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**Intellectual Property and Fight Against Counterfeiting**

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### **PUBLIC CONSULTATION ON**

#### **PATENTS AND STANDARDS - A MODERN FRAMEWORK FOR STANDARDISATION INVOLVING INTELLECTUAL PROPERTY RIGHTS**

#### **SUMMARY REPORT**

#### **Executive summary**

In the context of the European Commission's objective to ensure a smooth functioning IPR system that ensures fair returns to inventors and innovators and promotes the rapid diffusion of new technology and products across the Internal Market, the Commission has been analysing if this objective is being met in the specific area of standard essential patents (SEP). To that end it commissioned a report in 2013<sup>1</sup> to identify barriers to the efficient licensing of SEPs and on their evaluation as well as suggested remedies. The report identified a number of potential issues. The Commission then launched a public consultation to canvass views regarding the significance of these issues for stakeholders and suggested avenues for their resolution.

Respondents confirmed that patents feature an increasing role in many of the areas of ICT standardization that are central to European policy initiatives such as the Digital Single Market and the Energy Union. Replies also indicate that patent licensing issues greatly concern patent holders and standard implementers alike. Replies have revealed the specific challenges companies face in acquiring information, negotiating licenses, and in the case of smaller firms getting overall clarity of IPR infringement exposure. The divergence of opinions also testifies to a dynamic and at times adversarial environment.

Transparency of the patents covered by the relevant standards is an area where stakeholders see scope for improvements if the relevant measures to remedy the current opaqueness have costs that do not outweigh the enhanced transparency benefits. Stakeholders also see positive contributions to SEP licensing coming from an increased role of patent pools and alternative dispute resolution mechanisms. The FRAND concept has been confirmed as vitally important by stakeholders however there are doubts as to whether this general concept can be refined further. Patent transfers are of concern as reflected by the fact that rules in some standard setting organization have recently been changed to account for this. Injunctions have been confirmed as divisive topic with further clarity expected by stakeholders to come primarily from the Courts.

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<sup>1</sup> [http://ec.europa.eu/growth/tools-databases/newsroom/cf/itemdetail.cfm?item\\_id=7833&lang=en&title](http://ec.europa.eu/growth/tools-databases/newsroom/cf/itemdetail.cfm?item_id=7833&lang=en&title)

On the whole, opinions differ significantly. Thus, based on further analyses the Commission shall apply the insights gained from this public consultation and will determine the best way to ensure a balanced licensing framework for SEPs as announced in the Digital Single Market Strategy for Europe.

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### 1. CONSULTATION TOPIC AND PARTICIPATION

This document reports on the public consultation held by the European Commission from 14 October 2014 to 15 February 2015 on the topic of Patents and Standards.

The objective of this consultation was to gather information and views on the efficiency of the patent market linked directly to standardisation (i.e. that for standard essential patents). The consultation notably called on interested stakeholders on the basis of a background report commissioned by the Commission's services in 2013, to provide their views on (1) how the current framework governing standardisation involving patents performs and on (2) whether it should evolve to ensure that it facilitates the development and use of standards adapted to the fast-changing economic and technological environment of the Digital Single Market.

More than one hundred respondents took this opportunity to express their views on these issues. Of these responses 87 are non-confidential and are being released. There were only twelve replies from SMEs, four from SME representative bodies (such as PIN-SME who participate in ETSI and also one of the EU SME envoys) and only five research bodies responded suggesting that the issue is known by, and of interest to, large economic players. Only six public authorities representing Member States replied and three patent offices sent in responses. In contrast ten standards setting organisations (among them the three European Standardization Organisations (ETSI, CEN, CENELEC) ) responded and no less than thirty two ICT/Telco companies took part aptly demonstrating how the issue of standard essential patents is currently focussed in the telecoms field. Without prejudice to the difficulties in drawing an exact classification, it

appears that more patent holders (close to 30) than implementers (close to 20) responded. It was also interesting to note that over a third of respondents were based outside of the EEA. Finally, the consultation found interest among professional organizations in the area of law, consulting and IPR.

