

Public consultation on a new framework for standard-essential patents

Fields marked with * are mandatory.

Introduction

In view of the discussions related to the licensing of standard essential patents (“SEPs”), the Commission announced in its Action Plan on Intellectual Property of November 2020 that it would consider a reform to ensure an efficient framework for SEP licensing. This public consultation aims at seeking the views of stakeholders on various questions that are important in developing such future framework. Those questions pertain to the most important elements of such an efficient framework, namely transparency, the concept of licensing on fair reasonable and non-discriminatory (“FRAND”) terms and conditions, including the level of licensing and enforcement.

All stakeholders are invited to provide their views. We are particularly interested to get the views of SEPs holders, SEP implementers, patent attorneys, legal practitioners, academics, patent pool administrators, industry associations, start-ups and SMEs, standard setting organizations (“SSOs”), also referred to as standard developing organizations (“SDOs”), consultants, policy makers and any other stakeholders that have experience with SEPs.

About you

* Language of my contribution

- Bulgarian
- Croatian
- Czech
- Danish
- Dutch
- English
- Estonian
- Finnish
- French
- German
- Greek

- Hungarian
- Irish
- Italian
- Latvian
- Lithuanian
- Maltese
- Polish
- Portuguese
- Romanian
- Slovak
- Slovenian
- Spanish
- Swedish

* I am giving my contribution as

- Academic/research institution
- Business association
- Company/business organisation
- Consumer organisation
- EU citizen
- Environmental organisation
- Non-EU citizen
- Non-governmental organisation (NGO)
- Public authority
- Trade union
- Other

* First name

Efe

* Surname

Usanmaz

* Email (this won't be published)

usanmaz@earto.eu

* Organisation name

255 character(s) maximum

EARTO (European Association of Research and Technology Organisations)

* Organisation size

- Micro (1 to 9 employees)
- Small (10 to 49 employees)
- Medium (50 to 249 employees)
- Large (250 or more)

Transparency register number

255 character(s) maximum

Check if your organisation is on the [transparency register](#). It's a voluntary database for organisations seeking to influence EU decision-making.

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* Country of origin

Please add your country of origin, or that of your organisation.

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| <input type="radio"/> Åland Islands | <input type="radio"/> Dominica | <input type="radio"/> Liechtenstein | <input type="radio"/> Saint Pierre and Miquelon |
| <input type="radio"/> Albania | <input type="radio"/> Dominican Republic | <input type="radio"/> Lithuania | <input type="radio"/> Saint Vincent and the Grenadines |
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- Aruba
- Australia
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- Azerbaijan
- Bahamas
- Bahrain
- Bangladesh

- Barbados
- Belarus
- Belgium
- Belize
- Benin
- Bermuda
- Bhutan

- Bolivia
- Bonaire Saint Eustatius and Saba
- Bosnia and Herzegovina
- Botswana
- Bouvet Island
- Brazil
- British Indian Ocean Territory
- British Virgin Islands
- Brunei
- Bulgaria
- Burkina Faso

- Faroe Islands
- Fiji
- Finland
- France
- French Guiana
- French Polynesia
- French Southern and Antarctic Lands

- Gabon
- Georgia
- Germany
- Ghana
- Gibraltar
- Greece
- Greenland

- Grenada
- Guadeloupe

- Guam
- Guatemala
- Guernsey
- Guinea
- Guinea-Bissau
- Guyana
- Haiti
- Heard Island and McDonald Islands
- Honduras

- Martinique
- Mauritania
- Mauritius
- Mayotte
- Mexico
- Micronesia
- Moldova

- Monaco
- Mongolia
- Montenegro
- Montserrat
- Morocco
- Mozambique
- Myanmar/Burma

- Namibia
- Nauru

- Nepal
- Netherlands
- New Caledonia
- New Zealand
- Nicaragua
- Niger
- Nigeria
- Niue
- Norfolk Island

- Sint Maarten
- Slovakia
- Slovenia
- Solomon Islands
- Somalia
- South Africa
- South Georgia and the South Sandwich Islands
- South Korea
- South Sudan
- Spain
- Sri Lanka
- Sudan
- Suriname
- Svalbard and Jan Mayen
- Sweden
- Switzerland

- Syria
- Taiwan
- Tajikistan
- Tanzania
- Thailand
- The Gambia
- Timor-Leste
- Togo
- Tokelau

- Burundi
- Cambodia
- Cameroon
- Canada
- Cape Verde
- Cayman Islands
- Central African Republic
- Chad
- Chile
- China
- Christmas Island
- Clipperton
- Cocos (Keeling) Islands
- Colombia
- Comoros
- Congo
- Cook Islands
- Costa Rica
- Côte d'Ivoire
- Croatia
- Cuba
- Curaçao
- Cyprus
- Czechia
- Hong Kong
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- Iceland
- India
- Indonesia
- Iran
- Iraq
- Ireland
- Isle of Man
- Israel
- Italy
- Jamaica
- Japan
- Jersey
- Jordan
- Kazakhstan
- Kenya
- Kiribati
- Kosovo
- Kuwait
- Kyrgyzstan
- Laos
- Latvia
- Lebanon
- Northern Mariana Islands
- North Korea
- North Macedonia
- Norway
- Oman
- Pakistan
- Palau
- Palestine
- Panama
- Papua New Guinea
- Paraguay
- Peru
- Philippines
- Pitcairn Islands
- Poland
- Portugal
- Puerto Rico
- Qatar
- Réunion
- Romania
- Russia
- Rwanda
- Saint Barthélemy
- Saint Helena
Ascension and
Tristan da Cunha
- Tonga
- Trinidad and Tobago
- Tunisia
- Turkey
- Turkmenistan
- Turks and Caicos Islands
- Tuvalu
- Uganda
- Ukraine
- United Arab Emirates
- United Kingdom
- United States
- United States
Minor Outlying
Islands
- Uruguay
- US Virgin Islands
- Uzbekistan
- Vanuatu
- Vatican City
- Venezuela
- Vietnam
- Wallis and Futuna
- Western Sahara
- Yemen
- Zambia

- Democratic Republic of the Congo
- Lesotho
- Saint Kitts and Nevis
- Zimbabwe
- Denmark
- Liberia
- Saint Lucia

The Commission will publish all contributions to this public consultation. You can choose whether you would prefer to have your details published or to remain anonymous when your contribution is published. **For the purpose of transparency, the type of respondent (for example, 'business association', 'consumer association', 'EU citizen') country of origin, organisation name and size, and its transparency register number, are always published. Your e-mail address will never be published.** Opt in to select the privacy option that best suits you. Privacy options default based on the type of respondent selected

* Contribution publication privacy settings

The Commission will publish the responses to this public consultation. You can choose whether you would like your details to be made public or to remain anonymous.

Anonymous

Only organisation details are published: The type of respondent that you responded to this consultation as, the name of the organisation on whose behalf you reply as well as its transparency number, its size, its country of origin and your contribution will be published as received. Your name will not be published. Please do not include any personal data in the contribution itself if you want to remain anonymous.

Public

Organisation details and respondent details are published: The type of respondent that you responded to this consultation as, the name of the organisation on whose behalf you reply as well as its transparency number, its size, its country of origin and your contribution will be published. Your name will also be published.

