

AIPPI • JAPAN



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International Association for the Protection of Intellectual Property of Japan

February 13, 2015

European Commission,
DG Enterprise and Industry
Unit A4 - Industrial Competitiveness
Policy for Growth Avenue
d'Auderghem 45, 1040
Bruxelles, Belgium

Re: Comments on the "Patents and Standards"

Dear Sirs,

The Japanese Group of AIPPI (AIPPI Japan) appreciates the opportunity to offer comments regarding the "Patents and Standards"

AIPPI Japan is the local group in Japan of AIPPI, The International Association for the Protection of Intellectual Property, which has more than 9,000 members worldwide. The Japanese group was founded in 1956 and currently has about 1,100 members (approximately 900 individuals and 200 corporate members). It is the largest national/regional group of AIPPI. Its members include patent attorneys, lawyers and other patent practitioners in private and corporate practice, and in the academic community. AIPPI Japan represents a wide and diverse spectrum of individuals, companies, and institutions involved directly or indirectly in the practice of patent, trademark, copyright, and unfair competition law, as well as other fields of law affecting intellectual property.

Our comments are attached hereto.

Very truly yours,

Eiji Katayama
President
The Japanese Group of AIPPI

Comments of AIPPI JAPAN

| No. | Questions | | Answers |
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| 1.1.1 | 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? | Technological areas where patents are important for standardization: communication connection, image-coding, image-recognition, smart grid, IoT Background: It is becoming increasingly difficult these days for a single company to cover everything for a business activity (a product or service) with its own technology. |
| 1.1.2 | 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? | Increase or decrease in involvement of patents in standardization: On the increase. Practical consequences: There is an increase in the number of standard essential patents (SEPs) involved in setting of standards, which will lead to an increase of licensing-related workload. |
| 1.1.3 | 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? | *Since ensuring of interoperability among different companies' products is an important element when working on product development, the standardization efforts are playing a greater role as an opportunity to access to different companies' technologies and patents. *If a standard technology is repeatedly improved through the setting of standards, related patents and developed standards are for improved technologies within a narrow technical scope. |
| 1.1.4 | 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? | Do you consider that standardisation involving patents contributes to innovation and to the uptake of new technologies?: Yes (provided that the holders of patents involved in standardization participate in the standardization efforts). If so, in which areas?: In those areas where interoperability and/or compatibility is important (communications, broadcasting, AV coding, etc.) Would technologically neutral standardization promote innovation equally well in these areas?: No. Should standardisation be less specific by excluding those elements that are covered by patents?: No. Exclusion of technological elements covered by patents in the standardization process would not contribute to the widespread use of products that contain highly advanced technologies, which would make the standardization efforts meaningless. |
| 1.2.1 | 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. | N/A |
| 1.2.2 | 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? | What technology elements to be included should be firstly decided on what functionality/performance needs to be achieved. Whether such technologies are patented or not is a factor to be considered next. |
| 1.2.3 | Q 1.2.3 Process for deciding on inclusion | Who should take the decision of including (or not) patented technologies into a standard? Should the entity suggesting the patented technology for inclusion be asked to justify the inclusion? If so, what elements should be covered, at minimum, in the justification? | A decision on whether patented technologies are included or not is a result of discussions on the standard setting process. |
| 1.2.4 | 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? | N/A |
| 1.3.1 | 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? | N/A |

