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Feedback of

ACT | The App Association

(Transparency Reg. # 72029513877-54)
Rue Belliard 40,
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to the

European Commission,

DG COMP, Unit A1,

regarding its

Draft guidelines on exclusionary abuses of dominance

I. Introduction

ACT | The App Association (hereafter 'App Association') welcomes the opportunity to submit comments to the European Commission's consultation on its draft guidelines on exclusionary abuses of dominance.

The App Association is a policy trade association for the **small business technology developer community**. Our members are entrepreneurs, innovators, and independent developers within the global app ecosystem that engage with verticals across every industry. We work with and for our members to promote a policy environment that rewards and inspires innovation while providing resources that help them raise capital, create jobs, and continue to build incredible technology. Today, the ecosystem the App Association represents—which we call the app economy—is valued at approximately €86 billion, and is responsible for more than 1.3 million jobs in the European Union (EU).[1]

We are deeply committed to fostering competitive, opportunity-rich environment for SMEs and have been actively engaged in discussions surrounding policies that shape the digital economy. With the App Association representing a broad range of SMEs operating at various layers of the app ecosystem, from developers to service providers, we are acutely aware of the challenges and opportunities faced by smaller companies. Our small and medium-sized enterprise (SME) members voices are crucial to informing policy decisions that ensure fair competition, innovation, and consumer protection in digital markets.

II. Moving away from an economic effects-based approach

The new draft guidelines are shifting away from a more economic, effects-based approach toward a more formalistic approach on enforcing Article 102 TFEU.

We ask the Commission to align its draft guidelines on exclusionary abuses with the Court of Justice of the European Union's (CJEU's) emphasis on a more rigorous, evidence-based economic approach, in light of its recent *Intel* judgement.[2] Such an approach is essential for making competition law enforcement predictable and grounded in actual economic analysis. Market interventions by competition authorities are inherently intrusive and can lead to unintended ripple effects that distort competition and impact all market participants, including SMEs. By focusing on real market impacts and demonstrable benefits, an economically substantiated approach ensures that intervention occurs

[1] *See* https://actonline.org/wp-content/uploads/Deloitte-The-App-Economy-in-the-EU-2020.pdf.

[2] The recent Intel judgment (Case C-240/22 P, October 2024) underscores the CJEU's endorsement of a more economic, evidence-based approach in competition law. By rejecting presumptive illegality and requiring the Commission to demonstrate actual anti-competitive effects, the case highlights the need for substantiated economic analysis in enforcing Article 102 TFEU.

only where genuine harm to competition and consumer welfare can be proven. This promotes a balanced ecosystem where both consumers and businesses, including smaller market players, can thrive without unnecessary disruption.

III. Network effects

While we recognise the challenges created by network effects,[3] particularly with regard to barriers to entry and expansion, we advocate for a more nuanced discussion also including positive network effects that can facilitate market entry. This is particularly the case with markets built on platforms, which has transformed how businesses, especially SMEs, access markets.

Platforms have revolutionised market access for smaller companies in a way that has transformed how these businesses connect with consumers. While the advent of the internet itself was a significant leap forward in enabling global connections, platforms have streamlined this process even further, making it easier for businesses to enter markets and interact with consumers.

> *'App stores facilitate developers' —and especially small business developers'—entrance into markets. The platforms effectively enable fast and inexpensive access to smartphone users around the world. Having low barriers to entry means that even the smallest businesses have access to 3.5 billion smartphone users globally. Facilitating market entrance of small innovative companies increases the sustainability of this dynamic ecosystem'.* [4]

There is a **symbiotic relationship between app stores, developers, and users.** Increased app store traffic attracts more developers, which brings in more consumers who then benefit from a higher quantity of high-quality apps. **For SMEs and startups, the network effects of this multi-sided market are particularly beneficial.** They allow small developers to reach new consumers instantly across borders. This also makes it possible for app stores to invest substantial resources into research and development (R&D). Investment in R&D means app stores can offer a variety of high-quality services and other benefits to developers. Programming and advertising integration tools, ready-to-use payment and billing services are particularly advantageous for the smallest app developers who would not otherwise have the resources to develop such features. The more attractive these offerings are, the more app developers flock to the app stores. Today, the largest app stores show intense competition between app developers. All developers pay the

