## IV. The Role of SSOs while Improving the Access to SEPs

Taking into consideration the afore-discussed new situations that arise in the context of standardization, e.g. patent ambush, broad meaning of FRAND commitment and the fact that SEP-related litigation highly depends on the proper evaluation of a number of legal, technical and economic aspects, in the recent years, there have been a number of proposals, which are designed to prevent SEP owners to engage in patent ambush and to maintain a level of royalties on a reasonable level.[113] In general, when discussing the improvement of the royalty rate setting system of SEPs and the avoidance of extensive litigation, two types of solutions may be analysed: (i) *ex ante* disclosure or establishment of royalty rates or even licensing terms before the standard is set; (ii) *ex post* establishment of licensing terms of SEPs by dispute resolution bodies within SSOs or by a separate arbitral tribunal. Both proposals will be discussed in the following parts of this work.

### *A. The Obligation of Ex Ante Disclosure in the IPRs Policies*

Under the existing systems of a large number of SSOs, the royalty rates of SEP's licenses are determined only after the proprietary technology is set as an industry standard. However, given the incredible market power that a SEP is able to confer on its owners, the latter have every incentive to offer licenses at anticompetitive prices or establish other conditions, which may negatively affect the users of SEPs. This conduct may lead to restraints of undistorted competition. With regard to that, it is claimed, that the current system leaves individual SEP users in an uneven bargaining position against a SEP owner, who has a complete control over the user's ability to participate in the product market.[114]

113 Damien Geradin, 'Standardization and Technological Innovation: Some Reflections on ex ante Licensing, FRAND, and the proper means to reward innovators' (Intellectual Property and Competition Law Conference, Brussels, June 2006) <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=909011> accessed 19 August 2014.

114 Curran (n 108) 1007.

The afore-specified situations, as it was previously stated, usually end up before the courts. In order to avoid such a litigation, there are proposals of establishing a system of mandatory *ex ante* disclosure of licensing fees.[115] The proposals regarding a mandatory *ex ante* disclosure vary: some propose a disclosure of the licensing terms before the standard is adopted, others speak about the disclosure of the most restrictive licensing terms or maximum royalty rates, whereas, some even propose the joint negotiations between potential licensors and licensees of SEP royalty rates before the standard is formally adopted.[116]

In general, the afore-indicated mandatory *ex ante* disclosures refer to a situation where a patent owner, at an early stage of the standard-setting process, makes binding commitments on the royalty fee or other conditions it is going to use in the licensing agreement after the standard is set. In principle, such disclosure could help to take informed decisions on whether or not to include patented technology in a standard, as well as help users of the technology in their licensing negotiations, because certain limits of licensing terms, e.g. the maximum royalty rate, would already be set. Moreover, it is stated, that, for example, maximum licensing fee disclosure would restrain the licensing demands of the IPR owners, because by such an *ex ante* disclosure they are able to increase the possibility of their technology being implemented into a standard.[117] However, a mandatory *ex ante* royalty rate determination may have some drawbacks.
It is claimed, that these proposals ignore various constraints which are faced by the companies holding the SEPs when setting the royalty rates. The indicated constraints are the following: '(i) horizontal constraints from the royalty rates set by the holders of complimentary patents, (ii) vertical constraints due to the impact of an increased royalty rate on downstream activity, and (iii) institutional constraints associated with the standardization process which tends to penalise in subsequent iterations of the selection process those patent holders who behaved opportunistically in the past'.[118] Depending on which type of the afore-specified subjects or situations the SEP owner is dealing with, it may adjust the royalty rate of

115 E.g. Standard-Setting, Competition Law and the Ex Ante Debate, Cisco Systems, Presentation to ETSI SOS (Interoperability III Meeting, Sofia Antipolis, February 2006) <http://www.etsi.org/images/files/SOSInteroperability/SOSinteropIIIpresentation3-02.pdf?> accessed 19 August 2014.
116 Geradin (n 111) 2.
117 Bekkers and Updegrove (n 22) 139.
118 Geradin (n 111) 5.

the SEP in accordance to the circumstances. However, in the situation of mandatory *ex ante* disclosure, such adjustment becomes less possible.

