

Randolph W. Tritell, *Director, Office of International Affairs, US Federal Trade Commission*

## **General Principles**

- Enforcement of unilateral conduct provisions of competition laws often frequently implications for innovation. Given that it is often difficult to distinguish vigorous competition from anticompetitive conduct, careful analysis is necessary to strike the right balance – overly aggressive enforcement can chill dominant firms from innovating while under-enforcement can allow dominant firms to improperly squelch innovation by competitors.
- Dominant firms can be important innovators but their conduct can also deter or prevent innovation by others from reaching the market. Innovation often flows from intellectual property rights. It is important that competition law not be used to undermine those rights and the incentives to innovate that they provide, but also to ensure that IP rights are not abused to harm innovation.

## **ICN**

- Many thought this area too fraught with disparate laws and views for the ICN to be able to make any progress toward convergence. However, the ICN working group has produced a significant volume of quality work consisting of reports on international practice and, notably, recommended practices on the assessment of dominance, including in the context of state monopolies. The group is now compiling a workbook that is intended to serve as a practical manual for agency staff to investigate unilateral conduct and analyze its competitive effects in accordance with international best practice.
- In areas where there is not a consensus, the ICN has been a valuable forum to facilitate dialogue. The working group has conducted teleseminars that present different views on issues such as margin squeeze and price discrimination, and holds workshops where officials and NGAs can explore in depth the difficult issues that arise in unilateral conduct cases. Our discussions have included the relationship between dominant firm conduct and innovation and the impact of enforcement on innovation. The ICN seeks to foster convergence toward sound practice but where consensus is absent works to ensure that there is a good understanding of the different approaches and a forum to compare approaches, with a view to learning from each others' experiences.
- The working group's long-term plan calls for the group to attempt to develop recommended practices on types of unilateral conduct (such as exclusive dealing, predatory pricing, refusal to deal, tying and bundling). The group will also continue to develop the workbook and to conduct teleseminars and workshops, and will also focus on promoting implementation of its recommended practices. The ICN has not pursued the innovation-related issues to the level of comparing cost tests, specifying the relevant time period for measuring effects, or other aspects of a deeper analysis – the discussion at this point is on higher level principles.

## FTC

- The FTC carefully considers the impact of its enforcement actions on innovation. It seeks to use its available enforcement tools, including traditional Section 2 theories and its unique authority under Section 5 to ensure a competitive marketplace in which innovation can thrive. Its analysis considers dynamic as well as static effects, including the likely impact of the dominant firm's conduct on innovation.
- The FTC's approach is illustrated in its case against Intel. The FTC alleged that Intel's conduct, including its discount program, payments to customers, and inaccurate portrayals of rival products, prevented rivals from benefitting from their own innovation. These practices were directed at AMD but also at NVidia with respect to graphic cards. The FTC was concerned not only with the static effects of the alleged conduct but with its long-term effects on innovation.
- The FTC carefully considered the effects of its remedies on innovation. For example, the order prohibits Intel from making any design changes to its CPUS that would degrade the performance of Intel's rival's products unless Intel can show that the change benefits Intel's products. This enhances Intel's incentive to make changes to its products that improve them, making consumers better off, but any stronger remedy could limit Intel's incentives to devote resources to improving its products.