[3] Discussed in para 31 of the Draft Communication From The Commission on its "*Guidelines on the application of Article 102 of the Treaty on the Functioning of the European Union to abusive exclusionary conduct by dominant undertakings*"

[4] p.13. Deloitte Finance, The App Economy in the European Union: *A Review of the Mobile App Market and Its Contribution to the European Economy*, June 2020. https://actonline.org/wp-content/uploads/Deloitte-The-App-Economy-in-the-EU-2020.pdf

same low entry fee to make their products available online. No matter their size, they all have access to the same built-in benefits and compete under the same terms and conditions.

The app economy exemplifies the success of this model. The mobile app sector in the EU reached direct revenues of 86 billion euros in 2019, and the overall contribution of the app economy, factoring in both direct and indirect effects, amounted to 187 billion euros.[5] This staggering figure highlights how competition on digital platforms can drive significant economic growth.

Today, platforms such as app stores offer the easiest entry point for small businesses to reach consumers. The low barriers to entry mean that anyone—from startups to hobbyists—can become app creators. This accessibility fosters competition and innovation, making app development one of the most dynamic and competitive markets.

Moreover, these **positive network effects can help balance out some of the disadvantages posed by negative network effects.** In digital markets like app stores, one of the largest barriers to entry for small businesses is overcoming the network effects and brand loyalty enjoyed by more established players. In these highly competitive markets, platforms help smaller providers by giving them access to the trust and loyalty consumers have in the platform itself. This allows consumers to feel safer exploring products from less-established businesses, levelling the playing field and making it easier for small companies to thrive.

In conclusion, we encourage a broader acknowledgment of these positive externalities of network effects, which lower entry barriers for certain businesses and foster innovation and competition within the platform economy.

IV. Standard-essential patents

We are pleased to see that the role of standard-essential patents (SEPs) is acknowledged in footnote 52 and in paragraph 104 of the draft guidelines on exclusionary abuses, however we believe it's vital that the guidelines include more discussion on SEPs and their increasing role in exclusionary practices. While SEP holders voluntarily commit to license on fair, reasonable, and non-discriminatory (FRAND) terms, some opportunistic SEP holders actively disregard and circumvent this commitment. Instead, some opportunistic SEP holders exploit their dominant position within technical standards to demand supra-FRAND licensing terms. This is particularly important in light of the European Commission's recent amicus intervention in the *VoiceAge EVS v. HMD Global* appeal case before the Munich Higher Regional Court,[6] which highlighted significant misinterpretations and misapplications of the '*Huawei*

[5] p.32 Deloitte Finance, The App Economy in the European Union: *A Review of the Mobile App Market and Its Contribution to the European Economy*, June 2020. https://actonline.org/wp-content/uploads/Deloitte-The-App-Economy-in-the-EU-2020.pdf

[6] https://competition-policy.ec.europa.eu/document/download/66e0bd63-36da-4b27-9eef-70602a8c7be2_en?filename=2024_Amicus_Curiae_6U3824_22Kart_de.pdf

steps', established in *Huawei v. ZTE*[7] judgement before the CJEU, as a framework for when the use of injunctions by SEP licensing disputes constitutes an abuse of dominance. Currently, there are entities that are using the judicial system in the EU to enhance their bargaining position and apply undue pressure on willing licensees. One such case is a dispute between SEP holder Panasonic and licensee Xiaomi in the United Kingdom (UK).[8] In this case, Panasonic sought an injunction in both German national courts and the Unified Patent Court (UPC), while seeking a fair, reasonable, and non-discriminatory (FRAND) determination in the UK. The UK Court of Appeal recognised that Panasonic was acting outside the bounds of its FRAND commitment and represented an unwilling licensor. Given this, it is essential that the Guidelines on Exclusionary Abuses by Dominant Undertakings provide further clarification on the conditions under which SEPs holders engage in exclusionary practices.

1. Dominant position

We welcome the draft guidelines' acknowledgment that ownership of a SEP may constitute a dominant position under *Article 102 TFEU*.

