



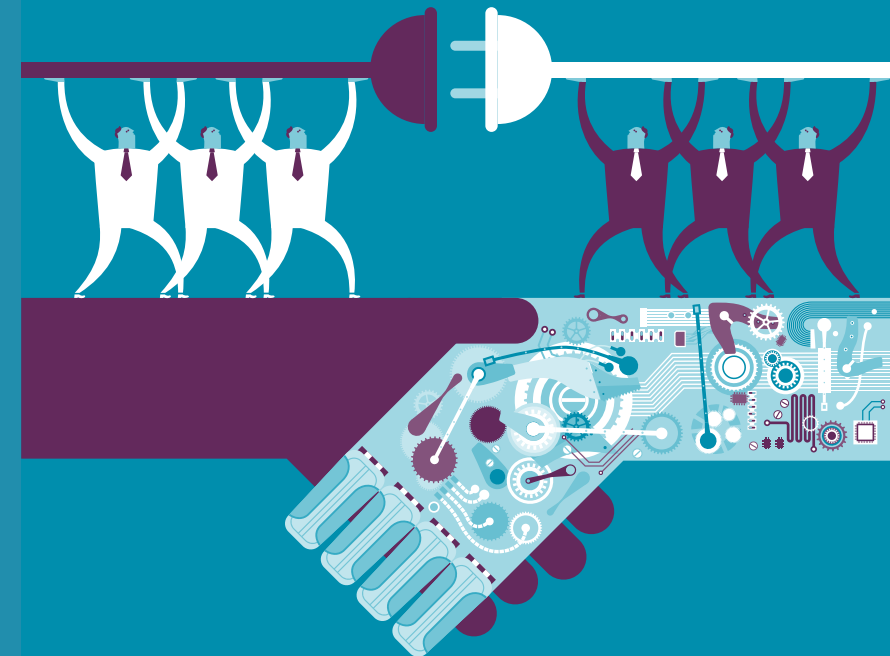
Rigorous empirical
research on
intellectual property

EC new framework for Standard-Essential Patents

Host: Axel Ferrazzini, Managing Director, 4iP Council

Presenters:

- Dr Bowman Heiden
- Dr Justus Baron



Housekeeping: EC new framework for Standard-Essential

12th October 2021

- ✓ The webinar will start in a few minutes
- ✓ Today's webinar is being recorded. We will be able to share links of the recording and the slides with you within 24 hours
- ✓ Please look at the Q&A box on your screen. If you think of a question for the speakers at any point, just type it in there and we will hold it for the discussion portion at the end of presentation

While waiting you may read the research paper summary:



What do we do?



Non-Profit Activities



High Quality Academic Research



Education



Promotion Innovative SMEs



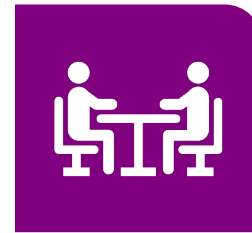
Free materials on...



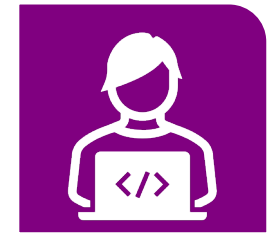
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case law



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Which types of intellectual property do you need?

Filter table columns

?	PATENTS	COPYRIGHTS	DESIGNS	TRADE MARKS	TRADE SECRETS
What do they protect?	An invention: a new and creative way of doing something or solving a technical problem. See also Patents Inventions	A work: an original intellectual creation. See also Copyright Creative works	A new and original visual appearance of a product. See also Designs Industrial designs	Distinctive words or symbols. See also Trade marks Brands	Confidential information. See also Trade secrets Know-how
Examples of what is protected	Inventive products and processes in all areas of business. For examples of successful inventions by SMEs see also Patents	Audio-visual works, pictures, graphics, architecture, databases, software, designs, literature, music, games, films, books and video, dramatic works. See also Copyright	Packaging, containers, furnishings, graphics, symbols, computer icons, logos, graphical user interfaces, signs and maps. See also Designs	Words, marks, signs, symbols. See also Trade marks	Confidential information. See also Trade secrets
How are my rights protected?	Through contractual means, using or setting of the patent invention. See also Patents	Protects the work being created automatically upon its creation. Protects the integrity and attribution of the work. Related rights: Public performance and display of the work. See also Copyright	Protects the original use of an industrial or similar visual appearance for the same kind of products and/or services. See also Designs	Through contractual means, using or setting of the trade mark. See also Trade marks	Through contractual means, using or setting of the trade secret. See also Trade secrets
How long is my innovation protected?	Up to 20 years. See also Patents	(Lifetime of the author + 70 years after death) (depending on the country). See also Copyright	Up to 25 years for registered designs. See also Designs	As long as it is highly distinctive and original. See also Trade marks	As long as it is confidential. See also Trade secrets
Do I have to register it?	Yes, filing an application to a patent office is required. Have on patent applications in: UK EU USA Japan China India Australia	No, copyright protection arises automatically with its creation. See also Copyright	No, but it is highly advisable to register designs. Registered designs are protected only if they are not already known and they have a shorter term of protection (up to 15 years versus up to 25). See also Designs	Yes, filing an application to a trademark office is required. Have on trademark applications in: UK EU USA Japan China India Australia	No, but it is highly advisable to register trade secrets. See also Trade secrets



2 - NEGOTIATING

3 - FUNDING

4 - STRATEGIC VALUE

Explore how patents add value with our [Interactive guide](#).

