



POLICY BRIEF



October 23, 2025

RESPONSE TO EC OPEN CONSULTATION ON TTBER GUIDELINES

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Below are our brief comments on the draft of the revised Technology Transfer Block Exemption Regulation ('TTBER') and revised Guidelines on the application of Article 101 of the Treaty to technology transfer agreements ('Guidelines') on behalf of CIP (Center for Intellectual Property), Gothenburg, Sweden. CIP's mission is to facilitate the transformation of knowledge into wealth and welfare through promoting research, education, and collaboration in the field of intellectual property.

Our insights stem from decades of standard-essential patent (SEP) research, industry licensing efforts, and policy experience as part of the EC SEP Expert Group, which forms the foundation for our understanding of the markets for SEP-enabled standards and SEP policymaking. In general, we support the use of pools (both technology pools and license negotiation groups) to enhance the efficiency of SEP licensing, thereby benefiting both innovation and the dissemination of standards. For this response, we have limited our comments to the provisions concerning Licensing Negotiation Groups (LNGs) in the context of SEP-enabled standards.

General Comments

Open standardization is a unique form of collective, private ordering that facilitates upstream collaboration on standards development and downstream competition in product markets.³ In the context of SEP-enabled standards, such as cellular and WiFi standards, standard development

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² Ruud Peters is currently the Co-Director of the Center for Intellectual Property (CIP) at the University of Gothenburg, and the CEO of Peters IP Consultancy. Before that, he served as Chief Intellectual Property Officer at Philips Intellectual Property and Standards for 15 years, where he developed one of the most successful industrial IP departments in the world, generating significant value from IP and standards for Philips' businesses. He was a member of the ETSI IPR Committee that formulated the ETSI IPR Policy and member of the DVB IPR Committee that formulated the DVB IPR Policy. He was involved in the establishment of several patent pools, including MPEG-2 Video, CD, DVD, and One-Blue. He was a member of the SEP Expert Group at the European Commission.

³ Heiden, B., & Baron, J. (2021). A policy governance framework for SEP licensing: assessing private versus public market interventions. Available at SSRN: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3872493.

organizations (SDOs) employ FRAND-based IPR policies to govern the downstream licensing of SEPs between SEP holders (licensors) and SEP implementers (licensees). The FRAND agreement is a contractual instrument that defines the general scope of licensing agreements under Fair, Reasonable, and Non-Discriminatory terms.

The key insight for competition policy is that SEP licensing is not an open market negotiation between competing suppliers of inputs and buyers, but rather the fulfillment of a FRAND agreement that was defined during the standard's development. The FRAND commitment limits the market power of sellers and buyers that could otherwise occur in open markets. Under the constraints of FRAND, both seller pools (patent pools) and buyer pools (LNGs) provide pro-competitive solutions to increase the efficiency of SEP licensing, particularly in the context of standards that involve numerous licensors and licensees. This is especially true for newer IoT markets, where implementing firms in new verticals often lack knowledge of SEP licensing and are reluctant to obtain a license unless all their competitors are also licensed (i.e., the collective action problem).

In summary, SEP licensing is not a traditional arm's length market of competing buyers and sellers. It is the finalization of a collective agreement, FRAND, which was established as part of the SDO's open standardization process, often for a single, global standard. The goal of the FRAND agreement, by definition, is to govern the scope of SEP licensing at a fair and reasonable price, offered in a non-discriminatory manner to similarly situated implementors, so as not to distort competition on the product market. Thus, SEP licensing exists as a pre-competitive layer between the upstream markets for technology and the downstream markets for products. This is why collective activities, such as patent pools and LNGs are fundamentally pro-competitive if designed properly, and why safe-harbour guidelines are so beneficial to their formation. We have previously written an article that outlines these key issues in greater detail.⁴

Response to Draft Revised TTBER Guidelines

We appreciate the Commission's guidance on LNGs included in Section 4.5 of the Guidelines. The introduction of the soft safe harbour for LNGs offers the necessary clarity about the conditions they must meet to operate without likely violating competition rules.

1. Safe harbour

We find the safe harbour conditions (a), (b), (c), (d), and (f) listed in paragraph (326) of the Guidelines reasonable and acceptable. However, we have some observations regarding conditions (e) and (g).

