

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS  
COMPETITION COMMITTEE**

**Summary of discussion of the Roundtable on the Licensing of IP rights and  
Competition Law**

**Annex to the Summary Record of the 131st Meeting of the Competition Committee held in  
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This document prepared by the OECD Secretariat is a detailed summary of the discussion held during the 131st meeting of the Competition Committee on 6 June 2019.

More documentation related to this discussion can be found at  
<https://www.oecd.org/daf/competition/licensing-of-ip-rights-and-competition-law.htm>

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## *Summary of the Roundtable on the Licensing of IP rights and Competition Law*

### 1. Introduction

The discussion began with an introductory speech by the **Chair**. He described how the Competition Committee had looked at the interface between intellectual property ('IP') and competition policy a number of times in the past, but not in the recent past. He explained how IP rights create temporary exclusive rights that protect investments in research and some creative activities, and how this is an essential mechanism to promote innovation, economic growth and, by extension, consumer welfare.

IP rights have taken on an increasingly prominent and extensive role in economic activity – and in market competition as well. These developments are broadly related to the digitalisation and globalisation of the economy, topics which this Committee has dealt with on multiple occasions. In addition, as the economy digitalises and the importance of intangible assets in the overall economy increases, the relevance of the interaction between competition and IP law has grown.

IP rights 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. The main mechanism to allow the diffusion of IP-protected innovations during this exclusivity period is through licensing. The existence of technology markets in which IP owners can license their innovations efficiently and at attractive terms is likely to have a positive effect on their incentives to invest in innovation. Licensing contracts are generally thought to also be procompetitive, fostering both competition *ex post* and innovation *ex ante*.

Nonetheless, a number of circumstances and licensing arrangements give rise to competition concerns. The main topic of this session is precisely this – the instances where IP licensing and competition are at cross-purposes. That such instances arise is something that has been known for a long time. Over recent decades, jurisdictions around the world recognised the potentially procompetitive effects of licensing, and require effects-based assessments of potentially anticompetitive licensing practices.

So consensual is this approach that it led to the adoption of two fairly ancient OECD Recommendations – on the Use of Trademarks and Trademark Licences, from 1978; and on Patent and Know-How Licensing Agreements of 1989. These Recommendations are, unsurprisingly, somewhat out of date. They do not address the licensing of various IP rights, such as copyright – which is nowadays economically more relevant than patents. Further, since the adoption of the OECD Recommendations a number of new competition concerns, not mentioned or referred to in those recommendations, have come to the fore. These include patent tickets, technological standards, standard essential patents, and the question of the fair, reasonable and non-discriminatory ('FRAND') royalties and compulsory licensing. The Chair emphasised that while the goal of this Roundtable was not to update these Recommendations, this session could be thought of as preparatory work to that end.

The Chair then introduced the speakers. They are Koren Wong Ervin, legal counsel at Qualcomm and law professor at UIBE in China, and formerly of George Mason University in the US; Prof Herbert Hovenkamp, from the University of Pennsylvania; Dr Thomas

Vinje, the head of the competition practice at law firm Clifford Chance, based in Brussels; and Prof Carl Shapiro from the University of Berkeley.

The Chair then explained that we had received thirteen contributions, and described how he intended to structure the session. The session would begin with a discussion of the interaction between IP and competition law in general, before moving on to a number of country contributions that describe a number of IP exemptions from competition law. The discussion would then focus on standard essential patents and FRAND requirements, before finally looking at broader competition enforcement efforts regarding IP licensing in a number of jurisdictions.

He then passed the word to the **OECD Secretariat**, who contextualised the roundtable in light of a number of OECD work streams related to IP rights and digitalisation. These work streams include the Going Digital Project, the ongoing project to review and update all OECD Recommendations, and a long-term project undertaken by the OECD Competition Committee on IP Rights and Competition. All these initiatives take place in the shadow of increasing number and strength of IP rights around the world and growing economic relevance of IP-intensive industries.

The Secretariat then described how past OECD work on IP and competition law – not only the work streams just described, but also a number of earlier roundtables on IP rights and digitalisation organised by the Competition Committee – have focused on patents and on the interaction between competition and innovation. This means that the OECD – and the competition community – have not really engaged with other IP rights, even though they make up the bulk of IP-related economic activity. The Committee has also recently focused mainly on standards and standard essential patents, even though these are not the bulk of competition enforcement activity, as is apparent from the country contributions to this roundtable.

A review of past and current practices reveals that IP rights' enforcement follows well-established principles, which are broadly reflected in the OECD Recommendations on IP rights. However, these Recommendations are somewhat out of date – the one on Trademarks adopts a form-based approach, which is no longer followed by OECD members, or endorsed by the most recent OECD Recommendation on Patent and Know-How Licensing. This latter Recommendation, in turn, deals only with a limited number of IP rights and, unsurprisingly, fails to address more recent challenges and matters that have arisen in this area. The Secretariat concluded by saying that he hoped that today's discussion would lead to the identification of consensual principles that could underpin an update of the OECD IP Recommendations.