3 - COLLABORATION

4 - FUNDING

Explore the benefits of copyright with our [Interactive guide](#).

4 REASONS 4 TRADEMARKS

- 1 - DIFFERENTIATION
- 2 - PROTECTION
- 3 - REPUTATION
- 4 - REVENUE

Explore the benefits of trademarks with our [Interactive guide](#).

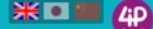
4 REASONS 4 DESIGN RIGHTS

- 1 - EXCLUSIVITY
- 2 - COMMERCIALISATION
- 3 - REPUTATION
- 4 - VALUE

Explore the benefits of design rights with our [Interactive guide](#).

Case Law post CJEU ruling *Huawei v ZTE*

[Back to main 4IP Council site](#)



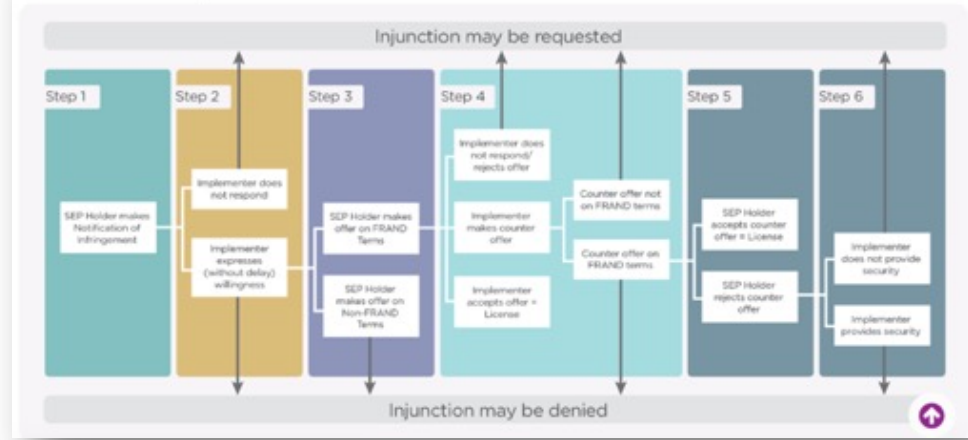
National Courts Guidance

Negotiating Licenses for Essential Patents in Europe

Increased clarity provided on the principles established by the Court of Justice of the European Union in *Huawei v ZTE*.

The Court of Justice of the European Union clarified, in *Huawei v ZTE* (Case No. C-170/13), European law relating to the availability of injunctive relief for infringements of FRAND-based standard essential patents. In doing so, the Court provided a legal framework focused on the good faith conduct to be expected of both parties. Since

Huawei v ZTE process



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EC new framework for Standard-Essential Patents



Dr Bowman Heiden

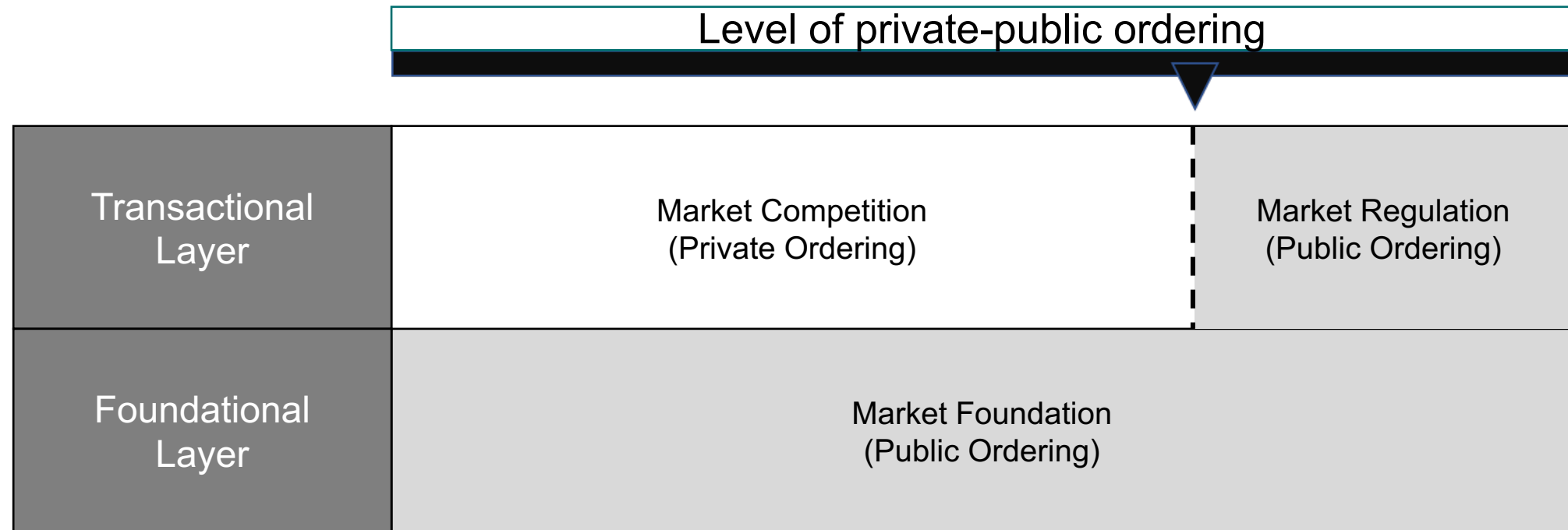
Co-Director of the Center for Intellectual Property (CIP), which is a joint centre for knowledge-based business development between University of Gothenburg, Chalmers University of Technology, and the Norwegian University for Science and Technology.



