



Médecins Sans Frontières (MSF) Access Campaign position paper Mandatory open sharing of technologies for COVID-19 to ensure equitable access for all

How could a global platform for the open sharing of technologies help fight the COVID-19 pandemic more efficiently?

In the context of the current pandemic, the world urgently needs **effective medical tools, including diagnostics, medicines and vaccines, to be available and accessible in all countries**. Concretely, this requires the research and development (R&D) of new tools, decentralised and rapid scale-up of manufacturing and supply capacities, transparent and affordable prices for governments and treatment providers, and free access for people at the point of care.

The open sharing of technologies, knowledge and data is a **powerful way to boost the R&D of new medical tools. If terms and conditions on the right to use and produce these technologies allow, it can also expand and diversify production and supply capacities by enabling multiple manufacturers to produce. Furthermore, this can also facilitate the management of costs and bring prices down.**

However, a key challenge of this approach is ensuring that **all needed technologies, knowledge and data are shared in such a way that guarantees the right to use and produce by all competent entities worldwide**. A critical risk is that the entities retaining exclusive rights will limit their use. For instance, relying on the willingness of the holders of these technologies, often pharmaceutical companies, risks leading to restricted use of selected rights or knowledge.

Voluntary patent pools between companies is common practice in many technological fields, including in the pharmaceutical industry. A typical voluntary patent pool allows members who join the pool to access, use, exchange and contribute relevant technologies and information under pre-defined terms and conditions. While pooling patents can, to a certain degree, save time and money, the effects of pooling through forming business clusters can also trigger anti-competitive concerns. Patent pools where rights and information are only of use to the pool members may encourage collusion between competitors that share information, such as on pricing, marketing strategies, or R&D information. In addition, while in the short term a patent pool can facilitate lower prices, a lack of transparency on the terms and conditions of the licences and restrictions on their use can enable a company to take the upper hand over competitors and have stronger control over the global market.

Previous experiences with voluntary mechanisms in the medical field, such as the voluntary licensing of patents, including through the Medicines Patent Pool (MPP), **have demonstrated the inherent limitations** of relying on pharmaceutical companies' willingness to address public health needs. Challenges with voluntary approaches have arisen because companies ultimately retain the

rights to determine which entities can access information or knowledge, and/or which entities can produce medicines and where they can be supplied. For example, many middle-income countries with manufacturing capacities, and all high-income countries, were excluded from the licenses as part of the current voluntary patent pool mechanism for HIV and/or hepatitis C medicines.

The COVID-19 pandemic will affect all countries regardless of their socio-economic status. It will likely have serious health, social and economic impacts worldwide, disproportionately affecting vulnerable populations and exacerbating existing vulnerabilities within health systems. In such a context, **governments and UN bodies have the responsibility to ensure that monopolies and other exclusivities do not limit the development and use of health technologies needed to combat COVID-19.** There are examples of non-voluntary pooling mechanisms in other technical fields which have successfully created pro-competitive conditions whilst sharing techniques. An emblematic example is the Manufacturers Aircraft Association, which, during the first world war, was forced by the US government to form a patent pool. Whilst MSF supports the principles of open sharing and open science to facilitate sustainable and equitable access to medical tools, it is imperative that **any initiative or platform aiming to share technologies in the context of COVID-19 are designed and organised in such a way that ensures the right to use and produce such technologies by all competent entities world-wide.**

Public funding will play a large role in the funding of R&D of technologies to prevent or treat COVID-19, but governments also have the legal means to **impose mandatory sharing, as well as require transparency of production, prices, stockpiles, and supply capacities to ensure access to all people in need across the world.**

In the midst of the COVID-19 pandemic, it is important to reaffirm the core responsibility of governments and the World Health Organization (WHO) to adopt mandatory measures and direct interventions. This is including, but not limited to, adopting binding agreements at the international level under the WHO Constitution, the use of compulsory licensing and the suspension and cancellation of exclusivity protections. These measures would accelerate the development of diverse and sufficient manufacturing and supply capacities, and enable equitable distribution of COVID-19 diagnostics, treatments and vaccines for all in need.

Essential considerations for initiatives aiming to pool or share technologies

1. Mandatory sharing through global suspension or fast-track compulsory licensing of patents and exclusivities by all governments would ensure no monopolies on COVID-19 medical technologies and data: The profound impact of the COVID-19 pandemic at the global level needs to be addressed through collective action and commitments from all governments. As such, direct legal and policy interventions are critical. Governments are able to suspend patents and exclusivities, or issue compulsory licenses, and mandate companies to share the concerned technologies, data and knowledge with a global open platform. This would ensure that no monopolies are attached to the technologies, and the data shared through the platform is accessible to all.

2. Explicit binding obligations related to the sharing of technologies should to be put in place in all funding agreements concerning COVID-19: It is essential to ensure public funding agencies and governments hold sufficient power over decision-making to ensure that technologies are shared in a global open platform with favourable terms and conditions. This needs to be explicitly stated and required ahead of funding allocations to ensure the open sharing of technologies.

3. Ensure inclusion of all countries in the territory of any agreement related to access and use: Previous experiences with voluntary licensing has revealed the constant and ongoing challenge of ensuring all countries, especially middle-income countries with manufacturing capacity, are included in the territory of the license agreements with the right to produce and supply. It is critical that all countries, due to the nature of the pandemic, are included in the scope of the agreement.

4. Full transparency and disclosure of the participation of key stakeholders, including governments, in negotiations between the MPP, WHO and rights holders: To avoid the pitfall of unfair terms and conditions being negotiated in the business-as-usual bilateral and confidential negotiation settings for voluntary licenses, it is critical to ensure full transparency and disclosure of the participation of key stakeholders, especially governments, in negotiations. Full agreements should be made public.

5. Worldwide, royalty-free, non-exclusive obligations: Any agreements or terms and conditions to be established in the proposed mechanism, including through the possible administration of those terms and conditions by the MPP, should be non-exclusive and ensure global coverage of production and supply. It should be royalty-free for low- and middle-income countries, with reasonable remuneration terms for the other countries.

6. Binding obligations to prevent secondary patenting and additional exclusivities, and ensuring the continued open sharing of technologies: To ensure that no exclusivities and/or secondary patents arise in the future development of COVID-19 medical tools, it is critical to set up explicit, upfront obligations requiring that: 1) original technology holders will not seek secondary patenting or additional regulatory exclusivities; 2) any additional intellectual property sought by the original technology holders should be shared back into the pool or platform under the same terms and conditions as the original agreements. In addition, explicit open source licensing terms could be considered. This would require all contractual parties to agree on the binding obligations to share/grant back any development, improvement or adjustment of the original technologies with the same terms and conditions set out in the original license, in order to ensure the continuation of the open sharing mechanism.