

Welcome Letter to the Hungarian EU Council Presidency from ACT | the App Association July 2024

ACT | The App Association ('App Association') sends its best wishes and welcomes the Hungarian Presidency of the Council of the European Union (EU). 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 €830 billion globally and is responsible for over 1.3 million jobs in the European Union (EU).¹

To continue improving the lives of European citizens and creating sought-after jobs in the Member States, App Association members rely on EU and national-level policies that enable them to innovate and grow. As Hungary takes on the Council Presidency, we share below our top priorities for the upcoming months. The App Association believes that the Hungarian Presidency has a great opportunity to further develop and strengthen Europe's digital economy and ensure that European small and medium-sized enterprises (SMEs) continue to thrive. As the leading industry voice of the app economy, we respectfully offer the following high-level recommendations and look forward to supporting the Hungarian EU Council Presidency in its work.

Main recommendations to the Hungarian EU Council Presidency

I. Ensuring a clear regulatory framework for SMEs

A streamlined regulatory environment reducing bureaucratic hurdles is essential for SMEs to thrive, as it reduces compliance costs and allows them to focus on innovation and growth. Regulatory measures, even when meant to be aimed at larger businesses, often impact SMEs. A balanced approach that considers the unique needs of SMEs is therefore crucial for fostering a competitive and inclusive digital economy. We ask the Hungarian Presidency to use its influence to promote a regulatory landscape that supports SMEs, ensuring they are not overburdened by excessive compliance requirements.

II. Advancing technological innovation and supporting small business growth

We advocate for increased funding for research and development, particularly in areas such as artificial intelligence, machine learning, and augmented reality. These cutting-edge technologies are pivotal for the next generation of tech developments, and enhanced investment in these fields will ensure that Europe remains at the forefront of innovation. We believe that small businesses are champions of innovation due to their flexibility, adaptability, and close community ties, allowing them

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

to quickly identify and respond to market gaps and needs. Therefore, we ask for the implementation of funding designed to support small businesses in the tech sector, such as grants, tax incentives, and improved access to venture capital, enabling small businesses to thrive.

III. The ability for SMEs to fairly license standard-essential patents (SEPs)

We ask the Hungarian Presidency to prioritise and support the proposed EU SEP Regulation and to push the Council forward in establishing a position on this crucial matter. The App Association views the proposed EU standard-essential patent (SEP) Regulation as vital for creating a transparent and fair SEP licensing framework within the EU.

To foster innovation and competition, it is essential that EU SEP policy aligns with key SEP licensing principles, consistent with the CWA 95000:²

1. The fair, reasonable, and non-discriminatory (FRAND) commitment means all can license – A holder of a FRAND-committed SEP must license that SEP to all companies, organisations, and individuals who use or wish to use the standard on FRAND terms.
2. Prohibitive orders on FRAND-committed SEPs should only be allowed in rare circumstances – Prohibitive orders should not be sought by SEP holders or allowed for FRAND-committed SEPs except in rare circumstances where monetary remedies are not available.
3. FRAND royalties – A reasonable rate for a valid, infringed, and enforceable FRAND-committed SEP should be based on the value of the actual patented invention itself to the smallest saleable patent practicing unit, which is separate from purported value due to that patent's inclusion in the standard, hypothetical downstream uses, or other factors unrelated to invention's value.
4. FRAND-committed SEPs should respect patent territoriality – Patents are creatures of national law, and courts should respect the jurisdiction of foreign patent laws to avoid overreach with respect to SEP remedies. Absent agreement by both parties, no court should impose global licensing terms on pain of a national injunction.
5. The FRAND commitment prohibits harmful tying practices – While some licensees may wish to get broader licenses, a SEP holder that has made a FRAND commitment cannot require licensees to take or grant licenses to other patents not essential to the standard, invalid, unenforceable, and/or not infringed.
6. The FRAND commitment follows the transfer of a SEP – As many jurisdictions have recognised, if a FRAND-committed SEP is transferred, the FRAND commitments follow the SEP in that and all subsequent transfers.

This framework is particularly important for SMEs, which often face significant challenges in SEP negotiations due to limited resources and experience. The proposed mechanisms in the EU SEP Regulation can help remove these barriers to competition. We support the establishment of a non-binding FRAND conciliation process, aggregate royalty rate determination, and an essentiality

² <https://actonline.org/2024/06/07/cen-cenlec-95000-a-guide-to-developing-an-equitable-standard-essential-patent-landscape/>

assessment process under the European Union Intellectual Property Office (EUIPO) and facilitated by independent experts.

The adoption of the proposed EU SEP Regulation cannot come soon enough for SMEs, and we hope that the Hungarian Presidency will play a key role in achieving relevant progress in a strong Council position. Imbalances in the SEP licensing landscape have persisted for decades, with the EU striving to address and resolve them for more than 30 years.³ Now there is a historic opportunity to finally implement lasting solutions. The upcoming Hungarian Presidency has the potential to lead in this endeavour, leaving a legacy by spearheading these efforts. By taking decisive action, the Hungarian Presidency can help secure a fair and competitive market, free from the distortions caused by abusive SEP licensing practices.