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| 1.3.2 | 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? | N/A |
| 2.1.1 | 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? | <p>Which elements should be kept: a common practice in a standard-setting process to expressly state licensing terms for a standard essential patent, i.e. "RF," "FRAND," or "No intention of licensing."</p> <p>Which elements can be improved: In actual patent dispute cases, the FRAND declaration for merely the standard essential patents do not guarantee safe use of international standards. In this regard, so far MPEG-LA has equipped "defensive termination" clause in its MPEG-2 systems license agreement to ensure a certain safety in using the standard.</p> <p>For instance, a licensor of a SEP can terminate its license agreement, if a licensee referred to the licensor's SEP and patented the SEP's related technology, and enforce it to the licensor with unreasonable license conditions.</p> <p>In our opinion, SSOs should consider to introduce such a measure as an improvement plan, so that the safe use of standards will be ensured.</p> <p>More explicit IPR policies: Not helpful if each SSO becomes more explicit about the objective of their IPR policies on their own way. It would be desirable to create a basic part of such policies within an international framework, with which SSOs may be compliant when making their policies more explicit.</p> |
| 2.1.2 | 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)? | Intention of the Japan Patent Office to make SSO documents publicly available for patent prior-art search. As a prerequisite, however, the JPO and SSOs need to agree on definition of a "publicly-known document." |
| 2.1.3 | 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? | IPR policies are broadly classified into those based on RF and those based on RAND terms. There should be no problem if each organization makes its own decision to select either one of them. |
| 3.1.1 | 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. | Transparency of SEPs is not sufficient in any standardization fields. |
| 3.1.2 | 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? | N/A |
| 3.1.3 | 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? | N/A |
| 3.1.4 | 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. | 1) existence of patents, 4) ownership of patents |
| 3.1.5 | 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. | N/A |
| 3.1.6 | 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? | N/A |

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| 3.2.1 | 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)? | N/A |
| 3.2.2 | 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)? | Regardless of degree of participation in the standard setting process, all participants should identify their relevant patents. |
| 3.2.3 | 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? | We search our own patents and compare with standards documents. If any of the patents can be regarded as SEP(s), we make a patent declaration. |
| 3.2.4 | 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. | The cost of (2) is negligible compared to (1). The cost of (1) varies. |
| 3.2.5 | 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. | No. A blanket declaration does not provide enough transparency. 1. If you make a FRAND declaration by disclosing the patent numbers and what these patents are about: the existence of patent map will become clear, and therefore it will become possible to estimate reasonable license fees. Also, it will become certain that injunction will not be sought. 2. If you make a declaration without identifying the patent numbers but all patents are royalty-free, transparency will be enough because there is no need to estimate license fees. |
| 3.2.6 | 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? | Identification of patent numbers and items relevant to the standard. |
| 3.2.7 | 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? | If a patent holder does not make a declaration, he/she should be regarded as having no SEPs. |
| 3.3.1 | 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? | N/A |
| 3.3.2 | 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? | As for (1), updating should be required; in the cases of (2) and (3), it is costly to take care of them in the long run, and therefore, it is appropriate to ask for updating without penalty for failure; as for (4), to be stipulated by the policy. |
| 3.3.3 | 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? | N/A |

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| 3.3.4 | 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? | N/A |
| 3.4.1 | 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? | They should make the information publicly available after setting the standard. An impact on personal data protection will be small, if such information is equal to that of the patent applications. |
| 3.4.2 | 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? | Ease of access can be achieved as in the case of IETF: their declarations are stored in the database, and it is possible to search data by version of a standard and by declarant. |
| 3.4.3 | 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? | In our opinion, combining information will improve convenience for users of the standard. |
| 3.5.1 | 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? | N/A |
| 3.5.2 | 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? | N/A |
| 4.1.1 | 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? | 1) How common is it, in your area of activity or interest, that standard essential patents are transferred?: Transfers of SEPs take place, although we cannot figure out how many cases. The other questions: N/A |
| 4.1.2 | 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? | 1) When transferred to an NPE, defense of business by own patents will become ineffective; 2) There are cases where transfers may lead to fragmentation of patent ownership; 3) There are cases where transfers lead to disputes or litigation; 4) Royalties tend to be more expensive. |
| 4.1.3 | 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? | 1) Yes. Actually, an infringement lawsuit was filed and a letter of warning was sent based on SEPs transferred to an entity that did not produce or market products. 2) There is a risk that payment of a large amount may be requested by an entity (NPE) against which a countermeasure cannot be taken based on own patents. |
| 4.2.1 | 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. | N/A |
| 4.2.2 | 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.)? | 1) There are no rules governing SEP transfers. 2) We have no experience related to such rules. 3) We think, without such rules, it is necessary to provide at least that a SEP shall be transferred together with the SSO's patent policy and the FRAND commitment made in relation to the standard. 4) Reducing litigation risks and facilitating smooth licensing process (based on reasonable fees, in particular) |