Dr Justus Baron

Senior Research Associate at the Center on Law, Business, and Economics at Northwestern University's Pritzker School of Law. His area of expertise is the empirical economic analysis of technological innovation and markets for technologies, with a particular focus on technology standards and Standard-Essential Patents.

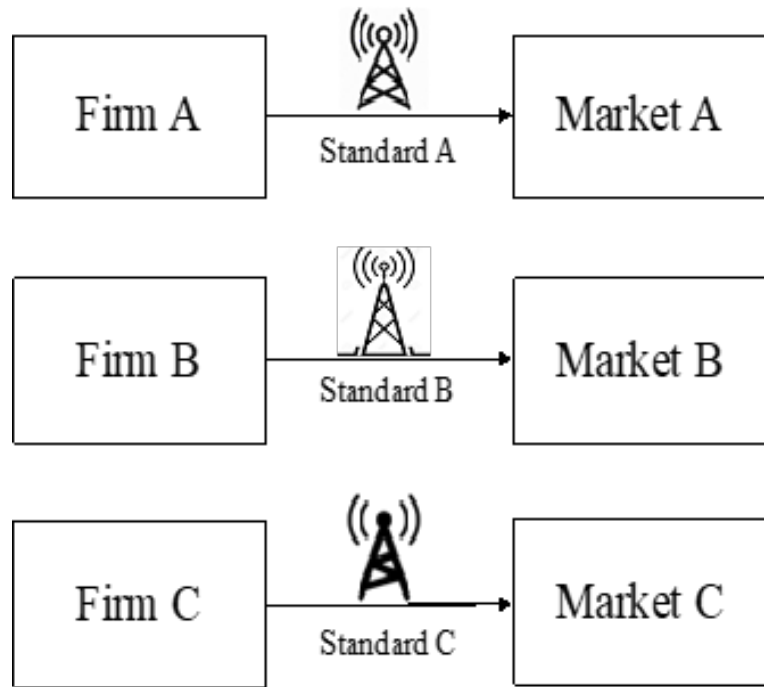
Market governance – Private vs. public ordering



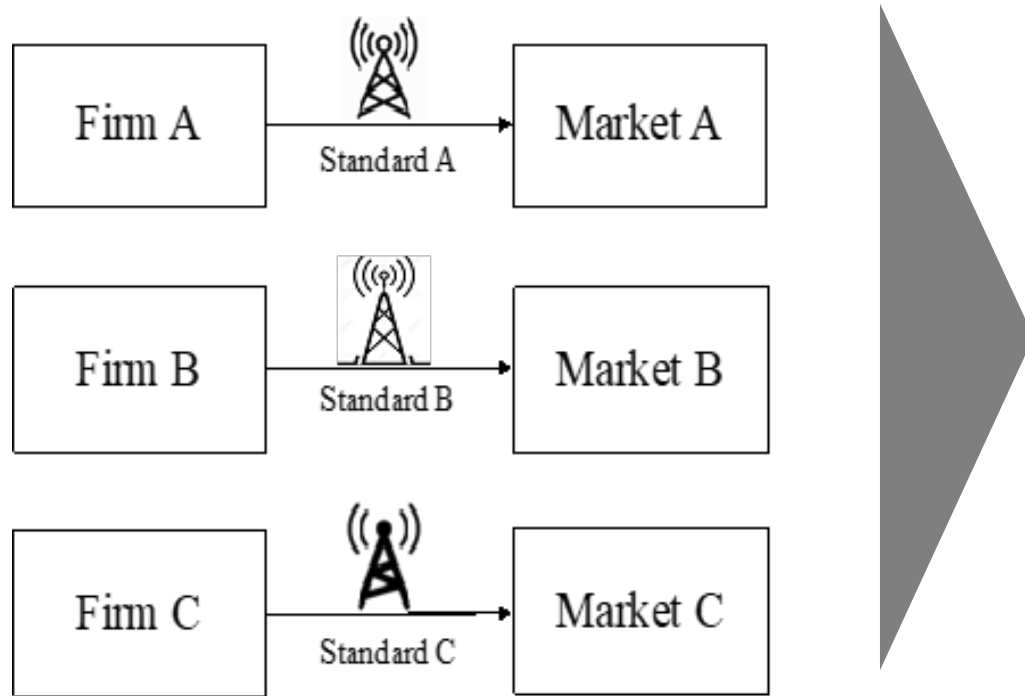
Market transactional layer – Range of actions

