



The European Commission's initiative on Standard Essential Patents

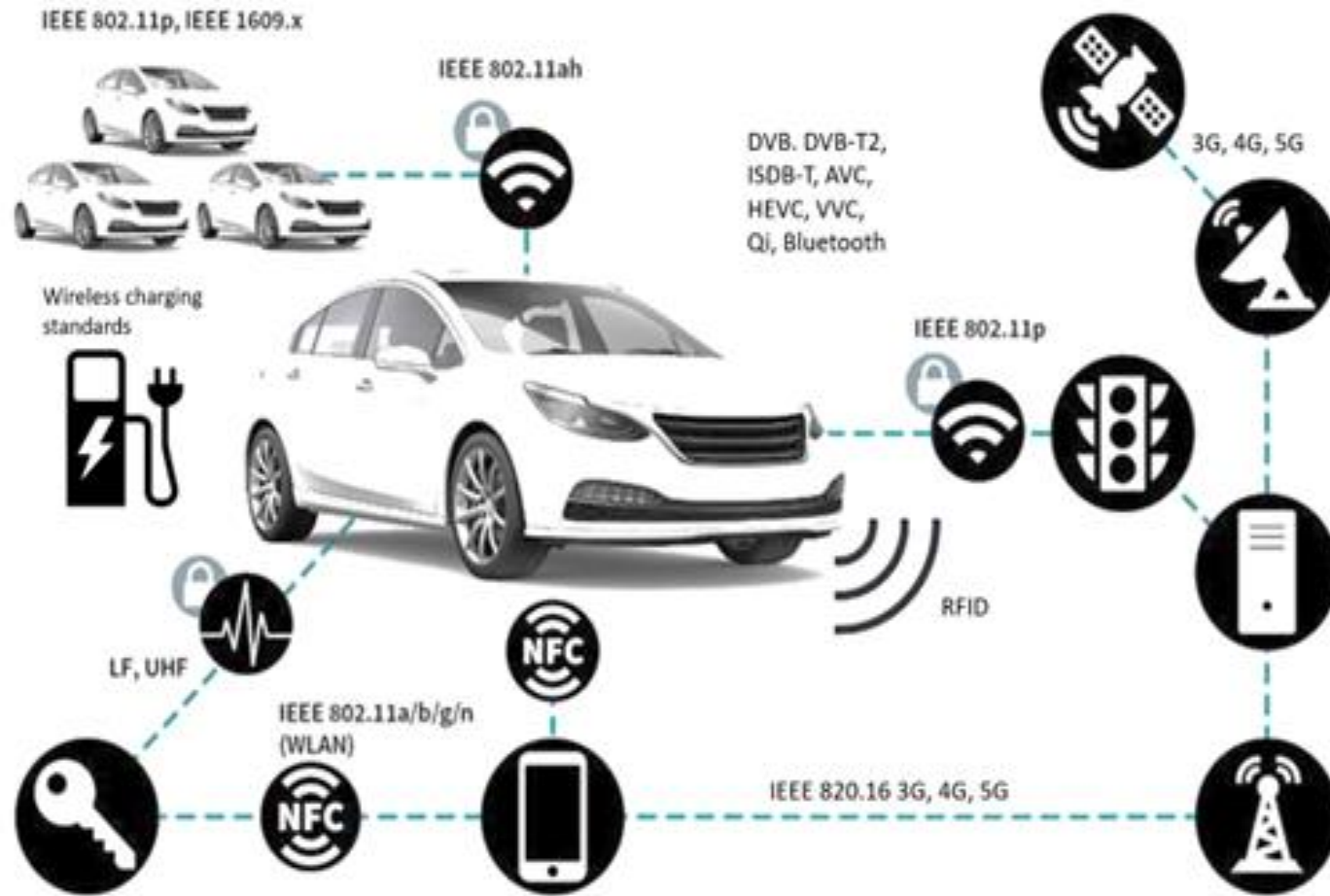
Kamil Kiljanksi

JPO SEP event

19 May 2022



SEP is all around you



SEP are implemented to deliver digital integration of objects, devices, sensors, and everyday items, with applications ranging from connected cars, health, energy to smart cities requires interoperable solutions based on standards.

Current Union context

- **Communication 2017:** ‘Setting out the EU approach to Standard Essential Patents’
- **Announced reform 2020:** IP action plan COM(2020) 760 final, 25.11.2020
- **CJEU (2015):** *Huawei v. ZTE*, Case C-170/13
- **Competition Law Guidelines:** Horizontal Guidelines and Technology Transfer Agreements (2014)
- **Standardization strategy (February 2022)**
- **Customs enforcement of IP (2013)**

International context

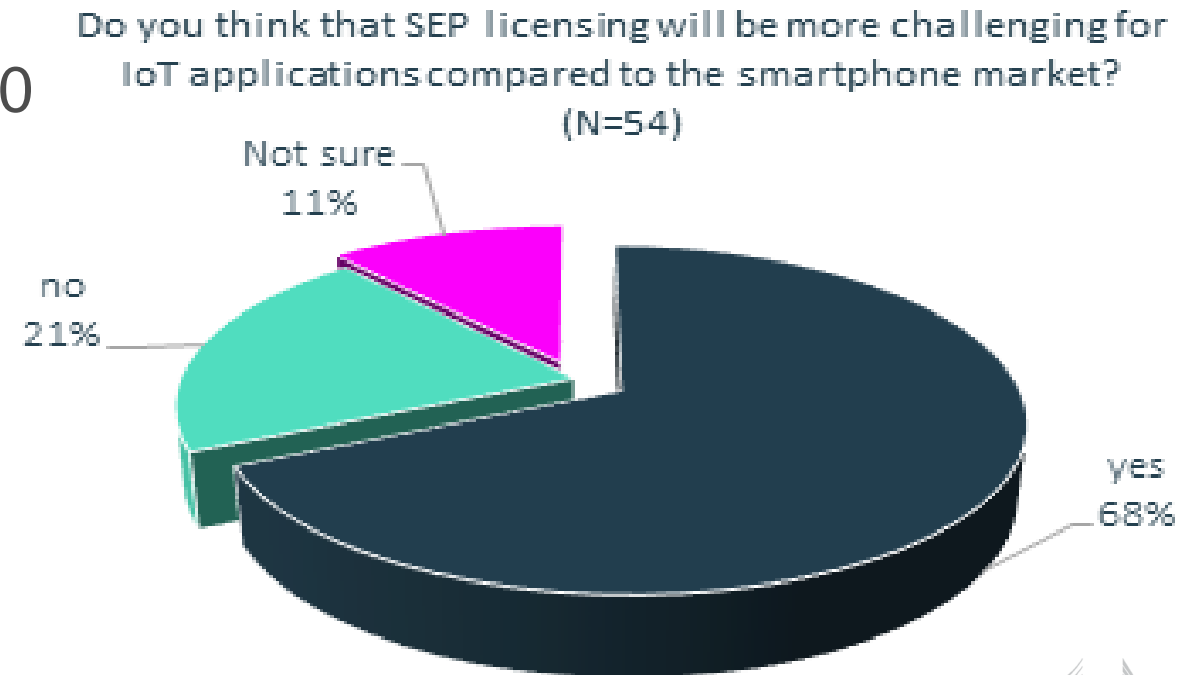
- The major jurisdictions are contemplating a regulatory action on SEP
 - US launched two public consultations (December 2021 and April 2022)
 - UK launched a public consultation (December 2021)
 - JP adopted guidelines in 2018, 2020 and 2022
- 2022 EU WTO case against China on anti-suit injunctions

The stakeholder triangle

- SEP owners (for example 5G):
 - **EU:** Nokia, Ericsson (~17%)
 - **US:** Qualcomm, Intel, Interdigital (~14%);
 - **China:** Huawei, ZTE, Oppo (~33%).
 - **Korea:** LG, Samsung (~27%).
 - **Japan:** Sharp, NKK Docomo, Panasonic, Sony (~9%)
- SEP implementers
 - Phones, cars, health, IoT, connected cities, connected plants, cloud security...
- Standard Developing Organisations

Why contemplate regulatory action now?