Footnote 52 of the draft guidelines states:

'***While ownership of a standard essential patent ("SEP") does not on its own equate to dominance, it may nevertheless be established that a SEP confers a dominant position vis-à-vis market participants on the basis of all relevant factors.*** *See in this respect Commission decision of 29 April 2014 in case AT.39985 – Motorola, paragraphs 223 and 241 and Commission decision of 29 April 2014 in case AT.39939 – Samsung, paragraph 46'.*

We request additional clarification in the draft guidelines regarding the circumstances under which ownership of a SEP may confer a dominant market position under *Article 102 TFEU*. We ask the Commission to incorporate more extensive language from its established decisions and the CJEU's case law to clarify this further.

While ownership of a SEP does not necessarily automatically equate to dominance, successful global standards often create a scenario of market lock-in, granting SEP holders a particularly powerful market position. This aspect is highlighted in paragraph 231 of the *Motorola* decision,[9] which discusses that wide adoption of a standard can create dependencies for market participants, leading to a lock-in effect:

[7] https://curia.europa.eu/juris/document/document.jsf?text=&docid=165911&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=5093007

[8] https://www.eplaw.org/app/uploads/2024/10/Panasonic-UK-Holdings-Corp-v.-Xiaomi-3-October-2024-SEP-FRAND-2024-EWCA-Civ-1143.pdf.

[9] https://ec.europa.eu/competition/antitrust/cases/dec_docs/39985/39985_928_16.pdf

'*Due to the **wide adoption** of GPRS in the EEA and the need of operators and device manufacturers to base their services and products on the same air interface technology, so that devices can communicate with the network, **industry players are locked-in** to the GPRS technology'.*

Similarly, paragraph 46 of the *Samsung* decision[10] explores how technical standards, which lack meaningful competition, can become indispensable:

'*First, Samsung holds a 100% market share in each of the relevant markets. While ownership of a SEP does not, on its own, confer a dominant position, UMTS is de facto the only 3G standard in the EEA. **Due to its wide adoption, it is indispensable** for manufacturers of mobile devices to comply with the UMTS standard'.*

The *Huawei v. ZTE* case reinforces how SEPs can confer dominance due to their essentiality. In paragraphs 49-51, the Court highlights that SEPs are indispensable for complying with a standard, while also highlighting that SEP holders have increased obligations due to their FRAND commitments:

'*49. It is characterised, first, as the referring court has observed, by the fact that the patent at issue is **essential to a standard** established by a standardisation body, **rendering its use indispensable to all competitors which envisage manufacturing products that comply with the standard to which it is linked.***

*50. That feature **distinguishes SEPs from patents that are not essential to a standard** and which normally allow third parties to manufacture competing products without recourse to the patent concerned and without compromising the essential functions of the product in question.*

*51. Secondly, the case in the main proceedings may be distinguished by the fact, as is apparent from paragraphs 15 to 17 and 22 of the present judgment, that the patent at issue obtained **SEP status only in return for** the proprietor's irrevocable undertaking, given to the standardisation body in question, that it is **prepared to grant licences on FRAND terms'.***

In conclusion, we believe that the guidelines should explicitly acknowledge that in instances of successful standard adoption or where only one standard prevails, the control of SEPs may directly lead to dominance due to the lack of competitive alternatives and the locked-in nature of the market.

2. Refusal to supply: Injunctions and discriminatory licensing of SEPs

[10] https://ec.europa.eu/competition/antitrust/cases/dec_docs/39939/39939_1501_5.pdf

We welcome the draft guidelines' reference to the *Huawei v. ZTE* judgement in footnote 249 to paragraph 104, underscoring that a refusal to license SEPs on FRAND terms, or the pursuit of injunctions against willing licensees, may constitute an abuse of dominance under *Article 102 TFEU*. However, we believe that the draft guidelines should provide clearer explanations on how SEP holders, who have made voluntary commitments to licensing on FRAND terms, can engage in exclusionary abuses through the misuse of injunctions and discriminatory licensing practices. We request that the Commission expand on this by referencing its past decisions on abusive conduct by SEP holders and relevant CJEU case law to provide further clarity on the conditions under which certain exclusionary practices by SEP holders may constitute an abuse of dominance.

