

**SURVEY ON COMPULSORY LICENSES GRANTED BY WIPO MEMBER STATES TO  
ADDRESS ANTI-COMPETITIVE USES OF INTELLECTUAL PROPERTY RIGHTS**

*prepared by the Secretariat*

## I. INTRODUCTION

This survey was prepared on the basis of the answers to the questionnaire on compulsory licenses granted by WIPO Member States to address anti-competitive uses of intellectual property rights (hereafter – the “Questionnaire”). The Questionnaire was prepared by the Secretariat in the framework of the Thematic Project on Intellectual Property and Competition Policy, as revised and approved at the Fourth Session of the Committee on Development and Intellectual Property, which was held in Geneva on November 16 to 20, 2009.<sup>1</sup>

By March 1, 2011, 34 (thirty four)<sup>2</sup> Member States responded to the Questionnaire (hereafter – the “respondents”). The description and analysis of the answers received from the respondents (hereafter – the “Answer(s)”) are provided in this survey as follows.

## II. DESCRIPTION AND ANALYSIS OF THE ANSWERS PROVIDED BY THE RESPONDENTS

### *A. National statutory provisions regarding compulsory licenses to address anti-competitive uses of IP rights (ref. to Question 1)*

1. Most respondents indicated their national statutory provisions which regulate granting or permission of compulsory licenses under intellectual property and (or) antitrust laws and regulations, as well as other legislation which embodies provisions on compulsory licenses. The relevant national legislation (as indicated in the Answers provided by the respondents) is listed in Table 1. The titles of the national laws, the relevant articles embodied in the laws and the dates of the laws are provided in the same form as they are indicated in the respondents’ Answers in English.

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<sup>1</sup> This survey is based on a document prepared by Dr. Kristina Janušauskaitė and reviewed by Mr. Giovanni Napolitano.

<sup>2</sup> The respondents are: Algeria, Austria, Azerbaijan, Belgium, Chile, Czech Republic, Finland, France, Germany, Hungary, Ireland, Japan, Kenya, Lithuania, Mexico, Monaco, Nicaragua, Norway, Oman, Panama, Peru, Poland, Russia, Saudi Arabia, Syria, Spain, Sweden, Trinidad and Tobago, Ukraine, United Kingdom, Uruguay, United States of America, Uzbekistan and Yemen.

Table 1

No	Member State	National Statutory Provisions on Compulsory Licenses		
		IP Law(s)	Competition (Antitrust) Law	Other
1	Algeria	Ordinance on Patents (No 03-07 of July 19, 2003)	Ordinance on Competition (No 03-03 of July 19, 2003)	
2	Austria	Austrian Patents Act, Art. 37	Cartel Act, Art. 5	
3	Azerbaijan	Law on Patents, Art. 20 (also covers utility models and industrial designs)	Law on Antimonopoly Activity, Art. 12	
4	Belgium	Law on Patents (March 24, 2004), Arts. 31, 31bis; Law on the Protection of Plant Varieties (May 20, 1975), Arts. 24, 25	Law on the Protection of Economic Competition (September 15, 2006)	
5	Chile	Law on Industrial Property No. 19.039		
6	Czech Republic	Patent Act No. 527/1990; Act on Utility Models No. 478/1992; Act on the Protection of Biotechnology Inventions No. 206/2000; Act on the Protection of Rights to New Plant and Animal Varieties No. 132/1989 (as amended)	Act on Protection of Competition No. 143/2001	
7	Finland	Patents Act (550/1967); Act on Utility Model Rights (800/1991); Design Protection Act (221/1971); Plant Breeder's Right Act (1279/2009)		
8	France	Intellectual Property Code, Art. L 613-16, Art. L 613-19-1	Code of Commerce, Arts. 420-1 and 420-2	
9	Germany	Patent Act, Sec. 24; Utility Models Act, Sec. 20; Plant Variety Protection Act, Sec. 12; Copyright Act, Sec. 42a	Act Against Restraints of Competition, Sections 19, 20	
10	Hungary	Act XXXIII of 1995 on the Protection of Inventions by Patents; Act XXXVIII of 1991 on the Protection of Utility Models	Hungarian Competition Act	
11	Ireland	Patents Act, 1992 (as amended)		
12	Yemen	-	-	

No	Member State	National Statutory Provisions on Compulsory Licenses		
		IP Law(s)	Competition (Antitrust) Law	Other
13	Japan		Act of Prohibition of Private Monopolization and Maintenance of Fair Trade	
14	Kenya	Industrial Property Act, 2001		
15	Lithuania	Patent Law, Chapter VI		
16	Mexico	Industrial Property Law, Arts. 70, 77, 129	Federal Law on Economic Competition (June 22, 1993)	
17	Monaco	Law No. 606 on Patents of June 20, 1995, Title V		
18	Nicaragua	Law No. 354 on Patents, Utility Models and Industrial Designs ( <i>note</i> : compulsory licenses only apply to patents)		
19	Norway	Patents Act, Chapter 6		
20	Oman	Industrial Property Act of the Sultanate of Oman promulgated by virtue of the Sultanate's Decree No. 67/2008		
21	Panama	Law No. 35 on Industrial Property of May 10, 1996 ( <i>note</i> : law was under the amendment process (data as of April, 2010))		
22	Peru	Decision 486 of the Commission of the Andean Community, Chapter VII, Title II		
23	Poland	Industrial Property Law of June 30, 2000		
24	Russia			Civil Code of the Russian Federation, Art. 1362, Art. 1423
25	Saudi Arabia	Copyright Statute, Section 16; Regulation related to procedures granting compulsory licences, Section 30		
26	Syria	-	-	
27	Spain	Spanish Law on Patents (Law 11/1986, of March 20, 1986), Arts. 83 to 107	Competition Act 15/2007 of July 3, 2007	

No	Member State	National Statutory Provisions on Compulsory Licenses		
		IP Law(s)	Competition (Antitrust) Law	Other
28	Sweden	Patents Act (1967:837); Act on the Protection of Plant Breeders' Right (1997:36); Act on Copyright in Literary and Artistic Works (1960:729)	Competition Act (2008:579)	
29	Trinidad and Tobago	Patents Act No. 21 of 1996 as amended by Act No. 18 of 2000; Protection of New Plant Varieties Act No. 7 of 1997 as amended by Act No. 18 of 2000; Layout-Designs (Topographies) of Integrated Circuits Act No. 19 of 1996 as amended by Act No. 18 of 2000		
30	UK	Patents Act 1977, Sections 48 to 54; Registered Designs Act 1949, Sections 11A and 11AB	Enterprise Act 2002; Competition Act 1998	
31	Ukraine	Law of Ukraine on the Protection of Rights in Inventions and Utility Models; Law of Ukraine on the Protection of Rights in Topographies of Integrated Circuits		Civil Code of the Republic of Ukraine
32	Uruguay	Law No. 17.164 under which the rights and obligations of patents, utility models and industrial designs; Implementing Decree No. 11/000 of January 13, 2000	Law No. 18.159 on Promotion and Defence of Competition of July 20, 2007; Implementing Decree No. 404/007 of October 29, 2007	
33	USA		U.S. Antitrust law and case practise	

