

## **ACEA COMMENTS ON THE 102 GUIDELINES ON EXCLUSIONARY ABUSES OF DOMINANCE**

### **I. Introduction**

1. The proposed 102 Guidelines on exclusionary abuses of dominance (Guidelines) aim to provide a framework for identifying and addressing situations where dominant firms engage in practices that unfairly limit competition.
2. The Guidelines provide a timely opportunity to clarify the application of EU competition rules to the challenges posed by Standard Essential Patents (SEP) licensing practices, particularly in industries such as automotive, Internet of Things (IoT), smart metering and telecommunications. These industries are increasingly subject to anticompetitive practices from SEP holders, notably through refusals to license SEPs to upstream implementers.
3. A central issue is the availability of SEP licenses to all willing licensees on Fair, Reasonable, and Non-Discriminatory (FRAND) terms, a principle that should apply under Articles 101 and 102 TFEU to preserve the pro-competitive nature of standardization agreements, especially where these standards have significant market impacts.
4. The existing language in the proposed Guidelines – and the statements in the Huawei, Samsung and Motorola decisions<sup>1</sup> – accurately reflect the law but are often disregarded in practice and should be clarified and strengthened.
5. The Huawei/ZTE ruling established a structured framework for resolving SEP-related disputes, particularly concerning FRAND licensing and the conditions under which SEP holders can seek injunctions. The Samsung and Motorola cases similarly addressed the abusive nature of SEPs injunctions, emphasizing that a refusal to license on FRAND terms could constitute an abuse of dominance under Article 102. The CJEU ruled that SEP holders, having made FRAND commitments, must license their patents to any willing licensee, and failure to do so can lead to exclusionary practices. These cases provide a clear legal basis that could be reflected in the Guidelines to prevent unwarranted injunctions and supra-competitive royalty demands.
6. Recently, the HMD litigation once again underscored the need to curtail abusive SEP injunctions. The EU Amicus filing in that case provides further justification for

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<sup>1</sup> Judgment of the Court of 16 July 2015 in Case C-170/13, Huawei v ZTE, EU:C:2015:477 (“Huawei”); Case AT.39985 - Motorola - Enforcement of GPRS standard essential patents, 29 April 2014, C(2014) 2892 final (“Motorola”); Case AT.39939 — Samsung — Enforcement of UMTS standard essential patents, 29 April 2014, C(2014) 2891 final (“Samsung”).

the inclusion in the Guidelines of general directions on the applicability of EU competition law to SEP licensing, rather than further leaving the development thereof to the vagaries of precedent case law.<sup>2</sup>

7. Indeed, for two reasons, the EU Amicus filing in re HMD *in itself* cannot be seen as sufficient for ensuring a uniform application of EU competition law across the EU:
  - The full precedent value of the HMD Amicus will only be established if the matter actually gets referred to the CJEU. That is by no means a given. The Munich court, where the case is presently pending, may well believe it is not obliged to refer the case to Luxemburg as it is not the highest instance. That would be the German Supreme Court (BGH). However, also the BGH may not feel obliged to refer the matter, if it is of the opinion that the aspects covered by the EU Amicus filing in re HMD do not require further guidance. For example, an argument could be construed that the practical interpretation of Huawei/ZTE is up to the Member State courts, and that the BGH has already conclusively ruled on the sequential nature of Huawei/ZTE Steps in Sisvel/Haier<sup>3</sup>;
  - That alone would undo the Commission's aim in formulating the HMD Amicus, i.e. to achieve a more uniform application of Huawei/ZTE, with a balanced negotiation setting for SEP holders and implementers, and without the pressure of injunctions hanging over such negotiations. In addition, however, the extent of the HMD Amicus does not touch upon the substantive shortcoming of the German jurisprudence when it comes to SEP licensing, in that German courts do not deal with FRANDness. The HMD Amicus sets out the case-relevant position of the EU as far as steps 1 and 2 of Huawei/ZTE are concerned (the notification of infringement and the willingness of the licensee), but it does not cover steps 3 and 4 (is the SEP holder's offer FRAND, and what about the implementer's counter).
8. With that in mind, the Guidelines should address the following SEP-related competition law concerns by:
  - The "license to all" principle is needed to prevent market foreclosure, as the refusal to license SEPs risks limiting downstream innovation and stifling competition. The Guidelines should clearly reiterate that in principle, and in line with Huawei/ZTE, any willing licensee should be in a position to negotiate a license to SEPs on FRAND terms.
  - The undue availability of injunctions often results in supra-FRAND licensing at the end-product level, increasing the risk of hold-up. The Guidelines should reinforce the limits on SEP holders' ability to use injunctions abusively to

<sup>2</sup> Case 6 U 5066/22 Kart, *HMD Global Oy v VoiceAge EVS GmbH & Co KG*, EU Amicus filed 15 April 2024.

