

Real Knowledge Is to Know the Extent of One's Own Ignorance: On the Consumer Harm Approach in Innovation-Related Competition Cases

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Modern economics advocates an assessment of competition law cases in light of the effects of firm conduct on the relevant market. In many instances, law enforcers and also firms that have to assess the legality of their business models in advance will often have to predict the "likely" effects in the future. This obviously creates a problem of uncertainty. This article reviews this problem for the assessment of competition law cases in innovation-related markets. Thereby, three specific sets of cases are discussed: (1.) the GlaxoSmithKline cases in Europe, where the question was whether R&D intensive pharmaceutical companies should be allowed to restrain parallel trade between Member States in order to enhance their ability to invest in innovation, (2.) the European Microsoft case, and (3.) "pay-for-delay" settlements of patent litigation proceedings that involve a so-called "reverse payment" by the patent holder to the generic drugs producer for delaying the market entry of the generic drug. Thereby, the article aims to identify the most appropriate standard of liability against the background of the problem of uncertainty. It rejects the consumer harm standard which is accepted by the courts in the U.S. and traditionally rejected by the EU courts in favor of a concept of protecting the process of dynamic competition which focuses on the elements of rivalry, openness of the market, and consumer choice.