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The Competition Bureau Canada Protects Competition in Future Markets, not Innovation Spaces

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The Competition Bureau Canada Protects Competition in Future Markets, not Innovation Spaces

Canada Should Follow the American, not the European, Merger Guidelines

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A response to the Bureau's proposed new Merger Enforcement Guidelines

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Abstract

The Competition Bureau Canada says that, when it protects competition to innovate, it may be able to do more than protect competition in Future Markets. It says that it may be able to protect competition in what the European Commission calls an Innovation Space. The Bureau says this in its discussion paper, in which it explains its initial thoughts, and to which it asks others to respond as it considers issuing new merger enforcement guidelines.

Responding to this discussion paper, Lawrence B. Landman shows that the Canadian Bureau, like all competition authorities, can do no more than protect competition in Future Markets. Landman analyzes the three Canadian cases in which the Bureau implied that it may have found an Innovation Space, or done something other than protect competition in a Future Market. Landman shows that in these cases the Bureau's analyses focused on current markets, markets for currently existing products. It also to a limited extent analyzed competition in Future Markets. But it did no more than that. It certainly did not protect competition in an Innovation Space.

In sum, Landman says the Canadian guidelines should follow the American guidelines and acknowledge that when authorities protect competition to innovate they protect competition in Future Markets.

Contents

I. All Authorities Protect Competition in Future Markets

I write in response to Competition Bureau Canada's request for comments regarding its proposed new merger guidelines. I write in particular in response to § 2.9, entitled "Innovation and dynamic competition," of the Bureau's discussion paper, the document in which the Bureau explains its preliminary thoughts on these matters.[1]

I have written extensively on how the American, European, and British competition authorities protect dynamic competition, or, as it is sometimes called, competition to innovate. I have shown that all these authorities protect dynamic competition by protecting competition in Future Markets, markets for products[2] at least some of which do not exist yet.[3]

All these authorities have, at times, claimed that rather than protect competition in Future Markets they have protected competition in what they have called, among other things, innovation markets; research and development markets; R&D market; research, development and commercialization markets; and innovation spaces. Yet my writing has shown that in all these cases, while the relevant authority claimed otherwise, it actually protected competition in a Future Market.

The American authorities now acknowledge in their new Merger Guidelines[4] that what I have been saying all along is correct: the American authorities, like all authorities, protect competition in Future Markets. Indeed, in their guidelines the American authorities acknowledge that they apply the Future Markets Model, the four step analytical framework which, as I have shown, any competition authority must apply when analyzing competition in a Future Market.[5] Further, the American authorities reconfirmed this in their new Hart-Scott-Rodino rules. In these new rules they say they will

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[1] Reviewing the Merger Enforcement Guidelines, dated November 7, 2024 (Reviewing the Merger Enforcement Guidelines).

[2] "Products" also includes services.

[3] See e.g. 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), and Lawrence B. Landman, The Revised US Merger Guidelines Adopt the Future Markets Model, ProMarket (July 25, 2023).

[4] Department of Justice and Federal Trade Commission, Merger Guidelines, (Dec. 18, 2023) (Merger Guidelines).

[5] See e.g. Lawrence B. Landman, The Future Markets Model: How Antitrust Authorities Really Regulate Innovation, 42 European Competition Law Review, 505-514 (2021).

protect competition in markets for what they call "known planned *products*" [Emphasis Supplied].[6]

Even if the incoming administration were to repeal these new guidelines, as some suspect it may, this will not change the reality that competition authorities protect competition in Future Markets. It is just a matter of logic. And if the new administration continues to claim that it will protect competition in markets for "known planned products" then it will continue to acknowledge that it protects competition in Future Markets.

Yet in its § 2.9 of its discussion paper "Reviewing the merger enforcement guidelines" the Competition Bureau implicitly rejects this analysis. First, regarding the American merger guidelines, the Bureau focuses too narrowly on just one paragraph of what is, regarding dynamic competition, the crucial section of the American guidelines, § 4.2.E. In its footnote 71 the Bureau quotes the fourth paragraph of this section of the American guidelines. But the Bureau quotes only this fourth paragraph. Yet, as I have shown, § 4.2.E in its entirety shows that the American authorities not only acknowledge that they protect competition in Future Markets, but also that they apply the Future Markets Model.[7]

Second, as I have also shown, this fourth paragraph expects competition authorities to be able to evaluate a firm's capabilities, which they are not able to do. Indeed, firms themselves have difficulty assessing their own capabilities, and sometimes fail to make the products they are trying to make. In sum, if a firm is in the process of trying to make a product then a competition authority cannot conclude that the firm is incapable, and thus will fail to make the product.[8]

It seems that the Bureau is focusing on this fourth paragraph because it is looking for support for its belief that a competition authority can do more than "merely" protect competition in a Future Market. Yet this belief is on the one hand wrong, but on the other hand it is not as simply as the Bureau may believe. When a competition authority protects competition in Future Market it does more than "merely" protect competition in that market.

