

Patents and Standards

A modern framework for standardisation involving intellectual property rights Questionnaire

Respondent profile

Afep - Trade association representing EU businesses

Since 1982, Afep is the association which brings together large companies operating in France. The Association is based in Paris and Brussels.

Afep aims to foster a business-friendly environment and to present the company members' vision to French public authorities, European institutions and international organisations.

Restoring business competitiveness to achieve growth and sustainable employment in Europe and tackle the challenges of globalisation is Afep's core priority.

Afep's work relies on:

- the direct participation of business leaders and their teams in defining economic and social policy directions, as well as in determining the actions to be taken for growth and employment;
- direct and sound exchanges with public authorities, which are based on analyses and well-founded proposals;
- active and constructive contributions to French and European public consultations.

Afep is involved in drafting cross-sectoral legislation, at French and European level, in the following areas:

- economy,
- taxation,
- company law and corporate governance,
- corporate finance and financial markets,
- competition, intellectual property and consumer affairs,
- labour law and social protection,
- environment and energy,
- corporate social responsibility.

Afep has 112 members. More than 8 million people are employed by Afep companies; their annual combined turnover amounts to €2,000 billion.

– **Type of respondent :**

Organization

– **Country of residence or location of headquarters :**

In one of the EU 28 Member States

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- **Indicate whether you are registered in the EU Transparency Register (see below)**

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Afep, the French Association of Large Companies welcome the consultation open until 31 January 2015, launched by the European Commission's DG Enterprise and Industry, concerning Patents and Standards.

Intellectual property is a major field for the European Union's economic development and, in this regard, patents are an essential tool for supporting research and innovation.

As far as the companies are concerned, standardisation, and the certification process in general, is taking on an increasingly strong competitive dimension, both within Europe and in relation to third countries. Its technical, industrial and commercial dimension encourages them to comply from an engaging, comparative perspective. Consequently, they often call on certification bodies, the operation of which they support in principle.

To this end, the guidelines adopted in the framework of the Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal cooperation agreements help to create a structured and predictable climate conducive to the development of R&D in Europe.

It is highly desirable that these recently introduced regulations, which recognise the competitive advantages of IPRs, the need to encourage R&D as well as the contribution these results make to the definition of voluntary standards, should be changed the least amount possible.

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

Standardisation is common in all fields and all geographic areas, through healthy, competitive dynamics. Standards have become vital benchmarks for consumer societies and, indeed, permeate every aspect of our daily lives. In practice, it has to be said that it is very rare for a single standard to address a problem. In most cases, standards are developed competitively. This avoids companies being locked into a standard and limits their potential transitional costs since, as far as its users are concerned, the solution which emerges as a result of market pressure is naturally more economically viable than the others.

Innovation technologies symbolise this knowledge-sharing within a standardised framework, benefiting the global economy thanks to ever greater interoperability. In order to be viable, however, this implies quality contributions based upstream on research and innovation made secure by patents providing a structured legal and economic framework.

Smart grids are a good illustration of this development, in that their construction is based on interoperability. The same applies, for example, for home automation.

In contrast, standardisation "on the cheap" neither favours the development of new products within an aggressive competitive context nor the customers who are offered non-smart products/services (what good is a mobile phone if it cannot be used all over the world, which is what has been achieved through globalised demanding and consistent standardisation?).

- 2. A variety of rules and practices govern standardisation involving patents. Which elements of these rules and practices are working well and should be kept and/or expanded? Which elements on the other hand can be improved?**

What works well: flexibility

Standardisation bodies have created their own balanced regulations and procedures governing participation, transparency, openness and IPRs. Standardisation is an ongoing and multi-faceted process which is often based on parallel initiatives where nothing is set in stone. Standards are developed within a competitive environment and have to be economically viable in order to be adopted. Indeed, once an alternative to the existing standard is economically viable, standards utilising these alternative technologies are developed and may be adopted, considerably reducing the risk of technology exclusion.

What can be improved: economic relevance

Said standardisation bodies are set to play an increasingly important role in the future. The economic relevance of their approach is vital in order to stimulate innovation.

In this framework, it appears necessary to enhance the professionalization of these structures in order for the European standard to be efficient and powerful compared with other geographic areas where standardisation is enhanced, with the support of the regulators.

- 3. Patent transparency seems particularly important to achieve efficient licensing and to prevent abusive behaviour. How can patent transparency in standardization be maintained/increased? What specific changes to the patent declaration systems of standard setting organizations would improve transparency regarding standard essential patents at a reasonable cost?**

Among a number of options, the Commission intends to propose that royalties be determined ex ante in order to improve the transparency of patent-related costs.

The companies would like to point out the mechanical difficulty of implementing a provision of this kind. Indeed, how can a royalty rate be set before its base is known, i.e. in this case the product/service to be marketed?

As an alternative, they would suggest that standardisation bodies should monitor the declaration of essential patents more closely, and ensure the updating thereof as the adoption of the standard draws closer.

