

European Commission
Competition DG – A1 – HT.5454
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Apple comments on the Commission Guidelines on Horizontal Cooperation Agreements, providing binding guidance on the interpretation of the Research & Development and Specialisation Block Exemption Regulations, expiring on 31 December 2022

1. INTRODUCTION AND BACKGROUND TO APPLE'S SUBMISSION

- (1) Apple appreciates the opportunity to contribute to the European Commission's (Commission) consultation on the review of Guidelines on Horizontal Cooperation Agreements (Horizontal Guidelines).¹ Our feedback in this document is limited to the provisions of Section 7 (Standardization Agreements).
- (2) Innovation is the cornerstone of Apple's business. Apple has consistently invested billions of euros annually in R&D, with more than €14 billion invested in 2019.² Apple owns over 60,000 utility patent rights worldwide, with a portfolio consistently ranked among the largest and strongest in the world.
- (3) Apple has been operating in Europe for over 35 years and has been an engine of growth for the European economy, supporting over 1.7 million jobs.³ In the decade since the launch of the iPhone, an entire industry has been built around app design and

¹ Response submitted by Apple Inc. ("Apple"), a corporation with its principal executive offices at One Apple Park Way, Cupertino, California 95014, United States. The reference person for this response is Jeffrey L. Myers, Chief IP Counsel, e-mail: jeff.myers@apple.com. Apple manufactures and sells mobile communication devices, media devices, portable digital music players and personal computers. It also sells a variety of related software, services, peripherals, networking solutions, and third-party digital content and applications. Apple does not qualify as a "small and medium sized enterprise" according to the EU definition. Apple is registered in the EU Transparency Register with ID 588327811384-96. Apple approves of the publication of its response. This response does not include confidential information.

² Apple Annual Report on Form 10-K (2019) at 29, at [https://s2.q4cdn.com/470004039/files/doc_financials/2019/ar/_10-K-2019-\(As-Filed\).pdf](https://s2.q4cdn.com/470004039/files/doc_financials/2019/ar/_10-K-2019-(As-Filed).pdf).

³ For more information on the scope of Apple's activities in Europe, see <https://www.apple.com/uk/job-creation/> (English), or parallel national pages, e.g., <https://www.apple.com/fr/job-creation/> (French), etc.

development, earning European developers over €20 billion in App Store sales worldwide. Apple spends billions of euros annually with European suppliers.

- (4) Apple is known for its unique and differentiating technology, but it is also a leader and key technological contributor to many standards development activities. Our engineers participate in over 100 diverse standards development organizations (SDOs), and Apple has contributed to the advancement of a wide range of standards, including, for example, cellular, Wi-Fi, and USB-C. Apple has a strong commitment to cellular and related technologies, including standardization. We recently also acquired the majority of Intel's smartphone modem business, including a significant number of cellular SEPs. As a result of all of these activities, Apple's portfolio includes a significant number of patents declared essential to various industry technical standards, including many thousands of standard essential patents for 5G.
- (5) In addition to owning SEPs and contributing to various, diverse SDOs and consortia, Apple is a downstream innovator and standards implementer. Our products support many different standards, and we rely on the commitment of third parties to license their SEPs on FRAND terms and conditions. Apple has a long history of respecting the intellectual property rights of others, and of licensing negotiations, and where needed litigation, to establish fair and reasonable value and compensation for patented technologies. Apple has SEP licenses with dozens of SEP holders, and has paid sums totalling billions of dollars in royalties to license SEPs, including patents allegedly essential to GSM, GPRS, UMTS, LTE, 802.11, MPEG-2, MPEG-4 and Audio MPEG.
- (6) As a result of Apple's extensive experience in the market, we wish to provide the Commission with input and comments on the specific aspect of Standardization Agreements (Section 7 of the Horizontal Guidelines). Apple has therefore prepared the present document outlining its comments, linking them to its experience and trying to propose practical, balanced solutions benefiting innovation, industry and consumers.
- (7) Apple's views here are informed not only by its own experience, but by those of its suppliers, distributors, and industry contacts. Apple regularly comes into contact with European-headquartered companies and European SMEs that are feeling the harmful effects of SEP abuses as SEP licensing moves into new economic sectors. We refer the Commission to the CEN-CENELEC Workshop Agreement *Core Principles and Approaches for Licensing of Standard Essential Patents*.⁴ The views cited therein – including more than 50 signatories from throughout the economy – are in line with mainstream industry views and concerns over SEP abuses. The Commission should not underestimate the economic harms that abusive SEP licensing has already caused within Europe, nor the much greater harms that will occur if enforcement or regulatory standards are weakened.

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See *Core Principles and Approaches for Licensing of Standard Essential Patents*, CEN- CENELEC CWA 9500 (Jan. 2019), available at <https://www.cencenelec.eu/news/workshops/Pages/WS-2019-014.aspx>.