In addition, the mandatory *ex ante* disclosure leads to 'one size fits all' solutions, which homogenize licensing conditions and also distort the way standards' development fosters competition between and amongst implementing standards participants.[119] In the absence of mandatory disclosure, the standard implementers make different strategic choices, thus, such system of disclosure would eliminate the freedom of SEP owners and users to negotiate different licensing terms, according to specific situation. With regard to that, it should be mentioned, that such a restriction on the royalties that would be charged by innovators comes at a cost: 'by limiting the returns to innovators, such limitations discourage investment and stifles the innovation process'.[120]

Furthermore, such mandatory *ex ante* disclosure could be regarded as an obligation to set the royalty rates in vacuum, i.e. without having the possibility to take all the important elements into account. The fact that SEP royalty rates depend on a number of factors could be illustrated by court decisions. For example, in the case *Georgia-Pacific v. United States Plywood*[121] the 'simulating market' factors which are important in determining the SEP royalty rate were stated out. This case illustrates, that SEP royalty rate determination is a matter of case by case judgement highly dependent on the technical, economic and legal circumstances of every single situation. Therefore, mandatory *ex ante* royalty rate disclosure may restrict the freedom of the parties to negotiate and may obstruct their opportunities to achieve economically satisfactory results.

Additionally, with regard to the proposal of the joint *ex ante* negotiations of royalty rates, it should be specifically mentioned, that such actions may trigger Art. 101 (1) TFEU as it would be regarded as creating restrictions on competition because such a negotiation may be regarded as illegal collaborations between the companies. Due to the afore-specified competition law concerns, mandatory *ex ante* disclosure is proposed as a less risky option. However, although the risk of infringing competition law is markedly lower than that arising from joint negotiations, still the mandatory *ex ante*

119 ibid 6.
120 ibid 3.
121 *Georgia-Pac. Corp. v. U.S. Plywood Corp*. 318 F. Supp. 1116, 1120 (S.D.N.Y. 1970) modified and aff'd 446 F.2d 295 (2d Cir. 1971) cert. denied 404 U.S. 870 (1971), para 1120.

disclosure has potential to fall under Art. 101 (1) TFEU. Such situation explains why, for example, ETSI has a system of voluntary *ex ante* disclosure of the most restrictive licensing terms.[122] With regard to the aforespecified competition law issues, ETSI in its IPR policy indicates, that voluntary *ex ante* disclosure of licensing terms is 'not prohibited' and, if such disclosures would happen, they would be used to reveal the technical features of the technology and would help to make informed choices over the standardized technology in the standardization process.[123]
With regard to all the specified above, it is possible to state, that the aforediscussed mandatory *ex ante* disclosure may obstruct the process of standardization and implementation of the standard into the industry as well as diminish the incentives of the parties to innovate and participate in the standard-setting. In addition, according to the EU competition law, *ex ante* disclosure is acceptable under current EU competition law, if it is not binding. However, although SSOs, such as, ETSI, implemented policies that allowed participants to voluntarily disclose their most restrictive licensing terms, SSOs' members have shown a general resistance to make such disclosures.[124] This situation leads to the conclusion that SEP royalty rates would likely to be determined after the standard is set. This calls for a discussion over the role of SSOs and their IPR policies in the post-standardization procedures.

### *B. The Role of SSOs in the Post-Standardization Stage*

The idea, that SSOs should be more active in standard-setting procedures in general, is not a new one. Even the Commission prefers actions of the

122 Bekkers and Updegrove (n 22) 141.

123 European Telecommunications Standards Institute Intellectual Property Rights Guide 19 September 2013, s 4.1.

124 Urška Petrovčič, *Competition Law and Standard Essential Patents: A Transatlantic Perspective* (Kluwer Law International 2014) 3, 175 (as cites in J. Contreras, An Empirical Study of the Effects of Ex Ante Licensing Disclosure Policies on the Development of Voluntary Technical Standards (National Institute of Standards and Technology, June 2011), available at: <http://gsi.nist.gov/global/docs/pubs/NISTGCR_11_934.pdf>).

SSOs[125] over its own intervention, when it comes to any possible competition law concerns involved in standard-setting. It is claimed, that such an approach 'is a consequence of lack of technical expertise, lack of resources and the long lead-time of the Commission's procedures.'[126] Similar view could also be applied to the courts, when they are in the position of solving SEP and FRAND-related issues that require not only legal but also technical and economic knowledge.

According to the Guidelines, in order to determine, what FRAND is, the main question to be answered is whether the fees bear a reasonable relationship to the value of the IPR.[127] This means, that it is possible to evaluate the IPR by taking into consideration all the technical, commercial and legal aspects related to a specific technology. This is usually possible after the standard is set. With regard to that, it becomes important to search for ways of solving SEP and FRAND-related disputes, which arise while setting the royalty rates in the post-standardization stage. SSOs and their IPR policies in this case may play an important role.