- IoT multiplies SEP applications and implementers, increasingly SMEs
- Number of connected devices to grow from 7.6 billion in 2019 to 24.1 billion by 2030
- Declared SEP: more than 75,000
- SEP holders: more than 500



Results of a Survey conducted with SEP industry experts by the Technical University of Berlin in October 2020

Reported problems

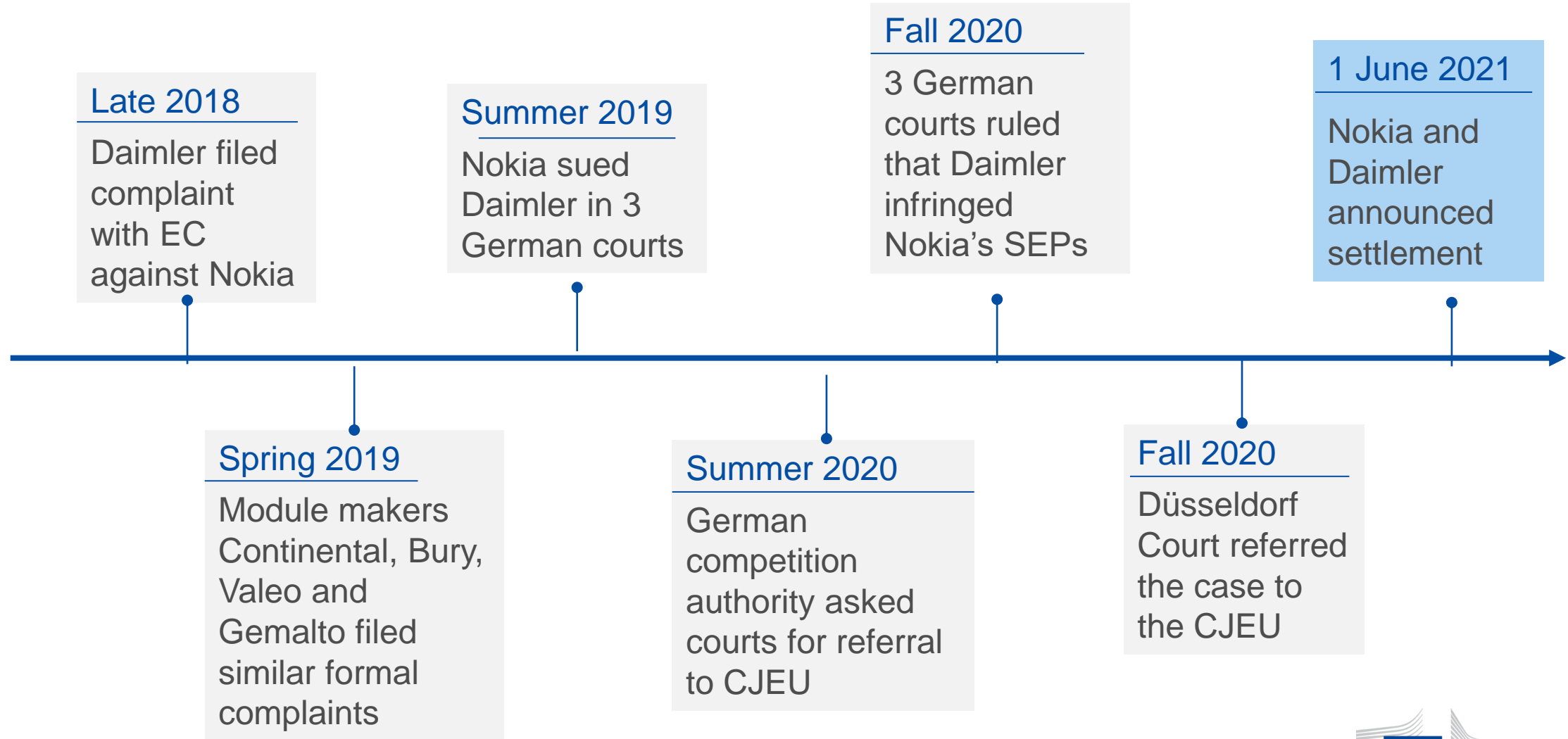
Hold out:

Implementers use various delaying tactics to avoid taking a licence. SEP holders need to force a license by means of litigation.

Hold up:

The opportunistic licensing of a SEP where the SEP holder seeks increased licensing fees because the patent is essential to the standard.

Litigation e.g. Nokia – Daimler et al



Patent pools: Avanci, a one stop shop?

Licensors in the Avanci licensing marketplace



Licensees in the Avanci licensing marketplace



Problems of implementers

- No design around –technical alternatives eliminated through the standardization process and technology protected by SEPs
- No access to a license degrades implementers to an extended workbench for specific OEMs, without any leeway to explore innovative opportunities
- Limited transparency on essentiality of self-declared SEP and SEP licensing terms
- No clarity on concept of FRAND

Consequence: Difficult for implementers to assess whether an offer is FRAND and to anticipate their potential licensing cost

Problems of SEP licensors

FTC v Qualcomm, deposition Mr
Blumberg (Lenovo VP Litigation & IP)

- Implementer already uses technology
 - does not need license to continue
 - patentee has to go to court
 - limited capacities / resources
 - implementer might stay under radar
- >> threat to "level playing field"
- No / limited damages
 - damages assertion patent-by-patent, country-by-country
 - high discounts on past release

28. PAGE 187:23 TO 189:24 (RUNNING 00:02:54.538)

23 Q. And in your experience, do parties to
24 licensing negotiations assess the anticipated outcome
25 of any litigation when evaluating their position in
00188:01 the -- in the negotiation?
02 A. I can't speak to everyone, but certainly
03 that's the number one thing I use to assess whether I
04 want to sign a license, is a careful analysis of
05 whether litigation and the likely outcome of
06 litigation, plus the expense, taking into account the
07 time value of money and so on, is ultimately greater
08 than or less than the negotiated alternative.
09 And I'm very pragmatic; when the
10 negotiated alternative is clearly less expensive, I'm
11 happy to take a license. When the negotiated
12 alternative is equal to or greater than the likely
13 litigation outcome, I'm not ready to sign, and I'm
14 ready to keep negotiating and/or litigating as
15 necessary. That's certainly been my -- my
16 experience, not only for myself, but at least for the
17 more successful licensing folks that I've dealt with
18 over the years.
19 Q. And how, if at all, does that assessment
20 differ vis-a-vis Qualcomm?
21 A. Well, as I've said, when the dispute
22 resolution is either keep talking or use some legal
23 means like going to court and letting a judge decide
24 for you, it's relatively easy to assess and figure
25 out where you stand.
00189:01 But unless you're facing someone who's got
02 100 patents, all of which have been just been
03 litigated 12 times successfully, the odds are
04 litigation is not that sure an outcome, so you -- you
05 have some basis to negotiate.

