PROTECTING COMPETITION TO INNOVATE IS PROTECTING COMPETITION IN FUTURE MARKETS: TEN LAW REVIEW ARTICLES LEAVE NO DOUBT

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For at least the last 30 years the American and European competition authorities have claimed they can protect competition to innovate. The authorities have at times claimed they can protect competition in an Innovation Market, an R&D Market, or an Innovation Space. In all these cases however, the authorities have actually protected competition in a Future Market, a market for products at least some of which do not exist yet. In a series of 10 law review articles, which the author summarizes here, he has shown not only that the authorities protect competition in Future Markets, he also explains the Future Markets Model, the methodology the authorities actually use to do so. The author also shows why so many authorities exert jurisdiction to review the same transaction when that transaction involves Future Markets. The author also shows why the Future Markets Model explains the authorities' attempts to protect nascent competition. Regarding the United States, the authority explains Future Potential Competition, the doctrine courts must develop and apply so they can protect competition in Future Markets. Finally, the author shows that American courts have already interpreted the Sherman Act to allow them to protect competition in Future Markets, and says they should do the same when interpreting the Clayton Act.

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The ultimate merger to monopoly is, of course, if the only two firms selling a product become one firm. Surely, no self-respecting competition authority would allow such a merger. But what if the two firms were still developing their products? What if the two firms were to merge before the products existed? If no market yet existed, would this same self-respecting competition authority still block the merger?

Historically, the answer has been: "it depends." Often the answer was: "No, the authority will not block the transaction." Sometimes the authority concluded that if no product existed, then no market existed. There was no market within which it needed to protect competition.

But in many other cases the authority did not act because it felt it could not adequately predict the future. The relevant firms, the authority realized, may never develop a product. And even if the firms did eventually develop products, they may be sufficiently different that they would not compete against each other. Thus, many times the relevant competition authority, believing it could not adequately predict the future, did not block the relevant transaction. Both the European Commission[2] and U.S. Federal Trade Commission ("FTC"),[3] for example, believing they could not adequately predict the future, allowed Google to buy DoubleClick.

But sometimes the answer was: "Yes the authority will block the transaction." Sometimes the risk that the merging firms would monopolize the Future Market was just too obvious. This was, indeed still is, particularly true for pharmaceutical markets. The long drug development process makes it relatively easy for the authorities to see what drugs merging firms will probably sell in the future. If the authority believed that the risk that the merger would cause only one firm to sell products which, were it not for the merger, would compete against each other in the future was just too great, then the authority would, typically, only approve the merger if the merging firm licensed one of the relevant R&D programs.

The American and European competition authorities have been doing this since at least 1993. In these cases the authorities claim they are directly protecting competition to innovate. But they are not. They are protecting competition in Future Markets, markets for products[4] at least some of which do not exist yet.

Firms compete on innovation in an almost infinite number of ways. Low and no alcohol beer taste better than they ever because their manufacturers are very consciously trying to pull back their former customers, who are increasingly drinking Coca-Cola and other non-alcoholic beverages.[5] Supermarkets sell ready-made meals of ever higher quality, and thus increasingly compete against restaurants. More restaurants, in turn, now deliver food. And new services will deliver a recipe and just the food it requires. Food offerings, of different prices and quality, continue to proliferate.

Innovation is thus constant, and ubiquitous. From an antitrust perspective the question is: When are the relevant firms competing to innovate so directly that a competition authority may justifiably intervene in the market to preserve this competition to innovate? The answer is: When the firms are trying to make the same future product. In other words, when they are both competing in the same Future Market. This is the only criteria which effectively limits the authorities' actions. And as this implies, whenever any competition authority claims it is protecting competition to innovate it is actually protecting competition in a Future Market.

Competition to innovate burst onto the antitrust scene in 1995 when Richard J. Gilbert & Steven C. Sunshine, two then-high United States Department of Justice ("DOJ") officials, wrote a seminal article announcing that DOJ would protect competition in a market in which innovation itself was the product.[6] Confirming this, DOJ and the FTC said in their 1995 intellectual property licensing guidelines that they would indeed protect competition in an Innovation Market.[7]

Gilbert & Sunshine used as their primary example what became the founding case of the Innovation Market concept, *General Motors/ ZF Friedrichshafen* ("*GM/ZF*").[8] In this case ZF wanted to buy the GM division which made automatic transmissions. In the United States the firms

2 Commission Decision of 11/03/2008 declaring a concentration to be compatible with the common market and the functioning of the EEA Agreement (M.4731—*Google/ DoubleClick*).

