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Scoping Note on Competition and Intellectual Property Rights as a long-term theme for 2019-2020

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Scoping Note by the Secretariat on Competition and Intellectual Property Rights

1. Introduction

1. At the December 2017 meeting of the Competition Committee (the 'Committee'), the Secretariat was asked to prepare a scoping note on a possible long-term project on "Competition and Intellectual Property Rights". This note will support the Committee's discussion in June 2018 on this strategic topic.

2. It is widely accepted that innovation and technological progress are the single most important determinant of economic growth in the industrialised world. Studies show that the social return on investment in R&D not only extends beyond but significantly exceeds private returns, which suggests that policies that promote innovation can pay large dividends for society.

3. Paramount among such policies is intellectual property (IP) law. IP rights create exclusive rights with a view to promote risk-taking and innovation. The patent system, in particular, is often conceived as: 'a limited monopoly that is granted in return for the disclosure of technical information'.[1] Patents are thought to create incentives for inventors to invest in research and to develop new products by granting them a temporary monopoly on the fruits of their investment, while simultaneously disclosing valuable information to the public that would otherwise have remained secret.

4. Another source of economic growth is open and competitive markets. While there is a growing literature on the relationship between innovation and competition policy, it is still unclear how competition affects innovation. It is generally accepted, however, that competition law should protect the innovation process by keeping the market open for potential innovators.

5. This scoping note is structured as follows: the next section lays out the main reasons why the Committee may want to pursue this project; a third section will identify a number of potential work topics for the Committee to select from; and the fourth and last section will delineate a work plan.

6. The OECD is currently pursuing a number of initiatives related to the digital economy, including a proposed cross-cutting project on how to seize the benefits of digitation.[2] We would expect at least some of the work undertaken by the Committee in the context of this project to intersect with work on innovation and digitalisation being pursued in other parts of the OECD, and to involve the OECD's Science, Technology and Innovation (STI) Directorate and/or the Committee on Consumer Policy. Thus, the Committee's outputs are likely to add to, or be included in the wider OECD work in this area, which would benefit from the Committee's contribution and leadership on the topic.

[1] Lionel Bently and Brad Sherman *Intellectual Property Law* (4th Ed.) (OUP, 2014), p. 375.

[2] See for example the OECD Going Digital project (http://www.oecd.org/going-digital/)

2. Motivation and Overview

7. The importance of IP rights for market competition has increased significantly in recent years. IP rights increasingly underpin the most dynamic economic sectors, digitalisation continues to extend its reach, and the importance of intangible assets in the overall economy has increased.

8. It is hardly controversial today that competition agencies can take enforcement actions that affect IP rights. The challenge for competition authorities, regardless of how far they venture into the IP sphere, is how to minimize the anticompetitive effects of IP rights while respecting their existence and the societal goals they are meant to promote.[3] As a result, competition regimes around the world contain exemptions or exceptions that accommodate IP rights by granting the normal use of these rights a form of partial immunity from competition law.

9. While this immunity is justified by the creation of incentives for innovation, it is circumscribed by an over-riding concern with preserving effective competition. As such, competition enforcement may interfere with the exercise of IP rights. Competition agencies may also, on occasion, get involved in IP processes and IP policy. If it is too easy to obtain IP rights, future innovation may be discouraged by the use of exclusive rights that prevent other innovations from reaching the market or by the prospect of disputes to determine the scope of such rights. In "easy patentability" environments, competition agencies and courts may try to rely on competition law to limit the negative effects of over-patenting. However, competition law is a relatively blunt instrument to that end, and competition enforcement that interferes with the substance of an IP right can limit the incentives to innovate in the first place. As such, the role of competition agencies in IP law and policy is one that requires delicate balancing.

10. To reduce uncertainty regarding the IP system and competition law enforcement, the circumstances under which agencies will act should be identified and publicised to the business community. Most of the leading competition jurisdictions, such as the European Union, Japan, and the United States have issued guidelines which serve that purpose with respect to licensing agreements.

