

Competition and Innovation Policy

A dialogue on consumer welfare between agencies
and business

ICC Commission on Competition

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The Hague

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- Innovation is the engine of economic growth
- Antitrust over-enforcement in innovation-related areas is likely to lead to significant welfare losses
- But agencies must prevent anticompetitive conduct that hampers innovation
- The case for antitrust intervention is strongest with respect to cheap exclusion cases:
 - > Microsoft: misleading rivals' engineers
 - > AstraZeneca: deregistering market authorisations and misrepresentations to patent agencies

- The 6 potential problems:
 - > Uncertain which market structure is most conducive to innovation (Arrow, Schumpeter, Aghion)
 - > The concept of innovation itself is often not well understood
 - > Benefits of innovation are difficult to factor in the consumer welfare analysis
 - > Agencies' analysis of harm to innovation is often rudimentary
 - > Underlying philosophy unclear: imposition of innovation paths
 - > Uncertainty on the “right” level of remuneration

- Various types of innovation
 - > Breakthrough – incremental (Baumol and others)
 - > Sustaining – disruptive (Christensen)
 - > By large firms- small startups (Arrow, Schumpeter)
 - > User driven- manufacturer-driven (Von Hippel)
 - > By one firm- by the “network” (Idem, and Trimble and Govrindarjan)
 - > Stand-alone – cumulative (Scotchmer)
 - > Open – proprietary (Tirole and others)

- Benefits of innovation are difficult to factor in the consumer welfare analysis
 - ICN Special Project 2011: Consumer Welfare: agencies often do not explicitly apply Consumer Welfare analysis, quantify (static) benefits and losses, let alone seek to quantify innovation effects
 - EC Commission 2005 Notice on Article 101(3): dynamic efficiencies (CECED- EC Commission decision 1999)

- Agencies' analysis of harm to innovation is often rudimentary
 - EC Microsoft Case (2007)
 - EC Intel Case (May 2009)

Innovation, consumer welfare and antitrust

- Underlying philosophy often unclear: imposition of innovation paths
- The rule of law and agencies:
 - Steering markets towards a specific outcome
 - Keeping innovation paths open
 - Do nothing

Uncertainty regarding the “right” level of remuneration

- Exploitative abuse?

- Comments by EC deputy chief economist

- EC Horizontal Guidelines: SSO and “arbitration” if doubt whether royalties are “fair royalties” under FRAND-licensing