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Observations of AIPPI Turkey Association for the Protection of Intellectual Property to Commission Consultation on Patents and Standards

Dear Sirs,

Please find attached the observations submitted by the AIPPI Turkey Association for the Protection of Intellectual Property to the detailed questions in your Public Consultation on Patents and Standards.

This response is submitted on behalf of the AIPPI Turkey, which is the Turkish National Group of the AIPPI (International Association for the Protection of Intellectual).

At present, the Institute comprises more than 140 members among which attorneys at law, patent attorneys, trademark attorneys and academicians. The members are both from industry and private practice and represent clients from all fields of technology and of all sizes, including start-up companies, single inventors, SMEs, and multi-national corporations. Thus, AIPPI Turkey members regularly act in their professional capacity on behalf of many contributors to open standards as well as standard users.

The AIPPI Turkey headquarters are located in Istanbul, Turkey.
At present, the Association is not registered in the EU Transparency Register.

In the following, AIPPI Turkey has elected to comment on most of the detailed questions listed in the Consultation. In order to provide traceability, each of the answers are given right after the questions.

Yours sincerely,

Dilek Ustun Ekdial
President

A. Sertaç Murat Koksaldi
Vice-President

AIPPI TURKEY ANSWERS TO COMMISSION CONSULTATION ON PATENTS AND STANDARDS

Answers to Detailed Questions

Key issues 1 and 2 – Scope of standardisation involving patents; best rules and practices

Questions on the prevalence and effect of standardisation involving patents

Q 1.1.1 Fields of standardisation involving patents: To your knowledge, in which technological areas and/or fields of on-going standardisation work are patents likely to play an increasingly important role in the near future? What are the drivers behind this increase in importance?

A 1.1.1 Considering the fact that interoperability is the main factor leads standardisation and closely related to technology in general, patents play increasingly important role in on-going standardisation work related to telecommunication, consumer electronics, and automotive sectors. Furthermore we believe that in near future patents may play an essential role in standard development process of automotive sector as electric and hybrid cars market related to which there are (will be) many new and patented technologies will grow and in order to keep that market growing, there will be need for standardization and especially standards involving patents.

On the other hand it is quite hard to give Turkey specific information for that issue as there is no database that we can access standard essential patents (SEPs) in Turkey even though it is possible to access the current standardization processes in the web site of the Turkish Standards Institute ("TSE"), standards involving patented technologies are not separately listed in that database. However in any way as the standardization is global (or at least regional) rather than national and considering that the firms involved in global business activities lead that, it may not be wrong the state that the fields in which SEPs play increasingly important role in Turkey are not different than the ones in other countries.

Q 1.1.2 Trends and consequences: Do you see a general trend towards more/less standards involving patents? Are there any practical consequences of this trend? Are business models changing?

A 1.1.2 Even though we do not have a database in which we can see whether the trend towards standards involving patents increases or decreases in Turkey, in general and especially in European Union ("EU"), we know that there is an increasing trend considering the fact that there is a growing number of patent declarations during standard development process before Standard Setting Organisations ("SSOs").¹

The trend regarding the number of standards is increasing especially in the field of consumer electronics with the rate of current technological progress and the demands for products with interoperability, increased and complex functionality, and smart features.

One of the practical consequences of that increasing trend is that the firms make more license agreements and it seems that there is increasing number of disputes raised from these agreements. Furthermore we think that this increasing trend also gives rise to concerns related to competition.

We think that the increasing trend changes the business model inevitably as firms see SEPs as (direct/indirect) income source; (i) firms aim to have SEPs and get royalty fees from the others

¹ For instance when we checked the IPR Online Database of the European Telecommunications Standards Institute ("ETSI"), we see that the patent declarations made increases between 2011 and 2014. Indeed while there were 141 declarations made in 2011, the number is 186 in 2014.

implemented that standard (direct income source) or (ii) firms aim to have SEPs related to their highly innovative technologies to have more players in growing/potential markets that they lead to create an additional income sources (indirect income source). For instance firms work on electric/hybrid car technologies try to get SEPs for these and assure the growth of the market that they lead to create an increasing income source currently.

Q 1.1.3 Standardisation prevalence/complexity: In general, do you observe an increasing role of (any type of) standardisation in your fields of activity/interest? Are standards becoming more, or less, detailed and comprehensive? How does this trend impact on the functioning of the standardization system?

A 1.1.3 As the technology develops, interoperability of the devices becomes more important and therefore the role of standardization increases in any relevant field. For instance as we have experienced in consumer electronics sector, we can confidently say that the role of standardization increases in there. Furthermore we are of opinion that standardization will be more important in the future and may be one of the essential requirements to keep the market alive as it may be almost impossible to sell a product/device which does not interoperate with other products/devices.

We think that considering the nature of standards they shall be detailed and comprehensive and as we mentioned above as the technology develops, they become more detailed and comprehensive. This heavily impacts the functioning of the standardisation system because the barrier to enter the standards arena successfully requires more time, personnel and more R&D investments. Yet with proper regulation, detailed and transparent standards could act to reverse these barriers.

The fact that the standards become more detailed and comprehensive slows down the standardization process and makes it cumbersome. Thus we observe that in order to develop a standard (/standards), firms prefer to join consortiums instead of SSOs in nowadays as they are seemed to be more efficient than SSOs.

Q 1.1.4 Standardisation in support of innovation: Do you consider that standardisation involving patents contributes to innovation and to the uptake of new technologies? If so, in which areas? Would technologically neutral standardization promote innovation equally well in these areas? Should standardisation be less specific by excluding those elements that are covered by patents?

A 1.1.4 Even we think that SEPs motivates firms to contribute to innovation as they are one of the source of royalties, we do not think that it is quite right to see SEPs as a motivation for innovation. Indeed patent protection fulfils that objective and seeing SEPs as a reward for innovations does not fit the purposes of standardization especially with Patent Licensing Entities or Non-Practicing Entities. Mainly the aim of standardization is to provide interoperability between the products of different firms and ensure the integrity of the market.

There are examples where patents disable adoption of standards or the use of them. This is usually the case where the standard specification is dominated by patents of one or two companies. If there is sufficient competition of innovation, patent licensing concerns should in principle not play a major role in development of a standard.

On the other hand considering the fact that most of the time, innovations made through using the existing technologies, through contributing to them and as SEPs enable more firms to use patented technologies, that may be seen as a contribution way for SEPs. Moreover in any way as standards enable firms to earn more, they can invest on R&D activities more and therefore it may not be wrong to state that standards (not specifically SEPs) contribute innovation somehow.

In light of above if SSOs' IPR policies may be revised to clarify the FRAND concept more and again to ensure that only the essential patents can be involved in standards, in that case SEPs may have more contribution to innovation.

Questions on the decision to include patented technologies into a standard

Q 1.2.1 Issue of over-/under-inclusion: Are there fields of standardisation in which you consider that standards include too many patented technologies? Are there areas in which standards would benefit from including more patented technologies? Please explain.

A 1.2.1 Again we do not have Turkey specific information regarding that issue. However in global level it seems that in telecommunication or consumer electronics sector standards include too many patented technology as the innovation and patents play important role and interoperability is essential in this sector.

Q 1.2.2 Criteria for inclusion decision: What should be the criterion/criteria to use when deciding on whether or not to base a standard on a patented technology and/or to include a further patent-protected technology into a standard? How can a possible cost and benefit analysis be done? What could be used as benchmarks?

A 1.2.2 We are of opinion that the essentiality of the patent and the clear FRAND commitment of the patent holder may be the criteria for inclusion decision. Indeed if implementers trust that only patents which are essential incorporated into standards and they can obtain license on fair, reasonable and non-discriminatory terms, most of the concerns related to SEPs may be eliminated. In that respect SSOs amend their IPR policies to clarify the concept of FRAND in general and accordingly, may request patent holders to make written statements to undertake essentiality of their patents.

We are also of the opinion that major implementers should be consulted and should play a big role of such inclusion decisions because they are the parties with the experience of applicability and necessity of patents which are deemed as essential by SSOs. When proposing technologies, members of working groups influence the development of functions with little obligation at that stage. Private companies thereby exercise public functions without public oversight, to their own significant advantage.

Q 1.2.3 Process for deciding on inclusion: Who should take the decision of including (or not) patented technologies into a standard? Should the entity suggesting the patented technology for inclusion be asked to justify the inclusion? If so, what elements should be covered, at minimum, in the justification?

A 1.2.3 SSOs (or at least independent authorities) with the major implementers shall be the ones deciding on whether patented technologies incorporated into standards in order to avoid any abuse. Furthermore as abovementioned, patent holders' ex ante statements regarding the essentiality of patents may be a useful tool to eliminate the concerns and justify inclusion.

Q 1.2.4 Disputes over inclusion: Are you aware of legal disputes over a decision to include (or not) a patented technology into a standard? What were the main facts and what was the outcome of the dispute? Sometimes a non-SEP patent may get a certification from an independent examiner as SEP and get into the pool thus earn money from it by licensing out the non-SEP patent as SEP. On the other hand a SEP may be excluded from a patent pool of the related standard by the licensor or patentee itself. This may create a royalty stacking for the individual standard. Some patent owners may exit from the patent pool of the standard by claiming their patent is non-SEP. However they may try to license out the same patent separately.

A 1.2.3 Intentionally left blank

Questions on other links between standards and patent-protected technologies

Q 1.3.1 Pertinence of these two situations: To your knowledge, has any of the two situations occurred? If yes, where and how often? In your answer, please explain in detail why the respective conditions specified above were fulfilled. What were the consequences?

A 1.3.1 As mentioned in 1.2.4 there are such patents that realize both situations.

Q 1.3.2 Defences by the patent holder: Do you see a risk that a standard setting process could be abused to obtain (preferential) access to patent-protected technologies? Has this happened? Please explain. How can the patent holder defend his/her rights?

A 1.3.2 In case a SSOs' IPR policies strictly require the disclosure of patent rights for its members, includes principles to assure licenses are made on FRAND terms (i.e. joint negotiations and most restrictive licensing terms disclosure requirement) and a member holds a patent which is commercially valuable (starring-role patents), then we think that a standard setting process may be abused to obtain access to patented technologies. Therefore in any way a balance between patent holders and implementers shall be preserved and any reform shall be made considering that balance.

Questions on "best rules and practices"

Q 2.1.1 Best rules and practices: A variety of rules and practices govern standardisation involving patents. Which elements of these rules and practices are working well and should be kept and/or expanded? Which elements on the other hand can be improved? Would you consider it helpful if standard setting organizations would be more explicit about the objectives of their patent policies?

A 2.1.1 We are of the opinion that current practices of standardisation is controlled by the companies who are taking advantage of the licensing of SEPs for years and we believe more transparent system wherein the new or developing companies can take a part in.

It can be proposed that SSOs should be required to maintain public and detailed records on the setting of its standards, to include all documents including correspondence, technical analysis and minutes of meetings, which such database would function as metadata to the standard itself.

Q 2.1.2 Trends and initiatives: The pertinent rules and practices are constantly evolving. Do you see any particular trends? What are recent improvement initiatives that you find promising or worthwhile of attention? Are there initiatives outside the SSO domain that you find helpful (e.g. patent quality initiatives by patent offices)?

A 2.1.2 Intentionally left blank

Q 2.1.3 Differences in SSO rules and practices: Do you see significant differences between SSOs in terms of their patent policies and/or treatment of standard essential patents in practice? If so: What are the practical consequences of these differences? Which of these differences (if any) pose problems? Which of these differences are justified?