The quality of the responses was detailed with many respondents providing useful insights and factual information. This report covers the non-confidential submissions received between October 2014 and 15 February 2015. These submissions can be found on the consultation website<sup>2</sup>.

Most respondents stated that their reply was based on first-hand experience with the interplay between patents and standards. Many respondents chose to reply to the detailed questions under all eight key issues of the public consultation. Others made use of the explicitly allowed possibility to focus their replies on individual sections of the questionnaire.

## **2. OVERALL INSIGHTS ON SUBSTANCE AND QUESTIONS 1.1.1-2.1.3**

The first set of questions concerned the importance of the issue and respondents' overall assessment of how the Intellectual property right rules of SSOs governing standardization involving patents perform.

Given the sample respondents it was not surprising that nearly all participants noted that standard essential patent issues are most prevalent in the telecommunication industry. Many stakeholders however pointed to a rising number of standards that include patent-protected technologies in many other sectors, such as automotive, energy/smart grids, healthcare, electrical and electronic engineering, audio-video-media, smart mobility and more broadly the internet-of-things (IoT). A telecommunication network operator noted the growing convergence of internet and telecom technologies with a greater influence of the internet sector on the telecom sector.

Overall, it appears that in the telecommunications field the number of standards needed is growing and so is the number of patents per standard, with a corresponding increase in patent holders to deal with. In the same vein, at least three respondents pointed to the current multiplication of standard setting initiatives and fora and open source initiatives complementing the work of SSOs. A few implementers believed that the multiplication of patents and standards would lead firms to prefer technologies with low royalties. They claimed that many consortia were working along those lines and according to one engineering firm new technologies were entering the market at lower rates.

The risk of proprietary solutions was seen by a few to be increased if technology owners perceive the standardisation environment is not balanced enough.

The increasing importance of interoperability was noted as firms now need to integrate as a 'system' to grow mass markets. The idea was floated in several responses to develop licensing solutions for a product or 'system' bringing together in one negotiation all the needed technology. Standards themselves need to be 'system'-related, which according

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<sup>2</sup> [http://ec.europa.eu/growth/tools-databases/newsroom/cf/itemdetail.cfm?item\\_id=7833&lang=en&title=Patents-and-Standards%3A-A-modern-framework-for-standardization-involving-intellectual-property-rights](http://ec.europa.eu/growth/tools-databases/newsroom/cf/itemdetail.cfm?item_id=7833&lang=en&title=Patents-and-Standards%3A-A-modern-framework-for-standardization-involving-intellectual-property-rights)

to one European standardisation body may require more of a ‘top down’ approach to standardisation.

Most respondents did not challenge the inclusion of patented technologies in standards, notably when the standard promotes interoperability, and some indicated the need for standards to cover highly advanced technologies in order to be meaningful. Although a small number of respondents expressed preferences for avoiding patents in standards whenever possible, the majority seemed to endorse a system where standards are chosen purely on technical grounds. More than the inclusion of patents in standards, the issue of concern seems to be the licensing of these patents.

Overall, responses suggested that the licensing environment was being complicated by a higher divergence in business models and the multiplication of players along the value chain. In particular, technological convergence is apparently bringing many more companies together in developing solutions. These companies do not have similar business models. For example, monetary compensation for the patents is important to those that are focused on long term investment in R&D but less so for those who want to grow the market for the current technology.

In this context, a few respondents support an environment where standardisation projects have the flexibility to establish bespoke IPR- and licensing rules for individual participating members. One chipmaker company mentioned the possibility that new SSO be set up if existing ones are not flexible enough.