Market Transactional Layer			
Private Ordering		Public Ordering	
Independent	Collective	Guidance	Regulation

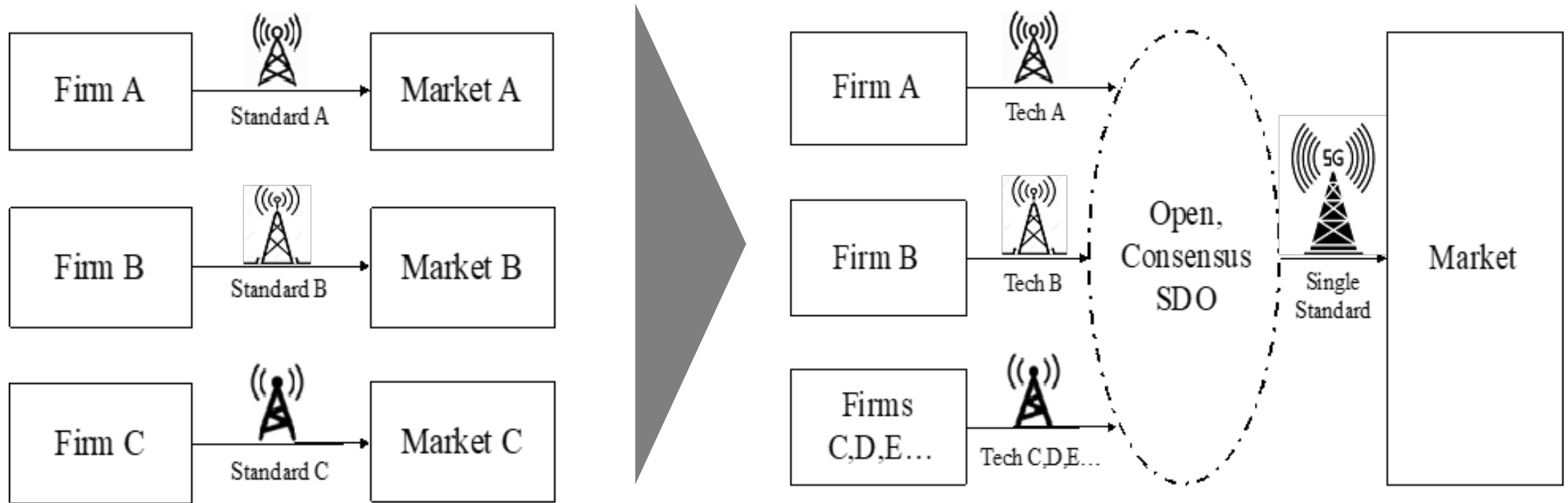
Open, consensus vs. competing de facto standards