No	Member State	National Statutory Provisions on Compulsory Licenses		
		IP Law(s)	Competition (Antitrust) Law	Other
34	Uzbekistan	Law of the Republic of Uzbekistan on Selection Achievements of August 30, 1996 (new wording of 2002); Law of the Republic of Uzbekistan on Inventions, Utility Models and Industrial Designs of May 6, 1994 (new wording of 2002)		

1.1. Most respondents indicated that compulsory licenses were not specifically designed to address anti-competitive uses of IP rights. Moreover, most statutory provisions (which were indicated by respondents) embodied in the corresponding national IP laws do not contain language addressing anti-competitive uses of IP rights.

1.2. From the analysis of the statutory provisions listed in Table 1, it can be observed that compulsory licenses are generally aimed at achieving objectives other than remedying, repressing, correcting or preventing anti-competitive uses of IP rights. As said by most respondents, these grounds are specified in national IP laws. They vary from country to country; however, a general list (not exhaustive, however) can be made. The list is presented in Table 2. It can be assumed that some of those legal grounds such as a non-use of patented inventions, or a failure to work or insufficient working of patented inventions, or public interest of extreme importance can be linked to competition, even if national statutory provisions do not clearly stipulate it. This view was expressed by some of the respondents (for example, Spain and Sweden).<sup>3</sup>

<sup>3</sup> The connection between lack of sufficient exploitation of patented inventions and the notion of abuse in the exercise of patent rights is explicitly made in Article 5(A)(2) of the Paris Convention. The language of this provision, as it stands, was introduced during the Diplomatic Conference held at The Hague, in 1925, as a solution of compromise between opposite views on how far could the sanctions against lack of exploitation go. The language of Article 5(A)(2) was partly borrowed from the UK Patents Act in force at that time and, indirectly, drew inspiration from the Statute of Monopolies of 1624.

Table 2

<i>Legal grounds to grant compulsory licenses as stipulated in the national IP laws</i>	<i>Country(-ies)</i>
Anti-competitive uses (practices) of IP rights	Chile, France, Lithuania, Nicaragua, Norway, Oman, Peru, Poland, Trinidad and Tobago, UK, Ukraine, Uruguay
National or public interests (national security, national defence, considerable public interests, protection of natural environment, etc.)	Algeria, Azerbaijan, Belgium, Czech Republic, Finland, Ireland, Japan, Kenya, Mexico, Lithuania, Nicaragua, Norway, Oman, Panama, Poland, Spain, Sweden, Trinidad and Tobago, UK, Ukraine, Uruguay, Uzbekistan
Interests of public health	Belgium, France, Hungary, Kenya, Mexico, Lithuania, Oman, Panama, Poland, Trinidad and Tobago, Ukraine
Compulsory cross-licensing	Finland, Czech Republic, Ireland, Lithuania, Poland, UK
Failure to work or insufficient working of a patented invention	Algeria, Austria, Belgium, Czech Republic, Finland, Japan, Spain
Non-exploitation of IP right(s) for a period of time indicated in the national law(s)	Azerbaijan, Belgium, Czech Republic, Finland, Hungary, Kenya, Mexico, Monaco, Russia, Sweden, Trinidad and Tobago, Ukraine, Uzbekistan
If a patented invention cannot be exploited without infringing an invention patented with a better priority (earlier patent) (dependency of patents)	Austria, Azerbaijan, Belgium, Czech Republic, Finland, Hungary, Ireland, Japan, Oman, Russia, Spain, Sweden
Necessity to supply market with propagating material (plant varieties) and to provide licenses as are necessary to supply them, or if exploitation of a plant variety cannot be done without infringing dominant plant variety protection or a patent	Belgium, Finland, Hungary, Lithuania, Norway, Russia, Spain, Sweden, Trinidad and Tobago
Necessity to permit use based on specific features of a patented invention, failure to get a license under favourable commercial terms	Azerbaijan, Czech Republic
Mandatory licenses for exported patented pharmaceutical products	Azerbaijan
The invention or other IP protected content (for example, editions of a original work) is not available in sufficient quantities or quality or at predetermined reasonable prices in the respective territory, either through manufacture in that territory or through importation	Oman, Saudi Arabia

1.3. On the other hand, the national competition (antitrust) laws provided by the respondents and listed in Table 1 refer to the grounds to grant compulsory licenses that may encompass anti-competitive uses (practices) of IP rights. As follows from most Answers, compulsory licenses granted under national antitrust regulation may exist alongside with compulsory licenses regimes under IP legislation. As indicated by some respondents, these grounds cover anti-competitive practices and abuse of monopolistic position and (or) misuse of monopolistic rights in patents with the purpose of restraining or eliminating competition on the market.

1.4. EU Member States (Austria, Belgium, Czech Republic, Finland, France, Germany, Hungary, Spain, Sweden, UK) referred to the EU competition law, namely, Articles 101 (ex Article 81) and 102 (ex Article 82) of the Treaty on the Functioning of the European Union (hereafter – the “EC Treaty”) alongside with the relevant European case practice which applies to antitrust cases. Those respondents noted that Article 101 of the EC Treaty refers to individual restraints to address anticompetitive practice which can also envisage IP rights.

BOX I – ARTICLE 101 (ex Article 81) & ARTICLE 102 (ex Article 82) OF THE EC TREATY

Article 101.

1. The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which:

- (a) directly or indirectly fix purchase or selling prices or any other trading conditions;
- (b) limit or control production, markets, technical development, or investment;
- (c) share markets or sources of supply;
- (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.

3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:

- any agreement or category of agreements between undertakings,
  - any decision or category of decisions by associations of undertakings,
  - any concerted practice or category of concerted practices,
- which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

- (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
- (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

Article 102.

Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the



internal market in so far as it may affect trade between Member States.  
Such abuse may, in particular, consist in:  
(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;  
(b) limiting production, markets or technical development to the prejudice of consumers;  
(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;  
(d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

*Source:*

Consolidated Version of the Treaty on the Functioning of the European Union.  
Available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:083:0047:0200:EN:PDF>.

With this, EU Member States expressed the view that in cases of abuses of a dominant position under competition law, a right to access IP might be granted (which is comparable with compulsory licensing). Such compulsory licensing of IP rights in the case of a single dominant company is an example of the application of the “essential facility doctrine”.