It is advocated that SSOs should set up some means of dispute resolution within the organization to help resolve SEP royalty disagreements.[128] In addition, other proposal is that SSOs IPR policies should be modified in such a way, that SEP owners making a FRAND commitment, in the event that they cannot reach an agreement on the licencing terms with potential licensees, submit the dispute to an arbitration tribunal.[129]

In general, the disputes to be submitted to a dispute resolution body, which should be regarded as an alternative to court proceedings, are those, that cover whether a member of SSO, which is the owner of SEP, has offered a license for SEP on FRAND conditions. It should be clarified, that the main idea is *not*, that the courts cannot be viewed as the possible recourse to which the parties to the dispute arising from the standardization are able to refer. Rather, in this work it is stated, that the claimant might be better off turning to a SEP-specialized dispute resolution body, which

125 Magdalena Brenning, 'Competition & Intellectual Property Policy Implications of Late or No IPR Disclosure in Collective Standard-Setting' (American Bar Association's International Roundtable on International Standards, Brussels, June 2002) <http://ec.europa.eu/competition/speeches/text/sp2002_037_en.pdf>accessed 21 August 2014.

126 ibid.

127 Guidelines (n 21) para 289.

128 Lemley (n 13) 1966.

129 Larouche, Padilla and Taffnet (n 33) 17.

would solve the dispute faster than an average court by using its technical, legal and economic knowledge.

The idea of such dispute resolution mechanisms is not a new one. The representatives of Commission mentioned the establishment of arbitration mechanism already in 2002.[130] The afore-specified arbitration idea survived until the recent years on both sides of the Atlantic: in 2013, US Federal Trade Commission, US Department of Justice and the Commission have suggested changes to the IPR policies of SSOs, which covered the inclusion of arbitration as a process to solve SEP-related disputes.[131]

It is claimed, that at the moment, there is also some movement taking place in ETSI. This SSO is trying to amend its IPR policy in the light of regulatory guidance of Commission.[132] One of the matters to consider while reviewing the IPR policy of the latter organization is arbitration, which might be advanced by a cooperation with World Intellectual Property Organization Arbitration and Mediation Center (WIPO Center).[133]

In addition, according to the Summary Report of International Association for the Protection of Intellectual Property, the majority of the questioned countries are in favour of internal arbitration proceedings prior to involving of courts, due to the two main advantages: (i) the possibility of involving specialists in the respective technical field and (ii) lower costs and greater efficiency.[134]

However, despite the afore-specified developments, there is no common view among the countries as to how the royalties should finally be determined.[135] In addition, besides quite extensive discussions, so far there is no guidance for the parties, SSOs and potential tribunals that wish to implement effective arbitration procedures for disputes regarding SEPs.[136] However, at this stage of the development of the dispute resolution bodies for SEPs, it is important to have at least preliminary view on the suggested

130 Brenning (n 123).
131 Carter Eltzroth ''Arbitration of Intellectual Property Disputes' [2014] 1 (19) Arbitration News: Newsletter of the International Bar Association Legal Practice Division, 86.
132 Contreras and Newman (n 7) 9.
133 Eltzroth (n 129) 87.
134 International Association for the Protection of Intellectual Property Summary Report (Executive Committee Meeting in Lisbon, Portugal, June 2002) 7-8.
135 Summary Report (n 132) 10.
136 Contreras and Newman (n 7) 1.

dispute resolution procedures and to be able to identify areas that need the most attention. In addition, it should be pointed out, that the IPR policies of SSOs may play an important role regarding this question.

While discussing the establishment of dispute resolution bodies for SEP and FRAND-related disputes, one of the proposals is that there could be (i) dispute resolution bodies established within the SSOs and having experts of certain fields to make the decisions, whereas the other suggestion would be (ii) referring the dispute to a separate arbitration tribunal, where it would also be heard by the experts of a specific sphere, which is relevant to that dispute. Both dispute resolution options would be mandated to the parties to the dispute by the IPR policy of a relevant SSO. The afore-specified IPR policy would state, that all the disputes among the members would be solved by one of the afore-mentioned dispute resolution bodies.

With regard to the former option, such SEP and FRAND-related dispute resolution bodies attached to SSOs, that have the relevant industry-specific expertise, could be regarded as being in the best position to set the licencing conditions of SEPs. However, it should be pointed out, that such dispute resolution bodies within the SSOs, would possibly have institutional issues. As it was stated before, SSOs usually consist of different types of rightholders[137] and, thus, some of the members are more influential than the others.[138] Such close contact between the standard-setting actions of SSO and the dispute resolution body within the same organization may turn the whole dispute resolution procedure more favourable for one of the parties.

