



Brussels, 14 October 2014

**Extended deadline for submissions**

## **Patents and Standards**

### **A modern framework for standardisation involving intellectual property rights**

#### **Questionnaire**

#### **I. Formal aspects**

##### **Topic and objective**

The objective of this consultation is to gather information and views on the interplay between standardisation and intellectual property rights (IPR) such as patents.

Standardisation is the voluntary process of developing technical specifications based on consensus among the interested parties. Standard setting takes place in the European and International Standardisation Organizations (ETSI, CEN, CENELEC, ITU, ISO, IEC) but also in other organizations and fora or consortia on national, European or international level. Many standards comprise technologies that are patent-protected. Public authorities and the standardisation community have developed rules and practices to ensure the efficient licensing of these standard-related patents.

The purpose of the present consultation is to allow stakeholders interested in standardisation involving patents, to bring to the Commission's attention their views on

- how the current framework governing standardisation involving patents performs and on
- how it should evolve to ensure that standardization remains efficient and adapted to the fast-changing economic and technological environment.

The European Commission has the task of ensuring that the European Union's internal market functions efficiently. Therefore harmonisation standards are particularly important for the EU. Furthermore, an efficiently performing standardization system is also crucial for the EU's objectives in the areas of industrial policy, innovation, services and technological development.

##### **Target group(s)**

Companies of all sizes, organizations, public authorities, citizens and any other interested stakeholders are welcome to contribute to this consultation.

We particularly encourage those having direct experience with standardisation involving intellectual property rights to share with us their experiences and insights. This includes those currently active in

standardisation activities or planning to become active, as well as those who use standards without taking part in their formulation.

We also encourage participation of those having direct experience with

- patent transfers
- patent pools and other types of patent market intermediation
- patent dispute resolution (Courts, ADR service providers, users of ADR services etc.).

### **Period of consultation**

The consultation is open from 14 October 2014 to **15 February 2015** (extended from 31 January 2015).

### **Study on "Patents and Standards"**

In 2013 DG Enterprise and Industry commissioned a fact-finding study on the issue of patents and standards. This fact-finding study analyses the rules and practices developed to ensure efficient licensing of standard-related patents. It also covers barriers to efficient licensing and ideas discussed among stakeholders for dealing with these barriers.

The study can be found here:

[http://ec.europa.eu/enterprise/policies/industrial-competitiveness/industrial-policy/intellectual-property-rights/patents-standards/index\\_en.htm](http://ec.europa.eu/enterprise/policies/industrial-competitiveness/industrial-policy/intellectual-property-rights/patents-standards/index_en.htm)

The study is useful background reading for this public consultation. The questionnaire is stand-alone and can be answered without having read the study. We encourage you to structure your reply along the modules of the public consultation document (below). Where you want to comment on aspects in the study that do not directly fit to any specific part of the questionnaire, please do so in the section that is closest to the subject matter.

### **How to submit your contribution**

Please submit your observations by sending your contribution to the following e-mail address:

[ENTR-SEP@ec.europa.eu](mailto:ENTR-SEP@ec.europa.eu)

You can submit observations on all questions in this consultation or on specific sections alone. In either case, please ensure that we know to which question your answer belongs.

### **Respondent profile**

Please indicate clearly on your submission the following information about yourself:

- Your name or the name of the submitting organization
- Type of respondent (enterprise, association, citizen, public authority, judge/law firm, other)
- Country of residence or location of headquarters
- Your contact details including an e-mail address

In case you reply as an association, please also:

- Indicate whether you are registered in the EU Transparency Register (see below)
- State clearly whom you represent (see below)

In case you reply as an enterprise, please also indicate:

- Your main field of business activity and the field of activity related to the consultation's topic (if not identical to the overall business activity)
- Whether your enterprise can be classified as a "small or medium sized enterprise" (SME) according to the EU definition<sup>1</sup>. In case of doubt in this regard, please make a judgement call.

Submissions that are sent unanimously will not be published nor taken into account. If you include the above information but wish that your contribution is published without this information, please submit a non-confidential, anonymized version as well.

The Commission may contact you in case a clarification regarding your submission is needed. If you do not wish to be contacted, please state this clearly in your reply.

