

Call for Input – Technology Transfer Block Exemption Regulation

Unit 20, The Hyde Building
The Park, Carrickmines
Dublin
D18 AX61
Ireland

Avanci Response

6 September 2024

Stakeholder information

We would like to understand the types of stakeholders responding to this Call for Inputs, and the types of business which use the Assimilated TTBER and the Guidelines.

1. Please confirm the capacity in which you are responding to this Call for Inputs.**(a) If you are responding as a business:****(i) Please confirm whether you are primarily a licensor or a licensee of technology rights.**

Avanci is an independent joint standard essential patent (SEP) licensing platform. This independence allows it to talk with companies from the SEP licensing ecosystem without prejudice and subsequently discover a set of licensing terms and conditions for an optional, non-exclusive joint licence that can be (and, in the case of the Avanci 4G Vehicle, Avanci 5G Vehicle and Avanci Broadcast licensing programme have been) widely accepted by licensors and licensees. Since its founding in 2016, the mission of Avanci has been to provide simple, transparent and efficient SEP licensing solutions. For more information, please visit www.avanci.com.

(ii) Please specify the technology right(s) to which your knowledge of and/or experience with the Assimilated TTBER and the Guidelines primarily relate.

Avanci offers a variety of one-stop shop SEP licensing solutions for cellular technology: Avanci 4G Vehicle, Avanci 5G Vehicle, Avanci Aftermarket, Avanci Smart Meter and Avanci EV Charger. Furthermore, Avanci Broadcast offers a one-stop shop solution for the ATSC 3.0 broadcasting technology and Avanci Video licenses a range of video technologies (including AV1, H.265, H.266, MPEG-DASH, and VP9).

(iii) Please identify the sector(s) to which your knowledge of and/or experience with the Assimilated TTBER and the Guidelines primarily relates.

Avanci primarily has experience with the Technology Transfer Guidelines' section on so-called technology pools whose guidance has proved to be valuable for the operation of Avanci. Therefore, this response to the Call for Input will be limited to the Guidelines. Questions that do not relate to the Guidelines have therefore been removed from the questionnaire.

The Technology Transfer Guidelines

We are interested in understanding how effectively the Technology Transfer Guidelines are working and whether any changes to the Guidelines could improve their effectiveness.

17. The purpose of the Guidelines is to assist businesses in their assessment of technology transfer agreements. In your view:

(a) Have the Guidelines been effective in providing legal certainty for UK businesses in their assessment of technology transfer agreements?

We believe that the TTGs are sufficiently principle-based so they allow for innovative industry-led solutions such as Avanci to develop and create licensing efficiencies through aggregated – independent – licensing platforms. The TTGs have allowed for solutions such as Avanci not only to be launched but also to become widely adopted within certain industries to the benefit of the entire licensing ecosystem. Indeed, Avanci is independently owned and managed, and works with both licensors and licensees to find optimal licensing solutions.

Avanci's independence allows it to freely engage with both patent owners and prospective licensees, establishing license terms that fairly balance the interests of those constituencies, and which can be widely accepted, by licensors and licensees alike, and reflect requirements and specificities of a particular industry sector. The TTGs, in their current form, have facilitated such developments. Avanci's extensive global reach and success demonstrates the relevance of the TTGs. It has licensed the vast majority of vehicle OEMs in its 4G vehicle program (more than 100 brands collectively responsible for more than 175 million connected vehicles have been licensed under the 4G, 3G and 2G SEPs of more than 55 companies and research institutes around the world) and continues to engage with the rest of the automotive OEMs.

Avanci's 5G vehicle program, which was launched just last year and adds 5G SEPs to go along with 4G, 3G and 2G SEPs, has even more (almost 60) licensors and already has almost 40 automotive brands under license, including Audi, Bentley, BMW, Ford, General Motors, Hyundai, Kia, Mercedes-Benz, MINI, Rolls-Royce, Porsche, Renault, Volkswagen, and Volvo. All of the 5G vehicle license agreements that Avanci has signed to date were concluded without any cellular SEP litigation, demonstrating that the Avanci 5G Vehicle licensing terms and conditions indeed represent a balance that can be widely accepted by both licensees and licensors.

In 2023, Avanci launched five additional SEP licensing programs: Avanci Aftermarket, Avanci Smart Meter, Avanci EV Charger, Avanci Broadcast and Avanci Video (please see www.avanci.com for more information). The continued ability of Avanci to bring efficient, transparent and predictable solutions to the SEP licensing ecosystem is in large part due to the guidance provided in the TTGs. It is also confirmation that a market-driven approach based on the TTGs is appreciated by market participants, SEP holders and implementers alike.

(b) Are there any changes that could improve the effectiveness of the Guidelines? Please provide reasons for your answer.

The TTGs are fit for purpose. Industry-wide joint licensing – such as via Avanci – has built steadily over the years since the TTBER and TTGs have come into force. Avanci was founded in 2016 and since then has successfully managed to provide the global auto industry with an optional one-stop-shop solution for cellular SEP licensing for both 4G and 5G technology. Building on that success and underlying expertise has allowed Avanci to explore further areas that could benefit from a one-stop-shop SEP licensing solution. Avanci has observed a growing interest by companies from across the SEP licensing spectrum for independent joint licensing solutions as these offer transparency and predictability and enable tremendous transaction costs savings. This beneficial market trend should continue to be supported by the positive effects the TTBERs and TTGs have had in enabling these developments.