I agree with the [personal data protection provisions](#)

I. General questions

1. (If the contribution is given as a company) I am

- SEP holder
- SEP holder and implementer of a standard
- Implementer
- Other (please indicate)

If other, please indicate here

50 character(s) maximum

Representing RTOs as SEP holder organisations

2. Do you consider that the current legal framework for SEPs[1], provides sufficient legal protection against “hold-out” (broadly opportunistic behaviour by SEP implementers such as delaying the conclusion of a licence for as long as possible)?

[1] Communication of 2017 entitled “Setting out the EU approach to Standard Essential Patents” the European Commission (“Commission”), endorsed by Council Conclusions 6681/18, Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights (“IPRED”), Regulation (EU) No 608/2013 of the European Parliament and of the Council of 12 June 2013 concerning customs enforcement of intellectual property rights and repealing Council Regulation (EC) No 1383/2003 (“Regulation concerning customs enforcement of IPRs”), Regulation (EU) No 1025/2012 of the European Parliament and of the Council of 25 October 2012 on European standardisation (“Regulation on European standardisation”), Communication from the Commission – Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements (notably chapter 7) (“Horizontal Co-operation Guidelines”), Communication from the Commission — Guidelines on the application of Article 101 of the Treaty on the Functioning of the European Union to technology transfer agreements, Judgment of the Court of Justice of the European Union (“CJEU”) of 16 July 2015, Huawei v. ZTE, national patent laws and judgments of national courts.

- Fully agree
- Somewhat agree
- Neutral
- Rather disagree
- Fully disagree
- No opinion / cannot answer

Please explain your answer

700 character(s) maximum

See EARTO's papers on SEPs:

1)EARTO's Views on the EC Communication on Standard Essential Patents, 22 December 2017:

<https://www.earto.eu/wp-content/uploads>

/EARTO_Views_on_EC_Communication_on_Standard_Essential_Patents_-_final-1.pdf

2)EARTO Position Paper on the European Licencing Framework for Standard Essential Patents, 8

November 2017: <https://www.earto.eu/wp-content/uploads>

/EARTO_Paper_on_the_European_Licencing_Framework_for_SEPs_-_final-1.pdf

3)EARTO Answer to EC Consultation on Patent & Standards, 26 January 2015: https://www.earto.eu/wp-content/uploads/EARTO_Answer_to_EC_Consultation_on_Patents_Standards_-_Final_26012015.pdf

3. Do you consider that the current legal framework for SEPs provides a sufficient legal protection against “hold-up” (broadly opportunistic behaviour

by SEP holders such as using their market power to extract excessive rents or terms from implementers)?

- Fully agree
- Somewhat agree
- Neutral
- Rather disagree
- Fully disagree
- No opinion / cannot answer

Please explain your answer

700 character(s) maximum

Explanations are in EARTO's paper cited in comment for question 2. Moreover, EARTO is in line with US AUTM on this subject matter: [https://autm.net/getmedia/f416f0fe-d7da-4195-b120-e7df5b7e0507/AUTM-Comments-on-2021-SEP-Policy-Statement-\(Docket-ATR-2021-001\).pdf](https://autm.net/getmedia/f416f0fe-d7da-4195-b120-e7df5b7e0507/AUTM-Comments-on-2021-SEP-Policy-Statement-(Docket-ATR-2021-001).pdf). This AUTM position (February 4, 2022) is a response to a consultation launched by the DoJ in the USA, December 13, 2021, which is similar to that of the present consultation of the Commission. EARTO strongly advises the Commission to take into account the results of this consultation in the USA so that for reasons of reciprocity, European regulations will not be less favorable to innovation than similar regulations in the USA.

4. What is the impact of the current framework for SEP licensing on start-ups and SMEs?

- It does not impact start-ups and SMEs differently than other stakeholders
- It is more favourable to start-ups and SMEs
- It puts start-ups and SMEs at competitive disadvantage
- Other, please specify

Please specify here

700 character(s) maximum

The current regulatory framework allows for a good balance between technology providers (SEP holders) and implementers. Given that SMEs and start-ups can be either technology providers or implementers, changing this balance would disadvantage some SMEs and start-ups."
Please note that, due to their size start-ups and SMEs often must rely on outside specialized counsel. Either in their role as technology provider or as implementer. As such they may encounter somewhat higher costs than larger stakeholders. Even where this may lead to some minor disadvantages to these stakeholders, that should be addressed by capacity building efforts or financial grants rather than by means of legislation.

5. What is the impact on your business of recent litigations in courts in different jurisdictions, including China, Germany, India and the UK?[1]

[1] See for example Chinese Supreme Court's ruling of 28 August 2020, Huawei v. Conversant, (2019) Zui Gao Fa Zhi Min Zhong 732, 733 and 734 No 1, Order of the Wuhan Intermediate Court of 23 September 2020, Xiaomi v. Interdigital, (2020) E 01 Zhi Min Chu 169 No 1,

Judgment of the Munich Regional Court of 25 February 2021, Interdigital v Xiaomi, Case No. 7 O 14276/20, Judgment of the High Court of Delhi at New Delhi of 3 May 2021, Interdigital v Xiaomi, A. 8772/2020 in case CS(COMM) 295/2020 and Judgment of the United Kingdom's Supreme Court of 26 August 2020, Unwired Planet v. Huawei, UKSC 2018/0214, [2020] UKSC 37.

1000 character(s) maximum

No impact. Explanations are in EARTO papers:

1)EARTO's Views on the EC Communication on Standard Essential Patents, 22 December 2017:

<https://www.earto.eu/wp-content/uploads>

/EARTO_Views_on_EC_Communication_on_Standard_Essential_Patents_-_final-1.pdf

2)EARTO Position Paper on the European Licencing Framework for Standard Essential Patents, 8

November 2017: <https://www.earto.eu/wp-content/uploads>

/EARTO_Paper_on_the_European_Licencing_Framework_for_SEPs_-_final-1.pdf

3)EARTO Answer to EC Consultation on Patent & Standards, 26 January 2015: https://www.earto.eu/wp-content/uploads/EARTO_Answer_to_EC_Consultation_on_Patents__Standards_-_Final_26012015.pdf

Please explain your answer. Please also explain whether your answer would change on the basis of the different type of sectors to which your SEPs are licensed (e.g. IoT, automotive)

500 character(s) maximum

Recent litigations did not impact RTOs business which is to transfer knowledge to the market mainly through the Intellectual Property and Licensing system. This business is the same whether the patents are SEPs or not and recent litigations in courts for SEPs, whose results are on average of the same nature as patent disputes that are not SEPs, did not change RTOs technology transfer policies. Moreover, there are proportionally no more disputes concerning SEPs than disputes concerning non-SEPs.

II. Licensing process

II.a) Questions for all stakeholders

6. In your experience, in licensing negotiations, how many SEPs are discussed technically between an implementer and a SEP holder with a large portfolio?

- < 20
- 20-50
- 50-100
- 100-200
- 200-400
- > 400

Comments

700 character(s) maximum

All cases are possible. There is no typical number for such technical discussions. In bilateral licensing discussions with regard to a small number of patents usually ALL patents to be licensed will be scrutinized by the prospective licensee. In such cases, the license fee will be greatly dependent on the number of actually licensed patents and hence the additional effort is considered worthwhile . However, where SEP's are licensed out by a patent pool, all patents will have been independently evaluated on essentiality AND the relative weight of each patent in the licensed portfolio will be rather small. Therefore implementers usually do not scrutinize individual patents in the portfolio.