2. SUMMARY

- (8) Apple's submission, not including the above introduction and this summary, is organized into two key parts. The first offers a high-level issues summary, focusing on the four key substantive issues addressed herein, and explaining why Apple views these issues as critical to innovation, industry and economic development, and consumer interests. The second provides more specific, detailed feedback regarding the terms of the Horizontal Guidelines and how they can be tailored to effectively promote European economic interests while maintaining vigilance against abusive practices that harm industry and consumers.
- (9) It is critical that the Commission *not* undermine decades of precedent, practice and support for standardization with new and untested approaches to the Horizontal Guidelines. The Commission has been steadfast in its messaging regarding standardization – from the *Rambus* investigations and settlements, to the *Motorola* matter, and most recently the SEP Communication. Suggestions by some stakeholders that the Commission should experiment with radical new approaches to standardization that would legitimize conduct that the Horizontal Guidelines previously addressed as potentially anti-competitive, must be rejected if European 5G, Automotive, and IoT ecosystems are to flourish.
- (10) Key issues addressed by this submission include:

The Horizontal Guidelines Correctly Identify SEP Hold-up as an Abusive Harm to Innovation, and Include Competition Law Considerations in Evaluating SEP Licensing Practices: SEP hold-up is a significant, empirically-documented problem harming innovation and the development of 5G/Automotive/IoT. The Horizontal Guidelines correctly recognize the competition law basis for regulating SEP hold-up, and in doing so, are in line with international authorities. Indeed, SEP hold-up is both a contract and a competition law problem. The Commission may also wish to expressly recognize that anticompetitive effects from SEPs are no longer primarily a communications industry issue. A broad range of European consumers and businesses are, and increasingly will be, impacted by court and agency approaches to SEP issues and policies. The Horizontal Guidelines should continue to recognize the threat of hold-up and continue to support the competition law enforcement precedents (*i.e.*, *Rambus*; *Motorola*) and ECJ authority providing guidance as to how to combat abusive hold-up practices. If the Commission chooses to make changes to this discussion, it should update it to address more recent examples of hold-up, for example, obtaining an injunction in one jurisdiction to obtain leverage to conclude a global SEP portfolio license.

The Horizontal Guidelines Correctly Require that Licenses Not be Refused to Some Market Participants: A lynchpin of the Horizontal Guidelines' protections against SEP abuses, and of the European (and international) approaches and precedent for SEPs, is that FRAND licenses must be available to "all third parties". This approach also is in line with the ECJ's *Huawei* decision, with the *Motorola* enforcement decision, and with expectations and desires of European stakeholders and SMEs. Suggestions that the Commission should backtrack on policies supporting the

fundamental right of third parties to obtain FRAND licenses must be rejected. As the current Horizontal Guidelines acknowledge, "[S]tandardisation may lead to anti-competitive results by preventing certain companies from obtaining effective access to the results of the standard-setting process", and "[I]n order to ensure effective access to the standard, the IPR policy would need to require participants wishing to have their IPR included in the standard to provide an irrevocable commitment in writing to offer to license their essential IPR to all third parties".⁵ If, on the other hand, FRAND licenses were not available to willing licensees, the justification under Article 101(3) TFEU for the competitor cooperation involved in standardization agreements would be lost. If the Commission decides to change this section, it instead should consider strengthening its current discussion by stating that an SDO IPR policy must require licensing to all to fall within the scope of the safe harbour.

- *The Horizontal Guidelines Correctly Require that SEPs Must be Valued on Their Own Merits:* The Commission should reinforce its guidance that the value of an SEP must be evaluated based on the patented technology, *not* based on the value of the standard or the “lock in” thereto. SEP owners always should be able to obtain compensation based on *the value of their patents*. They never should be able to obtain compensation based on value *added* by others, or that it is attributable to standardization itself (*i.e.*, the value of the agreement among competitors to build products one way rather than another). We strongly request the Commission to strengthen its current discussion by stating that an SDO IPR policy must require members to value SEPs in accordance with these principles to fall within the scope of the safe harbour. Companies that seek the value of SEPs “to the end user” or that are based on the price or use of end product are seeking the value created by standardization, and value added by the end product, rather than the value of their own inventions.
 - *The Horizontal Guidelines Correctly Recognize Transparency Interests Around Standardization:* Apple supports the Commission’s ongoing efforts to bring further transparency to SDO declaration processes. Requiring SDO participants, in accordance with applicable IPR declaration policies, to provide information known to them at an early stage of the development process fosters a sustainable and more-predictable standardization environment.
- (11) To the extent that some may assert that the Commission’s historical policy and enforcement approaches harm standardization or innovation, the empirical record shows the opposite. Arguments to the contrary were recently dismissed by one court (which had access to internal documents from some participants in standards development stating their “closed door” views on standards) as “pretextual” and “not credible”, and not in line with historical practices in the industry.⁶

⁵ Horizontal Guidelines, paragraphs 268, 285.

⁶ *Federal Trade Comm’n v. Qualcomm, Inc.*, Findings of Fact and Conclusions of Law, Case No. 5:17-cv-00220 (N.D. Cal. May 21, 2019).

- (12) In short, without continued oversight by the Commission to prevent SEP abuses such as patent hold-up, excessive licensing fees (e.g. end product, end user value or use-based licensing) and refusal to license, SEP abuses will harm European economic, innovation and consumer interests – with no concomitant benefit to standardization processes or incentives.⁷ If not effectively addressed, SEP abuses will gravely undermine the Commission’s drive to support Automotive, IoT and 5G rollout, particularly as standardized technologies migrate to new industries and sectors, including European SMEs. The Commission’s longstanding efforts and policies to prevent SEP abuse, and the economic and consumer harms attendant thereto, should be maintained and strengthened. Any updates to the Horizontal Guidelines should be mindful of the entire supply chain and the innovation that occurs throughout, without creating new preferences or privileges for some market participants at the expense of others.