11. Given this background, it is unsurprising that the OECD's Competition Committee has been working on IP related matters since its inception. Since the 1980s, the Committee held a number of roundtables on the relationship between competition policy and intellectual property rights.[4] More recently the Committee's work has focused on the relationship between IP rights and innovation,[5] and on standard setting.[6] A number of topics dealt by the

[3] Even completely legitimate uses of IP rights can restrict competition, at least in the short run – thus producing a trade-off between the benefits of increased competition and the gains from further innovation. Such a trade-off probably lies outside patent office mandates, and is inherently difficult for competition agencies to make.

[4] This includes roundtables on the topic in 1989 ('Competition Policy and Intellectual Property Rights'), 1997 ('Competition Policy and Intellectual Property Rights'), and 2004 ('Intellectual Property Rights').

[5] Most notably, the Competition Committee held two roundtables on Competition, Patents and Innovation – in October 2006 and in June 2009.

[6] Roundtables on the topic were held in 2010 and in 2014.

Committee in recent years also touch, indirectly, on the interaction between competition and IP law.[7]

12. Reflecting the importance of the interaction between competition and intellectual property law for economic growth, the OECD Competition Committee has two Recommendations regarding the interaction between competition and IP law (the ‘Recommendations’). The Recommendations concern: (i) restrictive business practices relating to the use of trademarks and trademark licences. This Recommendation was adopted in 1978;[8] (ii) patent and know-how licensing arrangements. This Recommendation adopted in 1989.[9] The topics covered by these Recommendations have not been the subject of work by the Council in recent years.

13. Since the time when these Recommendations were adopted, the treatment of IP rights and related business conduct by leading competition agencies has undergone far-reaching changes. Form-based approaches have been replaced by case-by-case analysis of the effects of IP-related practices; and important competition enforcement actions have been pursued across the world against a broad range of practices implicating intellectual property. Such practices include: 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 'hold-up' in the context of standard-setting processes; and unilateral abuses of market power derived (at least in part) from IP rights in high-technology industries.

14. At the same time, the interaction between competition and IP law has been growing in prominence as the economy digitalises and the importance of intangible assets in the overall economy increases. These developments have led the Competition Committee to ask the Secretariat to prepare the present scoping note.

3. Areas of Future Possible Work

15. Further work on competition and IP rights can be helpfully divided into three sub-streams: (i) general questions regarding the interaction of IP and competition regimes; (ii) IP rights and competition enforcement; (iii) IP, competition and globalisation. This distinction should not be viewed as analytically watertight, and individual topics may fall into more than one work stream: its purpose is mainly to facilitate the description of the various potential areas for work.

[7] The October 2011 and February 2012 hearings on the digital economy touched on matters at the intersection of IP and competition law, such as interoperability, standardisation and the patent system. As recently as December 2017, the roundtable on ‘Extraterritorial Reach of Competition Remedies’ revealed a number of difficulties in identifying effective remedies regarding cross-border licensing practices.

[8] Recommendation of the Council concerning Action against Restrictive Business Practices relating to the Use of Trademarks and Trademark Licences [C(78)40/FINAL].

[9] Recommendation of the Council concerning the Application of Competition Laws and Policy to Patent and Know-How Licensing Agreements [C(89)32/FINAL]. This Recommendation requires that, when reviewing patent and know-how licensing agreements from the perspective of competition law, account be taken of the Conclusions of the Report of the Committee on Competition Law and Policy on Competition Policy and Intellectual Property Rights [CLP(89)3 and Corrigendum 1]. This Report is no longer publically available in the OECD’s website.

3.1. General Questions Regarding the Interaction of IP and Competition Regimes

16. One area of work could be on **recent developments in IP systems and on their effect on innovation**. Over the past years there has been a debate brewing on the actual effect of intellectual property rights on innovation. Some experts have found that intellectual property rights regimes are conducive to innovation, and duly conclude that patent rights should be strengthened. Others contend that patents can sometimes impede innovation, instead of promoting it.