II.b) Questions for SEP implementers

7. Have you ever sought a licence before being approached by a SEP holder?

- Yes
- No
- No opinion / cannot answer

Please explain your answer

700 character(s) maximum

For implementers only. RTOs are generally not implementers.

8. If yes, how did that impact on your business?

- It had no impact
- It helped enter a new market
- It caused me delay of the time-to-market
- It prevented me from entering an new market
- It gave me competitive advantage
- It put me at competitive disadvantage
- Other, please specify

Please explain your answer

700 character(s) maximum

For implementers only. RTOs are generally not implementers.

9. How much time after the first implementation of a standard in your products are you, on average, contacted by a SEP holder with an invitation to take a licence?

- less than 6 months
- 6 – 12 months
- 1 – 2 years

- 2 – 4 years
- 4 – 6 years
- More than 6 years
- I was never approached

Please explain your answer. In particular, please explain whether you find that there are differences depending on the type of products or sector (e.g. IoT, automotive)

For implementers only. RTOs are generally not implementers.

10. What would be the main reason for you to request a licence?

- To be able to compete with other suppliers
- Not to infringe a SEP without a licence
- To be able to indemnify my customer
- To have legal certainty over my costs and plan my business activities
- To be able to carry our R&D and develop new products
- To be able to sell my products
- Other (please specify)

Please explain your answer

700 character(s) maximum

For implementers only. RTOs are generally not implementers.

11. What are the average costs you incur for estimating your SEPs exposure per product that you want to bring on the market? These costs include cost for searching patent databases on enforceability, validity and ownership of the patent, assessing the essentiality of the patents, whether there is an infringement, the potential number of true SEPs and the share of the individual SEP holders in those.

- < 10.000 euros
- 10.000-50.000 euros
- 50.000-100.000 euros
- 100.000-250.000 euros
- 250.000-500.000 euros
- > 500.000 euros

Please explain your answer.

700 character(s) maximum

For implementers only. RTOs are generally not implementers.

12. What is the main effect for SEP implementers, in particular start-ups and SMEs, of the costs involved in licensing SEPs (search, negotiation and litigation costs)?

- I look for alternatives (e.g. not using standardised technology or royalty free standards)
- I go out of business/change business
- I become less competitive
- I settle as quickly as possible for a SEP licence, because it is cheaper than litigation
- I take licence only if absolutely necessary
- I increase final price to my business or retail customers
- I ask my suppliers to indemnify me for possible patent infringement
- Cannot answer / not applicable
- Other, please specify

Please explain your answer

700 character(s) maximum

For implementers only. RTOs are generally not implementers.

II.c) Questions for SEP holders

13. What are top three reasons for licensing/having SEPs?

- It is our main source of income
- For defensive purposes/better bargaining power
- For cross licensing
- For return on investment in R&D
- For continuation of future participation in standardisation
- Other, please specify....

Please explain your answer

700 character(s) maximum

RTOs, not-for-profit organisations, do not exploit SEPs directly e.g. by selling products or rendering services, but indirectly by licencing to undertakings. As royalties is an important issue, it is neither our main source of income, nor a goal per se, as our goal per se is to carry out efficient technology transfer mainly through the Intellectual Property and Licensing system. Royalties are important to cover the patent costs and because we use royalty earnings to fund new RDI programs and to reward researchers for the attention they bring to the economic impact of their work. Generally, the RTOs work with the taxpayers money. We have the obligation to use the public investment efficiently.

14. On average, how much time after publication of a standard do you first start inviting SEP implementers to take a license for applications known at the time of its adoption?

- less than 6 months
- 6 – 12 months
- 1 – 2 years
- 2 – 4 years
- 4 – 6 years
- More than 6 years
- Never

Please explain your answer

700 character(s) maximum

All cases are possible, cannot provide a meaningful average. As RTOs are research organisations carrying out RDI projects from intermediate TRL levels (1-3) to high TRL levels (above 4), and as the licensing of a technology depends on the TRL level, all cases are possible. In the early stage of a standard, these SEP's are often licensed out bilaterally by the RTOs themselves. Varying duration of SEP implementers taking a licence is not due to delays that are specific to the SEPs FRAND licence negotiation process, but is mainly caused by the varying TRL level of the technology. In later stages, when the number of implementers rises sharply, SEP licensing is often transferred to patent pools.

15. Do you contact all known SEP implementers from the selected category?

- Yes
- No
- No opinion / No answer

Please explain your answer

700 character(s) maximum

Not relevant for RTOs.

16. What percentage of these SEP implementers reply within a year after sending the first letter?

- < 25%
- 25-40%
- 40-55%
- 55%-70%
- 70-85%
- > 85%
- It depends (please explain)

Please explain

700 character(s) maximum

Not relevant for RTOs.

17. What percentage of the SEP implementers that reply take a license without litigation?

- < 25%
- 25-40%
- 40-55%
- 55-70%
- 70-85%
- > 85%
- It depends (please explain)

Please explain

700 character(s) maximum

Not relevant for RTOs.

18. On average, how much time after your first letter do implementers take a licence?

- Less than 6 months
- 6-12 months
- 1-2 years
- 2-4 years
- 4-6 years
- More than 6 years

Please explain your answer. Please also explain whether your answer would change on the basis of the different type of sectors to which your SEPs are licensed (e.g. IoT, automotive)

1000 character(s) maximum

Not relevant for RTOs.

III. Problems related to SEP licensing

III.a) Question for all stakeholders

19. What problems do you encounter when it comes to SEP licensing?

	Strongly disagree	Disagree	Neutral	Agree	Strongly agree	No opinion
Lack of transparency of the SEPs landscape in general and of the share of the different SEP holders	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Lack of transparency on FRAND royalty rate	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Lack of guidance on the FRAND concept	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Lack of clarity on the level of licensing	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Hold out	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Hold up / Unavailability of a licence	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
The licensing process is too expensive	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Divergent court rulings	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Court rulings ordering to take a worldwide licence	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Injunctions	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Anti-suit injunctions	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Other (please specify)	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

Please explain your answer. Please provide information on particular problems start-ups and SMEs may face.

700 character(s) maximum

RTOs do not encounter specific problems when it comes to SEP licensing. Licensing in general is not an easy task and must be conducted with professionalism and seriousness, taking into account the interest of both parties.

Therefore, response to abovementioned items are irrelevant, except for item “hold-up/unavailability of a licence” where EARTO’s response is: fully disagree. As RTOs are non for profit organisations with a public mission to transfer their knowledge to the economy, the concept of patent hold up is not relevant at all.

III.b) Questions for SEPs implementers

20. Under which circumstances would you consider not using a certain standard? Question of particular relevance for start-ups and SMEs.

Circumstances	Strongly disagree	Disagree	Agree	Strongly agree	No opinion
There is an alternative technology which is available at better conditions	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
There is no real need to implement the standard. The standardised technology is a mere add on.	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
It is not clear which patents are truly essential and require a licence for a particular implementation	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
It is not clear which SEPs my products actually implement/use	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
The requested royalty is too high	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
The SEP holder refuses to give a licence	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Licensing negotiations and litigation are too costly	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Other (please specify)	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

Comment. Please provide information, if you are aware of circumstances, in which start-ups and SMEs considered not using a certain FRAND-based standard.

700 character(s) maximum

Not relevant for RTOs.