What have we done?

- [Webinar series](#) (2021)
- [Expert Group Report](#) (2021)
- JRC(2020) [Pilot on essentiality assessment](#)
- JRC(2020) [Essential patents in ETSI](#)
- JRC(2017) [Licencing terms – case](#)
- CRA (2016) [Transparency, Predictability and Efficiency](#)
- JRC(2015) on FRAND
- TU/e(2014) [IPR-based standardization](#)
- Study team producing customised inputs for the IA

What do we want to achieve?

- Promote an efficient and sustainable SEP licensing ecosystem in the interests of both SEP holders and implementers.
- Ensure a continued participation in standardization.
- Ensure a smooth access to standardised technology.
- Ensure a fast and widespread diffusion of the standardised technology.
- All potential actions should be to the benefit of all stakeholders, especially start-ups and SME.

**Efficient SEP licensing
=
Lower transaction cost**

Transparency

Regulation

FRAND

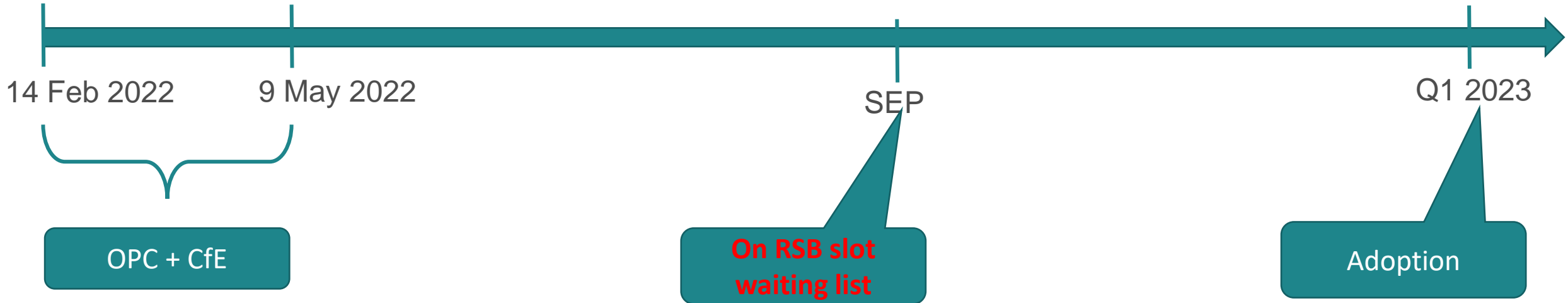
Limit hold-up
Limit hold-out

Guidelines

Enforcement

**Regulation +
Guidelines**

Timeline



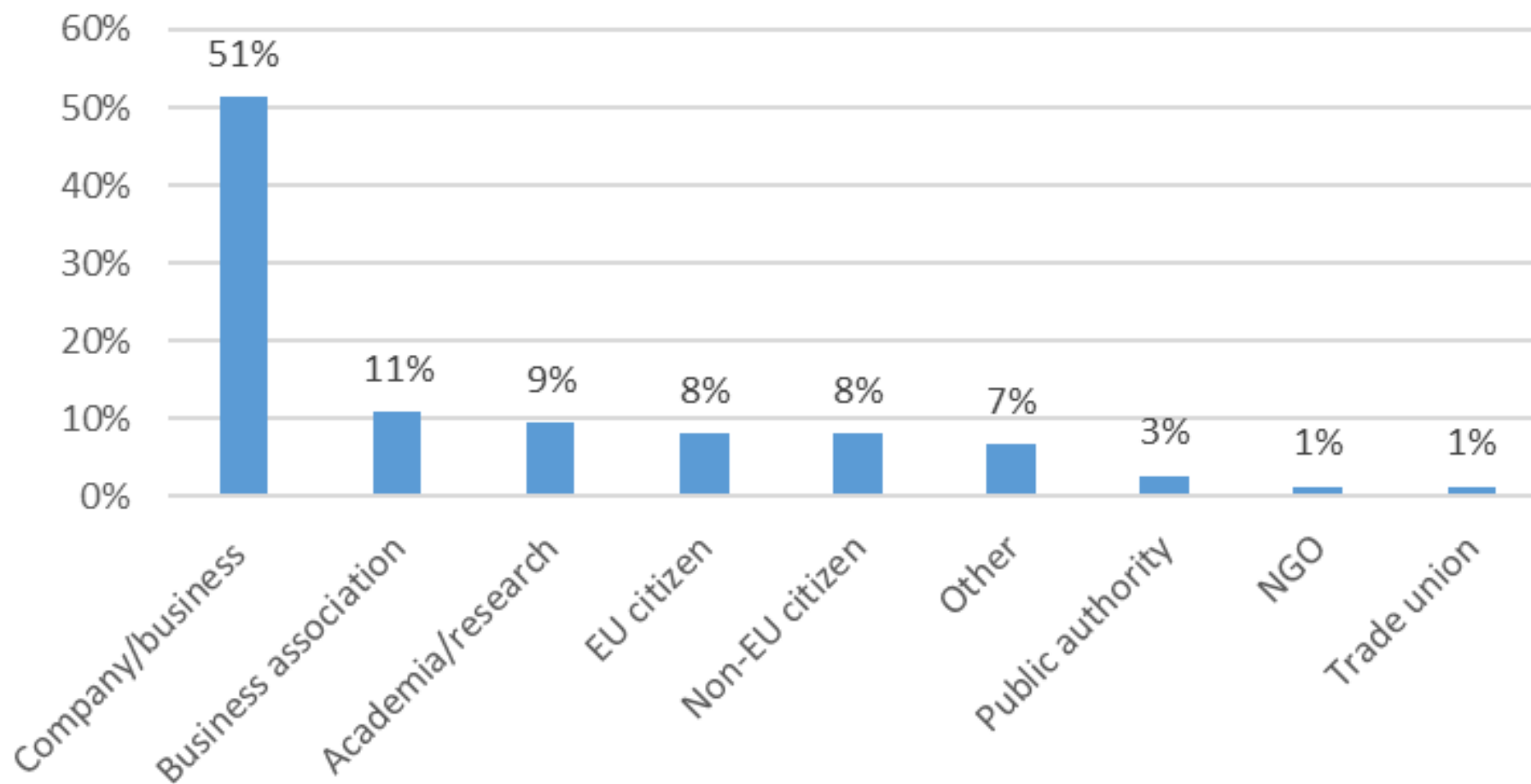
Comprehensive questionnaire (80 questions)

- Questions regarding:
- Transparency,
- “FRAND”, including the level of licensing
- Enforcement.

