Council of the
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**NOTE**

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| From: | General Secretariat of the Council |
| To: | Delegations |
| Subject: | OECD Recommendation of 8 June on "Intellectual Property Rights and Competition as adopted |

Delegations will find attached a note from the Commission on the above-mentioned subject with a view to the meeting of the Working Party on Competition on 27 June 2023.

The Recommendation on Intellectual Property Rights and Competition was adopted by the OECD Council meeting at Ministerial level on 8 June 2023 on the proposal of the Competition Committee. It revises, consolidates and replaces two earlier Recommendations adopted respectively in 1978 and 1989.

The Recommendation sets out the key principles applicable in competition enforcement cases which involve intellectual property (IP)-related business practices and aims to provide guidance on how to navigate the complex interaction between intellectual property rights and competition, to ensure a correct functioning of markets and adequate incentives to innovate. This is particularly important for the digital economy, which is continuing to grow rapidly in Adherents.

***OECD's work on Intellectual Property Rights and Competition***

The Competition Committee has been working on IP-related matters since its inception, and developed two IP Recommendations:

- the Recommendation concerning Action against Restrictive Business Practices relating to the Use of Trademarks and Trademark Licences [OECD/LEGAL/0162], adopted by the Council in 1978: this Recommendation noted the necessity of remedying harmful effects of certain restrictive business practices related to the use of trademarks, to the extent that such practices are not essential to the legitimate protection of the trademark owner's exclusive right;

- the Recommendation concerning the Application of Competition Laws and Policy to Patent and Know-How Licensing Agreements [OECD/LEGAL/0248], adopted by the Council in 1989: this Recommendation acknowledged that IP rights, and particularly their licensing, is generally procompetitive, even though the licensing of intellectual property rights, like other agreements between enterprises, contains a risk of anti-competitive effects.

Since then, the Competition Committee has held multiple roundtables on the relationship between competition policy and intellectual property rights.

The Competition Committee's work on intellectual property and competition over all these years demonstrated the need to fully reflect current practices or challenges related to IP business no longer fully reflected in the content of the IP Recommendations.

Economies have become increasingly knowledge-based, with innovation being key to success in global markets, to upgrade global value chains and to sustain growth in the long run. In line with this, the treatment of IP rights and related business practices by leading competition agencies has undergone far-reaching changes – as reflected in the Competition Committee work over the years.

Over the past couple of decades, important competition enforcement actions have been pursued across the world against a broad range of practices implicating intellectual property. Such practices include but are not limited to: mergers likely to undermine incentives for innovation; anti-competitive settlements in patent litigation relating to prospective entry by generic suppliers in the pharmaceutical sector; the possibility of anticompetitive conduct in the context of standard-setting processes; manipulation of IP award procedures; and unilateral abuses of market power derived (at least in part) from IP rights in high-technology industries, often to the detriment of SMEs and potential competitors.

Simultaneously, the interaction between IP rights and competition has become increasingly prominent with the growth of the digital economy, and its expansion beyond goods and services to other areas of the economy. Competition issues arising in the digital sector have become increasingly significant for competition authorities, and many of these raise questions concerning IP rights.

In light of these developments, the update and consolidation of the IP Recommendations was considered necessary by the Competition Committee to ensure the continued relevance of its legal instruments in this crucial area for economic activity and market competition.

***Process for developing the Recommendation***

The Competition Committee started discussing the update and consolidation of the IP Recommendations in 2021. The update and consolidation of the IP Recommendations was guided by an informal working group of interested delegates and the process involved discussions on multiple drafts both in the informal working group and in the full Competition Committee, with other OECD policy communities also being consulted on the draft.

The Secretariat also organised a webinar with relevant external stakeholders to present the building blocks of the draft Recommendation and increase its visibility and relevance. Invited stakeholders included representatives of international organisations (i.e. World Trade Organisation, United Nations Conference on Trade and Development and World Intellectual Property Organisation), as well as BIAC, TUAC, the International Chamber of Commerce, the International Bar Association (IP and Entertainment Law Committee), and academics with extensive expertise in this area.