IV. Digital infrastructure and connectivity

As committed advocates for innovation and technological advancement, we actively support the expansion of networks and the development of connectivity standards across Europe. This commitment not only drives innovation but also ensures that consumers and businesses alike reap the benefits of a more connected and efficient digital ecosystem.

However, we are still concerned about the ambiguity of the proposed investment possibilities, as well as with their practicality, specifically with discourse around the possibility of introducing network fees. We believe that providers of electronic communication networks (ECNs) should invest in the future of connectivity infrastructure. As the main custodians of the necessary infrastructure, they have the responsibility to ensure access to their services and the necessary innovation for the improvement of connectivity. We caution the Hungarian Presidency against imposing network development contribution obligations to content and application providers (CAPs), as they generally provide different services than telecom providers.

As the electronic communications sector continues to evolve, we want to ensure that the ecosystem remains accessible, stable, and resilient. Any undue disruption of existing pro-competitive market dynamics would impose an additional burden and negatively impact our members, who currently use the integrated electronic communications system as the foundation of their businesses. Imposing stricter rules and unwanted burdens on SMEs like our members could put them at a competitive disadvantage compared to larger actors in the sector. Whether imposed directly or indirectly, this financial burden would have a negative effect on these small enterprises' growth and competitiveness, making it more difficult for them to innovate and provide customers with special services.

³ The EC has long recognised that abusive SEP licensing practices distort competition, publishing communications on these concerns as early as the EU's inception in 1992. In 1992 the European Commission published its Communication on Intellectual Property Rights and Standardization: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:51992DC0445>. In 1995 the European Commission published its Green Paper on Innovation: https://eur-lex.europa.eu/resource.html?uri=cellar:eb5dae41-104d-4724-ac99-d7cbcfa11b86.0006.01/DOC_1&format=PDF. Both of these documents discuss the competition implications of improper SEP licensing.

We urge the Hungarian Presidency against promoting any measures related to the introduction of network fees, which would result in distortion in digital markets, and lead to increased barriers for SMEs such as our members.

V. Acknowledging privacy, cybersecurity, and data protection as competition parameters

We advocate for the recognition of privacy, security, and data protection as key parameters of competition in digital markets. In today's digital landscape where data is a valuable asset, ensuring robust privacy and security measures not only protects consumers but also fosters trust and confidence in digital services. By promoting these factors as key competitive differentiators, EU institutions can encourage digital actors to continually innovate and offer users robust privacy and data protection measures. This, in turn, results in increased consumer choice, including options which align with privacy-conscious users' preferences, while driving standards in markets towards a more secure digital ecosystem for all.

Privacy and security protections offered by platforms not only enhance consumer trust but also allow small businesses to benefit from the established consumer trust of larger platforms, levelling the playing field against bigger brands that already enjoy network effects and consumer loyalty. Through access to these trusted platforms, SMEs can compete more effectively and foster innovation in the digital marketplace. Therefore, we hope that any future measures aiming to promote competitiveness will make a balanced effort to uphold protections for privacy, cybersecurity, and data protection, or at least not actively worsen these protections, nor restrict the ability to compete on these essential parameters.

VI. Digital Fairness

The App Association supports the objectives of the European Commission's discussions around Digital Fairness.⁴ We have long advocated for enhanced online safety and cybersecurity measures, recognising the importance of protecting consumers in the digital age. The initiative's focus on increasing transparency and combating deceptive practices, such as dark patterns, aligns perfectly with our ongoing efforts to foster a trustworthy online environment. We are also strong proponents of digital literacy and education, understanding that empowering consumers with knowledge is essential as we navigate an increasingly digital world.

However, with the recent rollout of European digital regulations, SMEs are struggling and experiencing regulation fatigue, finding it difficult to keep up with regulatory changes, including navigating overlaps between laws. Additionally, some of these overlaps can sometimes appear contradictory, further enhancing confusion among businesses. For example, while there are ongoing initiatives aiming to promote online safety, the Digital Markets Act (DMA)⁵ has introduced new security risks by forcing digital ecosystems to open up to third parties, which can increase the potential for online safety risks, such as malware, fraud, and other threats.

⁴ https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13413-Digital-fairness-fitness-check-on-EU-consumer-law_en

⁵ Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act)

We believe that instead of introducing new laws and further complicating the already confusing digital regulatory landscape, it is essential to focus on optimising and implementing existing laws effectively. Firstly, we promote the re-examination of these laws to identify the parts that might inadvertently create increased security issues, as seen with the DMA. We ask the Hungarian Presidency to use its influence to promote thoughtful and careful implementation of existing regulations, ensuring they do not further compromise digital security. Secondly, we ask the Hungarian Presidency to acknowledge and address the overwhelming regulatory fatigue experienced by SMEs in Europe.

Conclusion

We wish the Hungarian government a successful Presidency, and we thank you in advance for considering our comments. We look forward to future opportunities for engagement, and we remain available for any follow-up questions or conversation.

Sincerely,



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