NEW POWERS, NEW HSR RULES: THE *ILLUMINA* RIPPLE EFFEC

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The article explores the impact of new Hart-Scott-Rodino rules on merger reviews, emphasizing their focus on protecting competition in Future Markets. It highlights how the Fifth Circuit's decision in *Illumina v. FTC* empowered enforcers by affirming their authority under the Clayton Act to regulate competition in markets for products that do not yet exist. These new rules require merging parties to disclose extensive information on "known planned products." These products compete in Future Markets, markets for products which do not exist yet. The article examines how enforcement priorities may vary across administrations but asserts that both Republican and Democratic enforcers will act when necessary to safeguard competition in Future Markets. It explains the Future Markets Model – a framework for analyzing these markets. The article also discusses the complexities of applying the model under ambiguous scenarios, such as nascent competition and roll-up strategies. The piece also addresses procedural challenges, including increased compliance burdens and the potential for ambiguity in interpreting the new requirements. It advocates for strategic planning by merging parties, suggesting that clear, well-prepared documentation and white papers can help demonstrate the procompetitive nature of transactions and avoid second requests. Ultimately, the article underscores the heightened attention regulators will pay to innovation-driven markets and urges parties to proactively align with the new rules to ensure regulatory clearance.

I. *ILLUMINA v. FTC* EMPOWERS ENFORCERS OF THE SECOND TRUMP ADMINISTRATION

The new Hart-Scott-Rodino ("HSR") rules[2] require firms to provide extensive information on, in particular, Future Markets, markets for products which do not exist yet.[3] In these rules, therefore, the enforcers are using the authority the Fifth Circuit gave them in *Illumina v. FTC*.[4] The title of a previous article in this journal explains exactly what the Fifth Circuit found in this case: *Illumina v. FTC: The Clayton Act Protects Competition in Future Markets*.[5] With the new HSR rules, the enforcers now require merging firms to provide the information the enforcers need so they can exercise the authority the Fifth Circuit gave them in *Illumina v. FTC* to protect competition in Future Markets.

Under the second Trump Administration, enforcers will continue to protect competition in Future Markets. Republican Administrations, including the first Trump Administration, have acted to protect competition in Future Markets. Even before the Fifth Circuit decided *Illumina v. FTC*, in many cases these enforcers would not approve the relevant transaction until the parties transferred one of their R&D projects to a third party. These enforcers acted to ensure that a sufficient number of companies were trying to make the relevant possible future products, and thus that the Future Market remained sufficiently competitive.

Further, the Fifth Circuit, in *Illumina v. FTC*, gave the enforcers the authority to protect competition in Future Markets. Indeed, the Fifth Circuit's decision in *Illumina v. FTC* is pivotal in antitrust jurisprudence, as it endorsed the FTC's use of the Brown Shoe "practical indicia" test to define relevant markets.[6] This broadened market definition includes not only existing products but also products firms are still developing. The court's holding is thus crucial for safeguarding competition in Future Markets. This holding also strengthens the ability of enforcers to address anticompetitive risks in nascent or developing sectors.

The Fifth Circuit is not known as a bastion of liberal activism. If the Fifth Circuit gave the enforcers this authority, then one should expect enforcers, whether working under a Democratic or Republican administration, to enforce the law and thus act, when they believe they must, to protect competition in Future Markets. And if enforcers working under Republican and Democratic administrations will protect competition in a Future Market, then it is appropriate for parties to give the enforcers the information they need to analyze such markets. Indeed, competition authorities in other jurisdictions, including the European Commission, require companies seeking approval of their mergers and similar transactions to provide information which will allow that authority to analyze competition in a Future Market.

While competition authorities across jurisdictions solicit information regarding Future Markets, their intervention policies vary considerably. Some authorities are more proactive in recognizing competitive issues in these emerging markets than others. During the Trump administration, regulators are expected to be less predisposed than their predecessors to intervene in Futures Markets. Nonetheless, they remain poised to act decisively when they consider it essential to safeguard competition.

