The suggested questions will try to analyze and to understand the definition of the “person skilled in the art” in three steps: the notion of the “person”, the issue of its personal “skills” and finally the “technical field” in which these skills are exercised.

1) The study proposed by AIPPI starts with the consideration of the person as one of the elements of the definition of the person skilled in the art.

The Groups are therefore requested to indicate if the person skilled in the art is one, or more, person.

If a skilled person is a team of people, then are the team members all the same or may they be different in their various attributes, specifically if such a team may comprise persons from various disciplines or having different levels of qualifications?

The "person skilled in the art" in connection with the inventive step requirement in German patent law has never been the generally educated skilled person, but has always been the one who, in accordance with his technical field and is technical level, would be faced with the object on which the protected teaching is based when looking for a solution. This statutory criterion is thus directed at the expected competence to find a solution. It is therefore not a question of the number of persons, even if as a rule, the skilled person is usually one person and not several within the meaning of the law.

Sec. 4 PatG, like Art. 56 EPC, defines that an invention is considered involving an inventive step if, having regard to the state of the art, it is not obvious to a person skilled in the art. This definition is unambiguous with respect to the question posed and is not amenable to an interpretation - the skilled person is one person. If the legislator had wanted to allow the yardstick by which inventive step is measured to be whatever a group of skilled persons is able to derive from the prior art in an obvious manner, it would clearly have had to use a different wording.

This is confirmed by the recent Federal Supreme Court case law which now and again contemplates whether a skilled person, when dealing with certain questions in practice today, is one of a team of specialists. Even in these cases, the Federal Supreme Court has
rightly emphasised that it cannot be derived from this observation that all of the knowledge and skill that any other member of the team has can automatically be ascribed to the skilled person, BGH Xa ZR 130/07 – „Escitalopram“. These considerations will only come to bear in the determination of what the skilled person (as previously defined) can derive from the prior art in an obvious manner. In this context it is expected that a skilled person - when faced with a recognized (sic!) problem in a field that is not his - will consult other persons with other skills and knowledge and will ask them in order to obtain expert advice on the foreign field.

As we have mentioned above - all these considerations come to bear after the skilled person has been defined, when assessing whether the invention was rendered obvious by the prior art, and in this context when dealing with the question as to how a skilled person (once defined) would handle the object of the invention. If it is occasionally assumed in this context that this skilled person could possibly be a member of a team of specialists in order to solve the object, or could obtain advice from other specialist fields, then rightly this does not mean that the relevant skilled person himself could be a plurality of persons. The bottom line is that only one skilled person is assumed for determining inventive step.

This conclusion is conducive too, because it represents the right starting point: In each individual case, it permits to determine whether the skilled person had any motivation to consult experts or other persons with more skill, once he had recognized a problem. It leaves room for considerations as to which specialists the skilled person might have consulted based on a certain problem, and which contribution this further skilled person could have been expected to make. If one were to choose a team of experts as a starting point for the assessment of inventive step from the outset, then the assessment of what can be derived from the prior art in an obvious manner would be foreshortened by a decisive step: One skilled person (in the art) would have had to recognize a certain problem, and would also have had to recognize that it is advisable to consult other team members in order to solve it.

2) Is the skilled person a real person (or team of persons) or a hypothetical person?

It is obvious that the skilled person cannot be a real person. It is a fictitious character that designates a person who was typically involved in development work that corresponded to the invention, in a relevant company at the priority date. The skilled person is ascribed average skill and knowledge; in the literature and case law, he is therefore occasionally referred to as the "average skilled person".

Any other definition seems hard to fathom. If one were to base the assessment of inventive step on an existing person, and to determine skill, knowledge and what is "obvious" e.g. by examining witnesses, the results would not be reproducible. This person may exhibit different degrees of creativity on different days, he is dedicated to some things while he finds others more difficult - so it would be a matter of chance what this persons considers to be obvious or not. The question as to whether the skilled person is a real person is therefore rightly not a topic of discussion in Germany.

3) The person skilled in the art has to be analyzed in the frame of her/his personal capacities and attributes.

At first, it is necessary to know whether and if so to which extent this person has reasoning and/or creative capacities or if he/she has merely the capacity to perform or execute the orders or instructions from other people.