17. To a certain extent, this debate maps disagreements regarding the role of original and follow-on innovation in increasing welfare, and about the state of IP regimes. In the past, the Committee has invited IP experts and representatives of IP offices to discuss the functioning of the IP regime. The last time the Committee did so, in 2004, a number of concerns were identified, such as the creation of environments of excessive patentability, the extension of the scope of patent protection, and increased reliance on competition law to remedy the perceived failings of IP regimes. While it would be inappropriate to use competition law for the purpose of remedying the defects of IP regimes, it was thought important for competition authorities to try to improve IP agencies' awareness of competition issues and to assist them in taking the necessary steps to improve IP regimes.[10]

18. The beginning of this project may be a good time to revisit these topics and take stock of developments over the past few years.

19. A variation of this topic, better suited for the Global Forum, may look at the **competitive implications of differences in the effectiveness of IP regimes around the world**, where the importance of **Trademarks** for competition law, and the continuing relevance of the Committee Recommendation on the topic, could be assessed. The same session could also cover a related area of work concerning **competition advocacy and IP regimes**. Leading agencies have devoted significant resources to advocacy efforts aimed at ensuring the integrity of patent regimes and avoiding the issuance/recognition of ill-founded rights that potentially weaken competition or impede follow-on innovation without serving valid off-setting purposes. It might be useful for competition agencies to share experiences and insights on how to pursue such efforts.

20. A related area of work concerns the c**ompetitive implications of different IP rights** and how their impact may vary across economic sectors. The relevance of individual IP rights will usually require a case-by-case analysis, but it may be possible to identify patterns by looking at individual markets. For example, while patents predominate for a number of technologies, the situation is different for software. Given the immense value of controlling access to a platform, platform developers and entrepreneurs have sought to use intellectual property to protect APIs and other means through which to control and exclude competitors from their platforms and systems. However, there were significant doubts about the patentability of computer software and, as a result, copyright became the primary tool to protect software and control to platforms. Likewise, multiple cases in the past years have assessed the competitive effects of pooling of copyrights regarding artistic works. Yet, copyright is not covered by OECD instruments on competition law, nor is there work on the different competitive effects of applying certain IP rights to certain industries. At the same time, the OECD has a Recommendation on trademarks, even though this IP right does not seem to have had particular prominence in competition law and policy in the last decades.

[10] OECD (2004) Intellectual Property Rights DAF/COMP(2004)24.

21. The last topics in this stream are more directly concerned with competition enforcement. A first topic looks at the relationship between **IP rights and market power**. For a long time, there was confusion between: (i) the legal monopoly granted by IP rights, and (ii) forms of economic monopoly and market power that are relevant to competition law. This view has been firmly replaced by an understanding that the legal monopoly conferred by IP rights does not equate with economic market power. A topic which may be of interest, and particularly suitable for the Global Forum, is how the existence of IP rights is relevant for market power assessments, and whether there are specific considerations or techniques that should be taken into account when looking at IP-affected markets.

22. Another relevant topic is the role of **innovation in merger control**, a matter that competition agencies have had to grapple with increasingly in recent years and which has attracted a significant amount of attention. This June, the Committee may address the topic in the context of the session of ‘Non-Price Effects of Mergers’. However, if the topic is not exhausted during this session, this could be an area for further work in the future.

3.2. Intellectual Property Rights and Competition Law Enforcement

23. Since the mid-1990s, attention and enforcement activity regarding IP rights have shifted from licensing arrangements to a range of other specific behaviours deemed to entail significant risks of anti-competitive consequences. As such, an obvious area for work concerns **the relationship between IP rights and competition law enforcement**. This topic could be discussed in a single session. However, and given the proliferation of competition interventions involving IP rights recent years, the work and subsequent discussions are likely to be more fruitful if sessions are devoted to particular types of infringements.

24. First, there are a number of anticompetitive practices that relate to the **abuse and manipulation of regulatory processes**. Such abuses reflect business practices that use regulatory procedures set up to promote valid societal goals to illegitimately foreclose competition. In December 2018, the Committee will discuss excessive pricing in pharmaceuticals. While these cases do not directly relate to IP rights, they concern attempts to use of regulatory systems that have been set up to address, among other things, the possibility of market power arising from patent protection. But there are many other conducts that abuse IP regimes more directly. One obvious example of this type of practice is the **provision of fraudulent and misleading information** to patent offices. Such practices can be coupled with other conduct that seeks to protect entrenched market positions, such as **pay-for-delay** settlements regarding generics, whereby sellers of branded pharmaceuticals use the regulatory and judicial process to pay potential entrants not to enter the market with cheaper generic products. A last potential topic is **patent trolls**, and particular the possibility of vexatious litigation and the impact of patent assertion entities on competition and innovation.