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| 4.2.3 | 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? | 1) It is possible to provide by SSO's policy that, at the time of SEP transfer or grant of an exclusive license, a member shall be obliged to ensure that the FRAND commitment is transferred together with these rights. Alternatively, such a provision may be included in regulations. 2) The SSOs can include the above-mentioned provision in their policies. 3) Yes, the interpretation should be influenced. Requirements for a transfer should be: the seller of SEP has given a FRAND commitment in relation to the SEP and the commitment shall be transferred together with the SEP. In response to an inquiry or a request in proceedings, the seller shall disclose documents to show that he/she sold the SEP on such conditions. |
| 4.2.4 | 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? | N/A |
| 5.1.1 | 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? | In the beginning, patent pools played a meaningful role in developing a realistic perspective of SEP license fees that had been much higher. Now, however, if fees are set in accordance with court precedents, the amount of license revenues for each holder will be small, and when expenses for the patent-pool operation are deducted, companies see much less advantage of joining a patent pool. |
| 5.1.2 | Q 5.1.2 Benefits of patent pools | What are the benefits of patent pools in the above situations (Q 5.1.1) respectively for patent holders and/or patent users? What aspects in patent pool governance are particularly relevant in practice to ensure the realization of these benefits? | A patent pool allows patent holders to eliminate the need for licensing negotiations by themselves. Advantages to patent users include: many SEPs can be found in a pool; and royalties are kept at a reasonable rate. |
| 5.1.3 | 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? | N/A |
| 5.1.4 | 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? | (1) The EU competition law and national anti-monopoly laws are not clear about the extent to which a patent pool is legal, e.g. how large its market share can be? (2) It is pointed out that most NPEs (non-practicing entities) do not join patent pools in the first place. |
| 5.1.5 | 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? | N/A |
| 5.2.1 | Q 5.2.1 Decision to participate in pool | What factors influence a patent holder's decision to participate in a pool or not? | N/A |
| 5.2.2 | 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? | N/A |
| 5.3.1 | 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? | N/A |
| 5.3.2 | 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? | N/A |
| 5.3.3 | 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? | N/A |
| 6.1.1 | 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? | 1) Terms and conditions are not unfair in such a way as to constitute a barrier to entry of businesses (e.g. high royalty rates). 2) Definition given by reference to market value of similar trades outside the realm of standardization. 3) N/A |
| 6.1.2 | 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. | N/A |

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| 6.1.3 | 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? | N/A |
| 6.1.4 | 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? | The terms relate to both the initial offer and the outcome of negotiations. As a court precedent, see Motorola v Microsoft. |
| 6.1.5 | 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? | 1) It can be a proxy. 2) SEP holders do not always join a patent pool. 3) N/A |
| 6.2.1 | 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? | N/A |
| 6.2.2 | 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? | N/A |
| 6.2.3 | 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? | N/A |
| 6.3.1 | Q 6.3.1 Advantages of portfolio licensing | What are the advantages of portfolio licences respectively for the patent holder and for the implementer? How important is the so-called "freedom to operate" or "patent peace" between companies? Please cover in your answer also issues of scope (e.g. geographic scope, product scope, inclusion of future patents). | N/A |
| 6.3.2 | 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? | N/A |
| 6.3.3 | Q 6.3.3 Cross-licenses | What are the advantages of cross-licensing? What problems arise? How do the concepts "fair" and "reasonable" apply to cross-licensing? | 1) What are the advantages of cross-licensing?: Cross-licensing allows the parties concerned to reach a settlement in a win-win situation because they can decide on the terms and conditions through negotiation between themselves. It also allows them to avoid litigation. What problems arise?: N/A 2) How do the concepts "fair" and "reasonable" apply to cross-licensing?: N/A |
| 6.4.1 | 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? | 1) N/A 2) Information and communication fields 3) It is possible that the amount of royalties may become so large that business may not be viable. 4) N/A |
| 6.4.2 | 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? | 1) Co-ordination among the holders through creation of a patent pool. Adjustment of royalty rates for each among the patent holders. Setting of upper limit of royalty rates for each patent holder. 2) N/A 3) We think it may be necessary to apply restrictions under the anti-monopoly or competition law in the cases of "abuse of dominant bargaining position" and "trading on restrictive terms". |

