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

**ANNEX TO THE SUMMARY RECORD OF THE 121st MEETING OF THE COMPETITION  
COMMITTEE HELD ON 18-19 JUNE 2014**

**-- Executive Summary of the Discussion on Intellectual Property and Standard Settings --**

*This Executive Summary by the OECD Secretariat contains the key findings from the discussion held during Item VII of the 122nd meeting of the Competition Committee on 17-18 December 2015.*

*More documents related to this discussion can be found at  
[www.oecd.org/daf/competition/competition-intellectual-property-standard-setting.htm](http://www.oecd.org/daf/competition/competition-intellectual-property-standard-setting.htm)*

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## EXECUTIVE SUMMARY

*By the Secretariat\**

Considering the discussion at the hearing, the background paper and the delegates' and experts' written submissions, several key points emerge:

- (1) ***The existence of standards has encouraged ICT innovation and fast and continuing penetration of ICT devices delivering important benefits to business, government and consumers. However, many important ICT standards rely on technologies covered by patents. This may raise potential for harm to competition stemming from patent holdup or royalty stacking. Standard Setting Organisations (SSOs) aim to mitigate these risks in their intellectual property rights (IPR) policies.***

In principle, a mobile phone of any make can connect to any other mobile phone in the world. Similarly, personal computers and smart phones of different makes can connect to the internet and download and upload text, pictures, graphics, video and music almost irrespective of their service provider, the geographical location of the device, and the source/destination of the material. This interoperability feature of ICT devices is of great value to business, government and consumers, and exists because manufacturers produce standards-compliant products.

ICT standards are often created in SSOs on the basis of technical discussions between interested members who seek to incorporate the best technologies available into the standard. While there may be competing technologies available at the time the standard is being developed (i.e. *ex ante*), once the standard is set certain technologies are chosen over others and standard-specific investments are made. As a result, holders of standard essential patents (SEPs) may acquire additional market power after the standard is set because it is costly/impossible for implementers to switch to alternatives (i.e. manufacturers are "locked-in"). SEP holders can potentially delay licensing, demand unreasonable or discriminatory royalties, or seek -- or threaten to seek -- patent infringement injunctions, resulting in "holdup". In addition, implementers may need to license a number of SEPs (and non-SEPs) from several independent fee-charging patent-holders, possibly resulting in "royalty stacking". Holdup delays the implementation of new technologies, imposing social costs. Royalty stacking can raise costs above the appropriate value in use of the combined patents. Both circumstances may be detrimental to competition and consumer welfare, and contrary to the goal of standards.

As a result, SSOs often adopt IPR policies that require members to 1) disclose the existence of patents that may be essential to the standard being discussed during the standard setting process; and, 2) commit to licensing those patents on "royalty-free" or "fair, reasonable and non-

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\* 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 roundtable, the delegates' written submissions, and the Secretariat's background paper.

discriminatory” (FRAND<sup>1</sup>) terms in the event they are incorporated into the standard. In principle, the disclosure requirement guards against the risk of “patent ambush” (see OECD (2010)), and allows the SSO to be aware of the patents that the standard may read on so that they can consider potential alternative technologies, if necessary. The licensing commitment encourages widespread access to the standard, while at the same time encouraging patent holder participants to include the best technology in a standard by allowing for appropriate compensation. Of course, there may also be other market-based constraints on SEP holders, including: the cost of patent enforcement; the availability of substitutes for the patent/standard in question; potential losses in the SEP holders’ downstream or complementary product sales; the need of the SEP holder to obtain cross-licences, etc. Therefore, a case-by-case analysis is typically necessary to determine whether an SEP holder has the ability and incentive to exercise market power.

- (2) ***In practice, commercial disputes can arise between SEP holders and standard implementers regarding the definition of FRAND terms. While there is currently no generally accepted methodology for determining FRAND royalties, certain principles and techniques have emerged.***

FRAND terms are not precisely defined in the IPR policies of most SSOs. This allows for some flexibility in commercial negotiations between licensors and licensees, but this flexibility can also give rise to disputes. To date, competition authorities in OECD member countries have largely refrained from directly applying competition law enforcement tools to commercial disputes over FRAND royalties, deferring such matters to competent courts for adjudication. However, some authorities have engaged in advocacy by offering guidance on how FRAND can be interpreted in light of competition principles, or by offering their views to courts in specific cases where FRAND royalties are at issue.