Open, consensus vs. competing de facto standards

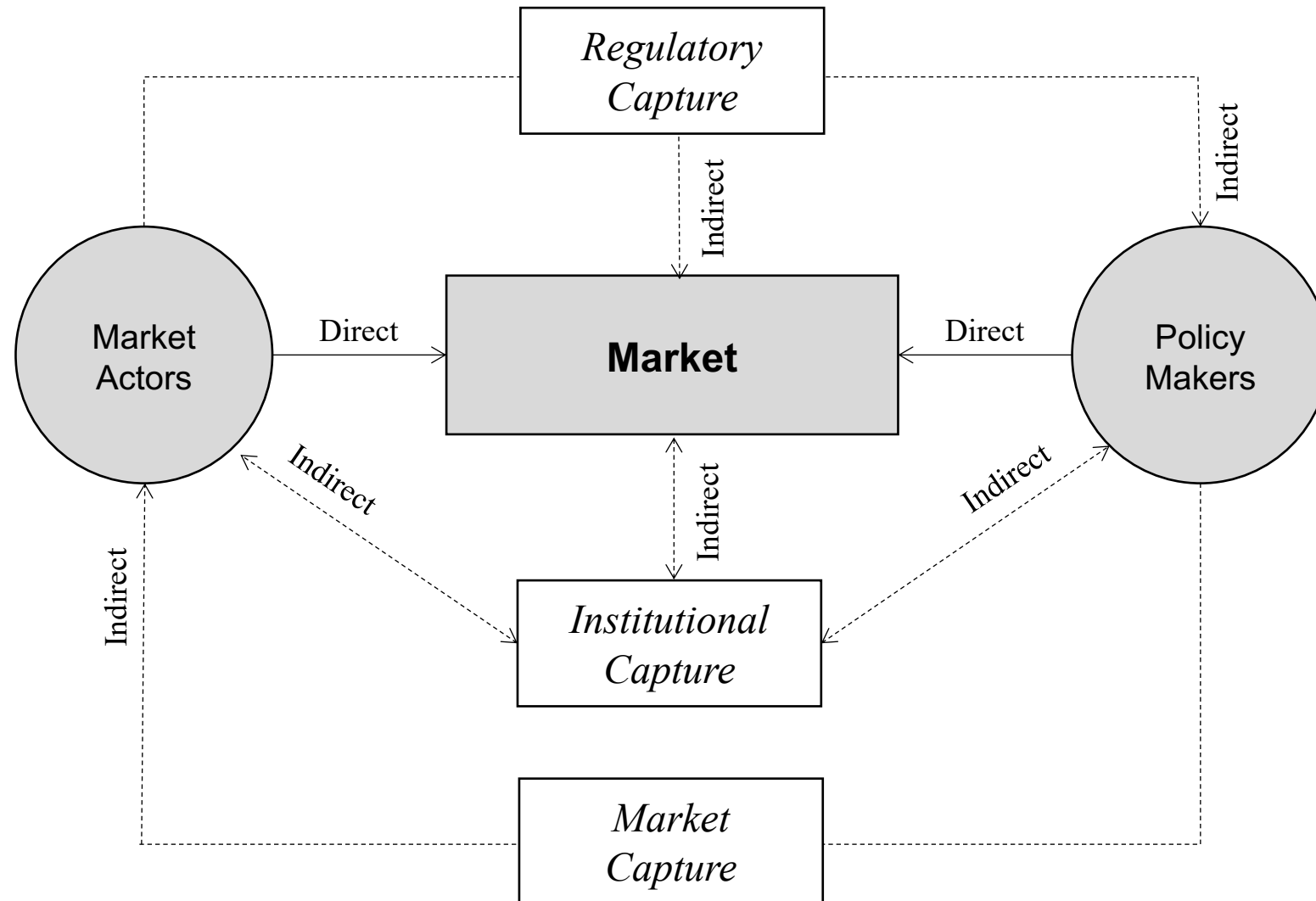


Open, consensus vs. competing de facto standards

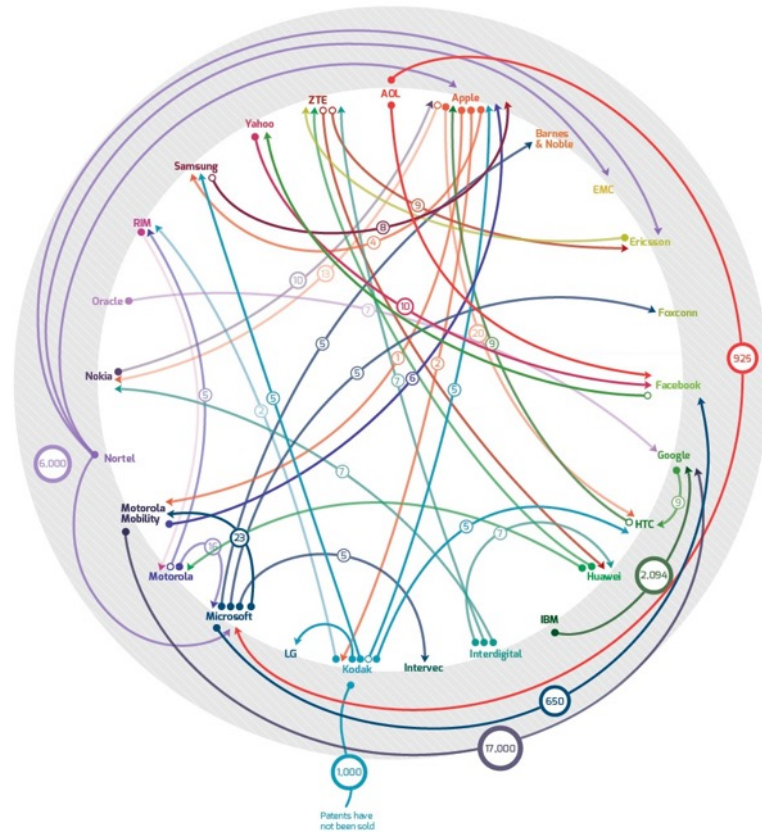


The SEP ecosystem has evolved to include a large degree of collective, private ordering

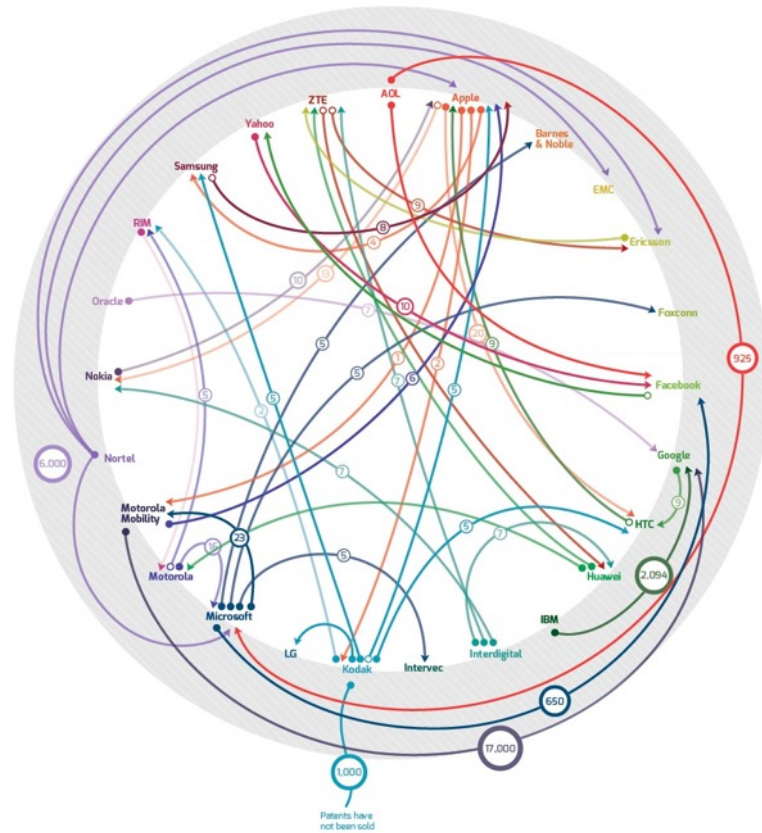
Market governance - Direct and indirect interactions