The **Chair** then emphasised that the object of today's session is not to decide to update the Recommendations, but merely to assess the state of discussion and practice as regards IP rights.

#### Convergence and Divergence on Competition Law Approaches to IP Licensing

He then passed the word to **Prof. Koren Wong-Ervin**, who started by canvassing the areas of convergence and divergence on competition enforcement. She explained that IP rights, including standard essential patents, do not necessarily lead to market power. Instead, identifying market power requires a fact specific case-by-case- analysis. On the other hand, there are international distinctions regarding how effects-based assessments are pursued around the world.

She mentioned a number of jurisdictions that seem to adopt presumptions or quasi-presumptions that patents belonging to a standard will have market power if they are indispensable and there are no substitute standards. This seems to reflect a generalised idea in economics that standardisation generally confers monopoly power. However, empirical research shows that if standardisation may at times confer monopoly power, it mostly tends to crown winners.

Further, the absence of substitutes does not mean that the standard essential patent holder will necessarily have monopoly power because there might be competitive constraints. Such constraints can relate to conditions imposed by standardisation bodies, which standard essential patent holders accept because of their incentives to promote widespread adoption of their standard essential patents. It can also relate to the complementarity of standard essential patents in a standard, which creates a connection among the patents and patent holders such that standard essential patent licensing terms cannot be set unilaterally.

Prof. Wong-Ervin then moved to describe another area of international divergence, the analytical framework to identify anticompetitive effects. While most jurisdictions consider the counterfactual or the but-for world, the way this counterfactual is identified varies. In a significant number of jurisdictions the comparison is with a world where some form of licensing occurs, whereas in the United States the antitrust agencies explicitly consider what would have happened had the IP holder exercised its core right not to license in the first place.

Another area of divergence concerns refusal to supply. The essential facility doctrine, which provides a basis to consider refusals to license as anticompetitive, is accepted in a number of jurisdictions, such as the EU, Japan and Korea. In the US, however, this doctrine is viewed sceptically and unconditional refusals to license are generally lawful.

Prof. Wong-Ervin then concluded by focusing on whether refusal to license can lead to foreclosure at the component level. In this respect, there is a key difference between vertically integrated and non-integrated firms. If an IP holder only licenses patents but is not active in the downstream market, then it does not have any rivals to exclude in that downstream market. On the other hand, a vertically integrated IP holder that both licenses its IP and sells component in a downstream market can, under certain circumstances, have the ability to engage in margin squeeze or otherwise foreclose rival component makers. A paper by Prof. Wong-Ervin and Dr Jorge Padilla shows, however, that a vertically-integrated IP right holder will be unable to foreclose so long as it does not assert its patents at the component level (i.e. if it leaves component manufacturers free to sell their products without fear of infringement litigation) and it licenses its IP right to end-device makers on FRAND terms, irrespective of where the end-device maker source their components. This is because the bundle of patents and components can be replicated competitively by the end-device makers, who can mix and match the components of the non-integrated rival with the IP rights of the vertically integrated company.

The **Chair** thanked Prof. Koren-Ervin for mapping out some of the areas of international convergence and divergence as regards IP licensing, and passed the word to Prof. Herbert Hovenkamp.

**Prof. Hovenkamp** began by providing a quick introduction to IP licensing in the US. He emphasised that it is very important, under US law to distinguish between simple, unilateral refusals to license from conditional refusals. Already in 1914, Congress held that while a firm is entitled not to license a patent, it would be unlawful for it to refuse to license the

patent except on a condition or understanding that the licensee not deal in the goods of a competitor (i.e. by tying the licence or agreeing to exclusive dealing).

A reform in 1988 further clarified that unilateral refusals to license do not amount to patent misuse. However, the scope of this exemption is subject to dispute. The FTC seems to have adopted a position, consistent with the language adopted by Congress, that this provision does not create a general antitrust exemption, but merely applies to the patent misuse doctrine. As a result, it is Prof. Hovenkamp's opinion that the question of whether an unconditional unilateral refusal to license can violate the antitrust laws is not closed. In any event, conditional refusals are still prohibited under antitrust law, in situations such as tying, exclusive dealing, loyalty discounts or other forms of so-called quasi-exclusive dealings.

Another area of concern has been the interaction between IP rights and product market restraints. In two early cases, *Beaman v. National Herald* and *General Electric*, the US Supreme Court unfortunately permitted product market price fixing via patent licenses. The Justice Department tried strenuously for half a century to get *General Electric* overturned, but other than *dicta* in the Actavis decision limiting *General Electric* to price agreements between a single licensor and a single licensee, such efforts were unsuccessful.