### **Transparency and registering**

In the interest of transparency, organisations (including, for example, NGOs, trade associations and commercial enterprises) are invited to provide the public with relevant information about themselves by registering in the Transparency Register<sup>2</sup> and subscribing to its Code of Conduct.

- If you are a Registered Organisation, please indicate the name and address of your organisation and your Register ID number on the first page of your contribution. Your contribution will then be considered as representing the views of your organisation.
- If your organisation is not registered, you have the opportunity to register now. Please then return to this page to submit your contribution as a Registered Organisation.
- Responses from organisations that are not registered will be published separately.

The Commission asks organisations who wish to submit comments in the context of public consultations to provide the Commission and the public at large with information about whom and what they represent. If an organisation decides not to provide this information, it is the Commission's stated policy to list the contribution as part of the individual contributions. (Consultation Standards, see COM (2002) 704, and Communication on ETI Follow-up, see COM (2007) 127 of 21/03/2007).

### **Confidentiality and data protection**

The replies submitted will be published after the end of the consultation period on:

[http://ec.europa.eu/enterprise/policies/industrial-competitiveness/industrial-policy/intellectual-property-rights/patents-standards/index\\_en.htm](http://ec.europa.eu/enterprise/policies/industrial-competitiveness/industrial-policy/intellectual-property-rights/patents-standards/index_en.htm)

Please indicate clearly at the beginning of your reply if you do not wish your contribution to be published. If you consider that certain parts of your reply are personal data or business secrets and should not be published, please submit a confidential and a non-confidential version and mark them as such prominently at their respective starts. In this case, we will only publish the version marked as non-confidential.

Please find information on the protection of your personal data on the website indicated above.

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<sup>1</sup> [http://ec.europa.eu/enterprise/policies/sme/facts-figures-analysis/sme-definition/index\\_en.htm](http://ec.europa.eu/enterprise/policies/sme/facts-figures-analysis/sme-definition/index_en.htm)

<sup>2</sup> <http://ec.europa.eu/transparencyregister/info/homePage.do>

**Contact details**

European Commission  
DG Enterprise and Industry  
Unit A4 - Industrial Competitiveness Policy for Growth  
Avenue d'Auderghem 45, 1040 Brussels, Belgium  
ENTR-SEP@ec.europa.eu

## II. Context and key issues

### **Patent based standardisation**

Standardisation and intellectual property rights, such as patents, are key contributors to industrial innovation and industrial competitiveness. Standards facilitate rapid diffusion of technologies and ensure interoperability and compatibility between products thus enabling innovation dissemination. Patents provide incentives for research and development and facilitate knowledge transfers. Effective standard setting and the protection of intellectual property rights are thus crucial for promoting innovation and the development of new technology areas.

Many standards comprise innovative technologies that are protected by patents. Where standards comprise patented technologies, efficient licensing is crucial for the success of the standard as well as for a fair return for innovators' efforts.

### **The need for a modern framework**

Public authorities and the standardisation community have developed rules and practices to ensure the efficient licensing of patents on technologies that are included in standards. These rules and practices aim to give patent holders a fair return on investment in innovation effort, including research and development, and at the same time to allow all users of the standard fair access at a reasonable cost.

The framework governing standardisation involving patents needs to reflect the requirements of all stakeholders and needs to adapt to a constantly evolving technological and business context. The Commission is therefore closely following the ongoing debate on the use and role of IPR in standards and is in the process of assessing whether it needs to address the issue in a dedicated initiative<sup>3</sup>.

### **Key issues**

The present consultation focuses on eight key issues concerning standardisation involving patents. You are kindly invited to structure your submission around these eight issues.

You are free to choose which issue you want to comment upon as well as the degree of detail you want to express for each of the chosen issue. Wherever you would like to bring detailed observations to the Commission's attention on one or more of these issue, you are invited to draw upon the more detailed questions found further below (Section III).

The eight key issues for which we are seeking your feedback are:

1. Standardisation involving patents is common in the telecommunication industry and in the consumer electronics industry. Which **other fields of standardisation** comprise patent-protected technologies or are likely to do so in the future?
2. 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?

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<sup>3</sup> See the Commission's 2014 Communication on Industrial policy "[For a European Industrial Renaissance](#)".