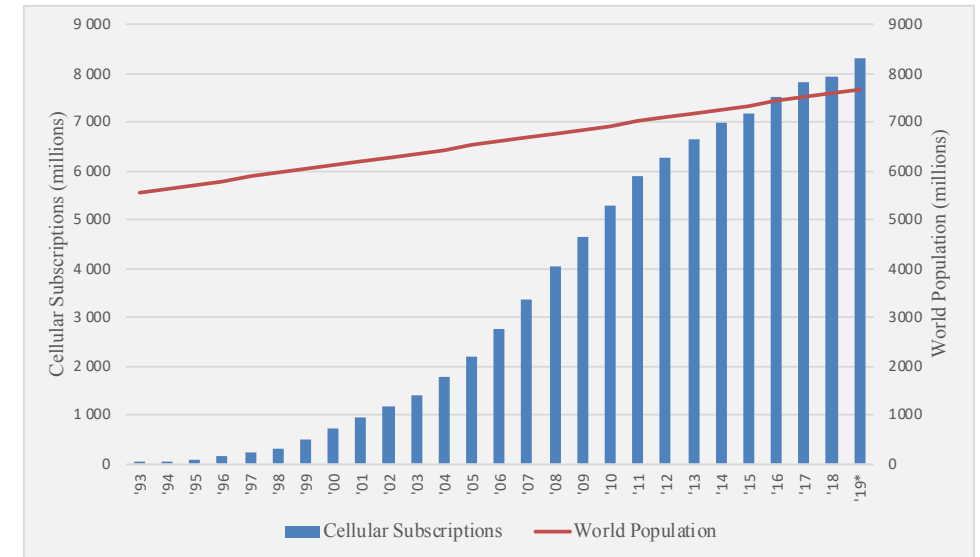
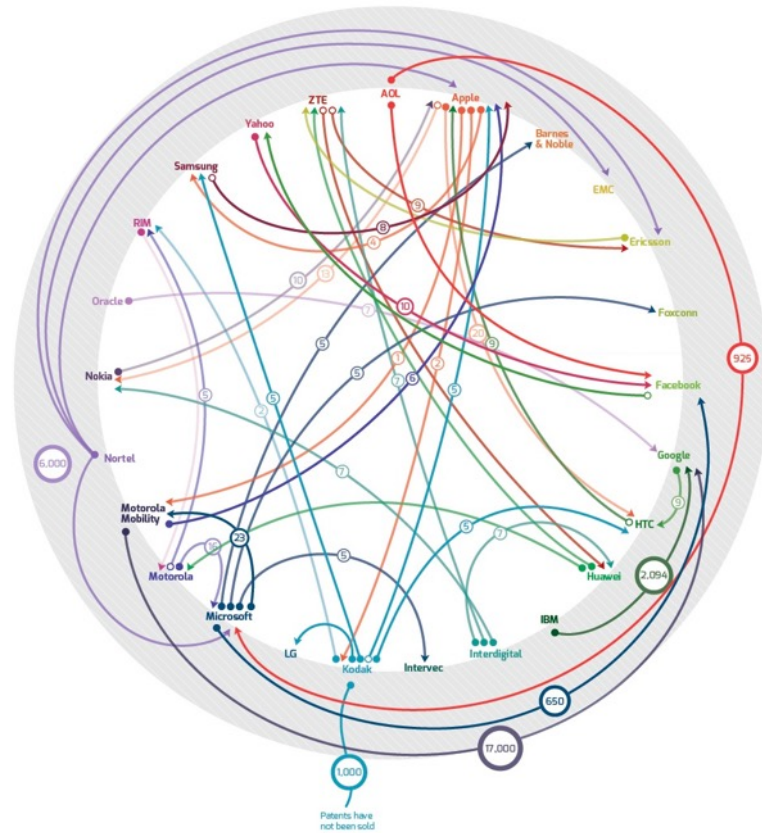
Framing the problem