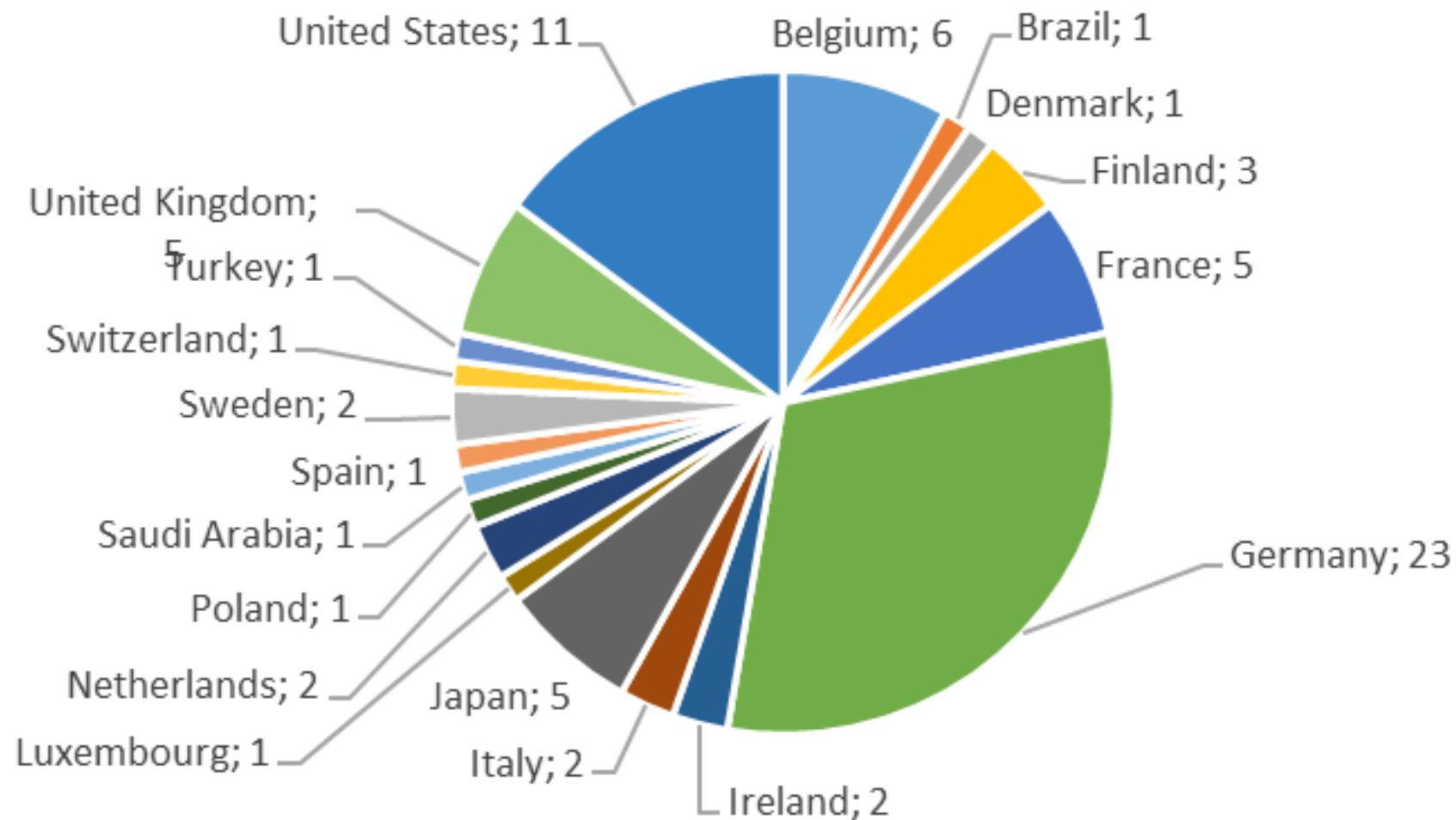
Additionally:

- Bilateral consultations
- Expert group/webinars
- Contacts with MS
- Contacts with 3rd countries (JP, UK, US)

