

# APPLE INC.'S RESPONSE TO THE EUROPEAN COMMISSION'S CONSULTATION ON THE DRAFT ANTITRUST GUIDELINES ON EXCLUSIONARY ABUSES

31 October 2024

## Introduction and Summary

- (1) Apple appreciates the opportunity to contribute suggestions for the draft Guidelines on Exclusionary Abuses (“**Guidelines**”) that the European Commission published for comment. This submission addresses solely aspects of the Guidelines related to standard-essential patents voluntarily committed to standards development organizations (“**SEPs**”) for licensing on fair, reasonable and non-discriminatory (“**FRAND**”) terms.<sup>1</sup>
- (2) Apple is a major SEP owner, licensor, and licensee, which allows us to bring a balanced perspective to this consultation. We are one of the top ten worldwide cellular SEP owners and have licensed most of the world’s major cellular infrastructure implementers and over 1.5 billion cellular devices since 2015. We are also a SEP licensee. We pay significant sums annually to license cellular SEPs from third parties, relying on their voluntary FRAND commitment. As of October 2024 using IPLytics share data, we are licensed to more than 70% of the declared cellular SEP patent assets worldwide. As an innovative and accomplished product company and licensee, we are a major target for patent assertions, including from non-practicing entities who purchase SEPs to assert them against others.
- (3) We are deeply committed to innovation and the development of voluntary, industry-led standards for wireless communications and other technologies. We invested close to EUR 30 billion in R&D globally in FY 2023.<sup>2</sup> We also participate in over 900 standard activities, including cellular standards, and our engineers participate in over 100 diverse standard development organizations.
- (4) The Guidelines refer to conduct by owners of voluntarily FRAND-committed SEPs as an example of conduct that can be found abusive under Article 102 TFEU (¶104). However, the Guidelines only cite the leading European Court of Justice judgment on abusive conduct by SEP owners, *Huawei v. ZTE*,<sup>3</sup> in relation to bringing an action for infringement of an IP right, without providing further details on the ECJ ruling. The Guidelines do not currently expressly address the *Huawei* requirements for injunctions or for licensing voluntarily committed SEPs on terms that are actually FRAND.

---

<sup>1</sup> See Guidelines on the application of Article 102 of the Treaty on the Functioning of the European Union to abusive exclusionary conduct by dominant undertakings. This response is exclusively addressed to aspects of the Guidelines pertaining to SEPs. It does not address or take a position on any other aspects of the Guidelines, including other intellectual property-related matters. Nothing in this response implies Apple’s position on those other aspects of the Guidelines.

<sup>2</sup> See Apple, Annual Report on Form 10-K, p. 28, 2023, <https://d18rn0p25nwr6d.cloudfront.net/CIK-0000320193/faab4555-c69b-438a-aaf7-e09305f87ca3.pdf>.

<sup>3</sup> Judgment of 16 July 2015, *Huawei Technologies v ZTE and ZTE Deutschland*, C-170/13, EU:C:2015:477 (“*Huawei*”), ¶¶51 *et seq.*

- (5) As discussed in greater detail below, despite the EC’s earlier enforcement actions and recent case-specific guidance, there has been a continued stream of national court decisions in certain jurisdictions that misinterpret *Huawei v. ZTE*, forcing potential licensees to pay *supra*-FRAND license fees under the leverage of injunctions, or even forcing them entirely out of European jurisdictions.
- (6) Because the use or threat of injunctions based on voluntarily FRAND-committed SEPs, and related demands for SEP licenses on *supra*-FRAND terms, continue to be the most significant and consequential hold-up practices that potential licensees face today, we invite the EC to provide more details on the criteria to establish abusive conduct that apply in the context of voluntarily FRAND-committed SEPs, as further detailed below. For example, codifying key aspects of the EC’s *amicus curiae* brief in *VoiceAge v. HMD* into the Guidelines would provide greater clarity and certainty to both licensors and licensees.<sup>4</sup> Further, the Guidelines should expressly state that refusals to license voluntarily FRAND-committed SEPs on FRAND terms (such as by insisting instead on *supra*-FRAND terms) can constitute an abuse of dominance within the meaning of Article 102 TFEU, and cite the legal framework that applies.