The *Samsung* decision demonstrates in paragraph 61 the direct link between FRAND commitments and a SEP holder's promise not to engage in exclusionary behaviour:

'*When contributing its technology to the UMTS standard, Samsung therefore agreed to: (i) license its UMTS SEPs; and (ii)* ***license them on FRAND terms and conditions.*** *It follows that Samsung expects to obtain remuneration for its SEPs by means of licensing revenue* ***rather than using these patents to seek to exclude others'.***

The *Samsung* decision further elaborates in paragraph 62 how the use of injunctions may constitute an exclusionary abuse in the context of SEP licensing disputes:

'*The Commission preliminarily concluded that Samsung's seeking of preliminary and permanent* ***injunctions*** *against Apple on the basis of its UMTS SEPs was capable of: (i)* ***excluding*** *Apple, a rival manufacturer of UMTS-compliant mobile devices from the market; and (ii) inducing Apple to* ***accept disadvantageous licensing terms****, compared to those which Apple may have accepted in the absence of injunctions being sought'.*

The *Motorola* decision further explores in paragraph 289 how SEP holders can participate in anti-competitive exclusionary behaviour, by holding-up implementers:

'Once GPRS, based on the agreement of patent holders to grant access to their SEPs on FRAND terms and conditions, was **widely implemented and the industry became locked in**, a SEP holder may be able to behave in **anti-competitive ways**, for example by "**holding-up" implementers of the standard after its adoption**'.

The *Motorola* decision further elaborates in paragraph 291 that FRAND licensing terms are meant to result from fair commercial negotiations rather than being imposed through the market power a SEP holder gains from having their technology included in a standard:

'In principle, **FRAND terms and conditions should be the outcome of commercial negotiations** in which a **SEP holder should not be able to exploit the market power it enjoys** following the inclusion of its patented technology in the standard. A SEP holder should, however, be able to obtain FRAND royalties in return for making the standardised patented technology available to third parties'.

In paragraph 312, the *Motorola* decision explains that when a SEP holder seeks and enforces an injunction, they can effectively exclude innovative standard-compliant products from the market:

'By seeking and enforcing an injunction, a SEP holder may be able to **exclude even the most innovative standard-compliant products from the market** as, by definition, the patented technology cannot be worked around. In turn, the elimination of competing products from the market may limit consumer choice and partially eliminate downstream competition'.

The *Huawei v. ZTE* case played a pivotal role in establishing a framework for European law regarding the use of injunctions by SEP holders and when such actions may constitute abuse of dominance:

'52. Although the proprietor of the essential patent at issue has the right to bring an action for a prohibitory injunction or for the recall of products, the fact that that patent has obtained SEP status means that its proprietor can **prevent products manufactured by competitors from appearing or remaining on the market** and, thereby, **reserve to itself the manufacture of the products in question**.

53. In those circumstances, and having regard to the fact that an **undertaking to grant licences on FRAND terms creates legitimate expectations** on the part of third parties that the proprietor of the SEP will in fact grant licences on such terms, **a refusal** by the proprietor of the SEP **to grant a licence on those terms** may, in principle, **constitute an abuse within the meaning of Article 102 TFEU**'.

The paragraphs above from the *Huawei v. ZTE* judgment delineate two primary categories of potential abuses by SEP holders; First, the abusive use of injunctions, where a SEP holder may improperly leverage injunctions to exert pressure on implementers. Second, the failure of a SEP holder to license on FRAND terms, which may include (i) imposing supra-FRAND pricing by exploiting enhanced market power, potentially reinforced by the threat of injunctions (violation of the fairness principle), and (ii) an outright refusal to license (violating the non-discriminatory principle).

(1) Injunctions directly result in market exclusion, as they require a product to be withdrawn from the market entirely. When wielded abusively by a SEP holder against a willing licensee, this practice effectively excludes the licensee from the market and leverages the SEP holder's dominant position in an exclusionary manner.

(2) Supra-FRAND pricing poses significant issues, especially given the lock-in effect associated with widely adopted standards where viable alternatives are often unavailable. In these cases, SEP holders may exploit this lack of competition to demand 'monopoly pricing'.