There is currently no universal methodology for determining FRAND royalties. Recent US Court of Appeals and district court decisions have analysed reasonableness by simulating what would have been the outcome of a hypothetical *ex ante* negotiation between the SEP holder and licensee, in an effort to determine the value of the SEP relative to alternatives that could have been written into the standard. This exercise attempts to isolate the technological value of the patent from its holdup value.

In some cases it may be possible to determine FRAND royalties by making use of comparables such as the royalties charged by the SEP holder in an *ex ante* environment; comparable royalty rates from patent pools; rates charged for other comparable IPRs within the same standard, or for the same IPR in other comparable standards. Depending on the circumstances, some of these comparators will be more appropriate than others, and some may not be available at all. Independent experts may also be relied on to assess the technological centrality and essentiality of the relevant SEPs to the standard at issue. In all cases, the valuation of SEPs, and the determination of FRAND royalties will be a highly fact intensive exercise.

Various SSOs are considering the ways in which the FRAND commitment can be clarified to help address the ambiguities above.

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<sup>1</sup> Alternatively, RAND terms. The remainder of the text refers to FRAND terms.

- (3) ***Patent infringement injunctions are among the remedies that are available to non-SEP patent holders in order to enforce their IP rights. However, the availability of injunctions on FRAND-encumbered SEPs may significantly affect licensing negotiations with implementers, leading to holdup. Courts have already dealt with these questions in many jurisdictions. Competition authorities have intervened in a few cases.***

Disputes and applications for injunctions, over non-SEP patents, are not rare. Courts routinely grant injunctions on non-SEP patents, i.e. they order implementers to cease infringing these patents. However, injunctions are assessed differently for FRAND-encumbered SEPs. Holders of SEP patents who have committed to licensing on FRAND terms are in a different position: an implementer of the standard in question has no choice but to use the SEP technology.

The issue of when, if ever, injunctions should be available in respect of FRAND-encumbered SEPs figured in several of the written contributions and was discussed during the meeting. There are different views regarding FRAND-related injunctions but, overall, there is a growing reluctance by courts to grant them, and growing opposition by competition authorities. It is argued that, by agreeing to FRAND licensing terms, SEP holders commit to negotiating over royalty rates and, implicitly, to allowing implementers to use the SEPs.

The delegates expressed concern that injunctions on SEPs are potentially anticompetitive and should be granted by courts only in very specific cases. Competition authorities have so far brought few cases against patent holders that have applied for injunctions on FRAND-encumbered patents. In their decisions, they have provided some indications on the circumstances where an injunction may be an appropriate remedy. These include factors such as whether implementers are unwilling to engage in negotiations on FRAND rates, whether they are unwilling to pay royalties that have been determined to be FRAND and whether they refuse to be bound by the decision of a neutral party.

The precise act that is considered abusive, whether it is the mere seeking or the enforcement of an injunction, is unclear. It could be argued that it is the enforcement that results in hold-up, rather than a simple application for an injunction. Equally, there is no agreement on the nature of competition law violation that would result from injunctions. Possible theories include an abuse of dominance, refusal to license, and unfair method of competition.

- (4) ***Co-operation between SSOs, patent offices and competition authorities can be useful. SSOs can play a very important role in this debate and there is support for further work within SSOs to continue efforts to clarify their IPR policies on FRAND.***

Co-operation between patent offices and SSOs can help the latter during a standard-setting programme. Patent officers have, and can facilitate, access to patent databases, as well as being better placed to assessing prior art, and to some extent the essentiality of proposed SEPs. An EPO officer felt that it could also offer coherent advice to the competition authorities on the dynamic efficiency aspects when regulations involving patents are being drafted.

If invited to do so by SSOs, competition authorities can provide input and guidance on intellectual property rights policies that may reduce the likelihood of anticompetitive outcomes from the standard-setting process.

Periodic efforts by SSOs to review and revise their IPR policies can address strategic behaviour by patent holders that might be viewed as inconsistent with or detrimental to the goals of the standard-setting process.