

FRAND conditions for access to app stores

DMA Stakeholder Workshop, 6 March 2023
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Art. 6 (12) DMA

The gatekeeper shall apply fair, reasonable, and non-discriminatory general conditions of access for business users to its software application stores, online search engines and online social networking services listed in the designation decision pursuant to Article 3(9).

For that purpose, the gatekeeper shall publish general conditions of access, including an alternative dispute settlement mechanism.

The Commission shall assess whether the published general conditions of access comply with this paragraph.

fair, reasonable, and non-discriminatory

conditions of access

publish

alternative dispute settlement mechanism

Commission shall assess

2

fair, reasonable, and non-discriminatory

1

conditions of access

3

publish

alternative dispute settlement mechanism

Commission shall assess

1 Conditions of access

fees * data * technicalities * design * on top-services * updates * content * security * ranking * compliance * sales * payment *

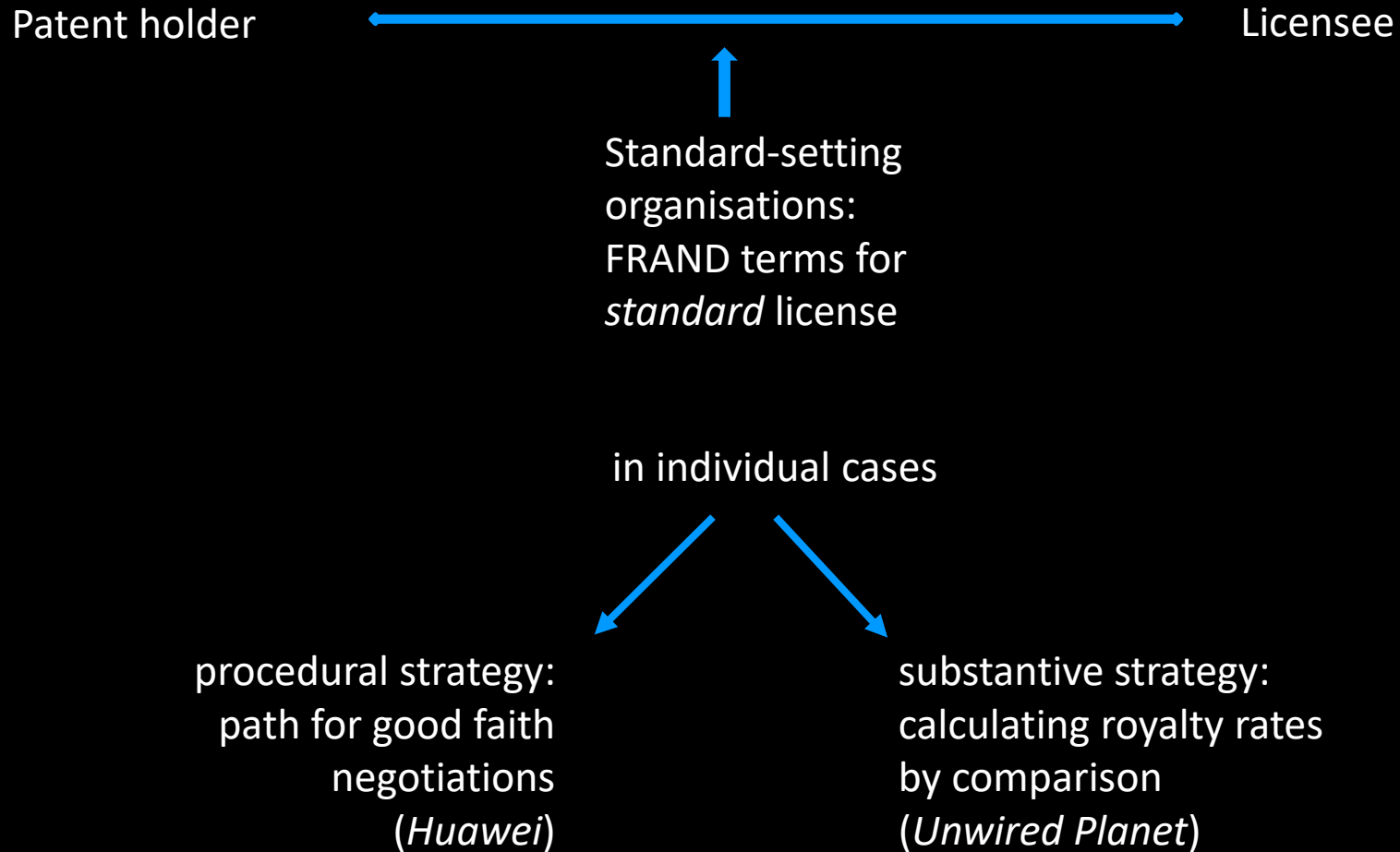
Does my app get in?
No, because...

