

**Meeting of the Council at Ministerial Level, 7-8 June 2023****DRAFT RECOMMENDATION OF THE COUNCIL ON INTELLECTUAL  
PROPERTY RIGHTS AND COMPETITION****JT03519964**

**THE COUNCIL,**

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

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

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

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

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

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

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

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

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

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

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

- “IP right” refers to an exclusive right, granted by a jurisdiction and often limited in duration, which allows the holder to exclude (or limit) others from certain actions, such as using or exploiting the subject matter of its right. IP rights vary by jurisdiction but may include, *inter alia*, copyright and related rights, geographical indications including appellations of origin, industrial design rights, layout designs (topographies) of integrated circuits, patents and utility models, plant breeder’s rights, and trademarks. It may also refer to other forms of intellectual property such as trade secrets.
- “IP-related business practice” refers to business conduct involving an IP right, including but not limited to the acquisition, exercise, and licensing of IP rights.

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

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

2. Apply the same competition principles across different IP rights, while accounting for relevant differences between types of IP rights.
3. Apply a case-by-case approach and an actual or likely effects-based analysis (except for restrictions analysed under per se or by object rules) when reviewing the specific market circumstances in which IP-related business practices occur.
4. Take the existence of IP rights into account when defining relevant markets without automatically equating the scope of the IP right with the scope of the relevant market.
5. Treat the existence of the IP right as one of the relevant factors for assessing market power, without presuming that it inherently confers market power on the right holder.
6. Apply, when relevant, exceptions from national competition law for IP rights narrowly, having regard to the importance of preserving effective competition.

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

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

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

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

1. Tailor remedies to the facts of the particular case at issue.
2. Address the competitive harm completely by stopping anticompetitive conduct and enjoining and deterring future violations, with the goal of restoring competitive market conditions; and permit reasonable compensation to the right holder for any licensing requirements imposed by a remedy when consistent with this goal and with procompetitive aims.
3. Seek remedies needed to effectively redress harm or threatened harm in the Adherent's jurisdiction, and where such a remedy has an extraterritorial effect, take into account whether the remedy would affect the significant interests of any other jurisdiction.

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

1. Establish procedures to allow effective policy co-operation between their competition

authorities and their IP bodies, as well as with other relevant regulatory agencies.

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

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

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

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

- a) Serve as a forum to exchange information and experiences with respect to the implementation of this Recommendation, in particular to promote best practices for competition enforcement in IP- related cases, and support technical assistance and capacity building programmes including in close coordination with relevant international organisations;
- b) Develop a toolkit to support Adherents' implementation of this Recommendation; and
- c) Report to Council on the implementation, dissemination and continued relevance of this Recommendation no later than five years following its adoption and at least every ten years thereafter.