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| 6.4.3 | 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? | N/A |
| 6.5.1 | 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? | 1) On both levels of components and final products. 2) N/A |
| 6.5.2 | 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? | N/A |
| 6.5.3 | 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? | 1) Not addressed in the IPR policies. 2) There is a need for more explicit rules for certain standards. Because when promoting the widespread use of innovative technology in society through a standard, safety in use should be ensured. |
| 6.5.4 | 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. | N/A |
| 6.6.1 | 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? | In your opinion, what is the best definition of the non-discrimination principle?: "Non-discrimination" means that terms and conditions are substantially the same. What aspects of non-discrimination do you find important?: An important aspect is that terms and conditions are substantially the same. Is there sufficient clarity on what non-discrimination means and how it is to be applied in practice?: No (not sufficiently clear). Does the non-discrimination principle relate to the initial offer of the patent holder or the actual outcome of negotiations?: It relates to the initial offer. Does it relate to an offer isolated to a single standard or to multiple standards?: N/A Do you consider that the non-discrimination principle creates obligations on the (potential) licensee?: We do not think it definitely creates obligations. |
| 6.6.2 | 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? | 1) Since a licensee does not know about the terms of license agreements between the licensor and third parties (other licensees), the licensee does not know whether the non-discrimination commitment is broken. 2) Not sufficiently transparent. |
| 6.6.3 | 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? | When combined with other patents to be licensed, the terms and conditions may look different superficially. However, such difference can be justified if the terms and conditions are substantially the same. |
| 6.6.4 | 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? | N/A |
| 6.6.5 | 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? | N/A |

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| 7.1.1 | 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? | N/A |
| 7.1.2 | 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? | N/A |
| 7.1.3 | 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? | N/A |
| 7.1.4 | 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? | N/A |
| 7.2.1 | 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? | N/A |
| 7.2.2 | 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? | N/A |
| 7.2.3 | Q 7.2.3 Suitable forms of ADR | What form of ADR (mediation, arbitration, other) do you consider suitable for what type of conflict? | N/A |
| 7.2.4 | 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? | N/A |
| 7.2.5 | 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? | N/A |
| 7.3.1 | 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? | N/A |
| 7.3.2 | 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? | N/A |
| 7.3.3 | 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. | N/A |
| 7.3.4 | 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? | N/A |

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| 7.4.1 | 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"? | N/A |
| 7.4.2 | 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? | N/A |
| 7.4.3 | 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? | N/A |
| 7.4.4 | 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? | N/A |
| 7.4.5 | 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? | N/A |
| 7.4.6 | 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? | N/A |
| 8.1 | 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? | When regarded as unwilling to pay royalties, an injunction should be granted. |
| 8.2 | 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? | There should be administrative guidelines on conditions under which injunctions cannot be granted. |
| 8.3 | 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. | N/A |
| 8.4 | 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? | N/A |
| 8.5 | 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? | In our opinion, guidelines provided by the antitrust authorities would be useful. |

Comments of AIPPI JAPAN

| No. | Questions | | Answers |
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| 1.1.1 | 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? | Technological areas where patents are important for standardization: communication connection, image-coding, image-recognition, smart grid, IoT Background: It is becoming increasingly difficult these days for a single company to cover everything for a business activity (a product or service) with its own technology. |
| 1.1.2 | 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? | Increase or decrease in involvement of patents in standardization: On the increase. Practical consequences: There is an increase in the number of standard essential patents (SEPs) involved in setting of standards, which will lead to an increase of licensing-related workload. |
| 1.1.3 | 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? | *Since ensuring of interoperability among different companies' products is an important element when working on product development, the standardization efforts are playing a greater role as an opportunity to access to different companies' technologies and patents. *If a standard technology is repeatedly improved through the setting of standards, related patents and developed standards are for improved technologies within a narrow technical scope. |
| 1.1.4 | 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? | Do you consider that standardisation involving patents contributes to innovation and to the uptake of new technologies?: Yes (provided that the holders of patents involved in standardization participate in the standardization efforts). If so, in which areas?: In those areas where interoperability and/or compatibility is important (communications, broadcasting, AV coding, etc.) Would technologically neutral standardization promote innovation equally well in these areas?: No. Should standardisation be less specific by excluding those elements that are covered by patents?: No. Exclusion of technological elements covered by patents in the standardization process would not contribute to the widespread use of products that contain highly advanced technologies, which would make the standardization efforts meaningless. |
| 1.2.1 | 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. | N/A |
| 1.2.2 | 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? | What technology elements to be included should be firstly decided on what functionality/performance needs to be achieved. Whether such technologies are patented or not is a factor to be considered next. |
| 1.2.3 | Q 1.2.3 Process for deciding on inclusion | Who should take the decision of including (or not) patented technologies into a standard? Should the entity suggesting the patented technology for inclusion be asked to justify the inclusion? If so, what elements should be covered, at minimum, in the justification? | A decision on whether patented technologies are included or not is a result of discussions on the standard setting process. |
| 1.2.4 | 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? | N/A |
| 1.3.1 | 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? | N/A |