However, most other restraints involving patented products are subject to traditional antitrust principles – e.g. territorial restraints such as location clauses or end-use clauses are normally subject to a rule-of-reason. In some instances, practices may be evaluated under the *per se* rule. A particular concern in this area is that while the distinction between patents and products is easy to maintain when you have products that incorporate a variety of patents, in some cases the patent is also a product (e.g. molecules that are medicines). In such circumstances, it is hard to distinguish a restraint on the patent from a restraint on the product itself.

Prof. Hovenkamp then moved to patent pools and cross-licensing. The traditional view of patent pools was that they are groups of perfect complements or at least strong complements, and that they should be encouraged because that pools get complementary technologies together create opportunities to create new innovative products. On the other hand, pools of competing patents should not be encouraged because one does not need two substitutes in order to produce something, and they create opportunities for price fixing, double marginalization or so-called royalty stacking. However, this view is somewhat unrealistic, because most pools take place in high-tech markets with complex (and a complex mix of) patents, with no control of whether the patents are substitutes or complements. A potentially better view is of pools as a clearing device that reduce transactions and litigation costs.

The Chair then turned to **Prof Carl Shapiro**. Prof Shapiro started by pointing out that, while patent law is going to vary from one country or jurisdiction to another, competition policy should take it as whatever bundle of rights has been assigned to entities that have been granted patents – and there are many aspects to this bundle, such as the scope of the right to exclude and whether the available remedies are royalties or injunctions, or the procedures for testing whether patents are invalid.

Patent licensing is a mechanism to diffuse innovation by means of reasonable royalties. The balance between royalties and injunctions is important because injunctions may over-reward patent holders. In particular, where investments are made by a patent implementer and an injunction can then be obtained by a patent holder, this could lead to the patent holder enjoying excessive bargaining power and ultimately obtaining excessive royalties.

This prospect create incentives for patent hold up on the part of the patent holder, a serious problem for any economist who studied transaction costs.

A second point is that patents' validity is probabilistic, i.e. an increasing number of patents are issued quickly by patent offices and some of these are going to be found to be invalid if they are tested. It is very important to weed out those patents and have process to do so, so that competition is not blocked by patent grants that do not reward innovation.

The two concerns above are addressed by patent law, but a third concern, refusal to license, is specific to competition law. A unilateral refusal to license is widely perceived as a legitimate exercise of the IP rights. The question is what to do once conditions start to be attached to such refusals. A number of licensing restrictions, such as field-of-use or exclusivity, are usually seen as being pro-competitive. However, once one starts imposing conditions on a license, then collusive or exclusionary antitrust concerns may arise. In other words, once conditions are attached to a licence, traditional antitrust effects analysis would apply.

A fourth concern focuses on patent thickets and royalty stacking. A single product will potentially infringe dozens, even hundreds of patents, and this creates a lot of problems and complexities. The obvious business solution to these things does involve cross-licensing, patent pools, various forms to cut through this thicket. The traditional approach is to be concerned with the pooling of substituting patents, but today is hard to assess whether patents in a pool are substitutes or complements.

As such, it is hard to separate the pro-competitive combination of complementary claims from the anticompetitive combination of substitute patents. This ultimately leads to the cross-licensing of patent pools, which brings up questions regarding standard essential patents. Concerns with standard essential patents arise when there is a product that uses many patents, so a single product (e.g. a smartphone) could infringe many patents. This happened in the past (e.g. sewing machines or airplanes), but nowadays we also have standards overlaid on top of this. The fact that two patents are complements within a standard does not mean that they do not have market power if each is a standard essential patent in the context of standard essential patent pools – instead, you may have multiple monopolies regarding a product, leading to royalty stacking.

The Chair then asked **Dr Vinje** to speak on the European perspective on IP licensing. Dr Vinje began by pointing out that there is great similarity between the EU and other legal systems around the world as regards a number of topics. First licensing arrangements that achieve price collusion or output restraints are generally *per se* prohibited and most other licensing provisions (e.g. field use, grant backs and the like) are subject to an effects test, where pro and anti-competitive effects are balanced. The law on patent pools is also very similar around the world.

There is some areas where the EU differs from other jurisdictions. One concerns the European prohibition of territorial restrictions, which relate to the origin of EU law and the removal of obstacles to trade.

