

タイトル	提出先	発信
中国標準必須特許分野に関する独占禁止ガイドライン (意見募集稿) への意見提出	国家市場規制総局	2023 年 7 月

一、关于日本汽车工业协会

日本汽车工业协会（Japan Automobile Manufacturers Association, Inc., JAMA）是一个非营利性行业协会，代表了 14 家日本的乘用车、货车、客车和摩托车制造商，包括：

- YAMAHA MOTOR CO., LTD.（雅马哈发动机株式会社）
- DAIHATSU MOTOR CO., LTD.（大发工业株式会社）
- HINO MOTORS, LTD.（日野汽车株式会社）
- HONDA MOTOR CO., LTD.（本田技研工业株式会社）
- ISUZU MOTORS LIMITED（五十铃自动车株式会社）
- KAWASAKI MOTORS, LTD.（川崎摩托株式会社）
- MAZDA MOTOR CORPORATION（马自达汽车株式会社）
- MITSUBISHI MOTORS CORPORATION（三菱自动车工业株式会社）
- MITSUBISHI FUSO TRUCK & BUS CORPORATION（三菱扶桑卡·客车株式会社）
- NISSAN MOTOR CO., LTD.（日产自动车株式会社）
- SUBARU CORPORATION（株式会社斯巴鲁）
- SUZUKI MOTOR CORPORATION（铃木株式会社）
- TOYOTA MOTOR CORPORATION（丰田汽车株式会社）
- UD TRUCKS CORPORATION（优迪卡汽车株式会社）

JAMA 的总部设在东京，并在北京设有分支机构。JAMA 的宗旨是推动汽车行业的健康发展，支持其成员为消费者提供服务，为经济和社会繁荣做出贡献，并解决其在全球各地生产和销售产品的社区所面临的安全和环境问题。

几十年来，JAMA 的成员一直是中国汽车工业和更广泛的中国经济领域中不可或缺的一部分。

鉴于 JAMA 成员在中国广泛的经济布局，对于《关于标准必要专利领域的反垄断指南（征求意见稿）》（“《指南》”）中的要求，即专利权人在授予标准必要专利的许可时，应遵循公平、合理和无歧视原则（FRAND），以此提升行业的竞争力，JAMA 及其成员表现出了特别的关注和兴趣。

二、总体评论

我们非常感谢及支持中国国家市场监督管理总局主动推进在中国构建最合适的标准必要专利环境。在《指南》所提出的所有要点中，从经济角度来看，对中国市场增长最重要的一项是第 13 条，其中规定了“对所有实施方授予许可”的政策，即标准必要专利权人如果没有正当理由，**不得**拒绝任何愿意获得许可的标准实施方。通过允许任何愿意获得许可的实施方都能够获得许可，标准必要专利的许可费将更为合理，因为最了解此项技术的人将与标准必要专利权人进行协商。显然，过高的专利许可费会降低终端委托制造商的产品利润，并可能减缓他们在中国市场进行投资的步伐，因此第 13 条中“对所有实施方授予许可”的政策必然要求合理的标准必要专利许可费。

三、对指南的具体建议

我们按照《指南》中条款的顺序，在相关条款之后提出了我们的建议。

对于每一条款，我们列出了现有条款，并用红色下划线标出了我们建议修改的内容，在条款后按照“建议”（我们建议修改的内容）和“理由”（修改的理由）的顺序进行阐述。

1. 【第五条】 标准必要专利的信息披露

【第五条】（现有条款）标准必要专利的信息披露

参与标准制修订的专利权人或者专利申请人应按照国家制定组织规定，在标准制修订的任何阶段及时充分披露其拥有的专利，并可以披露其知悉的其他专利，同时提供相应证明材料，并对真实性负责。

没有参与标准制修订的专利权人或者专利申请人可以按照标准制定组织规定，在标准制修订的任何阶段披露其拥有和知悉的专利，同时提供相应证明材料，并对真实性负责。

在具体个案中，专利权人未按标准制定组织规定及时充分披露专利信息，或者明确放弃专利权，但在标准颁布后向标准实施方主张专利权的情形，是认定具体行为在相关市场中是否会对市场竞争产生排除、限制影响的重要考虑因素。

【第五条】（建议修改后的条款）标准必要专利的信息披露

参与标准制修订的专利权人或者专利申请人应按照国家制定组织规定，在标准制修订的任何阶段及时充分披露其拥有的专利，并可以披露其知悉的其他专利，同时提供相应证明材料，并对真实性负责。

没有参与标准制修订的专利权人或者专利申请人可以按照标准制定组织规定，在标准制修订的任何阶段披露其拥有和知悉的专利，同时提供相应证明材料，并对真实性负责。

在具体个案中，无论是否参与标准制修订，专利权人未按标准制定组织规定及时充分披露专利信息，或者明确放弃专利权，但在标准颁布后向标准实施方主张专利权的情形，是认定具体行为在相关市场中是否会对市场竞争产生排除、限制影响的重要考虑因素。

建议：在本条第三款中的“专利权人”之前增加“无论是否参与标准制修订”。

理由：没有参与标准制修订的专利权人，如果未按标准制定组织规定及时充分披露专利信息，但在标准颁布后向标准实施方主张专利权，也存在违反《反垄断法》相关规定的风险。因此，其相应行为同样应受到本条的规制。因此，有必要明确本条第三款中的“专利权人”包括“没有参与标准制修订的专利权人”，故建议进行如上修改。

2. 【第六条】 标准必要专利的许可承诺

【第六条】（现有条款）标准必要专利的许可承诺

公平、合理和无歧视原则，是标准必要专利权人与标准实施方进行标准必要专利许可谈判需遵循的重要原则，被国际、国外和国内标准制定组织所公认并广泛采用成为知识产权政策的重要内容。

参与标准制修订的专利权人或者专利申请人应按照国家制定组织规定，明确作出专利实施许可承诺，即同意在公平、合理和无歧视原则基础上，免费或者收费许可任何经营者等在实施该标准时使用其专利。

对于已经基于公平、合理和无歧视原则作出许可承诺的专利，标准必要专利权人转让或者转移该专利时，应当事先告知受让人该专利实施许可承诺的内容，并保证受让人同意受该专利实施许可承诺的约束，即标准必要专利许可承诺对受让人具有同等效力。

在具体个案中，标准必要专利权人或者其受让人是否违反公平、合理和无歧视承诺，是认定以不公平的高价许可，没有正当理由拒绝许可、搭售商品、附加其他不合理的交易条件或者实行差别待遇等具体垄断行为的重要考虑因素。

【第六条】（建议修改后的条款）标准必要专利的许可承诺

公平、合理和无歧视原则，是标准必要专利权人与标准实施方进行标准必要专利许可谈判需遵循的重要原则，被国际、国外和国内标准制定组织所公认并广泛采用成为知识产权政策的重要内容。

无论是否参与标准制修订的专利权人或者专利申请人应按照国家制定组织规定，明确作出专利实施许可承诺，即同意在公平、合理和无歧视原则基础上，免费或者收费许可任何经营者等在实施该标准时使用其专利。

对于已经基于公平、合理和无歧视原则作出许可承诺的专利，标准必要专利权人转让或者转移该专利时，应当事先告知受让人该专利实施许可承诺的内容，并保证受让人同意受该专利实施许可承诺的约束，即标准必要专利许可承诺对受让人具有同等效力。

在具体个案中，标准必要专利权人或者其受让人是否违反公平、合理和无歧视承诺，是认定以不公平的高价许

可，没有正当理由拒绝许可、搭售商品、附加其他不合理的交易条件或者实行差别待遇等具体垄断行为的重要考虑因素。

为避免疑义，无论标准必要专利权人是否通过专利池和/或专利代理开展许可活动，标准必要专利权人均应遵守基于公平、合理和无歧视原则向实施该标准的任何经营者授予专利许可的义务，并且专利池和/或专利代理也应同等地遵守该义务。