A 2.1.3 Intentionally left blank

Key issue 3 – Patent transparency

Questions on the relevance of patent transparency

Q 3.1.1 Scope of transparency issue/Priority areas: Is there sufficient patent transparency in the fields of standardisation that are of interest to you? In which of these standardisation field(s) is patent transparency particularly good and in which field(s) is it insufficient? Please explain.

A 3.1.1 From the point of view of an implementer, any lack of transparency is too much, no matter how small it is within an environment where the patent owners use all of their potential to make their invention to be standardised.

Q 3.1.2 Ex-ante transparency: In your experience, is there sufficient knowledge about the relevant patent situation during the discussions leading to the setting of standards? Have you experienced a situation

where a standard was decided based on significantly incorrect assumptions about the relevant patent situation? What were the causes of such incorrect assumptions and what were the consequences? Could all relevant stakeholders participate in the discussions?

A 3.1.2 We experience in standardization process in EU ex-ante transparency to be insufficient in most consumer electronics standards and also consider that setting of standards should not be led by patents. Any possible IP concerning aspects of the standard need to be listed before.

Q 3.1.3 Ex-post transparency: Either as licensor or as licensee, how do you initiate the licensing of the relevant patents? What are the means of identifying the relevant patents, the patent holders, the potential licensees, etc.? What are the respective costs of collecting information on the patent situation?

A 3.1.3 Intentionally left blank

Q 3.1.4 Non-transparent aspects: In those areas where you deem patent transparency insufficient, what aspects of the patent situation are insufficiently transparent: (1) existence of patents, (2) validity of patents, (3) essentiality of the patents for the pertinent standard, (4) ownership of the patents, (5) enforceability of the patents, (6) coverage of patent by existing licences/pass through and (7) others? Please explain.

A 3.1.4 Information about existence of patents and essentiality of the patents is a major issue for licensees. Even if a standards organization or a patent pool provides a list of patents, there is often no insight how the patent is mapped into the standard, or even to which particular technique the patent contributes. This is a very poor level of transparency. All of the issues identified are important, as a failing in any one renders the declared patent irrelevant. All must be present for a patent to be standard essential and for negotiations to be accessible.

Q 3.1.5 Consequences/risks: What are the consequences of insufficient patent transparency? What risks occur, and what are the (financial) impacts if these risks materialize? If appropriate, distinguish between ex-ante/ex-post transparency and between the different aspects of patent transparency above.

A 3.1.5 Standards are now non-optional for implementers to adopt. It is well-known that alternative competing technologies are liable to disappear from the market. Where patented technology is essential to standards, this leads to the unusual economic situation of a dual-layer monopoly: the first layer being a commercial monopoly (to use the standard for itself) controlled by SSOs, and administered at an international level; and the second layer being an intellectual property monopoly (to use the patented technology), controlled by patentees and administered at a national level.

The result is that implementers have no option but to enter the market with a product in a prescribed format; and by doing so, they have a consequent obligation to adopt monopoly technology. The possibility for anti-competitive results follows naturally.

A sophisticated patentee will reduce its disclosure to the minimum requirement, saving cost and improving its future position. There is a clear economic reason for this: Transparency creates information symmetry, and with it negotiating balance between the parties.

Q 3.1.6 Cost of coping individually: How do you deal with situations where you perceive that patent transparency on one or several aspects of interest to you is insufficient? Do you gather information proactively or do you wait to be contacted (e.g. by patent holders requesting royalties, by implementers asking for licences)? What costs are involved in dealing with situations of low patent transparency?

A 3.1.6 We encounter costs to identify the connection between the patent and the standard by patent attorneys and technology experts.

Questions on the content of the declaration obligation

Q 3.2.1 Trigger of obligation: Patent declaration obligations could be triggered either by membership of a standard setting organization, or by participating in a specific standardisation project or by having directly suggested a (patented) technology for a draft standard. What are your views on the respective triggers (advantages, disadvantages)?

A 3.2.1 Reasonable awareness for relevance of claims owned by member companies will be clarified with final version of the draft standard. Participation to specific standard is necessary to make such an analysis. Essential claims can be compared by participants with the final draft and then an obligation of declaration will be completed. Good faith of participants during discussion of draft standard has to be ensured. An independent patent search by SSOs before discussions on standard could be a useful input.

We believe that the obligation to disclose should trigger upon membership, to ensure that all relevant IP is captured. However, the stage at which disclosure is required of those members may in principle be at any stage of the standard setting process, even after final adoption of the standard.

Q 3.2.2 Required effort: What effort should be required from a patent holder in identifying relevant patents in his portfolio? Should these efforts be contingent on the degree to which the patent holder participates in a specific standard setting process (for example whether or not he has actively contributed the technology in question)?

A 3.2.2 Patent holder should briefly check its own portfolio and affiliates before standard setting meetings. If there is a contributed technology involved identified patents can be declared at the final draft. Active contribution is definitive.

Q 3.2.3 Process of declaration: If you are a patent holder active in a standard setting body that requires patent declarations, how do you comply, in practice, with the obligation to declare specific patents? What are the concrete steps undertaken to identify such specific patents, and what parts of your organization are involved?

A 3.2.3 Intentionally left blank

Q 3.2.4 Costs of declaration: What are the costs involved in complying with an obligation to declare specific patents? What are the respective costs of (1) identifying patents and (2) informing the standard setting organization? Would you search for patents in your own portfolio that relate to a standard, even when there is no obligation from the SSO patent policy? If yes, would your approach differ in process and thus in cost? Please be as specific as possible.

A 3.2.4 Internal costs depend on the location, experience and number of intellectual property responsible in charge and required man hour rate for specific case. It is not possible to provide a fixed or average cost for the both workload.

Q 3.2.5 Blanket declarations: Some standard setting organizations require their participants to declare that, in general, they hold essential patents over a standard without requiring that these participants identify each of these patents specifically. Do you believe that such declarations provide for enough transparency? Please justify your answer, where necessary distinguishing situations where you consider that this approach is sufficient from those where you do not.

A 3.2.5 Such declaration is not enough for transparency. Internal patent search report as an attachment to the declaration need to be furnished and should be considered binding.

We agree that identifying blanket declarations as a key concern for implementers is clear. Clearly, little to no transparency whatsoever is provided by such declarations. Patent portfolios in the thousands and tens of thousands are not uncommon. For these, portfolio licenses are common: value is not calculated on a singular per-patent basis.

At the extreme, a blanket declaration approach could well lead to a single, non-identifiable patent being the key for SEP disclosure of a portfolio in excess of 1,000 patents. In reality, that single patent will be responsible for the entirety of the accrued value of the entire portfolio license – that it comprises only 0.1% of the IP being licensed. The outcome is no less desirable where the ratio is 10:1 or 2:1.

The implementing organisation has neither the choice to refrain from taking a license, nor the resources to investigate the true useful extent of the “blanket”. The evaluation is time consuming, and requires highly-specialised analysis. It is thus costly, and a barrier to entry. Without negotiating strength or commercial option, the implementer is in effect held captive by the patent holder.

Q 3.2.6 Scope/detail: Where standard setting organizations require that patent holders identify the relevant patents individually, what information about the patent should be transmitted? Only the patent number or other aspects? What are the respective benefits and costs of requiring that the patent holder also (1) specifies to which part of the respective standard the declared patent belongs and/or (2) explains why the patent is relevant for the standard?

A 3.2.6 Claim set of the patent, legal status, list of countries should be accompanied to the transmitted official number. Cost for providing said information by the patent holder is very low comparing with other parties' individual efforts to access. Such declaration should also include short technical summary of the patent functionality, high-level explanation of essentiality, explanation of value of the patent to the standard overall, mapping to the areas of the standard to which the patent is essential and an undertaking to maintain declaration by means of further disclosure whenever required.

Q 3.2.7 Consequence of non-compliance: What should be the consequences if a patent holder has failed to comply with its declaration obligation (for the standard, for the patent holder, for licensing negotiations)? Should the respective standard setting organizations take action and what should this action be? Are the consequences of non-compliance sufficiently clear in your experience?

A 3.2.7 Good faith of the patent holder should be first requirement. Patent holder must bear the burden of proof. Non-compliance cases should be handled by disciplinary committee of SSOs.

We consider that with the power to invoke this substantial revenue stream should also bring a great responsibility. Correspondingly, any abuse of such a power should meet with commensurate penalties. Such penalties should be ensured to prevent the patent holders to disregard such rules by ignoring. Regulations should be brought to ensure such penalties will apply.

Questions on the quality of patent declarations

Q 3.3.1 Initial accuracy: In your experience, what is the reliability of patent declarations at the time when they are made? In which fields of standardisation and on which aspects of the declaration would initial accuracy need to be improved? What causes of initial inaccuracy are particularly detrimental to the usefulness of patent declarations?

A 3.3.1 Such patent declarations are highly debatable between patent owners and implementers. Patent holders tend to keep and enforce their patents on their own to maximize the revenue, without any declaration to SSOs.

The making of detailed public declarations would facilitate future negotiations or litigation. Setting a deadline for accuracy of declarations would tend to encourage detailed consideration of the issues.

Q 3.3.2 Updating requirement: Should declarants be asked to update their patent declarations at key events such as those mentioned above? What would be the respective advantages and disadvantages?

A 3.3.2 Updating declarations would help implementers to identify the parts of a standard to which a patent relates and may also clarify validity, partial validity and existence of patents. Also updating declarations should be required on the occurrence of events which may affect the essentiality or validity of the patent in question, such as amendment of the patent specification or any judgment by a Court or other competent tribunal in relation to that patent's infringement of validity.

Q 3.3.3 Check of declarations: Should the quality of patent declarations be submitted to a check by someone other than the declarant? Who should perform this check (peer review by members of the standard setting organization; standard setting organizations themselves; third parties on behalf of the standard setting organizations; patent offices; etc.)? What should be the scope of the check (essentiality for the standard; validity; enforceability; other)? Who should bear the cost of such a check? If you think the declarant should bear (part of) the cost, how can it be prevented that this creates an incentive to disrespect the declaration obligation?

A 3.3.3 Intentionally left blank

Q 3.3.4 Essentiality check (in particular): Depending on your answer to the above question, how can the essentiality check be performed in practice? What are the average cost of checking essentiality (for third parties) and what could be done to minimize these costs? Do you see a set-up of such a check that is particularly cost and time efficient? How can it be avoided that this check creates incentives for not respecting the declaration obligation?

A 3.3.4 Intentionally left blank

Questions on the handling of declared information

Q 3.4.1 Publication: Should standard setting organizations make the declared patent information publicly available? Do you see any impacts on the protection of personal data? Under what conditions would it be justifiable to restrict access or to charge for access?

A 3.4.1 SSOs should make declared patent information available to the public. Otherwise, disclosure may lead tradeoffs not only for SSOs but also for member companies. Declarations ensure direct access to the technical information and reduce risk of exploitation by incumbent firms. Protection of personal data is irrelevant after official publication of the patent by patent office.

Q 3.4.2 Ease of access: What are your views about the various methods used by standard setting organizations to make the declared information available? Which methods do you find particularly useful and why?

A 3.4.2 Voluntary declaration of patent information mechanism may lead to conflicts. SSOs should explicitly require member companies to ensure all relevant patent information was submitted. Change of legal status, e.g. ownership can be monitored from public access databases by any interested parties. Classification of declared information and make available with a web interface is strongly recommended. Updates on the database should be scheduled which is announced to the public.

