EQUIVALENCE IN EUROPE

A COMPARATIVE MEMORANDUM IN PATENT LAW (1)

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20. Turkey

A. Scope of protection

20.1 The scope of protection of a patent is defined in the various subparagraphs of article 89 of the Industrial Property Code No. 6769 ('***IP Code***'). Like most jurisdictions, the scope of protection is essentially determined by the claims, making use of the description and drawings for the interpretation thereof. It is important to note that this is not limited to a literal interpretation, although the scope cannot be extended to cover elements which were thought by the patent-holder but not claimed in the patent.

20.2 The examples contained in the patent are not to be interpreted as limiting the scope of protection of the claims to those particular examples. In general, the fact that a particular feature or characteristic of a product or method disclosed in the patent are not specifically provided for in the examples does not bring that feature or characteristic outside the scope of protection of the patent.

20.3 Overall, what is aimed at by article 89 of the IP Code in the interpretation of the claims is the awarding of the deserved protection to the patent holder and, in the meantime, sufficient certainty for third persons in their estimation of the scope of protection.

B. Equivalence

20.1 It was discussed above that the scope of protection of a patent is determined, as in (all) countries party to the EPC, not by a literal interpretation of the patent claims but in a reading of the claims together with the description and drawings. What's more, the scope of protection may extend to features equivalent to those claimed in the patent.

20.2 Equivalents are defined in the second sentence of article 89/5 of the Code as elements of the invention which (a) perform fundamentally the same function, (b) in a substantially similar manner and in the same way, and, (c) give the same result as the element claimed in the patent. With an understanding of the patent, if the skilled person knows immediately that instead of one of the elements in the claims he can use another and reach the same result, then that should still come within the scope of the patent according to article 89/5 of the Code: *'In the determination of the scope of protection of the patent or the patent application, elements equivalent to those contained in the claims at the time of the infringement allegations are also taken into account.'* (art. 89/5, first sentence)

20.3 What is aimed by this provision, naturally, is the prevention of any circumvention of the scope of protection of the claims of a patent by way of use of equivalents of the features of the patent.

20.4 The doctrine of equivalents has not yet seen precedential application under the new Industrial Property Code, although it is expected that the understanding of equivalents has not changed much; the doctrine of equivalents was, under the preceding Decree Law, also a field that beckoned discussion. It is clear, however, that the scope of protection of a patent is not limited to the literal wording of the claims.

20.5 Even though both the preceding Decree Law and the newly enacted IP Code do mention equivalents and provide for equivalents to be taken into account in the determination of the scope of protection, Turkey has seen little application of it.

20.6 The Court of Cassation had decided on no case where infringement through doctrine of equivalents was alleged by the year 2011.[144] Now in the appellate courts the doctrine of equivalents is merely mentioned, or is applied but the result is negative, in that the Court of Cassation declares that there is no infringement after and despite the application of the doctrine of equivalents.

20.7 Since, as stated above, that the equivalent performs the same function in the same way to reach the same result are three separate requirements that require technical knowledge of the patent in order to distinguish between them, it is submitted that it goes beyond the capabilities of mere civil courts, albeit specialised in industrial property, to segregate the questions. Although in the wording of the judgments of the Court of Cassation it seems to have been separately evaluated, where, for example, the Court decides that the alleged equivalent performs the same function and reaches the same results but does not do that in the same way or manner;[145] there is no indication of how these three criteria were distinguished. In other words, there is no test to be applied by the courts or questions to be answered by the court-appointed experts except that provided for in the statute.

20.8 Obviously the doctrine of equivalents finds room for argument best in patents that allow for elements other those stated in the claims to be substituted. For example in formulation patents then, the substitution of one element with an equivalent is relatively easier but naturally requires more in-depth technical knowledge as well as a closer technical examination. Most first instance courts do not go beyond instructing the court-appointed experts to conduct an on-file expert examination, whereas the determination of the presence of all three conditions of a finding of equivalents would evidently require closer examination.

20.9 In any case, the civil intellectual and industrial property courts have seen little application and little dispute over equivalents, most of the allegations of infringement through equivalents were dismissed. Other than that, in order to understand the true application of the doctrine of equivalents in Turkey, a detailed judgment where infringement through equivalents is decided upon is yet to be observed.

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[144] Kamer Aydınalp, accesible via: http://docplayer.biz.tr/19701933-Patent-istemlerinin-esdegerler-doktrini-kapsaminda-degerlendirilmesi-kamer-aydinalp.html.

[145] 11. H.D., 2014/18840 E., 2015/13906 K.