3. SPECIFIC FEEDBACK REGARDING SECTION 7 OF THE HORIZONTAL GUIDELINES

- (a) The Horizontal Guidelines Correctly Identify SEP Hold-up as an Abusive Harm to Innovation, and Include Competition Law Considerations in Evaluating SEP Licensing Practices.
- (13) The Horizontal Guidelines correctly highlight competition law’s vital role, both prior to the inclusion of their patents in a standard as well as subsequently, in promoting successful standard-setting.
- (14) Paragraphs 263-269 of the Horizontal Guidelines correctly recognize that standardization can produce “*significant positive economic effects*” by “*encouraging the development of new and improved products or markets and improved supply condition*”. But those paragraphs also recognize that standardization creates opportunities for misbehaviour that can limit or control “*production, markets or technical development*”. Companies that abuse standardization can “*acquire control over the use of the standard*” and can “*hold[[]-up users after adoption of the standard*”. We encourage the Commission to maintain these paragraphs as they currently stand, in accordance with historical (and largely successful) standardization policy and competition law precedent.
- (15) The Horizontal Guidelines identify two specific types of hold-up: (i) “*refusing to license the necessary IPR*” and (ii) seeking “*excessive royalty fees*”. Each of those species of hold-up is addressed below in sections (b) and (c), respectively.
- (16) The Horizontal Guidelines also correctly recognize FRAND commitments as the key practice designed to protect against hold-up. As noted in paragraph 287, FRAND

⁷ The changing market in relation to SEPs was documented in the CEN-CENELEC paper referenced above in note 3. In addition, it is publicly known that multiple auto industry participants have sought the Commission’s assistance in connection with certain SEP abuse. *See also* Commission Decision in Case AT.39939, Samsung - Enforcement of UMTS standard essential patents, Press Release, 29 April 2014, “[...]the seeking of an injunction based on SEPs may constitute an abuse of a dominant position [...] Since injunctions generally involve a prohibition of the product infringing the patent being sold, seeking SEP-based injunctions against a willing licensee could risk excluding products from the market. Such a threat can therefore distort licensing negotiations and lead to anticompetitive licensing terms that the licensee of the SEP would not have accepted absent the seeking of the injunction. Such an anticompetitive outcome would be detrimental to innovation and could harm consumers.”

Commitments “prevent IPR holders from making the implementation of a standard difficult by refusing to license or by requesting unfair or unreasonable fees (in other words excessive fees) after the industry has been locked-in to the standard or by charging discriminatory royalty fees”. Again, this is a critical aspect of the Horizontal Guidelines, in line with longstanding precedent, that should be maintained as it stands.

(17) An injunction or the threat of an injunction is one way in which an SEP licensor can effect either type of hold up. There is extensive empirical evidence that the effects of hold up are highly damaging to the competitive process and innovation. For example:

- The Commission’s *Motorola* decision describes how Motorola’s injunction against Apple resulted in Apple’s temporary exclusion from online sales of its GPRS-compatible iPhone and iPad products in Germany.⁸ The ban continued until Apple accepted a number of disadvantageous licensing terms.⁹ Besides having to accept Motorola’s excessive royalty levels, in order to keep its license, Apple was unable to challenge the validity of the relevant SEPs. Motorola even conceded that the aim of the termination clause was precisely to discourage Apple from bringing validity actions.¹⁰ The Commission found that this could limit Apple’s ability to influence the royalties it would pay, and could also lead to other potential licensees having to pay for invalid patent rights.¹¹ Apple was also forced to give up its argument that Motorola was contractually precluded from asserting its GSM and GPRS patents against a particular device model, and thus had to pay potentially undue royalties on that device.¹² Apple was forced to acknowledge past infringement of patents where such infringement had not been recognised by the competent courts.¹³
- The same decision also shows hold-up against Microsoft. The Commission found that Motorola used its privileged SEP holder position against Microsoft, charging Microsoft a rate which was almost 150 times more than the appropriate FRAND rate as determined by the Court. As discussed in the decision in the U.S. dispute between Microsoft and Motorola, Microsoft also had to incur significant costs to move its European distribution facility from Germany to the Netherlands in light of the threat of injunction.¹⁴
- In the U.S., LSI filed an action seeking a ban for certain Realtek products. LSI subsequently offered to licence Realtek the relevant SEPs for a royalty rate which exceeded the selling price of Realtek’s products reading on the relevant

⁸ Commission Decision AT.39985, *Motorola – Enforcement of GPRS Standard Essential Patents* (“*Motorola*”), 29 April 2014, recitals 312 to 321

⁹ *Motorola*, recitals 322 to 328.

¹⁰ *Motorola*, recital 340.

¹¹ *Motorola*, recital 336.

¹² *Motorola*, recitals 385 to 387.

¹³ *Motorola*, recital 406.

¹⁴ *Microsoft Corp. v. Motorola, Inc.*, No. 10-CV-01823, 2013 U.S. Dist. LEXIS 60233* 303 (W.D. Wash. Apr. 25, 2013).

standard. The Court determined that the royalties sought by LSI were around 500 times more than the appropriate FRAND royalty rate.¹⁵

- Similarly, Innovatio was found to be seeking royalties from various implementers between 35 and 386 times higher than the adjudicated FRAND royalty rate.¹⁶
- These are just a few examples of hold-up. Apple would be pleased to meet with the Commission to discuss and share information regarding the prevalence of SEP hold-up, and how it is harming innovation and economic development.