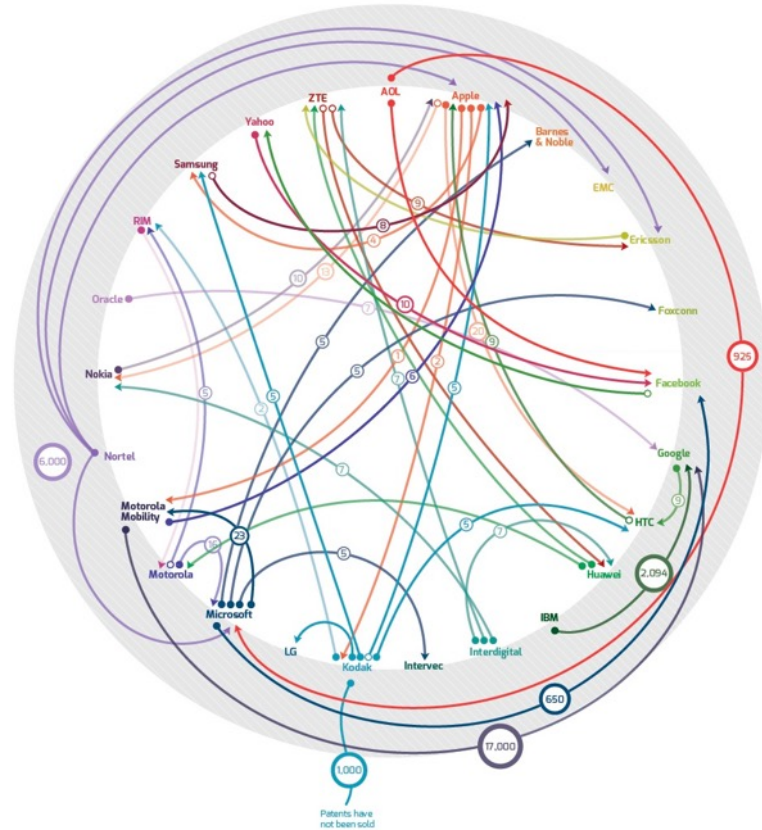
Framing the problem



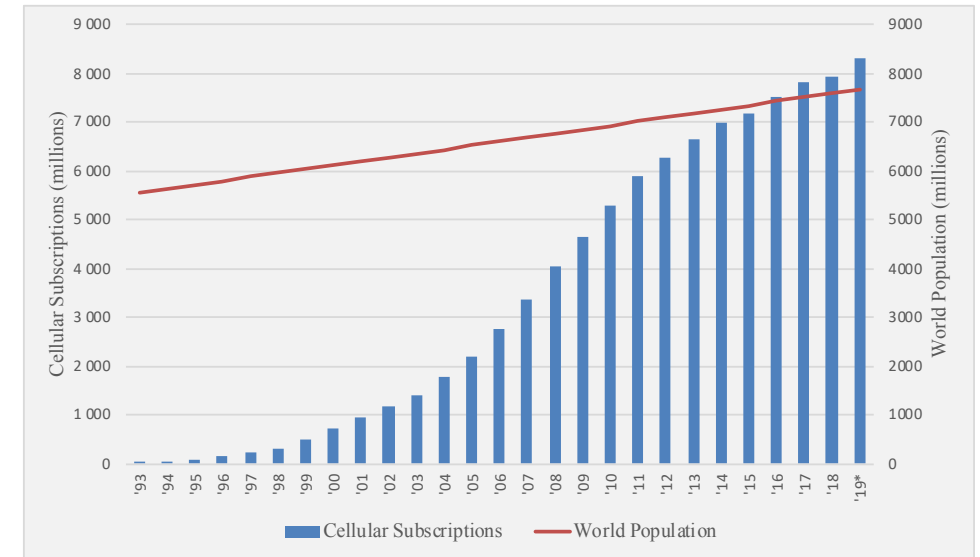
Framing the problem



Framing the problem



How do we solve this market failure?



How do we improve on this market success?

Assessment Framework

1. **Defining Problems** - Is there evidence of a significant problem in the market that cannot be managed through private ordering?
2. **Evaluating Solutions** - Will a public ordering solution increase social welfare?
3. **Experimental Governance** – Given the complexity and uncertainty, how can we test the impact of potential solutions and adjust?

Goals of regulatory action in the SEP space

- Transparency on SEP exposure
 - Identity of potential SEPs; Essentiality; Validity
 - Transparency on unlicensed uses of SEPs in the value chain
- Clarity on FRAND value of SEP licenses
 - Guidance on the legal substance of the FRAND obligation
 - Availability of information and methodologies for the valuation of specific SEP licenses
- Transaction cost savings in the licensing of SEPs
 - Cost reduction in dispute resolution
 - Economies of scale in licensing (pools, LNG)
- Undisputed desirability of each of these goals

Tremendous potential costs

- Costs of validity assessments, essentiality checks, etc. are in an open-ended range
- Figuring out the “correct” price of a license is costly – and so is setting a wrong price
- Pools can restrict bargaining, eliminate efficient price differentiation, and produce significant collective action problems
- *How much* investment in transparency, FRAND valuation, bilateral negotiations, pooling, is socially optimal?