In the Guidelines it is stated, that activities of SSOs are subject to EU competition law,[139] thus, such dispute resolution body, which is acting within the SSO, should be assessed from the perspective of the EU competition law. In general, under specific circumstances, standard-setting and IPRs' licensing policies may result in anticompetitive agreements or abuse of dominance, which, accordingly, would infringe Art. 101 or Art. 102 TFEU. Similar risk applies to the proposed dispute resolution body within SSOs.

137 Drexl (n 11) 217.

138 Seo ''Analysis of Various Structures of Standards Setting Organizations (SSOs) that Impact Tension among Members' [2013] 11 (2) International Journal of IT Standards and Standardization Research 46, 52.

139 Guidelines (n 21) para 258.

In the Guidelines, it is established, that 'where participation in standard-setting is unrestricted and the procedure for adopting the standard in question is transparent, standardization agreements which contain no obligation to comply with the standard and provide access to the standard on fair, reasonable and non-discriminatory terms will normally not restrict competition within the meaning of Article 101(1).'[140] In this context, the requirement of transparency means, that a SSO needs to have procedures which allow stakeholders to effectively inform themselves of upcoming, on-going and finalized standardization work 'in good time at each stage of the development of the standard'.[141] However, the discussed dispute resolution body within the SSO, which would be closely related to the standardization actions, may trigger the requirement of the transparency of the standardization procedure and, thus, may infringe the Art. 101 TFEU. Similar transparency-related concerns were raised in the *Samsung* case, where the interest third parties in their observations gave preference to the court as a 'more transparent venue for determining FRAND terms and conditions'[142] instead of an arbitration tribunal.

With regard to the afore-specified, it is possible to claim, that if the royalty rates and other licensing conditions will be determined within the SSO, this may cause situations, which would be able to infringe Art. 101 (1) TFEU. The afore-specified article states, that 'all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market' shall be prohibited as incompatible with the internal market.[143] It is claimed, that in some SSOs there could be a disproportion between the interests of the users and the interests of the IPR holders.[144] In addition, specific groups of SSO members may have more influence on the decision-making than the others. For instance, the participants of the Internet Engineering Task Force have pointed out, that alt-

140 ibid para 280.
141 ibid para 282.
142 *Samsung* (n 85), para 83.
143 Treaty (n 20).
144 Ginevra Bruzzone and Marco Boccaccio, 'Standards under EU Competition Law: The Open Issues' in Giandonato Caggiano, Gabriella Muscolo and Marina Tavassi (eds), Competition Law and Intellectual Property. The European Perspective (Wolters Kluwer 2012) 85, 100.

hough every member has the right to get involved, only privileged small groups of insiders have actual influence in the decision-making process.[145] With regard to that, it is clear, that in any SSO there could be groups of members that are more influential than the others. For example, due to their large number, the users of the standard, which conduct their business on the downstream market, could have more influence than the technology developers, which work only on the upstream market. In the event of the dispute regarding the licensing conditions of a SEP between the afore-specified groups, due to the close connection between the standard-setting procedure and dispute resolution proceedings, the more influential group may have improper influence on the final decision regarding the licensing terms. Such situation would be able to amount to a decision by an association of undertakings, which, under the Art. 101 (1) TFEU, distorts competition by price fixing or influencing any other trade conditions.

However, the fact that the standardization process does not conform specific requirements, e.g. transparency, does not constitute, that there is a *per se* infringement of Art. 101 (1) TFEU. In fact, there is a number of factors that should be taken into consideration before reaching this conclusion, such as, market power, incentives of the different parties involved in the agreement and their consequences and etc.[146] The way these factors are evaluated would have an impact on the conclusion whether such way of solving royalty setting disputes infringes the Art. 101 (1) TFEU.

In addition, it should be mentioned, that in the event, that the afore-specified dispute resolution procedure would be held as infringing the Art. 101 (1) TFEU, according to the Art. 101 (2) TFEU, the decisions of such dispute resolution bodies within the SSOs shall be automatically void. This would mean, that the terms and conditions of the licensing of SEP are not established and the dispute regarding these aspects between the SEP owner and the user would just develop deeper, leading to the impediment of further innovation and the implementation of the standard. For this reason, the establishment of dispute resolution bodies should be considered carefully and means for guaranteeing impartiality of such bodies must be adopted.