The skilled person under patent law is the one who is asked to find a solution to the problem underlying the invention; by definition, he will be someone who has creative capacities.
The skilled person has the specialist knowledge that is customary at the priority date and is of average skill.

Since the skilled person in patent law embodies the experts typically entrusted with development jobs in the technical field of the invention, the skilled person can generally be expected to take up suggestions known in the art to improve known solutions, e.g. to simplify known devices or build them to take up less space or be less costly. In doing so, he will apply the rules and methods of construction, modifications and experiments customary in his field, so that the work of the designer is usually not inventive, even if he skilfully combines known elements. (Benkard/Asendorf/Schmidt, PatG, Sec. 4 at 40)

What the skilled person can achieve when appropriately applying his specialist knowledge is not inventive. (Busse/Keukenschrijver, PatG, Sec. 4, at 132) The application of a general teaching to a narrower one can generally be expected. In contrast to that, fundamental innovations, or extensive testing, or modifications that initially seem to be little promising, cannot be expected; however, the degree of qualification is also relevant here (Busse/Keukenschrijver, PatG, Sec. 4, at 136) The general principle is that a skilled person with high qualifications (university degree) can be expected to be more creative than e.g. a craftsman.

Another point that can be discussed is whether the personal attributes of the person skilled in the art are the same also for other circumstances in which the person skilled in the art may have a role, such as construction of the patent or for the consideration of the sufficiency of the disclosure in the specification, even if this last point goes beyond the scope of the present study.

The answer to this question is "yes". When determining whether or not the invention is disclosed to the skilled person in an obvious manner by the prior art pursuant to Sec. 4 PatG or Art. 56 EPC, it is necessary to determine what this "invention" is. Systematically, it is obvious that the assessment of the "invention" according to Sec. 4 PatG or Art. 56 EPC, respectively, must correspond with the legal position that the inventor has been assigned by the grant of a patent. Pursuant to Sec. 14 PatG or Art. 69 EPC, respectively, the scope of the patent and the patent application is determined by the patent claims, with reference being made to the description and the drawings in order to interpret the patent claims, in order to assign the features defined in the patent claims a literal meaning. In order to make sure that the standard applied in the assessment of the inventive step underlying the protected subject matter - concerning the question as to whether an invention has a quality sufficient to warrant the grant of a patent - is not a different one than the one applied when determining the scope of protection that the protected subject matter is entitled to, it seems inevitable to base both assessments on the same person skilled in the art with the same knowledge and skill. This is because otherwise patent protection would arise within a scope in which an assessment of inventive step did perhaps not take place. The construction of a patent claim must therefore be based on the same person skilled in the art having the same knowledge and skill as the one to be used in the assessment of inventive step.

The question as to whether an invention is sufficiently disclosed also depends on the skilled person as a yardstick, because Sec. 4 PatG or Art. 56 EPC, respectively, require that the invention is assessed against the prior art based on the average skill and knowledge of a person skilled in the relevant field. This assessment includes that the skilled person is also relevant for determining what the "invention" is. It is therefore up to the skilled person to assess which teaching he derives from a patent application as an invention that can be carried out.

Finally, the question that can be discussed is the issue of knowing if the personal attributes of the person skilled in the art are the same for different IP rights covering
technical creations, like patents or utility models, species, etc., if they exist in the national law.

In Germany, technical developments are protected on the basis of the Patent Act, the European Patent Convention and the Utility Model Act, provided the quality of the development has the required level. The relevant provisions in Sec. 4 PatG and Art. 56 EPC are identical, differences between these provisions are not discernible.

According to Sec. 1 Para. 1 GebrMG [Utility Model Act], inventions can only be protected as utility models if they are based on an inventive step. The GebrMG itself does not define how it can be assessed whether an invention is based on an inventive step. Notably, the GebrMG does not *explicitly* make reference to the knowledge and skill of the person skilled in the art. Nonetheless, under the Utility Model Act, inventive step is also measured against the skill and knowledge of the *skilled person*. The skilled person on whom the determination of the inventive step relevant under utility model law must be based, does not differ from the skilled person who is relevant in the determination of inventive step under patent law. Otherwise one would arrive at different conclusions e.g. when determining the disclosure of a prior art application, depending on whether this is an earlier utility model application or an earlier patent application. It is obvious that the disclosure of an original priority application cannot be assessed against the knowledge and skill of different skilled persons.

