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Comments to proposal for a European Innovation Act from the Confederation of Swedish Enterprise

1. Core messages

It is often stated that the US innovates, Asia imitates and Europe regulates. It is nowadays followed up by mentioning that Asia is now dominating also on innovation. This can be seen as a background for the efforts done to enhance innovation in Europe.

In the Innovation Agenda presented by the European Commission in 2022, the focus was innovation as such. The notion “innovation” seemed however to target “ideas”, “solutions” or “inventions” rather than things actually taken to market. When entering (or even desiring to enter) a market, issues on intellectual property need to be targeted. Is the solution truly innovative, or is it infringing on someone else’s right? What trade mark should be used to communicate with potential customers? Have copyrights held by others been handled correctly?

The Innovation Act addresses regulatory fragmentation, the same problem is highlighted in the Single Market Strategy and the "Terrible 10". Many European firms can innovate successfully in one Member State but face obstacles when scaling across 27 markets. The Innovation Act therefore should complement traditional Single Market reforms by targeting barriers to growth rather than merely barriers to market entry.

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The focus of our comments is

- The importance of strategic handling of intangible assets.
- R&D procurement
- IP backed finance
- Creation of a marketplace

2. Initial notes on Confederation of Swedish Enterprise

The Confederation of Swedish Enterprise is Sweden's largest business federation. The Confederation of Swedish Enterprise has about 60 000 member companies from all types of industries. A majority of the members are small and medium sized companies.

Innovation is a core competence for many of the members of the Confederation of Swedish Enterprise. The Confederation has for several years worked intensely on issues regarding innovation and intellectual property.[1] We have also contributed at EU-level when it comes to intellectual property in public procurement.[2]

3. The importance of strategic handling of intangible assets

The Confederation of Swedish Enterprise welcomes the approach in the proposal to put emphasise on strategic handling of intangible assets. This perspective has not always been the case when discussing innovation in Europe, quite contrary to for example the definition of innovation in the Oslo Manual.[3]

However, there are still things that could be described in a clearer way. For example, in press material linked to the European Innovation Act it is described as "From discovery to market impact". Discoveries are normally seen as discovering the existence of something, like a new chemical element. Describing it as taking ideas to market impact would be a more accurate description.

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[1] For example, in 2023 the Confederation of Swedish Enterprise published a report on digital innovation. https://www.svensktnaringsliv.se/english/lost-opportunities-on-digital-innovation_1205527.html

[2] https://op.europa.eu/en/publication-detail/-/publication/9c4adb8e-abf3-11f1-b9e5-01aa75ed71a1/language-en

[3] On the Oslo Manual: https://www.oecd.org/en/publications/oslo-manual-2018_9789264304604-en.html

Innovation, according to the research of Joseph Schumpeter and the definition in the Oslo Manual, focuses on the relationship to the market. It is not just having ideas. It is also to have the capabilities and making the efforts to bring it to market. This perspective is now clear in the proposal for European Innovation Act. That is essential.

4. R&D procurement

The Confederation of Swedish Enterprise has for many years worked on projects regarding how intellectual property rights are handled within public procurement.[4] Article 19 does address problems detected in those projects.

In fact, an entrepreneur described the proposal as “a game changer” in the most possible of ways. To be part of any kind of R&D procurement has for that entrepreneur previously been seen as a risk, due to the clauses on handling of intellectual property rights. In the report published by the EU-commission, it is evident that clauses on transfer of intellectual property rights have substantial effects on companies.

It was also often detected that the public buyers did not desire to put a value on their acquisitions of intellectual property rights. Any bidder including that in their price would not be selected, since they were not likely to have a competitive price. Article 10.5 is therefore a welcome proposal.

There is however a concern regarding to parts of Article 19, namely Article 19.6 and 7 and Article 19.10. According to these, the public buyers may acquire intellectual property rights. Of course, there may be situations where this is the best solution. However, the options given are too broad in the proposal. This goes especially for Article 19.6 and 7. According to Swedish law, municipalities and other public entities are not allowed to compete with private entities, meaning that it may be difficult for them to part take in that kind of commercial activities.