Overall stakeholders argued for a framework that allows sufficient flexibility for different types of standardization projects but that also provides the certainty and predictability that is necessary for businesses developing and implementing standards. Most respondents did not believe that the system ‘was broken’ but only a few thought it had no problems. Most thought it could work better and commented positively on many proposals to address specific concerns of the current framework. Twenty five respondents did think that licensing SEP was costly, lengthy and burdensome. The lack of clarity in the legal framework surrounding SEP licensing was identified as a source of disputes by only five companies, while far more saw the other factors of over declaration and lack of transparency of patent applications as the main issues. The few representatives of smaller firms and SMEs that responded complained most about the lack of transparency of royalty fees which they argued deterred them from entering into new product markets. Royalty stacking was seen as particularly problematic by this same constituency.

In contrast many respondents from the sector pointed out the immense success of the telecommunication industry in terms of innovation and related it to a successful standardisation environment, which is based on FRAND licensing of SEP. The diversity in approaches to licensing by different standardisation bodies was nonetheless highlighted and some drew attention to the numerous royalty free initiatives. For example, such initiatives were said to be common in many areas of internet technology and for example in software interconnection standards. Some companies expressed a preference for such royalty free models when possible that is when companies are able to monetise on the product market growth. It was generally accepted that companies investing in innovation are entitled to fair returns for their innovations.

Nearly all stakeholders provided insights on the issue of licensing standard essential patents. Those respondents primarily holding standard essential patents pointed to the need to get a return on large investments they had made on the technologies which they had contributed to standardization. There were concerns expressed by them about systematic difficulties in getting some implementers to negotiate license agreements. They claimed that this problem was exacerbated in some emerging economies. One mentioned that the time and effort it took to find agreements in difficult licensing negotiations was increasing. Litigation costs and unwillingness to pay can prompt the decision by patent holders to transfer patents to another non-practising entity in order to recoup the investment in a timely way.

In contrast respondents primarily implementing standards pointed to their exposure to royalty demands based on what they consider as weak portfolios comprising invalid or non-essential patents as well as excessive licensing terms. Portfolio licensing is considered generally efficient and some see it as the only realistic way to go about licensing. It has the advantage of providing 'patent peace'. Yet, there is some concern about the quality and validity of those patents included in a company portfolio.

Nevertheless, a large number of respondents cautioned against public intervention before assessing the impact or the relation between its costs and benefits. Participation in standardisation is costly and needs a business model to support it. Many respondents explicitly support the FRAND-based open standard model as a viable solution.

Many responses pointed to increases in patent quality as the main avenue of improving the environment for standardization that includes patented technologies.

### **3. DETAILED INSIGHTS PER KEY ISSUE**

The questionnaire was divided into key issues that are central to the debates on patents and standards in the standardization community. This report follows the structure of the questionnaire.

#### **3.1. Transparency (Questions 3.1.1-3.5.2)**

Transparency has been defined for the purpose of the consultation and this summary report as relating to the ease for stakeholders to access reliable information about the patent situation in a specific area of standardization, notably on the existence of patents, their ownership, validity, enforceability and their essentiality for standards.

Questions concerned first of all the relevance of patent transparency. Further questions concerned the patent declaration obligations which exist in most standard setting organisations. These questions focused on the content of these declaration obligation, the quality of patent declarations and their handling by standard setting organizations. A final set of questions concerned possible measures to increase transparency of the declaration system.

Many participating stakeholders noted the importance of patent transparency in standardisation working groups. Transparency helps standard setting organizations and their technical committees to make an informed choice and notably to avoid a situation where adopted standards cannot be implemented for lack of necessary licenses.

There was broad support for requesting early patent declaration during the standard setting process in order to get licensing commitments. However, most of them recognised that such early ex-ante disclosure, by its very nature, does not guarantee the quality of the information for the purpose of evaluating final exposure to IPR claims.

A concern flagged specifically by 5 respondents and in general terms by other nineteen respondents relates to the transparency of patent applications filed during standardisation exercises. Some said that there is very little information on IPR available to standardisation group delegates. A patent office corroborated the statement by a chipmaker company and a private individual that as the discussions around a standard under development evolve companies file 'opportunistic' patents relating to newly approved essential features in the standard. Applications are not public for a period of time, which leaves the standardisation group in the dark as to the proprietary nature of the technology. Some proposed making the content of standard essential patent applications public.