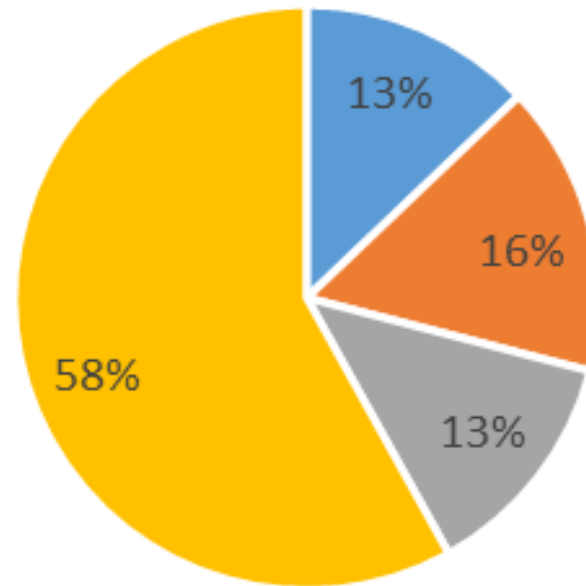
Categories of respondents



Number of replies per country

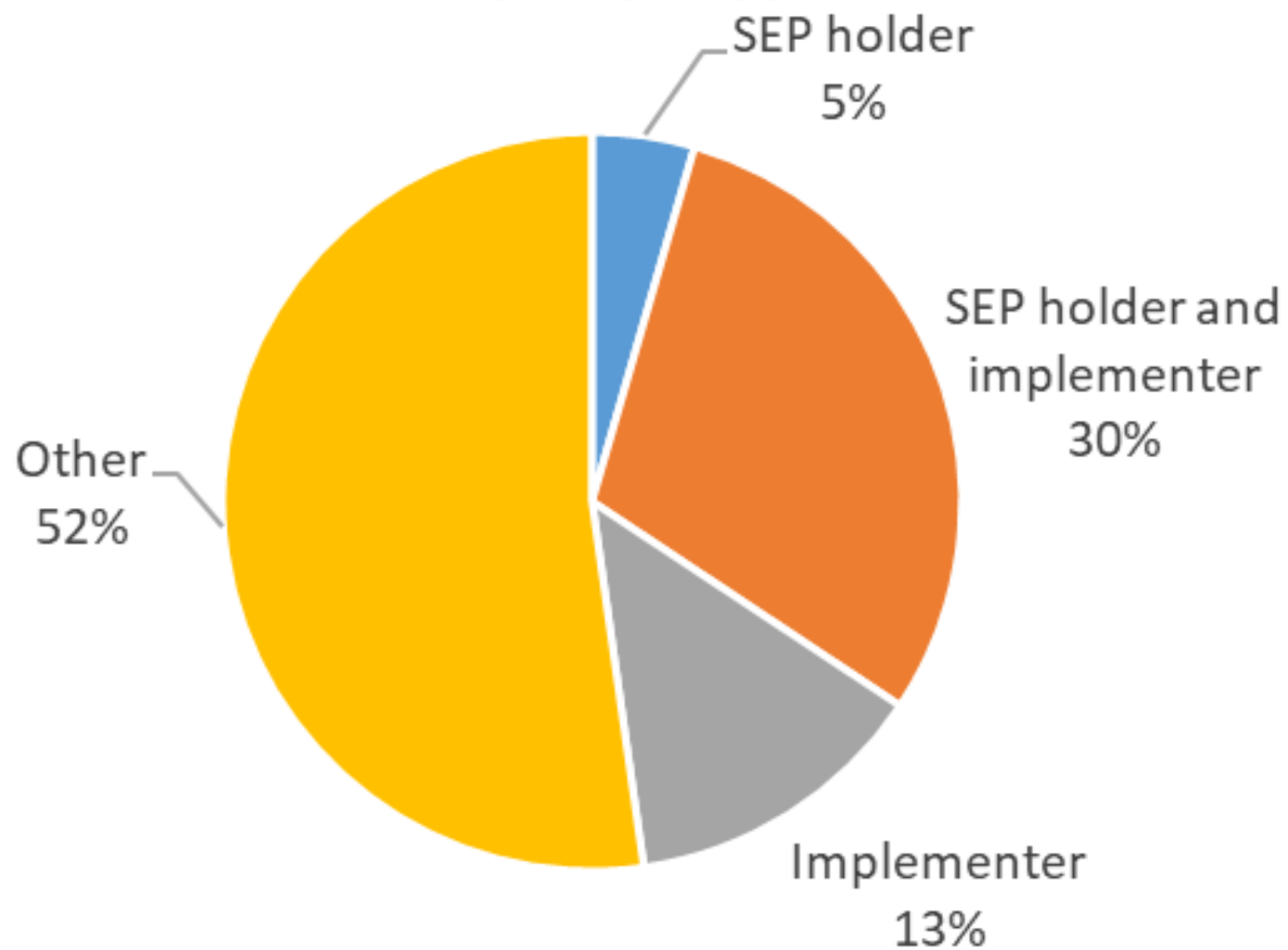


Organisation size

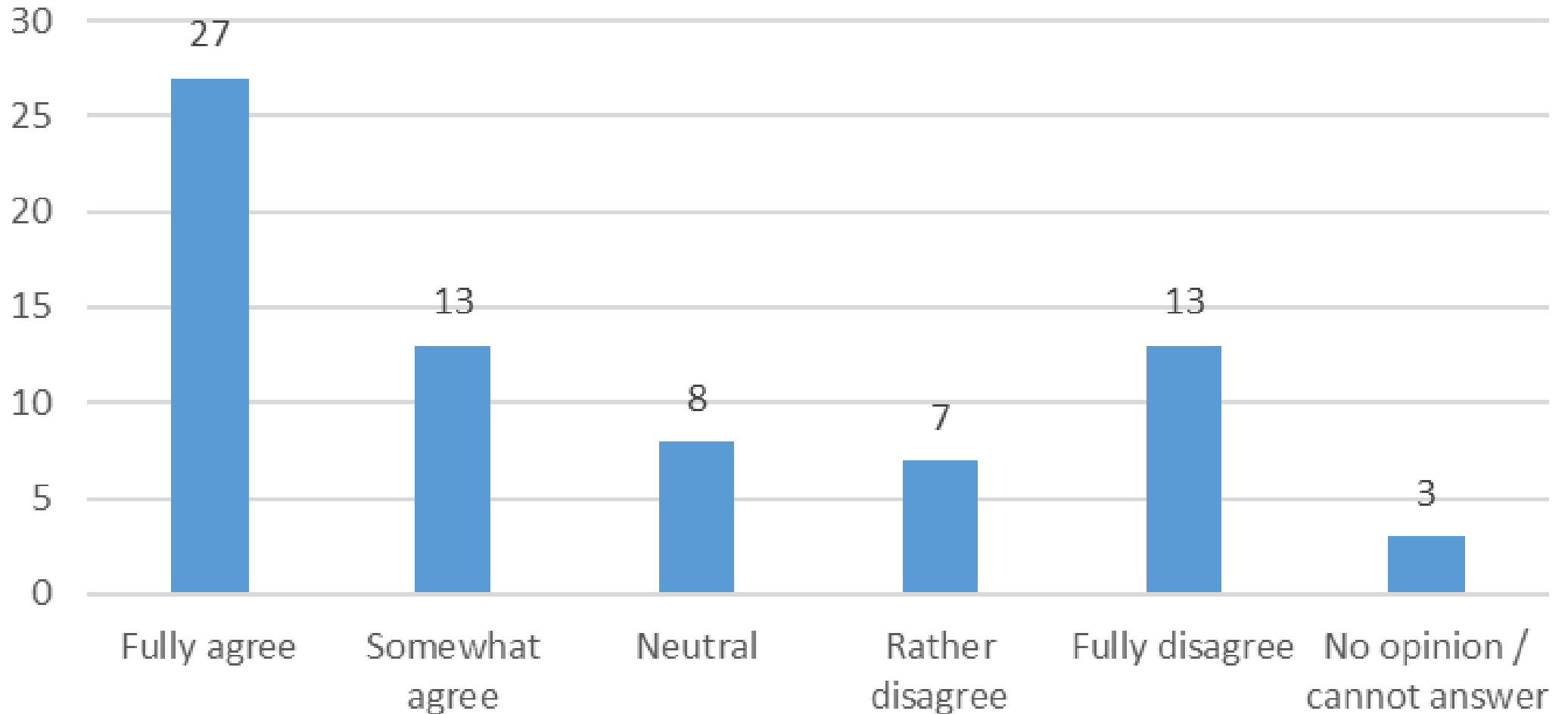


- Micro (1 to 9 employees)
- Small (10 to 49 employees)
- Medium (50 to 249 employees)
- Large (250 or more)