3 Statement of Federal Trade Commission Concerning Google/DoubleClick, F.T.C. File no.071-0170 (20 December 2007) (FTC Majority Statement).

4 These "products" could include services.

5 *Buzzkill: Alcohol-free beer is fizzing*, The Economist (Continental European Edition), July 10, 2021, p. 60.

6 Richard J. Gilbert & Steven C. Sunshine, *Incorporating Dynamic Efficiency Concerns in Merger Analysis: The Use of Innovation Markets*, 63 ANTITRUST L.J. 569 (1995).

7 *DOJ and FTC Antitrust Guidelines for the Licensing of Intellectual Property*, § 3.2.3 (1995). When the American enforcers updated these Guidelines, they claimed they could protect competition, not in "Innovation Markets" but instead in "R&D Markets." They changed the label, but not the substance. *DOJ and FTC Antitrust Guidelines for the Licensing of Intellectual Property*, § 3.2.3 (2017).

8 *United States v. General Motors Corp.*, No. 93-530 (D. Del. filed Nov. 16, 1993).

competed in only two narrow markets, those for automatic transmissions for busses and refuse trucks. But the firms competed broadly to make better automatic transmissions. DOJ wanted to preserve this broad competition to innovate, but it feared that if it tried to block this transaction ZF would simply sell GM's businesses in the two narrow markets in which both firms competed. DOJ therefore alleged that the firms competed in a broad Innovation Market to make better automatic transmissions. This, it hoped, would allow it to preserve the firms' broad competition to innovate.

But, as I showed in *Did Congress Actually Create Innovation Markets?*[9] the firms actually competed broadly. They competed in the broad current market to make many different kinds of existing automatic transmissions. But they competed in this market in Europe. DOJ simply used the Innovation Market concept so it could protect competition in a current market where, in reality, it lacked jurisdiction.

In fact, in that same article, *Did Congress Actually Create Innovation Markets?*, I analyzed in depth all the cases in which the American antitrust enforcers had at that time claimed they protected competition to innovate. I showed that in all these cases the enforcers really protected competition in Future Markets. As I showed, only if the relevant firms were trying to make the same future product, and only if an insufficient number of other firms were also trying to make comparable future products, would the enforcers block the relevant transaction. But, as I also said, the enforcers were acting reasonably. The enforcers, I said, should indeed ensure that Future Markets are competitive.

Having looked at how the American enforcers protected competition to innovate, I then turned to Europe. The European Commission had in fact reviewed many of the same cases I had analyzed in *Did Congress Actually Create Innovation Markets*. My article *Innovation Markets in Europe*[10] was the first to examine how the European Commission applied the American concept of Innovation Markets. It analyzed not only all the transactions which both the American and European authorities had reviewed, but also comparable cases which only the European Commission reviewed. This article shows that the European authority, just like its American counterparts, protected competition, not in Innovation Markets, but in Future Markets. Further, it showed that the European Commission did not claim otherwise. As I showed in this article, the Commission itself said it protected competition in Future Markets.

In *The Economics of Future Goods Markets*[11] I again showed that the competition authorities, on both sides of the Atlantic, act reasonably when they protect competition in Future Markets. The authorities are trying to ensure that Future Markets are competitive. Competitive markets, they believe, drive innovation. Indeed, the various competition law provisions all these authorities enforce assume that competition drives innovation. These legal provisions, in other words, implicitly reject Schumpeter's assertion that the monopolist is the better innovator. They instead accept Arrow's claim that the pressure competitive markets generate drives firms to innovate. And, as I conclude in this article, by protecting competition in Future Markets the authorities are doing what they should: ensuring that competitive markets drive innovation.

In *Innovation and the Structure of Competition*[12] I not only reviewed and confirmed the conclusions of these previous articles, I also put the authorities' efforts to protect competition in Future Markets in the larger legal context. I showed, for example, that when the American authorities protect competition in Future Markets, they are acting pursuant to Section 7 of the Clayton Act, which stops firms from acquiring assets "where in any line of commerce…the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."