In the "Demonstrationsschrank" decision - X ZB 27/05, the Federal Supreme Court had the opportunity to deal with the question as to how the inventive step is to be determined under utility model law, and in particular whether the Utility Model Act is able to protect developments that suffice lesser requirements than those of the Patent Act, i.e. that the skilled person is able to derive from the prior art in an obvious manner. The Federal Supreme Court held that reserving obvious matter to the utility model proprietor alone, while excluding all other sections of the trade, would meet with constitutional law concerns, because such an extension of intangible property rights could not be justified against the fact that the liberty of action of third parties is protected by constitutional law. Moreover, there are no apparent criteria eligible for generalisation, which would permit to still stay below the requirements of inventive step, yet by which a monopolisation of trivial innovations, in the case of which an exclusion of third parties from use could not even be justified with reference to superior law, is avoided.

In summary, the question can be answered by saying that the same standard applies with respect to all technical property rights in Germany. A technical property right is only granted for inventions which the skilled person cannot derive from the prior art in an obvious manner.

4) Another important aspect of the question is to know what are the personal skills of the "person skilled in the art"?

The German Patent Act does not contain any rule as to what kind of knowledge and skill the skilled person has, or how this has to be determined.

Usually, the Federal Supreme Court poses the following question to the expert in patent nullity cases: "*What is the qualification and professional experience that persons dealing with the development of innovations in the field the teaching of the patent in suit is concerned with usually have in practice?*" Accordingly, one needs to determine first of all, which field the invention belongs to. To do this, one needs to determine the object that is solved by the invention. The next step is to find out which persons deal with the development of innovations in the field in practice. Users, prospective customers, clients or customers of products or methods according to the invention are not the relevant group of persons. However, such persons may have to be taken into account when discussing the question from where the skilled person has received his motivation (BGH dated 17.09.2002, X ZR
If a pharmacist recognises problems that exist in connection with the operation of the equipment used in his business, when interested in finding a solution, he will therefore approach a technically versed person or company which he deems suitable in the individual case at hand. Since the technical problems that may arise in a pharmacy tend to be limited, it can furthermore be assumed that a circle of specialists equipped to specifically deal with problems in this field has probably not been able to form. The relevant skilled person therefore is an apparatus engineer having a background in process engineering whom the pharmacist has familiarized with the problem at hand, who has a university degree and several years of experience on the job and who is able to realise apparatus-based solutions to meet the requirements that users have in various fields of the art.

The final question is which level of training and which experience the persons usually have.

All questions about the knowledge and skill of the person skilled in the art must then be geared toward the average knowledge and skill of these skilled people (having the usual qualification and experience).

At least, two important issues deserve to be analyzed:

- What is the level of the qualification or skills of the person?

The qualification of the (fictitious) skilled person, i.e. his level of training and his experience, depend on which training and experience persons have who typically deal with the development of innovations in companies working in the field of the invention - i.e. the subject matter of the patent claims. Depending on the field of the invention, the skilled person can therefore either be a person with or without university degree.

The skilled person does not need to be specially qualified and have a university background if the typical companies (at the priority date) did not maintain any development departments, or if it cannot be assumed for other reasons that specially qualified persons with a university education are permanently employed (BGH dated 29.09.2009, GRUR 2010, 41, 42 – Diodenbeleuchtung: "... as a result of the oral hearing it can be assumed that typical glass building companies did not maintain development departments at the time or employed solid state physicists, especially since the product range of such companies did not give rise to the expectation that such companies employed such specially qualified staff with a university background on a permanent basis." BGH, GRUR 2005, 233. 235 – Panelelemente: "In the discussion in the oral hearing it turned out, however, that the businesses in question were mostly small and medium-sized enterprises in which the further development of known technologies was mainly the job of practitioners who do not have a university education - master craftsmen or mechanics, or experienced journeymen. It is therefore the knowledge and activities of these persons on which the further assessment must be based." BGH, BfPMZ 2004, 213, 214 – Gleitvorrichtung: "The relevant person skilled in the art in the present case is a design engineer having a technical education and corresponding professional experience. He does not have a university background, e.g. a degree from a technical college. Such a degree may be customary among the staff of design departments of industrial companies who preferably develop automatically operating technical devices for hospitals or rehabilitation centres. But such companies do regularly not deal with the design of simple products such as the devices according to the patent in suit. Such devices are usually the product of the knowledge and experience of businesses that tend to work on a more craft-oriented basis."