There were divergences with respect to the feasible level of accuracy that could be obtained in a declaration list. Of those responding to this issue, there was quasi unanimity that a perfect declaration list is not feasible but also large agreement that the situation could be improved. Broad blanket declarations were perceived to be useful against hold up but not useful for the purpose of informing on licensing exposure in settings without royalty free licensing.

The same stakeholders pointed to systematic inaccuracies in declaration lists. The issue of over-declaration was identified in twenty one responses. Stakeholders also pointed at factors that render initially accurate declarations incorrect (such as a change in the scope of the standard or of the patent). These stakeholders argued that as a result the declaration lists were not particularly useful for individual licensing negotiations and could at best serve as a starting point. However other stakeholders pointed out that for smaller companies in particular the declaration lists are the main means to assess their potential exposure to future royalty requests and more accurate lists would provide them better protection. Uncertainty about licensing fees exposure was noted by a handful of companies as a very significant deterrent for SMEs wishing to enter markets or develop products. Larger players mentioned they could gain from better information by way of a more efficient negotiation process due in part to closer starting positions.

Twenty one respondents voiced support for steps to improve declaration lists despite concerns relating to cost and achievable accuracy. Amongst these there was a widespread opinion that perfect information is difficult as companies faced high internal search costs. The majority of companies did not think that "patent searches" are warranted for declarations. A minority nonetheless suggested penalties for undeclared patents such as imposing royalty free licensing. One telecommunication operator proposed that an optimal declaration should provide the number of each patent of the patent family, the legal status of the patent, the claim of the patent deemed essential to the standard and the functionality of the standard to which the claim is essential. Among those that commented on this issue, the majority of respondents supported potential efforts to update the initial declarations at key moments in the standardization process, notably around the adoption of the standard itself.

Information exchange between patent offices and SSOs was seen as a credible avenue of improvement. Many participants also voiced support for improving declaration lists by

drawing in information available at patent offices or known to patent holders who could update the information at the adoption of the standard.

Some respondents also commented positively on the idea of having the essentiality of declared patents checked by a third party while pointing to a number of practical and costing issues that need to be overcome. But others saw this as unfeasible and too costly. The idea of a register to be accessed for ownership information was raised. Harmonizing information formats in SSOs and patent offices was also mentioned as an improvement.

Finally, as regards measures to increase transparency outside the declaration list, a stakeholder favourably commented on the role that patent offices can play, including in the form of a patent landscaping in areas relevant for standardization. But others were of the opinion that patent landscaping should be contracted by private parties.

### **3.2. Transfers (Questions 4.1.1-4.2.4)**

Transfers of SEP ownership has been signalled by a few respondents as being increasingly relevant and occurring increasingly often. It was noted that in the field of ICT, SEPs are transferred more often than non-SEPs. The consultation asked stakeholders about the prevalence of transfers and their causes and consequences, as well as the effectiveness of the current rules.

Responding stakeholders argued that SEP transfers can be a key monetisation tool for those players that do not have the financial resources to manufacture their inventions or who are not able to compete on global markets. It can also be a strategy to innovate for standardisation and subsequent sales of the related patents. It is also seen by some respondents as a tool to maximise return on investment.

Stakeholder views are balanced as regards the overall consequences of SEP transfers, notably on the questions whether such transfers lead to more or less fragmentation of the patent ownership and whether this then leads to market distortions.

Nearly all respondents who covered this section pointed out to the fact that the FRAND-commitment binds the original owner who has made the commitment. Problems may arise when it is not clear whether this commitment is transferred with the ownership. There seems to be very wide consensus among these stakeholders (but not unanimity) that SEP transfer should not allow circumvention of the FRAND commitment. One network operator proposed to indicate in patent office registers whether a patent had been declared essential to a standard.

