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**Re: Comments on the draft Guidelines on Exclusionary Abuses of Dominance**

Dear Sir/Madam,

I am writing to comment on the draft Guidelines on Exclusionary Abuses of Dominance (“Draft Guidelines”) as part of the European Commission’s public consultation. The Draft Guidelines are intended to replace the European Commission’s 2008 Guidance on the Commission’s enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings (“2008 Guidance”).<sup>1</sup>

I am a Lecturer (Assistant Professor) in Competition and Private Law at the School of Law of the University of Strathclyde. I teach and research in the areas of competition law, intellectual property, and private and commercial law. I have received no funding from any interested party with regard to this submission or any related work.

I write to comment on the Draft Guidelines’ treatment of intellectual property in the context of the enforcement of the Article 102 TFEU prohibition. In my view, the Draft Guidelines fail to provide sufficient legal certainty for IP holders in light of the recent actions by the Commission and the decisions by the General Court and Court of Justice in *Google Shopping*.<sup>2</sup> Further, the Guidelines do not include explicit reference to the negotiating framework for SEP holders laid down in *Huawei v ZTE*<sup>3</sup> in the context of Article 102 TFEU.

Intellectual property and effective competition are core to European competitiveness as an economy close to the frontier of innovation across a number of creative and technological fields. The interface of the IP and the competition laws must provide sufficient incentives and legal certainty for innovators.

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<sup>1</sup> 2009/C 45/02.

<sup>2</sup> Case AT.39740 *Google Search (Shopping)*; Case T-612/17 *Google v Commission* ECLI:EU:T:2021:763; Case C-48/22 P *Google v Commission* ECLI:EU:C:2024:726.

<sup>3</sup> Case C-170/13 *Huawei Technologies v ZTE and ZTE Deutschland* ECLI:EU:2015:477.



## Intellectual property in the Draft Guidelines and previous Commission communications

‘Intellectual property’ is mentioned in three contexts in the Draft Guidelines:

- (i) In paragraph 31 as a barrier to entry;
- (ii) in footnote 52, which explains that intellectual property rights may but are not assumed to create a dominant position; and
- (iii) in footnote 236 as an input capable of founding an action for a refusal to supply and in paragraphs 104-106, which explain that a refusal to supply in the context of intellectual property rights is only abusive if it satisfies the three *Bronner*<sup>4</sup> criteria as well as limits technical development on the market after *Microsoft*.<sup>5</sup>

The 2008 Guidance mentions intellectual property in only one context: In paragraph 78, the Commission states that “The concept of refusal to supply covers a broad range of practices, such as [...] refusal to license intellectual property rights”; associated footnote 4 states that the case law “show[s] that in exceptional circumstances a refusal to license intellectual property rights is abusive”.

In paragraphs 5-9 of the Commission’s Guidelines on the application of Article 101 of the Treaty on the Functioning of the European Union to technology transfer agreements (“Technology Transfer Guidelines”),<sup>6</sup> the Commission affirms the complementarity and concurrency of competition law and intellectual property rights under EU competition law and in principle: “The fact that intellectual property laws grant exclusive rights of exploitation does not imply that intellectual property rights are immune from competition law intervention”; at the same time, both intellectual property rights and competition are necessary to promote innovation and ensure a competitive exploitation thereof.<sup>7</sup> The observations in the Technology Transfer Guidelines are applicable to EU competition law beyond the scope of Article 101 TFEU.

Recent case law by the General Court has confirmed the complementarity and concurrency principles.<sup>8</sup> The Draft Guidelines commendably do not call the principles into question. The Commission should also be commended for avoiding relying on uncertain doctrines such as the distinction between the ‘existence’ and ‘exercise’ or the definition of ‘specific subject-matter’ of an intellectual property right.

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<sup>4</sup> Case C-7/97 *Oscar Bronner v Mediaprint* ECLI:EU:C:1998:569.

<sup>5</sup> Case T-201/04 *Microsoft Corporation v Commission* ECLI:EU:T:2007:289.

<sup>6</sup> 2014/C 89/03.

<sup>7</sup> Technology Transfer Guidelines, para 6.

<sup>8</sup> Case T-172/21 *Valve Corporation v European Commission* ECLI:EU:T:2023:587.



The Draft Guidelines offer insufficient guidance on the imposition of access obligations on the IP-competition interface

The Draft Guidelines do not to clarify the contexts in which intellectual property rights will be subject to access obligations under Article 102 TFEU. The *Google Shopping* case law has significantly constrained the ambit of the *Bronner* criteria with as of yet uncertain effects on the law governing refusals to license. It would be preferable to clearly state that the Commission will apply the higher standard expressed in the criteria in the case law stated at paras 104-106 exclusively to abuses imposing effective access obligations, distinguishing *Google Shopping*.

EU competition law is not well suited to a broad role in creating access obligations to intellectual property rights but is indispensable to provide access to confidential information, including know-how, which would not be disclosed through licensing. Interventions by competition law into intellectual property rights must be limited and subject to a sufficient degree of legal certainty. The wider ambit of the jurisdiction of Article 102 TFEU drawn in *Google Shopping* is inappropriate in the context of intellectual property rights as it applies beyond facilities that are indispensable to effective competition.

This should be clarified in the final version of the Guidelines. The Draghi Report has emphasized the importance of intellectual property in promoting innovation in Europe as well as in guaranteeing continued European industrial competitiveness.

The Draft Guidelines do not recognise the role of Article 102 TFEU in upholding SEP commitments

Paragraph 104 of the Draft Guidelines states that the exercise of an exclusive intellectual property rights can be abusive in the context of the bringing of an action for infringement of an intellectual property right. Associated footnotes 249 refers to *Huawei v ZTE* for support.

*Huawei v ZTE* shows that SEP commitments are underpinned *inter alia* by Article 102 TFEU. The framework laid down the Court of Justice differs substantially from the *Bronner* framework. The Draft Guidelines fail to explicitly recognise and adopt the framework created by the Court of Justice in paragraphs 60-69 of *Huawei v ZTE*. The final version of the Guidelines should do so.



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### Underlying Research

The research papers which underlie the recommendations here are the following:

‘Quentin B. Schäfer, “Reconsidering the Limits of EU Competition Law on the IP-Competition Interface” (2024) 15(3) Journal of European Competition Law & Practice 188-196. Available open access at <<https://doi.org/10.1093/jeclap/lpae021>>.

‘Quentin B. Schäfer, “Case T-172/21 Valve v Commission - Revisiting the territorial character and probabilistic nature of intellectual property rights in competition enforcement” (2024) 45(5) European Competition Law Review 229-235. Available on Westlaw at : <<https://uk.westlaw.com/Document/I00D06E90016111EFBD2DFAC45DB826DC/View/FullText.html>>.

Sincerely,

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