If the companies typically working in the field have a corresponding structure, the relevant person skilled in the art can also be university-trained and highly specialised (BGH, decision dated March 3, 2009 - X ZR 53/07: "The skilled person ... is considered to be an engineer
holding a degree in mechanical engineering from least at a technical college, and who in the course of his professional career has acquired special knowledge and experience in the field of printing machines for the further processing and handling of print products. This is the skilled person to be applied here, because the mechanics concerned are fairly complicated and its development or further development in the relevant companies tends to be placed in the hands of persons having a university background with in-depth practical knowledge and experience, rather than less competent employees. "BGH on 10.09.2009, Xa ZR 130/07 – Escitalopram: "The skilled person, the knowledge and experience of whom is relevant for the assessment .... is an experienced organic chemist or pharmaceutical chemist who is familiar with the structure and activity of pharmaceutical substances being developed or already in use. As the court-appointed expert has confirmed, this skilled person is part of a team of specialists that deals with finding new substances and developing them ...")

- And what are the nature and the scope of his/her knowledge?

The skilled person has the average knowledge (and skill) of a person having the qualification described above (BGH, BIPMZ 1991, 159, 160 – Haftverband).

In its decisions, the Federal Supreme Court makes reference to the "technical knowledge" (BGH, GRUR 2006, 930, 934 – Mikrotom), „common general knowledge“ (BGH, GRUR 2008, 90, 93 – Verpackungsmaschine), „general basic knowledge“ (BGH, BIPMZ 1989, 133 – Gurtumlenkung), „specific technical knowledge“ (BGH, GRUR 2009, 835, 837 – Crimpwerkzeug II) and „general knowledge“ (BGH, GRUR 2009, 835, 837 – Crimpwerkzeug II).

It is appreciated by the German National Group, the precise meaning that the respective nature of the "knowledge" of the skilled person has for assessing inventive step has not been defined sufficiently clearly yet by the Federal Supreme Court. On the one hand, in some decisions, the Federal Supreme Court negates inventive step based on the argument that these are steps the skilled person could perform by means of his (common) general knowledge and skill (BGH, GRUR 2006, 930, 934 – Mikrotom; BGH dated 13.10.2009 - X ZR 5/06: "Based on his common general knowledge and his experience, the skilled person was easily able to recognize that ..." BGH, GRUR 2008, 90, 93 – Verpackungsmaschine: "Thus it was part of the common general knowledge at the priority date that ..."), on the other hand, the Federal Supreme Court explained that the fact that knowledge of certain technical facts formed part of the "common general knowledge" does not prove that it was obvious to the skilled person to make use of this knowledge when solving a certain technical problem. (BGH, GRUR 2009. 743, 745 – Airbag-Auslösesteuerung; BGH, GRUR 2009, 835, 837 – Crimpwerkzeug II: "When assessing a technical innovation under the aspect of inventive step, the common knowledge of the average skilled person working in the field of the patent in suit must also be considered in addition to the specific technical knowledge of the relevant experts. ... But it cannot simply be concluded from this that the application of a measure that forms part of the common general knowledge of the skilled person in a specialist technical field was obvious to the expert community, if there are no indications thereof and if, on the contrary, the development in this special field in fact took a different course."

When presenting the (fictitious) knowledge of the (fictitious) skilled person down below, it must therefore be borne in mind that the scope of this knowledge does not necessarily allow to draw conclusions about the question of inventive activity.

The second issue encompasses more precisely the question of the capacity to understand and to analyze the documents which are accessible to the person skilled in the art, this capacity being called “the general knowledge" and concerns the proof of the content of the "general knowledge":
a) what is the scope of such knowledge in general terms?