The transfer of SEPs to certain forms of non-practicing entities was mentioned as an issue by several of these respondents as a particularly important problem for them. Some respondents claimed that a transfer of SEPs to non-practicing entities often leads to increased royalty rates and more litigation. Respondents who concentrate on R&D and who create revenue by licencing out stressed the legitimacy of their business model and its importance for innovative standards.

Several of these stakeholders commented positively on the recent modification of the ETSI IPR policy concerning SEP transfer, others suggested further improvements to the rules, such as direct reporting of transfers by patent holders to the EPO. Some pointed

out that national courts may not recognise the commitment made as binding the new owner if he has not accepted this.

The license-of right system received positive comments by some of these respondents, however it was pointed out that national laws would still be required in some Member States. Given their recent adoption, there is limited experience with the revised ETSI rules.

### **3.3. Patent pools (Questions 5.1.1-5-3.3)**

Patent pools are defined for the purpose of the consultation and this report as agreements by which two or more holders of (standard-essential) patents agree to licence these patents under a joint licence to each other and/or third parties.

Ten respondents showed interest in this issue, which has not been at the core of discussions in many SSOs. Several respondents with direct experience in patent pool creation focused their replies exclusively on this section.

Nearly all of these respondents stated efficiency advantages of pool-based licensing. The most often cited advantages are the savings in negotiation cost, the transparency as regards licensing conditions and the level playing field created among implementers. The benefits of a shared essentiality check were also mentioned. The importance of patent pools specifically for SMEs was stressed.

Despite the efficiency provided by pools, several factors were mentioned as a disincentive for participation. First, the need to agree on the commercial terms render a patent pool more difficult among businesses with different business models. Second, firms may be unwilling to surrender their right to individually assert their patents for defensive purposes. A good enforcement regime was important to elicit participation in pools for many firms. In particular, it was mentioned that generally firms do not commit their core technologies to pools. It was noted that patent pools in wireless communications have been difficult to create.

The important success-factors that were mentioned by these stakeholders included the neutrality of the pool administration and the involvement of outside experts (for example in the essentiality checking). Pools work better when they are narrower and well defined in scope but they also need to reach critical mass and provide the full benefits of a one-stop shop only if they cover all or at least most of the patents that are essential to a standard. Pools in particular allow players with just a few patents to obtain licensing income, which is important for smaller innovators.

As regards the role of public authorities, the role of a suitable regulatory framework was stressed including the need, for globally active pools underpinning global standards, to have coherent rules in the major jurisdictions.

The opinions of these stakeholders on the role of SSOs in the formation of patent pools was balanced. Most stakeholders pointed to the fact that most of the major patent pools are created in the context of standardisation but opinions were divided on the actual role of SSOs. It was argued that pool formation can be crucial for the success of the standard, notably in the case of competing standards. In such instances the patent pool is closely linked to the standard development as such. Many of these stakeholders argued that

standard setting organizations are not best placed to create or run patent pools although some disagreed. Most of these stakeholders argued strongly against making participation in patent pool formation mandatory for contributors to the standards.

As regards the outside licensing activities of patent pools, replies stressed differences between pools on the one hand and individual patent holders on the other and argued that this would require a difference in treatment as regards the enforcement of SEPs.

### **3.4. FRAND (Question 6.1.1-6.6.5)**

Many standard setting organizations require that patents on technologies included in their standards are licensed on "fair", "reasonable" and "non-discriminatory" terms, without however defining these concepts in detail. The questions concerned the need to define these concepts in more detail, their understanding and the practical solutions that could lead to bring understanding of these concepts among stakeholders closer to each other.

There is a disparity of opinions on how to deal with FRAND terms. Stakeholder views were divided by thirty one in favour and twenty five against as to whether the "fair", "reasonable" and "non-discriminatory" concepts would benefit from further clarifications and whether this can be done in terms of general principles. Possible forms of clarification were proposed by a number of respondents, with a majority being silent and a number of respondents seeing no value in clarifications.