3. **Patent transparency** seems particularly important to achieve efficient licensing and to prevent abusive behaviour. How can patent transparency in standardization be maintained/increased? What specific changes to the patent declaration systems of standard setting organizations would improve transparency regarding standard essential patents at a reasonable cost?
4. Patents on technologies that are comprised in a standard are sometimes **transferred** to new owners. What problems arise due to these transfers? What can be done to prevent that such transfers undermine the effectiveness of the rules and practices that govern standardisation involving patents?
5. Patent pools combine the complementary patents of several patent holders for licensing out under a combined licence. Where and how can **patent pools** play a positive role in ensuring transparency and an efficient licensing of patents on technologies comprised in standards? What can public authorities and standard setting organizations do to facilitate this role?
6. Many standard setting organizations require that patents on technologies included in their standards are licensed on "**fair**", "**reasonable**" and "**non-discriminatory**" (FRAND) terms, without however defining these concepts in detail. What principles and methods do you find useful in order to apply these terms in practice?
7. In some fields standard essential patents have spurred disputes and litigation. What are the causes and consequences of such disputes? What **dispute resolution mechanisms** could be used to resolve these patent disputes efficiently?
8. How can holders of standard essential patents **effectively protect** themselves against implementers who refuse to pay royalties or unreasonably delay such payment? How can it be ensured that **injunctions** based on standard essential patents are not used to (a) either exclude companies from implementing a standard or (b) to extract unreasonable, unfair or discriminatory royalties?

Please note that Issue 1 asks for the prevalence of standardisation involving patents (as compared to standardisation where patents do not play a role). Issues 2-8 above apply only to those areas where standards include patented technologies. Please also note that Issue 2 is more general, while Issues 3-8 concern more detailed elements of standardisation involving patents.

### **Quantitative answers**

We are particularly interested in learning more about the practicalities involved in complying with the current set of rules and practices on standardization involving patents as well as in the quantitative impacts of possible changes.

For this reason, many of the more detailed questions below concern the costs and benefits of specific developments and/or changes to the current framework. When replying to these questions please provide as much detail as possible. We encourage you to provide quantitative estimates, even where this is only possible in the form of a range. Please provide an explanation of such estimates for example by splitting up overall estimates into person-hours, hourly wage of the person performing a task, etc.. Where you consider that your estimate depends on certain factors, please state these factors.

In our analysis of the submissions to this consultation we will pay particular attention to these fully explained quantitative estimates.

## Definitions for the purpose of this consultation

For the purpose of this consultation, and without prejudice to the use of these terms in other contexts, the following definitions apply:

- **Standardisation:** Standardisation is the voluntary process of developing technical specifications based on consensus among all interested parties, such as industry (including Small and Medium-sized Enterprises), consumers, trade unions, environmental Non-Governmental Organisations, public authorities, etc.).
- **Standard setting organizations (SSOs):** Standard setting organizations are entities in which standardisation work takes place. This includes the formal European and International Standardisation Organizations (ETSI, CEN, CENELEC, ITU, ISO, IEC) but also other organizations and fora or consortia on national, European or international level.
- **Standards/Standardisation involving patents:** Standardisation involves patents where the standard comprises patented technologies. This is often the case for standards that ensure interoperability between products, where the interoperability is resulting from a patented technology.
- **Technologically neutral standards:** A technologically neutral standard is a standard that does not explicitly comprise specific technologies. Examples of such standards are standards that set abstract performance criteria, without specifying how these should be attained. Technologically neutral standards are not the focus of the present consultation and are covered only in Questions 1.3.1 and 1.3.2.
- **Standard essential patents (SEPs):** Standard essential patents are patents on technologies that are comprised in a standard. This essentiality results from the fact that products implementing the standard will infringe the respective patent(s). The notion of "standard essentiality" is objective and independent of whether a patent has been declared, or not, to the respective standard setting organization.
- **FRAND/RAND:** The abbreviation "FRAND" stands for **f**air, **r**easonable and **n**on-discriminatory. FRAND is a concept that is used by many standard setting organizations to specify the terms under which the holders of standard essential patents commit to licence these patents. Other standard setting organizations use the term "RAND", without a difference on substance necessarily intended.
- **Portfolio license:** Portfolio licenses cover groups of patents owned by the licensor. These groups of patents can be subsets of the patent holder's total patent holdings (e.g. all patents related to a specific product) but could also cover all patents held by the licensor, sometimes also including future patents.
- **Cross-licensing:** Cross licensing describes a licensing arrangement where two entities grant each other licenses to their respective patents. For each of the two entities the licences it obtains are (part of) the compensation for the licences it grants.
- **Patent pools:** For the purpose of this public consultation the term "patent pool" is defined as an agreement by which two or more holders of patents agree to licence these patents under a joint licence to each other and/or third parties.