***Scope of the Recommendation***

Intellectual Property Rights (IPR) seek to promote innovation and creativity by striking a balance between protecting the inventor or creator's rights and fostering follow-on or cumulative developments. They do this by granting inventors and creators an exclusive right to exploit their inventions and creations during a certain period, and by delineating the scope of that exclusive right.

The impact of individual IPRs on competition assessments is normally subject to a case-by-case approach. Countries' approaches to the relationship between competition and IP laws have evolved over time, moving from the application of formalistic rules to a contemporary focus on the effects of IP-related practices. In addition, a number of commonly accepted approaches and trends can be observed, and the likely competitive effect of discrete IP-related practices has become better understood.

While the 1978 Recommendation only addressed trademarks and the 1989 Recommendation focused on patents and licensing arrangements, the Recommendation covers all IPRs and addresses the interface of competition and IP law in general in a single instrument. It takes a principles-based approach that seeks to not only bring the IP Recommendations up to date, but also outline principles applicable to all relationships at the interface between competition and IP, thereby addressing not only issues and challenges faced currently, but also providing a framework for the analysis of new challenges that are bound to arise in the future at the intersection of these two disciplines. It has a specific focus on licensing arrangements.

The Recommendation notes the special characteristics of IPRs but highlights that these rights should nonetheless be treated like other forms of property for the purpose of enforcing competition law. It notes the complementarity of competition law and intellectual property law in promoting innovation and consumer welfare. The Recommendation is organised around five building blocks: enforcing competition law with respect to IP-related business practices; assessing IP licensing arrangements; transparency and legal certainty; IP-related competition law remedies; co-ordination and co-operation.

***Next steps***

The Competition Committee will support the implementation of the Recommendation by serving as a forum to exchange information and experiences with respect to its implementation, and through an implementation toolkit. The OECD Secretariat will continue to develop relevant analytical work, roundtables, hearings, workshops and conferences in support of Adherents' and Committee's work.

The Competition Committee will report to Council on the implementation, dissemination and continued relevance of the Recommendation in 2028.

**ANNEX**

**Recommendation of the Council on Intellectual Property Rights and Competition**



(In force)

**THE COUNCIL**,

**HAVING REGARD** to Article 5 b) of the Convention on the Organisation for Economic Co-operation and Development of 14 December 1960;

**HAVING REGARD** to the Recommendation of the Council concerning Action against Restrictive Business Practices relating to the Use of Trademarks and Trademark Licences [OECD/LEGAL/0162] and the Recommendation of the Council concerning the Application of Competition Laws and Policy to Patent and Know-How Licensing Agreements [OECD/LEGAL/0248], which this Recommendation replaces;

**HAVING REGARD** to the standards developed by the OECD in the areas of innovation, intellectual property (IP), licensing and competition;

**CONSIDERING** the importance of both IP rights and competition in market economies to promote innovation, economic growth, and consumer welfare;

**RECOGNISING** that IP rights do not relieve the holder from applicable legal duties when seeking or exercising these rights, including compliance with competition law;

**RECOGNISING** that some IP-related business practices may be pro-competitive or competitively neutral;

**RECOGNISING** that licensing arrangements, amongst other IP-related business practices, contribute to the dissemination and utilisation of protected innovations and creations, and promote their distribution, but may contain restrictive clauses that create, enhance, or maintain the market power of the licensee or licensor and substantially reduce competition in the market or facilitate cartels;

**RECOGNISING** that anticompetitive effects of IP-related business practices may lessen the incentives for breakthrough/disruptive innovation as well as for follow-on innovation;

**RECOGNISING** the importance of national and international co-ordination and co-operation between competition authorities and between competition authorities and IP bodies.

**On the proposal of the Competition Committee:**

**I.AGREES** that, for the purposes of the present Recommendation, the following definitions are used:

●"IP right" refers to an exclusive right, granted by a jurisdiction and often limited in duration, which allows the holder to exclude (or limit) others from certain actions, such as using or exploiting the subject matter of its right. IP rights vary by jurisdiction but may include, *inter alia*, copyright and related rights, geographical indications including appellations of origin, industrial design rights, layout designs (topographies) of integrated circuits, patents and utility models, plant breeder's rights, and trademarks. It may also refer to other forms of intellectual property such as trade secrets.