It is the understanding of the German National Group that "knowledge" as used in this question refers to the knowledge that is directly accessible to the skilled person when evaluating the prior art. The scope of this knowledge corresponds to the average knowledge of the persons having the qualification described above. It must be taken into account that the "knowledge" of the skilled person also includes established technical misconceptions or prejudices prevailing among the expert community, which may have diverted him from the technical solution to be assessed (BGH, GRUR 1982, 406, 408 – Verteilergehäuse).

b) is such knowledge limited to the general technical training of such person?

The skilled person’s knowledge is not limited to the content of his general technical training. It must be assumed that based on his professional experience, the skilled person has in-depth knowledge in his specialty, and also knowledge in neighbouring fields or a higher-level general technical field in which the same or similar problems arise to a greater extent (see BGH, BiPMZ 1989, 133 – Gurtumlenkung).

c) to what extent is information in documents – articles or prior patents - considered to be included as part of such working knowledge?

The knowledge (in the above sense) comprises information that the skilled person is aware of as immediately available, readily accessible knowledge, directly from memory or from sources of information he is familiar with, such as a customary technical book (Kraßer, Patentrecht, 6th edition, 2009, p. 313). As concerns the other prior art, it can only be generally noted that the skilled person may be aware of it. Yet the average person skilled in the art cannot be expected to have more than random, isolated knowledge of other prior art.

d) can such knowledge include information which the person may not have memorized, but can readily look up?

As already mentioned, the knowledge (within the above meaning) also comprises information that the skilled person knows from memory, but which he can easily look up (based on his qualification).

5) The question of the person skilled in the art raises also the problem of the moment of the evaluation of those skills: should they be all evaluated at the moment of the appreciation of the validity of the patent, i.e. at the moment of the priority date, or could they be evaluated also at the date when the patent is assessed by the Judge, for example in the infringement proceedings, where the validity can be debated jointly with the infringement claim? This may conduct to the differences of appreciation in case the notion of the equivalence is used in relation to the prior art.

Generally, in all matters in which the skilled person is relevant - novelty, inventive step, sufficient disclosure, interpretation of the patent claim, determination of scope - the relevant date is the priority date (BGH, GRUR 2008, 90, 93 – Verpackungsmaschine: "In this respect it was part of the common general knowledge at the priority date that ....").
There is a certain limitation of this principle, however, when determining the scope of the patent in connection with the equivalence test. In a recent decision, the Düsseldorf Higher Regional Court explained:

"An equivalent patent infringement may also be present if the alternative means as such was not known at the priority date, because it was not made available until through the further advances in technical development. Under such circumstances, it is sufficient for an inclusion in the scope of protection that the requirement for equivalence that the means must be obvious when making considerations that are guided by the technical teaching of the patent claim is met, if it is assumed that the skilled person was already aware of the alternative means (which actually did not become available until later) at the priority date." (OLG Düsseldorf, InstGE 10, 198 - "Zeitversetztes Fernsehen")

6) The next issue related to the definition to the person skilled in the art is the technical domain or "the art" in which his or her skills are performed.

The first sub-question is to know if those skills are concentrated in one or several technical fields.

As already mentioned, the skilled person is a person who deals with the development of innovations in companies usually doing business in the field of the invention. Whether the field this person works in is a technical field for which a separate name has been coined, or whether it is necessary to describe the field he works in as a borderland or sum of several established "technical fields" is of no importance. In the "Olanzapin" decision, the Federal Supreme Court defined the skilled person as an "experienced organic or pharmaceutical chemist working with pharmacologists and medical doctors" (BGH, GRUR 2009, 382, 385 – Olanzapin). As we have mentioned, the fact that the skilled person works in a team of specialists from other fields does not mean that all of the knowledge that any other team member has can be ascribed to him (BGH dated 10.09.2009, Xa ZR 130/07 – Escitalopram). In the "Überdruckventil" decision, the Federal Supreme Court held: "A special university training as packaging engineer did not exist at the priority date of the patent in suit according to the information given by the court-appointed expert. Merely special lectures about packaging technology existed that were offered at colleges for food processing technology, colleges for engineers and at technical universities for engineers in the field of technical physics, chemistry, mechanical engineering or process engineering. ... The general professional experience of the average packaging expert included knowledge in materials engineering in the area of plastics .... and working with sealing compounds. Knowledge of different sealing technologies can also be assumed." (BGH, BIPMZ 1991, 306-307 – Überdruckventil).