21. Which of the following behaviours would you assess as hold-up or opportunistic behaviour by a SEP holder?

Behaviour	Strongly disagree	Disagree	Neutral	Agree	Strongly agree	No opinion

The SEP holder refuses to license	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
The SEP holder refuses to license to a certain level in the value chain	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
The SEP holder refuses to license at a certain price I find commercially acceptable	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
The SEP holder discloses the SEP to the Standard Development Organisation (“SDO”) after the standard was adopted	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
The SEP holder requires implementers to pay royalties for rights to patents that are not essential to the relevant standardized technology	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
The SEP holder requires implementers to pay royalties for rights to patents that are not relevant to the implementer’s specific products	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
The SEP holder adopts discriminatory or exclusionary licensing terms or practices	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
The SEP holder insists on a new licence at a higher price in the context of a patent pool when the implementer has a licence for the same patents of the same SEP holder.	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
The SEP holder brings the accused infringer’s customers into the licensing dispute, by either contacting them, threatening to sue them, or actually suing them	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
The SEP holder attempts to base the royalty owed on prior licences that were not reasonably comparable (due to differences in patents, duration, geographic scope, implementer type, etc).	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

The SEP holder refuses to disclose the terms of prior licences with similarly situated companies	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Other (please specify)	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

Comment

700 character(s) maximum

Not relevant for RTOs.

III.c) Question for SEP holders

22. Which of the following behaviours would you assess as hold-out or opportunistic behaviour by implementers?

Behaviour	Strongly disagree	Disagree	Neutral	Agree	Strongly agree	No opinion
Ignore notifications and other communications for months	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Express a willingness to take a FRAND licence - but only for each individual patent for which infringement, essentiality, and validity is confirmed by the courts	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Insist on obtaining unreasonable amounts of information (e.g. a claim chart for every SEP in a portfolio) without appropriate confidentiality arrangements in place	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Refuse or delay signing a non-disclosure agreement as a hold-out tactic	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Claim to lack information or to not understand the licence offer	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Repeatedly ask for information that the SEP holder has already provided	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Buy time by professing willingness to engage in constructive licensing negotiations - even as behaviour suggests otherwise	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

Table counter-offers that are obviously unreasonable and unacceptable for the rights holder (e.g. a licensing rate of just 0.001 per cent per patent family)	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Table a counter-offer only once litigation has been initiated	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Refuse to enter into a global licence agreement despite having a global business for products that use standards	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Redirect the SEP holder to upstream suppliers for licences	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Redirect the SEP holder to a subsidiary or holding company	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Insist repeatedly that the licence offer is not FRAND without providing substantive arguments to demonstrate why	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Refuse to accept licence terms that have been confirmed by an EU court to be FRAND, and that are relevant and comparable for that implementer.	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Other (please specify)	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

Comment

700 character(s) maximum

For RTOs, licensing negotiations on standard-essential patents is no different than licensing negotiations on non-standards-related patents. In proportion to the number of licenses, there are no more disputes during negotiations on SEPs patents than in others. Moreover, and more generally, in proportion there are no more lawsuits related to SEPs than lawsuits related to patents that are not SEPs.

As part of their public mission of technology transfer, if an implementer had a "hold out" type behavior, the RTOs would seek other solutions to license their patents, including outside the standard.

Therefore, abovementioned issues are not relevant to RTOs.

IV. Transparency

SEPs play an increasing role in the digitalisation of the economy in many sectors and need to be dealt with by multiple players who are unfamiliar with the world of SEPs, including start-ups and SMEs. This shift may require adaptations to the current approach to SEPs, in an effort to enhance transparency, predictability and trust.

IV.a) Questions for all stakeholders

23. In your view, which of the information below should the SEP holder provide publicly?

	Strongly disagree	Disagree	Neutral	Agree	Strongly agree	No opinion
Patent and application number	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Transfer of ownership, if any	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Relevant standard, version, section of the standard	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Product categories that use the SEPs	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Licensing programs	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
List of licensees	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
High-level claim charts	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Detailed claim charts	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Essentiality confirmed by an independent third party	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Information on the enforceability of the patent (e.g. application, granted, validity)	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Standard FRAND terms and conditions	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Contact details of SEP holder	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Other (please specify)	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

Comment. Please indicate which information is of particular relevance to start-ups and SMEs.

700 character(s) maximum

For RTOs, lack of transparency is not an issue in SEP Licensing. So the response to all the questions in table in 23, is : disagree. Moreover, many items in the list , if applied, would slow down negotiations and slow down the diffusion of innovation.

For SMEs : applying the items would seriously harm start-ups and SMEs in the case they would be SEPs holder. Patents are very important to SMEs and start-ups in order to develop and compete against

established companies. Applying the proposed items would seriously harm their development and more generally harm the European innovation system.

24. In your view, which of the information below should patent pools make publicly available?

	Strongly disagree	Disagree	Neutral	Agree	Strongly agree	No opinion
Standards subject to pool licensing	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
Pool Administrators' shareholders / ownership structure	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
Process for evaluating SEPs to be included in the pool (essentiality, validity etc.)	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
List of independent evaluators	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
List of certified SEPs	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Illustrative cross-references to standard explaining why the SEPs are found to be essential	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
List of licensed products	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Product royalties per programme	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Standard licence agreement per programme	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
List of SEP holders	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
List of licensees	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Duplicate royalty policy[1]	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
[1] A policy whereby an implementer is obliged to take a licence for all of the patents in a pool relating to a specific standard even if the implementer already has a licence for some of the patents to that standard	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Other (please specify)	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

Comment. Please indicate which information is of particular relevance to start-ups and SMEs.

700 character(s) maximum

25. Which of the information below should a SEP implementer of the standard provide publicly?

	Strongly disagree	Disagree	Neutral	Agree	Strongly agree	No opinion
An indication of the standard being used	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
An indication of the standard and the relevant version of the standard	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
An indication of the standard, the relevant version and section of the standard	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
An indication of the standard, the relevant version, section and product category of the standard	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
Contact details of implementer	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
Other (please specify)	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

Comment. Please indicate which information is of particular relevance to start-ups and SMEs.

700 character(s) maximum

The fact that an implementer provides this information makes it possible to verify its real intentions, depending on its business model. A fair and reasonable license fee should be dependent on the actual use of the licensed SEP and hence requires information from the implementer. This information is of the utmost importance for SMEs and start-ups that are SEP holders in order to be able to ensure that their interests are protected.

26. How useful would the existence of a confidential repository of licensing agreements be to help judges and arbitrators determine a FRAND rate?

- Not useful
- Somewhat useful
- Useful
- Very useful
- No opinion

Comment

700 character(s) maximum

We acknowledge that SEP licensing under FRAND conditions should indeed be non-discriminatory between the various licensees having similar usecases. In bulk licensing, e.g. via patent pools, standard fees are

usually applied. FRAND disputes often come into existence where the anticipate use by a prospective licensee deviates from the normal usecase. This repository would only be helpful in those handful of specific cases. Such disputes could be better analysed by looking at their own merits than by simply comparing rates with earlier licenses. We feel that, judges and arbitrators have sufficient skills and information to analyse FRAND rates, which will be based on a case by case analysis.

27. If there should be a repository who should have access to such confidential repository of licensing agreements?

- Judges
- Arbitrators
- Mediators
- Public authorities
- Lawyers
- Trustees
- Other (please specify)

Comment

700 character(s) maximum

The question is not relevant for RTOs because their opinion is that such a repository is not useful. See comments for the other questions.

