



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

**OECD Legal
Instruments**

This document is published under the responsibility of the Secretary-General of the OECD. It reproduces an OECD Legal Instrument and may contain additional material. The opinions expressed and arguments employed in the additional material do not necessarily reflect the official views of OECD Member countries.

This document, as well as any data and any map included herein, are without prejudice to the status of or sovereignty over any territory, to the delimitation of international frontiers and boundaries and to the name of any territory, city or area.

For access to the official and up-to-date texts of OECD Legal Instruments, as well as other related information, please consult the Compendium of OECD Legal Instruments at <http://legalinstruments.oecd.org>.

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

© OECD 2018

This document is provided free of charge. It may be reproduced and distributed free of charge without requiring any further permissions, as long as it is not altered in any way. It may not be sold.

This document is available in the two OECD official languages (English and French). It may be translated into other languages, as long as the translation is labelled "unofficial translation" and includes the following disclaimer: *"This translation has been prepared by [NAME OF TRANSLATION AUTHOR] for informational purpose only and its accuracy cannot be guaranteed by the OECD. The only official versions are the English and French texts available on the OECD website <http://legalinstruments.oecd.org>"*

Date(s)

Adopted on 31/03/1989

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 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)].

Adherents*

OECD Members

Australia
Austria
Belgium
Canada
Chile
Czech Republic
Denmark
Estonia
Finland
France
Germany
Greece
Hungary
Iceland
Ireland
Israel
Italy
Japan
Korea
Latvia
Luxembourg
Mexico
Netherlands
New Zealand
Norway
Poland
Portugal
Slovak Republic
Slovenia
Spain
Sweden
Switzerland
Turkey
United Kingdom
United States

Non-Members

* Additional information and statements are available in the Compendium of OECD Legal Instruments:
<http://legalinstruments.oecd.org>

About the OECD

The OECD is a unique forum where governments work together to address the economic, social and environmental challenges of globalisation. The OECD is also at the forefront of efforts to understand and to help governments respond to new developments and concerns, such as corporate governance, the information economy and the challenges of an ageing population. The Organisation provides a setting where governments can compare policy experiences, seek answers to common problems, identify good practice and work to co-ordinate domestic and international policies.

The OECD Member countries are: Australia, Austria, Belgium, Canada, Chile, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Israel, Italy, Japan, Korea, Latvia, Luxembourg, Mexico, the Netherlands, New Zealand, Norway, Poland, Portugal, the Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Turkey, the United Kingdom and the United States. The European Union takes part in the work of the OECD.

OECD Legal Instruments

Since the creation of the OECD in 1961, around 450 substantive legal instruments have been developed within its framework. These include OECD Acts (i.e. the Decisions and Recommendations adopted by the OECD Council in accordance with the OECD Convention) and other legal instruments developed within the OECD framework (e.g. Declarations, international agreements).

All substantive OECD legal instruments, whether in force or abrogated, are listed in the online Compendium of OECD Legal Instruments. They are presented in five categories:

- **Decisions:** OECD legal instruments which are legally binding on all Members except those which abstain at the time of adoption. While they are not international treaties, they entail the same kind of legal obligations. Adherents are obliged to implement Decisions and must take the measures necessary for such implementation.
- **Recommendations:** OECD legal instruments which are not legally binding but practice accords them great moral force as representing the political will of Adherents. There is an expectation that Adherents will do their utmost to fully implement a Recommendation. Thus, Members which do not intend to do so usually abstain when a Recommendation is adopted, although this is not required in legal terms.
- **Declarations:** OECD legal instruments which are prepared within the Organisation, generally within a subsidiary body. They usually set general principles or long-term goals, have a solemn character and are usually adopted at Ministerial meetings of the Council or of committees of the Organisation.
- **International Agreements:** OECD legal instruments negotiated and concluded within the framework of the Organisation. They are legally binding on the Parties.
- **Arrangement, Understanding and Others:** several ad hoc substantive legal instruments have been developed within the OECD framework over time, such as the Arrangement on Officially Supported Export Credits, the International Understanding on Maritime Transport Principles and the Development Assistance Committee (DAC) Recommendations.