And the second one is related to the way the frontiers between different technical fields can be established: how this determination is assessed by the Judges or Patent Offices?

As already mentioned, the skilled person is defined as a person who has the special knowledge of someone who deals with the development of innovations in companies usually doing business in the field of the invention. The "technical field" of the expert ends where these persons only have general basis knowledge and where he has no reason to follow the current technical developments (see. BGH, BIPMZ 1991, 306-307 – Überdruckventil).

7) The question is also to know what is the nature of his/her competence in the technical field and particularly if this competence theoretical or practical?
Concerning the knowledge of the skilled person, this means the average knowledge of the practitioner to the extent that he has a practical and theoretical idea of things happening in his technical field. As already mentioned, the knowledge of the skilled person is not limited to his general technical training, but also comprises knowledge that the skilled person acquires through his practical professional experience. In the BGH Xa ZR 138/05 decision "Fischbissanzeiger" dated June 18, 2009, this is summarized as follows:

"... skilled person, who is not an angler, but a designer who does not necessarily have a university degree (see BGH, decision dated 5.11.1964 - Ia ZR 152/63, GRUR 1965, 138, 141 - Polymerisationsbeschleuniger), with experience in the development of fishing rods, who, if necessary, obtains information about angler's needs from anglers, and who consults specialists in those areas in which his own technical knowledge is not sufficient (see BGH, decision dated 4.1994 - X ZR 83/91, in Bausch, Nichtigkeitsrechtsprechung in Patentsachen, BGH 1994 - 1998, 159, 163 - Betonring, with further references)..."

thus attaching even greater importance to knowledge coming from practical development work compared to theoretical knowledge.

The question to which degree the skilled person is guided by his practical experience or by more fundamental considerations also depends on the qualification he is deemed to have. If the starting point is a skilled person without university training, he is regularly thought to think in a more practice-oriented fashion, whereas if the skilled person is considered to be someone with a university degree or someone doing research at a university, he is assumed to also make fundamental or theoretical considerations.

8) The Groups are requested to indicate how in practice the assessment of the skills of the person skilled in the art is operated. What is the role of the opinion of the experts on this point?

The ascertainment of the relevant knowledge of the average skilled person by the court is generally problematic in view of the fact that he is a fictitious character. This is summarized as follows e.g. in the decision BGH GRUR 2004, 1023, 1025 - Bodenseitige Vereinzelungseinrichtung:

"The skilled person's considerations, recognition and imagination is referred to ... in order to have a reliable basis for making a decision in the form of the customary - common - general knowledge in the relevant field of the art, and the average knowledge, experience and skill of those working in the field and based on this, the meaningful understanding of the content of an enabling teaching. The consequence of this is, of course, that the relevant view itself cannot be directly determined. It can only be inferred by evaluating the factual circumstances which in turn are - directly or indirectly - suitable to give provide information on the facts which are decisive here."

To aid this process, reference can be made to works of specialist literature. These include textbooks, reference books, and customary specialist journals, but also opinions and communications from the skilled person practical work, as well as measures that are customary in the field of the skilled person, or which form part of the basic knowledge (BGH GRUR 1998, 895 f. - Regenbecken). This also includes investigations and experiments to the extent that these are based on routine work. Furthermore, databases can represent common general knowledge, even if they are not manuals or encyclopaedias in the narrower sense, provided that
the are known to the skilled person as a suitable source of the information sought after,
- they can be searched for this information without undue effort
- they provide the information clearly and unmistakably without further research being necessary (EPO T 890/02 dated 14.10.2004).

The approach taken by the German courts when making this specific determination depends on the individual case:

In the first instance of nullity proceedings it has been the practice of the Federal Patent Court to determine the qualification of the skilled person based on the submissions of the parties and without the help of an external expert. The reason for this was, among others, that the Divisions of the Federal Patent Court also have technical members, apart from the legal ones. However, amendments introduced by recent legislation are supposed to make the courts resort to experts more frequently.