#### BOX II – WHAT IS THE “ESSENTIAL FACILITIES DOCTRINE” AND HOW DOES IT APPLY TO IP?

An "essential facilities doctrine" specifies when the owner(s) of an "essential" or "bottleneck" facility is mandated to provide access to that facility at a "reasonable" price. For example, such a doctrine may specify when a railroad must be made available on "reasonable" terms to a rival rail company or an electricity transmission grid to a rival electricity generator. The concept of "essential facilities" requires there to be two markets, often expressed as an upstream market and a downstream market.

The term "essential facilities doctrine" originated in commentary on United States antitrust case law and now has multiple meanings, each having to do with mandating access to something by those who do not otherwise get access. The definitions vary. Indeed, commentators cannot even agree on which US cases come within the purview of "essential facilities." Among other countries, the variance is even larger.

Over the years, there are some criteria that have been enunciated in court cases and have become guidelines in the assessment of what should be ruled an essential facility. These criteria can be summarized in the following four points:

- The facility must be controlled by a dominant firm;
- Competing firms must lack a realistic ability to reproduce the facility;
- Access to the facility is necessary in order to compete in the related market;
- It must be feasible to provide access to the facility’.

*Sources:*

OECD Policy Roundtables, The Essential Facilities Concept (1996). Available at: <http://www.oecd.org/dataoecd/34/20/1920021.pdf>

International Telecommunications Union, Regulation Toolkit. Available at:  
<http://www.ictregulationtoolkit.org/en/PracticeNote.aspx?id=2517>

The doctrine has been elaborated in the ECJ case practice, please see: ECJ Judgment of 5 October 1988, [1988] ECR 6211, *Volvo v. Veng*; ECJ Judgment of 6 April 1995, *Radio Telefis Eireann (RTE) and Independent Television Publications Ltd (ITP) v Commission of the European Communities*, Joined cases C-241/91 P and C-242/91 P (Magill case); also ECJ Decision in *IMS Health v. NDC Health*, Case C-418/01.

Even if case law in this field is very scarce, arguably, the essential facility doctrine applies in the field of IP under rare and well defined circumstances only. The essential facility doctrine applies in those cases where it is impossible for competitors to circumvent the IP right in question, by resorting to existing subject matter or by generating alternative subject matter, and where the use of the subject matter of the IP right in question is indispensable or unavoidable (in the field of patents, this is called "inventing around"). Given the nature of IP, it is generally possible for competitors to resort to alternative subject matter or to create their own. See *Data Gen. Corp. v. Grumman Sys. Corp.*, 761 F.Supp. 185 (D. Mass. 1991, *aff'd*, 36 F.3d 1147 (1<sup>st</sup> Cir. 1994)). The exception is the existence of mandatory/regulatory technical standards. To a large extent, the existence of voluntary standards, provided it is generally adopted by the industry, also may generate an essential facility situation. Otherwise, where the very existence of the IP right creates an insurmountable obstacle or barrier to entry one should find a problem with the IP itself. This was the case of *Volvo* (design protection for car body parts) and *Magill* (copyright in TV program listings). By contrast, *IMS Health* involved a widely accepted standard.

Moreover, some EU Member States (namely, Finland, Czech Republic, Hungary) mentioned EC Regulation No 816/2006 on compulsory licensing of patents relating to the manufacture of pharmaceutical products for export to countries with public health problems,<sup>4</sup> which is directly applicable in their jurisdictions and establishes a procedure for the grant of compulsory licenses in relation to patents and supplementary protection certificates concerning the manufacture and sale of pharmaceutical products, when such products are intended for export to eligible importing countries in need of such products in order to address public health problems. France indicated that compulsory licenses in the interests of public health can be issued *ex officio* on the assumption that the patent is exploited in conditions considered to constitute anti-competitive practices by final administrative or court decisions. In the semiconductor technology an *ex officio* license can be granted to remedy practices which were declared to be anti-competitive by a final administrative or court decision.

1.5. Chile provided texts of the national statutory provisions on IP rights which covered non-voluntary licenses in cases of conduct and practices declared contrary to free competition, in direct relation with the use or exploitation of the patent (when an interested person was not able to get it within reasonable time and conditions). The decision to grant such a license will be made by the competent authority based on the circumstances of the case.

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<sup>4</sup> Regulation (EC) No. 816/2006 of the European Parliament and of the Council of 17 May 2006 on compulsory licensing of patents relating to the manufacture of pharmaceutical products for export to countries with the public health problems, OJ L 157, 9.6.2006, p. 1.

1.6. The US pointed out that competition law did not contain any language that specifically provided for or permitted the granting of compulsory licenses to address anti-competitive effects arising from the use of IP rights. The US antitrust agencies, listed in Table 3, seek reasonable and necessary remedies sufficient to address violations of US antitrust laws. When IP rights are the focus of an investigation, the agencies generally use a flexible, effects-based approach to antitrust analysis, known as the “*rule of reason*.” This approach allows the agencies to assess an activity’s overall competitive significance on a case-by-case basis, taking into account its pro-competitive efficiencies and its anti-competitive effects.

**BOX III – WHAT IS THE “*RULE OF REASON*”?**

A legal approach by competition authorities or the courts where an attempt is made to evaluate the pro-competitive features of a restrictive business practice against its anticompetitive effects in order to decide whether or not the practice should be prohibited. Some market restrictions which *prima facie* give rise to competition issues may on further examination be found to have valid efficiency enhancing benefits. For example, a manufacturer may restrict supply of a product in different geographic markets only to existing retailers so that they earn higher profits and have an incentive to advertise the product and provide better service to customers. This may have the effect of expanding the demand for the manufacturer’s product more than the increase in quantity demanded at a lower price. The opposite of the rule of reason approach is to declare certain business practices *per se illegal*, that is, always illegal. Price fixing agreements and resale price maintenance in many jurisdictions are *per se illegal*.

**Sources:**

OECD Glossary of Industrial Organisation Economics and Competition Law.  
Available at: <http://www.oecd.org/dataoecd/8/61/2376087.pdf>.

U.S. Department of Justice and Federal Trade Commission, Antitrust Guidelines for the Licensing of Intellectual Property §3.4 (1995). Available at: <http://www.justice.gov/atr/public/guidelines/0558.htm>

The investigation performed by the US agencies can have various outcomes: obtaining a voluntary compliance by entering into a consent order with the party or parties in question, injunctive relief imposed by the federal court (in case a consent agreement cannot be reached), or a cease and desist order, consumer redress, civil penalties, injunction, and, in some cases, effective relief without having a trial (settlement).

**B. National authorities which are entitled to determine anti-competitive uses of IP rights and grant compulsory licenses (ref. to Question 2)**

1. Most respondents listed the relevant national authorities which according to the national legislation are entitled to grant compulsory licenses. The authorities can be generally grouped as follows: (a) national competition authority(ies), (b) the relevant Ministry(ies), (c) national court(s), (d) an IP office, and (e) other institution. The detailed information about the national authorities (as indicated in the Answers by the respondents) which are entitled to grant compulsory licenses is described in Table 3.

