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European Commission
Enterprise and Industry Directorate-General
Via Email: ENTR-SEP@ec.europa.eu

Helmholtz Association -
Helmholtz Gemeinschaft Deutscher
Forschungszentren e.V.

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Dear Sir or Madam,

Based on your public consultation dealing with the topic "Patents and Standards – A modern framework for standardisation involving intellectual property rights" from 14th October 2014 we would like to express our concerns about the presentation of the therein described topics of standard essential patents (SEP) and intellectual property rights (IPR) and the derived implications for the European standardisation system.

It is true that intellectual property rights (IPR) as well as international standards (IS) play an important role in the innovation process. Therefore, it is appreciated that the European Commission engages to optimize - where necessary - the processes for patent applications and standardization by regulations to support the economic development in the European Union. Nevertheless, as both aspects of the innovation process have a long and successful history, the European Commission should refrain from overregulation.

By any means the described practise of including IPR information laid down in patents into standards is in conflict with the fundamental methods and procedures on how to create standards. It has been commonly agreed in the past by standardizing parties that standards do not include any IPR information and that they are written in a generic form to allow a broad application by industry and further stakeholders.

Even if patents and standards are important instruments within the innovation process, they belong to different and conflicting company strategies. Patents are restrictive in nature and prevent competitors to enter into a market while standards support competition by reducing the barriers for market entrance. This means that, from a basic point of view, patented technologies cannot be standardized until the patent holder opens the patent for public use. The concept of Standards Essential Patents (SEP) therefore disagrees with the basic rules of standardization. This reflects the position of the major Standards Developing Organizations (SDO) like IEC/ISO, CEN/CENELEC and ETSI/ITU. With this in mind, the Helmholtz

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Association expresses its concerns regarding the intention of the questionnaire and the underlying study, because it suggests that the fundamental conflict arising from SEPs could be solved by a general procedure.

Furthermore, as one of four major German research organisations with a large number of research institutions and wide variety of research topics, we would like to express our concerns to the possible impact on the European research work by introducing IPR based standards. As a lot of research work is done creating new innovations it would be a great danger to research fields in which a single company is dominating the market. It is only natural for such a company to secure its business sector with IPR standards and patents. Because of this, new and maybe better technologies could only be introduced with acceptance of this dominant enterprise and only if they are not compromising their business model. Innovations that are good for the general public may have significant lower chance to be introduced, as they could weaken the strong position of the main key player.

Concerning the questions to key issues 2 and 3 of your questionnaire, we would like to express our point of view about transparency, best rules & practices and efforts which should be required from a patent holder. Transparency is of the utmost importance. Usually, the SDOs ask all participating stakeholders if they are aware of any possibly conflicting patents before entering and during the standardization process. The process will be stopped if there is a patent involved and the patent holder is not willing to license the patent to FRAND terms. If the SDO becomes aware that a patent is concerned in an already published standard, this standard will be canceled. A problematic result is that the so-called patent holdup also applies where patent holders hide their patents intentionally ("patent trolls") and do not inform the parties involved in the standardization project. The reason is that they try maximizing their profit by unfair licensing policy.

Therefore, the documents and procedures of the SDOs must address this issue. Although it becomes a more and more common practice to make a "call for patents" during the meetings of technical committees, this is not a solution to identify "patent trolls". Nevertheless, in most cases this procedure helps to find a good solution based on a FRAND license. The European Commission should try to find a solution which forces patent holders to make the involved parties aware about their patent. The standardization community including implementers of standards need to be protected of patent holders who do not announce the existence of patents early enough to stop standardizing the IPR protected technologies.

We share the point of view expressed in key issue 4, that a transfer of a patent to another party could lead to a problem if the new patent holder is not bound to agreements between the previous patent holder and the SDO. The European Commission should try to find a solution here, e.g. by a mandatory notice accompanied with the patent, that it is applicable to FRAND licensing only. In this case the new patent holder will be aware of these agreements and will have to accept these terms if he takes over the patent rights.

To solve problems beforehand and without litigation, transparency is necessary. Regarding the questionnaire key issue 7 concerning alternative dispute resolutions,

the SDO´s could act as the right forum. The SDOs are only able to recognize a conflict with an existing patent if the involved parties announce it. If made aware however, they can provide the platform for a discussion within the respective technical committee and reach consensus between all involved parties using the same proven procedures as for regular standardization.

The study which has been the base for your survey is strongly addressing industrial point of views on the R&D work and is furthermore aiming at the four industrial branches consumer electronics, automotive, electricity grid industry and telecommunication. We feel that these four industrial branches are not the best basis for a study on the interaction of patents and standards as they are characterized by high competition. Past experiences have shown that companies from these areas try to claim and protect their market position with strong emphasis. One possible method used is to raise the barriers for entry into market for new potential competitors. Therefore the solution to question 8.2 of your questionnaire is of great importance.

In our experience, the problem is not that patent holders do not get royalties for their intellectual property rights. There are already enough regulations for this issue. But, if someone is allowed to establish IPR based standards, it is possible to create a foreclosure of a specific business and technology area by excluding future innovations of other competitors as they are not conform to the IPR standards. This could be a market disadvantage for other companies already at the beginning and could lead to a situation in which it would be impossible to introduce new innovations. The European Union has addressed this major problem only to a minor extent in the current consultation.

We would like to suggest restarting the research on the topic by setting up a new study in which all standardizing stakeholders are involved and which focuses on including the experience of the various national standardization bodies throughout Europe. Furthermore one of the main questions of a new study should be the benefit for the general public and what it will bring for the economics of the European Union. The actual study and your derived survey are at the moment only addressing a small facet of the overall picture.

Best regards,

Annika Thies