II. THE NEW HSR RULES REQUIRE INFORMATION REGARDING FUTURE MARKETS

The new rules require merging companies to identify products which they are developing, and which could compete against each other in the future.[7] The new rules require parties to produce information regarding "known planned products or services include those that the acquiring person or target researches, develops…" This definition echoes the "research and development markets" which the 2017 Licensing Guidelines

2 Premerger Notification; Reporting and Waiting Period Requirements, Final Rule, 16 CFR Parts 801 and 803, (Oct. 10, 2024, https://www.ftc.gov/system/files/ftc_gov/pdf/p110014hsrfinalrule.pdf. (Final Rules)

3 For a definition and discussion of Future Markets and their antitrust implications, see Lawrence B. Landman, "Refining Future Potential Competition: The Doctrine Allowing Courts to Protect Innovation," GW Competition & Innovation Lab Working Paper Series, No 2024/24, https://competitionlab.gwu.edu/refining-future-potential-competition-doctrine-allowing-courts-protect-innovation (forthcoming, Antitrust Law Journal, 2025); Lawrence B. Landman, "The Future Markets Model: How Antitrust Authorities Really Regulate Innovation," 42 European Competition Law Review, 505-514 (2021).

4 *Illumina, Inc. v. FTC*, 88 F.4th 1036 (2023).

5 Lawrence B. Landman, Illumina v. FTC: The Clayton Act Protects Competition in Future Markets, CPI Antitrust Chronicle, Jan. 2024, Vol. 1(1), pp. 39-44.

6 *Illumina, Inc. v. FTC, supra* note 5, at 1048-55 (2023).

7 The "Overlap Description" section of the new form requires filers to "list and briefly describe each of the current or known planned products or services of the acquiring person that competes with (or could compete with) a current or known planned product or service of the target…"

claim to describe.[8] But such research and development markets are really Future Markets, markets for products[9] which do not exist yet.[10] The new rules confirm this by referring to "known planned *products*." Further the enforcers make clear in their Merger Guidelines that they protect competition in Future Markets.[11] And in *Illumina v. FTC* the Fifth Circuit held, for the first time, that the enforcers have the authority to protect competition in Future Markets. Thus, regarding Future Markets, in the new HSR guidelines the enforcers are simply using the authority *Illumina v. FTC* gave them. They are doing so extensively. The rules say this explicitly[12] and, for good measure, Commissioners Kahn, Bedoya and Slaughter repeat this.[13]

In their Merger Guidelines the enforcers also implicitly say that when they analyze Future Markets they apply the Future Markets Model.[14] This Model lays out, explicitly, the questions any competition authority must answer when it analyzes competition in a Future Market. The Model therefore helps filers decide what information to provide, and what to say, as they try to convince an enforcer that their transaction will not harm competition in a Future Market. This Model also makes clear the policy the enforcer is implementing when it decides whether or not to protect competition in a Future Market. It makes clear how willing the enforcer is to act to protect such competition even when it cannot know with certainty whether the products the parties to the transaction are trying to make will actually exist, or exactly what these products' features will be. It also clearly shows how many firms the enforcer believes must compete to make that Future Market competitive.[15]

Thus, both a Democratic and a Republican administration will collect information regarding Future Markets. They will do so to help them understand the competitive dynamics of that Future Market. And to understand these dynamics the enforcer will apply the Future Markets Model. This Model requires an enforcer to answer four questions:

***A**. Does a current product exist?*
***B**. How many firms are trying to develop a future product?*
***C**. For each possible future product, is it sufficiently developed that the authority will consider it a possible future product?*
***D.** 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?*

The new HSR form does ask both acquiring companies, and targets, to provide the information the enforcers need to answer these questions. It asks the filers to identify what it calls "overlapping known planned products," products which do not exist yet, but which will probably compete against each other in the future. While parties must identify these overlapping known planned products, they may limit this list to those possible future products which a document they produce identifies. These will be regularly prepared reports, and documents given to board members, which analyze competition. The enforcers seem to assume that if the parties are trying to develop products which may compete against each other in the future, then at least one party will mention any such possible future product in at least one of the documents it produces.

Parties, particularly sophisticated filers, will now know when they draft these documents that the enforcers will review them. They may therefore, not typically but in a situation on the edge, leave out information on a known planned product and thus hope that the enforcers do not learn of this possible future product. It is also possible, but even less likely, that a party would include information in a regularly prepared report, such as identifying additional competitors, so as to make the market seem as competitive as possible. Instead of adjusting a regularly prepared report, however, a party is far more likely to present this information to the enforcer either when, as is discussed *infra*, it is explaining its strategic rationale or in a white paper which it may choose to file.