Q 3.4.3 Combining information: Some standard setting organizations combine declared information with information drawn from other sources, such as patent offices. What are your views on this? In what forms and to what fields of standardization could this be expanded? What sources of information (in addition to patent offices) could be used and what types of information could be added?

A 3.4.3 Patent Offices use various databases, such as INPADOC to provide information on patent families. SEP mark and relevant standard and version could be added to the database to easy access up to date information and track relevant standard. SSOs can provide declared in-

formation to the patent offices so that all relevant information can be accessed via legal status screen of a national or regional patent.

Questions on transparency improvements beyond the system of declarations

Q 3.5.1 General question: What can be done to increase standardisation-related patent transparency other than to strengthen the system of patent declarations used by standard setting organizations?

A 3.5.1 Intentionally left blank

Q 3.5.2 Public patent landscaping: Public patent landscaping in the context of standardisation would be an exercise where (1) patents that are relevant to the particular technological/product area to which the standard relates are identified and (2) this information is then shared with all interested parties. Do you see benefits of such public patent landscaping and in which areas would this be particularly useful? Who should perform this exercise (e.g. patent offices, commercial service providers, public authorities) and how could this exercise be financed?

A 3.5.2 Intentionally left blank

Key issue 4 – Transfer of standard essential patents (SEPs)

Questions on the prevalence of transfers and their causes and consequences

Q 4.1.1 Prevalence: How common is it, in your area of activity or interest, that standard essential patents are transferred? Are standard essential patents transferred more, or less, often than other patents? Do you see any trend in the transfer rate? Do transfers usually concern individual patents or larger patent portfolios?

A 4.1.1 Intentionally left blank

Q 4.1.2 Issues and consequences: In your experience, what are the typical issues that arise in the context of transfers of standard essential patents? Are such transfers leading to more or less fragmentation of SEP ownership? Are these transfers leading to more or less disputes/litigation? What is their impact on royalty rates for the transferred patents and on the total royalty rate for all patents essential for a standard?

A 4.1.2 Upon transfer of SEP patents, FRAND undertakings may not pass to the transferee which then engages in negotiations. Such matters will vary according to national law and custom, and the individual terms of the assignments. That introduces a great deal of uncertainty for implementers.

FRAND Undertakings are the foundation of the SEP system and without such obligations, declarations are arguably of no value to implementers. We propose that undertakings should be reinforced at three stages.

a- At the legislative level: that any patents declared as essential should be registered at national patent offices and at the European Patent Office and this requirement is imposed by suitable legislation.

By endorsing a FRAND obligation against the patent itself, that obligation may attach to the property of the patent itself, and pass with the patent ownership to the transferee.

b- At the declarant level: The declarant is responsible for giving notice of FRAND obligations to transferees, and ensuring that the burden passes. It is proposed that even after transfer, the burden of a FRAND obligation should be enforceable against the transferring party unless that party can prove that transferees were given good notice and entered into equivalent FRAND undertakings as the original declarant.

Because FRAND Undertakings are contractual, they exist independently of ownership of the asset itself. Accordingly, the obligation discussed above could be implemented by means of a contract, and enforceable against the transferor of an SEP by those means.

c- At the transferee level: The transferees are required to enter into equivalent FRAND undertakings at the same time, or before, taking ownership of a Patent.

Q 4.1.3 Non-practising entities: Have you encountered transfers of standard essential patents to entities that do not produce or market products including the technologies covered by these standard essential patents? What particular consequences have you observed?

A 4.1.3 We have encountered such transfer of rights of SEPs to the non-practising entities and consequently we have encountered an uncertainty of terms of the new licensing program. We believe such transfer of rights of SEPs should be publicly available so any uncertainty or doubt especially regarding FRAND conditions can be evaluated.

Questions on the effectiveness of the current rules

Q 4.2.1 Impact on effectiveness: Is there a risk that SEP transfers circumvent existing patent policy rules of standard setting organizations or render them less effective? Please explain and if possible cite specific examples.

A 4.2.1 Intentionally left blank

Q 4.2.2 Specific rules: In your area of interest, are there specific rules governing SEP transfers and what is your experience with them? Where there are no specific rules, would you see a need for such rules? What should be their objectives (achieving transparency about ownership, providing legal/business certainty, reducing litigation risks, facilitating smooth licensing process, fostering research and innovation activity, etc.)?

A 4.2.2 Intentionally left blank

Q 4.2.3 Transfer of FRAND commitment: How can it be ensured that the new owner of the transferred SEP is bound by the FRAND licencing commitment given by the initial owner? What can standard setting organizations do in this regard? What do the sellers of the SEPs need to do? Should the licencing terms (including royalty rates) practiced by the initial owner influence the interpretation of the concept of "FRAND" for the new owner?

A 4.2.3 Intentionally left blank

Q 4.2.4 License of right: Have you been involved in the use of a License-of-Right system? What benefits and risks are, in your opinion and experience, linked with this? Are there important differences across national jurisdictions that reduce the reliability of License-of-Right provisions?

A 4.2.4 Intentionally left blank

Key issue 5 – Patent pools related to standardisation

Questions on benefits and costs of patent pools

Q 5.1.1 Target areas: What are the situations/external factors which render a patent pool useful? Are you aware of specific standards for which a patent pool would be useful but where there has been a failure to create one?

A 5.1.1 In case of an existence of a patent thicket in a specific field of technology, from a perspective of a licensee, there are two very critical factors which render a patent pool useful: man-

agement of individual licensing processes with different patentees and royalty stacking on a certain technology.

The intellectual property pooling is procompetitive when it:

- integrates complementary technologies,
- reduces transaction costs,
- avoids costly infringement litigation, and
- promotes the dissemination of technology.

Even if it is not directly related to a specific standard but a technology, the case in the Blue-Ray patents would be a good example of this. There were lots of patent owners which are reluctant to meet in a patent pool and non-patentee manufacturers had to draw back out of the Blu-Ray business because of the very high royalty rates requested by various patent owners.

Similarly regarding the digital televisions there are more than one patent pools which is licensed by such as Thomson and Philips. This creates a license fee over than 5 euro which causes extra workload and extra fee for the licensee.

Yet such patent pools may only be deemed as “useful” only if all the patents in the pool are valid and essential to the standard without any doubts, and if all patent owners are encouraged to participate to the patent pool for their SEPs. Patent owners should be prevented to include invalid or non-essential patents. Such rules should be regulated by laws.

Q 5.1.2 Benefits of patent pools: What are the benefits of patent pools in the above situations (Q 5.1.1) respectively for patent holders and/or patent users? What aspects in patent pool governance are particularly relevant in practice to ensure the realization of these benefits?

A 5.1.2 From a perspective of a licensee, there are many technical and administrative works before entering into a licensing agreement such as conducting infringement analysis, invalidity searches, internal discussions, negotiations with licensor, legal reviews on the contract and signature process. Moreover, there are some further administrative works after the signature such as royalty reporting process, payment process and tax documentations. Doing all these works just once for all patent owners prevents an undue burden and allows using internal work force in a more efficient manner.

Besides, royalty stacking on a specific technology is prevented by combining all patent owners in a single patent pool and controlling the royalty rate by FRAND conditions. It provides earning money from patents to licensors with that they spend time less than individual licensing. They also don't make any effort for licensing their own patents.

To achieve these benefits, it is very important to collect all patent owners in a single pool. Even a single out of pool patent owner may destroy all these advantages of a patent pool.

For the realization of these benefits, patent pool governance should ensure the transparency of the patent pools. In addition; patent pools should have been auditable by the patent pool governance.

Q 5.1.3 Alternatives to patent pools: What alternatives to patent pools do you see to achieve efficient licensing in situations where ownership of patents which are essential to a standard is widely dispersed?

A 5.1.3 Since works on standards are contributed by a group of individual parties, most of the contributing parties try to establish a self-patented part in the related standard and mostly they manage to do it. Without patent pools, it would be very difficult to manage various licensing programs separately.

On the other hand an alternative could be that in order to provide unbiased FRAND conditions, SSOs may take possession of the patent pool's governance.

Q 5.1.4 Difficulties of pool creation: What are the main difficulties in setting up a patent pool and how can they be addressed? Are there differences in national law or its application across countries of the EU/EEA or worldwide that make patent pool creation more difficult?

A 5.1.4 Intentionally left blank

Q 5.1.5 Costs of pool creation: What are the costs involved (do you have estimates)? What do these costs depend on? How are they usually (pre-)financed?

A 5.1.5 Intentionally left blank

Questions on the incentive for patent pool participation

Q 5.2.1 Decision to participate in pool: What factors influence a patent holder's decision to participate in a pool or not?

A 5.2.1 Intentionally left blank

Q 5.2.2 Incentives for pool participation: How can this balance be influenced positively? What incentives can be provided by public authorities and/or standard setting organizations to increase patent pool participation?

A 5.2.2 Intentionally left blank

Questions on the organizational links

Q 5.3.1 Right moment for pool creation: What is the right moment in the standard setting process to start the process of creating a patent pool? What part of work on setting up a patent pool start could/should be done in parallel to the standard setting discussions?

A 5.3.1 Intentionally left blank

Q 5.3.2 Role of SSOs: What contribution can standard setting organizations make with regard to patent pools? Should they provide guidance patent pools? Should they provide and/or select patent pool administration services?

A 5.3.2 Intentionally left blank

Q 5.3.3 Role of public authorities: What contribution can public authorities make to facilitate patent pool creation? What role could publicly owned patents play? Are there specific features of non-EU legal systems that could be useful also in the EU? Under what conditions and to what purpose would public financial support be beneficial?

A 5.3.3 Intentionally left blank

Key issue 6 – Notions of "fair", "reasonable" and "non-discriminatory"

Questions on the understanding of and experience with "fair" and "reasonable"

Q 6.1.1 Notions "fair" and "reasonable": How, in your view, should the terms "fair" and "reasonable" be understood? Which of the above methodologies do you consider particularly appropriate, which other methodologies do you find important and what could be an appropriate mix of references?

A 6.1.1 Both terms "fair" and "reasonable" should be interpreted very carefully when defining royalty rate for a SEP. First of all, conditions should be "fair" and "reasonable" only for SEPs. In practice, many unrelated and unnecessary patents are bundled with 1-2 SEPs and being licensed out

together. This changes the scale of “fair” and “reasonable” evaluation in comparison with SEP only conditions. For example; in a patent pool related to Digital TV sets, there are 20 patents whereas only 3 of them are standard essential. When you object to royalty rate, patentee defends itself with the number of patents they offer. However, none of them may be useful for the licensee but the terms are still “fair” and “reasonable” for that pool of 20 patents. Accordingly, to reach the real “fair” and “reasonable” terms, SEPs should not be bundled with other patents.

Apart from this bundling problem, these terms should be interpreted together. In FRAND conditions, competitiveness of licensees should be kept unharmed while contributing parties should get some return from their contribution to the standard. This balance is very critical for defining fair and reasonable conditions. If licensees face financial difficulties because of the high royalty rates while licensors having excessive amount of profits from royalty income then “fair” and “reasonable” conditions are not realized for that license program. On the contrary contributing parties to the standards which are licensor on latter stages, should not lost any income because of contributing to the standard.

None of the abovementioned methods is enough to define FRAND conditions alone. All of them should be taken into account very carefully. Incremental value of the technologies adopted in the standard in comparison to alternative technologies that were rejected should be taken into account while the value should not be considered differently because the patent is standard essential anymore. Even it is difficult to calculate incremental value of some SEPs over consumer electronic products, in principal it is one of the best ways to determine the value of the patent. The value of a patent should be defined regardless of its essentialness to the standard. There should not be overrated royalties for comparably less important technologies because of the essentialness to the standard. On the other hand, market value of similar transactions outside of the standardization context could be a good guide for applying this principle.