建议 1: 将本条第二款中的“参与标准制修订的专利权人或者专利申请人”修改为“无论是否参与标准制修订，专利权人或者专利申请人”。

理由 1: 没有参与标准制修订的专利权人如果违反公平、合理和无歧视原则，也存在违反《反垄断法》相关规定的风险。因此，有必要明确本条第二款的要求不仅适用于“参与标准制修订的专利权人或者专利申请人”，也适用于“没有参与标准制修订的专利权人或者专利申请人”，故建议进行如上修改。

建议 2: 增加第五款“为避免疑义，无论标准必要专利权人是否通过专利池和/或专利代理开展许可活动，标准必要专利权人均应遵守基于公平、合理和无歧视原则向实施该标准的任何经营者授予专利许可的义务，并且专利池和/或专利代理也应同等地遵守该义务。”

理由 2: 实践中，许多标准必要专利权人通过专利池和/或专利代理开展许可活动，这些专利池和/或专利代理积极参与到标准必要专利的许可中。无论是否通过专利池和/或专利代理进行许可活动，标准必要专利权人都不应免除其基于公平、合理和无歧视原则进行许可的义务。

3. 【第七条】 标准必要专利的善意谈判

【第七条】（现有条款） 标准必要专利的善意谈判

标准必要专利善意谈判是履行公平、合理和无歧视承诺的具体表现。标准必要专利权人和标准实施方之间应当就标准必要专利许可的费率、数量、时限等许可条件开展善意谈判，以达成公平、合理和无歧视的许可条件。善意谈判包括但不限于下列程序和要求：

（一）标准必要专利权人应对标准实施方提出明确的许可谈判要约，包括提供标准必要专利清单、标准必要专利与标准的对照表及合理的反馈期限等具体内容；

（二）标准实施方应在合理期限内对获得许可表达善意意愿，即不存在恶意拖延、无正当理由拒绝许可谈判等情形；

（三）标准必要专利权人应提出符合其所作出的公平、合理和无歧视承诺的许可条件，主要包括许可费率计算方式及合理性理由、标准必要专利保护时效及转让情况等与许可直接相关的必要信息和实际情况；

（四）标准实施方应在合理期限内接受许可条件，如不接受，应在合理期限内就许可费率、回授等许可条件提出符合公平、合理和无歧视原则的方案。

在具体个案中，须对谈判的过程和内容进行全面评估，非善意的标准必要专利许可谈判将提高相关市场中排除、限制竞争的风险。标准必要专利权人和标准实施方均需对其上述过程中不存在过错进行证明，提供相应证明材料，并对所提供证明材料的真实性负责。

【第七条】（建议修改后的条款） 标准必要专利的善意谈判

标准必要专利善意谈判是履行公平、合理和无歧视承诺的具体表现。标准必要专利权人和标准实施方之间应当就标准必要专利许可的费率、数量、时限等许可条件开展善意谈判，以达成公平、合理和无歧视的许可条件。善意谈判包括但不限于下列程序和要求：

（一）标准必要专利权人应对标准实施方提出明确的许可谈判要约，包括提供标准必要专利清单、将标准必要专利的权利要求按照特征与标准逐一比对的权利要求比对表、标准必要专利与标准的对照表及合理的反馈期限等具体内容；

（二）标准实施方应在合理期限内对获得许可表达善意意愿，即不存在恶意拖延、无正当理由拒绝许可谈判等情形，但该“合理期限”不受第（一）项中“合理的反馈期限”的限制。为避免疑义，当实施产品的供应链上的其他实施方在合理期限内对获得许可表达意愿时，依赖于这些实施方获得许可的意愿的标准实施方不应被视为“恶意拖延或无正当理由拒绝许可谈判”；

（三）标准必要专利权人应提出符合其所作出的公平、合理和无歧视承诺的许可条件，主要包括许可费率计算方式及合理性理由、所有其他的被许可人及对每个被许可人的许可条件、标准必要专利保护时效及转让情况等

与许可直接相关的必要信息和实际情况；

(四) 在标准必要专利权人遵循前述第(一)项和第(三)项规定的情况下，标准实施方应在合理期限内接受许可条件，如不接受，应在合理期限内就许可费率、回授等许可条件提出符合公平、合理和无歧视原则的方案。在具体个案中，须对谈判的过程和内容进行全面评估，非善意的标准必要专利许可谈判将提高相关市场中排除、限制竞争的风险。标准必要专利权人和标准实施方均需对其上述过程中不存在过错进行证明，提供相应证明材料，并对所提供证明材料的真实性负责。

为避免疑义，无论标准必要专利权人是否通过专利池和/或专利代理开展许可活动，标准必要专利权人均应按照本条遵守就许可条件开展善意谈判的义务，并且专利池和/或专利代理也应同等地遵守该义务。

对于前述第(二)项和第(四)项中的“合理期限”，应根据具体情况进行个案判断。在具体判断时，应综合考虑以下因素：

- (一) 标准必要专利的数量；
- (二) 技术的复杂性；
- (三) 标准实施方对技术和标准的认知程度；
- (四) 标准实施方是否是符合标准部件的设计者；
- (五) 标准必要专利权人与标准实施方之间的商业关系。

为避免疑义，以下情况应视为“在合理期限内对获得许可表达善意意愿”：

- (一) 标准实施方（包括实施产品的供应链上的其他实施方）就标准必要专利的必要性和有效性向标准必要专利权人提出意见且客观上是善意的；
- (二) 实施产品的供应链上的其他实施方在合理期限内对获得许可表达意愿。

建议 1：在本条第一款第(一)项中增加“将标准必要专利的权利要求按照特征与标准逐一比对的权利要求比对表”作为标准必要专利权人所应提出的内容之一。

理由 1：一般来说，在缺乏将标准必要专利的权利要求按照特征与标准逐一比对的权利要求比对表的情况下，标准实施方难以准确对许可要约进行评估。因此，标准必要专利权人提出的许可要约应包括按照特征逐一比对的权利要求比对表，故建议将该内容加入第一款第(一)项。

建议 2：在本条第一款第(二)项后增加“但该‘合理期限’不受第(一)项中‘合理的反馈期限’的限制”。

理由 2：本条第一款第(一)项所规定的“合理的反馈期限”的范围较模糊。“合理的反馈期限”由专利权人单方设定，并不一定真的代表合理的反馈期限。因此建议此处明确，标准实施方对获得许可表达善意意愿的期限不受标准必要专利权人设定的“反馈期限”的限制。即使实施方反馈的时间稍晚于专利权人提出的“反馈期限”，也不应被视为本条第二款中的“过错”。

建议 3：在本条第一款第(二)项后增加“为避免疑义，当实施产品的供应链上的其他实施方在合理期限内对获得许可表达意愿时，依赖于这些实施方获得许可的意愿的标准实施方不应被视为‘恶意拖延或无正当理由拒绝许可谈判’”；同时，增加第五款“为避免疑义，以下情况应视为‘在合理期限内对获得许可表达善意意愿’：(一)标准实施方（包括实施产品的供应链上的其他实施方）就标准必要专利的必要性和有效性向标准必要专利权人提出意见且客观上是善意的；(二)实施产品的供应链上的其他实施方在合理期限内对获得许可表达意愿。”