- **Patent thickets:** A patent thicket is a situation where a multitude of patents bear on a specific product and where these patents are held by different entities. Any company wishing to produce or market the product must thus obtain licences from a multitude of patent holders.
- **Royalty stacking:** For the purpose of this public consultation, the term "royalty stacking" describes a situation where patents bearing on the same standard (or product) are held by different entities and each of these entities requests royalty payments. The royalty burden on the company making the (standard-compliant) product is thus the sum (or "stack") of these royalty demands.
- **Alternative dispute resolution (ADR):** The term "alternative dispute resolution (ADR)" should be understood as comprising all forms of dispute resolution other than Court litigation. The most common forms are mediation and arbitration. Mediation describes a process by which the parties to a dispute ask a third party to facilitate negotiations between them. Arbitration describes a process by which the parties to a dispute agree to mandate a third party to decide on the dispute.

### **III. More detailed questions**

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

##### **Objective of this section and definitions**

This section of the consultation relates to the scope of standardisation involving patents and to best rules and practices. We are particularly interested in:

- The technological/product areas where standardisation comprises patented technologies;
- The trends concerning standardisation involving patents;
- The decision whether a standard should include (or note) a patented technology;
- Links between patents and standardization other than the direct incorporation of patented technologies into a standard;
- Best rules and practices available across the standardization domain.

You can find background information on trends in standardization involving patents in chapter 3 of the Study on "Patents and Standards" (link see above; hereafter referred as "the Study").

##### **Questions on the prevalence and effect of standardisation involving patents**

The first set of questions aims at identifying the prevalence of standardisation involving patents. When answering these questions, please specify the technological/business/product fields with the appropriate degree of detail.

**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?

**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?

**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?

**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?

##### **Questions on the decision to include patented technologies into a standard**

The next questions relate to cases where there is a choice on whether or not to base a standard on a patented technology. This can either be the choice to keep the respective standard free of any patented technologies or the choice to include an additional patent-protected technology into a standard that will in any case comprise patent-protected technologies. You can find information as regards the decision to include a patented technology into a standard in sub-section 5.7 of the Study.

**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.

**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?

**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?

**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?

### **Questions on other links between standards and patent-protected technologies**

The main focus of this public consultation is on the situation where a standard directly and explicitly includes a patent-protected technology.

However, two other links between patents and standards are also frequently discussed in the standardization community:

First, the situation where a standard does not refer to any particular patented technology (in other words it is technologically neutral) but where the standard can in practice only be implemented by using one or more technologies that are patent-protected.

Second, the situation where a product implements a standard but also includes patent-protected technologies which cumulatively (1) cannot be designed around technically and (2) are so important to the customer that the product cannot be sold without the patent-protected technology.

The following questions aim at gathering your views on these two situations. It should be noted that both situations are structurally different from the situation otherwise covered in this public consultation. The patent holder will regularly not have consented to the link between the standard and its patented technology and will also not have given any licensing commitment. We therefore also ask on the patent holder's defences in this situation.

**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?

**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?

## Questions on "best rules and practices"

The following questions allow you to submit your views on rules and practices that you find particularly interesting or useful. If you intend to answer the more detailed questions below (Key issues 3-8), please use Questions 2.1.1-2.1.3 to submit observations that you don't cover when answering the more detailed questions. Question 2.1.3 is targeted at stakeholders who have experience with several standard setting organizations.

**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?

**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)?

**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?

## Key issue 3 – Patent transparency

### Objective of this section and definitions

This section of the consultation relates to transparency regarding standard essential patents.

For the purpose of this consultation, **transparency** should be understood as relating to the ease with which interested parties can establish the patent situation relevant to an area of standardisation. This would cover the existence of particular patents, their scope, ownership, validity, enforceability, and essentiality for a standard. Transparency may be relevant during the discussions leading up to the formal decision on a standard (**ex ante**) but also afterwards when standard-compliant products are marketed (**ex post**).