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| 1.3.2 | 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? | N/A |
| 2.1.1 | 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? | <p>Which elements should be kept: a common practice in a standard-setting process to expressly state licensing terms for a standard essential patent, i.e. "RF," "FRAND," or "No intention of licensing."</p> <p>Which elements can be improved: In actual patent dispute cases, the FRAND declaration for merely the standard essential patents do not guarantee safe use of international standards. In this regard, so far MPEG-LA has equipped "defensive termination" clause in its MPEG-2 systems license agreement to ensure a certain safety in using the standard.</p> <p>For instance, a licensor of a SEP can terminate its license agreement, if a licensee referred to the licensor's SEP and patented the SEP's related technology, and enforce it to the licensor with unreasonable license conditions.</p> <p>In our opinion, SSOs should consider to introduce such a measure as an improvement plan, so that the safe use of standards will be ensured.</p> <p>More explicit IPR policies: Not helpful if each SSO becomes more explicit about the objective of their IPR policies on their own way. It would be desirable to create a basic part of such policies within an international framework, with which SSOs may be compliant when making their policies more explicit.</p> |
| 2.1.2 | 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)? | Intention of the Japan Patent Office to make SSO documents publicly available for patent prior-art search. As a prerequisite, however, the JPO and SSOs need to agree on definition of a "publicly-known document." |
| 2.1.3 | 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? | IPR policies are broadly classified into those based on RF and those based on RAND terms. There should be no problem if each organization makes its own decision to select either one of them. |
| 3.1.1 | 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. | Transparency of SEPs is not sufficient in any standardization fields. |
| 3.1.2 | 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? | N/A |
| 3.1.3 | 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? | N/A |
| 3.1.4 | 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. | 1) existence of patents, 4) ownership of patents |
| 3.1.5 | 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. | N/A |
| 3.1.6 | 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? | N/A |

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| 3.2.1 | 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)? | N/A |
| 3.2.2 | 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)? | Regardless of degree of participation in the standard setting process, all participants should identify their relevant patents. |
| 3.2.3 | 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? | We search our own patents and compare with standards documents. If any of the patents can be regarded as SEP(s), we make a patent declaration. |
| 3.2.4 | 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. | The cost of (2) is negligible compared to (1). The cost of (1) varies. |
| 3.2.5 | 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. | No. A blanket declaration does not provide enough transparency. 1. If you make a FRAND declaration by disclosing the patent numbers and what these patents are about: the existence of patent map will become clear, and therefore it will become possible to estimate reasonable license fees. Also, it will become certain that injunction will not be sought. 2. If you make a declaration without identifying the patent numbers but all patents are royalty-free, transparency will be enough because there is no need to estimate license fees. |
| 3.2.6 | 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? | Identification of patent numbers and items relevant to the standard. |
| 3.2.7 | 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? | If a patent holder does not make a declaration, he/she should be regarded as having no SEPs. |
| 3.3.1 | 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? | N/A |
| 3.3.2 | 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? | As for (1), updating should be required; in the cases of (2) and (3), it is costly to take care of them in the long run, and therefore, it is appropriate to ask for updating without penalty for failure; as for (4), to be stipulated by the policy. |
| 3.3.3 | 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? | N/A |