理由 3：对于“恶意拖延、无正当理由拒绝许可谈判等情形”，应提供具体示例以避免疑义：

首先，应当注意到，标准必要专利通常涉及最终产品中包含的部分零部件是符合标准的，因此可以向零部件供应商或最终产品制造商的任何一方授予许可。因此，如果实施产品的供应链上的某一实施方表达了获得许可的意愿，且该许可包含供应链上其他实施方的实施产品，则这些“其他实施方”应当被认定为有正当理由不推进许可谈判。

其次，标准实施方在获得许可之前，需要就对许可的必要性、标准必要专利的必要性和有效性进行讨论。这些考虑是合理的，不应被视为恶意拖延。

建议 4：在本条第一款第(三)项中增加“所有其他的被许可人及对每个被许可人的许可条件”作为标准必要专利权人所应提出的内容之一。

理由 4：标准实施方如果不能确认标准必要专利权人与其他被许可人之间的实际协议，就无法判断标准必要专利权人提供的许可条件是否与其他被许可人相比是无歧视的。实践中，标准必要专利权人与很多被许可人之间存在许多协议，例如，在英国法院审理的 *InterDigital v. Lenovo* 案中，对于交互数字的同一个标准必要专

利组合，有超过十份协议被提交，且各被许可人的许可费率差异很大。标准必要专利权人不应挑选其希望披露的协议，而是应公平、合理地向相关方披露所有协议。

建议 5: 在本条第一款第（四）项前增加“在标准必要专利权人遵循前述第（一）项和第（三）项规定的情况下，”。

理由 5: 应在此明确规定作为实施标准的前提条件，标准必要专利权人必须履行进行善意谈判所需的义务。如果专利权人未提供足够的信息，标准实施方很难接受许可条件。

建议 6: 增加第三款“为避免疑义，无论标准必要专利权人是否通过专利池和/或专利代理开展许可活动，标准必要专利权人均应按照本条遵守就许可条件开展善意谈判的义务，并且专利池和/或专利代理也应同等地遵守该义务。”

理由 6: 实践中，许多标准必要专利权人通过专利池和/或专利代理开展许可活动，这些专利池和/或专利代理积极参与到标准必要专利的许可中。无论是否通过专利池和/或专利代理进行许可活动，标准必要专利权人都不应免除其就许可条件开展善意谈判的义务。

建议 7: 增加第四款“对于前述第（二）项和第（四）项中的‘合理期限’，应根据具体情况进行个案判断。在具体判断时，应综合考虑以下因素：（一）标准必要专利的数量；（二）技术的复杂性；（三）标准实施方对技术和标准的认知程度；（四）标准实施方是否是符合标准组件的设计者；以及（五）标准必要专利权人与标准实施方之间的商业关系。”

理由 7: “合理期限”的判断应视具体情况而异，建议对以上影响较大的因素进行列举，以明确判断“合理期限”时需要考虑的因素。

4. 【第十二条】以不公平的高价许可标准必要专利

【第十二条】（现有条款）以不公平的高价许可标准必要专利

通常情况下，标准必要专利具有较高的价值，合理的许可费能够保障标准必要专利权人就其研发投入和技术创新获得回报。但是，标准必要专利权人可能滥用其市场支配地位，以不公平的高价许可标准必要专利或者销售包含标准必要专利的产品，排除、限制竞争，具体分析时可以考虑以下因素：

- （一）许可双方是否根据本指南第七条进行善意的许可谈判；
- （二）许可费是否明显高于研发成本；
- （三）许可费是否明显高于可以比照的历史许可费或者许可费标准；
- （四）许可费是否超出标准必要专利的地域范围或者覆盖的商品范围；
- （五）是否就过期、无效的标准必要专利或者非标准必要专利收取许可费；
- （六）标准必要专利权人是否根据标准必要专利数量和质量发生的变化合理调整许可费用；
- （七）标准必要专利权人是否通过非专利实施实体进行重复收费。

【第十二条】（建议修改后的条款）以不公平的高价许可标准必要专利

通常情况下，~~标准必要专利具有较高的价值，合理的许可费~~标准必要专利的合理许可费能够保障标准必要专利权人就其研发投入和技术创新获得回报，即对于标准制定过程中提出的技术提案具有直接帮助并被标准制定组织采纳的技术。但是，标准必要专利权人可能滥用其市场支配地位，以不公平的高价许可标准必要专利或者销售包含标准必要专利的产品，排除、限制竞争，具体分析时可以考虑以下因素：

- （一）许可双方是否根据本指南第七条进行善意的许可谈判；
- （二）许可费是否明显高于研发成本，即对于标准制定过程中提出的技术提案具有直接帮助的技术的研发成本；
- （三）许可费是否明显高于可以比照的在没有禁令威胁下的历史许可费或者许可费标准；
- （四）许可费是否超出标准必要专利的地域范围或者覆盖的商品范围；
- （五）是否就过期、无效的标准必要专利或者非标准必要专利收取许可费；
- （六）标准必要专利权人是否根据标准必要专利数量和质量发生的变化合理调整许可费用；
- （七）标准必要专利权人是否通过非专利实施实体进行重复收费；
- （八）许可费是否明显高于许可产品的利润。

为避免疑义，无论标准必要专利权人是否通过专利池和/或专利代理开展许可活动，标准必要专利权人均应遵守

不得滥用市场支配地位的义务，并且专利池和/或专利代理也应同等地遵守该义务。

建议 1: 建议将本条第一款的第一句话修改为：“通常情况下，标准必要专利的合理许可费能够保障标准必要专利权人就其研发投入和技术创新获得回报，即对于标准制定过程中提出的技术提案具有直接帮助并被标准制定组织采纳的技术。”同时，在本条第一款第（二）项的“研发成本”后增加“即对于标准制定过程中提出的技术提案具有直接帮助的技术的研发成本”。

理由 1: “研发投入”和“研发成本”的定义不够清晰，建议明确。实际上，只有向标准制定组织提出技术提案并被标准制定组织采纳为标准的技术才应视为研发对象，需要将其与公司自身业务（通过业务创造利润）的研发投入区分开来。

建议 2: 在本条第一款第（三）项中增加“在没有禁令威胁下的”。

理由 2: 最合适的 FRAND 费率应当是标准必要专利权人和标准实施方在没有任何禁令威胁的情况下、作为纯粹的商业决策所达成的费率。如果存在禁令威胁，例如标准必要专利权人在德国已提起专利侵权诉讼使得实施方被迫处于禁令威胁下，在这种情况下达成的许可费率无法被视为 FRAND 费率。

建议 3: 在本条中增加第（八）项“（八）许可费是否明显高于许可产品的利润。”

理由 3: 建议将第（八）项作为考虑标准必要专利许可费是否合理的因素之一。

建议 4: 增加第二款“为避免疑义，无论标准必要专利权人是否通过专利池和/或专利代理开展许可活动，标准必要专利权人均应遵守不得滥用市场支配地位的义务，并且专利池和/或专利代理也应同等地遵守该义务。”

理由 4: 实践中，许多标准必要专利权人通过专利池和/或专利代理开展许可活动，这些专利池和/或专利代理积极参与到标准必要专利的许可中。无论是否通过专利池和/或专利代理进行许可活动，标准必要专利权人都不应免除其不得滥用市场支配地位的义务。

建议 5: 对于本条第（四）项中的“覆盖的商品范围”，应当明确，将体现了标准必要专利技术内容的适当技术单元（即符合标准的部件）作为许可使用费的计费基础。例如，在蜂窝通信中，通信基带芯片等可以成为许可使用费的计费基础。此外，我们建议采用最小可销售专利实施单位（SSPPU）作为适当技术单位。

5. 【第十三条】拒绝许可标准必要专利

【第十三条】（现有条款）拒绝许可标准必要专利

通常情况下，标准必要专利权人作出公平、合理和无歧视承诺后，如果没有正当理由，不得拒绝任何愿意获得许可的标准实施方，否则可能对市场竞争产生排除、限制影响，具体分析时可以考虑以下因素：

