



18 Mar 2020

Is a minor difference from a patented range enough to win an infringement case?

[Gün + Partners](#) - Turkey

Co-published

There is no explicit rule in Turkish law that covers patent infringement in cases where a product possesses a minor difference from a patented range. Further, Turkish High Court decisions have not shed any direct light on this matter.

However, there have been several infringement actions brought before IP courts, wherein a rights holder has alleged that a product, which varies slightly from its patent's scope of protection, is considered to be infringing. Thus far, the court's approach to such allegations has not been promising for rights holders.

In one action, the pharmaceutical patent disclosed a tablet, which included an active ingredient of 30% to 80% of its total weight. Following the inspection of the marketing authorisation dossiers, it was determined that the product had an active ingredient of 28.18% of the total weight. The patentee argued that the minor deviation from the patented range did not exempt it from being infringing, especially considering that there could be differences in both active ingredient and tablet weight.

The court resolved that, as the patent did not protect the active agent itself but a formulation including between 30% and 80% of the active ingredient, any formulation that did not have an active ingredient within this range fell outside of the patent's scope of protection.

The court also considered that there may be a possible 5% deviation in tablet weight but concluded that the active ingredient percentage is not affected as this difference occurs in the total weight of the tablet only, not in the amount of the active ingredient. However, it did not provide satisfactory reasoning for this.

Similarly, in another infringement action, it was determined that the disputed product included 80.32% and 80.997% of the active ingredient as part of the total tablet weight. The patentee claimed that the generic product was not excluded from patent's scope of protection with a 0.3% difference from the active ingredient, which meant that the product fell outside of the patent's coverage. However, as a result of a court-appointed expert panel examination, the court concluded that the percentage of the active ingredient would not be affected by a deviation in the total weight. In conclusion, a minor deviation from the patent's scope of protection sufficed to exclude the generic product from being infringing.

Comment

The IP court's approach to products that possess a minor difference from the range claimed in a patent is rather rigid and it appears reluctant to consider prosecuting allegedly infringing products due to formula deviations. Unfortunately, this hinders a satisfactory evaluation of patent infringement in cases where the product differs from the patented range in only a minor way in Turkish IP law at present.

For further information contact:

Selin Sinem Erciyas
Gün + Partners
[View website](#)
Email: selin.erciyas@gun.av.tr
Tel: +90 212 354 00 00

Zeynep Çağla Üstün
Gün + Partners
[View website](#)
Tel: +90 212 354 00 00

This is a co-published article whose content has not been commissioned or written by the IAM editorial team, but which has been proofed and edited to run in accordance with the IAM style guide.

TAGS

[Europe](#), [Turkey](#)

GÜN + PARTNERS
AVUKATLIK BÜROSU



Selin Sinem
Erciyas