However, it is also possible, that the afore-described situations may benefit from the application of Art. 101 (3) TFEU, which foresees that restric-

145 Seo (n 136) 52.
146 Bruzzone and Boccaccio (n 143) 85, 104.

tive decisions may bring about objective economic benefits so as to outweigh the negative effects of the restriction of competition.[147] The application of Art. 101 (3) TFEU means that, firstly, the assessment whether a decision of the dispute resolution body of the SSO, which is capable of affecting trade between the Member States, has anti-competitive object or actual or potential anti-competitive effects, should take place, and, secondly, if the afore-specified decision is found to be restrictive of competition, it will be necessary to determine the pro-competitive effects of that decision and balance its anti-competitive effects and pro-competitive effects. The afore-mentioned balancing exercise will be conducted within the framework established by the Art. 101 (3) TFEU.[148]

In addition, with regard to the discussed dispute resolution bodies within the SSOs, there could also be an infringement of the Art. 102 TFEU. Although much less expected than the infringement of the Art. 101 TFEU, this is possible in the situation when the innovators, which are acting in the upstream market, are the more influential group in the SSO. In such situation, owners of SEPs are able to inappropriately influence the dispute resolution body and, thus, to indirectly abuse their dominant position, i.e. imposing unfair selling prices or other unfair trading conditions, as it is foreseen in the Art. 102 (a) TFEU.

Generally, the prerequisites of applying Art. 102 TFEU are the following: a) dominant position and b) abusive conduct. According to the CJEU, a 'dominant position <…> relates to a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, its custom-

147 Commission, 'Guidelines on the application of Article 81(3) of the Treaty' OJ C 101, para. 11.

148 The application of this exception under the Art. 101(3) TFEU is subject to four cumulative conditions: (a) the decision must contribute to improving the production or distribution of goods or contribute to promoting technical or economic progress, (b) consumers must receive a fair share of the resulting benefits, (c) the restrictions must be indispensable to the attainment of these objectives, and (d) the agreement must not afford the parties the possibility of eliminating competition in respect of a substantial part of the products in question. When these four cumulative conditions are fulfilled, it is held, that the decision enhances competition within the relevant market, because it leads the undertakings concerned to offer cheaper or better products to consumers, compensating the latter for the adverse effects of the restrictions of competition.

ers and ultimately of the consumers'.[149] The market power is established taking into consideration the following factors: a) definition of the relevant market, on which, as it is stated, is not easy to agree in standardization cases[150]; b) showing that the defendant possesses a dominant share of that market; and c) showing that there are significant barriers to entry, so that the seller's price is not constrained by the threat of entry or greater competitive output.[151]

With regard to the conditions specified above, the most important issue regarding the dominant position requirement in the discussed context, is that at the time when a dispute resolution body affected by other members of a SSO, which own SEPs, is making a decision on the unfair licensing conditions of the afore-specified SEPs, the IPR owner, which is not acting in good faith, is not always in the dominant position. However, in the application of Art. 102 TFEU, the assessment of dominance cannot be skipped even in the presence of a standard and of IPRs essential to the standard.[152]

For this reason, the second necessary condition for applying Art. 102 TFEU, i.e. the abusive conduct, may not be the SEP owner's conduct while influencing the dispute resolution body within SSO to establish licensing conditions beneficiary for that owner, but, most likely, the excessively high royalty rates. According to the CJEU case law, a price is considered to be excessive, when it is not related to the economic value of the product supplied.[153] However, as it was pointed out, price control is in itself a problem, because it is not clear how to determine the threshold of the price abuses, especially, in the context of IPRs.[154] Still, due to the requirement of dominant position while applying the Art. 102 TFEU, this would be the only way of trying to hold the SEP owner liable. With regard to that, the already mentioned *Rambus*[155] case, could be regarded as a good example, while discussing the liability for the inappropriate influence performed by the SEP holder on the dispute resolution body within an SSO.

149 Case 85/76 *Hoffmann-La Roche v Commission* [1979] ECR 461, para 4.
150 Fuchs (n 63) 187-188.
151 *Image Technical Servs. v Kodak* (9th Cir. 1997), paras 1202-1203.
152 Bruzzone and Boccaccio (n 143) 85, 106.
153 Case 27/76 *United Brands v Commission* [1978] ECR 207, para 250.
154 Fuchs (n 63) 182.
155 *Rambus* (n 65).