Although a few respondents recommended methodologies for FRAND calculation, most respondents favoured some flexibility in the determination of FRAND rates and saw a big role for negotiations in FRAND determination. Methodologies proposed included the use of benchmarks or using as a license rate base the smallest saleable unit. There were advocates of facilitating benchmarking by revealing actual licensing terms and conditions, at least to courts and arbiters for comparison purposes. Some went further asking for arbitration results to be made public. Some respondents argued that the FRAND concept of "non-discrimination" implies licensing at any level of the value chain. All these methods were however contested by other respondents. Some respondents found ex-ante clarifications of FRAND terms not practical or even not feasible.

Some respondents suggested using third parties for patent valuation for an impartial starting point to negotiations.

There is in fact a stark division of opinions on any of the aspects relating to FRAND clarification.

A Japanese intellectual property protection body expressed concerns for divergent rules evolving in different regions and supported an international framework for FRAND compliance.

Most of these respondents found portfolio licensing and cross licensing as useful and necessary. For many, cross licenses greatly simplify the licensing process. A large number of respondents stated that portfolio licensing should be a voluntary solution with mutually agreed valuation methods. A minority expressed outright opposition to portfolio blanket rate setting. Others mentioned that patent-by-patent adjudication was not feasible for players with large patent portfolio and that patent validity or essentiality are best

challenged after royalty-rate adjudication. A large number of respondents considered that cross-licensing should not force the licensing of non-SEPs in return for SEPs.

Respondents usually believe royalty stacking is an issue but there was no consensus on the relevance of the issue. Many responded that royalty stacking had to be proven and could not be assumed. A few respondents believe royalty stacking is only a theoretical concept as in reality cross licensing and non-assertion de-facto decrease royalties paid. Four respondents argued that royalty stacking is a key problem for SMEs which often will be less able to benefit from cross licensing agreements.

Most respondents indicated that licensing terms should be left to negotiations. In particular it was repeatedly (but not unanimously) pointed out that SSO's should stay away from licensing issues. But some proposals were made to improve clarity of FRAND commitments. This includes specifying the minimum issues that need to be spelled out in a FRAND offer (e.g. royalty type; territorial or branding restrictions; types of applicable products). It was also proposed that standardisation participants agree to announce some of these parameters in advance. Another alternative proposed was to submit complete ex-ante declarations of licensing terms. This last option has a number of opponents. Another issue mentioned is the possibility of 'defensive termination clauses' to reinforce FRAND.

Finally, many pointed to the need to pay attention to incentives of stakeholders participating in standardisation and implementation in any attempt at clarifying FRAND. These incentives should not be changed. Some respondents pointed to the fact that a devaluation of patents might increase the reliance on trade secrets and proprietary solutions.

The major SSOs saw a limited role for themselves in the definition of FRAND terms. Companies pointed to the fact that some informal standard setting bodies were more willing to address these issues and would attract implementers. Others questioned however generally the role of SSOs as a vector of change as regards the FRAND concept.

### **3.5. Patent Dispute Resolution (Questions 7.1.1-7.4.6)**

Key issue 7 in the consultation concerned SEP disputes and their resolution. A particular focus was placed on alternative dispute resolution (ADR), which is to be understood as comprising all forms of dispute resolution other than court litigation.

The consultation raised questions related to the prevalence and impact of SEP disputes as well as to their benefits and costs. Further questions referred to a potential integration of dispute resolution mechanisms into the standardisation process and the set-up of such a mechanism.

Stakeholders were divided on whether SEP disputes would further rise, including in the mobile telecom industry. Fourteen thought they would. Others argued that SEP disputes actually stem from general business competition, not necessarily linked to SEPs. But evidence was provided that even though in absolute terms SEP litigation is less frequent, SEPs are more likely to be litigated than other patents. They also confirmed the high

costs of such disputes and their often uncertain or incomplete resolution. Alternative dispute resolution mechanisms are used, but in a limited manner, given that both parties' agreement to move to arbitration is a pre-requisite. This voluntary feature was supported by most, but not all respondents. While most respondents mentioned arbitration as a useful tool, mediation was also suggested by some as a helpful assistance for parties to reach amicable solutions to disputes.