Additionally, the licensing terms are highly dependent on individual circumstances. A well-declared and transparent pool of patents for a standard may cover up to 90-95% of the technology required for standards implementation and that pool may demand an agreeable amount.

That amount may, however only be in the region of 50% of the royalties required for full compliance, because patentees outside the pool may demand almost an equivalent amount, even if they own considerably fewer patents. This may simply be because it has freedom to operate outside the pool, or because it is aware of the commercial pressure that it is able to exert.

FRAND is a notion arising from contractual terms: it is customary, but has been defined by lawyers and not by law-makers. Therefore it is particularly unclear, especially the notion of what is “fair” and what is “reasonable”.

We consider that competition guidelines should be issued for FRAND valuations accordingly and such guidelines may cover concepts such as calculation of licenses.

Q 6.1.2 Examples of non-FRAND licences: Are you aware of cases of licenses of standard essential patents that, according to you, do not fulfil the FRAND terms and conditions? Please be as specific as possible.

A 6.1.2 “Non-Discriminatory” part of the FRAND should refer to “equal to everyone”. In standard patents, every licensee should pay the same amount for the same patents. However, in some licensing programs including SEPs request a royalty according to the “percentage of net sales”. Since the net sales prices of different companies are naturally different, almost every licensee pay different amount for the same patent. Companies define net sales price considering many parameters such as material costs, workmanship costs, geographical conditions, administrative cost, brand value etc. A company which is using very high quality materials in its products and accordingly having higher net sales prices should not be punished by paying more license fee for the same SEP.

Similarly, a company may build up an important brand value over years thanks to big efforts in management, public relations, marketing, R&D activities etc. Accordingly they can mirror this value on their prices as a prize of providing reliable products and services over the years. In this case, as a result of the royalty defined according to the net sales price, licensor as well, would take advantage of the brand value of that company. It is not fair and reasonable at all.

This may be a usual way of calculating royalty in non-standard patent licenses, especially in university patents for newly developing products, but should not be used in licensing SEPs, because SEPs are mostly being licensed in compulsory manner and do not add enormous value to the products. On this base, license programs for SEPs should not request royalty fee according to the percentage of net sales price.

For example, in a Digital TV license program, Licensor request a royalty fee of around %1 of net sales price. Moreover, they have some upper and lower limits according to size of the TV. However, upper limit sometimes reaching to twice of the lower limit. This means, one licensee may pay twice the royalty the others are paying. So, this kind of license for a SEP would not fulfill the FRAND terms.

Yet non-discriminatory term is only subject to the licensees. However, we see a lack of pressure from licensors to license each implementer. Such lack of pressure will harm the competition between licensed implementers.

Q 6.1.3 Time required for negotiations: In your experience, how long does it take, on average, to negotiate FRAND terms? What does the length of negotiations depend on? Is it more or less difficult/fast to reach an agreement on FRAND terms and conditions for standard essential patents licenses compared to other similar patent licensing deals?

A 6.1.3 The length of the negotiation period mostly depends on the power and essentialness of the patent and the margin between the initial offers of both the patent proprietor and the licensee. In negotiations, generally terms which are already defined as FRAND by licensor itself, are being offered to licensee and these terms may be compelling for the licensee.

There are some critical points which strengthen the position of the licensor at the beginning of the negotiations. First of all, licensors do not have to explain why they evaluate the offered terms as FRAND and how they calculated it. Moreover, after they sign a contract with anyone, they are hiding behind the FRAND and claiming they have already signed an agreement with those conditions and they should offer the same to everyone because of the FRAND.

On the other hand, if it is a SEP license, licensor becomes less flexible because of the essentiality of the patent to the product of licensee and licensee becomes more cautious in terms of validity and digging every possible prior art document to attack validity of the patent. This causes negotiations to be finalized later than expected. Unless there is an objective authority defining terms of the license for SEPs, the understanding of FRAND terms differ dramatically between two sides of the agreement.

In most negotiations, patentees and implementers will negotiate to a compromise, and both parties will respect "deal-breaking" points. Normal patent holders will take this into account, but SEP holders know well that the commercial pressure arising from hold-up of implementation overrides any other considerations. Their position is so dominant that FRAND becomes a secondary consideration. We believe such patent holders should be obliged to license every implementer for the market.

Q 6.1.4 Initial offer or outcome: Do the terms "fair" and "reasonable" relate to the initial offer of the patent holder or to the actual outcome of negotiations? Are you aware of FRAND adjudication cases where there was a large difference of terms and conditions between the last offers of the licensor on the one hand and the last offer of the licensee on the other?

A 6.1.4 Actually, “fair and reasonable” terms should not relate to actual outcome of negotiations or initial offer of the patent owner. However, terms are usually set by the patent owner itself and enforced to the industry as is. Afterwards, it is defended by the patent owners for “non-discriminatory” reasons. A “Non-discriminatory” condition is not meaningful if it is not “fair” and “reasonable”. Accordingly, “fair” and “reasonable” terms should not be defined by the patent owner itself. On the other hand, it should not be determined according to the result of the negotiation either. This time, it would depend on the negotiation skills of the licensee and royalty rates would differ among licensees. Again, it would not be “fair” and “reasonable”. It seems like the obvious solution would be the determination of license conditions by an objective authority.

Q 6.1.5 Other methods of ensuring reasonableness of licensing terms and conditions: Can patent pool prices for a given standard be a proxy for FRAND terms and conditions? What are the limits of the use of patent pools as a proxy? How can bias coming from such a method be avoided?

A 6.1.5 Every patent pool has different characteristics and should be evaluated separately. In some pools, there are many SEPs with some unrelated and non-SEP patents but in some others there are hundreds of unrelated patents with just a couple of SEPs. Moreover, the values of some SEPs are much higher than others considering the importance of the standard for the product. Accordingly, using patent pools as proxy is not an efficient way of setting terms and conditions all the time. However, in some conditions, an analogy can be established with same or neighboring technical fields. It is important to make this proxy without taking the SEP examples into account to derive more realistic results.

Questions on guidance and mechanisms

Q 6.2.1 Existing guidance: To your knowledge, what guidance on FRAND definition already exists (regulators, standard setting organizations, courts)? Which of this guidance do you consider as particularly useful? Would you welcome additional guidance? If so, on what specific aspects of FRAND?

A 6.2.1 First of all we would like to note that there is no guidance on FRAND definition provided by any authority in Turkey currently. Besides we are aware of the DOJ suggestion regarding that SSOs may provide guidance on F/RAND rate and again Microsoft v. Motorola case where the Judge, James L. Robart tries to answer the question of “What is a “fair and reasonable rate?”. As far as we know neither de facto definition nor satisfactory guidance for FRAND currently and generally it is determined according to the terms of first transaction. Moreover considering the fact that the lack of guidance on FRAND (as a result wide variety of licensing base) is one of the reason causes patent hold-up, it seems that there is a need for additional guidance.

We think that it will be better if SSOs provide such guidance rather than the regulators (considering that government interventions may upset the balances) and without waiting courts’ precedents (as that may take some time and the hold-up is currently a problem). For that purpose maybe the SSOs which are active in the same field can come together to work on a project to provide a guidance for FRAND.² Moreover a cap on per product royalty and the option, whether SSOs can collect and distribute royalties may also be considered when a guidance on FRAND is provided.

Additionally considering the fact that rather than **non-discriminatory, fair and reasonable** are the vogue terms, we think additional guidance for those terms may be useful.

² Rebecca Haw Allensworth *Casting a FRAND Shadow: The Importance of Legally Defining “Fair and Reasonable” and How Microsoft v. Motorola Missed the Mark* Texas Intellectual Property Law Journal 235, 2014.

Q 6.2.2 Unilateral ex-ante disclosure: Would you welcome a larger role for unilateral ex-ante disclosure of licensing terms in order to facilitate the licensing of SEPs? What form could it take? How should SSO mechanisms be shaped to facilitate this instrument? Should they be mandatory or voluntary? Should the disclosure only concern the most restrictive terms?

A 6.2.2 It seems that larger role for unilateral ex-ante disclosure of licensing terms are seen as a tool to **preserve competition** and thereby **to avoid unreasonable patent licensing terms** and **to avoid disputes over licensing terms** in the countries where there are many SSOs and firms participated standard development process. However we think that when imposing such an obligation on patent holders, (i) the neutral role of SSOs (ii) the fact that the more extensive and effective policies may lead unwillingness of patent holders to attend standard development and (iii) the possibility that the standardisation process may be longer and becomes more complex shall be considered.³

We are of opinion that **most restrictive licensing terms disclosure rules** will be the most efficient way to introduce unilateral ex-ante disclosure and for that purpose SSOs shall amend their IPR policies. However if legally binding rules/decisions require SSOs' to amend their policies provide certainty and uniformity in that respect. Furthermore we think that it is better to have mandatory disclosure obligation considering the abovementioned concerns.

Q 6.2.3 Ex-ante setting of parameters: Alternatively, would it be efficient to set FRAND parameters - within the limits of competition law - at the beginning of discussions of a technical committee within or outside an SSO in order to facilitate the future FRAND licensing? Such parameters could be: the royalty base (at end product or component level, if component what component (s)), royalty type (lump sum, per unit price, percent value of a product/component). What other parameters could be discussed upfront to make licensing more practical, without violation of competition rules?

A 6.2.3 We think there are two things really important for the concept of FRAND and to provide trust among the implementers in that respect; (i) royalties shall be determined according to the real value of the technology and (ii) the licensing terms shall be foreseeable before a patent is incorporated into a standard. By this way both the interests of patent holders and implementers may be protected and a mutual trust environment may be created.

Portfolio licencing, cross licencing and "freedom to operate"

Q 6.3.1 Advantages of portfolio licensing: What are the advantages of portfolio licences respectively for the patent holder and for the implementer? How important is the so-called "freedom to operate" or "patent peace" between companies? Please cover in your answer also issues of scope (e.g. geographic scope, product scope, inclusion of future patents).

A 6.3.1 If the portfolio is related with a strong technology and there isn't any other portfolio regarding that technology, this situation is an advantage for the implementer since the implementer ensures freedom to operate.

From the patent holder's point of view, extended royalty terms and continuous flow of ongoing licensing fee are the advantages of portfolio licensing. Portfolio licensing may be used as a way to regulate the FRAND requirements.

Patent peace is very important. The reason is that; if two big players (competitors) can manage this, they would provide each other an advantage in manufacturability.

Inclusion of future patents is very critical because the implementer will not be required to make further freedom to operate searches. When his license expires he should change the design of the product and this could bring some unwanted cost.

Q 6.3.2 Determination of portfolio license value: How can the value of licences over large portfolios be determined if there is disagreement over the validity, essentiality/infringement or enforceability of (some) patents included in the portfolio? Is sampling (i.e. the review of a representative set of patents) a good approach for the evaluation of a patent portfolio? If so, how should sampling be done?

A 6.3.2 If there is any doubt over the validity of patents of the portfolio, the grounds of this claim should be investigated deeply. For determination of portfolio license value, holder of portfolio should also search market share of products which have features that are protected with patents pertained to its portfolio. It should be noted that a portfolio without the threat of invalidity is more valuable. In such cases, some risk factors should be taken into account. From a perspective of license as a first step all doubts about validity of the patent(s) should be cleared before entering into licensing negotiations.