- （一）许可双方是否根据本指南第七条进行善意的许可谈判；
- （二）通过符合公平、合理和无歧视承诺的许可是否能够弥补标准必要专利侵权损害；
- （三）标准实施方是否缺乏支付合理许可费的能力等；
- （四）标准实施方是否有不良信用记录或者出现经营状况恶化等情况，影响交易安全；
- （五）是否因不可抗力等客观原因无法进行标准必要专利的许可；
- （六）拒绝许可相关标准必要专利对市场竞争和标准实施方进行创新的影响及程度；
- （七）拒绝许可相关标准必要专利是否会损害消费者利益或者社会公共利益。

【第十三条】（建议修改后的条款）拒绝许可标准必要专利

通常情况下，标准必要专利权人作出公平、合理和无歧视承诺后，如果没有正当理由，不得拒绝任何愿意获得许可的标准实施方，否则可能对市场竞争产生排除、限制影响，具体分析时仅限于可以考虑以下因素：

- （一）许可双方是否根据本指南第七条进行善意的许可谈判；
- ~~（二）通过符合公平、合理和无歧视承诺的许可是否能够弥补标准必要专利侵权损害；~~
- ~~（三）标准实施方是否缺乏支付合理许可费的能力等；~~
- ~~（四）标准实施方是否有不良信用记录或者出现经营状况恶化等情况，影响交易安全；~~
- （五二）是否因不可抗力等客观原因无法进行标准必要专利的许可；
- （六三）拒绝许可相关标准必要专利对市场竞争和标准实施方进行创新的影响及程度；

(七四) 拒绝许可相关标准必要专利是否会损害消费者利益或者社会公共利益。

为避免疑义，无论标准必要专利权人是否通过专利池和/或专利代理开展许可活动，标准必要专利权人均应遵守不得无正当理由拒绝任何愿意获得许可的标准实施方的义务，并且专利池和/或专利代理也应同等地遵守该义务。

建议 1: 建议删除本条第（二）、（三）、（四）项。

理由 1: 第（二）、（三）、（四）项或没有明确的依据，或是不明确的规定，我们担心这些条款成为专利权人不正当拒绝许可的依据。具体而言：

对于第（二）项，不同于普通专利，标准必要专利权人一开始就接受或认识到了标准必要专利应当按照 FRAND 条款进行许可，通过 FRAND 许可费，标准必要专利权人已经可以获得所期望的补偿。因此，第（二）项中所述的情况不太可能出现，建议删除。如果决定保留第（二）项，则应明确其适用于哪些具体情形。此外，如果第（二）项是考虑到标准实施方的支付能力无法补偿标准必要专利权人，那么，应删除第（二）项。这是因为，对于利润较低行业的企业，其支付能力可能无法补偿标准必要专利权人，标准必要专利权人可能会滥用第（二）项拒绝向该行业的所有标准实施方进行许可。

对于第（三）项和第（四）项，在合理的许可费范围内，正常经营状态下的标准实施方应被认为具备足够的损害赔偿能力。因此，第（三）项和第（四）项中所述的情况不太可能出现，建议删除。如果决定保留第（三）项和第（四）项，也应当明确说明“根据每个公司的具体经营情况，判断其与同行业其他公司相比是否存在特殊情况，例如明显的支付能力不足或经营状况恶化”，以避免第（三）项和第（四）项被扩大性地解释。如果第（三）项和第（四）项适用于利润较低行业的企业，如果不考虑上述情况，将导致标准必要专利权人拒绝向该行业的所有标准实施方授予许可。

建议 2: 将本条第一款中的“可以考虑以下因素”改为“仅限于考虑以下因素”。

理由 2: 应当明确标准必要专利权人拒绝许可的例外情形仅限于考虑所列出的因素。

建议 3: 明确本条第一款中的“正当理由”不包括权利人自己的许可政策（例如，只向最终产品制造商授予许可）。

理由 3: “正当理由”应当是客观上正当的。应当限制标准必要专利权人基于自己的政策任意拒绝许可。

建议 4: 增加第二款“为避免疑义，无论标准必要专利权人是否通过专利池和/或专利代理开展许可活动，标准必要专利权人均应遵守不得无正当理由拒绝任何愿意获得许可的标准实施方的义务，并且专利池和/或专利代理也应同等地遵守该义务。”

理由 4: 实践中，许多标准必要专利权人通过专利池和/或专利代理开展许可活动，这些专利池和/或专利代理积极参与到标准必要专利的许可中。无论是否通过专利池和/或专利代理进行许可活动，标准必要专利权人都不应免除其不得无正当理由拒绝任何愿意获得许可的标准实施方的义务。

6. 【第十四条】涉及标准必要专利的搭售

【第十四条】（现有条款）涉及标准必要专利的搭售

通常情况下，在标准必要专利许可时进行一揽子许可或者搭售相关必要产品，可以降低整体交易成本，提高标准实施效率。但是，标准必要专利权人可能滥用其市场支配地位，没有正当理由，在许可时强制标准实施方接受一揽子许可或者购买其他不必要的产品，排除、限制竞争，具体分析时可以考虑以下因素：

- （一）许可双方是否根据本指南第七条进行善意的许可谈判；
- （二）是否符合所在行业或领域交易惯例或者消费习惯；
- （三）是否具有合理性和必要性，如有利于标准实施或者发挥产品功能等；
- （四）拆分一揽子许可是否具有可行性，并且是否会给标准实施方造成不合理的标准实施成本；
- （五）标准实施方是否可以自主选择许可组合或者所购买的产品；
- （六）是否排除、限制其他经营者的交易机会；
- （七）是否限制消费者的选择权。

【第十四条】（建议修改后的条款）涉及标准必要专利的搭售

通常情况下，在标准必要专利许可时进行一揽子许可或者搭售相关必要产品，可以降低整体交易成本，提高标准实施效率。但是，标准必要专利权人可能滥用其市场支配地位，没有正当理由，在许可时强制标准实施方接受一揽子许可或者购买其他不必要的产品，排除、限制竞争，具体分析时可以考虑以下因素：

- （一）许可双方是否根据本指南第七条进行善意的许可谈判；
- （二）是否符合所在行业或领域交易惯例或者消费习惯；
- （三）是否具有合理性和必要性，如有利于标准实施或者发挥产品功能等；
- （四）拆分一揽子许可是否具有可行性，~~并且是否会给标准实施方造成不合理的标准实施成本~~；
- （五）标准实施方是否可以自主选择许可组合或者所购买的产品；
- （六）是否排除、限制其他经营者的交易机会；
- （七）是否限制消费者的选择权；
- （八）是否会给标准实施方造成不合理的标准实施成本。

建议 1：明确本条第一款第（四）项中“拆分一揽子许可不具有可行性”的具体情形。或者，应要求标准必要专利权人提供无法进行拆分的证据或研究结果。

理由 1：应对“拆分一揽子许可不具有可行性”的情形和条件予以明确，防止标准必要专利权人在不提供任何解释和证据的情况下，任意地主张自己有正当理由进行一揽子许可。

建议 2：将本条第一款第（四）项后半句“是否会给标准实施方造成不合理的标准实施成本”单独列为第（八）项。

理由 2：“一揽子许可”一般均会对标准实施方造成不合理的标准实施成本，因此无需增加“是否会给标准实施方造成不合理的标准实施成本”作为考虑因素。但考虑到如果删除该内容，标准实施方可能会因标准必要专利的一揽子许可而被施加不合理的标准实施成本，故建议增加第（八）项“是否会给标准实施方造成不合理的标准实施成本”。