In *Competitiveness, Innovation Policy and the Innovation Market Myth: A Reply to Tom and Newberg on Innovation Markets as the "Centerpiece" of "New Thinking" on Innovation*[13] I responded to two FTC officials who claimed, once again, that the American enforcers could directly protect competition to innovate. All they could do, I showed yet again, was protect competition in Future Markets.

Then the European Commission came along and announced that it too could directly protect competition to innovate. But, the European Commission said, it does not protect competition in an Innovation Market. The European Commission instead created a new concept. The European Commission said in *Dow/Dupont*[14] that it protects competition in an Innovation Space.

9 Lawrence B. Landman, *Did Congress Actually Create Innovation Markets?* 13 Berkeley Tech. L.J. 721, 759-767 (1998).

10 Lawrence B. Landman, *Innovation Markets in Europe*, 19 E.C.L.R. 21 (1998).

11 Lawrence B. Landman, *The Economics of Future Goods Markets* 21 World Competition: Law and Economics Review 63 (1998).

12 Lawrence B. Landman, *Innovation and The Structure of Competition*, 84 J. Pat. Off. Soc. Part 1, September, 728-740, Part 2, October, 789-802, and Part 3, November, 838-881 (1999).

13 Lawrence B. Landman, *Competitiveness, Innovation Policy and the Innovation Market Myth: A Reply to Tom and Newberg on Innovation Markets as the "Centerpiece" of "New Thinking" on Innovation*, 13 St. John's Journal of Legal Commentary 223 (1998).

14 Commission Decision of 27.3.2017 declaring a concentration to be compatible with the internal market and the EEA Agreement (M.7932—Dow/Dupont).

In *From Innovation Markets to Innovation Spaces: a new phrase is not innovation*[15] I showed that this is simply not true. Just as the American enforcers cannot protect competition in an Innovation Market neither can the European Commission protect competition in an Innovation Space. When the European Commission claims it is protecting competition in an Innovation Space it is actually protecting competition in a Future Market. To justify its intervention in the market the European Commission claimed in *Dow/Dupont* that if it did not act then the relevant products, which would have competed against each other in the future, would, because the firms were combining, not compete against each other in the future. What this claim really shows, as I said in this article, is that the Commission was protecting competition in a Future Market.

One the other hand, as I also show in *From Innovation Markets to Innovation Spaces: a new phrase is not innovation*, in *Dow/Dupont* the European Commission acted aggressively. The Commission assumed that various products which the merging firms were trying to develop would in fact compete against each other in the future. It made this assumption although it did not know if the relevant R&D programs would in fact succeed. It also made this assumption although it did not know the precise features of these products, which of course the firms were still developing. This case therefore shows that, while, on the one hand, whenever the competition authorities claim they are protecting competition to innovate they are really protecting competition in Future Markets, this case also shows that, on the other hand, while doing this the authorities can act more or less aggressively.

Building on this, in *The Future Markets Model: how the authorities really protect innovation*,[16] I explain the methodology the competition authorities always use when they protect competition in Future Markets. I call this the Future Markets Model. This is not the methodology I say the authorities should use. This is the methodology I say the authorities do use. I derived this methodology from all the cases in which the authorities, on both sides of the Atlantic, actually protected competition in Future Markets. It is thus *the methodology the authorities actually use*.

The Future Markets Model requires an authority to ask a series of four questions:

1. Does a current product exist?

2. How many firms are trying to develop a future product?

3. For each possible future product, is it sufficiently developed that the authority will consider it a possible future product?

4. How broad will the authority define the Future Market? Will the authority consider future products which are similar, but not identical, as future competing products?

Since the products do not exist yet, the authority can answer these questions more or less aggressively. And, as I show in this article, this is in fact the key policy decision any competition authority must make when it claims to be protecting competition to innovate, and thus is, in reality, applying the Future Markets Model: How aggressively should the authority apply the Model?