- 4. Patents on technologies that are comprised in a standard are sometimes transferred to new owners. What problems arise due to these transfers? What can be done to prevent that such transfers undermine the effectiveness of the rules and practices that govern standardisation involving patents?**

The companies that hold standard essential patents or licensees are of the opinion that the commitment to grant FRAND licences should be recognised as being attached to the patent in question, provided this remains essential for the standard and, consequently, the party to whom the patent is transferred remains bound by the commitment attached thereto.

- 5. Patent pools combine the complementary patents of several patent holders for licensing out under a combined licence. Where and how can patent pools play a positive role in ensuring**

**transparency and an efficient licensing of patents on technologies comprised in standards?
What can public authorities and standard setting organizations do to facilitate this role?**

The companies are of the opinion that pools play a positive role. They are an effective means of combating royalty stacking, and are often proposed as a solution to the "patent thicket" problem. Secondly, patent pools can have extremely beneficial effects for the economy, by creating a one-stop-shop for users of a technology and, especially, by lowering prices when patents complement one another, enabling the ambiguity associated with the promise of "reasonable" royalties to be resolved.

6. Many standard setting organizations require that patents on technologies included in their standards are licensed on "fair", "reasonable" and "non-discriminatory" (FRAND) terms, without however defining these concepts in detail. What principles and methods do you find useful in order to apply these terms in practice?

The regulations based on "FRAND" terms are an effective way of maintaining a good balance between all stakeholders and of guaranteeing actual remuneration for them. They are particularly necessary for mass market economic systems, which require a high number of licences.

However, there is no need whatsoever to define FRAND concepts in detail. They are an integral part of the licence terms (parties' good faith, etc.) and the commercial discussions between private parties related thereto. This contractual dimension does not therefore appear to be within the competence of the European Commission.

For these reasons, the standardisation bodies have deliberately refused to address the issue of "FRAND" licence criteria in their governance regulations, pragmatically considering that these considerations do not come within their competence. It should be pointed out that if a "declarant" right holder, particularly those who were involved in drafting the standard, does not comply with said regulations, the internal policies state that the standard should not include patents that are not the subject of "FRAND" licences, and even that these patents should be declassified by stripping them of their essential nature. This solution is potentially dissuasive for a declarant.

7. In some fields standard essential patents have spurred disputes and litigation. What are the causes and consequences of such disputes? What dispute resolution mechanisms could be used to resolve these patent disputes efficiently?

Dispute resolution through alternative regulation methods should be promoted due to its speed and lower cost than litigation. In the case in point, arbitration is an attractive method, as recently underlined in the findings of the Advocate General to the CJEU in the context of the Huawei/ZTE case (C-170/13).

However, a number of practical matters remain concerning the difficulty for the arbitrator of assessing the exact scope of the patent or of enforcing it throughout the Member States. Nor is the identity of the party who decides the FRAND nature of the royalty in the framework of an arbitration resolved.

8. How can holders of standard essential patents effectively protect themselves against implementers who refuse to pay royalties or unreasonably delay such payment? How can it be ensured that injunctions based on standard essential patents are not used to (a) either exclude companies from implementing a standard or (b) to extract unreasonable, unfair or discriminatory royalties?

From the point of view of holders of standard essential patents or licensees, the essential scope of this question and of chapter 8 as a whole concerns the intellectual property rights approach adopted by the competition in the framework of the implementation of standard essential patents ("SEPs").

Generally speaking, the issue is whether it is advisable for national competition authorities to regulate the conduct of companies invested in standardisation procedures. In fact, the Commission has, for a long time, regularly said that the role of the competition authorities should not be prescriptive as regards the regulations of standardisation bodies, but rather to provide indications about which policies would or would not be admissible in the light of competition regulations.

The companies are particularly keen on this approach given that issue 8 on "unwilling implementers and injunctions" mainly illustrates the role of these authorities in a litigation context.

Given this, it is important to note that:

- *these complaints more surely come under contractual relations managed by the parties in the light of patent-specific regulations;*
- *as the Advocate General highlights (§ 57) in the recent Huawei v. ZTE case (Case C-170/13, Nov 2014) "the fact that an undertaking owns an SEP does not necessarily mean that it holds a dominant position within the meaning of Article 102 TFEU, and that it is for the national court to determine, on a case-by-case basis, whether that is indeed the situation."*

Over and above these essential principles, it is worth pointing out the conditions whereby a fair and necessary balance should be struck between the parties concerned by an SEP.

In fact, the Advocate General in the aforementioned Huawei case states (§ 50) that "although the press release in the Samsung case does concern an SEP the owner of which has given a commitment to a standardisation body to grant licences on FRAND terms, it seems to me that a mere willingness on the part of the infringer to negotiate in a highly vague and non-binding fashion cannot, in any circumstances, be sufficient to limit the SEP holder's right to bring an action for a prohibitory injunction."

He consequently seems to be laying down the principle that actions should be permitted in the framework of balanced negotiations between an SEP holder required to grant licences under FRAND terms and unwilling implementers.

This is a major condition for supporting innovation development and research-sharing.