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8 DOJ and FTC, *Antitrust Guidelines for the Licensing of Intellectual Property*, § 3.2.3 (2017) (2017 Licensing Guidelines).

9 As used in this article, "products" includes services.

10 Lawrence B. Landman, *Refining Future Potential Competition, supra* note 3). See also Lawrence B. Landman, *Protecting Competition to Innovate is Protecting Competition in Future Markets: Ten Law Review Articles Leave No Doubt*, 55 CPI Antitrust Chronicle 2(2) (Feb. 2023).

11 See *infra* note 15 and accompanying text.

12 See Final Rules, *supra* note 3, at 46-49, notes 112, 113, 117, and 126.

13 Statement of Chair Lina M. Khan Joined by Commissioner Rebecca Kelly Slaughter and Commissioner Alvaro M. Bedoya Regarding The Final Premerger Notification Form and the Hart-Scott-Rodino Rules Commission File No. P239300 and Regarding the FY2023 HSR Annual Report to Congress Commission File No. P859910, p. 3, notes 8, 9, and 10. (Oct. 10, 2024).

14 Lawrence B. Landman, *Refining Future Potential Competition, supra* note 4. See also Lawrence B. Landman, *The Revised US Merger Guidelines Adopt the Future Markets Model*, ProMarket (July 25, 2023). Even if the new administration were to revoke the Merger Guidelines, as some have speculated it might, such an action would, regarding use of the Future Markets Model, be irrelevant. Any person analyzing a Future Market must apply the Future Markets Model; it's a matter of logic, not choice.

15 See e.g. Lawrence B. Landman, *Nascent competition and transnational jurisdiction: the future markets model explains the authorities' actions*, 43 E.C.L.R. 294 (2022).

The enforcers are of course aware of these risks and have taken steps to mitigate them. First, as they prepare their filings parties may not exchange information regarding, among other things, Future Markets. Thus, if one filer were more sophisticated than the other then, perhaps, the less sophisticated filer will provide information which the other filer would rather the enforcers not have.

The new rules also require the parties to explain their transaction to the enforcers. They must do so in two ways. First, the rules require parties to not only list but also to "briefly describe" their overlapping products, including their overlapping known planned products. Second, the new rules also require each party to "explain *each* strategic rationale for the transaction." The parties must explain any strategic rationale "discussed or *contemplated* by any officer, director, or *employee*." This is very broad. While the parties will probably limit their explanations to strategic rationales which one of the documents they produce mentions, in some situations they may be required to explain other strategic rationales as well—after all, employees contemplate many things. And a strategic rationale, either mentioned in a document or otherwise, could very well relate to a Future Market. Further, when the parties explain *each* strategic rationale, they must cite the places in the various documents they produce which illustrate each strategic rationale.

When parties describe their transaction, they must therefore coordinate what they write in three documents: the business documents they are producing, their "brief description" of the overlapping known planned products, and their explanation of each strategic rationale. In their brief descriptions and their explanations of their strategic rationales, parties will not just describe, but advocate. They will explain why the relevant markets, including the relevant Future Markets, will remain competitive after the parties complete their transaction. Regarding Future Markets, the Future Markets Models shows how filers should structure their presentation so they clearly explain why their transaction will not harm competition in a Future Market.

The enforcers have also created a new online portal which in theory will make it easier for small companies, and individuals, to provide information. Of course these companies and individuals could under the old rules provide information, but are perhaps more likely to do so now. This may be particularly true of a small company which may fear that, due to the transaction, it will face a more dominant competitor. This small company may fear that it will be harmed by a transaction involving what many call nascent competition.

III. NASCENT COMPETITION AND ROLL-UPS

Nascent competition is competition in a Future Market between a large company and a smaller company. The nascent competitor is either not yet making the relevant product, or it has just begun to sell its product. The small company's product is typically better than the big company's product, and thus presents a future competitive threat. The firms are therefore competing in a Future Market, the market for the better version of the relevant product. When the enforcers say they have particular concerns regarding nascent competition, as they say they do when they explain their new rules,[16] they are in fact saying they will protect competition in Future Markets.