The problem of knowledge in the regulatory framework

“The peculiar character of the problem of a rational economic order is determined precisely by the fact that the knowledge of the circumstances of which we must make use never exists in concentrated or integrated form, but solely as the dispersed bits of incomplete and frequently contradictory knowledge which all the separate individuals possess.” (Hayek, 1945)

Private and public ordering in economic governance

- Traditional economics juxtaposes “market failure vs social planner”
- Economic analysis of economic governance (Williamson, 2002; Dixit, 2009) offers a conceptual framework in which
 - There is a diversity of private and public ordering mechanisms
 - Private ordering is more than markets: First-, second-, and third-party private ordering co-exist
 - Third-party private ordering may encompass rules and norms
 - The regulatory framework elicits information, rather than presupposing it

Transparency on essentiality – private ordering

- **First-party private ordering**: efficient disclosure of relevant information
 - Theory of failure: information externalities and opportunism (e.g. ambush)
- **Second-party private ordering**: risk of ostracism in repeat interaction
 - Theory of failure: full benefits of standardization only if “trust in strangers”
- **Third-party private ordering**: SDO policies requiring certain types and levels of disclosure

Preference signaling in the SEP declaration framework

- Significant and meaningful variation between SDOs' disclosure policies
 - Scope, timing, depth of required disclosure
 - Relatively frequent SDO policy updates/clarifications
- Disclosure rules themselves reflect choices: SDO governance choices, and stakeholders' "voting with their feet"
- Massively heterogeneous disclosure practices within single SDOs
 - meaningful menus of disclosure options (e.g. blanket vs. specific; standard specification, section, or only project or release?)
 - wide margin for interpretation of key provisions (e.g. ETSI "in a timely fashion"; choice what patents to declare as potentially essential)
 - majority of declarants exceed minimum requirements in at least some respects

Transparency on essentiality – public ordering

- Indirect influence: e.g. 1992 European Commission White Paper:
“It is therefore for standards-making bodies to establish procedures whereby late disclosure or non-disclosure of rights is penalized once actual or presumed knowledge can be established.”
- Availability of enforcement mechanism; e.g. 2007 S.O. to Rambus
- Reserve certain regulatory benefits to SDOs with disclosure policies; e.g. safe harbor provisions in the 2011 Horizontal Guidelines
 - Currently set a low floor (explicitly extended to blanket disclosure policies)

Transparency on essentiality – Limitations of more direct public ordering

- 2005 revision of ETSI's IPR policy at direct request of the Commission, from “they become aware of” to “reasonable endeavour”
 - Led ETSI to seek (and obtain) reassurance from the Commission that patent searches are not required
 - Larger number of SDOs reacted by clarifying that their IPR disclosure policies do not require patent searches
- Clause 6.4. of ETSI's IPR policy,
 - Allows the European Commission to request ETSI to conduct IPR policy searches (and to cover the expense of that search)
 - “Very rarely” (if ever) been used

Clarity on FRAND

- Vast literature on relevance and limitations of first- and second-party private ordering mechanisms
- Third-party private ordering
 - through SDO policies; but
 - Purposefully incomplete (“Vagueness” of licensing requirements)
 - Limited variation between SDO policies
 - Changes in SDO policies rarely from within and by SDO members’ consensus
 - Very limited use of alternative options in commitment menus
 - Through industry norms

FRAND and norms

- Norms are defined by
 - Common practice
 - Widely shared value judgments
- FRAND as common practice
 - Acceptability of licensing offers relative to others
 - Relative to other licensees (“Level playing field”)
 - Relative to other SEP holders (likelihood of challenge; incentive to set a benchmark)
 - positive cross-price elasticity
- FRAND as shared value judgment
 - “Market for FRAND theories”: value statements competing for buy-in from different parties
 - Parties’ statements on reasonable aggregate royalties for standard generations

FRAND and public ordering

- Public ordering instruments act as guarantor and adjudicator
 - Availability of sanctions for breach of FRAND obligations
 - Determination of whether parties have met their FRAND obligations
- Adjudications may uphold or substitute for role of norms in price formation
 - Determination of what is the price of a license – comparable licenses, ex ante announcements, etc.; or what should be the price (based on considerations of equity and economic efficiency)
- Influence of public ordering on SDO policies
 - Reference to empirically observable common SDO practices (EC → ETSI's 1994 policy)
 - Institutional engineering (US DoJ → IEEE's 2015 policy revision)

A way forward – the role of public regulation

- Scope for regulatory intervention constrained by information problems
- But regulation can also be a tool of producing/eliciting information
 - Produce factual information and analysis (e.g. numerous studies funded by the Commission)
 - Public entrepreneurship to reveal demand structure (e.g. “Hantei” system of the JPO)
 - Create a framework for experimental governance

Thank You!

Q&A

Forthcoming Webinar:

Date	Title	Summary
23-11-2021	Licensees Negotiation Groups: what, why, how?	Join Haris Tsilikas and Dr. Igor Nikolic on this discussion
December 9-11, 2021	CIP Forum, Göteborg, Sweden	The focus of the event is on sharing innovative ideas, research, and practical experiences among global actors.