To pick one example which I use in this article, both the European Commission and the FTC reviewed Glaxo's purchase of Wellcome. Glaxo already sold an injectable form of an anti-migraine drug and both firms were trying to develop an oral form of the drug. The European Commission found that the existing injectable drug competed in the same Future Market as the two oral forms of the drug which the firms were trying to develop. And since three drugs competed in this Future Market the European Commission concluded that the Future Market was sufficiently competitive. The FTC, by contrast, found that the injectable and the oral forms of the drug competed in different Future Markets. Further, it found that since only two firms competed in the Future Market to make the oral form of the drug that Future Market was not sufficiently competitive. The FTC therefore required a remedy (licensing intellectual property) which the European Commission did not require.

Another example, which I also use in this article, and which I mentioned above, is Google's purchase of DoubleClick. Both the European Commission and the FTC, believing they could not adequately foresee the future, approved this acquisition. Dissenting Commissioner Pamela Harbour however, although she also recognized that she was facing uncertainty, nevertheless said the risk that the acquisition would allow Google to dominate the future online advertising market was too great. Acting more aggressively in the face of uncertainty, she would have blocked the acquisition.[17]

15 Lawrence B. Landman, *From Innovation Markets to Innovation Spaces in Europe: a new phrase is not innovation*, 42 E.C.L.R 30, 34 (2021).

16 Lawrence B. Landman, *The Future Markets Model: how the competition authorities really regulate innovation*, 42 E.C.L.R. 505 (2022).

17 *In the matter of Google/DoubleClick*, F.T.C. File no.071-0170 Dissenting Statement of Commissioner Pamela Jones Harbour (December 20, 2007).

The fact that whenever the authorities claim they are protecting competition to innovate they are really protecting competition in Future Markets also explains other actions the authorities have taken in this area. First, it explains the jurisdictional tangle in this field. As I explain in *Nascent Competition and Transnational Jurisdiction: the future markets model explains the authorities' actions*,[18] in a number of Future Market cases the competition authority of more than one jurisdiction has reviewed the same transaction. And they have often reach contradictory conclusions. Two examples make this very clear. First, although an American federal district court approved Sabre's purchase of Farelogix, the United Kingdom's Competition and Markets Authority disagreed. It blocked this transaction between two American companies, and thus, in effect, overruled the American court. And the European Commission has stopped Illumina from buying Grail. It has done so although the American authorities have not blocked this transaction, and despite the fact that Grail conducts no business in Europe – none whatsoever.

Once one understands that the authorities are regulating competition in a Future Market then these decisions make sense. The products of Future Markets do not exist. But they may exist in the future. And they may exist in the future everywhere. Future Markets are therefore everywhere and nowhere at the same time. For example, while Grail and its competitors are not yet selling their revolutionary cancer detection tests in Europe, if they develop the tests then they surely will. Thus, the European Commission reasonably wants to ensure that Illumina does not impose the vertical restraint it fears it will if it buys Grail. The European Commission wants to ensure that Grail's competitors have access to Illumina's equipment, which they need to develop and sell their tests. The Commission wants to ensure that Grail's competitors sell their revolutionary test in Europe because these tests, if they work as advertised, will save European lives. But for comparable reasons the Brazilian and South Korean competition authorities also want Grail's competitors to sell their tests in their jurisdictions. The Future Market is everywhere.

Understanding that the authorities are protecting competition in Future Markets also explains the authorities' efforts to protect nascent competition. As I also show in *Nascent Competition and Transnational Jurisdiction: The Future Markets Model Explains the Authorities' Actions*, nascent competition cases are just a subset of Future Market cases. In nascent competition cases a large firm is buying a small firm, one which the large firm fears will successfully compete against it in the future. The two firms are thus competing in the Future Market, the market for better versions of the larger firm's product. And the relevant competition authority, reasonably, wants to protect competition in this Future Market.