These situations can be seen as bargaining factors in the negotiations and also it may provide flexibility against FRAND requirements. Extra conditions can be added to licensing agreement about these situations. Moreover, license agreement can be reviewed and renewed periodically. Taking into these considerations, during the agreement period FRAND requirements will be changed occasionally. The value of large portfolios can be determined by making classifications of the products in the portfolio.

Q 6.3.3 Cross-licenses: What are the advantages of cross-licensing? What problems arise? How do the concepts "fair" and "reasonable" apply to cross-licensing?

A 6.3.3 By cross licensing, each party finds the opportunity to bring its product to market. Cross-licensing can also act as a safeguarding mechanism for transfer of knowledge. Cross-licensing is not only an exchange of existing technologies but also an exchange of future innovation possibilities. Thus it can increase knowledge of technologies but if any of the parties develops crucial technologies, they must give right of usage.

Moreover, it can be treated as anti-competitive activity if the contracting parties are dominant players in the market. Cross licensing can be a good tool for the negotiations of SEP license. Since SEP licensors are obliged to apply FRAND terms for every licensee, you may have leverage by cross-licensing for better royalty offer.

The most significant potential benefit of portfolio cross-licensing is that it allows a firm operating within a patent thicket to use each other's patented technology without the risk of litigation, including the risk of facing an injunction that shuts down production. Portfolio cross-licensing can also reduce transaction costs to licensors by allowing firms to license multiple patents at once.

There are several differences between licensing and cross-licensing of SEPs. When cross-licensing the SEPs, the licensee has an advantage of changing the FRAND values. Consequently; the licensee gets the chance of obtaining the licence under advantageous conditions.

Overall/cumulative royalty requests

Q 6.4.1 Pertinence and impacts: In your experience how common is royalty stacking and in which areas of past, ongoing, or planned standardization does it exist or will it likely occur? What problems arise in such situations? How do individual companies deal with such situations and what are the (financial) costs?

A 6.4.1 In consumer electronics industry, royalty stacking is a common problem for some individual standards. Recent issues are being experienced in digital video broadcasting and decoding/encoding standards.

There are three well-known companies which are licensing allegedly standard essential patents according to the digital video broadcasting standards and each of which is requesting considerably high royalty fees. If you get license from all three companies you should pay almost % 2.5 of the net sales price of an average priced TV. This is almost equal to the net profit of the related

product and it is only for one standard. There are some other licenses you should have to pay as well. This situation causes serious financial problems on the licensee side. Sometimes, license fees are reaching to the % 10 of the product price because of the royalty stacking on SEPs. To compensate that cost, companies may have to decrease product and service qualities and this would affect the end customer as well. It may even lead to the insolvency of a company in a broader time period. Normally, standard and patent mechanisms supposed to develop the technology and industry together; however, it is not working expectedly in the current system.

Another kind of royalty stacking is occurred because of companies which are requesting royalties, out of the commonly licensed pool. The latest example to this situation is happened in H.264 patent pool. There is a well-known patent pool for this standard and being licensed for years. Suddenly, one of the contributors to the standard declared that they are licensing their own patents separately. This is a big concern for companies already received license for the pool and for the ones considering getting new license for the H.264 technology. Which license to get now, both? Do we have to get the new one as well? If companies get the second license for the same standard in this way, since it is an unexpected cost, they will look to compensate it from other aspects of the business.

Q 6.4.2 Co-ordination mechanisms: What forms of voluntary co-ordination mechanisms are, or could be, efficient for situations of royalty stacking? Should they be limited to a single standard, or cover families of standards, or cover all standards related to a type of product? How can the abuse of such mechanisms, for example by a group of dominant license-takers, be avoided?

A 6.4.2 First of all, this kind of voluntary co-ordination mechanism should be established within an internationally non-governmental organization such as WIPO, EPO. There should simply be a central unit for governing, and sub-units which control the royalty rates for SEPs in an individual technical field. Defining an upper royalty limit per product group could be an efficient way to control the royalty stacking. For example; under the Consumer Electronics field, there would be several products such as TV, media player, speaker, etc. The related sub-units of the organization would define all required standards together with related SEPs. Afterwards, they would determine a certain upper royalty limit per product group in proportion with the number of standards and SEPs within the standards and average product price. This upper limit may differ according to the product features as well and can be updated periodically to be in line with the developing technology. In this case, to ensure the completeness, all of the SEPs should be submitted to this organization and any SEPs should not be allowed to be licensed out of the organization. This would of course create some problems among the contributors, but with this way, it can be ensured to license all other competitors and contributors may be persuaded with this motivation.

Q 6.4.3 Method for allocating value: In order to improve methods to deal with royalty stacking and for adjudicators to find proportionate FRAND value, what are best ways to allocate value between patent holders of a given standard? How can the proliferation of patent applications in case of simple patent counting be avoided?

A. 6.4.3 It is one of the most difficult tasks in the patent system to define a certain value for a patent. The value of the patent varies according to the number of objective parameters such as territory, age, legal statues and subjective parameters such as included technology, additional value to product and essentialness. At this point it is not possible to satisfy all players using subjective parameters. Even it is not the most correct way of valuing patents by only using objective parameters; it may be the most efficient way in situations like allocating value through various patents from different patent owners. However, before valuing the patent, firstly the essentialness of the patent to the related standard should be proved by a technical committee.

Questions on the royalty base and the value chain level

Q 6.5.1 Current business practices: On what level of the value chain (e.g. component, bundle of components, final product) does SEP licensing currently take place in the fields of standardization in which you are active/interested? Is this business practice applied by all patent holders/implementers or are there different business practices?

A 6.5.1 SEP licensing is mainly active for final products. Since final products are usually delivered to the end customer, under the threat of preliminary injunction, final product manufacturers and retailers are more sensitive to customer loyalty. In order to be able to enforce the patents at the upper level of the value chain, patent proprietors draft the patents that are targeting the final products, not the components. This business practice is widely established by patent proprietors. There are also instances where patents are drafted in such a way that both the final product and components are covered. In such cases, both of the final product and component is attacked by the patent proprietor. Such practices are widely adopted in consumer electronics industry.

Q 6.5.2 Royalty base: How should the royalty base be selected to allow licensing for different types of products (products that rely entirely on a given standard or set of standards, or rely mostly on a set of standards or on multiple technologies)? For a given implementation of a standards in a product, to what extent would it be desirable or feasible that the royalty type be streamlined, e.g. in a percentage of the product value, royalty per unit sold, or lump sum?

A 6.5.2 The current approach to computing a value base for the SEPs is not too much different from the usual methods that are applied to regular patents. It focuses on the individual patents and generates a subjective value for each and every SEP. Whereas, there is need for a more holistic approach which focuses on the economic contribution of the standard which is in question. The value of a SEP is a combination of the technical contribution of the invention that is protected by the patent and the impact of the standard on the market. Standards help markets to develop, enlarge and capitalize. Therefore, an economic value could be attributed to each standard. Such an economic value of the standard constitutes the impact of the standard on the market. Therefore, it can be assumed that the value of a SEP is a function of the said economic value of the standard escalated by the technical contribution of the said SEP when compared to other SEPs. Finally such value should not exceed a predetermined percentage of that product.

Q 6.5.3 Need for clarity: Is this issue, in your opinion, currently addressed in the patent policies of the standard setting organizations in your area of activity/interest? Is there a need for more explicit rules or should this be left open?

A 6.5.3 No references to the royalty base and relevance to the value chain are observed in the patent policies of SSOs. Regulation of the royalty base by the SSOs, can help both parties and can clear out uncertainties.

Q 6.5.4 Impacts of changes: What are the advantages of giving or denying the patent holder the right to licence only on one level in the value chain and thus of allowing or prohibiting that he refuses licences to implementers on other levels? Please distinguish between impacts on patent holders, on component makers, on end product makers and on the standardization system itself.

A 6.5.4 For patent holders, this will decrease their flexibility and decrease royalty generated.
On component makers, the royalties that are paid will increase, will not help business to flow but rather, it will complicate their business and increase the costs.
On end product makers, the royalties that are paid will decrease and the legal pressure that is created by injunction threats will go down.
On the standardisation system, there will be no significant consequences.

Questions on the "non-discrimination" principle

Q 6.6.1 Definition in practice: In your opinion, what is the best definition of the non-discrimination principle? What aspects of non-discrimination do you find important? Is there sufficient clarity on what non-discrimination means and how it is to be applied in practice? Does the non-discrimination principle relate to the initial offer of the patent holder or the actual outcome of negotiations? Does it relate to an offer isolated to a single standard or to multiple standards? Do you consider that the non-discrimination principle creates obligations on the (potential) licensee?

A 6.6.1 It is known that the most common licensing commitment is a commitment to license on fair, reasonable and non-discriminatory (FRAND) terms. Therefore the “non-discriminatory” leg of FRAND ensures the right for licensees to be treated in a non-discriminatory way.

It is believed that the non-discrimination principle and the term non-discrimination does not involve sufficient clarity and as such requires a more clear-cut definition. Especially, the discrimination on the cost side should be definable in terms of specific parameters of the case and yet in a manner to allow comparison with information on other licensing contracts. Therefore, it is believed that the non-discrimination principle can work better especially if information is available on the treatment of other licenses to allow comparison. This may require a new level confidentiality of handling information where the information is not treated as confidential within a specific case but is made at least partially public to allow comparison between cases.

It is evaluated that the non-discrimination principle should not only relate to the initial offer of the patent holder but also to the actual outcome of negotiations. In fact, the non-discrimination principle should prevent incidental or categorical discrimination of those parties owning no SEPS by way of setting measurable and comparable parameters which would function as reliable tools throughout the negotiations starting from the initial offer of the patent holder to the outcome of negotiation process, irrespective of whether the patent at issue became an essential patent only during negotiations. The non-discrimination principle therefore equally creates obligations on the (potential) licensee because the measurability of the effects of the parameters taken into account and cross-comparability of the cases requires active involvement of the parties to ensure fairness of the outcome of the negotiation process. The non-discrimination principle is therefore believed to cover not only the equal treatment principle but also involves cross-comparability.

A legitimate reason for justifying exclusion of the non-discrimination principle can be based on lack of available information to ensure measurability of the effects of the parameters taken into account during negotiations, in which case cross-comparability of different cases cannot be ensured. In this case, due to lack of comparability of information, the patent holder can be more inclined to exclude the non-discrimination principle because no other participants were previously locked in to use the technology in question.

Q 6.6.2 Pertinence: In your experience, is the non-discrimination commitment sometimes/often broken? In what ways is it broken? Please provide examples. Is there sufficient transparency about licensing terms to allow participants to assess whether they are discriminated against?

A 6.6.2 Intentionally left blank

Q 6.6.3 Justification for discriminations: Are there any reasons why individual implementers could be excluded from the obligation to license to (reciprocity)? What would justify different terms and conditions for FRAND licenses?

A 6.6.3 Many aspects to consider when defining into what one can apply FRAND terms can be referred to as the allowed royalty rates, reciprocity conditions, reciprocity bundling of other SEPs or non-SEPs and conditions in the legal framework such as entitlement of the patent holder to seek injunction in case of infringement. Reasons (if any) to justify exclusion of certain implementers from the obligation to license to (reciprocity) should not provide legitimate rules where the prospective licensee's position is adversely effected, i.e. his initial position where he is not in a position to decide not to license becomes even worse, because basically, as the definition of SEPs imply, the patent in question and its technical disclosure is indispensable for the licensee to

be able to compete in the market, since the technology becoming a standard eliminates any chance for the licensee to circumvent the scope of protection of the SEP in question. Therefore the prospective licensee should be able to obtain a FRAND license even in case he is not willing to license to (reciprocity). Because while licensing as a general process between the licensor and the licensee is subject to free commercial interests of the parties in market conditions, obligation to license to (reciprocity) can damage market positions of the implementers regarding other products in relation with which they have strong but non essential patents.