【英文】

Suggestions for Revisions on Guidelines on Anti-Monopoly in the Field of Standard Essential Patents (Draft for Public Comment)

Submitted by: Japan Automobile Manufacturers Association, Inc. (“JAMA”)

A) JAMA

JAMA is a nonprofit industry association representing 14 manufacturers of passenger car, truck, bus, and motorcycle manufacturers of Japan, consisted by the following companies:

YAMAHA MOTOR CO., LTD.,
DAIHATSU MOTOR CO., LTD.,
HINO MOTORS, LTD.,
HONDA MOTOR CO., LTD.,
ISUZU MOTORS LIMITED,
KAWASAKI MOTORS, LTD.,
MAZDA MOTOR CORPORATION,
MITSUBISHI MOTORS CORPORATION,
MITSUBISHI FUSO TRUCK & BUS CORPORATION,
NISSAN MOTOR CO., LTD.,
SUBARU CORPORATION,
SUZUKI MOTOR CORPORATION,
TOYOTA MOTOR CORPORATION,
UD TRUCKS CORPORATION

JAMA is headquartered in Tokyo and has a branch office in Beijing, China. JAMA’s objective is to promote the sound development of the motor industry and support its members’ efforts to serve consumers, contribute to economic and social prosperity, and address safety and environmental challenges in those communities around the world in which they build and sell their products.

JAMA members have been integral to the Chinese auto industry and the broader Chinese economy for decades.

In light of JAMA’s strong economic footprint in China, JAMA and its members are particularly interested in the Draft’s commitment to facilitate industry competitiveness through licensing of standard essential patents (“SEPs”) that adheres to the patent owners’ commitments to license on fair, reasonable, and nondiscriminatory (“FRAND”) terms.

B) General Comments

We very much appreciate SAMR’s initiative in considering most appropriate SEP environment in China. Among all the points raised in the proposed regulation, most important point for the growth of Chinese market in terms of economical point of view is the Article 13 where it addresses “license to all” policy that the SEP owner should NOT refuse any licensing request from willing implementer without justification. By allowing the license to be able to taken from anybody who wishes a license will allow the SEP royalty to be more reasonable since the person who knows the technology the most will negotiate with the SEP owner. Obviously, too high royalty will cause the decrease in product profitability of the end OEM and may slow down investment of end OEM in China market and thus appropriate SEP royalty rate is definitely required by the having the “license to all” policy as stated in the Article 13.

C) Comments on the Guidelines

We put our comments by each Article as below.

For each Article, we list current draft regulation, our proposed revisions with underline, Suggestion (what we propose to revise) and Reason (rationale for revisions) in this order.

1. Article 5: Information Disclosure of SEPs

Article 5 (current draft regulation): Information Disclosure of SEPs

Patent holders or applicants participating in the standard-setting process shall, in accordance with the rules of the SSO, timely and fully disclose the patents they own at any stage of the standard-setting process. They may also disclose other patents they are aware of and provide corresponding supporting materials, taking responsibility for the authenticity of the disclosed information.

Patent holders or applicants who do not participate in the standard-setting process may, in accordance with the rules of the SSO, disclose the patents they own and are aware of at any stage of the standard-setting process, while providing corresponding supporting materials and being responsible for the authenticity of the disclosed information.

In specific cases, if a patent holder fails to timely and fully disclose patent information in accordance with the rules of the SSO, or explicitly waives patent rights but later asserts those rights against standard implementers after the standard is published, it is an important factor in determining whether the specific conduct will have exclusionary or restrictive effects on market competition.

Article 5 (proposed revision): Information Disclosure of SEPs

Patent holders or applicants participating in the standard-setting process shall, in accordance with the rules of the SSO, timely and fully disclose the patents they own at any stage of the standard-setting process. They may also disclose other patents they are aware of and provide corresponding supporting materials, taking responsibility for the authenticity of the disclosed information.

Patent holders or applicants who do not participate in the standard-setting process may, in accordance with the rules of the SSO, disclose the patents they own and are aware of at any stage of the standard-setting process, while providing corresponding supporting materials and being responsible for the authenticity of the disclosed information.

In specific cases, whether or not participating in the standard-setting process, if a patent holder fails to timely and fully disclose patent information in accordance with the rules of the SSO, or explicitly waives patent rights but later asserts those rights against standard implementers after the standard is published, it is an important factor in determining whether the specific conduct will have exclusionary or restrictive effects on market competition.

Suggestion: Add “whether or not participating in the standard-setting process,” before “if a patent holder” in Paragraph 3 of this Article.

Reason: If a patent holder who does not participate in the standard-setting process fails to timely and fully disclose patent information in accordance with the rules of the SSO, but later asserts those rights against standard implementers after the standard is published, there is also the risk of violating the *Anti-Monopoly Law*. Therefore, their behaviors should also be regulated by this Article. Accordingly, it is necessary to clarify that the term “patent holder” in Paragraph 3 of this Article includes “patent holder who does not participate in the standard-setting process.”

2. Article 6: Licensing Commitments for SEPs

Article 6 (current draft regulation): Licensing Commitments for SEPs

The principle of fair, reasonable, and non-discrimination (FRAND) is an important principle that SEP holders and standard implementers should adhere to during licensing negotiations. The principle has been widely accepted by international, foreign, and domestic SSOs and has become significant content in intellectual property policies.

Patent holders or applicants participating in the standard-setting process shall, in accordance with the rules of the SSO, make explicit licensing commitments, agreeing to license their patents to any undertaking implementing the standard on a fair, reasonable, and non-discriminatory basis, either for free or for royalties. For patents that have already made fair, reasonable, and non-discriminatory licensing commitments, when a SEP holder transfers or assigns the patent, they should notify the transferee in advance of the licensing

commitments associated with the patent and ensure that the transferee agrees to be bound by those licensing commitments, thus making the licensing commitments equally effective for the transferee.

In specific cases, whether the SEP holder or its transferee violates the FRAND commitment is an important consideration in determining specific anti-competitive behaviors such as licensing at unfairly high rates, unjustified refusal to license, bundling or imposing other unreasonable trading conditions, or implementing discriminatory treatment.

Article 6 (proposed revision): Licensing Commitments for SEPs

The principle of fair, reasonable, and non-discrimination (FRAND) is an important principle that SEP holders and standard implementers should adhere to during licensing negotiations. The principle has been widely accepted by international, foreign, and domestic SSOs and has become significant content in intellectual property policies.

Patent holders or applicants, whether or not participating in standard-setting process, shall, in accordance with the rules of the SSO, make explicit licensing commitments, agreeing to license their patents to any undertaking implementing the standard on a fair, reasonable, and non-discriminatory basis, either for free or for royalties.

For patents that have already made fair, reasonable, and non-discriminatory licensing commitments, when a SEP holder transfers or assigns the patent, they should notify the transferee in advance of the licensing commitments associated with the patent and ensure that the transferee agrees to be bound by those licensing commitments, thus making the licensing commitments equally effective for the transferee.

In specific cases, whether the SEP holder or its transferee violates the FRAND commitment is an important consideration in determining specific anti-competitive behaviors such as licensing at unfairly high rates, unjustified refusal to license, bundling or imposing other unreasonable trading conditions, or implementing discriminatory treatment.

For the avoidance of doubt, the obligation of the SEP holder that shall license their patents to any undertaking implementing the standard on a fair, reasonable, and non-discriminatory basis shall remain the same regardless of SEP holders conducting licensing activity through patent pool and/or patent agency, and the patent pool and/or the patent agency shall be bound by the same obligation herein.

Suggestion 1: Add “whether or not participating in standard-setting process” after “patent holders or applicants” in Paragraph 2 of this Article.