Table 3

No	Member State	National Authority(-ies) Entitled to Grant Compulsory Licenses
1	Algeria	1- Algerian National Institute of Industrial Property (INAPI); 2 - The Minister of Industrial Property
2	Austria	1 - The Cartel Court (Kartellgericht) and the Appellate Cartel Court (Kartellobergericht); 2 - The Federal Competition Authority (Bundeswettbewerbshoerde); 3 - The Federal Cartel Prosecutor (Bundeskartellanwalt)
3	Azerbaijan	1 - The State Committee on Standardization, Metrology and Patents of the Republic of Azerbaijan; 2 - Courts
4	Belgium	1 - The Competition Council; 2- The courts and tribunals of law; 3 - The King, by Decree deliberated on in the Council of Ministers (in interests for public health)
5	Chile	The Free Competition Court
6	Czech Republic	The Industrial Property Office of the Czech Republic
7	Finland	The District Court of Helsinki
8	France	1 - The Minister of Public Health (in interests of national public health); 2 - Administrative and court authorities (for patented inventions in the field of semiconductor technology)
9	Germany	1 - The Federal Cartel Office; 2 - The Land Cartel Offices
10	Hungary	1 - The Metropolitan Court of Budapest; 2 - The Hungarian Patent Office
11	Ireland	The Controller of Patents
12	Yemen	-
13	Japan	1 - The Japan Fair Trade Commission; 2- The Minister of Economy, Trade and Industry; 2 - The Commissioner of the Japan Patent Office
14	Kenya	1 - The Industrial Property Tribunal; 2 - The Minister
15	Lithuania	The Competition Council of the Republic of Lithuania
16	Mexico	1 - The Federal Commission of Competition; 2 - The Federal Institute of Industrial Property; 3 - The Federal Public Administration (General Health Council, Secretariat of Health, Secretary of Economy, Head of the Federal Executive)
17	Monaco	The Court of First Instance of Monaco
18	Nicaragua	1 - The Competition Department of the Ministry for Industrial Promotion and Trade; 2 - The Minister for Industrial Promotion and Trade; 3 - The Intellectual Property Registry
19	Norway	1 - Courts, 2 - Norwegian Competition Authority
20	Oman	The Ministry of Commerce and Industry
21	Panama	The Minister of Trade and Industry
22	Peru	1 - The Directorate of Inventions and New Technologies; 2- The Commission for the Protection of Free Competition

No	Member State	National Authority(-ies) Entitled to Grant Compulsory Licenses
23	Poland	The Patent Office of the Republic of Poland (in litigation proceedings)
24	Russia	Judicial authorities (not specified)
25	Saudi Arabia	The Ministry of Culture and Information
26	Syria	The Ministry of Economy and Trade
27	Spain	1 - The Government by means of Royal Decree, as proposed by the Ministry of Industry, Tourism and Commerce; 2 - The Ministries of Health and Defence; 3 - The National Competition Commission
28	Sweden	1 - The Swedish Competition Authority (on appeal – the Market Court); 2 - Stockholm District Court (on appeal – Svea Court of Appeal and the Supreme Court)
29	Trinidad and Tobago	1 - Courts (not specified); 2- The Minister with responsibility for IP rights
30	UK	1 - The Intellectual Property Office; 2 - The Competition Commission; 3 - The Secretary of State
31	Ukraine	1 - The Cabinet of Ministers of Ukraine; 2 - the Anti-Monopoly Committee of Ukraine
32	Uruguay	1 - Commission for Promotion and Defence of Competition; 2 - Ministry of Public Health, Ministry of Livestock, Agriculture and Fisheries; 3 - The National Directorate of Industrial Property
33	USA	1 - The U.S. Federal Trade Commission (FTC); 2 - The Department of Justice Antitrust Division (DOJ); 3 - National courts
34	Uzbekistan	1 - Courts; 2 - Cabinet of Ministers; 3 - State Committee of the Republic of Uzbekistan on Demonopolization and Competition Development

*C. Examples of anti-competitive uses of IP rights which led to granting compulsory licenses by the competent authorities. Description of the circumstances, terms and conditions of such licenses (ref. to Questions 3 and 4)*

1.1. Hungary cited a case dated of 1970, the judgement in which was not accessible. Austria indicated one case regarding the imposition of a preliminary injunction which was applied when the monopolistic manufacturer of the database containing data necessary for the reasonable operation of another database refused the access to that data without due case or only granted access against an unreasonable fee. However, such injunction was not considered a compulsory license as such. Kenya explained that in 2004 one Kenyan pharmaceutical company applied to the Minister for an order to compel two foreign pharmaceutical companies to grant a license to manufacture HIV/AIDS drugs using certain ingredients. As indicated in Kenya's Answer, voluntary licenses were finally signed to allow the local pharmaceutical company to exploit patents in question. UK pointed out that only a few applications for granting compulsory licenses are received per year and even fewer granted (none in the last ten years). Recently a number of applications for compulsory licenses were refused<sup>5</sup>. Saudi Arabia answered that the fact that all the editions of the original work or of its Arab translation are sold out and no copy is made available by the right holders upon request is an example of

<sup>5</sup> See *Swansea Imports Limited v Carver Technology Limited* BL O/170/04; *Cohmor Holdings Plc v Therma-Tru Corp* [1997] R.P.C. 777

circumstances that would authorize the granting of compulsory licenses. As regards circumstances, terms and conditions of compulsory licenses, the Saudi authorities refer to their Regulation which embodies the provisions of the Appendix to the Berne Convention, Articles II and III<sup>6</sup>.

2.2. The cases briefly described in the US Answer reveal three types of circumstances in which the agencies use IP licensing as a remedy to address anti-competitive effects: (1) anti-competitive mergers<sup>7</sup>, (2) cases in which the harm arises from an anti-competitive use of IP rights<sup>8</sup>, and (3) cases in which the harm arises from activities that do not involve IP rights<sup>9</sup>.

As regards the first situation (anti-competitive merger in the Dow Chemical case), the FTC's concern was that the merger would significantly reduce competition in the development of new consumer plastic products and polyethylene process technology (LLDPE). To alleviate these concerns, while still allowing the merger, Dow was required to divest and license certain IP that was critical to the production of LLDPE. The purpose of this remedy was to eliminate a significant post-merger competitive effect in the market for a specific LLDPE production technology (metallocene catalyst technology).