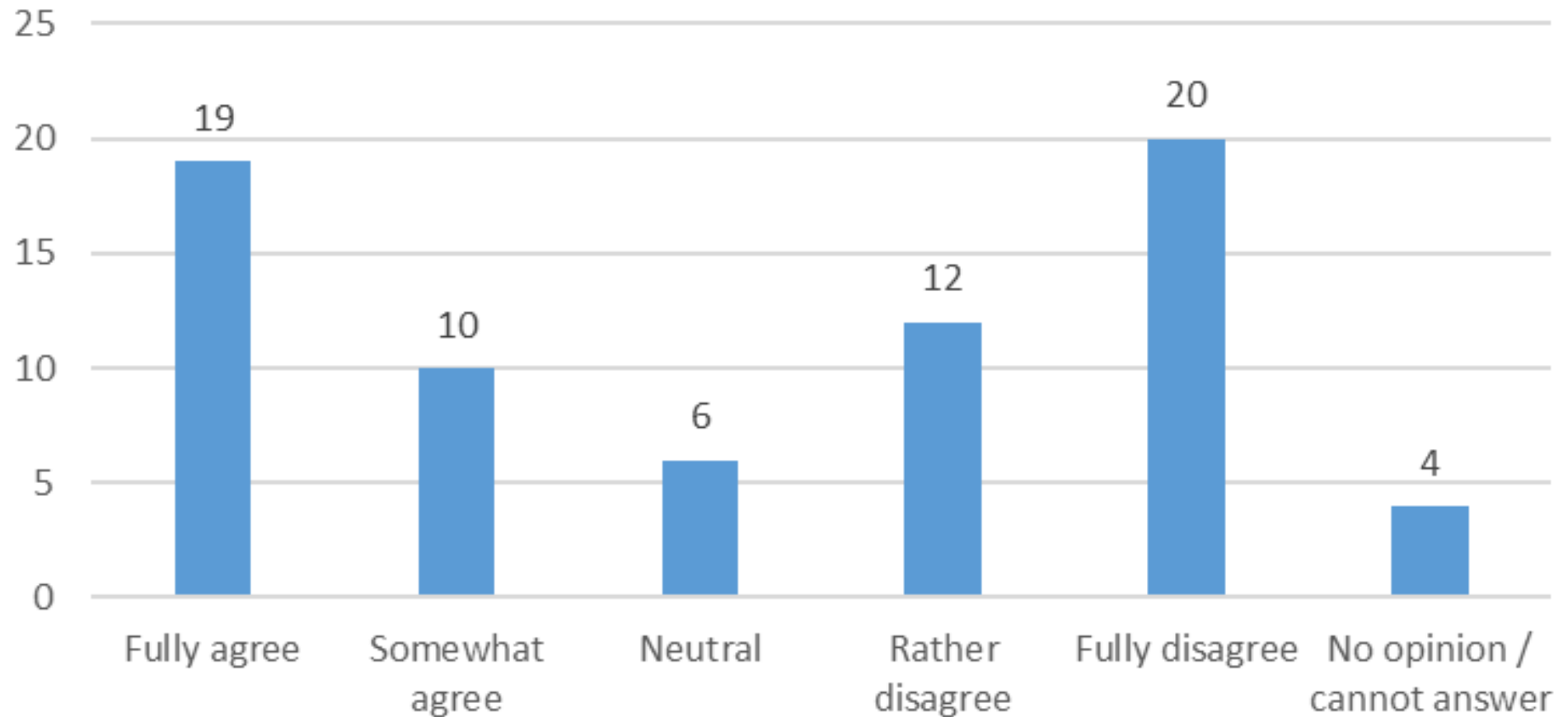
Company: type



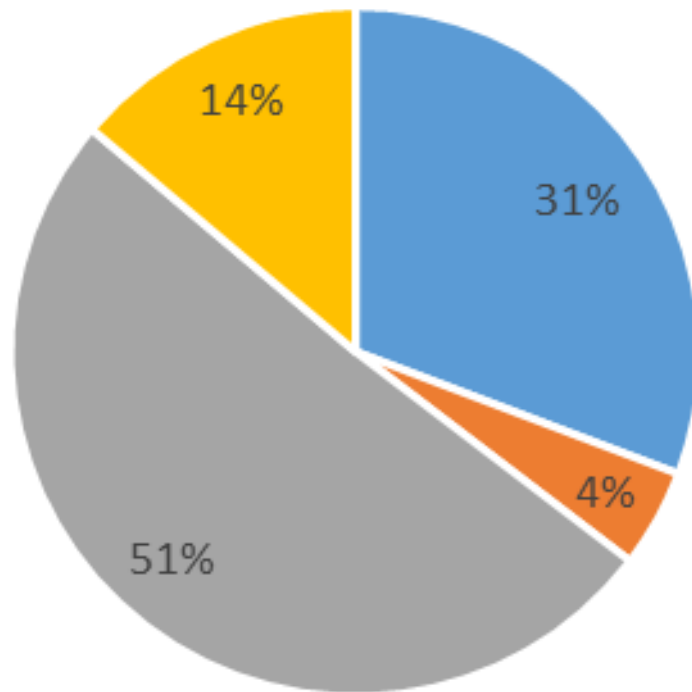
Does the current legal framework for SEPs provide sufficient protection against “hold-out”?



Does the current legal framework for SEPs provide sufficient protection against “hold-up”?

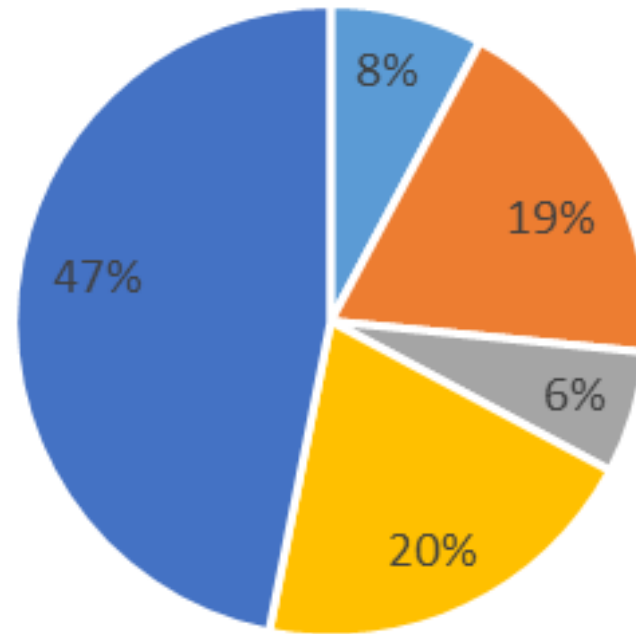


What is the impact of the current framework for SEP licensing on start-ups and SMEs?



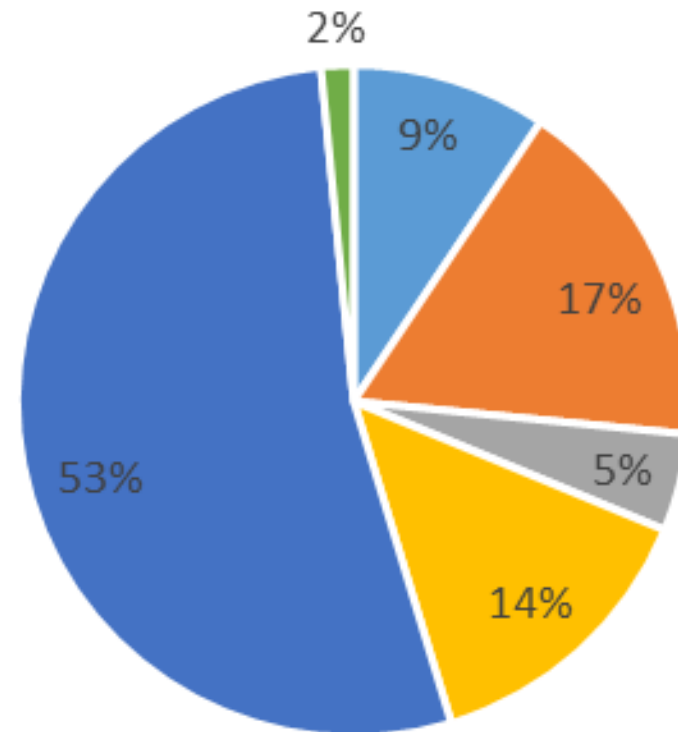
- It does not impact start-ups and SMEs differently than other stakeholders
- It is more favourable to start-ups and SMEs
- It puts start-ups and SMEs at competitive disadvantage
- Other, please specify

Problems: Lack of transparency of the SEPs landscape in general and of the share of the different SEP holder



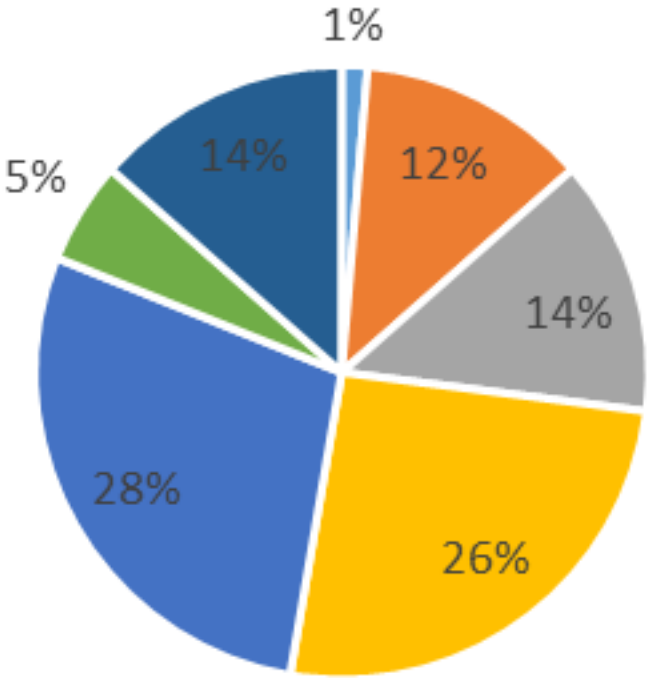
■ Strongly disagree ■ Disagree ■ Neutral ■ Agree ■ Strongly agree