<sup>3</sup> *Sisvel v. Haier II*, Bundesgerichtshof, November 24, 2020, KZR 35/17 (F.R.G.).

demand inflated royalties, and reiterate the FRAND principles governing SEP licensing.

## II. Proposed Amendments to the proposed Guidelines

9. The proposed Guidelines are a positive step toward ensuring fair access to SEPs and improving the transparency and efficiency of standardization processes. However, to fully address the risks to competition, additional SEP-specific guidance should be incorporated into the final Guidelines, ensuring that the SEP holders' market power is not abused.

### 1. Risks of Exclusionary Practices and Market Foreclosure

10. Proposed Wording Addition to footnote 52, inserting a new penultimate sentence ahead of the reference to the Motorola and Samsung precedents: *"SEP holders who refuse to license upstream suppliers while reserving licenses for end-product manufacturers create barriers to entry and hinder downstream competition, constituting an abuse of dominance under Article 102."*
11. The refusal to license SEPs has a profound exclusionary impact, especially in sectors where upstream suppliers are essential to innovation and market entry, such as the automotive industry. There is a growing trend where SEP holders refuse to license upstream suppliers, opting instead to focus on end-product level licensing with Original Equipment Manufacturers (OEMs). This practice leads to market foreclosure, raising barriers to entry and increasing costs for suppliers, thereby limiting their ability to innovate and compete. The refusal to license SEPs across the supply chain disrupts competition, negatively affecting downstream innovation and creating inefficiencies in the market.
12. End-product level licensing often captures the value of downstream innovation, including the substantial investments made by upstream suppliers. SEP holders are able to reap the benefits of innovations they do not create by linking royalties to end-product value. In industries like automotive, where connectivity SEPs only account for a fraction of a vehicle's overall value, this practice results in unfair and inflated royalty demands.
13. The Motorola and Samsung cases recognized the anticompetitive effects of using injunctions and refusals to license, which effectively limit the ability of upstream suppliers to access the standard and innovate. The result is a distortion of the

market, as vertically integrated companies with cross-licensing agreements are favored over independent, non-integrated suppliers.

14. According to research by Professor Damien Neven and Dr. Gerard Llobet, as commissioned by ACEA, licensing SEPs at the end-product level reduces innovation incentives in industries with significant supply chain contributions. SEP holders can adjust royalties based on product value, diminishing returns from supply chain innovations.<sup>4</sup>
15. In the automotive sector, refusal to license SEPs to upstream suppliers has led to market foreclosure and stifled innovation. The number of suppliers bidding for research or production contracts has decreased due to concerns over SEP licensing, and competition is distorted as non-European vertically integrated companies, which can cross-license, are favored over other suppliers. End-product licensing forces manufacturers into cellular communications, disrupting specialization and reducing operational efficiency.

## 2. Clarifying the “License to All” Principle

16. Proposed Wording Addition as a footnote in the first sentence of paragraph 104:  
*“SEP holders must offer licenses to all willing licensees on FRAND terms, irrespective of their position in the supply chain. A refusal to license any willing licensee restricts market access and constitutes an abuse under Article 102.”*
17. The Guidelines reflect this principle, by explaining that a refusal to supply refers to situations where a dominant company denies access to a product or service it developed, often impacting competitors. This refusal can also involve intellectual property rights and SEPs in particular. A refusal to license (such as for interface information) or initiating infringement actions can be deemed abusive if certain legal criteria are met, particularly when it restricts technical development in the market. Such refusals may violate competition laws if they harm market innovation and competitors.
18. This issue is particularly relevant in markets with complex supply chains, such as the automotive industry, where connectivity SEPs make up only a small fraction of the final product. Despite this, SEP holders aim to derive royalties from the end-product level, inflating royalty costs far beyond the value of their contribution. Such practices harm downstream innovation and create an unfair competitive environment.

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<sup>4</sup> G. Llobet & D. Neven, Investment and patent licensing in the value chain, (2023) Journal of Competition Law & Economics, Vol. 19, pp. 527-555.

