimler* (Case 4c O 17/19) cases.

On February 14 2022, the European Commission initiated a public consultation aimed at creating a fair and balanced licensing framework for SEPs. The initiative also contains a 'call for evidence for an impact assessment' document defining the political background, problem, policy options and likely impacts of an improved SEP framework. Accordingly, industry stakeholders are entitled to submit their feedback to the EU Commission's official website by May 9 2022.

In accordance with the EU Commission's document, the main issues in the sector stem from lack of transparency; uncertainty about FRAND terms and conditions and high enforcement costs. The document further discusses that SEPs also suffers from a lack of predictability as at the time the standard is adopted, SEP holders may not be aware of all potential applications of the standard. In this regard, the EU Commission offers an improved framework that will enhance transparency on SEPs, provide clarity of various aspects



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of FRAND and improve the effectiveness and efficiency of enforcement.

One of the most discussed concepts in SEP is 'access to all' and 'license to all' that attempts to answer the point at which to license SEPs in the production supply chain. In this regard, the 'access to all' approach enables SEP owners to choose at which level of the production chain to license, which is usually the end-product. Therefore, they request a royalty per product which the standard is used.

However, this concept is criticised by the manufacturers of the end-products as the firms located at a different level of the value chain benefit from having access to a standard without paying royalty. Therefore, they offer another concept called 'license to all' which provides that the value of a standard should be reflected by components of the end-product and therefore, that FRAND licenses should be

granted to the component manufacturers (or other suppliers in different level of the supply chain), rather than the manufacturer of the end-product.

Another topical discussion in SEP cases is the interpretation of the 'unwilling licensee' concept. The prevailing question here is that when a standard implemented company becomes an unwilling licensee. There are many possible answers to this question such as when the alleged infringer is aware of the SEP but continues to use the standard without a license or when the alleged infringer walks away from the licensing negotiations although terms of the license was FRAND.

These concepts are discussed in a case between Nokia and Daimler before the Dusseldorf Court and the court referred the detailed set of questions to the CJEU which would have enlightened SEP litigators. Unfortunately, these questions are left unanswered since Nokia and Daimler settled in June 2021 and all patent litigation between the two companies were withdrawn within the scope of the settlement.

Turkey's position

The Turkish Standards Institution (the TSE) and the Information Technologies and Communications

Authority in Turkey (the BTK) are the two main government-backed organisations dealing with standards in Turkey.

The TSE is a public institution founded with the Law No: 132 which was adopted on November 18 1960 and having legal entity with exclusive competence, managed according to special law provisions.

The TSE has full membership of International Organisation for Standardisation (ISO) and International Electrotechnical Commission (IEC), Standards and Metrology Institute for the Islamic Countries (SMIIC), European Committee for Standardisation (CEN) and European Committee for Electrotechnical Standardisation (CENELEC).

Relations of Turkey with standard organisations in the field of international telecommunications are conducted through the BTK which has an observer status membership at the ETSI. Although TSE and BTK have memberships in SDOs, they are not actively taking a role in setting standards in Turkey or publishing IPR policies currently.

As regards to SEP litigations, to the best of our knowledge, there is no decision issued by Turkish courts on FRAND licenses and/or SEPs to date. However, on December 26 2019, the Turkish Competition Authority (TCA) issued its first decision regarding SEPs in the *Vestel v Philips* case (19-46/790-344).

The TCA evaluated the case with references to the EU Commission's decisions (in its decision, the TCA specifically referred to EU Commission's Decision No. AT.39985 between Apple and Motorola, the EU Commission's Decision No. At.39939 on Samsung and the Huawei-ZTE decision No. C-170/13 of the CJEU) and at certain points, the FRAND principles referred to in EU precedents were implemented to the case even more strictly.

In its decision, the TCA concluded that Koninklijke Philips NV abused its dominant position in the relevant TV technology market due to the provisions of the TV Patent License and Settlement Agreement signed by the



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parties upon a series of SEP litigations in Germany. The TCA concluded that some of those provisions such as shifted burden of proof, excessive information request and no-challenge of validity may constitute violation of competition law.

The TCA further concluded that Koninklijke Philips NV did not provide a license under FRAND conditions as it did not comply with the step of "applying to the third independent party in the determination of fees" and therefore, did not act transparently in the determination of license fees.

In conclusion, the TCA decided that Koninklijke Philips NV had abused its dominant position and imposed a penalty of 0.75% of its annual gross income generated by the end of fiscal year 2018. On the other hand, the TCA decided that the Turkish affiliate, Turk Philips Ticaret AŞ had not violated the Com-

petition Law No. 4054. The decision of the TCA will serve as a guideline for the evaluation of anti-trust issues as it is the first decision in the context of SEPs under Turkish law.

Continual increase of SEP litigations

It appears that SEP litigations will continue to increase in the coming years. Although SEP holders seem to mostly prefer Germany, the US and UK courts to enforce their SEPs due to the reliability and predictability of these jurisdictions, this trend may change in the future as technology companies continue to increase the number of production facilities in different parts of the world every day by following an expansionary policy with the effect of globalisation and shortage crises.

Given the investments and incentives in different industries and high market potential, Turkey may become one of the jurisdictions to handle SEP litigations. While the TCA surprisingly delved into the specifics of the patent law in its only caselaw regarding SEPs, we will be keeping a close eye on whether a case will be heard in an IP court in Turkey and if they will follow the TCA's approach in dealing with FRAND terms.