The new rules also reflect the enforcers' concerns with roll up acquisitions–multiple acquisitions by a single firm. The new rules require both the acquiring party, and the target, to disclose the acquisitions they have made within the past five years. A party need only identify a prior acquisition if the firm acquired in that prior transaction made a product which the party to the current transaction identified as an overlapping product. A party must also report a prior acquisition if it derived revenue in the same industry as that in which an overlapping product competes. Regarding Future Markets, including nascent competition, these rules may allow a party to avoid revealing a roll up strategy if the goal of that strategy is to dominate such markets. First, if the party to the current transaction derived skills or intellectual property from the firm it acquired previously such skills or intellectual property may not qualify as a "product" which competes with an "overlapping product."[17] It could certainly be unclear, and for this reason alone the party to the current transaction may not report it. Yet combining the skills or intellectual property of prior acquisitions with the skills or intellectual property of the parties to the current transaction could be an important part of the roll-up strategy.

Second, if the prior acquisition generated less than $10 million in revenues—or had assets of less than this amount—then the party need not report this acquisition. If the prior acquisition firm were only trying to develop a product, and thus competing in the Future Market, then that firm may very well have earned less than $10 million in revenues, indeed it may have earned no revenue. On the other hand, it may have assets of greater than $10 million. Determining the value of such a firm's assets will probably depend on how one values the prior acquisitions'

16 See Final Rules, *supra* note 3, at, e.g. 13.

17 The Final Rules explain that parties must report as prior acquisitions assets which helped produce products which competed with overlapping products. *Id.* at 350. The parties therefore, it would seem, do not need to report assets, including skills and intellectual property, which they may themselves be using but which did not help produce a product which competed with an overlapping product. On the other hand, perhaps, the relevant intellectual property is itself a product. Intellectual property is the product of a technology market. See 2017 Licensing Guidelines, *supra* note 9, § 3.2.2. Thus, in short, on this point the rules are unclear.

intellectual property. Yet the value of intellectual property is often unclear. A firm applying a roll-up strategy with the intent of dominating a future market may therefore not report some or all of its prior acquisitions.

The new HSR rules contain other ambiguities. For example, the new rules require the acquirer to list officers and directors responsible for, among other things, developing overlapping products, and who also serve as an officer or director of another firm in the same industry. But again, since the relevant products do not exist yet, it may not be clear what "industry" the products will compete in. Indeed, by one's definition, the industry may not even exist.

IV. DEFINING GOOD FAITH TO PROTECT FUTURE MARKETS

To deal with these and similar issues the enforcers say that when providing information regarding Future Markets the parties should act in good faith.[18] But even parties acting in good faith often not know what information they should supply. In particular the answers to the questions Prongs C and D of the Future Markets ask are often unclear. For example in *Illumina/Grail*, both the Fifth Circuit and the Administrative Law Judge gave different answers to the questions Prong C and D pose. Regarding Prong C, unlike the ALJ, the Fifth Circuit thought the early detection cancer tests were sufficiently developed; it therefore, unlike the ALJ, considered them possible future products. Similarly, regarding Prong D, the Fifth Circuit, again unlike the ALJ, thought the products were sufficiently similar that they would compete against each other in the future.[19] And if the Fifth Circuit and ALJ can answer the questions these prongs pose differently, then certainly parties completing an HSR form could, reasonably, answer these questions differently than would the FTC or DOJ.

Given the level of ambiguity regarding products which do not exist yet, the documents the parties draft during the regular course of business could, reasonably, describe known planned products, or research programs which could produce products, but, again reasonably, do so in a way which is so vague that parties cannot determine if these possible products will exist or will compete against each other in the future. In short, parties acting in good faith may reach a conclusion in this area with which the enforcers may disagree.

While the enforcers may provide additional guidance on these and similar issues, they will probably not be able to remove all ambiguities. First, in all contexts, not just antitrust, agencies have difficulty writing rules which encompass all possible scenarios. Second, the enforcers may be able to issue guidance to only a limited extent. The final rules clearly reflect a compromise, one which lead all five FTC commissioners to support the new rules. Given this compromise, the enforcers may hesitate to offer additional guidance which would be broad enough to cover all contingencies.