Problems: Lack of transparency on FRAND royalty rate



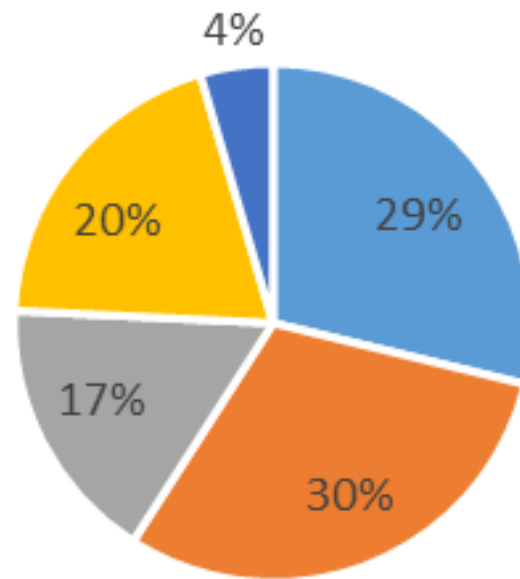
■ Strongly disagree ■ Disagree ■ Neutral ■ Agree ■ Strongly agree ■ No opinion

Problems: Divergent court rulings



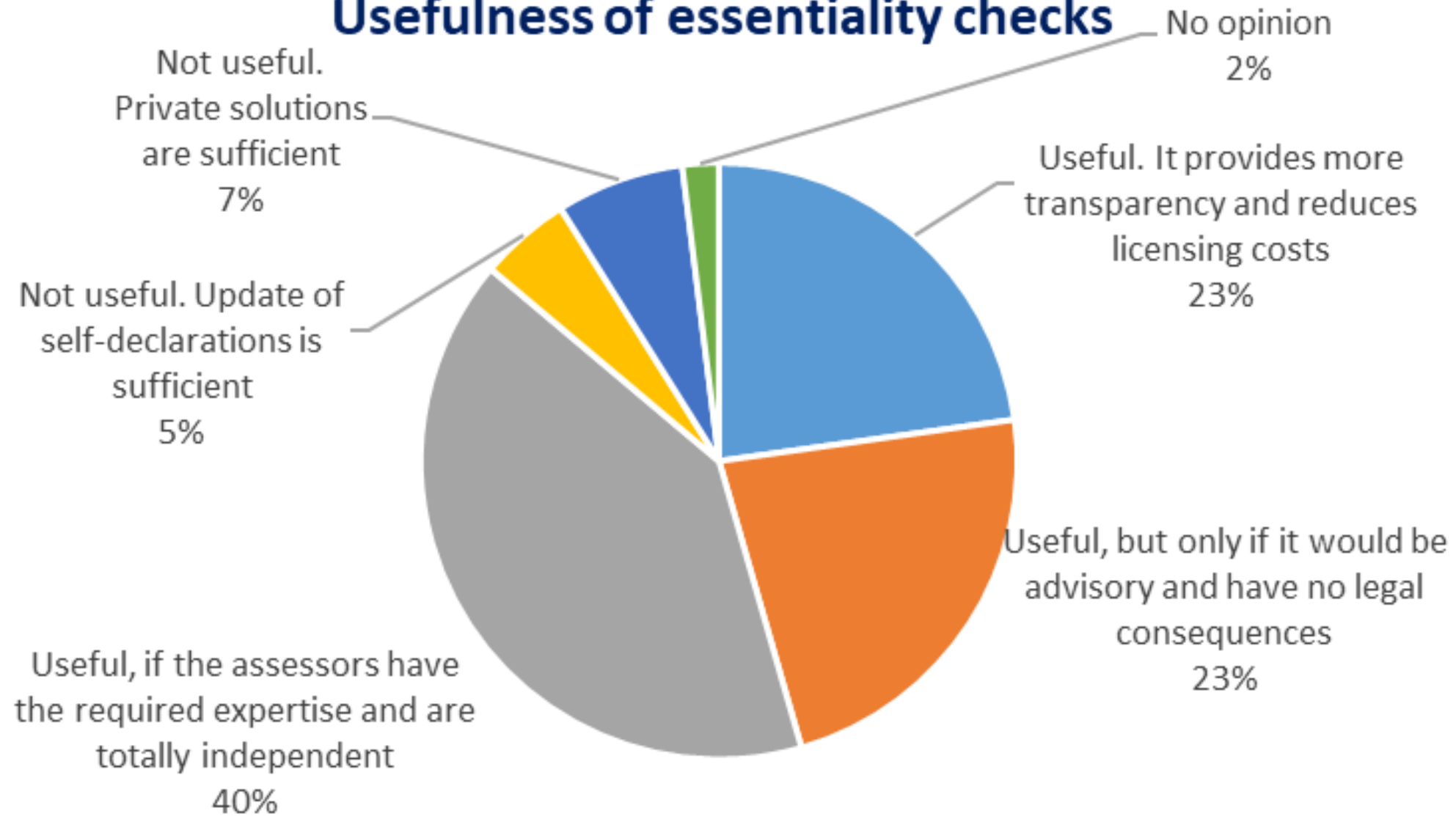
- Strongly disagree
- Disagree
- Neutral
- Agree
- Strongly agree
- No opinion
- No Answer

Usefulness of a confidential repository of licensing agreements for determination of a FRAND rate by judges and arbitrators