(3) Outright refusal to license can be especially problematic for SMEs. While some advocate for an 'access-for-all' model rather than a 'license-for-all' approach, SMEs require formal licenses rather than mere access to SEPs. Operating without licenses exposes them to significant legal risk, as SEP holders may assert claims against them at any time, making long-term business planning and financial forecasting challenging. For SMEs, such uncertainty also poses a substantial barrier to growth and scalability, as risk-averse European investors are often unwilling to support businesses without clear, comprehensive licensing agreements in place.

In conclusion, it is crucial to solidify in the guidelines how SEP holders may abuse their dominant position. Regarding injunctions, SEP holders must be restrained from using them as a tool to exclude competitors or coerce willing licensees into accepting unfavourable terms. Furthermore, any refusal to supply licenses under FRAND commitments should also be considered an exclusionary abuse.

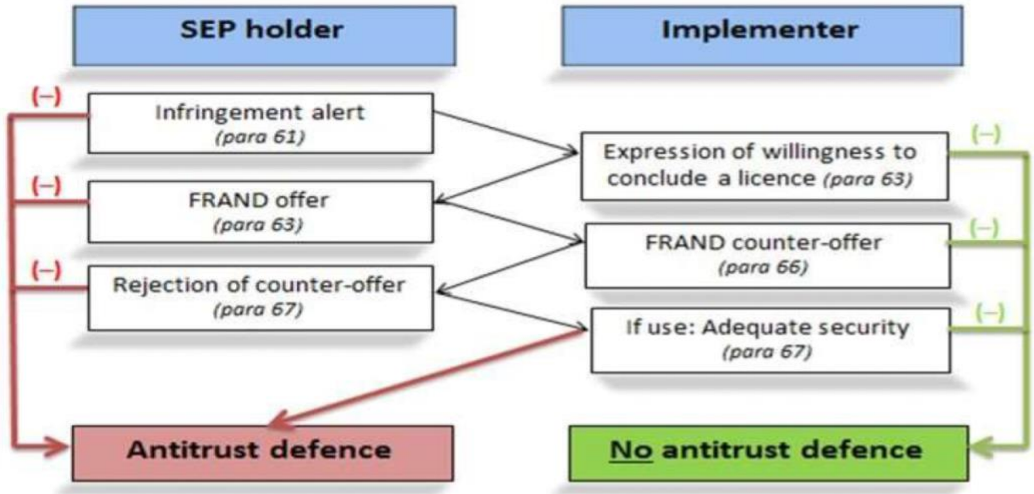
Incorrect interpretation and application of the 'Huawei steps'

The *Huawei v. ZTE* case established the well-known 'Huawei steps', which set out the conditions under which an abuse of dominance defence can be invoked against SEP holders seeking injunctions.[11] According to the CJEU's ruling, SEP holders must first alert the alleged infringer of the infringement and provide them with a clear offer for licensing on FRAND terms.[12] Only if the infringer fails to respond and shows an willingness to negotiate can the SEP holder then seek an injunction without it being considered an abuse of dominance.[13]

Unfortunately, some EU Member State courts, particularly in Germany, have misinterpreted and misapplied the 'Huawei steps' in a rigid and restrictive manner, creating a loophole that allows SEP holders to continue engaging in abusive use of injunctions. This has prompted the Commission to intervene in a case involving VoiceAge EVS and HMD Global before the Munich Higher Regional Court with an *amicus* brief. This case is a part of an ongoing, complex legal dispute, which has led to differing first-instance judgments by the Munich and Mannheim Regional Courts on whether a SEP holder's injunction requests constitute an abuse of dominance under the 'Huawei steps'. Due to divergent interpretations of the 'Huawei steps' by the Munich and Mannheim courts, the Commission's brief aims to clarify the conditions to ensure consistent application of Article 102 TFEU across the EU.

[11] Huawei vs. ZTE, Paragraph 55
[12] Paragraphs 60-62
[13] Paragraph 63

In its *amicus curiae* brief, the Commission included the following visual illustration of the 'Huawei steps' represented as a 'ping-pong sequence':



The Commission's brief explains that the 'Huawei steps' are designed to ensure a balanced negotiation process for SEP licensing, requiring SEP holders to fulfil specific, sequential procedural steps before seeking an injunction. This prevents SEP holders from leveraging abusive licensing demands while also obliging SEP implementers to participate constructively in licensing discussions. The Commission emphasises that each step needs to be completed in sequential order to maintain the intended balance between the negotiating parties.[14]

Moreover, the Commission clarified in depth the conditions within step 1 (infringement alert) and step 2 (expression of willingness to conclude a licence) of the Huawei framework.