2. Condition 326 (e)

⁴ See Peters, R., Nikolic, I., and Heiden, B. (2022). Designing SEP Licensing Negotiation Groups to Reduce Patent Holdout in 5G/IoT Markets (March 1, 2022). *5G and Beyond: Intellectual Property and Competition Policy in the Internet of Things* (eds. Jonathan M. Barnett and Sean M. O'Connor) Cambridge University Press.

Regarding condition 326 (e), we opine that LNG members must not engage in coordinated hold-out behavior for any purpose. We support efficient, good-faith licensing negotiations by LNGs as the best way to achieve the benefits they can offer to their members. We agree that LNGs must not restrict the ability of SEP holders to decide whether to enter into negotiations with an LNG or to terminate such negotiations.

We do have several concerns regarding the limitation to a maximum of six months that LNG members may agree not to negotiate bilaterally with a SEP holder or patent pool. In addressing this issue, we will distinguish between negotiations of an LNG with an individual SEP holder and with a patent pool.

An LNG may have governance rules requiring its members to enter into a license agreement, negotiated by an LNG administrator with a SEP holder or patent pool, provided that such license is based on a negotiation mandate agreed upon by the LNG members. This requirement aims to prevent hold-out by LNG members who might use the outcome of LNG negotiations (or advanced negotiation positions of the LNG) as a starting point for their own bilateral negotiations.

2.1. Negotiations between an LNG and a patent pool

If an LNG administrator negotiates with a patent pool, a member might decide that it would be better to negotiate a bilateral agreement with one of the licensors in the pool. Allowing this will generally not cause a problem as long as the leaving member still signs a license agreement with the pool (if based on a negotiation mandate agreed upon by the LNG members), regardless of whether that member has already signed a bilateral agreement with that licensor. Any adjustment to the royalty that this LNG member must pay to the pool can be handled between the licensor, licensee, and the patent pool administrator in the usual manner through pre- or post-netting.

2.2. If the LNG administrator negotiates with a single SEP licensor and then a member chooses to negotiate a bilateral agreement with that licensor, it causes serious problems that undermine the viability of the entire LNG. When a member has already committed to signing a license agreement negotiated by the LNG administrator, based on a mandate agreed upon by the LNG members, it must honor its commitment and not leave the LNG.

Allowing members to leave at this stage opens the door to two-step negotiations, where a member uses the outcome of the LNG negotiations as a starting point for its own bilateral negotiations. This not only leads to undesired hold-out by that member but also creates the risk that other LNG members will follow suit, especially when the departing member is a direct competitor. Given this risk, a SEP licensor will be hesitant to enter negotiations with the LNG administrator initially, as there is no assurance that any LNG member will ultimately sign a license agreement after successful negotiations.

We recommend that when an LNG is negotiating with a single SEP licensor, it should be allowed to limit the period during which an LNG member may leave the LNG. This period is preferably until the SEP licensor has made its (FRAND) license offer to the LNG administrator. After that, a departing LNG member may use information about the negotiation position(s) of the LNG in its own bilateral negotiations, which is entirely undesirable, as this would encourage two-step negotiations and lead to hold-out.

3. Condition (g)

Under this condition, the royalty rate may not exceed 10% of the sales price of the products that use the licensed technology (SEPs). This condition requires several clarifications, as some terms are ambiguous.

- 3.1. If a SEP holder targets licenses at the end-user product level, the products incorporating the licensed patents are these end-user products. However, if a SEP holder targets licenses at the component/module level, it may grant the component/module maker a license under patents used in the end-user products, which the component/module maker can then pass on to its customers. In that case, it is not clear what “the products incorporating the licensed technology” are.
- 3.2. This is relevant in considering whether a royalty does not exceed 10% of the sales price of the products incorporating the licensed technology. A royalty of 5% over the sales price of an end-user product is below the 10% threshold. Still, it could easily exceed this threshold if a license under the same patents is licensed to component/module makers for use in these end-user products.
- 3.3. It is also unclear what is meant by “sales price” of the products that use the licensed technology. Is this the net sales price as typically used in patent licenses, or something else? We recommend clarifying this, as the definition of sales price affects determining whether a royalty exceeds the 10% threshold.