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SEP: Navigating the Technology-Driven World

Standard-Essential Patents (SEPs) is a concept arising from the interaction between patent rights, which provide exclusive use of an invention and "standards" aimed at the widespread and mandatory use of this innovation in the relevant market. Considering the upward trend in patent litigation arising from SEPs, it would be fair to say that SEP has become patent law's new buzzword.

Licensing SEPs: FRAND Terms

Standard Developing Organisations ("SDOs") determine the technical specifications and standards, including sets of technical specifications in a certain industry, and aim to make these standards accessible to all players in the industry. In this sense, SDOs typically publish their policies regarding intellectual property rights as part of their governing rules.

Among these policies is the identification by SDO members of patents that may be essential to the SDOs' standards. When a member discloses that it has a patent with a potential to become a SEP, it is also asked to declare whether it will agree to license the patent on FRAND ("Fair, Reasonable, Non- Discriminatory") terms and conditions.

The terms of FRAND declarations may vary for different SDOs and may also vary between declarants. In this regard, as their main goal is to increase the number of members and make SEPs available to as many industry players as possible, SDOs do not impose rigid policies regarding intellectual property rights on their members to encourage them to declare a greater number of patents as SEPs, advantaging the SEP holder over the party wishing to implement the standard.

SEP Licensing

The proliferation of SEPs has also seen an increase in the number of related litigations. A I though It hough I

Additionally, on 14 February 2022, the European Commission initiated a public consultation process to establish a fair and balanced licensing framework for SEPs, asking



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industry stakeholders to provide feedback on policy options for a sustainable, transparent, and predictable SEP licensing ecosystem.

One of the most discussed concepts in SEP is "access to all" and "license to all", which try to answer at which point in the production supply chain to license an SEP. The "access to all" approach allows SEP holders to choose at which level of the production chain to license their patents, which is usually the end-product stage. Accordingly, a license fee is requested per end-product in which the standard is used. However, this concept is criticised by end-product manufacturers as it allows companies at different levels of the value chain to access the standard without paying a license fee. The concept of "licensing for all", which envisages the reflection of the value of a standard on the parts of the end-product and granting FRAND licenses to parts manufacturers (or suppliers at different levels of the supply chain) instead of the end-product manufacturers, emerged due to these criticisms.

Another heated discussion in SEP cases is the interpretation of the "unwilling licensee" concept. The prevailing question is when a company using the SEPs 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 the license terms were FRAND. Within this scope, as a result of the proceedings, the standard implementer may be found to have infringed the patent and responsible for damages.

Finally, one of the most talked about topics of discussion regarding the SEP at present is the anti-suit injunctions imposed by Chinese courts, which prevent SEP proceedings from being brought in other countries. These preliminary injunction decisions prevent SEP holders from filing lawsuits in countries other than China and even prohibit the request for enforcement of injunction decisions ruled in other countries, such as Germany. Following the decisions, the European Union filed a complaint with the World Trade Organization ("WTO") on 18 February 2022, alleging that the practices of the Chinese courts unfairly restrict patent rights and prevent fair trade in violation of TRIPS provisions. Since the consultation process between the parties through the WTO did not yield any results, the dispute was referred to arbitration and the arbitration process is currently ongoing.

Türkiye's Position

As far as is known, Turkish courts have not yet issued a detailed decision on FRAND licenses and/or SEPs. However, on 26 December 2019, the Turkish Competition Authority ("TCA") issued its first decision regarding SEPs in the Vestel v. Koninklijke Philips



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investigation (19-46/790-344). The Competition Board evaluated Vestel's application by referring to the decisions of the European Union Commission, especially the European Union Commission's Apple v. Motorola (AT.39985) decision and the Samsung (At.39939) decision and the European Union Court of Justice's Huawei-ZTE decision (C-170/13). However, The Competition Board has applied the FRAND principles by interpreting them more strictly on some points in comparison to the EU jurisprudence above.

In its decision, the Competition Board concluded that Koninklijke Philips N.V 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 parties upon a series of SEP litigations and imposed on Koninklijke Philips N.V a penalty of 0.75% of its annual gross income generated by the end of the 2018 fiscal year.

Although the annulment action filed by Koninklijke Philips NV before the administrative court against the decision of the Competition Board was accepted, the Council of State subsequently reversed the decision of the court of first instance.

The Council of State, in the reasoning of its reversal decision, analysed in particular the contractual provisions regarding the non-suitability of the invalidity of the patent as grounds and explained that the SEP user should always be free to file a lawsuit on the validity of the patent. It also stated that the patent owner's attempt to prevent SEP user from challenging validity of a patent would constitute a breach of competition in the context of abuse of dominant position.

Increase in SEP Litigation

It appears that SEP litigations will continue to proliferate in the upcoming years. Although we see that SEP holders mostly prefer German, USA 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 seek enforcement in jurisdictions used to export infringing products following an expansionary policy with the effect of globalisation and shortage crises.

Given the investments and incentives in different industries and its high market potential, Türkiye may become one of the jurisdictions where SEP cases are heard. While the Competition Board surprisingly examined the specifics of the patent law in its only case law regarding SEPs, we will be keeping a close eye on whether a case will be heard in an IP Court in Türkiye and if the courts will follow the Boards approach in dealing with FRAND terms.