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**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE****Executive Summary of the Roundtable on the Licensing of IP rights and
Competition Law****Annex to the Summary Record of the 131th Meeting of the Competition Committee held
in 5-7 June 2019**

6 June 2019

This Executive Summary by the OECD Secretariat contains the key findings from the discussion held during the 131st Meeting of the Competition Committee on 6 June 2019.

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

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Executive Summary of the Roundtable on the Licensing of IP rights and Competition Law

By the Secretariat*

Considering the discussion at the roundtable held by the Competition Committee on 6 June 2019, the delegates' submissions, the panellists' presentations and the Secretariat's background paper, several points are noted:

1. While a number of jurisdictions exempt intellectual property rights from competition law, such exemptions do not seem to preclude enforcement against anticompetitive licensing practices.

A number of countries partially exempt IP rights from competition law. In most cases, those exemptions concern the exercise of the IP right, which is therefore exempt from competition scrutiny.

While a number of competition agencies have been working towards the elimination of such exemptions, it seems that those exemptions in practice do not impede competition enforcement against anticompetitive practices that go beyond the mere lawful exercise of intellectual property rights.

At the same time, delegates agreed that competition enforcement should only occur as regards IP rights if there are good reasons for intervention, and that account should be taken of the incentive system set in place by IP law to protect innovation and economic growth when intervening in this area.

2. Most IP licensing practices are pro-competitive, since they enhance the incentives to innovate *ex ante* and promote the diffusion of innovations and market competition *ex post*. However, a number of licensing arrangements can give rise to competition concerns, and should be subject to a case-by-case effects' analysis.

IP rights are an essential mechanism to promote innovation, economic growth and, by extension, consumer welfare. At the same time, IP rights seek to strike a balance between protecting the inventor or creator's rights and fostering innovation diffusion and follow-on or cumulative developments.

IP rights create temporary exclusive rights that protect investments in research and some creative activities. The main mechanism to diffuse IP-protected innovations and creations during this exclusivity period is licensing. The existence of technology markets in which IP owners can license their innovations efficiently and on attractive terms is likely to have a positive effect on their incentives to invest in innovation. As a result, licensing contracts are generally thought to be procompetitive, fostering both competition *ex post* and innovation *ex ante*.

Nonetheless, a number of licensing arrangements can give rise to competition concerns. In light of this, jurisdictions around the world recognise the potentially procompetitive effects

* This Executive Summary does not necessarily represent the consensus view of the Competition Committee. It does, however, encapsulate key points from the discussion at the session, the delegates' written submissions, the panellists' presentations and the Secretariat's issues paper.

of licensing, but also submit potentially anticompetitive licensing practices to effects-based analyses.

3. Competition enforcement regarding IP licensing practices follows a number of well-established principles around the world.

There are widespread areas of convergence regarding the treatment of IP licensing practices by competition law. For example, it is consensual that holding an IP right does not necessarily create market power. Licensing arrangements that achieve price collusion or output restraints are generally prohibited, while most other licensing are subject to an effects test, where pro- and anti-competitive effects are balanced.

Throughout the years, a number of practices that can have anticompetitive effects have been identified by competition regimes around the world. These practices will typically be subject to closer scrutiny by competition authorities, even if they still are subject to a case-by-case analysis. Examples of such licensing practices include specific forms of field-of-use restraints, grant backs, no-challenge clauses and the like.

Another potentially problematic conduct takes the form of conditional refusal to license, which in practice can amount to anticompetitive forms of tying, bundling, loyalty discounting or exclusive dealing. Like other non-collusive arrangements, such licensing practices will be subject to traditional antitrust effects analysis.

4. Some limited areas of international divergence remain as regards IP licensing. However, these differences do not seem to be very significant in practice.

An area where international practices differ is on how anticompetitive effect analyses are pursued. In particular, the counterfactual against which anticompetitive effects are assessed varies across jurisdictions. In a significant number of jurisdictions, the comparison is with a world where some form of licensing occurs, whereas in others the competition agencies explicitly look at what would have happened had the IP holder exercised its core right not to license in the first place. However, it is unclear whether such a difference leads to different outcomes in a substantial number of instances.

Another area of dispute concerns unilateral refusals to license. Some jurisdictions contain an essential facilities doctrine, which provides a basis to consider refusals to license as anticompetitive and for the award of compulsory licensing remedies. In other jurisdictions, the essential facilities doctrine is viewed sceptically and unconditional refusals to license are generally lawful. At the same time, this difference should not be overemphasised. The number of cases of refusals to license are limited, and the conditions for finding that a refusal to license is anticompetitive are rather stringent around the world, leading to only small differences in practice.