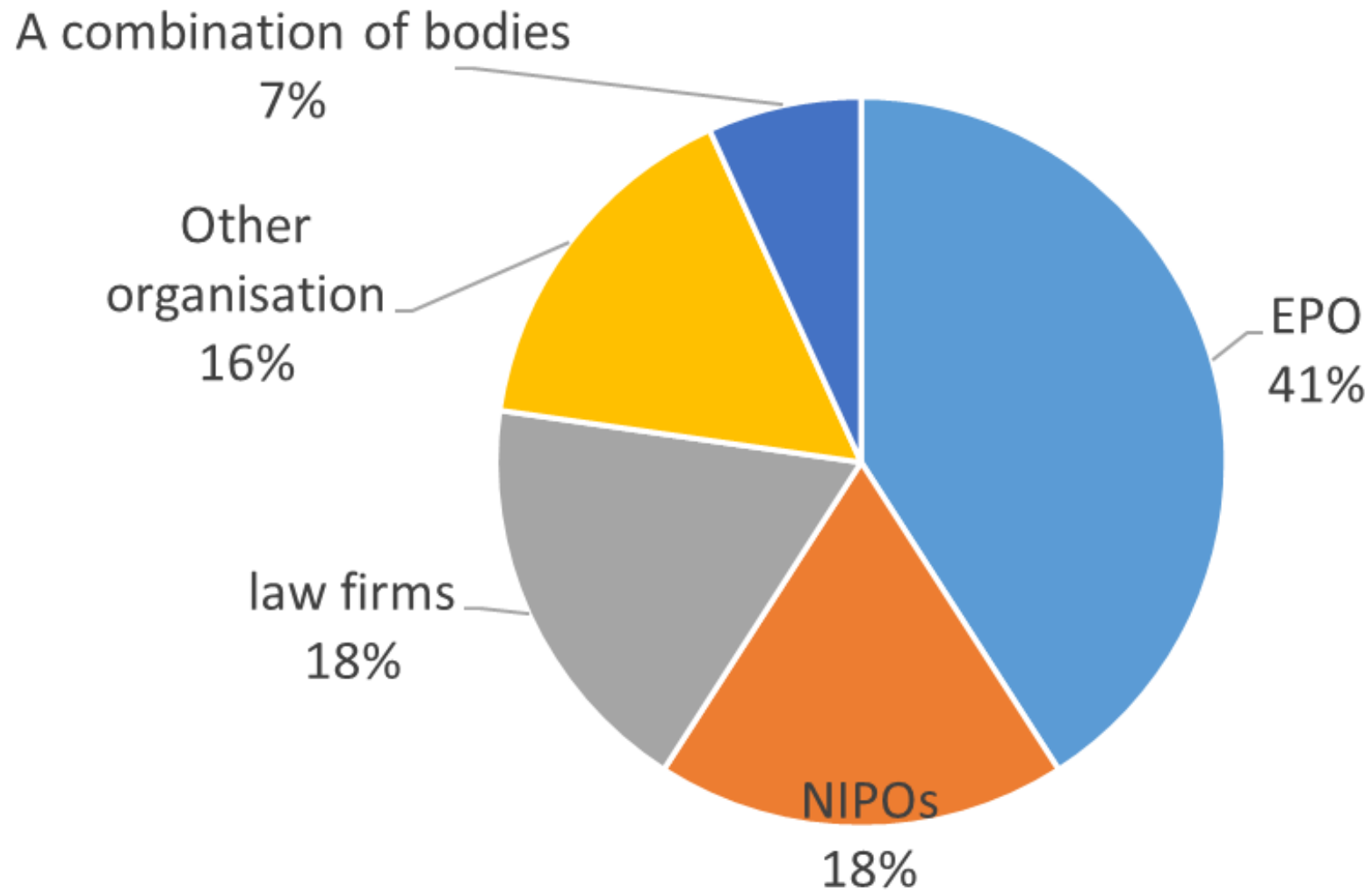


■ Not useful ■ Somewhat useful ■ Useful ■ Very useful ■ No opinion

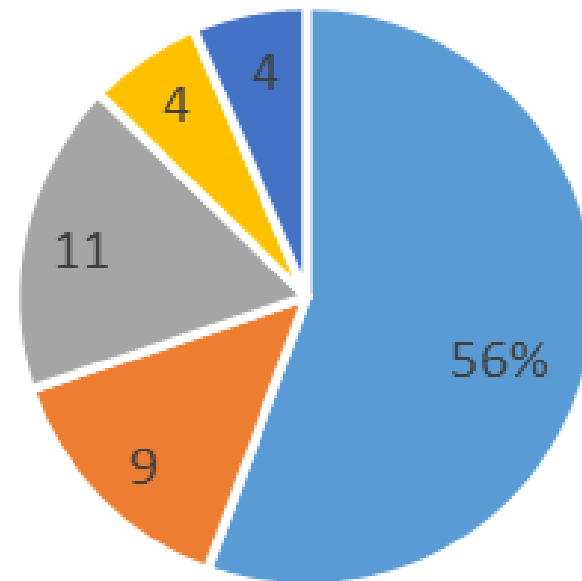
Usefulness of essentiality checks



Category of assessors

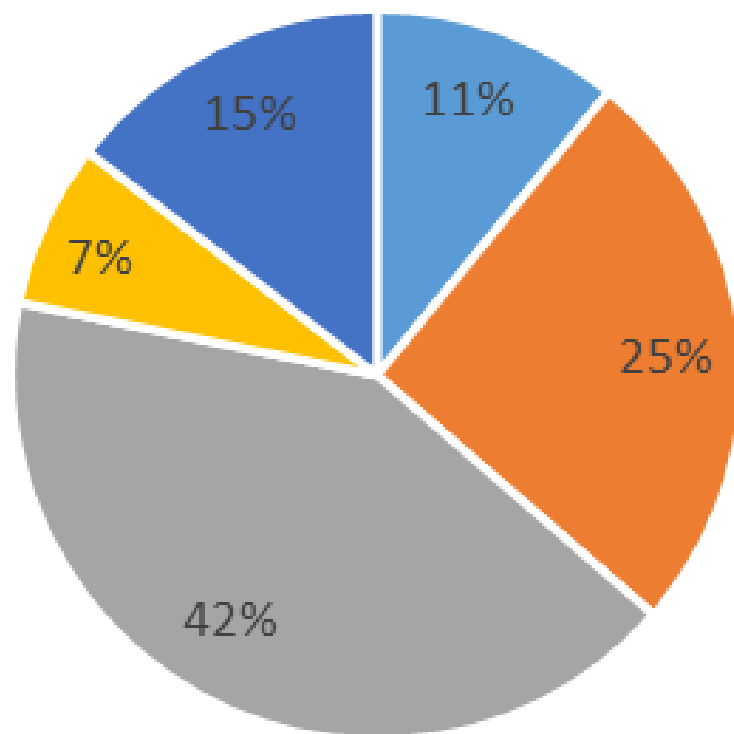


How important is it to know the reasonable aggregate royalty for all SEPs relevant to a potentially licensed product?



■ Very important ■ Important ■ Neutral ■ Not so important ■ Not important

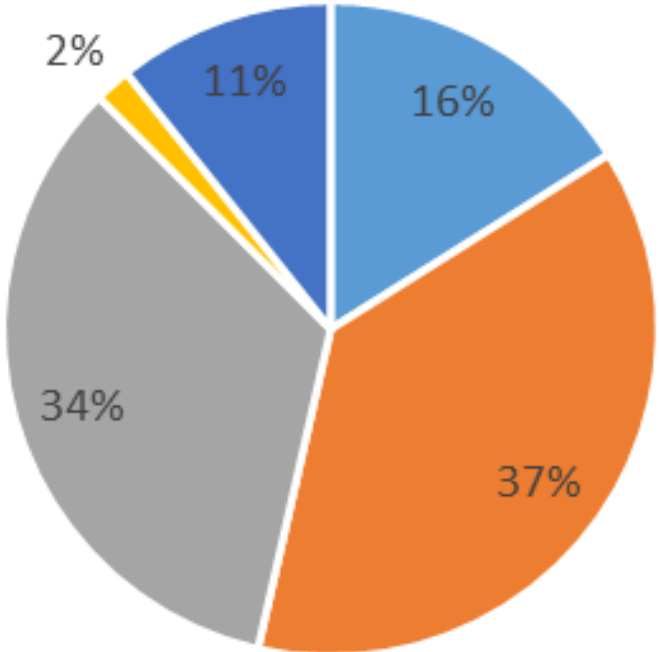
Usefulness of arbitration for FRAND assessments



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



Usefulness of mediation for FRAND assessments



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



Thank you

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More information can be found on the DG GROW SEPs [website](#)



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