The other main area of divergence between the US and the rest of the world concerns refusal to license, but this should not be overemphasised. In Europe, the number of cases is limited, and people tend to become very agitated about these differences which are, in practice, rather limited because the conditions for finding that a refusal to license is anticompetitive are rather stringent. It is only where intellectual property is an indispensable input to allow the emergence of new products or technological developments such as to eliminate all competition in the downstream market, and the prospective licensee

does not intend to clone the product of the dominant IP right holder, that a refusal to license will be abusive. The basic criteria are the following. Furthermore, the courts have hinted that objective justifications would exist if a compulsory license were to hinder incentives to innovate.

The **Chair** then intervened to explain that the presentations allowed one to develop a clear view as to areas of agreement and potential disagreement regarding IP licensing around the world.

## 2. The Interface of Competition and IP Law

The Chair then moved on the roundtable to discuss a number of contribution on the interaction between IP and competition law by calling on Colombia.

**Colombia** began by addressing the relationship between intellectual property, competition, growth and economic development in the region. Colombia evaluated the impact of patents on economic growth and development, a topic on which there was little research as regards its geographical region. It found that around 10% of GDP growth in the region could be ascribed to IP rights.

Colombia also emphasised that one particularity of its system is that the competition authority is also the intellectual property registry. This was relevant in a recent competition case where the authority investigated whether a collective entity that managed copyrights was abusing its dominant position. This investigation emphasised the important role that the competition authority plays not only in protecting competition in the market, but in protecting IP-protected innovation as well – not only through its enforcement efforts, but also through its empirical studies.

The Chair then gave the word to BIAC, which cautioned against unrestrained competition intervention in cases related to IP rights. **BIAC** expressed a concern that competition law intervention might impact the operation of the IP system, which would in turn impact innovation incentives. The very reason for the existence of intellectual property law and patent protection is the protection of R&D and innovation and, therefore, economic growth. IP protection allows IP owners and innovators to attempt to recoup investments in both successful and non-successful projects. IP law already strikes a very careful balance between rewards, static efficiencies and innovation diffusion. It follows that antitrust law should not be used to correct potential failures of the IP system. An earlier speaker said it is important to remove invalid IP rights; however, this is a matter for IP courts, not competition agencies.

Competition intervention should only occur as regards IP rights if there are good reasons for intervention. Regarding when it is appropriate to intervene, this may be justified only in rare circumstances related to refusal to license. Another area for intervention is the potential abuse of IP rights, e.g. by providing misleading information to patent offices. A last area of potential abuse is IP litigation, which should be subject to a general doctrine to vexatious litigation, i.e. litigation exists not to establish a legitimate position but merely to harass the other party and it must be part of a plan to exclude a competitor.

Regarding patent pools, there are concerns regarding the type of patents that are included there, but antitrust agencies have set very detailed and valuable governance rules for patent pools, including the selection of essential and non-essential IP.

Concerning standard essential patents, BIAC believes that courts are better placed than competition authorities to establish royalty rates, and that courts are currently doing a good job regarding FRAND licensing, so there is little reason for competition authorities to intervene. Regarding discriminatory royalty rates, an earlier roundtable found that the effects of price discrimination are ambiguous. BIAC would assume that those same conclusions also apply to patent licensing and potentially discriminatory royalty rates.

The **Chair** agreed with BIAC's argument that there must be good reasons for competition agencies to intervene in IP rights cases.

### 3. IP Exemptions from Competition Law

On the other hand, BIAC proposed fairly limited areas for intervention, which means that BIAC's message is that Australia is taking the wrong path, since it is currently removing IP exemptions from competition law. The Chair asked Australia to explain what was behind this development.

**Australia** remarked that a narrow and technical exemption, which had been in place since 1965 but had never been used successfully, would be repealed in September 2019, following a 20 years campaign by the ACCC. This exemption reflected a view, not currently shared, that IP rights are inconsistent with competition law. The ACCC is also drafting guidelines that will assist parties to adjust to the situation after the exemption is removed.

The recent reform to the IP exemption in Australia seeks to make sure that a competition test applies to all conduct in the context of IP. However, the Harper Review in 2015 recommended that vertical supply arrangements, which includes some types of intellectual property licensing, could be more broadly exempted from prohibitions on cartel conduct. This would mean that such arrangements would not be prohibited under Australian competition law unless they had the purpose, effect, or likely effect of substantially lessening competition. The ACCC was opposed to this because it was concerned that, in addition to having to prove anticompetitive effects under a normal competition assessment, it would also have to face a new exemption that could be brought to bear against the ACCC's assessment of the case.

The **Chair** then called on Canada to speak about its exemption from certain types of abuse of dominance regarding IP practices. He also asked Canada to explain how this exemption could be squared with a recent abuse case regarding IP law conduct that was nonetheless not exempt.