In this context, it should be claimed, that under EU law, it is not accepted, that royalty rates for patent licenses should be controlled by competition law.[156] This approach is in conformity with the basic ideas of the patent law, which states, that inventor's right to claim any price should be an incentive for further research. Therefore, if competition law would be able to control the royalty rates, it might diminish innovation and development. For this reason, the interference with the IPR owner's right to establish prices, must be strongly substantiated by the objective of protecting competition. Indeed, patent ambush situation where the owner has not been acting according to *bona fide* standards, in order to achieve a market dominant position, is the situation that could justify the control of patent licensing fees.[157] Similarly as the deceptive conduct during the standard-setting in the *Rambus* case, the inappropriate influence on the dispute resolution body within an SSO while making the decisions on SEP licensing conditions, according to Art. 102 TFEU, could also be regarded as an appropriate justification for competition law to interfere and control the licensing fees of SEPs.

Furthermore, besides the afore-specified competition law problems, due to the large heterogeneity of SSOs in different levels,[158] there is also the question whether it would be possible to establish a suitable dispute resolution body for every existing SSO. As it was stated, due to the fact that SSOs vary by their structure, organization and IPR policies, this would lead to a creation of a large number of dispute resolution bodies, and that may lead to more inconsistency and less transparency, when FRAND-related issues arise.

Due to the afore-specified reasons, the establishment and functioning of the afore-described dispute resolution bodies within SSOs does not seem highly encouraging. However, the situation may be improved and this option must not be completely rejected. In general, all the non-transparency and also competition law related issues may be avoided, if the members of the dispute resolution body within the SSOs would be selected in a way that would guarantee impartiality. Such impartiality may be achieved, if, for example, the members of dispute resolution panel would be preselect-

156 Josef Drexl ''Anti-Competitive Stumbling Stones on the Way to a Cleaner World: Protecting Competition in Innovation without a Market' [2012] 8 Journal of Competition Law and Economics 507, 553.

157 ibid 553.

158 Seo (n 136) 47.

ed by the SSO or that the parties to the dispute would be able to appoint experts from the outside, which are not related to the SSO within which the dispute is going to take place. In addition, the number of the experts of the panel, as, for example, in the arbitration proceedings should be uneven. All these elements, which would provide with more impartiality of the discussed dispute resolution bodies and other important procedural provisions, should be specified in the internal document of an SSO and, according to the IPR Policy of relevant SSO, be binding to its members. Hence, this way, the issues regarding the impartiality of the dispute resolution bodies could be resolved and other important procedural aspects would be foreseen.

In the event that there are issues with regard to dispute resolution bodies within SSOs, referring SEP and FRAND-related disputes to separate arbitration tribunals should be considered as a possible option for solving these types of disputes. Such a real-life example of an arbitration of the disputes related to SEPs could be the Digital Video Broadcasting (DVB) Project, which is a rare example of a SSO that has an IPR policy, which indicates arbitration as the way of dispute resolution.[159] DVB Project is an association of more than 200 members of the digital television broadcasting industry that develops standards for digital television broadcasting.[160] The Memorandum of Understanding of the latter association requires each member to resolve all the disputes regarding to licences of DVB standards under the arbitration rules of the International Chamber of Commerce.[161] While considering the resolution of IPR-connected disputes before an arbitral tribunal, the procedure established by the German Law on Employee Inventions (Law on Employee Inventions)[162] should be analysed as a useful example. The Art. 28 of the Law on Employee Inventions foresees that all the disputes between the employer and employee arising of this law is heard by the Arbitration Board. The Art. 29 of the afore-specified law also provides that the Arbitration Board will be established within the German Patent Office.

According to the Art. 30 (1) of the Law on Employee Inventions, the Arbitration Board consists of three members: the chairperson and his alternate and two assessors. In addition, the Art. 30 (2) of this law states, that the

159 Eltzroth (n 129) 88.
160 Contreras and Newman (n 7) 1, 7.
161 DVB's Memorandum of Understanding (3 January 2014), Art. 14.7.
162 Law on Employee Inventions (Gesetz über Arbeitnehmererfindungen), 1957 July 25 (as amended 1994, June 24).

assessors must possess special knowledge in the technical field to which the intervention or technical improvement proposal applies. The Art. 30 (3) of the Law on Employee Inventions foresees, that the afore-specified members of the Arbitration Board are appointed by the President of the German Patent Office.

Such a dispute resolution procedure via arbitration should be considered as suitable option for solving SEP and FRAND-related disputes. Firstly, this procedure is administered by a third body (in this case – by the German Patent Office). This aspect should guarantee the adherence to impartiality requirement. Secondly, the established procedure includes not only a chairperson that possesses the qualifications required for judicial office, which are foreseen in the German law, but also involves the participation of two additional members from a relevant technical field. The latter element allows to evaluate all the necessary legal, technical and economic aspects related to the dispute, which takes place between the employer and the employee.