28. Under what conditions should access to the confidential repository of licensing agreements be granted? Please explain

1000 character(s) maximum

The question is not relevant for RTOs because their opinion is that such a repository is not useful. See comments for the other questions.

29. No licence agreement is the same. They are catered to the needs of the concluding parties and the agreed terms and rates may be influenced by elements other than merely SEPs. If there were an obligation to submit licensing agreements to a confidential repository and parties were obliged to “unpack” the complex licensing agreements, i.e. provide a clear picture of the agreed terms and conditions, which elements of the agreement would need to be explained in a form to be submitted to the confidential repository of licensing agreements, summarising those agreements?

- Parties
- Licensed SEPs
- Licensed product

- Geographical scope
- Duration
- Methodology used to calculate the royalty
- Royalties
- Discounts
- Reciprocity obligations
- Grant-backs
- Defensive suspension (clause that allows a SEP holder to terminate a licence upon the occurrence of a certain event, like being sued for patent infringement by a implementer or implementer's customer)
- Payment conditions (term, interest for late payments)
- Compliance (reporting obligations and auditing conditions)
- Non-disclosure requirements
- Legal (applicable law, competent forum/court)
- Patent related (validity)

Comments

700 character(s) maximum

The question is not relevant for RTOs because their opinion is that such a repository is not useful. See comments for the other questions. Additional comment: yes, no licence agreement is the same They are catered to the needs of the concluding parties and the agreed terms and rates may be influenced by element other than merely SEPs. Therefore such repository would not be useful and it should be avoided because it could even have counterproductive effects and lengthen negotiations and create more disputes.

V. Essentiality

V.a) Questions to all stakeholders

30. The SEPs legal framework does not provide for third party checks outside of court of patents declared essential to a standard. How useful would be to set up a system of essentiality checks?

- Useful. It provides more transparency and reduces licensing costs
- Useful, but only if it would be advisory and have no legal consequences
- Useful, but only if the assessors would have the required expertise and are totally independent
- Not useful. It is sufficient, if SEP owners were obliged to update their self-declarations (so as to remove declared SEPs that are no longer SEPs)
-

Not useful. It is sufficient, if SEP owners were obliged to submit claim charts confirmed by an independent third party

- Not useful. It is sufficient to develop private solutions to identify declared SEPs that are clearly not a true SEP.
- No opinion
- Other, please specify

Comment

700 character(s) maximum

31. What would be the main advantage of third party essentiality checks?

Statement	Strongly disagree	Disagree	Neutral	Agree	Strongly agree	No opinion
It may help in deciding with whom to engage in licensing discussions	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
It may help to be better informed about the actual SEP exposure of a given product	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
It may help to smoothen licensing negotiations	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
It may help to reduce the required amount of resources spent on licensing of SEPs	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
It may help to provide a trustworthy and reliable overview of the share of each SEP holders' essential patents	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
It may help to negotiate a fair royalty (preventing over-pricing)	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
It may facilitate the construction of better benchmarks to be used in case of disputes	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
It may help the SEP holder to meet its obligations as referred to in Huawei v ZTE	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
It may make SEP declarants to become more selective in submitting 'potentially essential' or 'probably not essential' patents	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

Other (please specify)



Comment. Please indicate any particular advantages or disadvantages for start-ups and SMEs.

700 character(s) maximum

Third party essentiality checks would be very harmful for the diffusion of the innovation because it would lengthen the negotiations and lead to more disputes and lawsuits. In SEP licensing by patentpools a third party essentiality check is obligatory due to the effects of anti-trust law. In bilateral SEP licensing, there is no such need and it should be left to the prospective licensees to “check the goods before buying”. If a prospective licensee holds the opinion that a certain patent is not essential to a standard, it may conduct its own essentiality study, commission it from an independent third party, or refrain from taking a license. That should be done as the need arises not before.

32. If there were a legal obligation to conduct essentiality checks on all declared SEP families that SEP holders intend to license, how should those be made?

Statement	Strongly disagree	Disagree	Neutral	Agree	Strongly agree	No opinion
One SEP per family	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Sampling of ‘Denominator data’ (which is information on actual SEPs owned by all relevant patent owners for a specific standard).	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Sampling of ‘Numerator data’ (which is information on the actual SEPs portfolio of a specific patent owner for a specific standard).	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Sampling of both ‘Numerator data’ and ‘Denominator data’.	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Only SEPs that are licensed on FRAND terms and conditions, including cross licensing, excluding SEPs licensed on a royalty free basis	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
One SEP per family that is being licensed on FRAND terms and conditions	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
For worldwide SEPs	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
For European SEPs only	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Other (please specify)	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

Comment

700 character(s) maximum

Third party essentiality checks would be very harmful for the diffusion of the innovation. In particular, it would harm the development of start-ups and SMEs that are SEPs holders and cause additional substantial costs in a phase where licensing revenue could normally not yet be expected. And, such essentiality study would have to be repeated with changing standards. Moreover, if such obligations would only be placed on formal standards and not on de facto standards, such obligations may skew the innovation ecosystem and encourage major players to set up their own de facto standardization fora. That should be strongly discouraged as not in the interest of EU industry.

33. If a system of third party essentiality checks would be in place, which authority/body would be best placed for doing such essentiality checks?

- The EPO
- The national patent offices
- Specialised law firms
- Other organisation, please specify
- A combination of the bodies listed in letters a, b, c or d. If so, please specify which bodies and why in your view both should be responsible for this task

Comment

700 character(s) maximum

None of them as EARTO's opinion is that essentiality checks by third parties would harm innovation in Europe and especially hinder the development of SMEs and start-ups that are SEP holders.

34. Please explain what are in your view the main challenges to set up such a system, in terms of complexity and/or costs.

1000 character(s) maximum

The complexity and costs to set up such a system would be so huge that it would rather not be set up, as in addition it would harm innovation in Europe and especially hinder the development of SMEs and start-ups that are SEP holders. Public funding would be saved.

VI. FRAND

While there is no 'one size fits all' approach when it comes to FRAND terms and conditions, there may be some scope for increasing predictability.

VI.a) Questions for all stakeholders

Questions 35 to 39 refer to the so called "level of licensing" discussion. After a product covered by a patent right, has been sold by the patent owner or by others with the consent of the owner, the patent right is said

to be exhausted. In the SEPs context this means that if a SEP holder grants a licence to SEPs implemented in a component upstream, it will not be able to license the same SEPs downstream in a value chain. SEP holders, however, often license their SEPs at end product level for various reasons.[1] Exhaustion thus does not happen for implementers of the SEPs upstream. To address this, SEP holders often provide end product manufacturers with the right to “have” some of the components that are fitted into their products “made” by third-party suppliers (the so called “have-made” rights). The practice of licensing at end product level is being disputed. Some believe any implementer, regardless of its position in the value chain, may be entitled to obtain a licence, while others believe the SEP holder should be free to decide at what level of the value chain to license its SEPs.