**Canada** explained that its laws contain an exemption that applies only to the exercise of the right or enjoyment of any interest derived under an Act of Parliament pertaining to intellectual property. However, the Bureau's view is that this exemption has not prevented the Bureau from enforcing competition law, because the exemption does not cover conduct that goes beyond the mere exercise of intellectual property rights. The Bureau may seek to limit to whom and how the IP owner may license, transfer or sell the IP, but it does not challenge the fundamental right of the IP holder to do so. The Bureau's approach is set out in its intellectual property enforcement guidelines, which cover all types of IP rights and identify circumstances in which IP licensing that goes beyond the mere exercise of an IP right can amount to anti-competitive conduct.

A recent example of competition enforcement in this area concerned the Toronto Real Estate Board's ("TREB's") restrictions on the use and online disclosure of certain important data from a database containing property listings. TREB invoked its copyright over the database and the IP right exemption, and said that it could not be engaged in anticompetitive conduct since it was merely exercising its IP right. The Competition Tribunal found that, since TREB had attached anti-competitive conditions to the use of its IP, it was not shielded by the exemption. This was supported by Court of Appeal, which said that only when the refusal to supply is solely the result of the exercise of the IP rights would the conduct be exempt from competition law. This is in line with earlier judicial decisions and the practice of the Bureau.

The **Chair** then turned to Russia, where the existence of multiple IP exemptions is a characteristic of competition law enforcement in this area.

**Russia** is committed to achieving a balance between IP and competition law by both promoting innovation and ensuring that IP rights can be used. On the one hand, the IP rights holder should be provided with the freedom to implement the creation protected by its IP rights, and obtain reasonable remuneration for it; on the other, end-users and manufacturers should be provided with reasonable conditions to access IP rights

The IP exemptions mentioned by the Chair seek to ensure that IP rights create incentives for innovation and research. While they pose one of the main challenges for competition enforcement in this area, they have not prevented FAS from investigating cases where defendants invoked these IP rights exemptions, leading to a number of controversial judgments.

One example concerns Teva's refusal to deliver some medicines to the Russian market, on the ground that it was the owner of a specific trademark protect which allowed for this conduct. A second case concerns Google, which also invoked its IP rights regarding its mobile devices' software as a defence for a number of its licensing practices. These defences were not accepted by the courts. However, there are also judicial decisions upholding IP exemptions, which have prevented a number of practices from being investigated. FAS is working towards removing those exemptions which undermine the effectiveness of competition law.

#### 4. Standard Essential Patents and FRAND Licensing

At this point, the **Chair** turned to standard essential patents, and asked the experts to give their presentations on the topic.

**Prof. Wong-Ervin** began by noting that she accepts that standard essential patents being perfect complements does not mean that the holders of such patents will not on occasion have market power. Her point is merely that patent complementarity may be a competitive constraint that should be taken into account, together with the fact that standardisation provides an institutional structure that helps to internalise the hold-up problem.

Prof. Wong-Ervin then moved to discuss the welfare effects of standard essential patents. She mentioned a study she pursued with Dr Padilla which shows that end-device royalties will lead to lower prices when compared to component-level (e.g. chip) royalties, due to greater opportunities for double-marginalisation, lack of alignment of incentives by the originator and the implementer, and increased incentives to pass through royalty rates in

the latter case. This points towards end-device licensing raising smaller concerns regarding royalty stacking than component-level licensing.

Some have argued that if licensing was granted to component makers instead of end-device makers, component makers would be unable to pass on higher prices because they would not have market power. However, double-marginalisation may arise merely as a result of the ability to charge above marginal costs. Furthermore, when there are industry-wide or common costs such as increased royalties, the more competitive the market is the more those increased costs will be passed on to final consumers.

Prof. Wong-Ervin then turned on to discussions concerning the suitability of injunctive relief in the context of standard essential patents. In the US, there is no liability under traditional antitrust law for bringing injunction suits for the unlicensed use of a patent, but there may be enforcement regarding unfair methods of competition. In the EU, there has been a discussion of whether the negotiation procedure set by the Court of Justice of the European Union in *Huawei v ZTE* to determine whether a standard essential patent injunction is anticompetitive provides a safe harbour or a roadmap to avoid liability. Recently, the UK courts found that it was a safe harbour. Prof. Wong-Ervin also pointed out that a number of Asian jurisdictions impose antitrust liability when an injunction is used against a willing licensee to obtain unfairly high royalties.

Turning to the economics of whether refusing to license a standard essential patent poses a problem, it was mentioned earlier how recourse to injunctions will endow standard essential patent holders with bargaining power that might incentivise them to hold up licensing of their standard essential patent so as to obtain higher royalties. However, if an injunction is not available as a remedy, then the only available remedy for the standard essential patent holder is typically to claim damages in the amount of royalties due. If one thinks of the impact of this for the implementer, it incentivises them to hold out on payment, since walking away from a negotiation enables it to postpone payment and it forces the standard essential patent holder to sue it around the world, typically on a patent-by-patent basis. In other words, hold out by implementers can be an attractive strategy, and this should be taken into account when assessing whether injunction claims are anticompetitive.