With regard to the first afore-specified point, for solving the disputes regarding the SEP licensing terms, WIPO Center should be considered as a suitable entity that could conduct such a procedure. At the moment, WIPO Center presents itself as a forum for SEP royalty rate setting disputes and offer to all the interested parties model submission agreements for arbitration related to SEPs and FRAND. As it is stated in the website of the WIPO Center, these model agreements were prepared by taking into account comments made by some members of the World Intellectual Property Organization and the ETSI.[163]

Although the referral of the SEP and FRAND-related disputes to a separate arbitration tribunal raises much less impartiality and potential competition law issues than the establishment of dispute resolution body within the SSO, both of the presented ways of dispute resolution may cause some additional aspects that require attention in the context of EU competition law. One of the most significant questions is related to the determination of the scope of the jurisdiction of arbitration tribunal or the dispute resolution body within SSO. This concern includes the approach of the arbitra-

163 Information from WIPO website 'WIPO Arbitration for FRAND Disputes' <http://www.wipo.int/amc/en/center/specific-sectors/ict/frand/> accessed 23 August 2014.

tion or the dispute resolution body regarding claims, which are related to competition law violations, breach of contract and etc.[164]

The afore-specified aspect could be a separate discussion topic, however, the issue of the availability of an injunctive relief in the context of FRAND and recent developments delivered by the Commission would be among the most important ones. With regard to the arbitration proceedings, it should be specified, that the rules of the most arbitration tribunals allow arbitrators to apply interim measures, which may include an injunctive relief. Alternatively to the latter possibility, parties to the dispute their right to obtain an injunctive relief may exercise by referring to judicial authorities. As an example, such procedure is foreseen in the Art. 48 of WIPO Arbitration Rules.[165] In the event, that the dispute resolution bodies within the SSOs would have their permanent dispute resolution rules, which provide a framework for the dispute resolution proceedings (e.g. appointment and number of the arbitrators and etc.), and its own form of administration to assist in the process, the similar procedures regarding the injunctive relief would be applicable to these bodies as to the afore-discussed separate arbitration tribunals.[166]

With regard to the afore-specified, it should mentioned, that in the event that the SEP and FRAND-related dispute resolution proceedings are taking place under the substantive law of EU member state, both of the afore-specified dispute resolution bodies while adjudicating will take into account the provisions of EU competition law.[167] This is due to the fact, that, according to the case *Eco Swiss*, the EU competition law provisions may be regarded as a matter of public policy within the meaning of the New York Convention.[168] This means, that the tribunal will consider the dispute at hand in the light of EU competition law, in order to prevent its award to be held unenforceable. Therefore, the availability of the injunctive relief in the situation of FRAND commitment will have to be evaluated in the light

164 Contreras and Newman (n 7) 1, 15-16.

165 World Intellectual Property Organization Arbitration Rules, 1 October 2002 (as amended 1 June 2014).

166 Julian D M Lew, Loukas A Mistelis, Stefan Kröll, *Comparative International Commercial Arbitration* (Kluwer Law International 2003) 35.

167 Pierre Heitzmann, 'Arbitration and Criminal Liability for Competition Law Violations in Europe' in Gordon Blanke, Phillip Landolt (eds), *EU and US Antitrust Arbitration: A Handbook for Practitioners* (Kluwer Law International 2011) 1251, 1257.

168 C-126/97 *Eco Swiss China v Benetton International NV* [1999] ECR I-03055, para 39.

of the recent developments of EU competition law, which can be illustrated by the *Samsung*[169] and *Motorola*[170] cases. This would mean, that if the SEP owner has made the FRAND commitment and the potential SEP user is a willing licensee[171], then the SEP owner would be considered as abusing its dominant position, under Art. 102 TFEU.

Another group of issues, that may arise, are related to the confidentiality requirement. In general, there are not many examples of case law regarding the setting of licensing terms for SEPs. However, due to the fact, that the setting of licensing terms for SEPs usually is a matter of case by case basis, having more cases for guidance would be beneficial. With this regard, the question of the confidentiality of the decision in SEP and FRAND-related cases[172] becomes important.