- (18) In light of the numerous adjudicated examples of patent hold-up, the Commission should continue its long-standing guidance against this type of opportunistic behaviour. As standards continue to promulgate through new industries, the potential for standard abuses harming European development has accelerated. Strict competition-focused requirements and obligations on SEP assertions should continue to be maintained and enhanced.
- (19) On the other hand, Apple is familiar with new theories of so-called “hold out”. A potential licensee’s unwillingness to license on FRAND terms (hold out) is an issue that can be fully remedied by the courts via awards of compensation, interest due to delays, and the like. These types of *monetary* remedies and penalties can provide sufficient deterrence against misconduct by users of standards. As paragraph 291 of the Horizontal Guidelines notes, “*nothing in these Guidelines prejudices the possibility for parties to resolve their disputes about the level of FRAND royalty rates by having recourse to the competent civil or commercial courts*”.
- (20) The Horizontal Guidelines should continue to recognize that potential SEP licensees, as well as SEP owners, who seek to resolve royalty disputes continue to have access to remedies in the national courts.¹⁷ To provide additional guidance, the Horizontal Guidelines should further explicitly state that by using their right to take recourse to the competent courts in a given jurisdiction, and by requiring that SEP owners meet their burdens of proof in their respective jurisdictions, potential SEP licensees do not thereby become “unwilling” or “unreasonable.” Patents are territorial in nature. Patent laws and remedies differ from one jurisdiction to the next. To the extent that SEP owners may try to seek an injunction in one jurisdiction as leverage to force a licensee into a *global* portfolio license, hold-up is magnified from a national to a global scale. The Horizontal Guidelines accordingly should explain that leveraging one nation’s

¹⁵ *Realtek Semiconductor Corp. v. LSI Corp.*, No. 12-CV-03451, 2014 U.S. Dist. LEXIS 81673 * 23 (N.D. Cal. June 16, 2014).

¹⁶ *In re Innovatio IP Ventures LLC*, No. 11-CV-09308, 2013 U.S. Dist. LEXIS 144061 *38 (N.D. Ill. 2013).

¹⁷ *In re Innovatio IP Ventures, LLC IP Litig.*, MDL Dkt. No. 2303, 2013 WL 5593609, at *11 (N.D. Ill. Oct. 3, 2013) (“[T]he court is not persuaded that reverse hold-up is a significant concern in general, as it is not unique to standard-essential patents. Attempts to enforce any patent involve the risk that the alleged infringer will choose to contest some issue in court, forcing a patent holder to engage in expensive litigation. The question of whether a license offer complies with the RAND obligation merely gives the parties one more potential issue to contest. When the parties disagree over a RAND rate, they may litigate the question, just as they may litigate any issue related to liability for infringement.”).

jurisdiction to obtain a global injunction is also a species of hold-up that can cause significant anti-competitive effects.

(21) Some additional related considerations are as follows:

- In the last sentence of paragraph 293 of the Horizontal Guidelines the Commission suggests that if the standard covers only minor aspects of the end product, then it is less likely for competition concerns to arise. This is far from Apple's experience. Standards covering only minor aspects of the end products absolutely give rise to very serious challenges for competition. The long-running IPRCom litigation is an example. The core patent in that campaign, referred to by IPRCom as #100A, covers *at most* a way of prioritizing network traffic in emergencies, that is rarely if ever used. That has not stopped IPRCom from seeking injunctive relief and billions of dollars in royalties.¹⁸ The ability to use SEPs to exclude rivals from the market or to extract excessive royalties is not in practice dependent on the importance of the feature to which the patent relates for the end product. We suggest that the Commission revisit this issue and delete this language.
- Paragraph 269 states that there is no presumption that holding or exercising IPR essential to a standard equates to the possession or exercise of market power. This statement no longer seems appropriate in light of the reference by Advocate General Wathelet in *Huawei v ZTE* to a presumption that the holder of a standard essential patent enjoys a dominant position, which is rebuttable with specific, detailed evidence.¹⁹ Again, we suggest that the Commission revisit this issue and delete this language.

(b) The Horizontal Guidelines Correctly Require that Licenses Not be Refused to Some Market Participants.

(22) Standardization has been a key to the creation and functioning of the EU Single Market, and has enabled enhancements to quality and consumer choice. However, this can only be achieved if the standards are open for licensing by any market participant, as generally was the case until approximately 2008 when a few SEP holders began to change their prior practices.²⁰

(23) Paragraph 285 provides, “*In order to ensure effective access to the standard, the IPR policy would need to require participants wishing to have their IPR included in the*

¹⁸ See *IPCom GmbH & Co. KG v. 1. Apple Inc., 2. Apple Sales International, 3. Apple Germany Retail GmbH*, no. 6 U 33/17 (2 O 53/12), German Appellate Court Karlsruhe, where IPRCom seeks, among other things, compensation for damages initially calculated to amount to roughly 1.028 Billion EUR plus interest and injunctive relief. The complaint was filed in 2012 and the proceeding is still ongoing.

¹⁹ Opinion of AG Wathelet in *Huawei v ZTE*, C-170/13, EU:C:2014:2391, paragraph 58.

²⁰ This historical change of approach was documented by the court in *FTC v. Qualcomm*. As the Court held (based on both public and non-public internal documents), a major SEP holder regularly licensed its patents to all types of companies prior to 2008, but then changed its practice to limit licenses to OEM companies. A few other SEP holders thereafter copied this behavior, which was held to be a violation of the competition laws, because they believed it to be more lucrative. See generally *Federal Trade Comm'n v. Qualcomm, Inc.*, Findings of Fact and Conclusions of Law, Case No. 5:17-cv-00220 (N.D. Cal. May 21, 2019).

standard to provide an irrevocable commitment in writing to offer to license their essential IPR to all third parties on fair, reasonable and non-discriminatory terms ('FRAND commitment'). That commitment should be given prior to the adoption of the standard. . . .To ensure the effectiveness of the FRAND commitment, there would also need to be a requirement on all participating IPR holders who provide such a commitment to ensure that any company to which the IPR owner transfers its IPR (including the right to license that IPR) is bound by that commitment, for example through a contractual clause between buyer and seller" (emphasis added). This language and requirement in the Horizontal Guidelines is central to the proper functioning of the standards ecosystem, to innovation, and to the development of next-generation technologies. The Commission should not entertain any suggestions to backtrack on this longstanding principle and requirement for FRAND licensing.