#### **Abusive exercise of voluntarily FRAND-committed SEPs**

- (7) First, we invite the EC to more explicitly state that seeking or threatening to seek an injunction for an alleged infringement of voluntarily FRAND-committed SEPs can be a form of abusive conduct under Article 102 TFEU, and that the assessment should follow the framework defined by the ECJ in *Huawei* as described by the EC in its *amicus* brief in *VoiceAge v. HMD*.
- (8) As the EC has recognized, in developing an industry standard, competitors collaborate to select technology to include in the standard from among voluntarily contributed competing alternatives. Because there are usually multiple competitive solutions available during the standardization process, the solution chosen for the standard is often technically equivalent or only marginally better than the other solutions available, and may be chosen because it is expected to make implementation less expensive than other alternatives.
- (9) When an entire industry, such as for cellular standards, agrees to use a particular standardized technology, a potential licensee cannot “invent around” a truly essential and valid SEP, and also cannot turn to a competing standard or shop around for a lower-priced or non-patented solution. These challenges are compounded by the fact that SEP licenses may be negotiated after a potential licensee has already invested in developing technology that implements the standard at issue. To avoid abuse of this leverage and ensure continued, widespread availability of standardized technology, standard setting organisations ask SEP holders who voluntarily contribute their patented technology to an industry standard to make a voluntary and binding commitment to license their SEPs on FRAND terms. Unfortunately, that promise is all too often broken. Failure to abide by their FRAND

---

<sup>4</sup> EC *amicus curiae* brief in case *HMD Global Oy gegen VoiceAge EVS GmbH & Co. KG* (“**HMD *amicus curiae* brief**”), available at [https://competition-policy.ec.europa.eu/antitrust-and-cartels/national-courts/amicus-curiae-observations\\_en](https://competition-policy.ec.europa.eu/antitrust-and-cartels/national-courts/amicus-curiae-observations_en).

commitments can allow such SEP holders to abuse their market power, which can distort competition and harm consumers.

- (10) SEP injunctions allow SEP holders to leverage the market power often created by standardization to extract supra-FRAND royalties and other non-FRAND terms uncurbed by their voluntary commitment to license on FRAND terms. These injunctions can also undermine future standardization efforts, which can drive up costs and create unnecessary delays. The mere threat of such SEP injunctions can prevent potential competitors and innovators from competing in the marketplace. Indeed, the harmful effects of such injunctions are well-known, and there is extensive empirical evidence that the effects of hold-up for voluntarily FRAND-committed SEPs can be highly damaging to the competitive process, to consumers, and to innovation.<sup>5</sup>
- (11) As the EC stated in its *amicus curiae* brief before the Munich court, the *Huawei* judgment establishes a clear framework that the SEP owner must observe to avoid having an action for injunctive relief deemed to be abusive.<sup>6</sup> This framework, which seeks to balance the interests of SEP licensors and licensees, has unfortunately been distorted by certain national courts, which have misapplied the *Huawei* judgment.
- (12) In the *Huawei* judgment, the ECJ held that it is a violation of Article 102 TFEU for a SEP holder who voluntarily agreed to license SEPs on FRAND terms to pursue an injunction against a potential licensee who has taken steps to negotiate a FRAND license, including by making an initial “expression of willingness”. Certain national courts, on many occasions, have misapplied this notion by imposing additional requirements to determine whether a potential licensee is “willing”, and by looking at the *Huawei* steps not in their prescribed order. Improperly, they judge the behavior of the potential licensee at any time before and during the negotiations, and without determining that the SEP holder discharged its obligation to make a FRAND offer. As a result, many SEP holders, including cellular infrastructure implementers as well as non-practicing entities, have flocked to jurisdictions favorable for injunctions.
- (13) Setting out clearly in the Guidelines the framework that the ECJ set out in the *Huawei* judgment is in line with the EC’s position in its recent *amicus curiae* brief before the Munich court and would provide legal certainty to stakeholders, and much-needed guidance to national courts, ensuring the harmonized application of EU competition law.