Although one of the advantages and features of alternative dispute resolution is that it is confidential, the standardization process, which could be regarded as having dual – private and public – nature, questions this feature. It is clear, that parties have legitimate interests to expect confidentiality, which is one of the criteria that make alternative dispute resolution more attractive than court proceedings.[173] On the other hand, the decisions regarding FRAND licensing terms would be useful for building up a practice in this field and could eliminate much of the current uncertainty that exists in the market. Such publication would create a body of case law upon which future FRAND determinations could draw and contribute to the decision-making in future SEP and FRAND cases.[174] Of course, the legitimate interests of the parties to the dispute should be respected. Therefore, similarly as it was proposed in the *Samsung*[175] case, it should be clearly determined by the rules of SSOs or rules of the arbitral tribunal, what information is regarded as non-confidential, to whom such information should be accessible and which sensitive information should be excluded from the public.[176]

169 *Samsung* (n 85).
170 *Motorola* (n 86).
171 *Motorola* (n 86), paras 492-495; *Samsung* (n 85), para 65-69.
172 *Samsung* (n 85), para 90.
173 *Samsung* (n 85), para 16.
174 *Samsung* (n 85), para 111.
175 *Samsung* (n 85), para 103.
176 Contreras and Newman (n 7) 1, 18.

The establishment of the afore-discussed dispute resolution procedures as an alternative to court proceedings may also raise more concerns in the sense, that, for example, arbitration procedures and frameworks for patent-based arbitration remain largely untested.[177] In the case of SEPs, these procedures and frameworks remain almost completely unused.[178] This could be illustrated by the DVB Project. Although this SSO was established in 1993, its arbitration system has not been used yet. This raises doubts regarding the effectiveness of this arbitration system while solving SEP and FRAND-related disputes. However, there are opinions, stating, that, in general, referrals to arbitration encourages negotiations as a way of addressing SEP licensing controversies between the parties and, therefore, there exists only such a small number of such type of arbitration proceedings.[179]

The afore-described issues regarding the establishment of dispute resolution bodies within SSOs or referring disputes to separate arbitral tribunals are not the only ones. In addition, with regard to the establishment of a new dispute resolution body such questions, as procedural rules, the number of members of the tribunal, the appointment of the members of the tribunal, the preclusive effect and etc. must be carefully discussed and answered. With regard to that, it should be pointed out, that in the standard-setting situation, SSOs play an important roles, because many of the mentioned aspects could be foreseen in the internal documents of SSOs, such as, IPR policies, Dispute Resolution policies or etc.

It is claimed, that any system of positive law which attempts to regulate matters relating to imperfectly understood mental or physical facts is problem loaded.[180] This problem more and more frequently is encountered in contemporary legal systems, when, due to the complexity of the object with which the law has to deal with, it becomes necessary for the law to act without knowing all the important facts and, thus, to raise difficult questions. However, as it has been stated in the context of competition law, although asking the right questions may be of little use, if it is not possible to provide with reliable answers, yet the acknowledgement of such limitations of our cognitive capacity may be in itself a big step ahead

177 Contreras and Newman (n 7) 1, 7.
178 ibid 7.
179 Contreras and Newman (n 7) 1, 8.
180 Joseph Straus, Courts as Pacemakers of Innovation - As Reflected in Case Law on Patentable Subject Matter (The Role of Courts in IP and Innovations, Proceedings of the 2013 Judicial Symposium in Korea, Seoul).

in enhancing the general debate.[181] The adherence to such point of view over time may improve the understanding of how to react even to unknown legal situations in the future, one of which could be issues arising in the field of standard-setting. For this reason, it is important to further explore possible ways of resolving SEP and FRAND-related disputes, and SSOs in this case may be helpful.

Taking into consideration all the specified above, it is possible to conclude, that, due to the rapid technological development, the diverging interests of participants of the standard-setting process and the demand for standardization, the current system of the establishment and implementation of the standard into the industry by royalty setting of SEPs and deciding what is FRAND-compliant licensing terms, leads to time-consuming and multi-jurisdictional litigation. Under the current system, the courts without having specialised technical and economic knowledge are forced to make decisions in the realm of uncertainty. The latter situation has a negative influence on the technology developers, manufacturers, consumers and on the whole innovation process itself. Therefore, despite the afore-mentioned possible legal issues that may arise, it should be in the interest of the overall standardization community to consider the establishment of SEP and FRAND-related dispute resolution bodies or referring disputes to separate arbitration, that have not only legal but also technical and economic expertise, as a possible alternative to the current court system, and to establish widely followed methodologies over the resolution of SEP and FRAND-related licensing disputes in such alternative dispute resolution bodies.

181 Josef Drexl ''Real Knowledge is to Know the Extent of One's Own Ignorance: On the Consumer Harm Approach in Innovation-Related Competition Cases' [2010] Antitrust Journal 667, 677.