- (24) Instead, the Commission should extend its guidance to explain that an SDO IPR policy must require FRAND licensing to all (without discrimination as to their level in the supply chain) to fall within the scope of the safe harbour. Because licensing to all is a fundamental counterbalance to the potential anti-competitive effects of an agreement among competitors to choose one set of technical solutions, an SDO that does not include such a requirement in its policy lacks an essential pro-competitive benefit.
- (25) To the extent that some may argue against this concept, the historical record does not support industry-based restrictions as to which industry participants may obtain a FRAND license, as one U.S. court recently explained in detail.²¹ Indeed, the Director-General of ETSI at the time the ETSI IPR Policy was created himself has written extensively about the requirement that licenses be available to any willing licensee.²² Even the 3GPP website includes a public notice that "[a]ll Individual Members of 3GPP abide by the IPR policies of the OP to which they belong; all such policies are broadly similar ... and require IPR holders to make licences available to **all third parties**, whether or not they are 3GPP Individual Members, under fair, reasonable and non-discriminatory (FRAND) terms".²³
- (26) The ECJ's *Huawei* decision similarly recognized the "legitimate expectations" of third parties to obtain licenses, and the Commission explained in *Motorola* that "all interested third parties" must be able to obtain a SEP license.²⁴
- (27) In contrast, any effort to eliminate or limit the European approach to this issue to not require licensing to all third parties would starkly conflict with international law,

²¹ See *Federal Trade Comm'n v. Qualcomm, Inc.*, Findings of Fact and Conclusions of Law, Case No. 5:17-cv-00220 (N.D. Cal. May 21, 2019).

²² Karl Heinz Rosenbrock, *Licensing At All Levels Is The Rule Under The ETSI IPR Policy* (Nov. 3, 2017), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3064894; Karl Heinz Rosenbrock, *Why the ETSI IPR Policy Requires Licensing to All*, http://www.fair-standards.org/wp-content/uploads/2017/08/Why-the-ETSI-IPR-Policy-Requires-Licensing-to-All_Karl-Heinz-Rosenbrock_2017.pdf.

²³ <https://www.3gpp.org/contact/3gpp-faqs#L5> (emphasis added).

²⁴ Judgment of 16 July 2015, *Huawei v ZTE*, C-170/13, EU:C:2015:477, paragraph 53; *Motorola*, Recital 63 (under the ETSI IPR Policy, "owners of essential patents in a proposed standard are requested to make their SEPs available to all interested third parties on FRAND terms and conditions").

including in the United States, Korea, and elsewhere.²⁵ This would harm European suppliers, who would not be able to obtain SEP licenses whereas foreign competitors would be free to obtain licenses. Such a calamitous approach would ensure only that Europe's 5G, Automotive, and IoT industries, just to name a few, fall behind the rest of the world.

(c) The Horizontal Guidelines Correctly Require that Royalties Correspond to Patent Value, Exclusive of the Added-Value of Standardization.

- (28) Paragraphs 289-291 of the Horizontal Guidelines address valuation. As the Guidelines correctly note, *"In case of a dispute, the assessment of whether fees charged for access to IPR in the standard-setting context are unfair or unreasonable should be based on whether the fees bear a reasonable relationship to the economic value of the IPR"*. Again, this is critical text in the Horizontal Guidelines that follows established precedent, and which should be maintained as is.
- (29) The importance of basing FRAND royalties on the value of the IPR also was recognized by the Commission in its SEP Communication, which explains that *"Licensing terms have to bear a clear relationship to the economic value of the patented technology. That value primarily needs to focus on the technology itself and in principle should not include any element resulting from the decision to include the technology in the standard"*.²⁶
- (30) This approach is consistent with the approach of the courts, both in Europe and elsewhere. As was emphasized by the European General Court, patent royalties have always been analysed based on the value of the claimed technology, not on the value of downstream uses that are not included in the scope of the patent.²⁷ It is also consistent with the Commission's guidance in the *Rambus* matter.²⁸
- (31) The Commission should extend its guidance to explain that an SDO IPR policy must require FRAND licensing based only on the value of the patented invention, and not the added value of standardization or the end product, in order to fall within the scope of the safe harbour. Apple urges the Commission further to recognise in the Horizontal Guidelines the harmful effect on innovation and competition of SDO arrangements that facilitate excessive pricing by patentees. Excessive pricing is harmful as such, and it also has consequences that distort the competitive structure of the market. Immediate

²⁵ Various international authorities are collected in the CEN-CENELEC document referenced above in note 3, at 32-33. Relevant authorities include the US *Motorola*, *Ericsson*, *FTC*, and *KFTC* cases.

²⁶ *Communication of the Commission: Setting out the EU approach to Standard Essential Patents* COM (2017) 712 final, 29 November 2017.

²⁷ Case T-167/08, *Microsoft Corporation v. Commission* ("[T]he distinction between the strategic value and the intrinsic value of the technologies covered by the contested decision is a basic premiss of the assessment of the reasonableness of any remuneration charged by Microsoft for allowing access to, and use of, the interoperability information").