---

<sup>5</sup> For example, the European Commission concluded that Motorola used the threat of an injunction on a cellular SEP in Germany to coerce Apple to accept “disadvantageous licensing terms”: “faced with the enforcement of the injunction, Apple had the choice of either having its products excluded from the market or accepting the disadvantageous licensing terms requested by Motorola as a condition for not enforcing the injunction”, Case AT.39985 *Motorola—Enforcement of GPRS Standard Essential Patents* C(2014) 2892 final. A recent study showed that the cost of injunctions (via loss of sales and destruction of property) can be orders of magnitude higher than SEP holders’ demands or adjudicated FRAND rates. John Hayes & Assaf Zimring, *Injunctions in Litigation Involving SEPs*, GRUR Patent (June 20, 2024), <https://www.crai.com/insights-events/publications/injunctions-in-litigation-involving-seps/>. As the authors note, “the leverage gained” through SEP injunctions “is not proportional to the economic value of the SEPs at issue, but to the economic harm to the licensee from being unable to sell standard-compliant products.” *Id.*

<sup>6</sup> *Huawei*, ¶37.

- (14) We suggest including the following additional text, for example in a new paragraph 107, or alternatively following the citation to *Huawei* in footnote 249 to paragraph 104:

Separately, the exercise of an exclusive right by a SEP owner that has voluntarily committed to license its SEPs on a FRAND basis can give rise to an abuse of dominance under Article 102 TFEU. In particular, the European Court of Justice judgment in *Huawei* sets out a series of obligations that a court must assess in sequence before granting an injunction to a SEP licensor based on a patent subject to a voluntary FRAND licensing commitment. Only if a prior step or steps have been properly completed can a later step be examined. Before seeking an injunction, the SEP holder first must provide a notice of infringement listing the patent at issue and outlining how it is infringed. The license seeker then must merely state its willingness to take a license on FRAND terms. That willingness should be assessed exclusively on the content of the statement itself and not the license seeker's subsequent behaviour. Reserving the right to challenge the infringement or validity of SEPs does not render a potential licensee unwilling. It is then for the SEP holder to provide a FRAND offer, for example, one that does not seek "*unreasonably high licence fees*". Only if the court concludes that the SEP holder's offer is FRAND, and that the licensee has not responded with a FRAND counteroffer in due course or has not provided appropriate security and rendered accounts, might an injunction only then be justified (*Judgment of 16 July 2015, Huawei Technologies v ZTE and ZTE Deutschland, C-170/13, EU:C:2015:477, paragraphs 55, 61-69*).

- (15) In addition, the Guidelines do not currently provide details on the criteria that apply to establish an abusive refusal to license voluntarily FRAND-committed SEPs. The ECJ held in *Huawei* that "*particular circumstances*" apply in such cases that distinguish them from other IP cases. First, that if a patent is essential to a voluntarily and jointly developed industry standard, this renders its use indispensable to all who envisage manufacturing products that comply with the standard.<sup>7</sup> Second, that the IP 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.<sup>8</sup>
- (16) As a consequence, the ECJ held in *Huawei* that "[i]n 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".<sup>9</sup> [emphasis added]
- (17) Both outright refusals to license and offering *supra*-FRAND terms for voluntarily FRAND-committed SEPs can constitute an abuse of dominance within the meaning of Article 102 TFEU. The Guidelines could helpfully, therefore, acknowledge this understanding for

---

<sup>7</sup> *Huawei*, ¶49.

<sup>8</sup> *Huawei*, ¶51.

<sup>9</sup> *Huawei*, ¶53.

example in a new paragraph after the new paragraph 107, or alternatively text could be added in footnote 247 in paragraph 104 concerning refusal to license IP rights:

Further, if a patent has been declared essential to a standard and the SEP owner has made a voluntary irrevocable undertaking that it will grant licenses on FRAND terms to a standard setting organisation, a refusal by the SEP owner to grant a license on FRAND terms (such as by granting licenses only on *supra*-FRAND terms) can constitute an abuse within the meaning of Article 102 TFEU (*Judgment of 16 July 2015, Huawei Technologies v ZTE and ZTE Deutschland*, C-170/13, EU:C:2015:477, paragraphs 49-51).