6.6.4 Cash-only/cash-equivalent: One idea discussed in the standardization community in order to make licensing terms comparable in cases, where non-cash elements such as cross-licenses are used with some implementers, is to foresee that a cash-only offer is made. What is your opinion on this? Should this idea apply only in some instances and, if so, in which? Should this be a genuine self-binding offer or would a cash equivalent estimation of non-cash components be preferable?

A 6.6.4 A portfolio of SEPs may serve for concluding agreements in bilateral cross licensing negotiations. It often acts as a means for avoiding payment of cash based royalties. Whether a cash-only offer is made or not may alone have an important role in the development of the negotiations. It is to be noted that a cash-only offer will evidently allow direct comparison of the cases. It is believed that a non-binding cash equivalent estimation of non-cash components is more advantageous in accelerating negotiations as it acts both as an instrument to allow 'inter-case' comparisons and also allows reciprocity bundling of other SEPs or non-SEPs as a more flexible approach.

A special situation where non-cash elements such as cross-licenses are not to be used can be cases where no other participants were previously locked in to use the technology in question. This would have the evident advantage of providing an initial cost estimation of the technology, which would later on serve as a starting point for other negotiators to the extent applicable.

Q 6.6.5 Other mechanisms/differences in national jurisdictions: What other mechanisms for ensuring non-discrimination are you aware of? What are their respective costs and benefits? Where and how should they be implemented (at standard setting organisations or in regulations)? Are there differences across national jurisdictions in the EU/EFTA or worldwide that negatively impact on these solutions?

A 6.6.5 Intentionally left blank

Key issue 7 – Patent dispute resolution

Questions on the prevalence and impacts of SEP disputes

Q 7.1.1 Pertinence of the issue: In your experience how often do disputes over SEPs arise, notably in comparison to patents that are not standard essential but comparable? Are there typical circumstances that make disputes particularly likely to arise? What role do business models or product life-time cycles have in this regard?

A 7.1.1 Disputes about SEP licensing arise regularly. These disputes most typically develop out of the issues of offering indivisible patent portfolios rather than allowing a licensee to license SEPs and non-SEPs separately. Patent holders always put pressure that all of their patents are essential and valid, and force implementers to include non-SEPs and patents with uncertain validity as well into the license because their obligations for "FRAND" conditions.

Q 7.1.2 Main areas of disputes: What are the main areas of disputes over SEPs (infringement/ essentiality, validity, value, etc.)? How are these areas related in the practice of negotiations and litigation?

A 7.1.2 Infringement and validity are the main areas of disputes over SEPs.

Where patents are identified as non-essential, disputes tend to relate more to the bundling issues rather than the essentiality.

Typically issues as to value are able to be resolved without recourse to disputes; however such negotiations for large portfolios can take several years in some cases.

We have particular concerns about the system of bifurcated proceedings, which is particularly used in Germany. The duration of reaching a final decision in an infringement case and invalidity case usually differs in favour of infringement case. This can create an asymmetry in negotiations against the implementer; thus may lead to unfair results in that an implementer has little or no choice whether to use the patent itself, and may be forced to make significant concessions even where a patent is likely to be declared invalid. As a result, patentees enter negotiations and litigation in a dominant position.

This is even more important in Germany, because patent invalidity actions have a significantly higher than expected success rates. Patents are routinely found invalid when challenged (see the paper of Peter Hess, Tilman Müller-Stoy and Martin Wintermeier from law firm Bardehle Pagenberg that is translated in English http://www.bardehle.com/uploads/files/Patent_Papiertiger.pdf).

Q 7.1.3 Cost of disputes: What are the typical costs of settling SEP disputes? What factors drive these costs in practice and to what extent? How do firms try to minimize costs?

A 7.1.3 Intentionally left blank

Q 7.1.4 Impact of disputes on standardization: Do you perceive an impact of disputes on the standardization work itself? Do standardization participants foresee future disputes and adapt their behaviour during the standardization process accordingly?

A 7.1.4 Intentionally left blank

Questions on benefits and costs of dispute resolution mechanisms

Q 7.2.1 Usefulness of alternative dispute resolution: In your experience, does ADR currently play an important role in resolving SEP disputes? Is it regularly considered/discussed when SEP disputes arise? Do you see any trend in its prevalence?

A 7.2.1 Intentionally left blank

Q 7.2.2 Target areas: Which situations/external factors render an alternative dispute resolution mechanism particularly useful? In what areas of patent based standardisation would ADR be particularly useful?

A 7.2.2 The situations/external factors which render an ADR mechanism particularly useful are as follows:

Cost and time effectiveness, higher quality outcomes, as a result of applicable competences, specialism and cumulative knowledge by the arbiters, more consistent outcomes, as parties can no longer do forum shopping expedited proceeding, multi-jurisdictional basis of SEP disputes, confidentiality in ADR mechanism, the opportunity of the parties to jointly determine specialized arbitrator or mediator, the jurisdictional basis, governing law, venue and rules of the proceeding either ad-hoc or in compliance with by-laws of ADR institutes.

In resolving essentiality, validity, royalty issues and in provision of a multi-jurisdictional decision which can be implemented harmoniously in different territories where SEP is being used would ADR be particularly useful. Besides, SEP owner will benefit from ADR mechanism when it comes to debate the validity and essentiality of its SEP patent since ADR mechanism will prevent the documents, assertions and evidences to be made publicly available.

Q 7.2.3 Suitable forms of ADR: What form of ADR (mediation, arbitration, other) do you consider suitable for what type of conflict?

A 7.2.3 AIPPI Turkey is of the opinion that mediation and expert determination mechanisms can be useful in resolving patent validity and essentiality issues in SEP disputes.

Mediation is a very good way of dealing with disputes where the parties want to emerge with a continuing relationship. In mediation proceedings, the parties have control over both the decision to settle and the terms of any settlement agreement, parties remain in control of the outcome by negotiating a contractually binding, win-win agreement based on their business interests. In the course of the mediation, the parties can exchange settlement proposals, which may lead to a negotiated agreement. Such proposals can be made directly between the parties or through the mediator. Mediation takes usually less time than arbitration or litigation and involves lower costs. Furthermore, the process enables parties to reach an agreement on solutions which could not be achieved through an adjudicative process such as arbitration or litigation and which would not therefore be available through the making of an arbitral award or a judicial decision. For example, the parties' preferred solution to a contractual dispute may be to renegotiate the terms of the contract. The renegotiation of a contract is possible in mediation, whereas it is unlikely to be any legal basis for seeking such relief in arbitration or litigation. Whilst the adjudicative processes focus on the parties' legal rights, mediation helps parties also to take into consideration commercial and other interests. The mediation process can help parties acquire a better understanding of each other's needs and interests so that they can look for a solution which accommodates these needs and interests as far as possible. Mediation can be a particularly useful tool when the parties in dispute have an on-going relationship (such as a joint venture or long-term supply contract). In the light of the preceding explanations as to mediation proceeding, assessment of licensing terms, basis and amount of royalty for the past and future use of SEP may be resolved through mediation.

An Expert Determination is particularly suitable where it is necessary to determine issues of a technical or scientific nature as is in SEP disputes. For example, disputes relating to the interpretation of patented claims, the extent of the rights covered by a license or the valuation of IP assets and establishment of royalty rates may be settled through an expert determination. Through expert examination, claim analysis could be conducted based on the unauthorized use of SEP. Mediation may also be useful in resolving the same issues. Alternatively, such technical opinions by an expert could be sought in advance by the parties in order to avoid any "disputes" arising in the future. The expert's involvement is based on a contract between the parties, and the parties have autonomy to decide whether the expert's determination should be binding or have effect as a recommendation, and whether it should be followed by mediation and/or arbitration. Expert determination can be highly effective where the parties enter into a specific type of technical dispute such as SEP validity and essentiality issues arising in which the expertise of the decision-maker will be critical.

On the other hand, according to Turkish Attorneys Act, Attorneys are entitled to prepare a settlement agreement out of litigation proceeding upon the requests of disputing parties which is final and binding as an enforceable judicial decree in the event that the parties and the attorneys jointly sign the agreement. Respectively, in Turkey, there is an alternative dispute resolution mechanism in which the parties may apply to specialized attorneys in resolving IP disputes instead of entering into long-lasting litigation proceeding as long as the parties are eager to abide by the attorneys' decision. Therefore, all the SEP related conflicting matters that we have mentioned above can be settled through attorneys instead of resolving them through mediation or arbitration.

Last but not the least, as arbitration is also consensual, eligible to resolve disputes of speciality through specialized arbitrators, neutral, confidential procedure and its decisions are final and easy to enforce, AIPPI Turkey is of the opinion that arbitration can also be useful in resolving essentiality, validity and royalty issues related to SEP disputes. Besides, mediation-arbitration ("med-arb") is also a useful mechanism to resolve SEP disputes in general.

Q 7.2.4 Benefits of ADR: What are the benefits of alternative dispute mechanisms applied to SEP disputes respectively for patent holders and/or patent users? What are the most important conditions to ensure that these benefits materialize?

A 7.2.4 The benefits of alternative dispute mechanisms that may be applied to SEP disputes are as follows:

A single procedure. Parties can use ADR to settle in a single forum disputes involving several jurisdictions, avoiding the expense and complexity of multi-jurisdictional litigation, and the risk of inconsistent results.

Expertise. The parties can appoint arbitrators, mediators or experts with specific proficiency in the relevant legal, technical or business area. It is of greatest importance to achieve high-quality solutions in SEP disputes where judges may often not have the relevant expertise in the pertinent area.

Neutrality. ADR can be neutral to the law, language and institutional culture of the parties, preventing any home court advantage that one of the parties may enjoy in court-based litigation.

Cost and time efficiency. Economically viable and speedy dispute resolution is essential in ICT disputes.

ADR methods allow parties to save significant costs that the parties would otherwise undergo in multijurisdictional court proceedings. Timing is also of particular importance for ICT projects where delays can put the whole project at risk. In this regard, ADR mechanisms provide for short timelines which the parties can further adapt. Specific fast-track methods exist to provide for even faster solutions, such as “expedited arbitration”.

Party autonomy. As opposed to court litigation, ADR allows parties to exercise greater control over the way their dispute is resolved because of its private nature. The parties themselves, with the assistance of the WIPO Center when necessary, can select the most suitable neutral for their dispute, specialized in the subject matter in dispute. Additionally, the parties may choose the place and language of the proceedings and the applicable law.

Confidentiality. ADR proceedings and their results are confidential, allowing the parties to focus on the merits of the dispute without concern about its public impact. This may also be of particular relevance where commercial reputations and trade secrets are involved.

Preserving long-term relationships. By using ADR mechanisms, in mediation particularly, parties may preserve their business relationships as business interests can be taken into consideration and viable long-term solutions can be adopted in a less confrontational forum.

Finality and enforceability of the awards. When the parties refer their disputes to ADR mechanisms, they benefit from the finality of the awards. ADR awards are normally final and binding and not subject to appeal, unlike court decisions.

In the light of above, please find below a table in which Litigation, Arbitration and Mediation mechanisms are compared to clarify the benefits of ADR mechanisms in resolution of SEP disputes.

The most important conditions to ensure that these benefits materialize are as follows:

The awards granted through ADR mechanisms shall be enforceable in both parties’ national jurisdictions.