To finish, Prof. Wong-Ervin touched on tying and bundling, which is another area of international divergence. While some jurisdictions focus on whether the IP holder is coercing or forcing someone to take something that they allegedly do not want as the basis for finding an infringement, in other jurisdictions the agencies pursue an effects-based analysis of foreclosure, generally based on a leveraging or monopoly maintenance theory.

**Prof. Hovenkamp** looked at how standard essential patents are and should be assessed under US antitrust law. He argued that outright refusal to license poses difficult issues. It is widely agreed that the window for such practices to amount to antitrust violations should be narrow but, given FRAND commitments, the window does not need to be closed entirely. He identified the *Microsoft* case in the EU, which adopts for IP rights an approach similar to *Aspen Skiing* in the US, as providing a useful roadmap in this regard.

As regards conditional refusal to supply, the law is clearer – practices that amount to tying or bundling, such as a no-chip no-license policy, can infringe antitrust rules. With respect to the royalty base for licensing (i.e. whether a license should be issued to component or end-device makers) Prof. Hovenkamp considers that this does not seem to be an antitrust issue. Instead, it concerns the exhaustion of IP claims regarding products put on the market; this is an IP, not an antitrust matter, despite analogies brought to bear on the matter.

Lastly, regarding the entitlement of a standard essential patent holder to an injunction, Prof Hovenkamp considers that this is primarily a matter of contract and IP law. On the other hand, the injunction entitlements under antitrust law are much more aggressive than under patent law, since they entitle plaintiffs to injunctions where an antitrust violation has been committed. Granting such an injunction may be justified if there is a finding of infringement.

**Prof. Shapiro** began by remarking that his point of view is that a standard essential patent is likely to have *ex post* monopoly power after a standard has been adopted, implemented and become successful. Given that a standard will typically have many standard essential patents, this means that there are many overlapping monopolies at play. A second question concerns whether a standard is pro-competitive, given that it reflects an agreement between many market participants, including competitors. While this could *prima facie* amount to an anticompetitive agreement, a standard is deemed to amount to be justifiable joint conduct that is pro-competitive as long as a reasonable royalty is awarded.

The main issue around standard essential patent concerns injunctions, because if a standard essential patent holder is able to impose, or credibly threaten to impose an injunction it may allow it to claim supra-competitive profits. Inasmuch as contract and other IP law do not restrict the ability to claim an injunction or the law on the topic is unclear, this can bring antitrust into the picture. Having said this, Prof Shapiro noted that IP law and clear FRAND rules are the best way to address this, not antitrust law. On the other hand, it is important to bear in mind that FRAND standards are the result of competitive processes, and if there are actions that interfere *ex post* with the functioning of FRAND standards, this interferes with the functioning of a competitive process and harms consumers, which is a typical antitrust concern.

To end, he referred to the recent Qualcomm case in the US. This was not a case about the appropriate royalty. Instead, it was a case about exclusionary conduct to raise rivals costs where consumer harm arose by means of unreasonably high royalties.

**Dr Vinje** noted that an area where standard essential patents are currently being discussed concerns the internet of things. However, no new legal questions seem to arise that were already not present in the smartphone context. In practice, what he is seeing is a shock of cultures between experienced standard essential patent holders, on the one hand, and new implementers who may or may not be sophisticated players in their industries but have no experience in this area.

Regarding more traditional enforcement, European competition authorities have been more focused on hold up and the competitive issues that can arise as a result of the bringing injunctions, but they have also sought to balance these concerns with the legitimate interests of IP right holders. The Commission has adopted a number of commitment decisions which balance the interests of IP right holders and implementers by setting out a negotiating procedure which may limit the possibility of holdout by implementers. The law was, however, set by the European court in *Huawei v ZTE*, which sets up a number of steps which, if the implementer does not follow them, allows the IP right holder to obtain an injunction. At the same time, there is a concern that this procedure may potentially allow implementers to hold out by following this procedure but dragging it out without paying royalties. This would prevent the standard essential patent holder from obtaining an injunction. Since the worst consequence for an implementer would be to pay reasonable royalties as set out by a court – i.e. the royalties it would have paid anyway – this may create incentives for implementers to try to leverage their position to lower the royalties they will pay.

Other important questions concern the duty to offer licensing terms for standard essential patent holders, in particular whether this duty obliges the patent holder to offer licenses to all comers, or allows them to restrict their licences to a single point in the supply chain. Dr Vinje noted that this is an area of debate, and one should try to avoid arriving at blanket conclusions. One must take into account the specificities of the relevant situation and industry. Importantly, the fact that someone does not obtain a licence does not necessarily mean that they will be excluded from the market, as there may be licensing at earlier levels in the supply chain. A last question in this respect is whether licensing at end-product level will lead to higher royalties; and Dr Vinje thinks this is not necessarily the case.