²⁸ European Commission Decision of 12 September 2009 ¶ 66, Case COMP/38.636 – *Rambus* ((the European Commission did not accept Rambus's proposed commitments to resolve allegations of deceptive conduct at a standard-setting organization until Rambus "clarified that the royalty shall be determined on the basis of the price of an individually sold chip and not of the end-product. If they are incorporated into other products, the individual chip price remains determinative.")).

effects could for example include lowering quality, limiting output, and reducing R&D expenditure.

- (32) Ensuring that royalties for essential patents provide a fair reward for SEP owners based on the actual value of their patented technology, and that they comply with their FRAND commitments, is a precondition for successful standard setting. In particular, the Horizontal Guidelines could be updated to more expressly recognise the ruling of the General Court in *Microsoft* that a dominant technology licensor is entitled to recover only the 'intrinsic value' of the technology, as distinct from its 'strategic value'.²⁹ In the context of SEPs, the consequence of this ruling is that the valuation must reflect the innovative character of the patented invention itself, as distinct, in particular, from any value obtained from the inclusion in the standard (i.e., the mere ability to interoperate with other products implementing the standard).³⁰ Since the reasonableness of royalties charged for SEPs also must be based on the intrinsic value of the licensed patented technology, this ruling likewise excludes royalty provisions that capture the value of other features of, or technologies in, an end-product implementing the standard.
- (33) The concept of the intrinsic value of the technology can also be used to further explain why, as indicated at paragraph 289 of the Horizontal Guidelines, cost-based methods are not well adapted to this context. It is not merely, as currently indicated in the Horizontal Guidelines, because of the difficulty of assessing attributable costs. Rather, the intrinsic value of a declared essential patented technology that may emerge from research and development efforts is not increased merely by spending more on that R&D.
- (34) At paragraph 289, the Commission also refers to the possibility of comparing proposed FRAND royalty rates with licensing fees charged before the industry became locked into a standard. Although the Commission cautions that this assumes the comparison can be made in a consistent and reliable manner, the Horizontal Guidelines do not provide adequate warning about the use of supposedly comparable licenses. Even when comparable license methodologies are used, the SEP owner still must provide evidence in a patent case that separates damages attributable to the patented feature from any unpatented features.³¹ A license concluded by two given parties could reflect many other considerations than the value of the patented technology, to include avoidance of litigation costs, business supply needs (for example, if a license is (improperly) tied to a product), other commercial leverage, or the hold-up value of an injunction or the threat of an injunction, among other things. For example, licenses could reflect inflated rates concluded under threat of an injunction (and thus the threat of losing profits on all sales of the relevant device in the jurisdiction concerned) being used to force implementers to accept non-FRAND terms. Similar considerations apply to the suggestions in paragraph 290 that FRAND values may be obtained by comparisons to licensors' *ex*

²⁹ Judgment of 27 June 2012, *Microsoft*, T-167/08, EU:T:2012:323, paragraph 138.

³⁰ See, by analogy, Judgment of 27 June 2012, *Microsoft*, T-167/08, EU:T:2012:323, paragraphs 138, 142 and 143.

³¹ See, e.g., in the U.S., *Apple Inc. v. VirnetX Inc.*, Petition for a Writ of Certiorari (Dec. 27, 2019), at https://www.supremecourt.gov/DocketPDF/19/19-832/126835/20191227112807116_191210a%20Petition%20for%20e-filing.pdf.

ante declarations of licensing terms, or the rates charged for IPR in “comparable” standards.

- (35) The Horizontal Guidelines accordingly should warn that, while comparisons with other licenses may in principle be capable of demonstrating the existence of excessive pricing,³² it should not be assumed that they in themselves affirmatively demonstrate that a price charged by a dominant SEP licensor is reasonable. Since the definition of dominance under Article 102 TFEU includes the ability to act independently of customers, the mere fact that other licensees have accepted the same terms may indicate merely that the dominant essential patent holder is imposing excessive prices generally.
- (36) The Commission also should endorse an approach providing consistency and predictability in the IPR valuation methodology, and which will reflect the 'intrinsic value' of the licensed technology. To ensure that the royalties charged are fair and reasonable, there should be a common a royalty base for all licensees implementing the same standard. Using a common royalty base gives comfort to all SEP holders and downstream innovators that the royalty calculation is non-discriminatory.
- (37) We submit that the smallest saleable unit reading on a standard offers the most fair, reasonable, and representative value-base for this purpose.³³ It would be unfair if, for example, the common base related to the end product, or even some arbitrary percentage of the end product, as this would arbitrarily reward licensors for features or technologies that are not theirs. For example, the use of luxurious materials or the addition of extra memory might increase the price of the end device, but the intrinsic value of the patent used in that device remains unchanged.³⁴
- (38) Recently some stakeholders have argued that rates should be calculated based on the value of a SEP “to the downstream user”. This line of argument was recently discounted by one court, and would diverge from traditional patent law norms that focus on valuing a patent based on its own merits, without consideration of value later added-on by others.³⁵
- (39) Basing royalties on non-patented, downstream values (*i.e.*, value added by downstream companies that incorporate standardized technologies) would enable SEP owners to capture the value of standardization, in violation of the Commission’s guidance. For example, prior to standardization, there are many different technologies capable of enabling wireless telecommunications. After standardization, however, there is usually just one commercially acceptable approach for each technology generation (*e.g.*, LTE for 4G). The value of *communication* (*e.g.*, the standard itself) is far greater than the value of the specific patented invention chosen for a particular standard. Allowing a

³² See the *Tournier* and *Lucazeau* judgments cited at paragraph 289 (footnote 2 on page 61).