In nullity appeal proceedings, however, it has been the practice to obtain an expert opinion as a rule. Accordingly, the determination of the skilled person is summarized as follows in a recent decision of the Federal Supreme Court (BGH Xa ZR 22/06, decision dated July 30.2009 "Dreihnahtschlaufolienbeutel", comment in brackets and emphasis by the undersigned):

"The patent court [without expert] considered the skilled person to be a mechanical engineer with a degree from a technical college and a major in packaging engineering, having several years of experience in the development and manufacture of film packaging with sealing film. The examination of the court-appointed expert confirmed this determination which was not contested by the parties, either. The court-appointed expert accurately pointed out that this packaging expert, as the patent court also rightly held, has to take into account the requirements of the pharmacist with respect to the physical and chemical properties and the production and filling conditions of the drug, but also those properties which are relevant in the packaged final product from a pharmacological point of view or under marketing aspects."

In infringement proceedings, the relevant common general knowledge is in particular determined in connection with questions relating to the interpretation of features or the equivalence test. In the first instance, the result of this determination is usually found based on the submission of the parties bearing in mind the burden of presentation of proof, while in the second instance an expert is consulted on this matter more frequently. The principles to be applied here were summarized e.g. in the decision OLG Düsseldorf, InstGE 10, 198 - "Zeitversetztes Fernsehen":

" ... because the evaluative understanding of the content of the features of a patent claim which the infringement court needs to come to, is regularly influenced by facts which can only be assessed from the point of view of the average skilled person, and which therefore have to be determined based on this skilled person's understanding. This includes a certain understanding of those skilled in the relevant art, but also knowledge, skills, experience and methodological approaches that the skilled person would have used at the priority date when reading the patent document. The infringement court has to determine all this - if necessary by obtaining and dealing with the opinion of an expert (BGH, GRUR 2006,962 - Restschadstoffentfernungs) - and on this basis, the court has to determine the substance of the patent independently (BGHZ
Future harmonization:

After assessing the national solutions, the Groups are invited to present their proposals for the possible harmonization and specifically the harmonized definition of the person skilled in the art. The object of this section is not to repeat all the questions related to the current statute of the national law, but to find the most fundamental points on which the international harmonization could be sought.

1) Specifically, the Groups are invited to precise on which points they see the particular need of the international harmonization on the issue of the person skilled in the art.

The German National Group considers an international harmonization desirable regarding the question as to how the qualification of the skilled person, i.e. his training and experience have to be determined. The approach of the Federal Supreme Court seems to be a good starting point for a proposed harmonization, i.e. to ask which qualification and which experience those persons have who in companies usually deal with the problems posed by the invention. The German National Group would also welcome if an international harmonization could be achieved on the fact that this is a question of fact which is generally accessible to offers of evidence.

A particularly difficult, related question is the definition of what the "readily available technical knowledge" of the skilled person is. It is particularly doubtful whether the readily available technical knowledge is only what the skilled person carries in his head, or also what he remembers or what he can look up. The distinction made in Germany between the "readily available technical knowledge" on the one hand, and "knowledge" that is attributed to the skilled person when assessing inventive step in a specific case on the other hand, is also a question that should be answered similarly on an international level.

2) The Groups may indicate if the "person skilled in the art" standard should be assessed as a hypothetical model or on the contrary appreciated in concreto?

The German National Group is of the opinion that the skilled person is a fictitious person, a "hypothetical model".

3) Should the skills of the "person skilled in the art" be only to execute other person orders or should they be creative and both practical and theoretical?

The German National Group is of the opinion that the "skilled person" is always creative, both in practice as well as in theory. As early as when determining the qualification of the skilled person one needs to ask what kind of persons typically think about new solutions in the field in question (BGH-Diodenbeleuchtung, at 21). A (fictitious) person that is not used to using its head and to trying out something new cannot be a standard for patentability. Especially today, as practically every company strives for innovation, the skilled person is always creative, but only in the sense of average creativity.

4) Should the art in which the skilled person intervene be of only one discipline, or should it cover several technical fields?

The German National Group is of the opinion that this question has to be assessed against what is customary in practice (in the individual case). It is the view of the German National Group that the main criterion should be which knowledge a skilled person entrusted with solving the object of the invention usually has in practice. It does not matter if one "technical
field” has become established with a separate name for the field the skilled person is working in, or whether the relevant field he works in is referred to as a borderland or sum of several established "technical fields". What is decisive is that the skilled person works in a field with limits that are defined by is usual activity. The exact nature of this field is a result of the determination of what is customary in the companies dealing with the problem of the invention.