It is also possible that the incoming administration may change the rules. However, since Democratic and Republican commissioners compromised as they all approved the new rules, the new administration may hesitate to change the new rules. And even if it did change the rules, it would probably not do so extensively; after approximately 50 years the HSR rules do need to be updated to reflect the modern economy. Since they are seeking to protect competition in this modern innovation-driven economy, when reviewing transactions the enforcers do need to know, among other things, what products the parties are trying to make, and which thus may compete against each other in the future.

V. RESOLVING AMBIGUITIES BY SEEKING ADDITIONAL INFORMATION

Rather than try to remove all possible ambiguities from the rules, the enforcers, if they see possible competitive concerns in a Future Market, may simply ask for additional information. And since acquirers and targets may not coordinate their responses as they complete the new HSR form, they may describe the transaction differently. One party's description may, by itself, highlight a possible competitive problem in a Future Market which would lead the enforcer to ask for more information. This is particularly likely because the enforcer will, these days, probably be paying close attention to Future Markets, and will thus be inclined to quickly ask for additional information.

From the merging companies' perspective, are the new HSR rules an improvement? Clearly the new rules will increase the time and cost of obtaining clearance (assuming that occurs). Regarding Future Markets specifically, it is inevitable that the enforcers will pay closer attention to these markets. Protecting competition in Future Markets is, as a practical matter, the way the enforcers protect competition to innovate.[20] And

18 Final Rules, *supra* note 3, at 280.

19 Lawrence B. Landman, *Refining Future Potential Competition, supra* note 4.

20 See e.g. Lawrence B. Landman, *Protecting Competition to Innovate is Protecting Competition in Future Markets: Ten Law Review Articles Leave No Doubt, supra* note 11.

since promoting innovation is the most important goal of antitrust law,[21] the enforcers surely will, when they believe they must, act to protect competition in a Future Market.

Parties should take advantage of the opportunity the new HSR rules give them to provide the information which shows that their transaction does not harm competition, including competition in a Future Market. They should certainly draft their product descriptions and strategic rationales in a way which shows that their transaction is procompetitive.

Parties may also consider drafting a white paper. The new rules will require attorneys to learn more about a deal earlier than they did under the old rules. The attorneys will need to understand the deal so they can, among other things, draft those brief descriptions and strategic rationales. And since when complying with the new rules attorneys will be more knowledgeable earlier in the process, attorneys working under the new rules may be more inclined to draft a white paper. This white paper could, for example, show that third parties not mentioned in the documents the party produced are also trying to make possible future products.

This white paper could also show that the features of the products these third parties are trying to make will probably be sufficiently similar to those of the products the parties to the transaction are trying to make that after the deal closes the Future Market will remain competitive.[22] In other words, in its white paper, the parties could explain why the enforcer should answer the questions the Future Markets Model poses, particularly the questions Prongs C and D pose, in a way which leads the enforcer to conclude that their transaction will not harm competition in Future Market. The parties may even be able to do this in a way which allows them to avoid a second request. If it does turns out that the new rules allow some parties to avoid a second request, then the new HSR rules will have turned out to be, at least for those parties, an improvement over the old HSR rules.

In conclusion, parties should expect the enforcers to pay close attention to Future Markets. Parties should therefore use the opportunity the new rules give them to explain why their transaction will not harm competition in such markets. To be sure, parties should expect the enforcers to use the power the Fifth Circuit, in *Illumina v. FTC*, gave them, and should, accordingly, be prepared to explain why their transaction will not harm competition in a Future Market.

21 Phillip E. Areeda and Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application*; Section 704d, Monopolistic restraints on innovation (2017); Aurelien Portuese, "Why Competition? Innovation" in Daniel Crane, Damien Gerard, Randolph Tritell (Eds.), *Why Competition? Voices From the Antitrust Community and Beyond*, (Concurrences Book, Paris: 2024), pp.445-458.

22 Regarding how many firms must compete in a Future Market to make that market competitive, see Lawrence B. Landman, *Refining Future Potential Competition, supra* note. 4.

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