The second situation was explained by way of an example: in one case, the DoJ and two companies (Wind River and MathWorks) agreed that Wind River would use its best efforts to divest itself of interests in a dynamic control system design software product, known as MATRIXx. The agreement (which was deemed in violation of section 1 of the Sherman Act) granted MathWorks exclusive distribution and license rights to MATRIXx IP rights for 30 months with an option to purchase that software at the end of the period. During this time, Wind River agreed not to produce new versions of MATRIXx with product enhancements. Such an agreement eliminated competition between two software products, allocating customers between Wind River and MathWorks, and fixing price terms for customers who switched from one software product to another.

As far as the third situation is concerned, the US briefly explained the Microsoft case. In this case, the proposed final judgment imposed a series of prohibitions on Microsoft's conduct that were designed to end the company's restrictions on potentially threatening middleware, prevent it from hampering similar nascent threats in the future, and restore the competitive conditions created by similar middleware threats. In particular, the final judgment required Microsoft to license all of its IP for client-server interoperability (including copyrights, trade secrets and patents) in the server software field-of-use on reasonable terms. In November 2002, taking into account extensive public comments, the district court approved the settlement because it was in the public interest. The DoJ will continue to oversee the licensing programs until mid-May 2011.

*D. Opinion of the national authorities on whether IP rights confer market power per se (ref. to Question 5)*

1. Some of the respondents (Algeria, Belgium, Kenya, Oman, Syria, Saudi Arabia, Trinidad and Tobago, Uruguay, and Yemen) answered positively to this question, *i.e.* they indicated that IP rights conferred market power *per se*.

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<sup>6</sup> Available at: [http://www.wipo.int/treaties/en/ip/berne/trtdocs\\_wo001.html#P410\\_75777](http://www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html#P410_75777).

<sup>7</sup> In the matter of *Dow Chemical Company, and Union Carbide Corporation*, (File No. 991 0301, Docket No. C-3999). Available at: <http://www.ftc.gov/os/caselist/c3999.shtm>.

<sup>8</sup> See *United States v. The MathWorks, Inc.*, Civ. Action No. 02-888-A (E.D.Va. 2003) (consent decree). Available at: <http://www.justice.gov/atr/cases/indx346.htm>.

<sup>9</sup> See *United States v. Microsoft Corp.*, 97 F. Supp. 2d 59 (D.D.C. 2000), *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001).

#### BOX IV - MARKET POWER

The ability of a firm (or group of firms) to raise and maintain price above the level that would prevail under competition. The exercise of market power leads to reduced output and loss of economic welfare. Although a precise economic definition of market power can be put forward, the actual measurement of market power is not straightforward. One approach is the Lerner Index, *i.e.*, the extent to which price exceeds *marginal cost*. However, since marginal cost is not easy to measure empirically, an alternative is to substitute *average variable cost*. Another approach is to measure the price elasticity of demand facing an individual firm since it is related to the firm's price-cost (profit) margin and its ability to increase price. However, this measure is also difficult to compute. The actual or potential exercise of market power is used to determine whether or not *substantial lessening of competition* exists or is likely to occur.

Source:

OECD Glossary of Industrial Organisation Economics and Competition Law.  
Available at: <http://www.oecd.org/dataoecd/8/61/2376087.pdf>.

In general, those who are of the view that IP rights (and patents, in particular) amount to monopoly grants would agree that IP rights generate dominant market power *per se*, without the need for any other market or legal circumstance.

2. Some other respondents, such as Austria, Belgium, Mexico, Nicaragua, Peru, Oman, and Poland, were more specific. They directly or indirectly indicated that IP rights create a legal monopoly (exclusive rights), but not necessarily a dominant position or a market power *per se*. As follows from the Answers of Peru and Poland, economic and business strategy would be decisive in establishing if IP rights confer market power *per se*. Belgium indicated that IP right confers market power *per se* when there is an exploitation monopoly. Referring to the pharmaceutical field and the so-called "Bolar Exception", Belgium explained that in making such a finding the existence of competing subject-matter in public domain or covered by IP rights, as well as future development of competing subject-matter would be considered. Oman explained that the Authorities take into account the existence of competing goods, but within the scope and limits of fair competition while excluding abusive and monopolistic practices.

#### BOX V – WHAT DOES "BOLAR EXEPTION" MEAN?

Many countries use the provision embodied in Article 30 (*Exceptions to Rights Conferred*) of TRIPS Agreement to advance science and technology. They allow researchers to use a patented invention for research, in order to understand the invention more fully. Some countries allow manufacturers of generic drugs to use the patented invention to obtain marketing approval — for example from public health authorities — without the patent owner's permission and before the patent protection expires. The generic producers can then market their versions as soon as the patent expires. This provision is sometimes called the "regulatory exception" or "Bolar" provision.



Source:  
WTO Information. Available at:  
[http://www.wto.org/english/tratop\\_e/trips\\_e/factsheet\\_pharm02\\_e.htm](http://www.wto.org/english/tratop_e/trips_e/factsheet_pharm02_e.htm).

3. Other respondents, such as Chile, Germany, France, and the US, indicated that IP rights do not confer market power *per se*.

3.1. Chile said that the existence of market power would depend on the product in question, the structural features and operation of the relevant market, the number of substitutes, the competitiveness of the respective market, the existence and origin of barriers to entry for competitors, etc. Similar view was expressed by Germany, which stated that IP rights could only constitute one of the preconditions for a dominant position, in particular, when no alternative to the protected technology existed in the relevant market (for instance, in case of so-called “key patents” without whose exploitation the activity on a market would be practically impossible). France stated that the grant of a patent is not only designed to reward an inventor by assigning to him/her an exclusive right conferring a potential commercial advantage, but is also intended to stimulate research investment and to contribute to future technical progress. Therefore, the authorities in France look for a balance between stimulation of technological progress and competition.

3.2. The US antitrust agencies apply the same general antitrust principles, and therefore also the same market power analysis principles, to conduct involving IP that they apply to conduct involving any other form of tangible or intangible property. Besides, US Supreme Court has concluded that “a patent does not necessarily confer market power upon the patentee,” noting that “Congress, the antitrust enforcement agencies, and most economists have all reached the [same] conclusion.”<sup>10</sup>

4. The fourth group of the respondents did not clearly answer if IP rights conferred a market power *per se*, but from their Answers the assumption can be made that those countries would not deem IP rights to have such an effect. For instance, Sweden explained that the definition of the relevant market in the individual case is crucial for the assessment of market power. In its enforcement of competition law, the Competition Authority would take into account all relevant knowledge, facts, case law and circumstances accessible in this regard, as well as guidance from the EU *acquis* in this matter. The UK said that when considering a compulsory license, the Patents Act requires consideration of related subject-matter and/or the future development of related or competing subject-matter.

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<sup>10</sup> For more information see *Illinois Tool Works Inc. v. Independent Ink, Inc.*, 547 U.S. 28, 46 (2006).