Reason 1: If a patent holder or applicant who does not participate in the standard-setting process violates the principle of fair, reasonable and non-discrimination (FRAND), there is also the risk of violating the *Anti-Monopoly Law*. Accordingly, it is necessary to clarify that the “patent holders or applicants” in Paragraph 2 of this Article include “patent holders or applicants who do not participate in the standard-setting process.”

Suggestion 2: Add “[f]or the avoidance of doubt, the obligation of the SEP holder that shall license their patents to any undertaking implementing the standard on a fair, reasonable, and non-discriminatory basis shall remain the same regardless of SEP holders conducting licensing activity through patent pool and/or patent agency, and the patent pool and/or the patent agency shall be bound by the same obligation herein” after this Article.

Reason 2: In practice, many SEP holders manage their licensing activities through patent pools and/or patent agencies, with these entities actively engaged in SEP licensing. SEP holder should not be free from its obligation adhere to the principle of fair, reasonable, and non-discrimination regardless of whether it will use patent pool and/or patent agency for conducting the license activity.

3. Article 7: Good-Faith Negotiations for SEPs

Article 7 (current draft regulation): Good-Faith Negotiations for SEPs

Good-faith negotiations for SEPs are specific manifestations of fulfilling commitments of fairness, reasonableness, and non-discrimination. SEP holders and standard implementers should conduct good-faith negotiations on licensing conditions such as licensing royalties, quantities, and durations to achieve fair, reasonable, and non-discriminatory licensing terms. Good-faith negotiations include but are not limited to the following procedures and requirements:

1. SEP holders should make clear licensing negotiation offers to standard implementers, including

providing a list of SEPs, a comparison table between the SEP and the standard, and a reasonable feedback period.

2. Standard implementers should express their willingness to negotiate licenses within a reasonable period, without engaging in malicious delays or unjustified refusals to negotiate.
3. SEP holders should propose licensing conditions that are consistent with their FRAND commitment, including the calculation method and rationale for licensing royalties, the protection period and transfer status of SEPs, and other necessary information and practical circumstances directly related to licensing.
4. Standard implementers should accept the licensing conditions within a reasonable period. If not accepted, they should propose alternative solutions that comply with the principles of FRAND regarding licensing royalties, granting back, and other licensing conditions within a reasonable period. In specific cases, a comprehensive evaluation of the negotiation process and content is necessary, as non-good-faith negotiations for SEPs increase the risk of exclusion or restriction of competition in relevant markets. Both SEP holders and standard implementers need to prove that they were not at fault during the aforementioned process, provide corresponding supporting materials, and take responsibility for the authenticity of the provided evidence.

Article 7 (proposed revision: Good-Faith Negotiations for SEPs)

Good-faith negotiations for SEPs are specific manifestations of fulfilling commitments of fairness, reasonableness, and non-discrimination. SEP holders and standard implementers should conduct good-faith negotiations on licensing conditions such as licensing royalties, quantities, and durations to achieve fair, reasonable, and non-discriminatory licensing terms. Good-faith negotiations include but are not limited to the following procedures and requirements:

1. SEP holders should make clear licensing negotiation offers to standard implementers, including providing a list of SEPs, a comparison table between the SEP and the standard, claim charts mapping patent claims of the SEPs to the standards element by element, and a reasonable feedback period.
2. Standard implementers should express their willingness to negotiate licenses within a reasonable period, without engaging in malicious delays or unjustified refusals to negotiate. The aforesaid “reasonable period” shall not be limited by the “reasonable feedback period” as stated herein the above Item 1. For the avoidance of doubt, when other implementers in the supply chain of the implemented product express their willingness to obtain licenses within a reasonable period, then the standard implementers relying on the other implementers’ response on their willingness to obtain licenses shall not considered as “malicious delays or unjustified refusals to negotiate”;
3. SEP holders should propose licensing conditions that are consistent with their FRAND commitment, including the calculation method and rationale for licensing royalties, an existence of all other licensees and its license conditions for each licensee, the protection period and transfer status of SEPs, and other necessary information and practical circumstances directly related to licensing.
4. In the case where SEP holders comply with provisions set forth in Item 1 and Item 3 above, standard implementers should accept the licensing conditions within a reasonable period. If not accepted, they should propose alternative solutions that comply with the principles of FRAND regarding licensing royalties, granting back, and other licensing conditions within a reasonable period.

In specific cases, a comprehensive evaluation of the negotiation process and content is necessary, as non-good-faith negotiations for SEPs increase the risk of exclusion or restriction of competition in relevant markets. Both SEP holders and standard implementers need to prove that they were not at fault during the aforementioned process, provide corresponding supporting materials, and take responsibility for the authenticity of the provided evidence.

For the avoidance of doubt, the obligation of the SEP holders that shall conduct good-faith negotiations on licensing conditions as articulated herein shall remain the same regardless of SEP holders conducting licensing activity through patent pool and/or patent agency, and the patent pool and/or the patent agency shall be bound by the same obligation herein.

The reasonable period as stated in the above Item2 and Item4 shall be determined on a case-by-case basis according to the specific circumstances. When determining the reasonable period, the following factors should be considered comprehensively:

- (i) the number of SEPs,
- (ii) technical complexity,
- (iii) the level of knowledge of technology and standard by standard implementers,
- (iv) whether standard implementers are designers of standard-compliant components, and

(v) commercial relationship between SEP holders and standard implementers.

For the avoidance of doubt, followings shall be considered as “express their willingness to negotiate licenses within a reasonable period”.

(i) Standard implementers’ (including the other implementers in the supply chain of the implemented product) argument presented to the SEP holders regarding the essentiality and validity of SEP is objectively in good faith,

(ii) Other implementer in the supply chain of the implemented product is expressing their willingness to obtain licenses within a reasonable period.

Suggestion 1: Add “claim charts mapping patent claims of the SEPs to the standards element by element” in Item 1 as what the SEP holders should propose.

Reason 1: In general, implementer cannot evaluate the licensing negotiation offers exactly without claim charts mapping patent claims of the SEPs to the standards element by element. Therefore, the licensing negotiation offers made by SEP holder should include the claim charts element-by-element basis. Accordingly, we propose that Item 1 of this Article should include the claim charts element-by-element basis.

Suggestion 2: Add “[t]he aforesaid ‘period’ is not limited by the ‘feedback period’ stipulated in Item 1” in Item 2 of this Article.

Reason 2: The scope of “reasonable feedback period” stipulated in Item 1 is vague. “A reasonable feedback period” set by SEP holders unilaterally may not genuinely represent a reasonable feedback period. Therefore, it is suggested to clarify that the period for standard implementers to express their willingness to negotiate is not limited by the “feedback period” set by SEP holders. Even if standard implementers’ feedback time is slightly later than the “feedback period” set by SEP holders, it should not be regarded as “at fault.”

Suggestion 3: Add the following content in Item 2 of this Article “[f]or the avoidance of doubt, when other implementers in the supply chain of the implemented product express their willingness to obtain licenses within a reasonable period, then the standard implementers relying on the other implementers’ response on their willingness to obtain licenses shall not considered as ‘malicious delays or unjustified refusals to negotiate’”; and add Paragraph 5 to this Article “[f]or the avoidance of doubt, followings shall be considered as ‘express their willingness to negotiate licenses within a reasonable period’: (i) Standard implementers’ (including the other implementers in the supply chain of the implemented product) argument presented to the SEP holders regarding the essentiality and validity of SEP is objectively in good faith; (ii) Other implementer in the supply chain of the implemented product is expressing their willingness to obtain licenses within a reasonable period.”

Reason 3: Specific examples of “malicious delays or unjustified refusals to negotiate” should be provided to avoid ambiguity.