5. Some developments have raised concerns that a number of recent licensing practices may be prone to having anticompetitive effects.

Patent pools are traditionally distinguished between pools of complementary and substitute patents. Pools of complementary patents are pro-competitive because they allow for the licensing of complementary technologies, thereby lowering transaction costs and creating opportunities to bring innovative products to the market. Pools of substitute or competing patents, on the other, are widely viewed as anticompetitive. However, it is unclear how well this traditional distinction matches contemporary patent pools in high-tech markets, which typically contain a mix of patents which have not been subject to prior control on whether they are substitutes or complements. To address this, antitrust agencies have set very

detailed and valuable governance rules for patent pools, including for the selection of essential and non-essential intellectual property.

Another development that has raised new competition concerns is the increasing prevalence of patent thickets – i.e. overlapping sets of patent rights required by those seeking to commercialise new technologies. Patent thickets are common today in industries such as biotechnology, semiconductors, computing and telecommunications. The prevalence of patent thickets means that many products implement numerous patents. This means that a single product will potentially infringe dozens, even hundreds of patents. This happened in the past (e.g. sewing machines or airplanes), but the scope and importance of patent thickets has increased significantly in recent times. Furthermore, standards are nowadays commonly overlaid on top of many patent thickets, adding a layer of complexity to competition analysis.

These developments concerning patent tools and patent thickets underpin a lively debate on whether standard essential patents are likely to create market power. A standard essential patent may enjoy *ex post* monopoly power after a standard has been adopted, implemented and become successful. Given that a standard will typically contain many standard essential patents, this means that there may be many overlapping monopolies at play, creating concerns regarding the potential for royalty stacking and the incentives that a patent holder may have to manipulate the standard-making or licensing process to obtain unreasonably high royalties.

A number of jurisdictions 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. Other jurisdictions, however, emphasise that standard essential patents can be subject to a number of competition constraints such as patent complementarity and the standard setting organisations' rules, which means that it is inappropriate to presume that a standard essential patent confers monopoly power.

6. An area of particularly intense controversy concerns whether (threats of) patent injunctions as regards standard essential patents can amount to competition harms. Nonetheless, it is consensual that the interests of both patent holders and implementers should both be taken into account when determining whether to intervene in this area.

The most prominent theories of harm regarding standard essential patent concern the possibility of refusing to license an essential patent which the patent holder had committed to license on fair, reasonable and non-discriminatory (FRAND) terms. This has, in practice, typically taken the form of patent holders seeking to obtain injunctions forcing implementers to stop using standard essential patents until a licence has been negotiated.

Bringing injunction suits for the unlicensed use of a patent is a typical remedy under IP law, and usually poses no problems from a competition standpoint. In some jurisdictions, however, concerns have arisen regarding whether the use of such injunctions can be anticompetitive, particularly when it will endow standard essential patent holders with bargaining power that might incentivise them to hold up licensing its standard essential patent so as to extract unreasonably high royalties. This has led some competition agencies and courts to provide guidance on the circumstances in which bringing or threatening to bring such an injunction may be problematic. Other jurisdictions, however, have concluded that this is a purely contractual and IP law matter that will rarely, if ever, engage competition law.

On the other hand, if a standard essential patent holder is unable to obtain an injunction against an unlicensed implementer, then the only remedy typically available to it will be damages in the amount of royalties due. This can incentivise implementers to hold out on agreeing on licensing terms in order to lower the royalties they will have to pay, since the only consequence of this is to be forced to pay the royalties that would normally be due in any event.

It was agreed that, as a rule, IP law and clear FRAND rules enforceable under contract law are the best way to address matters related to the granting of injunctions regarding standard essential patents. Competition law should only apply exceptionally. When competition law does apply, it is important to balance the risk of competitive injury that can arise as a result of refusals to license on the part of standard essential patent holders against the legitimate interests of IP right holders.

Even where guidance is available regarding how to pursue this balancing exercise, a number of new questions keep arising. These questions include whether competition law requires standard essential patents to be licensed to all comers or whether licences can be restricted to a single point in the supply chain; or in what circumstances can FRAND licensing terms be different for different licensees without infringing competition law.

A particular concern as regards competition enforcement in this area is that competition intervention in FRAND disputes may require competition agencies to set prices and act as price regulators, when courts are better placed than competition authorities to establish royalty rates. In practice, however, competition authorities have explicitly abstained from setting royalties. Instead, competition agencies have intervened as regards conduct in the negotiation and litigation of FRAND terms, and sought to create avenues for the parties to come to agree on licensing terms without unduly harming consumer welfare.