[1] See ‘SEPs Expert Group – Contribution to the Debate on SEPs’, Part 3, Section 3.2

35. In your view, can a SEP holder refuse to licence in the following situations?

Situation	Yes	No	No opinion
An implementer asks for a licence for an application, for which the SEP holder has not yet sent any letter inviting any implementer to take a licence	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
An implementer asks for a licence for using an optional part of the standard, for which the SEP holder has not yet sent any letter inviting any implementer to take a licence	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
An implementer asks for a licence, the SEP holder is already licensing (or negotiating the licensing of) the application at another level of the value chain but has not provided “have made” rights to that implementer	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
An implementer asks for a licence, the SEP holder is already licensing (or negotiating the licensing of) the application at another level of the value chain and has provided the so called “have made” rights to that implementer	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
An implementer asks for a license for a limited number of products and the SEP holder prefers to avoid licensing costs by providing guarantees that it will not enforce its patents.	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

Comment

700 character(s) maximum

36. How would you assess the following statements for the determination of the level in the value chain for licensing of a SEP?

Statement with regard to a specific value chain	Strongly disagree	Disagree	Neutral	Agree	Strongly agree	No opinion
Licensing could take place at every level of the value chain	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Licensing should take place at one level of the value chain only	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

The implementers in a value chain should be able to determine the level of licensing	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
The SEP holder is the only one who should be able to determine the level of licensing	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
Both SEP holders and implementers should determine the level of licensing	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
The level of licensing should be determined by the person who asks for a licence first. If an implementer asks first, implementers determine the level of licensing. If the SEP holder asks first, it determines the level of licensing.	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Other (please specify)	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

Comment

1000 character(s) maximum

The interest of the SEP holder, in particular when it is an RTO, is to license the SEPs because the transfer of technology is in the missions given to it by the Member State. It is therefore in the best position, including to respect the public interest as a not-for-profit organisation to determine the level of licensing, in the Public Interest.

It should also be noted that a fair and reasonable license fee should be related to the added value that the SEP contributes to the end user of the device or service that makes use of the SEP. Only in this way can overpricing as well as underpricing be avoided. A SEP licensor should be allowed to differentiate its license fees and license conditions according to such widely different use cases.

37. If licensing were taking place at one level of the value chain only, what could be some guiding principles for the determination of that level of licensing?

Statement	Strongly disagree	Disagree	Neutral	Agree	Strongly agree	No opinion
Licensing should take place at the end level product of the value chain	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Licensing should take place at a component (intermediate) level of the value chain	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Licensing should take place at the most upstream level of the value chain	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

Licensing should take place at the level of the product that incorporates most functionalities of the standardised technology	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Licensing should take place at the level of the product which main function is that of the standardised technology	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Licensing should take place where the licensed technology affects a significant proportion of the value-inducing functionalities of the licensed product	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Licensing should take place where the SEP holder is able to monitor in which application the licenced technology is used	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Licensing should take place where the transaction costs are most efficient	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Other (please specify)	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

Comment

1000 character(s) maximum

Not relevant for RTOs as they have strongly disagreed with this item. Again, such “silver bullet” does not exist and could lead to both underpricing and overpricing, dependent on its use by the licensee. Both would be detrimental to the EU innovation ecosystem.

38. If licensing were available at all levels of the value chain, how could the SEP holder ensure that there is no “double dipping”, i.e. no double payments for the same SEPs and licensed products?

1000 character(s) maximum

Not relevant for RTOs as they have strongly disagreed with this item. Please note, wrt patent pools it is quite common that prospective licensees inquire with the pool contributors whether any licenses have been granted to their suppliers. And indeed, this should be the primary responsibility of especially system integrators. Whether “double dipping” exists would in any case be dependent on their own choice of suppliers, their own purchasing conditions, and whether their suppliers have indeed taken a license on the required SEP’s for the anticipated use.

39. Provided that the FRAND terms and conditions differ per application, if a licence is given at an upstream level and the standard is used downstream in many different applications, how do/would can SEP holders in practice

monitor purely via the upstream licence the quantities sold for each application (i.e. end product sales)?

1000 character(s) maximum

As RTOs recommend that: The SEP holder is the only one who should be able to determine the level of licencing. This problem is thus avoided.

The question posed here demonstrates that EARTO's answer is the best solution. If this situation would arise, then the only feasible solution would be to contractually oblige the upstream licensee to either keep track of all downstream use (via suitable contractual conditions with downstream users). That would enable a differentiated flow of royalties over the entire value chain from end-user to licensor. That would probably create a lot of administrative overhead and would also amount to the disclosure of confidential data between players in the value chain. This should be avoided.

40. How would you assess the following statements with regard to fair and reasonable terms and conditions (“FR TC”)?

Statement	Strongly disagree	Disagree	Neutral	Agree	Strongly agree	No opinion
The FR TC may be different for the different applications of the standard.	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
The FR TC should be the same irrespective of how the standard is used.	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
The FR TC may depend on the functionalities of the standard that are being implemented.	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
The FR TC are determined based on the added value that the patented technology brings to the product implementing the standard.	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
The FR TC are independent of the level of licensing.	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Implementers upstream should be able to pass the cost of the licence downstream.	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Other (please specify)	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

Comment

1000 character(s) maximum

That is best practice in all licensing negotiations, even for patents not linked to standards. There is no reason that SEP negotiations escape worldwide best practices in licensing negotiations.

41. How would you assess the following statements for the assessment of non-discrimination (“ND”)?

Statement	Strongly disagree	Disagree	Neutral	Agree	Strongly agree	No opinion
Similarly situated entities are those that use the same functionalities of a standard	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Similarly situated entities are those that use the standardised technology in the same applications	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Similarly situated entities are those that use the same functionalities of a standard in similar or same applications	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Similarly situated entities are those that are located at the same level in the value chain	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
For the ND assessment, it matters whether a similarly situated entity is put at a competitive disadvantage	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
For the ND assessment, it matters whether a licence was taken at the same period of time	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Entities at a different level in the value chain may be similarly situated if the FR TC are independent of the level of licensing	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Other (please specify)	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

Comment. Please indicate potential impact on start-ups and SMEs.

1000 character(s) maximum

Competition does not require multiple suppliers of a specific product or service. As long as there is at least one substitute product available, competition will ensue even if there is only one supplier of any particular product or service (e.g., one covered by one or more patents). Start-ups and innovative SMEs, as users of the standard, need exclusivity in order to compete with big companies.

42. What is the reasonable range of discounts that would not cause discrimination in the context of a licensing of a SEP?

--	--	--	--	--	--	--	--

Type of discount	Always discriminatory	1 to 10%	10 to 20%	20 to 30%	30 to 40%	40 to 50%	No opinion
Early bird discount (taking a licence at the beginning of a licensing programme)	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Volume discount	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Early payment discount (making upfront payments of royalties)	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Annual Royalty Caps	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Other (please specify)	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

Comment

1000 character(s) maximum

Many of the listed items are the same than in the context of non SEP licensing. Each licencing negotiation is specific and should be treated on a case by case analysis. Please see also EARTO's comments for questions 13 and 14.

43. Which of the following aspects of the licence terms and conditions are more likely to impact the non-discrimination part of FRAND? Please indicate their (relative) impact in the overall ND assessment below. The proposed rating below should describe the relative impact in the overall ND assessment.

FRAND terms and conditions	No impact	Very low	Low	Some	High	Very high	No opinion
Product scope of the licence (narrow or broad, end-product and/or modules)	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Territorial scope of the licence	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Term of the license (e.g. a particular time-period)	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Royalty rate	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Payment conditions (term, interest for late payments, discounts)	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Compliance (reporting obligations and auditing conditions)	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Non-disclosure requirements	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

Legal (applicable law, competent forum/court)	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Patent related issues (validity)	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Other (please specify)	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

Comment

1000 character(s) maximum

44. How important is it to know the reasonable aggregate royalty for all SEPs relevant to a potentially licensed product?