³³ See, *e.g.*, Japan Patent Office, Guide to License Negotiations Involving Standard Essential Patents, pp. 34, 36-38 (June 5, 2018) (addressing need “to identify the calculation base according to where the contribution of the essential part of the SEP lies.”).

³⁴ Even in the context of the smallest saleable unit, care will need to be taken to ensure that other technologies and standards are not included in the royalty base.

³⁵ *Federal Trade Comm’n v. Qualcomm, Inc.*, Findings of Fact and Conclusions of Law, Case No. 5:17-cv-00220 (N.D. Cal. May 21, 2019).

SEP holder to leverage the value of the standard (*i.e.*, the industry's collective agreement to build products a certain way rather than another) to increase its royalties beyond the value of the underlying patent would enable abuses.

- (40) Paragraph 290 of the Horizontal Guidelines states that one procedure to value SEPs could be to obtain an independent expert assessment of the objective centrality and essentiality to the standard at issue of the relevant IPR portfolio. It would be helpful for the Commission to further make clear that the conclusions of any such expert would need to be impartial (e.g., there should be no direct or indirect incentives for the expert to determine that a declared SEP is or is not essential). And any determination should not (i) be binding; (ii) result in any legal presumption as to essentiality, (iii) shift any of the traditional burdens of proof, or (iv) take the place of the patentee proving infringement, whether in licensing negotiations or in court.
- (41) Further, Apple notes that paragraph 269 of the Horizontal Guidelines (footnote 2 on page 58) indicates that references to high royalty fees concern fees that are excessive under Article 102 TFEU in accordance with the conditions established by the *United Brands* case law. This reference may need to be updated to reflect the role of contractual FRAND (for example, under the ETSI IPR Policy) in EU competition law. Specifically, the Court of Justice has ruled in *Huawei v ZTE* that “*having regard to the fact that an undertaking to grant licenses on FRAND terms creates legitimate expectations on the part of third parties that the proprietor of the SEP will in fact grant licenses on such terms, a refusal by the proprietor of the SEP to grant a license on those terms may, in principle, constitute an abuse within the meaning of Article 102 TFEU*”.³⁶ Thus the Horizontal Guidelines should recognise that charging royalties for standard essential patents that are not FRAND in accordance with a dominant firm's contractual FRAND commitment is also a form of excessive pricing prohibited by Article 102 TFEU.
- (d) The Horizontal Guidelines Correctly Recognize Transparency Interests Around Standardization.
- (42) Apple agrees that SDOs should maintain open and transparent specification development processes, as currently set out in at least paragraphs 268, 282, and 284 of the Horizontal Guidelines.
- (43) Transparency is critical to standards development. Disclosing and specifically identifying SEPs at an early stage of the SDO development process provides important benefits. As paragraph 286 correctly provides, “[m]oreover, the IPR policy would need to require good faith disclosure, by participants, of their IPR that might be essential for the implementation of the standard under development. This would enable the industry to make an informed choice of technology and thereby assist in achieving the goal of effective access to the standard. Such a disclosure obligation could be based on ongoing disclosure as the standard develops and on reasonable endeavours to identify IPR reading on the potential standard.”

- (44) Obscurity around the identity of who owns which intellectual property rights can prevent SDO participants from choosing between proposed technologies based on their likely costs. It can reduce price competition between technologies and can lead to higher royalties than would occur with greater transparency. For effective competition between technologies for inclusion in the standard, SDO participants should preferably be aware whether particular choices they make may lead to substantial proportions of the patented technology in the standard being held by a limited number of patentees, and likewise be aware of the identity of the likely patentees involved. With such transparency, SDO participants can make an informed choice based on which technologies are free of patents or patent applications, the record of individual patentees of charging fair royalties, or avoiding the concentration IPRs that may be essential to a standard from being concentrated in a small number of licensors.
- (45) Accordingly, paragraph 268 correctly states that “[a] system where potentially relevant IPR is disclosed up-front may increase the likelihood of effective access being granted to the standard since it allows the participants to identify which technologies are covered by IPR and which are not. This enables the participants to both factor in the potential effect on the final price of the result of the standard (for example choosing a technology without IPR is likely to have a positive effect on the final price) and to verify with the IPR holder whether they would be willing to license if their technology is included in the standard”. The Commission should retain this language and might consider expanding it by expressly also listing the factors stated in paragraph 42 above.
- (46) Obscurity around the identity of who owns what IPR also operates directly to facilitate excessive pricing. Given the benefits of specific disclosures, we urge the Commission to qualify the guidance indicated at paragraphs 286 and 327 that it also can be sufficient if the participant declares that it is likely to have IPR claims over a particular technology without identifying specific IPR claims or applications for IPR. This often will not provide sufficient protection of technology competition during standards development. Instead, the Commission should explain that, in general, specific disclosure of IPR should be required. Absent this information, technology competition can be reduced, and excessive pricing may be encouraged.
- (47) In the same vein, competition between technologies to be included in the standard should not be reduced simply by reference to the publication practices of patent authorities. Footnote 2 at page 57 of the Horizontal Guidelines (paragraph 267) states rather abstractly that IPR in particular refers to patent(s) “*excluding non-published patent applications*”. We believe that the Horizontal Guidelines should expressly define IPR as including patent applications, both published and unpublished. This construction would be in line with the definition of IPR as set out in ETSI’s IPR Policy, which states that “*IPR shall mean any intellectual property right conferred by statute law including applications therefor other than trademarks*”.³⁷
- (48) Explicitly including patent applications in the IPR definition will both enhance competition between technologies to be included in a standard and ensure that the

stakeholders make informed choices. That is because it is very common for patent applications to be filed around the time of the standard setting process. This choosing of timing is usually intentional given the lengthy review periods of patent application submissions. Put differently, by not including patent applications in the IPR definition of the Horizontal Guidelines, patent holders can maintain the obscurity around the IPR to be included in the standard, which can result in the issues explained above. It is therefore important that early disclosure obligations cover patent applications as well.