First, for SEPs, it is common for components included in the final product to comply with the relevant standards. Accordingly, licenses could be granted to either the component supplier or the final product manufacturer. Consequently, if an implementer in the supply chain expresses its willingness to obtain a license that encompasses implemented products of other implementers in the supply chain, then these “other implementers” should be considered to have good causes not to advance the negotiation.

Second, standard implementers need to confirm the necessity of the license as well as the essentiality and validity of SEPs before obtaining a license. These considerations are reasonable and should not be regarded as malicious delays.

Suggestion 4: Add “an existence of all other licensees and its license conditions for each licensee” in Item 3 as what the SEP holders should propose.

Reason 4: Implementer does not justify if license conditions offered by SEP holder is non-discriminatory compared to other licensees without confirming actual agreements b/w the SEP holder and other licensee. Also, SEP holders have many agreements with multiple licensees and in fact in InterDigital v. Lenovo in the U.K. case, more than ten agreements were produced for the same InterDigital’s SEP portfolio and the rates were very different from each licensee. SEP holder should not choose the one that they wish to disclose rather they should disclose all the agreements to be fair and reasonable to the related parties.

Suggestion 5: Add “in the case where SEP holders comply with the provisions set forth in Item 1 and Item 3 above” at the beginning of Item 4 of this Article.

Reason 5: It should be clearly stipulated that as a prerequisite for standard implementation, SEP holders must fulfill the obligations required for good-faith negotiations. If SEP holders do not provide sufficient information, it is difficult for standard implementers to accept the licensing conditions.

Suggestion 6: Add “[f]or the avoidance of doubt, the obligation of the SEP holders that shall conduct good-faith negotiations on licensing conditions as articulated herein shall remain the same regardless of SEP holders conducting licensing activity through patent pool and/or patent agency, and the patent pool and/or the patent agency shall be bound by the same obligation herein.” as paragraph 3 of this Article.

Reason 6: In practice, many SEP holders manage their licensing activities through patent pools and/or patent agencies, with these entities actively engaged in SEP licensing. SEP holder should not be free from its obligation conduct good-faith negotiations on licensing conditions regardless of whether it will use patent pool and/or patent agency for conducting the license activity.

Suggestion 7: Add “[t]he reasonable period as stated in the above Item2 and Item4 shall be determined on a case-by-case basis according to the specific circumstances. When determining the reasonable period, the following factors should be considered comprehensively: (i) the number of SEPs, (ii) technical complexity, (iii) the level of knowledge of technology and standard by standard implementers, (iv) whether standard implementers are designers of standard-compliant components, and (v) commercial relationship between SEP holders and standard implementers.” as paragraph 4 of this Article.

Reason 7: The determination of “reasonable period” shall vary depending on specific circumstances. It is suggested to list the above influential factors to clarify what needs to be considered when determining “reasonable period.”

4. Article 12: Unfairly High Royalties for Licensing SEPs

Article 12 (current draft regulation): Unfairly High Royalties for Licensing SEPs

In general, SEPs have significant value, and reasonable royalties can ensure that the SEP holder obtains returns on its research and development investment and technological innovation. However, the SEP holder may abuse its dominant market position by demanding unfairly high royalties for licensing the SEP or by selling products that include the SEP, thereby excluding or restricting competition. When conducting a specific analysis, the following factors may be considered:

1. Whether the parties engaged in good-faith negotiations for licensing, in accordance with Section 7 of this Guideline.
2. Whether the royalties are significantly higher than the research and development costs.
3. Whether the royalties are significantly higher than historical licensing royalties or licensing royalty standards that can be used as reference.
4. Whether the royalties exceed the SEP territorial scope, or the scope of goods covered by the SEP.
5. Whether royalties are charged for expired, invalid SEPs, or non-SEPs.
6. Whether the SEP holder reasonably adjusts the licensing royalties based on changes in the quantity and quality of the SEPs.
7. Whether the SEP holder engages in duplicate charging through non-practicing entities.

Article 12 (proposed revision): Unfairly High Royalties for Licensing SEPs

In general, reasonable royalties for SEPs can ensure that the SEP holder obtains return on its research and development investment and technological innovation for technologies that contribute directly to the proposals of technical solutions for standard-setting and are adopted by SSOs. However, the SEP holder may abuse its dominant market position by demanding unfairly high royalties for licensing the SEP or by selling products that include the SEP, thereby excluding or restricting competition. When conducting a specific analysis, the following factors may be considered:

1. Whether the parties engaged in good-faith negotiations for licensing, in accordance with Section 7 of this Guideline.

2. Whether the royalties are significantly higher than the research and development costs, that is, the research and development costs for technologies that contribute directly to the proposals of technical solutions for standard-setting.
3. Whether the royalties are significantly higher than historical licensing royalties or licensing royalty standards that were entered without injunction threat can be used as reference.
4. Whether the royalties exceed the SEP territorial scope, or the scope of goods covered by the SEP.
5. Whether royalties are charged for expired, invalid SEPs, or non-SEPs.
6. Whether the SEP holder reasonably adjusts the licensing royalties based on changes in the quantity and quality of the SEPs.
7. Whether the SEP holder engages in duplicate charging through non-practicing entities.
8. Whether the royalties are significantly higher than the profits of licensed products.
For the avoidance of doubt, the obligation of the SEP holders that shall not abuse its dominant market position shall remain the same regardless of SEP holders conducting licensing activity through patent pool and/or patent agency, and the patent pool and/or the patent agency shall be bound by the same obligation herein.

Suggestion 1: Revise the first sentence in Paragraph 1 of this Article as follows: “[i]n general, reasonable royalties for SEPs can ensure that SEP holder obtains returns on its research and development investment and technological innovation for technologies that contribute directly to the proposals of technical solutions for standard-setting and are adopted by SSOs. ” Add “that is, the research and development costs for technologies that contribute directly to the proposals of technical solutions for standard-setting after “the research and development costs” in Item 2 of this Article.

Reason 1: The definitions of “research and development investment” and “research and development costs” are ambiguous. It is recommended to specify that only technologies that are proposed as technical solutions to SSOs and are adopted as standards by SSOs can be considered as R&D objects, which is different from the R&D investment of a company’s own business that directly generates profits.

Suggestion 2: Add “that were entered without injunction threat” in Item 3.

Reason 2: The most appropriate FRAND rate should be the rate that the SEP holders and the implementers would have agreed as a mere business decision without any injunction threat. If there is an injunction threat such as infringement litigation was filed from the SEP holders in Germany, then the implementers are always forced with injunction threat and thus it cannot be considered as FRAND rate in such occasion.

Suggestion 3: Add Item 8 in this Article “8. Whether the royalties are significantly higher than the profits of licensed products.”

Reason 3: It is suggested to add Item 8 as a factor for evaluate whether the royalties for SEPs are reasonable.

Suggestion 4: Add “[f]or the avoidance of doubt, the obligation of the SEP holders that shall not abuse its dominant market position shall remain the same regardless of SEP holders conducting licensing activity through patent pool and/or patent agency, and the patent pool and/or the patent agency shall be bound by the same obligation herein.” as paragraph 2 of this Article.

Reason 4: In practice, many SEP holders manage their licensing activities through patent pools and/or patent agencies, with these entities actively engaged in SEP licensing. SEP holder should not be free from its obligation not abuse its dominant market position regardless of whether it will use patent pool and/or patent agency for conducting the license activity.

Suggestion 5: For “the scope of goods covered” in Item 4 of this Article, it should be clarified that appropriate technical units reflecting the technical contents of SEPs (that is, standard-compliant components) should form the basis for royalty calculations. For example, in cellular communication field, communication baseband chips and other components could be used as the basis for royalty calculations. Further, we propose that SSPPU (the smallest salable patent-practicing unit) is used as the appropriate technical units.