*E. Objectives of compulsory licenses (granted to address anti-competitive practices) as pursued by the national authorities and mechanisms that permit the monitoring of the practical implementation of compulsory licenses (ref. to Question 6)*

1. The objectives of compulsory licenses (as pursued by the national authorities) are indicated in Table 4.

Table 4

No	Member State	Four Possible Objectives of Compulsory Licenses <sup>11</sup>			
		To prevent	To control	To correct (or remedy)	To repress
1	Algeria	-	-	-	-
2	Austria			✓	✓
3	Azerbaijan				✓
4	Belgium	✓ (note: by means of provisional measures)		✓	✓
5	Chile	✓		✓	
6	Czech Republic	-	-	-	-
7	Finland	-	-	-	-
8	France	✓	✓	✓	
9	Germany	✓		✓	
10	Hungary	-	-	-	-
11	Ireland	-	-	-	-
12	Yemen	✓ (note: if a new legislation is adopted)	-	-	-
13	Japan	-	-	-	-
14	Kenya			✓	
15	Lithuania				
16	Mexico	✓ (note: for compulsory licenses)		✓ (note: for licenses in public interest and declarations on the use of marks)	
17	Monaco	-	-	-	-
18	Nicaragua			✓	
19	Norway	-	-	-	-
20	Oman			✓	
21	Panama	-	-	-	-
22	Peru			✓	
23	Poland	✓		✓	
24	Russia	-	-	-	-
25	Saudi Arabia	✓			
26	Syria	-	-	-	-
27	Spain	-	-	-	-
28	Sweden	-	-	-	-
29	Trinidad and	-	-	-	-

<sup>11</sup> Each of the listed objectives is defined and explained in more detail in the Questionnaire; see Fts. from 2 to 5 therein. The Table contains some notes made by the respondents in their Answers.

No	Member State	Four Possible Objectives of Compulsory Licenses <sup>11</sup>			
		To prevent	To control	To correct (or remedy)	To repress
	Tobago				
30	UK	✓		✓	✓
31	Ukraine			✓	
32	Uruguay	✓	✓	✓	
33	USA			✓	
34	Uzbekistan				✓

2. As regards the question if there were mechanisms in place that permitted the monitoring of the practical implementation of compulsory licenses (in cases when compulsory licenses were intended to control and (or) to correct (or remedy)), some countries (such as Belgium, Kenya) indicated that there were such mechanisms. They also designated the national authorities which were supposed to monitor the execution of the licenses.

2.1. Chile described such mechanisms in more detail. Namely, if the National Economic Supervisory Authority in Chile considers that a decision taken by the Free Competition Court has been infringed, it should request to take punitive action against an alleged infringer before the Court which could apply sanctions and take different preventive, corrective and (or) prohibitive measures.

2.2. Mexico referred to the statutory provisions that established that on expiration of the two-year term starting from the date of grant of the first compulsory license, the Mexican Institute of Industrial Property could declare the patent lapsed if the grant of the compulsory license had not remedied the non-use of the patent. As far as licenses in the public interest are concerned, when a license in the public interest has been granted, the Mexican Institute of Industrial Property shall set a deadline by which the licensee shall start working the patented invention; the period of use may not be longer than one year from the date of grant of the license. The non-use of the invention by the licensee shall constitute grounds for the revocation of the license. As far as implementing mechanisms are concerned, Peru referred that compulsory licenses can be amended. Moreover, the competent national authority may refuse the revocation of the compulsory license where conditions which led to the granting of the license are likely to recur.

2.3. The US explained that if the competitive harm requires remedial provisions that entail some continued obligation on the part of the parties, a consent decree provides the antitrust agencies with recourse to a court's contempt power to ensure compliance with the agreement. In some cases, a court may require the parties to report to it periodically on the status of compliance with the court's decree. The *Microsoft* case is one such example.

3. A number of respondents briefly indicated that although there were provisions on implementing mechanisms their effectiveness remained unknown due to absence of practice in granting compulsory licenses.

*F. Allegation of anti-competitive practices by an alleged infringer as a personal defence in proceedings in respect of the infringement of IP rights (ref. to Question 7)*

1. An alleged infringer can invoke anti-competitive practices as a defence in IP infringement proceedings in a few countries (Austria, Belgium, Chile, France, Germany, Japan, Saudi Arabia, Uzbekistan, and the US).

1.1. It seems that the possibility of resorting to that defence by an alleged infringer would be a question left to the courts' discretion and to be decided upon concrete circumstances. Absent

the case practice, most respondents would not inform on how such an allegation would be practically applied. The US said that, regardless of the presence of antitrust counterclaims, issuance of an injunction as a remedy in a patent infringement suit is within the equitable discretion of the trial court which considers factors such as whether the patentee has suffered an irreparable injury and monetary damages are inadequate to compensate for the injury. The balance of hardships between the plaintiff and defendant, and the public interest shall be considered as well.<sup>12</sup>

1.2. Germany stressed that compulsory licenses under antitrust law had only played a role as the respondent's defence in patent infringement proceedings. According to the recent German Federal Court of Justice's practice, the defendant in patent infringement proceedings can, as an exception, allege that the right holder should not derive any rights from the patent because the refusal to grant a license was anti-competitive. From a competition law perspective, decisive importance is given to whether the matter involves a market dependent on the use of the patent (this means that there is the need to have access to a technology that is essential for the respective industry standard).<sup>13</sup> The UK responded that, although the Patents Act does not list anti-competitive practices as a personal defence against infringement, and that it was not aware that it had happened in practice, it would seem possible that infringement proceedings might be brought before the Office or the courts by a patentee, and the alleged infringer could then file a counter action by filing an application for a compulsory license against the patentee. However, if the license was granted, this would seem to be in respect of future actions by the alleged infringer, and so would seem unlikely to provide a defence against any actions taken on the part of the infringer prior to the grant of the compulsory license.

2. Other respondents (Hungary, Mexico, Nicaragua, and Poland) responded negatively to this question. They indicated that an alleged infringer could not use an allegation of anti-competitive practices of IP rights as a defence argument in IP infringement cases.

3. The rest of the respondents did not reply to this question due to the absence of practical experience. Sweden, however, referred to one case where the Swedish Competition Authority had submitted an *amicus curiae* opinion and claimed that an alleged infringement of Article 102 of the EC Treaty should affect the possibility of obtaining an injunction against an alleged trademark infringement<sup>14</sup>.

*G. Conditions that the national authorities have applied to compulsory licenses granted to deal with anti-competitive uses of IP rights. Specifically, if granting a compulsory license an IP owner was or would be required to transfer know-how necessary to put invention into practice (ref. to Questions 8 and 9).*

1. As most respondents did not experience any practice of granting compulsory licenses in their jurisdictions, they did not indicate the conditions that would apply to such licenses.