The settlement concluded through mediation shall be ratified and annotated by the national Courts in order to provide a binding effect and enforceability hence the national legislations shall be harmonized in this direction when it comes to mediation.

ADR mechanisms shall be made mandatory in SEP disputes. The judiciary system shall divert parties to settle their disputes through ADR mechanisms and instead of advising them to settle

amicably, order them to first apply to ADR mechanisms and at the end, if ADR mechanism that they apply results unsatisfactory, allow them to litigate the conflict before courts.

More importantly, the mind-set of the nations shall be evolved from confrontation culture to reconciliation culture to ensure that the above benefits of ADR mechanisms materialize.

Q 7.2.5 Difficulties and costs: What are the main difficulties and costs for parties in agreeing to and setting up a given dispute resolution mechanism? What do the costs depend on? Do rules on ADR differ between jurisdictions and does this create problems?

A 7.2.5 There is always the risk that the adversary, particularly if it has no intention of settling the dispute, will misuse the ADR process to gain information to use against the other party during the litigation proceeding. If the dispute involves a question of law that must be resolved by a court, ADR mechanism may not be the most appropriate mechanism to resolve the dispute. Another potential disadvantage is that, although recourse to ADR is likely to take less time than recourse to the courts, it will not stop the clock running where there is a limit on the amount of time within which a legal claim can be made. In Turkey, the deadline for filing an action shall be interrupted upon commencement of mediation or arbitration procedure.

ADR may not support the party which has less experience in negotiations, particularly against a dominant patent owner.

Moreover, with ADR, some of the procedural protections of a court trial may be given up in exchange for a potentially faster, more cost-effective and more flexible process. This trade-off is likely to be of most concern when the ADR process is binding. ADR participants may not have the same right to discovery - an extensive pre-trial, fact-finding process - as they would in a case being prepared for trial. If a non-binding ADR process does not lead to a resolution of the dispute, you may wind up paying the additional cost of taking your case to trial.

In an arbitration process, parties must cover legal fees, plus the additional fees and expenses of arbitrators. If an institution administers the arbitration, administrative fees must also be paid. In addition, it is likely to entail some limited discovery, perhaps even including depositions, which will increase the cost. Thus, arbitration may not necessarily be less costly than litigation. However, parties can consciously try to limit costs by expediting the procedure and by selecting cost-efficient venues for meetings and hearings. Parties can also endeavor to appoint an arbitrator that is sensitive to the financial constraints of parties, and choose an arbitral institution that charges reasonable administrative fees. Furthermore, while arbitration may be costly, the finality and enforceability of arbitral awards may make arbitration less costly than litigation, which often involves multiple appeals and requires a judgment to be enforced in a foreign jurisdiction.

In mediation, costs are more easily contained. Mediation costs include the legal fees of each party, the mediator's fees, expert fees, and administrative fees (if an administering institution is present). Parties can monitor the costs and progress of the mediation to determine whether to continue it. If the mediator is not local or if the parties are in different cities, travel expenses will be an additional cost. While the cost of mediation is generally shared equally between the parties, parties may agree to change this allocation of costs depending on the economic power of each party.

On the other hand, if the parties choose to use a number of ADR method in sequence, such as negotiation, then mediation, then arbitration, the cost will of course be greater than any of the ADR method standing alone, unless the dispute is settled at an early stage.

The cost of ADR cases increases as the complexity and formality of the procedure increase. Also the cost depends on the fiscal value of the dispute and the amount of time that the ADR provider will need to spend on the case.

Rules on ADR differ between jurisdictions and this creates problems in terms of enforceability of awards, operation of statute of limitations to litigate the disputed matter, cost and fees of ADR methods.

Questions on the integration of dispute resolution mechanisms into the standardisation process

Q 7.3.1 Your experience: Are you participating in SSOs that have ADR mechanisms? To your knowledge are they being used? If so, what are the experiences? If they are not used, why not?

A 7.3.1 Intentionally left blank

Q 7.3.2 Role of SSOs: To what extent and how should SSOs be involved in the creation and provision of alternative dispute resolution mechanism? Should procedural aspects be further defined in SSOs in order to facilitate the use of ADR?

A 7.3.2 The SSOs can contractually oblige the members to first use the ADR means starting with negotiations, mediations and arbitration for the disputes arising both between the members and between the member and the 3rd parties who are implementing the standard. The procedural aspects should be defined at least with respect to when and which ADR will be implemented. SSOs can contractually prevent the members from taking the disputes before the courts without trying ADR. The SSOs can require the members to ensure that they used ADR and that this has been refused or remained without response from the other party of the dispute before taking the matter to the court.

The benefits of maintaining a public value and essentiality database for each standard has been discussed before at length in relation to the issues of transparency, essentiality and FRAND. Here too, in the issue of dispute resolution, the opinion of an SSO contained within that database could be of significant benefit.

Such qualitative and quantitative data would assist to narrow the issues of dispute and bring the negotiating parties together from the outset. Negotiations that begin from closer positions are less likely to break down or lead to litigation and will be resolved more quickly, which is in the interests of both parties.

Q 7.3.3 Incentives to use ADR: What incentives are necessary for parties to use ADR? Please explain those incentives depending on the type of ADR mechanism and/or type of dispute concerned.

A 7.3.3 As referred under Q 7.2.4 the following can also be regarded as the incentive necessary for using ADR:

A single procedure. Parties can use ADR to settle in a single forum disputes involving several jurisdictions, avoiding the expense and complexity of multi-jurisdictional litigation, and the risk of inconsistent results.

Expertise. The parties can appoint arbitrators, mediators or experts with specific proficiency in the relevant legal, technical or business area. It is of greatest importance to achieve high-quality solutions in SEP disputes where judges may often not have the relevant expertise in the pertinent area.

Neutrality. ADR can be neutral to the law, language and institutional culture of the parties, preventing any home court advantage that one of the parties may enjoy in court-based litigation.

Cost and time efficiency. Economically viable and speedy dispute resolution is essential SEP disputes.

Party autonomy. ADR allows parties to exercise greater control over the way their dispute is resolved because of its private nature.

Confidentiality. ADR proceedings and their results are confidential, allowing the parties to focus on the merits of the dispute without concern about its public impact. This may also be of particular relevance where commercial reputations and trade secrets are involved.

Preserving long-term relationships. By using ADR mechanisms, in mediation particularly, parties may preserve their business relationships as business interests can be taken into consideration and viable long-term solutions can be adopted in a less confrontational forum.

Finality and enforceability of the awards. When the parties refer their disputes to ADR mechanisms, they benefit from the finality of the awards. The finality and enforceability shall be available for any type of ADR settlement since otherwise the parties may not respect to the resulting decision/agreement.

Q 7.3.4 Voluntary/mandatory: What are the benefits and risks of making ADR mandatory for the resolution of SEP disputes? What consequences would this have for participation in standardisation, for licensing negotiations and for the implementation of a standard? If ADR would be made mandatory: Should it be linked to membership in SSOs, or to the fact of contributing a patented technology to a standardisation process, or other? Should there be an opt-in/opt-out possibility at the declaration stage? Should ADR replace litigation completely or should it be a mandatory step (e.g. mediation) before litigation?

A 7.3.4 The benefits of making ADR mandatory for the resolution of SEP disputes :

As referred under Q 7.2.4 and Q 7.3.3 the parties can expect a cheap, quick, confidential, more control on the procedure, and most importantly more expertise on the specific matter. This will avoid the long lasting disputes in standardizations; can trigger parties to settle with less cost and in a shorter period in licensing negotiations.

A mandatory provision for using ADR will also avoid abuses of the injunction requests especially where such requests are aimed to exclude companies from implementing a standard or to extract unfair, unreasonable or discriminatory royalties from them.

Finally a mandatory ADR will provide more possibility to settle without litigation and this will obviously save the SEP from being frequently challenged on grounds of validity in each dispute before the Court.

The risks of making ADR mandatory for the resolution of SEP disputes:

The SEP owner may lose the surprise effect achieved by the ex-parte obtained preliminary injunctions since a licensee candidate or an unauthorized implementer will be able to determine the timing of an action if no settlement is reached by ADR (especially in mediation, expert determination). Making the ADR mandatory (especially in mediation, expert determination) can enable the 3rd parties which are implementing the SEP to abuse the procedure by gaining time to conceal their activity. This may cause difficulty to the SEP owner in claiming the compensation for past use or locating the source of the infringement in a possible court action. Moreover a mandatory ADR (especially in mediation, expert determination) will enable the parties to get weak points and confidential information of each other in the disputes concerning licensing negotiations and unauthorized implementers, and this can be abusively used in a court proceeding initiated after an unsuccessful ADR.

If ADR would be made mandatory: Should it be linked to membership in SSOs, or to the fact of contributing a patented technology to a standardisation process, or other?

If ADR would be mandatory, we are of the opinion to be linked to the membership of SSOs in that it would be easier to regulate the mandatory ADR through a contractual obligation between the SSOs and the members.

Should there be an opt-in/opt-out possibility at the declaration stage?

We do not support an opt-in/opt-out possibility at the declaration stage since such possibility at the declaration stage would not contribute to the a mandatory ADR step before litigation.

Should ADR replace litigation completely or should it be a mandatory step (e.g. mediation) before litigation?

We are of the opinion that implementing the ADR shall not replace the litigation but should be a mandatory step before litigation in order to leave discretion to the parties to solve the dispute either by ADR or via litigation.

Questions on setting up such dispute resolution mechanisms

Q 7.4.1 Specificities of ADR for SEP disputes: Which particular features should ADR mechanisms have in order to be (more) suitable for SEP disputes? What would constitute a ADR mechanism "tailor-made for SEP disputes"?

A 7.4.1 In arbitration process, the arbitration award should be enforceable with an effect of a court order without detailed requirements for execution which could delay the execution and have a negative impact on the enforceability.

In mediation process, the settlement agreement should again be enforceable with an effect of a court verdict.

In a settlement reached by the parties without a mediator or the arbitrator, the settlement agreement again should have an effect of a court verdict at least if it has been concluded and signed by the lawyers of the parties besides the parties. (This procedure is regulated in the Turkish Attorney At Law Act as an alternative dispute resolution mechanism)

The rules concerning the execution of either the settlement agreement or the arbitration award can encourage the parties to use such means before getting into a court action for SEP disputes.

Q 7.4.2 Scope of ADR: Which issues such as rate, validity, essentiality and infringement should be addressed by ADR in SEP disputes? Which territory should be covered? When is the adjudication of a global license suitable and when not? Should ancillary claims also be addressed and if so, how?

A 7.4.2 Under the circumstances;

(i) where the SEP owner's compliance with the disclosure requirement under the IPR policy is contested because he did not, for example, make "reasonable endeavors" to disclose or provide information "on a best effort basis";

(ii) where the essentiality of a patent to the implementation of a standard cannot be agreed among parties due to, for example, different interpretation of claims;

(iii) where the validity of a disclosed patent is questioned;

(iv) where the licensing terms are questioned and disputes arise as to whether a SEP owner provides a license in accordance with commitments provided for in the IPR policy (for example, FRAND terms and conditions and non-discrimination requirement)

should ADR be implemented in SEP disputes.

The countries where the SEP in question is patented should be covered. If the territory is limited with single country then that country shall solely be covered. In the event SEP is registered thus protected and exploited globally, the adjudication of a global license is suitable. Otherwise, if SEP is used and protected in a single country, the adjudication of a global license is not suitable.