25. Work can also be pursued regarding the **pro- and anti-competitive effects of technological cooperation**. There are a number of technological cooperation mechanisms involving IP rights, such as patent pools or thickets, cross-licensing arrangements and standard-setting organisations. Patent thickets or pools are common today in industries such as semiconductors, computing and telecommunications, although they are by no means limited to those sectors. They allow firms that require access to overlapping sets of IP rights in order to commercialize new technology to obtain licenses from multiple patentees or to cross-license IP rights between themselves. Such mechanisms can be an efficient response to the

need to obtain a plurality of IP rights, but may also be anticompetitive – particularly for pools that may lead to the creation of market power.

26. Patent thickets or pools frequently provide the basis for industry standards. Standard setting organizations provide a forum for the development of new standards through the sharing of information on pertinent inventions as they are developed. The role of such organisations is particularly important in industries where the need for standardization is recurring – for example, because there are many players and technology evolves rapidly, or because standards that allow products to interoperate allow for technological development that otherwise would not take place. However, the inclusion of IP rights into standards also creates conditions for patent holders to exclude technology implementers from the market through injunctions. This has led standard setting organisations to adopt IP policies that require the licensing of standard essential patents (SEP) on fair, reasonable and non-discriminatory (FRAND) terms.

27. Standards, SEPs and FRAND have been reviewed by the Committee in the past, more recently in 2014. Nonetheless, enforcement has continued since then, and there have been developments in how agencies seek to ensure that SEPs and FRAND do not lead to anticompetitive outcomes. Furthermore, the debate on the relative importance of hold up and hold out in determining the outcome of competition intervention has blossomed in recent years, together with disputes on the respective roles of contract, IP and competition law in this field. As such, the Committee may decide to revisit the topic in the context of a wider discussion on pro- and anti-competitive effects of technological cooperation.

28. While the OECD has a Recommendation on patent and know-how licensing, this Recommendation has nothing to say on FRAND licensing – which reflects how long it has been since the Recommendation was adopted, and since licensing has been a topic of discussion. Licensing, and particularly compulsory licensing as a remedy to competition law infringements, has become an important topic in discussions about how to regulate ICT and other industries that are the building blocks of the new, information-based economy. These industries often require common access to unique facilities, and are prone to the possibility of 'tipping' or 'locking into' inefficient standards. The risk of undue exercise of market power through anti-competitive licensing and other practices may be particularly high in these industries. The analysis of these topics could be coupled with an **analysis of practical and theoretical developments on licensing**, with a view to **review and potentially update the Recommendation of the Council concerning the Application of Competition Laws and Policy to Patent and Know-How Licensing Agreements** [C(89)32/FINAL].

3.3. IP, Competition Law and Globalisation

29. The scope of IP rights is, like competition enforcement actions, circumscribed to the jurisdiction granting it. Nonetheless, the markets for which IP rights are important are often regional, and even global. This is apparent in how many technological standards and patent pools are subject to a single standard licence agreement applicable across the world, and in how royalty regimes often provide access to all patents in the pool on a worldwide basis. This represents a very convenient and efficient access arrangement for companies.[11] It poses problems for competition enforcement, however, since it may require the adoption of

[11] Companies tend to engage in cost-effective patenting strategies, whereby the amount they are willing to invest in patent protection within each country is dependent upon the significance of the corresponding market.

remedies which need to be enforced outside the jurisdiction. Furthermore, remedies which may be pro-competitive from a national perspective may nonetheless disrupt business practices which are globally pro-competitive.