Including conditions
for termination? Or
only upfront check?

Full package or only
commercial key
aspects?

De facto -
requirement to list
all potential reasons

2 fair, reasonable and non-discriminatory (FRAND)



2 fair, reasonable and non-discriminatory (FRAND)

Patent holder



Licensee

Standard-setting
organisations:
FRAND terms

UNFIT!

procedural strategy:
path for good faith
negotiations
(*Huawei*)

substantive strategy:
calculating royalty rates
by comparison
(*Unwired Planet*)

2 fair, reasonable and non-discriminatory (FRAND)

Discriminatory?

- different treatment
- no justification

Unfair/unreasonable?

- imbalance of rights and obligations
- disproportionate advantage with regard to service
- difficult to compete with gatekeeper

Benchmarks:

- other app store providers
- related or similar services
- other users
- different geographic areas
- gatekeeper itself

= comparison

(recital 62)

3 Triple Safety Net

publication

transparency

FRAND style of
publication?
readability &
accessibility?
P2B regulation!

COM assessment

control

ex ante or ex post?
procedure?
participation of third parties?
notification process?
duration of investigation?
depth of analysis?
back and forth process?
outcome?
publication?
binding effect?

dispute settlement mechanism

redress in individual cases

recital 62: easily accessible,
impartial, independent, free of
charge; Union based;
ADR (dir. 2013/11/EU)
only for access or general?

2

Fair, reasonable, and non-discriminatory

1

Conditions of access

3

Triple Safety Net:
Publication, Assessment, DSM

Thank you!

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Recital 62 DMA

For software application stores, online search engines and online social networking services listed in the designation decision, gatekeepers should publish and apply general conditions of access that should be fair, reasonable and non-discriminatory.

Those general conditions should provide for a Union based **alternative dispute settlement mechanism** that is easily accessible, impartial, independent and free of charge for the business user, without prejudice to the business user's own cost and proportionate measures aimed at preventing the abuse of the dispute settlement mechanism by business users. The dispute settlement mechanism should be without prejudice to the right of business users to seek redress before judicial authorities in accordance with Union and national law.

In particular, gatekeepers which provide access to software application stores are an important gateway for business users that seek to reach end users. In view of the **imbalance in bargaining power** between those gatekeepers and business users of their software application stores, those gatekeepers should not be allowed to impose general conditions, including pricing conditions, that would be unfair or lead to unjustified differentiation.

Pricing or other general access conditions should be considered **unfair if** they lead to an imbalance of rights and obligations imposed on business users or confer an advantage on the gatekeeper which is disproportionate to the service provided by the gatekeeper to business users or lead to a disadvantage for business users in providing the same or similar services as the gatekeeper.

The following **benchmarks** can serve as a yardstick to determine the fairness of general access conditions:

- prices charged or conditions imposed for the same or similar services by other providers of software application stores;
- prices charged or conditions imposed by the provider of the software application store for different related or similar services or to different types of end users;
- prices charged or conditions imposed by the provider of the software application store for the same service in different geographic regions;
- prices charged or conditions imposed by the provider of the software application store for the same service the gatekeeper provides to itself.

This obligation should not establish an access right and it should be without prejudice to the ability of providers of software application stores, online search engines and online social networking services to take the required responsibility in the **fight against illegal and unwanted content** as set out in a Regulation on a single market for digital services.