The efforts of standard setting organizations to achieve patent transparency are based on obligations of their members to declare patents to the respective standard setting organization which then makes these declarations available to the other members or to the public. However, other types of stakeholders such as patent offices, also contribute to patent transparency.

Accordingly, we are particularly interested in:

- The relevance of patent transparency in practice and the different areas or aspects where more patent transparency would be beneficial;
- The different forms of patent declaration obligations and their respective costs and benefits;
- The various ways of handling patent declarations in practice by standard setting organizations;
- Measures to increase patent transparency beyond the system of patent declarations.

You can find background information on patent transparency in Chapters 4.2 and 5.2 of the Study.

### **Respondent profile with regard to this section**

If you wish to reply to this section of the public consultation, please ensure that you mention in your submission any special type of experience you have regarding patent transparency and/or experience with the patent declaration system used in many standard setting organizations (e.g. if you declare numerous patents; if you are a provider of services to increase patent transparency).

If you are both a holder of standard essential patents as well as an implementer of standards including patented technologies, please specify, where pertinent, from which of those perspectives you are answering a particular question.

### **Questions on the relevance of patent transparency**

The first set of questions concerns your views on the relevance and level of patent transparency in the fields of standardisation of interest to you. The questions also aim at identifying the causes of a possible lack of transparency as well as the consequences thereof.

**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.

**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?

**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?

**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.

**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.

**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 pro-actively 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?

### Questions on the content of the declaration obligation

The second set of questions concerns the obligation imposed by many standard setting organizations on their members to formally declare the patents relevant for the respective standardisation work. We are interested in hearing your views on key aspects of such declaration obligations.

**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)?

**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)?

**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?

**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.

**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.

**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?

**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?

### Questions on the quality of patent declarations

The third set of questions concerns possible your experience with the patent declaration system. The transparency ensured by this declaration obligation depends on the accuracy of the information provided, both at the time of the declaration (initial accuracy) and subsequently over the lifetime of the standard.

As regards this second aspect, there are a number of events that can cause an initially correct patent declaration to become factually incorrect, such as (1) the final version of the standard is different from the draft version at the time of the declaration, (2) the patent is invalidated, (3) the scope of the granted patent differs from that of the declared patent application, (4) the ownership of patent changes.

**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?

**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?

**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?

**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?

### Questions on the handling of declared information

The fourth set of questions concerns the practical aspects of the patent declaration system. This includes the ways that the declared information is made available to interested parties.

**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?

**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?

**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?

### **Questions on transparency improvements beyond the system of declarations**

The fifth set of questions relates to possible tools to increase patent transparency other than the system of patent declarations used by standard setting organizations.

**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?

**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?

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

#### **Objective of this section and definitions**

This section of the consultation addresses issues related to the transfer of standard essential patents.

Particular focus will be on situations where after such a transfer, the patent is no longer owned by the entity that is a member of the SSO. In such situations, the acquiring entity will not necessarily have subscribed to the rules of the SSO such as the commitment to licence the respective patent on FRAND terms.

The Horizontal Antitrust Guidelines<sup>4</sup> specify that, in order to ensure the effectiveness of the FRAND commitment, there needs to be a requirement on all participating IPR holders who provide such a commitment to ensure that any company to which they transfer their IPR is also bound by this commitment. This could be, for example, implemented through a contractual clause between buyer and seller.

Please note that some questions in Section 2 of this consultation concern transparency as regards patent ownership transfers. Please feel free to cross-reference, in case you reply to both sections.

You can find background information on the transfer of standard essential patents in chapter 5.6 of the Study.

#### **Respondent profile with regard to this section**

If you wish to reply to this section of the public consultation, please ensure that you explain in your submission the type of experience you have/had with SEP transfers and, in particular, whether this experience was gained as a buyer or seller of SEPs. Where appropriate, please specify to which business activity, product group, standardization field etc. your respective observations apply.

### **Questions on the prevalence of transfers and their causes and consequences**

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<sup>4</sup> Communication from the Commission "[Guidelines on the applicability of Article 101 of the TFEU to horizontal co-operation agreements](#)".

The first set of questions aims at gathering your views on the prevalence, causes and consequences of SEP transfers.