(c) Are there any matters not covered by the Guidelines (for example, recent developments in the market for technology transfer licensing) that should be taken into account by any future Guidelines?

The TTGs are fit for purpose and provide a familiar and satisfactory framework for businesses to proceed and have significantly improved efficiency in the SEP licensing ecosystem.

(d) Are there any matters which are covered by the Guidelines that it would be appropriate to remove?

No.

19. To the extent not covered by your responses to the other questions, please outline areas of the Guidelines where clarification or simplification would be useful.

The concept of Licensing Negotiation Groups (LNGs) was considered during the European Commission’s and UK CMA’s reconsiderations of the respective Horizontal Guidelines but was ultimately removed. Avanci is not aware of any actual operational examples of LNGs and cautions that guidelines should first be informed by existing favorable experience.

While the German Federal Cartel Office has recently and prematurely decided to tolerate the formation of an automotive LNG (ALNG), it has yet to be seen that the ALNG can indeed operate within the constraints of competition law, in Germany, the UK and elsewhere. It is our view that LNGs will inevitably violate competition law, LNGs would be counterproductive to simple and efficient SEP licensing, and under no circumstances should LNGs be included in the TTGs without extensive prior scrutiny from competition authorities that takes the specific circumstances of SEP licensing into account in a comprehensive manner.

Proponents of LNGs claim that they are simply “reverse patent pools” but that analysis is incorrect. They introduce inefficiencies as they are not needed when licensees already have the option of bilateral licensing or licensing through an independent, optional intermediary such as Avanci in the

automotive sector. The interests of licensees are appropriately balanced via independent licensing solutions, which operate under the guidance of the current TTGs. The introduction of an LNG would fundamentally distort the current landscape and undermine much of the progress that has been made in recent years. It could result in an increase in legal disputes, including litigation, and undermine the efficiencies that Avanci's SEP licensing platform has established.

In fact, LNGs raise significant antitrust risks through the aggregation of collective purchasing power, potentially forming an unlawful buyers' cartel. This could lead to anti-competitive information exchanges among OEM competitors and depress royalties below FRAND levels, undermining innovation incentives.

Two scenarios could arise: one where the LNG sets an artificially low cartel price, forcing SEP owners to negotiate with the LNG instead of individual OEMs; and the other where the LNG's involvement is optional, but individual negotiations further suppress royalties due to LNG members using the LNG-determined rate as a mere ceiling in further negotiations.

Even if negotiations were voluntary and non-binding, the concerns about LNGs would persist, as such discussions would be largely a waste of time and would impose additional costs and delays on the licensing process. Furthermore, the optionality of the LNG-determined price would exacerbate the implementer hold-out risk. Collective boycotts, typically restrictive of competition, would negatively affect innovation and OEMs' price competition incentives.

Despite suggested rules of neutrality and limitation of information flow, the risk of cartel behavior via information exchange remains. To determine an acceptable level of royalty, each LNG member would guide the LNG coordinator regarding that member's price expectation for the royalty to be set, in the same way that Avanci gathers such information in the course of finding a consensus price acceptable to both SEP owners and OEMs. But in an LNG what would emerge is the consensus price only among OEMs. The supposedly neutral intermediary of the LNG would in reality be the hub in a hub-and-spoke cartel.

Collective boycotts, typically restrictive of competition and considered infringements by object of Chapter 1 of the Competition Act (1998), would negatively affect innovation and OEMs' price competition incentives. With significant market power, LNG members could be collectively dominant, committing a joint abuse (Chapter 2, Competition Act 1998) when boycotting licensing on FRAND terms.

Certain TTGs considerations for technology pools wouldn't apply to LNGs, such as safe harbor provisions about challenging validity, non-exclusive licensing, and ensuring only essential technologies are pooled. Other provisions would need careful adaptation, especially regarding the exchange of sensitive information among competing product makers. Despite potential adaptations, LNGs pose fundamental antitrust risks that cannot be solved through guidance.

Other considerations

22. Are there, in your view, any other considerations relevant to the Assimilated TTBER and the Guidelines that the CMA should take into account? Please provide any relevant evidence that you have to support your views.

Please see the following articles:

- FOSS Patents: SEP Licensing Negotiation Groups – Part I: analogy to patent pools entails false symmetry between facilitating and complicating automotive patent licensing (July 24, 2021), <http://www.fosspatents.com/2021/07/sep-licensing-negotiation-groups-part-i.html>
- FOSS Patents: SEP Licensing Negotiation Groups – Part II: justice delayed is justice denied when unwilling licensees can hide behind a consensus-building effort (July 26, 2021), <http://www.fosspatents.com/2021/07/sep-licensing-negotiation-groups-part.html>
- FOSS Patents: SEP Licensing Negotiation groups – Part III: legalization of buyers' cartels would invite group boycott and collective hold-out (July 27, 2021), http://www.fosspatents.com/2021/07/sep-licensing-negotiation-groups-part_27.html
- IP Fray: German cartel clearance of Automotive Licensing Negotiation Group for SEPs won't matter if SEP holders simply say no (June 14, 2024), <https://ipfray.com/german-cartel-clearance-of-automotive-licensing-negotiation-group-for-seps-wont-matter-if-sep-holders-simply-say-no/>
- Khushita Vasant: Patent pools must have safeguards to prevent information-sharing, price-fixing, US DOJ official says (December 6, 2023), <https://mlexmarketinsight.com/news/insight/patent-pools-must-have-safeguards-to-prevent-information-sharing-price-fixing-us-doj-official-says>