30. As such, a third theme that could be the subject of work by the Committee concerns **the international dimension of competition and IP law**. While this stream would touch on a number of work possibilities described above, it also gives rise to self-standing work topics. One such topic which may be of interest concerns the design of competition remedies for international licensing practices, and whether (national) competition law should be adapted when addressing practices that involve the global (or even merely regional) aggregation and licensing of IP rights. Another area of discussion may be to investigate international cooperation and coordination mechanisms in IP and competition law. This would build on work already pursued in the context of last December's session on the extraterritorial reach of competition remedies. It would focus specifically on the challenges of licensing remedies in a context of regional or global IP licensing arrangements, and on the potential need to develop international cooperation mechanisms to resolve potential conflicts.

4. Working Methods

31. The interaction between competition law and IP is one that competition agencies, courts and governments are likely to face increasingly over the next few years. This project will shed light on the challenges that this brings, and may lead to the identification of solutions.

32. Further, if approved, the project's impact will be felt well beyond the realm of competition enforcement, and feed into wider work – including at the OECD – on the digitisation of the economy. The Secretariat is already working across departments as the OECD devotes increasing attention to issues related to the digital economy and intellectual protection. Competition agencies are also likely to have to liaise with other stakeholders within their jurisdictions on related matters. The fruits of this project could thus be extremely valuable not only for the development of competition policy and enforcement, but for the role that competition agencies will be able to play in bringing about wider regulatory developments in their countries.

33. Work on these topics could take different forms:

- Some analytical topics could form the basis of roundtable/hearing events throughout 2019 and 2020. This would ideally be the case for work on Recent Developments in IP Systems and their Effect on Innovation; the Competitive Impact of Different IP Rights across Economic Sectors**;** Innovation and Merger Control; Competition Enforcement and the Abuse of IP Rules; Technological Cooperation and Competition Law in a Globalised Economy; Competition Remedies and IP Rights; and Licensing.
- Some topics could also be discussed in the Global Forum, as they might be highly relevant to developing countries which are more prone to take part in this forum. This approach may be particularly well suited to discussions about the relationship between IP and Market Power, or about the Competition Implications of Differences in the Effectiveness of IP Regimes.
- On topics that may require greater participation and in-depth work from delegates and other stakeholders, a mechanism where delegates can volunteer and work by conference calls, supported by the Secretariat, may be adopted. Some topics may be discussed remotely –via web seminars or teleconferences–, particularly as regards issues on which

there is still no consensus, when competition agencies are facing common challenges or more broadly when countries wish to share experiences. The organisation of workshops where competition agencies could discuss cutting-edge topics and developments with academics and the private sector should also be considered.

This approach would seem particularly well suited for areas where countries may want to share experiences – such as on how to engage in Competition Advocacy in IP Regimes, how to design remedies when IP rights need to be taken into account, or on the Practical Implications of the Effectiveness of the IP Regime for Competition Enforcement.

Furthermore, this type of work could be coupled with questionnaires and Secretariat synthesis reports whenever country experiences are likely to prove relevant to the identification of best practices. These informal work mechanisms may lead to Secretariat synthesis reports and to the identification of future roundtable/hearing topics, and could be used throughout the duration of the project – and potentially even after the project is officially concluded, if there is interest in doing so.

- One of the goals of this project is to provide a framework to review, and potentially revise existing OECD Recommendations on IP law. It is also possible that the Committee may conclude that new Recommendations may be desirable. In such an instance, work will probably need to be done with a drafting group, consulting the wider group of delegates by email and reporting progress back to the Committee.

34. In the Table below, a number of topics proposed in this scoping note have been assigned suggested meeting formats and dates. Some of the topics have been aggregated, reflecting the limited duration of the project.

Table 1. Work Plan

Topic	Format	Date
Recent Developments in IP Systems and their Effect on Innovation / Competition Implications of Differences in the Effectiveness of IP Regimes	Hearing	December 2018
Competitive Impact of Different IP rights across Economic Sectors	Roundtable	June 2019
Innovation, Market Power and Merger Control	Roundtable	June 2019
Competition Advocacy and Intellectual Property	Workshops / Tele-seminars	January to December 2019
Competition Enforcement and the Abuse of IP Rules and Related Regulatory Schemes	Roundtable	June 2019
Technological Cooperation and Competition Law in a Globalised Economy	Hearing / Roundtable	December 2019
Competition Remedies and IP Rights	Roundtable	June 2020
Licensing	Roundtable	December 2020