**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?

**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?

**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?

#### **Questions on the effectiveness of the current rules**

The following questions ask for your experience with the effectiveness of the current rules and practices when standard essential patents are transferred.

Question 4.2.4 specifically concerns the "license of right" concept existing in some Member States. Under this concept a commitment to licence SEPs on reasonable and non-exclusive terms can be tied to the patent itself.

**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.

**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.)?

**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?

**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?

## **Key issue 5 – Patent pools related to standardisation**

### **Objective of this section and definitions**

This section of the consultation concerns the role that **patent pools** play or could play in standardisation. We especially are interested in knowing your views on:

- Possible benefits of standard-related patent pools and difficulties in setting them up;
- Organizational links between standardisation and patent pool creation;
- Incentives for voluntary participation in patent pools.

For the purpose of this public consultation the term "patent pool" is defined as an arrangement by which two or more holders of patents agree to licence these patents under a joint licence to each other and/or third parties.

You can find background information on standard-related patent pools in chapter 5.3 of the Study.

### **Respondent profile with regard to this section**

If you wish to reply to this section of the public consultation, please ensure that you explain in your submission the type of experience you have with patent pools and whether this experience is as a patent pool contributor, as a patent pool administrator/facilitator and/or as a licensee of a patent pool. Your answer can cover on-going or failed attempts at patent pool creation.

### **Questions on benefits and costs of patent pools**

The first set of questions aims at obtaining your views on the possible benefits of patent pools and on difficulties in realizing these benefits.

**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?

**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?

**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?

**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?

**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?

### Questions on the incentive for patent pool participation

The second set of questions concerns the incentive for patent holders to license their patents via a patent pool. Please note that Question 5.2.2 applies to situations where patent pool creation would be beneficial but where it has failed (follow-up to Question 5.1.1).

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

**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?

### Questions on the organizational links

The third set of questions concerns the organizational links between standardisation and patent pool creation.

**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?

**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?

**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?

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

### Objective of this section and definitions

The present section of the consultation concerns the commitment to licence standard essential patents on "fair, reasonable and non-discriminatory" (FRAND) terms.

Many standard setting organizations require that their members give such commitments. The FRAND concept is also used in other contexts. In general, the meaning of "fair and reasonable" and of "non-discriminatory" is not explained in detail in the patent policies of standard setting organizations.

We are particularly interested in your views on:

- The definition of the terms "fair" and "reasonable";
- The guidance available on this topic and the so-called ex ante mechanisms in SSOs;
- Specific issues with "fair" and "reasonable" in portfolio licenses and cross-licenses;
- The application of "reasonable" on the overall, cumulative royalties;
- The royalty base and the level in the value chain where licensing takes places;
- The concept of non-discrimination.

You can find background information on FRAND aspects in chapter 5.5 and parts of 5.1 of the Study.

### **Respondent profile with regard to this section**

If you wish to reply to this section of the public consultation, please ensure that you mention in your submission any type of experience you have regarding FRAND licensing.

If you are both a holder of standard essential patent as well as an implementer of standards involving patents, please specify, whenever pertinent, from which of those perspectives you answer a particular question.

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

The first set of questions relates to your understanding of the terms "fair" and "reasonable" and your practical experience with these concepts. Methodologies for defining FRAND discussed in the literature are for example:

- definition by reference to the incremental value of the technologies adopted in the standard in comparison to alternative technologies that were rejected;
- definition focusing on the value of the technology before the standard was adopted;
- definition by reference to the market value of similar transactions outside of the standardization context;
- definition by reference to the actual transactions relevant to a given standard (if possible) or similar standards.

**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?

**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.

**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?

**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?

**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?

## Questions on guidance and mechanisms

This set of questions explores your views on the existing guidance and mechanisms on how FRAND could be better defined.

**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?

**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?

**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?

## Portfolio licencing, cross licencing and "freedom to operate"

This set of questions explores issues of FRAND in the case of portfolio licencing and comprehensive licences that are constructed to ensure "freedom to operate" or "patent peace".

**Q 6.3.1 Advantages of portfolio licencing:** 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).

**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?

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

## Overall/cumulative royalty requests

This set of questions concerns situations where a multitude of patents held by different entities are bearing on a specific product so that the licensee needs (royalty-bearing) licences from a multitude of patent holders. For the purpose of this consultation, this situation is called "royalty stacking". This set of questions explores the pertinence of the issue as well as solutions other than patent pools (for patent pools see Section 5).