Following this opinion permits that a skilled person working in a certain field recognizes that helpful hints may be found outside his technical field which would lead to an interdisciplinary solution. This other knowledge outside the field he works in is not attributable to his own (original) knowledge; when determining inventive step, it may be necessary to assess steps that the average skilled person would undertake in order to acquire the knowledge of other technical fields.

5) The Groups are also invited to present all other suggestions which may appear in the context of the possible international harmonization of the definition of the person skilled in the art.

The German National Group would welcome a resolution establishing that the knowledge and skill of the skilled person is a question of fact that is amenable to a taking of evidence.

Summary:

In German Patent Law, the "expert" is an artificial character. Certain characteristics (technical knowledge and technical skill) are attributed to it that an average expert would have, who in industrial practice would be assigned the task to search for the solution of the task underlying the protected teaching.

This expert possesses the common knowledge existing at the priority date in its field as well as average skills. Its common knowledge and its average skills have been acquired by the expert through common theoretical training in the relevant field as well as through practical experience in its area of expertise.

The German Section would appreciate if the determination of the expert's qualification (i.e. its training and experiences) could be internationally harmonized. In doing so a sensible start point could be determined by the common qualification and experience of those persons who are usually assuming the tasks that the invention is focusing on in enterprises. The German section would further appreciate if the assessment of this determination as a question of facts that in principle can be susceptible of proof could be internationally harmonized as well.
Zusammenfassung:

Im deutschen Patentrecht ist der „Fachmann“ eine Kunstfigur. Ihm werden Eigenschaften (technisches Wissen und technische Befähigung) zugewiesen, die ein durchschnittlicher Fachmann besitzt, dem in der gewerblichen Praxis die Aufgabe gestellt würde, eine Lösung für die Aufgabe zu suchen, die der unter Schutz gestellten Lehre zugrunde liegt. Dieser Fachmann verfügt über das auf seinem Gebiet zum Prioritätstag übliche Fachwissen und über durchschnittliche Fähigkeiten. Sein übliches Fachwissen und seine durchschnittlichen Fähigkeiten hat der Fachmann sowohl durch die im relevanten Gebiet übliche theoretische Ausbildung, als auch durch praktische Erfahrung in seinem Fachgebiet erworben.

Die deutsche Landesgruppe erachtet es als wünschenswert, wenn international harmonisiert werden könnte, wie die Qualifikation des Fachmanns (d. h. seine Ausbildung und seine Erfahrungen) zu bestimmen ist. Ein sinnvoller Ausgangspunkt hierbei könnte durch die übliche Qualifikation und Erfahrungen derjenigen Personen bestimmt werden, die üblicherweise in Unternehmen mit Aufgaben befasst sind, die sich die Erfindung stellt. Die deutsche Landesgruppe würde es auch begrüßen, wenn eine internationale Harmonisierung dahingehend erzielt werden könnte, dass es sich bei dieser Bestimmung um eine Tatfrage handelt, die grundsätzlich einer Beweiserhebung zugänglich ist.

Résumé:

Dans la législation allemande sur les brevets, "l'expert" est un personnage artificiel. Des caractéristiques (connaissance technique et qualification technique) lui sont attribués qu'un expert moyen possède qui dans la pratique industrielle a pour tâche de chercher la solution de la tâche sur laquelle l'enseignement technique protégé est fondée. Cet expert détient la connaissance de spécialiste habituelle de son domaine à la date de priorité et des capacités moyennes. L'expert a acquis sa connaissance de spécialiste habituelle et ses capacités moyennes par la formation théorique qui est habituelle dans le domaine pertinent et aussi en faisant des expériences pratiques dans sa spécialité.

La section allemande considère souhaitable que la manière de déterminer la qualification de l'expert (c'est-à-dire sa formation et ses expériences) puisse être harmonisée à l'international. Un point de départ raisonnable à ce sujet pourrait être déterminé par la qualification habituelle et les expériences des personnes qui habituellement accomplissent les tâches sur lesquelles l'invention se porte dans des entreprises. La section allemande apprécierait aussi si une harmonisation internationale pouvait être réalisée concernant le caractère de question de fait de cette détermination qui en principe est susceptible d'être l'objet d'un examen des preuves.