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| 3.3.4 | 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? | N/A |
| 3.4.1 | 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? | They should make the information publicly available after setting the standard. An impact on personal data protection will be small, if such information is equal to that of the patent applications. |
| 3.4.2 | 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? | Ease of access can be achieved as in the case of IETF: their declarations are stored in the database, and it is possible to search data by version of a standard and by declarant. |
| 3.4.3 | 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? | In our opinion, combining information will improve convenience for users of the standard. |
| 3.5.1 | 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? | N/A |
| 3.5.2 | 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? | N/A |
| 4.1.1 | 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? | 1) How common is it, in your area of activity or interest, that standard essential patents are transferred?: Transfers of SEPs take place, although we cannot figure out how many cases. The other questions: N/A |
| 4.1.2 | 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? | 1) When transferred to an NPE, defense of business by own patents will become ineffective; 2) There are cases where transfers may lead to fragmentation of patent ownership; 3) There are cases where transfers lead to disputes or litigation; 4) Royalties tend to be more expensive. |
| 4.1.3 | 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? | 1) Yes. Actually, an infringement lawsuit was filed and a letter of warning was sent based on SEPs transferred to an entity that did not produce or market products. 2) There is a risk that payment of a large amount may be requested by an entity (NPE) against which a countermeasure cannot be taken based on own patents. |
| 4.2.1 | 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. | N/A |
| 4.2.2 | 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.)? | 1) There are no rules governing SEP transfers. 2) We have no experience related to such rules. 3) We think, without such rules, it is necessary to provide at least that a SEP shall be transferred together with the SSO's patent policy and the FRAND commitment made in relation to the standard. 4) Reducing litigation risks and facilitating smooth licensing process (based on reasonable fees, in particular) |

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| 4.2.3 | 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? | 1) It is possible to provide by SSO's policy that, at the time of SEP transfer or grant of an exclusive license, a member shall be obliged to ensure that the FRAND commitment is transferred together with these rights. Alternatively, such a provision may be included in regulations. 2) The SSOs can include the above-mentioned provision in their policies. 3) Yes, the interpretation should be influenced. Requirements for a transfer should be: the seller of SEP has given a FRAND commitment in relation to the SEP and the commitment shall be transferred together with the SEP. In response to an inquiry or a request in proceedings, the seller shall disclose documents to show that he/she sold the SEP on such conditions. |
| 4.2.4 | 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? | N/A |
| 5.1.1 | 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? | In the beginning, patent pools played a meaningful role in developing a realistic perspective of SEP license fees that had been much higher. Now, however, if fees are set in accordance with court precedents, the amount of license revenues for each holder will be small, and when expenses for the patent-pool operation are deducted, companies see much less advantage of joining a patent pool. |
| 5.1.2 | Q 5.1.2 Benefits of patent pools | What are the benefits of patent pools in the above situations (Q 5.1.1) respectively for patent holders and/or patent users? What aspects in patent pool governance are particularly relevant in practice to ensure the realization of these benefits? | A patent pool allows patent holders to eliminate the need for licensing negotiations by themselves. Advantages to patent users include: many SEPs can be found in a pool; and royalties are kept at a reasonable rate. |
| 5.1.3 | 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? | N/A |
| 5.1.4 | 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? | (1) The EU competition law and national anti-monopoly laws are not clear about the extent to which a patent pool is legal, e.g. how large its market share can be? (2) It is pointed out that most NPEs (non-practicing entities) do not join patent pools in the first place. |
| 5.1.5 | 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? | N/A |
| 5.2.1 | Q 5.2.1 Decision to participate in pool | What factors influence a patent holder's decision to participate in a pool or not? | N/A |
| 5.2.2 | 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? | N/A |
| 5.3.1 | 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? | N/A |
| 5.3.2 | 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? | N/A |
| 5.3.3 | 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? | N/A |
| 6.1.1 | 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? | 1) Terms and conditions are not unfair in such a way as to constitute a barrier to entry of businesses (e.g. high royalty rates). 2) Definition given by reference to market value of similar trades outside the realm of standardization. 3) N/A |
| 6.1.2 | 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. | N/A |