The **Chair** then asked the US to intervene, given that the Committee had already heard quite a bit about its regime.

The **US** first commented on Prof Shapiro's intervention. In particular, it argued that breach of a FRAND commitment does not interfere with the competitive process, because the competition occurred earlier, at the moment the standard is set. If someone infringes a FRAND commitment down the line, contract law provides a remedy to ensure participants receive the benefit of the bargain from the competitive standard-setting process. Therefore, a breach of FRAND commitment alone is not evidence that a patent holder interfered with the competitive process.

The US then focused on the role of business reviews letters, and particularly the one the Department of Justice sent to the IEEE as regards its patent policy. The US emphasised that such letters do not provide guidance regarding standard-setting organisations in general. Instead, each standard setting context is different, and the letters should be seen as encouragement for standard-setting organizations to think beyond the scope of that letter about how to draft their patent policies to most effectively promote innovation.

The **Chair** then gave the word to **Korea**. Korea emphasised that while IP rights are crucial for innovation and economic growth, not all exercises of IP rights are procompetitive. As regards standard essential patents, most jurisdictions share Korea's approach according to which standard essential patents likely grant market power to their holders. In any event, any such presumption is rebuttable in Korea. Further, as regards enforcement regarding standard essential patents, Korea pursues an approach that allows for the demonstration of pro-competitive effects.

The Korean competition law requires the KFTC to issue guidelines regarding the application of competition law to IP rights. In light of this, the KFTC started working on Guidelines to provide guidance to and remove doubts in the minds of market players. The Guidelines acknowledge the pro-competitive effects of standard essential patents and their licensing, but also identify instances where they may lead to unfair competition and anticompetitive conduct, such as making unreasonable use of standardisation procedures or demanding unfair conditions after a patent has been included in a standard, among other practices.

In 2016, the Guidelines were reviewed to reflect developments regarding standard essential patents, to increase the quality of the guidance and to direct the KFTC's enforcement practices. For example, the guidelines now distinguish between *de facto* SEPs which become industry standards through competition, and SEPs adopted by international standard-setting organisations subject to voluntary commitments to license the patent on FRAND terms.

The **Chair** then turned to the EU, to know whether there was anything it wanted to say, and whether it agreed with the earlier assessment that the *Huawei v ZTE* judgment opened a gap that could be explored by implementers to hold out on paying royalties.

The **EU** affirmed that the European Commission's decisions and the European Court's judgment fit well together, and that the latter could even be said to have been inspired by the European Commission's earlier approach. Both approaches are broadly similar, even if there are small differences, namely in how the court's judgment did not set a timeline as the previous European Commission's decisions did. Nonetheless, they both provide an approach that addresses a significant number of hold up and hold out concerns, even if such concerns can continue to arise. Given this, some additional precision may be needed, and might be provided in further European or national court judgments, or in Commission decisions, as regards what each of the steps set out in *Huawei v ZTE* involves.

The EU emphasised that the approach adopted by the European institutions does not engage in price setting and does not set FRAND rates. Instead, this approach creates an avenue for the parties to arrive at an agreement, leaving to the courts the final decision on the matter only should an agreement not be reached. This strikes a balance between allowing patent injunctions while preventing their abuse. The European Commission will keep on following how this approach will continue to apply, and address new questions as they arise on their merits.

The **Chair** then asked whether the EU agreed that differences with the US are not as significant as they are usually made out. The EU said that the process might be different, but that in terms of outcome it is hard to consider a case where a different outcome would have been reached.

**Argentina** pointed out that jurisdictions with competition provisions prohibiting exploitative abuses have an avenue to intervene in this area. Argentina recently acted in a copyright case regarding the licensing of music by a collective association to hotels which was charging excessive licensing fees. However, this conduct might have reflected a gap in the rules regarding what this association could charge the hotels. This gap not only led to an antitrust enforcement action, but also to advocacy to reform the applicable regulations and fill this gap.

Argentina further asked whether there has been any study of whether intervention by a competition authority leads to a weakening of innovation. **Prof Shapiro** noted that there is some nice work by Petra Moser and Catherine Tucker at MIT on the topic. The **Chair** mentioned work by Aghion, but noted that this work was more about the link between the need for strong IP rights and economic development. **Prof Shapiro** recognised that there is no study specifically on the impact of competition intervention on innovation, and that such a study would likely be hard to pursue.

The **Chair** then turned to Japan.

