



Recommendation of the Council
concerning the Application of
Competition Laws and Policy to
Patent and Know-How Licensing
Agreements

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Please cite this document as:

OECD, *Recommendation of the Council concerning the Application of Competition Laws and Policy to Patent and Know-How Licensing Agreements*, OECD/LEGAL/0248

Series: OECD Legal Instruments

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Background Information

The Recommendation concerning the Application of Competition Laws and Policy to Patent and Know-How Licensing Agreements was adopted by the OECD Council on 31 March 1989 on the proposal of the Committee on Competition Law and Policy (now called Competition Committee). This Recommendation replaced the 1974 Recommendation Concerning Action Against Restrictive Business Practices relating to the Use of Patents and Licenses. The Recommendation calls for Adherents to take into account the Report of the Committee on Competition Law and Policy on Competition Policy and Intellectual Property Rights [CLP(89)3 and Corrigendum 1] when reviewing patent and know-how licensing agreements from the perspective of competition law and policy. This Report presents a comprehensive analysis of the various competitive effects of restrictions in licensing agreements and suggests how such agreements should be handled by competition authorities. It describes the relevant competition laws and policies of OECD Member countries and provides a critical analysis of relevant case law and administrative decisions. Included in the Report is a summary of recent (1988 and 1989) regulations and enforcement guidelines published by the Japanese Fair Trade Commission, the United States Department of Justice and the Commission of the European Communities. The Recommendation was abrogated on 8 June 2023.

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 Patents and Licenses [C(73)238(Final)];

HAVING REGARD to the Report by the Committee on Competition Law and Policy on Competition Policy and Intellectual Property Rights [CLP(89)3 and Corrigendum 1];

RECOGNISING the incentives for innovative activity created by patent rights;

RECOGNISING that the licensing of patents and know-how both disseminates new technology and provides returns to innovators;

RECOGNISING that the creation of property rights in innovation does not in itself, conflict with competition laws or policy;

CONSIDERING, however, that the licensing of intellectual property rights, like other agreements between enterprises, contains a risk of anti-competitive effects;

CONSIDERING that the risk of anti-competitive effects in patent and know-how licensing agreements depends upon the relationship between the parties, i.e. whether they are actual or potential competitors, the structure of the relevant markets and the terms of the particular agreement;

CONSIDERING that the risk of anti-competitive effects cannot, apart from purely cartelizing agreements, be assessed except on a case-by-case basis;

CONSIDERING that the Conclusions of the Committee on Competition Law and Policy contained in its above mentioned Report present a useful structure for the analysis of patent and know-how licensing agreements;

I. RECOMMENDS therefore to the Governments of Member countries that insofar as their laws permit, the analysis contained in 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] be taken into account when reviewing patent and know-how licensing agreements from the perspective of competition law and policy.

II. DECIDES that this Recommendation will cancel and replace the Council Recommendation of 22 January 1974 concerning Action Against Restrictive Business Practices Relating to the Use of Patents and Licences [C(73)238(Final)].

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