**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?

**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?

**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?

### Questions on the royalty base and the value chain level

This set of questions concerns the level in the value chain on which SEP licensing takes place. This is linked to the "base" on which royalties are calculated.

**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?

**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?

**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?

**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.

### Questions on the "non-discrimination" principle

This set of questions concerns your views and your experience with the "non-discrimination" element of the FRAND commitment. Please note that the issue of where in the value chain licensing happens - which is sometimes discussed under this heading - is already covered in questions Q 6.5.1-6.5.4 (above).

**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?

**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?

**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?

**Q 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?

**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?

## **Key issue 7 – Patent dispute resolution**

### **Objective of this section and definitions**

This section of the consultation concerns the role that **alternative dispute resolution (ADR)** plays or could play in resolving disputes over standard essential patents.

For the purpose of this section, the term "disputes" refers to disagreements that are not resolved in the process of negotiation. The term "alternative dispute resolution" includes dispute resolution mechanisms other than one party to the dispute litigating against the other.

We are especially interested in your views on:

- The prevalence, causes and impacts of disputes over standard essential patents;
- The benefits and costs of providing alternative dispute resolution mechanisms;
- The integration of dispute resolution mechanisms into the standardisation process and the incentives for participants to use them;
- The substantive and procedural aspect of setting up such dispute resolution mechanisms.

You can find background information on standard-related patent pools in chapter 5.4 of the Study.

### **Respondent profile with regard to this section**

If you wish to reply to this section of the public consultation, please ensure that you explain in your submission the type of experience you have had with dispute resolution mechanisms and, in

particular, whether this experience was gathered as an adjudicator/judge, representative of a party or other (patent holder, potential licensee or other).

### **Questions on the prevalence and impacts of SEP disputes**

This set of questions concerns the prevalence and impact of disputes concerning standard essential patents.

**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?

**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?

**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?

**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?

### **Questions on benefits and costs of dispute resolution mechanisms**

This set of questions aims at determining your views on the possible benefits and costs of alternative dispute resolution mechanisms for SEP disputes.

**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?

**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?

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

**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?

**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?

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

This set of questions aims at obtaining your views on how to integrate dispute resolution mechanisms into the standardisation process. We are also interested in learning your views on

whether and how to create incentives for SEP holders and standard implementers to use such ADR mechanisms for their SEP disputes.

**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?

**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?

**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.

**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?

#### **Questions on setting up such dispute resolution mechanisms**

This set of questions aims at obtaining your views on the substantive and procedural aspects of tailoring alternative dispute resolution mechanisms to the specificities of SEP disputes.

**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"?

**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?

**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?

**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?

**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?

**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?

## **Key issue 8 – Unwilling implementers and injunctions**

### **Objective of this section and definitions**

This set of questions aims at gathering your views on **efficient protections** for holders of standard essential patents against implementers who are unwilling to take licenses for these patents as well as on the use of injunctions for infringement of a standard essential patent.

For the purpose of this section, **injunctions** are defined as lawsuits against implementers of technologies covered by standard essential patents based on an alleged infringement of these patents and seeking to have the products of such implementers banned from specific markets in a particular jurisdiction.

The Commission has recently adopted **two antitrust decisions** in this area<sup>5</sup>. These decisions state that a patent holder, including a holder of SEPs, is generally entitled to seek and enforce injunctions as part of the exercise of its IP rights. However it can, under specific circumstances, be a violation of EU antitrust law to seek or enforce an injunction against a willing licensee after having given a FRAND licencing commitment. In the context of these decisions, the notion of willingness is referred to as the willingness to enter into a license agreement on FRAND terms and, in case of dispute, to submit to third party adjudication.

**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?

**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?

**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.

**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?

**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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<sup>5</sup> [http://ec.europa.eu/competition/antitrust/cases/dec\\_docs/39985/39985\\_928\\_16.pdf](http://ec.europa.eu/competition/antitrust/cases/dec_docs/39985/39985_928_16.pdf) and [http://ec.europa.eu/competition/antitrust/cases/dec\\_docs/39939/39939\\_1502\\_5.pdf](http://ec.europa.eu/competition/antitrust/cases/dec_docs/39939/39939_1502_5.pdf)