●"IP-related business practice" refers to business conduct involving an IP right, including but not limited to the acquisition, exercise, and licensing of IP rights.

**II.RECOMMENDS** that Members and non-Members having adhered to this Recommendation (hereafter "Adherents") effectively **enforce competition law against anti-competitive IP-related business practices**. To that effect, Adherents should:

1. Apply the same competition principles to IP rights as to other forms of property, while accounting for the unique characteristics of IP rights.

2. Apply the same competition principles across different IP rights, while accounting for relevant differences between types of IP rights.

3. Apply a case-by-case approach and an actual or likely effects-based analysis (except for restrictions analysed under per se or by object rules) when reviewing the specific market circumstances in which IP-related business practices occur.

4. Take the existence of IP rights into account when defining relevant markets without automatically equating the scope of the IP right with the scope of the relevant market.

5. Treat the existence of the IP right as one of the relevant factors for assessing market power, without presuming that it inherently confers market power on the right holder.

6. Apply, when relevant, exceptions from national competition law for IP rights narrowly, having regard to the importance of preserving effective competition.

**III.RECOMMENDS** that Adherents **weigh the actual or likely anti-competitive effects against the pro-competitive effects (and with regard to applicable presumptions), when assessing IP licensing arrangements** under competition law, except in cases where licensing amounts to a restriction analysed under *per se* or by object rules. To this effect, Adherents should take into account, *inter alia*, the following factors:

1. The legal and economic context in which IP-related business practices occur.
2. The horizontal or vertical relationship between the parties.
3. Whether the IP rights of the parties are substitutes or complements.
4. The effects on actual and potential competition both from a static and dynamic competition perspective.
5. The risk that the licensing arrangement may give a party the ability to foreclose access partially or completely to an important input.
6. The existence of countervailing efficiencies or objective justifications.

**IV.RECOMMENDS** that Adherents **develop and promote public guidance on the assessment of IP-related business practices under their jurisdiction's competition law** with a view to foster transparency and legal certainty for effective competition enforcement.

**V.RECOMMENDS** that Adherents **design effective and appropriate competition law remedies in IP-related competition cases**. To this effect, Adherents should:

1. Tailor remedies to the facts of the particular case at issue.

2. Address the competitive harm completely by stopping anticompetitive conduct and enjoining and deterring future violations, with the goal of restoring competitive market conditions; and permit reasonable compensation to the right holder for any licensing requirements imposed by a remedy when consistent with this goal and with procompetitive aims.

3. Seek remedies needed to effectively redress harm or threatened harm in the Adherent's jurisdiction, and where such a remedy has an extraterritorial effect, take into account whether the remedy would affect the significant interests of any other jurisdiction.

**VI.RECOMMENDS** that Adherents **foster effective co-operation** nationally and internationally. To that effect, Adherents should:

1. Establish procedures to allow effective policy co-operation between their competition authorities and their IP bodies, as well as with other relevant regulatory agencies.

2. Put in place mechanisms to foster effective enforcement co-operation between competition authorities of affected jurisdictions, including with respect to IP-related remedies in particular matters.

**VII.INVITES** the Secretary-General and Adherents to disseminate this Recommendation.

**VIII.INVITES** non-Adherents to take due account of, and adhere to, this Recommendation.

**IX.INSTRUCTS** the Competition Committee to:

a) serve as a forum to exchange information and experiences with respect to the implementation of this Recommendation, in particular to promote best practices for competition enforcement in IP-related cases, and support technical assistance and capacity building programmes including in close coordination with relevant international organisations;

b) develop a toolkit to support Adherents' implementation of this Recommendation; and

c) report to Council on the implementation, dissemination and continued relevance of this Recommendation no later than five years following its adoption and at least every ten years thereafter.