- Very important
- Important
- Neutral
- Not so important
- Not important

Comment. Please indicate any potential impact on start-ups and SMEs.

700 character(s) maximum

45. How important is it to have a fair process for the determination of a reasonable aggregate royalty for all SEPs relevant to a licensed product?

- Very important
- Important
- Neutral
- Not so important
- Not important

Comment

700 character(s) maximum

46. The aggregate royalty may be apportioned among the various SEPs or SEP portfolios based on an estimate of the declared SEP that are actually

essential (“true SEPs”). What could be an appropriate additional criterion for the apportionment of the aggregate royalty among the various SEPs or SEP portfolios?

- Number of “true” SEPs belonging to sections of the standard identified as of significant value
- Number of jurisdictions in which “true” SEPs are protected
- Number of significantly different claims
- Number of sections of the standard covered by “true” SEPs
- Man hours spent in contributing in the development of the standard at the SDO
- Forward citations[1]
- [1] A citation is a reference to a previous work (prior art) that is considered relevant to a current patent application. Forward citations are patents that cite a specific patent.
- Other, please specify

Comment

700 character(s) maximum

47. If there were an obligation to complete the “steps” provided in the Judgment of the Court of Justice of the European Union (“CJEU”) of 16 July 2015, Huawei v. ZTE[1] within certain time limits, which period would be reasonable? Please note that we ask for average reasonable time limits with due account taken of the fact that the analysis would have to be conducted on a case-by-case basis[2].

[1] Huawei v. ZTE, Case C-170/13.

[2] The reasonable amount of time needed for the implementer to express its willingness to obtain a license may vary depending on a number of factors, such as the number of patents at issue, the complexity of the technology, the level of knowledge the implementer may have about the technology and other.

Step Starting from the day on which the SEP holder alerts the implementer	1 to 3 months after the prior step	3 to 5 months	after the prior step	5 to 7 months	after the prior step	More than 7 months	after the prior step	Fixed time limits are not desirable	No opinion	Other please specify
The implementer expresses its willingness to conclude a licensing agreement on FRAND terms	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
The SEP holder presents to the implementer a specific, written offer for a licence on FRAND terms	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
The implementer responds to that offer (potentially with a counter offer)	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
If applicable, the SEP holder rejects the counter offer	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
If applicable, the implementer provides appropriate security	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
If applicable, parties may agree on arbitration	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
If applicable, the SEP holder requests an injunction	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>



Comment

700 character(s) maximum

48. Do you consider that the scope of the obligations imposed on both the SEP holder and implementers by CJEU Huawei v. ZTE is clear or needs to be clarified with regard to the following aspects?

Not clear	Somewhat unclear	Neutral	Somewhat clear	Clear	No opinion
The initial offer of the SEP holder must be FRAND	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
The counter offer of the implementer must be FRAND	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
A SEP holder cannot request an injunction before making a FRAND offer, even if the implementer has not expressed its willingness to take a licence	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
The amount of the security should be fair and reasonable	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

Comment

700 character(s) maximum

49. Which of the behaviours of an implementer listed below could indicate “willingness” to take a licence, and to what extent is that behaviour relevant?

Behaviour	Somewhat relevant	Rather not relevant	Not relevant	Unrelated	No opinion
Informs the relevant SDO that it uses the standard, version, section and product category	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
When reference materials provided by SEP holder are not sufficient, such as not identifying the SEPs or not including claim charts, promptly requests the SEP holders to provide such materials	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Agrees in writing to be willing to take a licence on FRAND terms and conditions, while reserving the right to challenge	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

essentiality, validity, and infringement in Court					
Submits a FRAND counter-offer	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Provides a security at a fair and reasonable amount	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Agrees on arbitration of the FRAND terms and conditions	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
If it disagrees with the scope of the licence (in particular the validity and essentiality of the patents), it files relevant court proceedings in a timely manner	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Other (please specify)	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

Comment

700 character(s) maximum

50. Which of the behaviours of a SEP holder listed below could indicate “willingness” to grant a licence on FRAND terms and conditions, and to what extent is that behaviour relevant?

Behaviour	Very relevant	Somewhat relevant	Rather not relevant	Not relevant	Unrelated	No opinion
Provides a list of the SEPs (patent numbers, the names of the standards at issue, the geographical scope of the patents) together with information to which section of the standard they refer to, specifying the way in which the SEPs have been infringed	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Provides a list of the SEPs (patent numbers, the names of the standards at issue, the geographical scope of the patents) together with a high level claim chart to indicate the correlation between products that are actually manufactured and patent claims, specifying	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

the way in which the SEPs have been infringed						
Provides a list of the SEP (patent numbers) with certificate from an independent third party confirming their essentiality, specifying the way in which the SEPs have been infringed	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Provides its standard FRAND terms and conditions (not subject to non-disclosure requirements)	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Provides a FRAND offer that (i) sets a time limit allowing for a reasonable period of time for consideration and (ii) explains how the royalty is calculated or (iii) alternatively, demonstrates that the licence offer is on FRAND terms and conditions.	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Agrees on arbitration of the FRAND terms and conditions	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Other (please specify)	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

Comment

700 character(s) maximum

VII. Enforcement

The problems reported most by SEP holders and implementers are hold up and hold out. On the one hand, SEP holders claim that it is necessary to go to court in order to conclude a license agreement with an implementer. This takes time, involves significant costs and may not always be efficient to achieve a fair and reasonable compensation. On the other hand, implementers claim that willing licensees have difficulties to obtain licences at FRAND terms and conditions and fear abuse of a dominant position by SEP holders. How could we reduce litigation for both SEP holders and implementers?

VII.a) Questions for all stakeholders

51. What is the average cost for you of a dispute (advice and litigation costs) in court, excluding the value of the SEPs licenses and any damages?

Type of dispute	Related to an Injunction	Related to FRAND	Related to Essentiality
Up to 500,000 euro	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
From 500,000 euro to 1,000,000 Euro	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
From 1,000,000 euro to 2,000,000 Euro	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
From 2,000,000 euro to 3,000,000 Euro	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
From 3,000,000 euro to 6,000,000 Euro	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
From 6,000,000 euro to 10,000,000 Euro	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
From 10,000,000 to 20,000,000 Euro	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Above 20,000,000 Euro	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Other please specify	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

Comment

700 character(s) maximum

All the questions in section VII are based on following statement written in the preamble for these questions: "The problems reported most by SEP holders and implementers are hold up and hold out." In line with EARTO's responses and comments to previous questions, and our opinion is that there are no more problems reported in SEPs licensing as in non SEPs licensing and as there are proportionally no more disputes concerning SEPs than disputes concerning non-SEPs, EARTO does not respond to these questions who seek to provide solutions where in reality there are not really big problems, in any case no more than for the licensing of non-SEPs, as the possible solutions may bring more problems.

52. What is the average cost of the dispute (advice and litigation costs) in arbitration, excluding the value of the SEPs licenses and any damages?