2. However, some of the conditions can be found in the national statutory provisions, as indicated by some respondents. On the basis of such provisions, a few general observations can be made.

2.1. First, a compulsory license should be non-exclusive, non-assignable. The rights and obligations of an IP owner and a person who obtained a compulsory license should be equal to the relations between licensor and licensee. If a compulsory license is not used within the period

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<sup>12</sup> For more information see *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388 (2006).

<sup>13</sup> See "Orange Book Standard" case, on 6.5.2009 (file no. KZR 39/06); "Standard Spundfass" case on 13.7.2004 (file no. KZR 40/02).

<sup>14</sup> See Svea Court of Appeal, Ö 1561-10 (dnr 632/2009) (the case was pending at the time the answer was submitted).

indicated in the laws from the date of its obtaining, an IP owner can request the court to cancel such license. Moreover, remuneration (adequate compensation) should be paid to an IP owner. Such provisions can be found in the national legislation of the countries like Austria, Azerbaijan, Belgium, Chile, Finland, France, Germany, Hungary, Ireland, Kenya, Mexico, Monaco, Nicaragua, Norway, Oman, Peru, Russia, Sweden, Trinidad and Tobago, Ukraine, and Uzbekistan. The statutes of most respondents provide that a compulsory license is limited in scope and duration and that amendments are possible. Moreover, the applicant should prove that he/she previously contacted the IP owner and that the latter refused to grant a license on reasonable commercial terms and conditions. In Austria, the conditions of use of the invention, considering its nature and the circumstances of the case, shall be determined in the proceedings before the Austrian Patent Office. According to the Austrian Patent Act, a license can be granted against an adequate compensation, and its extent and duration shall be primarily for the supply of the market of Austria and limited to its concrete purpose. In the semiconductor sector, a license can be granted for non-commercial use only or to remedy anti-competitive practices.<sup>15</sup>

2.2. The US practice in cases of granting compulsory licenses shows similar conditions. As the US response noted, drafting an IP license as a remedy in an antitrust case is a complex task. The scope of such a license is limited to the extent that is necessary to remedy the competitive harm. For example, in some cases licenses should be made available to a limited number of licensees only. In other cases, licenses must be made available to any willing licensee. A license must be confined to permitting the use of the IP right in question in the markets in which competition has been harmed. Attaching a reasonable royalty requirement to use the IP right may preserve incentives to innovate by continuing to compensate the patent owner for its invention. The duration of such licenses is limited to the period of time necessary to remedy the harm to competition.

3. As far as the requirement to transfer *know-how* necessary to put a patented invention (subject to a compulsory license) into practice is concerned, some of the Answers provided useful information.

3.1. Germany noted that there was no requirement to transfer know-how in cases of compulsory licenses. It emphasized that the licensee must himself possess the know-how necessary to put the patent into practice. The same is applicable in Ireland and Nicaragua. Chile indicated that request to transfer know-how to put an invention into practice was admissible and enforceable by the Free Competition Authority. Mexico explained that the Industrial Property Law does not stipulate an obligation to transfer know-how, but mentioned that for licenses in the public interest related to serious diseases, which are either the cause of an emergency or threaten national security, the Secretariat of Health shall assess the technical capacity of the applicant. In Peru the authority may, where necessary, sanction anyone who does not provide the information related to technological knowledge or only partly transfers this knowledge, thereby frustrating the purpose of a compulsory license. In Russia, the condition to transfer know-how can be determined by the judicial authority hearing the case on granting a compulsory license. The US stated that there is no requirement to include “know-how” transfer provisions in the IP license if one can be successfully drafted without them. However, if “know-how” is necessary to remedy the identified competitive harm, such provisions are included in the license.

3.2. On the other hand, Uruguay described that an obligation to transfer technical know-how is stipulated among other aspects to be applied to compulsory licenses. Article 67 of the Law on

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<sup>15</sup> One should remind, however, that some of these conditions – for example, the requirement to previously seek a voluntary license from the patent owner – are based on the assumption of the existence of normal business relations between the companies involved. In the event an anti-competitive practice is alleged, however, such assumption cannot be made. Therefore, some of these conditions do not apply when compulsory licenses are granted to remedy anti-competitive practices (Article 31(k) of the TRIPS Agreement).

Patents of Uruguay establishes the obligation to provide all the information needed to work the subject matter of the license. An unsubstantiated refusal by the owner to provide the technical know-how shall lead immediately to losing her/his rights to royalties. Furthermore, if the holder persists with anti-competitive acts or practices, the right in the patent may be cancelled, either automatically or at the request of an interested party.

*H. Communication of the relevant data by an IP owner to the licensee or reliance of that data by the national authority granting compulsory licenses in cases when a compulsory license applies to a patented invention whose commercial exploitation is subject to regulatory approval (ref. to Question 10)*

1.1. Algeria explained that this matter will be regulated by the contractual provisions on transfers or exploitation. Chile stated that test data relating to the safety and effectiveness of pharmaceutical products and chemicals (regulated products) which use a new chemical entity when the holder of the test data has engaged in conduct or practices declared contrary to free competition in direct relation to the use or exploitation of that information, shall not be exclusive, according to a final decision of the Free Competition Court, or when the product is the subject of a compulsory license.

1.2. Austria indicated that requirements regarding due diligence of a prudent businessman should be applied in this case. Belgium referred that the national statutory provisions on compulsory licenses did not contain any exception regarding an “exclusivity of data”. The use of “exclusivity of data” and “marketing exclusivity” has been made for pharmaceutical products in Belgium, though. In Germany, since through granting a compulsory license the licensee acquired the same status as a contractual licensee, any authorisation that may be required for the use of the patent must be obtained by the licensee him/herself. Peru stated that the health authority may authorize third parties to use or make a decision on the basis of the data<sup>16</sup> for the purposes of drawing up a health register in cases where a compulsory license has been granted. In addition, the regulation provides that this authorization shall end when the term of the compulsory license expires. It does not, however, provide that the health authority may oblige the IP holder to communicate the scope of test data to the licensee. Hungary pointed out that compulsory licenses are not linked to the marketing authorization regime and, thus, to the data protection system. The US stated that if a compulsory license were to be issued, the licensee’s products would be subject to the same regulatory requirements applicable to all such products.

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<sup>16</sup> Under Peruvian Supreme Decree No. 002-2009-SA establishing the Regulations under Legislative Decree No. 1072 on the Protection of Test Data and Other Undisclosed Data on Pharmaceuticals.

*1. Other sanctions (alternative or complementary) besides compulsory licenses applicable to anti-competitive uses of IP rights (ref. to Question 11)*

1. The answers to the question whether there are other, alternative or complementary, sanctions besides compulsory licenses that apply to anti-competitive uses of IP rights are described in Table 5.