19. The FRAND commitment requires SEP holders to license their patents to all willing licensees, regardless of their position in the supply chain. The Huawei/ZTE case firmly established that the refusal to license SEPs on FRAND terms could amount to an exclusionary abuse under Article 102.

### 3. Misuse of Injunctions and the Threat to Innovation

20. Proposed Wording Addition to footnote 249: *“The improper use of injunctions by SEP holders to force royalty payments exceeding FRAND terms constitutes an abuse under Article 102.”*
21. A supplier willing to obtain a SEP license but denied access is still considered a patent infringer. While they may avoid an injunction, the SEP holder can still pursue other legal remedies, such as damages or customer disclosure. In some jurisdictions, like Germany, non-licensed implementers even face potential criminal charges.
22. The legal uncertainty and liability over damages pose significant challenges for suppliers, discouraging innovation and development. Suppliers cannot offer licensed products, are unsure if customers will take licenses, and lack certainty about costs and negotiation power. This reduces competition, limiting suppliers' ability to bring new connectivity solutions to the market.
23. Injunctions may be misused by SEP holders to demand supra-FRAND royalties from OEMs, increasing the risk of hold-up. In industries like the automotive industry, production disruptions caused by injunctions can lead to significant financial losses, giving SEP holders leverage to extract unreasonably high royalties.
24. The risk of hold-up is exacerbated by the disparity in negotiating power and knowledge asymmetries in the automotive sector. SEP holders can exploit this by using injunctions to pressure OEMs into agreeing to exploitative royalty terms, knowing the potential costs of disruption in just-in-time production models.
25. The Guidelines should reaffirm that misuse of injunctions to extract supra-FRAND terms constitutes an exclusionary abuse; and should clarify that denying a FRAND license to any willing licensee limits access to the standard and violates competition law.
26. The Huawei/ZTE ruling clarified the circumstances under which SEP holders can seek injunctions. While SEP holders are entitled to protect their intellectual property, the misuse of injunctions to coerce supra-FRAND royalty payments undermines the principles of fair competition. The risk of hold-up increases when injunctions are used as a negotiating tactic, particularly in industries such as

automotive, where production disruptions caused by injunctions can result in significant financial losses.

27. This issue is particularly relevant given the German courts' approach to SEP injunctions, which has been more permissive, allowing SEP holders to use injunctions to extract higher royalties from OEMs and exercise hold-up.<sup>5</sup> The Guidelines should address this issue by reaffirming that the improper use of injunctions to extract supra-FRAND terms constitutes an exclusionary abuse. The Huawei/ZTE framework's strict adherence to the sequential nature of the process has been reaffirmed by the European Commission, notably in cases like HMD, where the Commission emphasized that all steps must be completed in the correct order. When a SEP holder pursues an injunction while negotiations or FRAND determinations are ongoing, it disrupts this process and undermines the goals of the framework, which is to promote fair and equitable negotiations before any exclusionary actions are taken. The HMD Amicus, incidentally, also illustrates why more general guidance is needed beyond the precedent case law: as per above, there may not be a referral to the CJEU emerging from this case, in which case the different interpretations of willingness and the sequential nature of the Huawei/ZTE steps as forwarded between the EU, the Mannheim/Düsseldorf/Karlsruhe/Munich courts, as well as the BGH would remain in place.<sup>6</sup>

### III. Geopolitical Outlook

28. In contrast to the EU, China's SAMR (State Administration for Market Regulation) has taken a proactive stance on SEP-related abuses, issuing antitrust guidance that seeks to ensure fair SEP licensing and prevent the misuse of market power by SEP holders. This is an important consideration for EU policymakers, as European companies are increasingly at risk of being disadvantaged in a global market where foreign competitors benefit from more favorable SEP licensing regimes.
29. To maintain EU competitiveness, it is essential that the Guidelines incorporate clear guidance on SEP-related abuses. By doing so, the EU can create a level playing field for European companies, ensuring that they are not subject to supra-competitive royalty demands or unwarranted injunctions.

<sup>5</sup> See Annex I: G. Llobet & D. Neven, Impact assessment report of SEP proposal (2024).

<sup>6</sup> See for a discussion N. Banasevic & Z. Bobowiec, SEP-based injunctions: how much has the Huawei v ZTE judgment achieved in practice? [2023] J. Europ. Comp. L. & Pract. (Vol. 14, Nr. 2), pp. 121-133.