- (49) Moreover, the Horizontal Guidelines should expressly include unpublished patent applications in the IPR definition. There is no logical reason why the practices of patent authorities as to when they publish applications should affect the obligations of SDO participants, if they choose to propose their technology for inclusion in a standard, to disclose all patents and patent applications that might be essential. The mere fact that a member has reason to believe that a patent may be essential, for example, if a member's technical standard proposal is adopted, should be sufficient to qualify it as disclosable IPR for the purposes of standard setting. Having this as a principle is essential for creating meaningful transparency during the standard setting process. In turn, the technical solution finally chosen will be the result of informed decision-making and true consensus, which would bring both technical and commercial added value to the standard.
- (50) Indeed, the U.S. Court of Appeals for the Federal Circuit has held that ETSI's policy already applies to unpublished patent applications without regard to whether patent authorities are required to treat them as confidential.³⁸ Apple would thus recommend that the footnote be amended accordingly to include both published and unpublished patent applications.
- (51) A reality of SEP licensing today is that patent holders routinely impose contractual obligations on prospective licensees to keep confidential information about whether SEPs are actually essential, infringed, and not otherwise invalid, exhausted, licensed, or unenforceable. Non-disclosure obligations in relation to such aspects of declared essential patents are incompatible with the objectives pursued by the Horizontal Guidelines. Accordingly, Apple recommends the insertion around paragraph 287 of clarification that SDOs should include within their FRAND commitment a commitment not to impose any contractual or other obligation restricting disclosure of information relating to whether declared essential patents are actually essential, infringed, and not otherwise invalid, exhausted, licensed, or unenforceable. There should be no legitimate objection to a FRAND commitment in this form. Patentees contributing technology to standards have no legitimate interest in extracting royalties from implementers based on patents that are not essential and infringed, or which are otherwise invalid, exhausted, licensed, or unenforceable. SDOs have no legitimate interest in enabling them to do so either.

(e) The Commission should also consider amending the Horizontal Guidelines to take into account the following principles.

- (52) In addition to the thematic suggestions discussed above, Apple also suggests the following additional suggested changes to the Horizontal Guidelines:
- (53) While discussing the consistency of intellectual property laws and competition laws, it is important to make a distinction. Paragraph 269 states that IPR promote dynamic competition. As a general proposition concerning the concept of protecting intellectual property, this is entirely valid. However, it would be worth clarifying that while the existence of IPR may promote competition, this is not necessarily true of all practices concerned in the licensing of such IPR. On the contrary, certain licensing and enforcement practices can be highly damaging to competition, both static and dynamic.
- (54) Similarly, the discussion of the incentives of SDO participants at paragraph 267 could usefully be expanded. For example, it is stated that for up-stream licensors, their “*only source of income is licensing revenue and their incentive is to maximise their royalties*”. This does not recognize the significant benefit that companies obtain simply from having their patented technologies incorporated into a standard. By doing so, such companies create a market for their technologies when otherwise there might be no, or very little, demand and ensure that they have a large number of locked-in licensees.
- (55) By contrast, paragraph 267 of the Horizontal Guidelines suggests that companies that manufacture products and offer services based on technologies developed by others have as their incentive “to reduce or avoid royalties”. Readers will infer that the Commission has in mind downstream innovators who implement standards, and yet even those companies with no patents essential to the standard concerned typically develop and use numerous – often much more valuable – technologies in their products. The caricature of a company that depends solely on the technologies of others is far from reality. It also disregards the reality that such companies have a genuine interest in the on-going development of technologies that can improve the standards on which they rely. Downstream innovators can recognise their own interest in ensuring sufficient incentives for standardization.
- (56) The Commission suggests in paragraph 324 and footnote 1 on page 66 that the competitive concerns applicable to standards development by multiple industry participants in a SDO may apply to de facto standards, which it defines as involving a situation where a (legally non-binding) standard is, in practice, used by most of the industry. This might be misinterpreted by some as suggesting that whenever a particular technology or format is taken up by most of an industry, then it is subject to the requirements discussed by the Commission in Section 7 of the Horizontal Guidelines. It would thus be very helpful for the Commission to clarify that Section 7 does not apply to proprietary technologies or formats developed outside the standard setting context, regardless of whether they achieve widespread adoption in the industry concerned.
- (57) Finally, section 7 of the Horizontal Guidelines currently addresses under each heading (main competition concerns, restrictive effects on competition, etc.) both issues relating to standard terms and issues relating to standardization agreements. Apple believes that switching between standard terms and standardization agreements in the same section

of the Horizontal Guidelines could cause confusion. The nature of these arrangements is sufficiently different that Apple therefore respectfully invites the Commission to consider whether it would be more “user friendly” to devote separate sections to standard terms and standardization agreements.

4. CONCLUSION

- (58) Apple thanks the Commission for the opportunity to provide Apple’s views in this very important field, and we remain available to discuss these issues as the Commission continues its review of the Horizontal Guidelines.