A large number of respondents (thirty eight) pointed out that ADR can provide benefits for both parties when deciding on FRAND rates. It is often faster and less costly than court litigation, although some pointed out that this was not always the case. A particular benefit mentioned was also that ADR can provide global portfolio and freedom-to-operate arrangements between companies, while litigation is nearly always limited to one jurisdiction and to a small selection of patents. The confidential nature of arbitration was mentioned as an interesting feature that can lead to efficient dispute resolution. Others however argued that the outcome should be made public to facilitate benchmarking. Stakeholders noted the benefit of specialist arbitrators familiar with the complexity of SEP disputes.

Many respondents argued however access to the Courts should not be restricted and they argued that disputes related to the assessment of infringement or validity should not be determined by ADR, but rather patent offices and court litigation. ADR was seen by a large number of respondents as an appropriate way to resolve SEP disputes focused on the determination of FRAND rates, with only a small minority explicitly arguing against its suitability.

Stakeholders were divided on whether and how to include dispute resolution procedures in SSO's IP policies. Some argued in favour while others opposed mandatory arbitration procedures. Respondents supported cooperation between ADR facility and SSOs.

Two existing initiatives in this field were mentioned. First, the recent collaboration between ETSI and the World Intellectual Property Office (WIPO) in which both agencies have tailor-modelled submission agreements that parties may use to refer a dispute concerning the adjudication of FRAND terms to WIPO arbitration. Second was the arbitration procedure in use at the Digital Video Broadcasting since 1996. The first is voluntary, the second mandatory.

### **3.6. Unwilling implementers and injunctions (Questions 8.1-8.5)**

In the last section of the questionnaire, respondents were asked to provide their views on efficient protections for holders of standard-essential patents against implementers who are unwilling to take licenses for these patents as well as on the use of injunctions for infringement of a standard-essential patents.

Injunctions for the purpose of the consultation and this summary report were defined as lawsuits against implementers of technologies covered by standard essential patents based on an alleged infringement of these patents and seeking to have the products of such implementers banned from specific markets in a particular jurisdiction.

The replies showed that stakeholders are divided in their views on the appropriate recourse to injunctions in the domain of SEPs. While some stakeholders stressed the need for a tool for patent holders to get non-paying implementers to the negotiation table,

others stressed the risk of abuse of injunctions to extract high terms. In the first case, problems of non-payment were in particular mentioned as regards jurisdictions outside the EEA, such as China and India. An example was given by one firm of a patent included in a standard for the sole purpose of providing access to injunctions against unlicensed implementers. Most stakeholders however nuanced their positions and provided avenues to explore on how to balance the opposing risks.

One large technology implementer proposed to match the concept of willing licensee with the concept of willing licensor, a condition that would be demonstrated by providing sufficient information for the implementer to be able to evaluate a FRAND offer.

Several stakeholders referenced jurisprudence on this matter and notably the, at the time of the survey, expected decision by the European Court of Justice in the Huawei and ZTE case.

#### **4. CONCLUSIONS AND NEXT STEPS**

The public consultation is part of the Commission's work on closely following the ongoing debate on the smooth functioning of the market for SEPs to assess whether and how the Commission might need to intervene in this field<sup>3</sup>.

The European Commission's Communication on the Digital Single Market Strategy for Europe advocates the need for a balanced framework for negotiations between right holders and implementers of standard essential patents in order to ensure fair licensing conditions. The insights on problems and solutions gained from the submissions shall be a useful contribution for determining what needs to be done in this field.<sup>4</sup>

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<sup>3</sup> Communication from the Commission "For a European Industrial Renaissance" (2014)

<sup>4</sup> Communication from the Commission "A Digital Single Market Strategy for Europe" COM(2015) 192 final