One crucial issue, at least for American lawyers, is that no court in the United States has developed a doctrine which allows the American enforcers to protect competition in Future Markets. Companies entering into the transactions I have analyzed have simply acquiesced to an enforcer's request that it take a certain action, such as licensing intellectual property, before approving a transaction. Only Illumina has challenged an enforcer's assertion that it has the authority to protect competition to innovate, which of course is really competition in a Future Market. And in the United States (unlike in Europe) Illumina prevailed. The administrative law judge would not allow the FTC to protect competition in the Future Market.[19]

In *Competition to Innovate and Future Potential Competition*[20] I develop the doctrine courts must use to protect competition in Future Markets. Building on the analysis of my earlier article, *Innovation and the Structure of Competition*, I show that Section 7 of the Clayton Act does allow courts to apply this new doctrine. As I explain, the closest applicable doctrine under current American law is perceived potential competition. Courts used Section 7 of the Clayton Act to develop perceived potential competition. This doctrine, however, only allows courts, and the enforcers, to determine if a firm may expand — geographically.

Because perceived potential competition addresses possible geographical expansion it does not address the fundamental question courts, and the enforcers, must address when they protect competition in a Future Market: Given that the authorities cannot predict with 100 percent certainty whether the relevant products will ever exist, or what their features will be, when should the enforcers nevertheless intervene in the market and block a transaction? In this article I develop the doctrine courts should use to answer this question. They should apply the doctrine I call Future Potential Competition.

Future Potential Competition requires courts, and the enforcers, to balance all appropriate variables. These variables include the probability that the relevant firms will actually develop the relevant products, the probable features of these products, and the number of competitors. It thus allows courts, and the enforcers, to determine when they should act.

Finally, not only can public authorities protect competition to innovate, but so too can private plaintiffs. I show this in *Private Plaintiffs*

18 Lawrence B. Landman, *Nascent Competition and Transnational Jurisdiction: the future markets model explains the authorities' actions*, 43 E.C.L.R. 294 (2022).

19 Initial Decision (Redacted Public Version), *In re Illumina Inc.*, Docket No. 9401 (F.T.C. Sept. 9, 2022).

20 Lawrence B. Landman, *Competition to Innovate and Future Potential Competition*, 103 Journal of the Patent and Trademark Office Society, April 2023 (forthcoming).

Can Easily Protect Innovation: The Sherman Act's standard is surprisingly lax, and courts should also use it when applying the Clayton Act.[21] As I show, regarding private plaintiffs, and thus the Sherman Act, the landmark case, *United States v. Microsoft*[22] set the standard. In this case, which Netscape and Sun Microsystems initially brought, these two firms claimed that Microsoft's actions improperly excluded them from the future computer operating system market. Because these future operating systems would presumably have been better than the then-current version of Windows, these firms actually claimed that they were excluded from the Future Market for better computer operating systems.

In this case Microsoft claimed, most importantly, that the court could not hold it liable because the court could not know if Microsoft's exclusionary conduct had in fact stopped Netscape and Navigator from entering the Future Market. The court cannot know what would have happened, Microsoft said. In other word, Microsoft said, the plaintiff has not proven causation.

In its key finding the court rejected this argument. Microsoft had engaged in exclusionary conduct, the court said, and could not benefit from the uncertainty this exclusionary conduct caused. The court called its causation test "edentulous," and indeed it is toothless. As long as the products which Microsoft excluded from the market were potential future competing products, the court said, Microsoft may not exclude these products from the market. Thus, although the court recognized that it too was facing uncertainty, it acted in the face of this uncertainty. It found Microsoft liable.

The *Microsoft* court applied the Sherman Act. The enforcers review mergers and similar transactions pursuant to the Clayton Act. Thus, it seems that under current law a plaintiff will find it easier to use the Sherman Act, rather than the Clayton Act, to protect competition in a Future Market. But it is supposed to be the other way around. As the Supreme Court said in *United States v. Penn-Olin Chem. Co*. 378 U.S. 158, 170-171 (1964):

> The grand design of the [Clayton Act is] to arrest incipient threats to competition which the Sherman Act did not ordinarily reach.

Thus, it would seem, courts should apply at least the same edentulous standard when applying the Clayton Act as they do when applying the Sherman Act. Courts will use the Sherman Act courts when they must, and in the face of uncertainty, to protect competition in Future Markets. They should do the same when applying the Clayton Act.

21 Lawrence B. Landman, *Private Plaintiffs Can Easily Protect Innovation: The Sherman Act's standard is surprisingly lax, and courts should also use it when applying the Clayton Act*, Journal of the Patent and Trademark Office Society (forthcoming).

22 *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001) *cert. denied*, 534 U.S. 952 (2001).

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