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| 6.1.3 | 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? | N/A |
| 6.1.4 | 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? | The terms relate to both the initial offer and the outcome of negotiations. As a court precedent, see Motorola v Microsoft. |
| 6.1.5 | 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? | 1) It can be a proxy. 2) SEP holders do not always join a patent pool. 3) N/A |
| 6.2.1 | 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? | N/A |
| 6.2.2 | 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? | N/A |
| 6.2.3 | 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? | N/A |
| 6.3.1 | Q 6.3.1 Advantages of portfolio licensing | What are the advantages of portfolio licences respectively for the patent holder and for the implementer? How important is the so-called "freedom to operate" or "patent peace" between companies? Please cover in your answer also issues of scope (e.g. geographic scope, product scope, inclusion of future patents). | N/A |
| 6.3.2 | 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? | N/A |
| 6.3.3 | Q 6.3.3 Cross-licenses | What are the advantages of cross-licensing? What problems arise? How do the concepts "fair" and "reasonable" apply to cross-licensing? | 1) What are the advantages of cross-licensing?: Cross-licensing allows the parties concerned to reach a settlement in a win-win situation because they can decide on the terms and conditions through negotiation between themselves. It also allows them to avoid litigation. What problems arise?: N/A 2) How do the concepts "fair" and "reasonable" apply to cross-licensing?: N/A |
| 6.4.1 | 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? | 1) N/A 2) Information and communication fields 3) It is possible that the amount of royalties may become so large that business may not be viable. 4) N/A |
| 6.4.2 | 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? | 1) Co-ordination among the holders through creation of a patent pool. Adjustment of royalty rates for each among the patent holders. Setting of upper limit of royalty rates for each patent holder. 2) N/A 3) We think it may be necessary to apply restrictions under the anti-monopoly or competition law in the cases of "abuse of dominant bargaining position" and "trading on restrictive terms". |

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| 6.4.3 | 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? | N/A |
| 6.5.1 | 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? | 1) On both levels of components and final products. 2) N/A |
| 6.5.2 | 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? | N/A |
| 6.5.3 | 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? | 1) Not addressed in the IPR policies. 2) There is a need for more explicit rules for certain standards. Because when promoting the widespread use of innovative technology in society through a standard, safety in use should be ensured. |
| 6.5.4 | 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. | N/A |
| 6.6.1 | 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? | In your opinion, what is the best definition of the non-discrimination principle?: "Non-discrimination" means that terms and conditions are substantially the same. What aspects of non-discrimination do you find important?: An important aspect is that terms and conditions are substantially the same. Is there sufficient clarity on what non-discrimination means and how it is to be applied in practice?: No (not sufficiently clear). Does the non-discrimination principle relate to the initial offer of the patent holder or the actual outcome of negotiations?: It relates to the initial offer. Does it relate to an offer isolated to a single standard or to multiple standards?: N/A Do you consider that the non-discrimination principle creates obligations on the (potential) licensee?: We do not think it definitely creates obligations. |
| 6.6.2 | 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? | 1) Since a licensee does not know about the terms of license agreements between the licensor and third parties (other licensees), the licensee does not know whether the non-discrimination commitment is broken. 2) Not sufficiently transparent. |
| 6.6.3 | 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? | When combined with other patents to be licensed, the terms and conditions may look different superficially. However, such difference can be justified if the terms and conditions are substantially the same. |
| 6.6.4 | 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? | N/A |
| 6.6.5 | 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? | N/A |

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| 7.1.1 | 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? | N/A |
| 7.1.2 | 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? | N/A |
| 7.1.3 | 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? | N/A |
| 7.1.4 | 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? | N/A |
| 7.2.1 | 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? | N/A |
| 7.2.2 | 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? | N/A |
| 7.2.3 | Q 7.2.3 Suitable forms of ADR | What form of ADR (mediation, arbitration, other) do you consider suitable for what type of conflict? | N/A |
| 7.2.4 | 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? | N/A |
| 7.2.5 | 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? | N/A |
| 7.3.1 | 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? | N/A |
| 7.3.2 | 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? | N/A |
| 7.3.3 | 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. | N/A |
| 7.3.4 | 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? | N/A |

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| 7.4.1 | 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"? | N/A |
| 7.4.2 | 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? | N/A |
| 7.4.3 | 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? | N/A |
| 7.4.4 | 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? | N/A |
| 7.4.5 | 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? | N/A |
| 7.4.6 | 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? | N/A |
| 8.1 | 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? | When regarded as unwilling to pay royalties, an injunction should be granted. |
| 8.2 | 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? | There should be administrative guidelines on conditions under which injunctions cannot be granted. |
| 8.3 | 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. | N/A |
| 8.4 | 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? | N/A |
| 8.5 | 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? | In our opinion, guidelines provided by the antitrust authorities would be useful. |