For step 1, the Commission clarifies that SEP holders must send an infringement notice to inform the patent user of the alleged infringement, identify the SEP, and explain how it has been infringed.[15] The Commission highlights paragraphs 61 and 62 of the *Huawei v. ZTE* judgement, which state:

'Prior to such proceedings, it is thus for the proprietor of the SEP in question, first, to alert the alleged infringer of the infringement complained about by designating that SEP and specifying the way in which it has been infringed'.

[14] European Commission Amicus Brief in *VoiceAge EVS and HMD Global*, Paragraphs 43 – 46
[15] Ibid Paragraph 6

'As the Advocate General has observed in point 81 of his Opinion, in view of the large number of SEPs composing a standard such as that at issue in the main proceedings, it is not certain that the infringer of one of those SEPs will necessarily be aware that it is using the teaching of an SEP that is both valid and essential to a standard'.

Deriving from this wording, the Commission elaborates that to satisfy the requirements of a sufficient infringement notice, the SEP holder must (i) expressly complain of a patent infringement, (ii) specifically name the patents concerned with their number, and (iii) specify the manner of infringement in the letter.[16]

Step 2 requires the SEP implementer to express willingness to license on FRAND terms.[17] The Commission explains that the *Huawei v. ZTE* decision did not formulate specific criteria for the expression of willingness to license, which is merely the starting point for negotiation discussions on FRAND terms leading to offers (step 3) and counter-offers (step 4).[18] Crucially, the Commission highlights that a SEP implementor cannot be deemed 'unwilling' merely for expressing an intention to challenge the validity or the essentiality of the SEPs in question, referencing paragraph 69 of the *Huawei v. ZTE* judgement:[19]

'Lastly, having regard, first, to the fact that a standardisation body such as that which developed the standard at issue in the main proceedings **does not check whether patents are valid or essential to the standard** in which they are included during the standardisation procedure, and, secondly, to the right to effective judicial protection guaranteed by Article 47 of the Charter, an **alleged infringer cannot be criticised** either **for challenging**, in parallel to the negotiations relating to the grant of licences, **the validity of those patents** and/or the **essential nature** of those patents to the standard in which they are included and/or **their actual use**, or for reserving the right to do so in the future'.

Additionally, the Commission expressed its opinion that willingness should be assessed based on the initial declaration and not based on later negotiation conduct, explaining that further negotiation behaviour is covered under 'step 4', namely 'FRAND counter-offer'.[20]

Lastly, the Commission clarified that the Huawei framework mandates that each step must be completed in order, with no retroactive corrections allowed.[21] The Commission explained that this is essential for respecting the balance of interests envisioned by the 'Huawei steps'.

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[16] Ibid Paragraph 64
[17] Ibid Paragraph 7
[18] Ibid Paragraphs 81-82
[19] Ibid paragraphs 57 & 83
[20] Ibid Paragraphs 84-87
[21] Ibid Paragraphs 8, 66-72 , 88-91

In conclusion, we ask the Commission to include a detailed clarification on the interpretation of the 'Huawei steps' in its guidelines on exclusionary abuses, based on its recent *amicus* intervention in *VoiceAge EVS v. HMD Global*. It is crucial to establish a well-defined and certain framework governing SEP licensing negotiations, as the misuse of abusive injunctions by opportunistic SEP holders can lead to significant exclusionary abuses. Clarity on the Huawei procedural steps is essential to define both the conditions SEP holders must follow to avoid abusing a dominant position and the circumstances under which implementers can rely on an antitrust defence against abusive injunctions.

V. Conclusion

We appreciate the opportunity to provide feedback on the draft guidelines and hope our contributions will be thoughtfully considered. We look forward to ongoing dialogue with the Commission on these issues and remain available for any follow-up discussions or clarifications.

Sincerely,

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