**Japan** pointed out that its first standard essential patent case was decided by a civil court, not by the JFTC. As a result of feedback that a competition intervention would have been justified in such a scenario, the JFTC conducted a market study that found that injunctions regarding standard essential patents could present significant risks for businesses and impact competition. As a result, the JFTC amended its Guidelines to reflect this and map out when the JFTC should intervene in such matters.

Following additional feedback, Japan conducted an international survey, and found that applying competition law in the IP context could, in some countries, lead to the imposition

of high sanctions that might detract from innovation. Such high sanctions could not, however, be imposed on infringers of competition law in Japan.

In Japan, a patent holder can easily achieve injunctions under IP law, affecting the negotiation of FRAND licences and competition in the market. In one case, at least, a leading a market player left the market following a threat of injunction by a standard essential patent holder despite the civil court finding against the patent holder. This case reflects how the local legal framework, the time and costs of resolving disputes in court, and industry structure can all have an effect on the competition impact of standard essential patent injunctions, which is something that should be taken into account in competition enforcement and reform efforts.

## 5. Refusal to License and Compulsory Licensing

The **Chair** then opened the last section of this roundtable, devoted to refusals to license outside the standard essential patent context.

In particular, the Chair turned to Italy, asking it to describe its refusal to supply cases. **Italy** explained that it has brought a limited number of cases on IP matters, and particularly concerning refusal to deal, but that these are niche areas. Such cases have been subject to careful case-by-case and effects' analysis, including as regards remedies to ensure that they fit the theory of harm.

Italy then described a specific case concerning copyright licensing where the Italian authority for the first time imposed as an interim remedy a FRAND licensing obligation. The affected company was an essential facility for operations in the downstream market, which it refused to supply. The competition authority sought to promote the parties' negotiation regarding the licensing, but given their failure and the existence of a clear benchmark for royalties, the competition authority imposed licensing conditions itself. The competition authority was, in this case, exceptionally in a better position than courts and could complement their action.

The **Chair** then turned to **Egypt**, who emphasised that it usually follows best practice and recognises the importance of following international benchmarks such as those set by the European jurisdictions. Egypt considers that a special responsibility is placed on dominant undertakings not to abuse their positions and undermine competition. Egypt further recognises the importance of balancing IP rights with the aims of competition law.

Egypt then described three recent cases pursued by its competition authority regarding anti-competitive licensing, all of which focus on sports – and, more specifically, on sports' broadcasting – and follow EU case law on the topic. These were the BeIn case, the CAF case and the FIFA case.

In these cases, the competition authority found that there were anticompetitive behaviours through either a vertical agreement between the entity holding the right and a distributor, and/or through the abuse of dominant position arising from ownership of IP rights. Following these cases, the competition authority intends to publish guidelines regarding different aspects of competition law, especially those relating to its interaction with IP law.

The **Chair** returned to the **EU** and asked it to comment on a recent case where the European Commission imposed a FRAND licensing remedy. This case concerned an investigation targeting the world's largest investment banks and a number of associations of which those banks were board members, namely Marquit and ISDA – two leading associations in the

setting of a number of price parameters for credit default swaps. The investigation ended up with the adoption of a set of commitments tabled by the two associations, including a new licence granted on FRAND terms. These commitments are valid for a period of 10 years, so they are still valid.

**Peru** then asked to intervene. They emphasised that they are not only a competition agency but, like Colombia's competition authority, also the IP registry office. This reflects the importance of patents for economic activity, which is also recognised by international treaties promoting IP rights and facilitating their registration. Nonetheless, there is an exception to IP protection within Peru's IP regime, which allows exceptionally for compulsory licensing when this is in the public interest. Peru concluded by noting that, to date, Peru has not had competition cases involving IP. On the other hand, they have had a case of abusive sham litigation concerning patent assertion.

**Norway** explained that it also allows for the possibility of compulsory licensing in the public interest within the IP licensing system. The power to grant such a compulsory license falls within the competence of the competition authority, but the last time it was invoked in 2009, regarding a vaccine, the competition authority refused the request.

## 6. Closing

The **Chair** then proceeded to conclude the session. The discussion revealed that competition authorities are quite cautious when intervening regarding IP rights, and that there is wide international convergence on a number of topics. The session also highlighted a number of areas where there are international divergences, such as the extent of but-for analysis, or the treatment of territorial restraints and refusals to license.

As regards conditional refusal to supply, there seemed to agreement that this is an area where there are legitimate antitrust concerns and where competition authorities might find it necessary to intervene.

Concerning, unilateral refusal to supply and standard essential patents, this seems to be a controversial topic in the US, but not for a number of countries that pursue competition enforcement against such actions, even if only within stringent conditions. Regarding standard essential patents, alignment was more pronounced than the Chair expected. An important question here is what is the nature of the competitive process being affected, which is a relevant consideration when deciding whether to intervene.