Given the complexity in today’s innovation processes, Article 31 regarding common rules on joint R&D procurement is welcome. It does clarify the relationships and responsibilities.

Another note is that for R&D procurement the guiding principle shall be needs and results, not the promotion of specific products, technologies or producer groups. R&D procurement should therefore be based on functional and performance requirements, allowing different solutions to compete to

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[4] One example is book about intellectual property in public procurement, published in 2022 https://shop.nj.se/products/immaterialratt-i-offentlig-upphandling It was authored by Ellen Hausel Heldahl and Christina Wainikka.

address the same challenge. Using procurement to favour pre-selected products, technologies or firms risk distorting competition, hampering innovation and tying public buyers to suboptimal solutions.

5. IP backed finance

At EU-level the Commission and EUIPO are working on issues relating to IP backed finance, resulting for example in a report.[5] The Confederation of Swedish Enterprise welcomes this initiative, it is especially welcome in relation to startups and scaleups. In a time when intangible assets represent a crucial part of the value of companies[6], finance cannot focus on tangible assets alone.

The proposal on creating a Union Competence Centre, in Article 32, is welcome. These are complicated matters and it is a good solution to make joint forces to be able to find the best possible experts. It is not foreseeable that this could be handled at Member State level. The structure to have a certification (Article 35) is similar to what has already been in place in South Korea. The Confederation of Swedish Enterprise has looked into their model and found it promising.

However, there are some concerns. First of all, there is a concern that the actors that would need this kind of competence centre would not be able to find information about it. We have seen that kind of problems regarding the IPR Helpdesk. The knowledge level regarding intellectual property is alarmingly low in many parts of society, leading to that many will not even understand that they need to investigate certain questions.

Secondly, it may be difficult to find expertise regarding all types of intangible assets. It is one thing regarding the registered rights, with a presumption that they are valid. It may be more difficult regarding for example copyright.

When it comes to an unregistered right, like copyright, that arises as a right held by a physical person, contracts and agreements are always necessary for anyone else who desires to use a protected work. As a consequence, handling of contracts and agreements regarding copyright is an essential part for many companies. This has to be reflected when discussing IP backed finance in relation to copyright protected works.

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[5] https://www.euipo.europa.eu/en/publications/IP-backed-finance-in-Europe-state-of-play-and-future-perspectives
[6] https://oceantomo.com/intangible-asset-market-value-study/

There is a divergence in the rules on contracts and agreements between the Member States, to a large extent due to variations in the implementation of EU-rules. Since this affects the opportunities for European businesses this is something that has to be handled within the proposed Union Competence Centre.

6. Marketplace

Chapter 3 in the proposal addresses not only the creation of the Union Competence Centre but also mentions the creation of a digital marketplace for intellectual property rights. In communication about the proposal the creation of this marketplace has been highlighted.

However, the actual proposal is rather unclear. In order to properly be able to evaluate the benefits of the creation of this marketplace it would be necessary to have more details.

There are difficulties for rightsholders and potential licensees to find one another. It is welcome to address these difficulties. However, the success of this marketplace will to a large extent be based on how it is executed. That execution is not described in a clear way.

As a business federation, we believe in functioning markets. A marketplace that operates on market conditions would be welcome. If there are attempts to create artificial markets or limit the actors' possibilities to actually act like it is a true market it may backfire.

7. Conclusions

Europe needs to create a business environment that promotes innovation. Europe also needs to make sure that creativity and inventiveness is taken from drawing boards and laboratories to market.

The proposal for a European Innovation Act does take important steps in that direction, not the least concerning the needs of the knowledge economy. The focus on strategic handling of intangible assets and the- proposals on IP backed finance are keys to a competitive innovation environment in Europe.

The most important part of the proposal is the handling of intellectual property rights in public procurement. This is especially important for innovative startups and scaleups. If they lose their intangible assets, they may be put out of business.

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