5. Article 13: Refusal to License SEPs

Article 13 (current draft proposal): Refusal to License SEPs

In general, after making FRAND commitments, a SEP holder shall not refuse to license any willing implementer without justification. Otherwise, it may have the effect of excluding or restricting competition in the market. When conducting specific analysis, the following factors may be considered:

1. Whether the licensor and licensee engaged in good-faith negotiations as outlined in Section 7 of this Guideline.
2. Whether licensing under fair, reasonable, and non-discriminatory terms can adequately compensate for the SEP infringement damages.
3. Whether the standard implementer lacks the ability to pay reasonable licensing royalties.
4. Whether the standard implementer has a history of poor credit or deteriorating business conditions that may affect transaction security.
5. Whether there are objective reasons, such as force majeure, that prevent the licensing of the SEP.
6. The impact and extent to which the refusal to license the SEP affects market competition and innovation by the standard implementer.
7. Whether the refusal to license the SEP would harm consumer interests or public welfare.

Article 13 (revised): Refusal to License SEPs

In general, after making FRAND commitments, a SEP holder shall not refuse to license any willing implementer without justification. Otherwise, it may have the effect of excluding or restricting competition in the market. When conducting specific analysis, only the following factors may be considered:

1. Whether the licensor and licensee engaged in good-faith negotiations as outlined in Section 7 of this Guideline.
2. Whether there are objective reasons, such as force majeure, that prevent the licensing of the SEP.
3. The impact and extent to which the refusal to license the SEP affects market competition and innovation by the standard implementer.
4. Whether the refusal to license the SEP would harm consumer interests or public welfare.

For the avoidance of doubt, the obligation of the SEP holders that shall not refuse to any willing implementer without justification shall remain the same regardless of SEP holders conducting licensing activity through patent pool and/or patent agency, and the patent pool and/or the patent agency shall be bound by the same obligation herein.

Suggestion 1: Delete Items 2, 3 and 4 of this Article.

Reason 1: Items 2, 3, and 4 either lack a clear basis or have ambiguous meanings. These provisions could be misused by SEP holders for unjustified refusals to license. Specifically:

For Item 2, unlike ordinary patent owners, SEP holders initially agree or recognize that SEPs should be licensed under FRAND terms, and have obtained the expected compensation through FRAND royalties. Therefore, Item 2 is unlikely to occur, and thus it is suggested to delete Item 2. If it is decided to keep Item 2, then it should be clarified which specific situations Item 2 applies to. In addition, if Item 2 considers the situation where standard implementers' ability to pay cannot compensate SEP holders, then Item 2 should be deleted. This is because for enterprises in industries with lower profits and whose ability to pay may not compensate SEP holders, Item 2 might be misused by SEP holders to refuse to license to all standard implementers in such industries.

For Items 3 and 4, within the range of reasonable royalties, standard implementers operating under normal conditions should be considered capable of sufficiently compensating for damages. Therefore, Items 3 and 4 are unlikely to occur, and thus it is suggested to delete them. If it is decided to keep Items 3 and 4, then it is suggested to clearly state that "according to the specific operating situation of individual companies, determine whether there are special circumstances compared with other companies in the same industry, such as obvious lack of payment ability or deterioration of operating conditions," to avoid Items 3 and 4 to be misinterpreted broadly. If Items 3 and 4 are applied to enterprises in industries with lower profits and such circumstances are not considered, it will result in SEP holders refusing to license all standard implementers in such industries.

Suggestion 2: Add a term "only" before the "the following factors" in Paragraph 1 of this Article.

Reason 2: It should be clarified that exceptions for SEP holders to refuse to license are limited to listed items

only.

Suggestion 3: Clarify that the term “justification” in Paragraph 1 of this Article does not include SEP holders’ own licensing policy, for example, the policy of only licensing to final product manufacturers).

Reason 3: “Justification” in Paragraph 1 ought to be objective. SEP holders should be restricted from arbitrarily refusing to license following their own policy.

Suggestion 4: Add “[f]or the avoidance of doubt, the obligation of the SEP holders that shall not refuse to any willing implementer without justification shall remain the same regardless of SEP holder conducting licensing activity through patent pool and/or patent agency” as paragraph 2 of this Article.

Reason 4: In practice, many SEP holders manage their licensing activities through patent pools and/or patent agencies, with these entities actively engaged in SEP licensing. SEP holder should not be free from its obligation not to refuse the license proposal regardless of whether it will use patent pool and/or patent agency for conducting the license activity.

6. Article 14: Bundling Involving SEPs

Article 14 (current draft proposal): Bundling Involving SEPs

In general, when granting licenses for SEPs, bundling or tying related essential products can reduce overall transaction costs and enhance the efficiency of implementing the standard. However, a SEP holder may abuse its dominant market position without legitimate reasons by requiring the standard implementer to accept bundled licenses or purchase unnecessary products, thereby excluding or restricting competition. When conducting specific analysis, the following factors may be considered:

1. Whether the licensor and licensee engaged in good-faith negotiations as outlined in Section 7 of this Guideline.
2. Whether the practice is consistent with industry or sector-specific trading practices or consumer habits.
3. Whether the practice is reasonable and necessary, such as facilitating the implementation of the standard or enhancing product functionality.
4. The feasibility of separating bundled licenses and whether it would impose unreasonable implementation costs on the standard implementer.
5. Whether the standard implementer has the autonomy to choose the licensing combination or the products to be purchased.
6. Whether the practice excludes or limits the trading opportunities of other undertakings.
7. Whether the practice restricts consumer choice.

Article 14 (proposed revision): Bundling Involving SEPs

In general, when granting licenses for SEPs, bundling or tying related essential products can reduce overall transaction costs and enhance the efficiency of implementing the standard. However, a SEP holder may abuse its dominant market position without legitimate reasons by requiring the standard implementer to accept bundled licenses or purchase unnecessary products, thereby excluding or restricting competition. When conducting specific analysis, the following factors may be considered:

1. Whether the licensor and licensee engaged in good-faith negotiations as outlined in Section 7 of this Guideline.
2. Whether the practice is consistent with industry or sector-specific trading practices or consumer habits.
3. Whether the practice is reasonable and necessary, such as facilitating the implementation of the standard or enhancing product functionality.
4. The feasibility of separating bundled licenses.
5. Whether the standard implementer has the autonomy to choose the licensing combination or the products to be purchased.
6. Whether the practice excludes or limits the trading opportunities of other undertakings.
7. Whether the practice restricts consumer choice.
8. Whether it would impose unreasonable implementation costs on the standard implementer

Suggestion 1: For Item 4, it is suggested to clarify the specific situations where it becomes infeasible to separate bundled licenses, or to request SEP holders to provide evidence or research results demonstrating the infeasibility.

Reason 1: The situations and conditions where “separate bundled licenses” is deemed as infeasible should be clarified, to prevent SEP holders from arbitrarily claiming that they have legitimate reasons for bundled licenses without providing any explanation or evidence.

Suggestion 2: Divide “and whether it would impose unreasonable implementation costs on the standard implementer” in Item 4 of this Article as an independent Item 8.

Reason 2: “Bundled licenses” generally impose unreasonable implementation costs on standard implementers, so there is no need to add “whether it would impose unreasonable implementation costs on the standard implementer” as a factor for consideration. However, if “whether it would impose unreasonable implementation costs on the standard implementer” is deleted in this Article, the standard implementer may be imposed by unreasonable implementation costs due to Bundling Involving SEPs. Therefore, we propose that “Whether it would impose unreasonable implementation costs on the standard implementer” is specified in Item 8.