- Up to 500,000 euro
- From 500,000 euro to 1,000,000 Euro
- From 1,000,000 euro to 2,000,000 Euro
- From 2,000,000 euro to 3,000,000 Euro
- From 3,000,000 euro to 6,000,000 Euro
- From 6,000,000 euro to 10,000,000 Euro
-

From 10,000,000 to 20,000,000 Euro

- Above 20,000,000 Euro please specify

Comment

700 character(s) maximum

All the questions in section VII are based on following statement written in the preamble for these questions: "The problems reported most by SEP holders and implementers are hold up and hold out." In line with EARTO's responses and comments to previous questions, and our opinion is that there are no more problems reported in SEPs licensing as in non SEPs licensing and as there are proportionally no more disputes concerning SEPs than disputes concerning non-SEPs, EARTO does not respond to these questions who seek to provide solutions where in reality there are not really big problems, in any case no more than for the licensing of non-SEPs, as the possible solutions may bring more problems.

53. How would you assess the use of mediation for FRAND assessments?

- Not useful
- Neutral
- Useful
- No opinion
- Other, please specify

Comment

700 character(s) maximum

All the questions in section VII are based on following statement written in the preamble for these questions: "The problems reported most by SEP holders and implementers are hold up and hold out." In line with EARTO's responses and comments to previous questions, and our opinion is that there are no more problems reported in SEPs licensing as in non SEPs licensing and as there are proportionally no more disputes concerning SEPs than disputes concerning non-SEPs, EARTO does not respond to these questions who seek to provide solutions where in reality there are not really big problems, in any case no more than for the licensing of non-SEPs, as the possible solutions may bring more problems.

54. How would you assess the use of arbitration for FRAND assessments?

- Not useful
- Neutral
- Useful
- No opinion
- Other please specify

Comment

700 character(s) maximum

All the questions in section VII are based on following statement written in the preamble for these questions: "The problems reported most by SEP holders and implementers are hold up and hold out." In line with EARTO's responses and comments to previous questions, and our opinion is that there are no more problems reported in SEPs licensing as in non SEPs licensing and as there are proportionally no more disputes concerning SEPs than disputes concerning non-SEPs, EARTO does not respond to these questions who seek to provide solutions where in reality there are not really big problems, in any case no more than for the licensing of non-SEPs, as the possible solutions may bring more problems.

55. What would be a credible independent arbitration body for making FRAND assessments?

- WIPO Arbitration and Mediation Center
- (the future) Patent Mediation and Arbitration Centre of the Unified Patent Court
- The International Court of Arbitration of the International Chamber of Commerce ("ICC")
- The London Court of International Arbitration ("LCIA")
- An ad hoc arbitration from a list of impartial arbitrators endorsed by a public authority
- An independent EU body designated to conduct this function
- Other (please specify)

Comment

700 character(s) maximum

All the questions in section VII are based on following statement written in the preamble for these questions: "The problems reported most by SEP holders and implementers are hold up and hold out." In line with EARTO's responses and comments to previous questions, and our opinion is that there are no more problems reported in SEPs licensing as in non SEPs licensing and as there are proportionally no more disputes concerning SEPs than disputes concerning non-SEPs, EARTO does not respond to these questions who seek to provide solutions where in reality there are not really big problems, in any case no more than for the licensing of non-SEPs, as the possible solutions may bring more problems.

56. What would be appropriate procedural rules for arbitration of FRAND disputes?

- ICC Rules of Arbitration of the International Court of Arbitration
- United Nations Commission on International Trade Law ("UNCITRAL") Arbitration Rules
- The rules of the WIPO Arbitration and Mediation Center
- The FRAND ADR case management guidelines proposed by the Munich IP Dispute Resolution Forum
- The rules agreed by the parties *ad hoc*
- Other (please specify)

Comment

700 character(s) maximum

All the questions in section VII are based on following statement written in the preamble for these questions: "The problems reported most by SEP holders and implementers are hold up and hold out." In line with EARTO's responses and comments to previous questions, and our opinion is that there are no more problems reported in SEPs licensing as in non SEPs licensing and as there are proportionally no more disputes concerning SEPs than disputes concerning non-SEPs, EARTO does not respond to these questions who seek to provide solutions where in reality there are not really big problems, in any case no more than for the licensing of non-SEPs, as the possible solutions may bring more problems.

57. How could arbitration be incentivised for making a FRAND assessment?

Action	Disagree	Neutral	Agree	Strongly agree	No opinion
Consider agreement to arbitrate and to accept outcome of arbitrator's determination of royalty rate as an indication that the party is "willing" to license	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Consider agreement to arbitrate and to accept outcome of arbitrator's determination of royalty rate as an indication that the party is "willing" to license but explicitly providing for a review of any such FRAND assessment, if a court later finds some of the patents non-essential or invalid.	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Create a list of trusted arbitrators	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
SDOs to introduce such an obligation to use arbitration in their IPR policies	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Other (please specify)	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

Comment

700 character(s) maximum

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58. What transparency requirements should be attached to arbitration on FRAND assessments?

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	Strongly disagree	Disagree	Neutral	Agree	Strongly agree	No opinion
The arbitral tribunal shall disclose the methodology used for the calculation of a FRAND rate	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Information on the name of the parties and patent registration and application numbers	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Information on specific licensing rates but no third party confidential information or other party confidential information shall be disclosed	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Other (please specify)	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

Comment

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59. Should it be possible to request authorities to “report” on imports of unlicensed products, if some conditions are fulfilled[1]? This does not concern detentions of imports under the regular intellectual property rights’ enforcement procedures by customs.

[1] Such conditions could for example be a proof that a SEP holder asked an implementer to take a licence, provided the necessary information on the SEPs concerned and its FRAND terms and conditions and the implementer did not respond.

- Yes
- No
- Depends (please explain)
- No opinion

Comment

700 character(s) maximum

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60. Would a positive list of licensed implementers be important?

- Very important
- Important
- Neutral
- Not so important
- Not important

Comment. Please indicate any potential impact on start-ups and SMEs.

700 character(s) maximum

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61. If infringement of SEP is confirmed, the court may (i) order an injunction for the future and (ii) grant damages for the past. The injunction for the future would in principle lead the infringer to take a licence, if it wants to continue to sell its products. In that context, should the court be empowered (under certain conditions – see following question) to order the parties to submit any disagreement on the FRAND terms and conditions to arbitration.

- Yes
- No
- Depends (please explain)
- No opinion

Comment

1000 character(s) maximum

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62. Under what conditions should the court be able to order the parties to submit any disagreement on the FRAND terms and conditions to arbitration?

1000 character(s) maximum

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63. If a SEP holder refuses to make a FRAND offer (for whatever reason), should the implementer be empowered to request a court to rule on the legality of the refusal?

- Yes
- No
- Depends (please explain)
- No opinion

Comment

1000 character(s) maximum

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64. Would you agree that efficient SEP licensing would also foster innovations by implementers, including start-ups and SMEs?

- Yes
- No
- There is no direct link
- No opinion
- Other (please specify)

Comment. Please indicate any other economic benefits or disadvantages

1000 character(s) maximum

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65. Would you agree that efficient SEP licensing would increase employment and keep a high level of competence in the EU?

- Yes
- No
- There is no direct link
- No opinion
- Other (please specify)

Comment. Please indicate any other social benefits or disadvantages.

1000 character(s) maximum

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66. Would efficient SEP licensing foster the EU's transition to the green economy enabling projects related to, for example, smart manufacturing, smart grids and energy and smart mobility?

- Yes
- No
- There is no direct link
- No opinion
- Other (please specify)

Comment. Please indicate any other environmental benefits or disadvantages.

1000 character(s) maximum

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END

Contact

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