Ancillary claims should also be addressed. Ancillary claims should be presented as early as possible. In the absence of specific justification, ancillary claims should be presented in the course of written proceedings. An incidental or additional claim that arises as a consequence of the primary claim shall be presented not later than in claimant's second pleading and a counter claim no later than in its first pleading. Ancillary claims should be subject to three preliminary conditions. (1) They must arise directly out of the subject matter of the dispute, in other words, the factual connection between the original and the ancillary claim must be so close as to require the tribunal to determine the latter in order to achieve a final settlement of the dispute; (2) ancillary claim should

be within the jurisdiction of the ADR provider and within the scope of the consent of the parties;
(3) certain time limits shall apply as to when they may be filed.

Q 7.4.3 Procedure: What procedural issues have you experienced in relation to ADR for SEP disputes? What procedural features are particularly important for resolving SEP disputes? What degree of procedural discretion should be left to the arbitrator? Should there be an appeals procedure and if so, in what form?

A 7.4.3 According to the arbitration rules of WIPO and Turkish Procedural Law, arbitrator retains larger procedural discretion than mediator. Therefore we think the below mentioned procedural discretions shall be attained to the arbitrator in the SEP arbitration in the line with Turkish Procedural Law.

Arbitrator should have discretion;

- to examine whether there is any valid arbitration clause in the relevant agreement or not between the parties upon objections to be raised by the parties in the beginning of the arbitration proceeding
- to examine whether he/she has been authorized in the arbitration proceeding or not.
- to provide both parties the opportunity to be listened equally.
- to manage arbitration proceeding according to the procedure that he/she deems appropriate at its own discretion in the event that both parties do not agree with the procedural rules of arbitration
- to reject parties' claims which are unfair, goes beyond its own purpose and will prolong the trial process.
- to apply expert opinion and discovery if he/she finds it requisite.
- to request information and document from the parties if he/she finds it requisite.

We are of the opinion that arbitrator shall not have any discretion to grant preliminary injunction decision against any "willingful" implementer to pay royalty based on FRAND terms in SEP disputes due to reason that the dispute should be resolved between the parties as soon as possible to render more beneficial results for both parties. Besides, the implementer who is willing to pay royalty based on FRAND terms should be protected from the pressure and the damages that preliminary injunction decision may cause in the long run.

As regards the appeal proceeding we are of the opinion that the arbitration verdicts shall not be appealed to a higher board. Nevertheless, the arbitration verdicts may be made subject to a cancellation action before competent civil courts as envisaged in Turkish Procedural Law and only the decision of that court can be appealed by the parties provided that the enforcement of arbitration decision shall not be suspended during the course of cancellation action/decision and its appeal proceeding.

Q 7.4.4 Timeframe: What would be a reasonable timeframe for dispute resolution mechanisms? In which cases is an accelerated procedure suitable? In what procedural and/or substantive ways should this accelerated procedure differ from the regular one?

A 7.4.4 In practice, trials take approximately 2 to 4 years during the court of first instance and appeal proceedings in Turkey. According to WIPO's arbitration rules, arbitration proceeding should be completed within 9 months and arbitrator should reach a decision within 3 months upon the completion of 9 months which makes the trial term in the aggregate 12 months. This timeframe for the arbitration proceeding is also 12 months in Turkey. Parties are entitled to extend the time limits if they mutually agree upon that in the beginning of the arbitration proceeding. There is not any time frame for mediation in Turkish Mediation Law. In addition, there are time tables in the agreement proposals which are published with the aim of providing samples for parties who wish

to apply to arbitration or mediation under the WIPO arbitration and mediation rules. In these time tables, time frame envisaged for arbitration and mediation proceeding is proposed as 14 months in total whereas time frame envisaged for expedited WIPO arbitration proceeding is 6 months. Besides, pursuant to ICC Arbitration rules time frame for arbitration proceeding is 6 months. The arbitral tribunal may fix a different time limit or extend the time limit (based upon the procedural timetable established pursuant to Article 24(2)).

We are of the opinion that the litigation duration in Turkish judicial system, proposed time frames in WIPO time tables or time frames in WIPO Arbitration Rules are too long for SEP disputes. Especially for the willing parties who wish to pay royalties based on FRAND terms in conciliation with the patent owner, it is important to conclude the dispute between the parties immediately. Because the willing implementers wish to continue their commercial activity without interruption and suffering from any damage as a result of enforcement of a preliminary injunction. For that reason, the total time frame for SEP disputes should be utmost 6 months in alternative dispute resolution mechanisms. Accordingly, 6 months' time frame for SEP disputes can be regulated in procedural laws implementing alternative dispute resolution mechanisms and it may be envisaged in a way that SEP disputes shall be examined with priority by the court as is the case in preliminary injunction proceedings.

In our opinion, an accelerated procedure such as WIPO's Expedited Arbitration procedure should be applied to resolve SEP disputes. Pursuant to the WIPO's practice, disputes arising in connection with ICT and software technologies are resolved through WIPO's Mediation and Arbitration Center as quoted below.

"As of August 2012, the WIPO Center has administered some 280 mediation and arbitration cases, filed by large companies, small and medium sized enterprises, research organizations and universities. 53 per cent of cases filed with the WIPO Center have been submitted to the WIPO mediation rules, 26 per cent to the WIPO arbitration rules and 21 per cent to the WIPO expedited arbitration rules.

Disputes often relate to ICT contracts, including out-sourcing agreements, system integration agreements, patent licenses regarding ICT and telecommunications related agreements, software agreements, such as software development, disputes involving the quality/performance of the delivered software, disputes involving timely delivery, software license disputes, source code and escrow disputes and reseller disputes, among others. Cases arising out of agreements in settlement of prior court litigation have also been filed with the WIPO Center.

The wide range of potential users internationally includes software developers, ICT companies, ICT users, service providers, hardware manufacturers, outsourcers, programmers, telecommunication providers and telecommunication regulators."

In the light of above, we are of the opinion that under the circumstances

(i) where the SEP owner's compliance with the disclosure requirement under the IPR policy is contested because he did not, for example, make "reasonable endeavors" to disclose or provide information "on a best effort basis" and

(ii) where the licensing terms are questioned and disputes arise as to whether a SEP owner provides a license in accordance with commitments provided for in the IPR policies of SSOs (for example, FRAND terms and conditions and non-discrimination requirement)

should expedited ADR procedure be implemented in SEP disputes.

In our opinion, WIPO's Expedited Arbitration system sets a good example to determine the characteristics of an accelerated procedure to be applied to SEP disputes. WIPO Expedited Arbitration is a form of arbitration that is carried out in a shortened time frame and therefore, at a reduced cost. To achieve those objectives, the WIPO Expedited Arbitration Rules provide for: A sole arbitrator rather than a three-member tribunal, shortened time periods for each of the steps

involved in the proceeding; a shorter hearing; and fixed fees (including the arbitrator's) in the case of disputes of up to US\$ 10 million.

- Procedurally and substantively, an expedited procedure shall differ from the regular one as indicated below.

- Request of ADR must be accompanied by Statement of Claim.

- Respond must be submitted within 20 days from receipt of request for ADR. It must be accompanied by Statement of Defense.

- There must be one arbitrator instead of three arbitrators.

- Counter-reply must be submitted within 20 days after receipt of Statement of Defense.

- Hearing must be held within 30 days after receipt of respond to the Request for ADR.

- Closure of proceedings must be completed within 3 months upon submission of Statement of Defense or appointment or establishment of the arbitrator or expert or mediator or arbitral tribunal or board of experts (whichever is later).

- Final award must be granted within 1 month after the closure of proceedings.

- Cost must be fixed if disputed amount is up to US\$ 10 million.

Nevertheless, in the expedited procedure, the arbitrator's discretion should be more limited than a regular one.

Q 7.4.5 Transparency: Should the outcomes of ADR be made public in order to achieve transparency? If only partially, which part? And in what form?

A 7.4.5 In our opinion, the outcomes of SEP disputes should remain confidential and not be made public.

Q 7.4.6 Forms of ADR: Are there forms of decision making by the arbitrator that you consider particularly suitable for SEP disputes? If so, in what situations and why? Is the concept of baseball arbitration, where the arbitrator resolves the dispute by choosing either the offer of the patent holder or the offer of the implementer, a practical form to settle SEP disputes?

A 7.4.6 Intentionally left blank

Key issue 8 – Unwilling implementers and injunctions

Q 8.1 Defences for patent holder: What needs to be done to ensure that holders of standard essential patents have effective means of obtaining appropriate remuneration for their patents and to defend themselves against implementers who are unwilling to pay royalties or who delay payment of such royalties? What can standard setting organizations do in this regard?

A 8.1 The holders of a SEP shall be entitled to claim the patent infringement against the implementers who are unwilling to pay royalties. The SEP holder shall be entitled to request either preliminary injunction at the outset of the proceeding or permanent injunction at the finalization of the trial. The standard setting organizations can force the SEP owner contractually to use a uniform ADR procedure which should start with the parties' negotiations and followed either by mediation and/or arbitration. The SEP owner shall be able to demand the preliminary injunction only if the unauthorized implementers of the SEP refuse to negotiate and use the consequent ADR means.

Q 8.2 Protection against abuses: How can it be ensured (at the same time) that injunctions based on standard essential patents are not abused to either exclude companies from implementing a standard or to extract unfair, unreasonable or discriminatory royalties from them?

A 8.2 As mentioned under Q 8.1. the SEP owner can be required to use negotiation and ADR means with the implementer of the standard in order to ensure the intention to settle the matter before entering into court litigation. This can provide an opportunity to the parties to collaborate and use all means of settlement before going to the court and claiming injunction. In the alternative, the Court can be obliged (via legislation) to not order either a preliminary or permanent injunction in SEP disputes unless the implementer of the standard is invited and heard in relation to asserted patent right. This can enable the court for clarifying whether the right to request an injunction is abused or not before issuing a decision in this respect.

Q 8.3 Prevalence of injunctions: According to your experience, in which fields of standardization and in which situations are/were injunctions based on standard essential patents threatened and/or actually sought? What are/were the consequences? Please be as specific as possible.

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Q 8.4 Consequences of banning injunctions: Are you aware of national jurisdictions that have banned injunctions based on standard essential patents or that have restricted injunctions even against unwilling implementers (court cases or legislative changes)? Did this impact on the licensing negotiations, on the royalty rates and/or on the risk of getting no remuneration at all? How did patent holders reacted in these jurisdictions?

A 8.4 Based on the comparative analysis that we have made upon various national jurisdictions (i.e. USA, India, France, Germany, Netherland, South Korea, Japan) we have not come across with any decision that have banned or restricted injunctions even against unwilling implementers. On the contrary, we have observed that all of these national jurisdictions that we have examined retain a common approach to grant injunction in favour of SEP owners against unwilling implementers irrespective of whether the patent is standard essential or not and irrespective of whether a FRAND-commitment has been given by the SPE owner or not. Besides, in some national jurisdictions, when it comes to evaluating implementers' willingness in FRAND disputes, the various decisions are increasingly consistent in resolving the willingness issue under the rubric of good faith. Accordingly, one would have to act accordingly and demonstrate its willingness to negotiate in good faith by exteriorized conduct, so that for example a failure to engage in any subsequent negotiations or the refusal to make offers or counter-offers, would likely render the alleged willingness to take a licence moot.

Q 8.5 Awareness among stakeholders: In your experience, is there sufficient awareness among standardization participants of the recent EC antitrust decisions cited above? What role can standard setting organizations play in ensuring awareness of these antitrust decisions? On what aspects of the issue as such would you welcome additional guidance, if any?

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