Table 5

No	Member State	Other Sanctions Besides Compulsory Licenses	Alternative or Complementary?
1	Algeria	-	-
2	Austria	A fine up to 10% of the last year's turnover (under the Cartel Act)	No indication
3	Azerbaijan	Any action under the national legislation	-
4	Belgium	A fine not exceeding 10% of a turnover; Periodic penalty payment up to 5% of the average daily turnover	Decision to impose a fine or a compulsory license, or a penalty payment depends on an assessment of the Competition Council
5	Chile	Modification or stopping of acts, contract, conventions, systems or agreements contrary to competition; Modification or dissolution of undertakings involved in anti-competitive acts; Fines to tax benefits up to a sum of equivalent to 20,000 annual tax units	Complementary (unless compulsory licenses are considered to be sanctions)
6	Czech Republic	-	-
7	Finland	Prohibitions under Arts. 101, 102 of the EC Treaty	Complementary
8	France	Prohibitions under Arts. 101, 102 of the EC Treaty	Complementary
9	Germany	Prohibitive orders in respect of prohibited conduct; Conduct-oriented measures (ordering of corrective measures to restore a lawful situation or an order to supply); Imposition of conduct measures of a structural nature (including granting of licenses); Fines	Complementary
10	Hungary	Prohibitions under Arts. 101, 102 of the EC Treaty and corresponding national antitrust law	Complementary
11	Ireland	Criminal prosecution; Fines or prison sentences	Complementary
12	Yemen	-	-
13	Japan	Cease and desist order; Criminal sanction, including a fine; Revocation of a patent	No clear indication

No	Member State	Other Sanctions Besides Compulsory Licenses	Alternative or Complementary?
14	Kenya	Exploitation of patented invention by the Government or third persons authorised by the Government	Complementary
15	Lithuania	-	-
16	Mexico	Mandatory registration or use of trade marks (when use of a mark is a factor associated with monopolistic or oligopolistic practices or unfair competition which causes serious distortions in production, distribution or marketing of certain goods or services)	Alternative to a measure on market competition or complementary to a patent license in the public interest (depending on circumstances)
17	Monaco	-	-
18	Nicaragua	-	-
19	Norway	-	-
20	Oman	-	-
21	Panama	-	-
22	Peru	-	-
23	Poland	Sanctions under antitrust law	Alternative
24	Russia	-	-
25	Saudi Arabia	-	-
26	Syria	Sanctions	Sanctions not specified, however, indicated that they do not replace compulsory licences (complementary)
27	Spain	Sanctions under antitrust law (for example, the imposition of specific conditions or obligations, be they structural or behaviour)	Not specified
28	Sweden	Decisions on commitments; Prohibitions; Administrative fines; Administrative orders	Not specified (All sanctions applicable in cases of an abuse of a dominant position)
29	Trinidad and Tobago	Civil remedies; Criminal Penalties (both in cases of plant breeders' rights infringements)	-
30	UK	-	-
31	Ukraine	-	-
32	Uruguay	Sanctions under antitrust law	Complementary
33	USA	Structural relief, such as a divestiture, or Relief that enjoins the anticompetitive use of the IP right	Alternative or complementary (depending on which remedies will best resolve the anticompetitive harm)
34	Uzbekistan	-	-

*J. On the appropriateness of compulsory licenses to enforce antitrust law to address anti-competitive uses of IP rights (ref. to Question 12)*

1. Only a few most countries answered this question. A number of them expressed the view that the available legal framework was sufficient and complete, but seldom applicable in practice. Other respondents answered positively to this question. See Table 6 below.

2.1. Germany stated that compulsory licenses were appropriate means to combat anti-competitive practices in individual cases. It emphasized that in accordance with the EU Court of Justice only the existence of IP rights was protected without any restriction, not their exercise. Therefore, the exercise of IP rights was subject to the same control under competition law as other forms of property, above all tangible property. When abuse control under antitrust law is applied in connection with IP rights, particular importance is attached to striking a balance between the interests of the holder of the protected right in preventing the market entry of a party seeking to obtain a license by means of the protected right, and the interests of free competition. The “essential facilities doctrine” within the framework of abuse control in Article 102 of the EC Treaty was particularly mentioned by Germany. See also Boxes I and II above.

2.2. The UK noted that the fact that the Intellectual Property Office receives so few applications for the grant of compulsory licenses could indicate that the legislation in this area acted in itself as a deterrent. It ensured that IP rights owners entered into negotiations with each other to come to voluntary agreements on licensing IP rights. This allowed for terms to be negotiated that were agreed by both parties rather than having terms imposed through the granting of a compulsory license.



Table 6

No	Member State	<i>Compulsory Licenses are Appropriate Mechanisms to Enforce Antitrust Law to Address Anti-Competitive Uses of IP Rights</i>		
		YES	NO	<i>Notes or Comments Made by the Member States</i>
1	Algeria	✓		-
2	Austria	-	-	No indication due to rare practise
3	Azerbaijan	-	-	No indication due to absence of practise
4	Belgium	-	-	No indication due to absence of practise
5	Chile	-	-	No indication due to absence of practise
6	Czech Republic	-	-	No indication due to absence of practise
7	Finland	-	-	No indication due to absence of practise
8	France	✓		No situation arose, however, including public health sector (where aims are met with other means such as market authorizations, price fixing mechanism, etc.) which could justify granting compulsory licenses.
9	Germany	✓		In individual cases; striking a balance between IP rights and free competition
10	Hungary	✓		Compulsory licenses regime may be enough to bring disputes to be solved under settlement negotiations instead of litigation
11	Ireland	✓		Depending on circumstances
12	Yemen	-	-	-
13	Japan	-	-	No indication due to absence of practise
14	Kenya	✓		-
15	Lithuania	-	-	-
16	Mexico	✓		Compulsory licenses are important because they prevent abuse of IP rights
17	Monaco	-	-	-
18	Nicaragua	-	-	[answer not clear]
19	Norway	-	-	-
20	Oman	✓		-
21	Panama	-	-	-
22	Peru	-	-	No indication due to absence of practise
23	Poland	✓		Only as a complementary measure
24	Russia	-	-	-
25	Saudi Arabia	✓		
26	Syria	✓		
27	Spain	-	-	-
28	Sweden	-	-	-
29	Trinidad and Tobago	-	-	[answer not clear]
30	UK	✓		Deterrent nature of compulsory licenses regulation ensures that IP owners enter into negotiation with each other to come to voluntary licenses.
31	Ukraine	-	-	No indication due to absence of practise
32	Uruguay	✓		-

33	USA	✓		In limited circumstances, when other remedies are insufficient to remedy illegal collusive or exclusionary behavior by IP owners or to restore competition in a market, and using a properly designed compulsory license.
34	Uzbekistan	-	-	-

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