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[6] Lawrence B. Landman & Aurelien Portuese, "New Powers, New HSR Rules: The Illumina Ripple Effect," CPI Antitrust Chronicle, Dec. 2024, Vol. 2, pp. 62-67.
[7] See, e.g. supra nt. 3.
[8] Lawrence B. Landman, The Future Markets Model: how the competition authorities really regulate innovation, supra nt. 5, at 507 and 513.

As I explain in greater detail *infra,*[9] a competition authority can apply the Future Markets Model more or less aggressively. It therefore can choose to act aggressively, or not aggressively, when it decides if it will act to protect competition in a Future Market. An authority can never know, with 100% certainty, either what products will exist, or what the features of these possible future products will be, and thus which products will compete against each other in the future. The authority therefore has discretion to decide when to act. It must therefore make a policy choice. And making this policy choice will, in many cases, not be as simply as many may believe.

Yet that is all a competition authority can do, protect competition in a Future Market. The Bureau implies, however, that it, like the European Commission and the United Kingdom's Competition and Markets Authority (CMA), can do more. In truth, not only can the Bureau only protect competition in a Future Market, but so can the CMA and European Commission also do no more.

II. European Commission Protects Competition in Future Markets

Regarding the European Commission, the Bureau implies that it can protect competition in an Innovation Space, as the European Commission claims it can. The Bureau implies that it can protect competition in an Innovation Space because it accepts the European Commission's claim that it, the Commission, can protect competition in an Innovation Space. The European Commission has made this claim, most prominently, in its analysis of Dow's merger with DuPont.[10] The Bureau seems to accept this claim when, in § 2.9 of its discussion paper it cites approvingly the European Commission's claim, in paragraph 92 of the Commission's Market Definition Notice,[11] that the Commission can "*defin[e] the boundaries within which innovation competition takes place.*" And in this paragraph 92 of its Market Definition Notice the European Commission cites as support for its claim that it can define these "boundaries within which competition takes place," the section of the European Commission's decision in *Dow/DuPont* in which the Commission claims it can protect competition in an Innovation Space.[12]

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[9] See infra, Section IV CMA Protects Competition in Future Markets

[10] Commission Decision of 27.3.2017 declaring a concentration to be compatible with the internal market and the EEA Agreement (Case M.7932—Dow/DuPont).

[11] European Commission, Commission Notice on the definition of the relevant market for the purposes of Union competition law, Feb. 8, 2024 (Market Definition Notice).

[12] Id., para. 92 nt. 126.

Yet I have analyzed the European Commission's *Dow/DuPont* decision in depth. I have shown that despite what the Commission says in reality in that case it did not protect competition in an Innovation Space. In that case it only protected competition in a Future Market.[13]

III. Competition Bureau Canada Protects Competition in Future Markets

Further, the Bureau also implies that in its own analysis of the Dow and DuPont merger[14] it did more than merely protect competition in a Future Market. The Bureau cites this case as one of three in which "innovation rivalry was a major concern."[15] Yet close analysis of these three cases shows that in all these cases the Bureau actually focused its analysis on current markets, markets for currently existing products. Only in *Dow/DuPont* did the Bureau even consider Future Markets. And in this case it did so only regarding one possible Future Market and, regarding just this one possible Future Market, only incidentally; its focus in this case was on the relevant current markets. In none of these cases did the Bureau do anything even remotely close to protecting competition in anything other than a current market or a Future Market. It most certainly did not protect competition in what the European Commission calls an Innovation Space.

1. Dow/DuPont: Competition Bureau Focuses on Current Markets

In *Dow/DuPont*, even as the Competition Bureau began its analysis it implicitly said it would analyze competition in Future Markets. First, it said it would analyze how Dow's and DuPont's "innovation efforts would yield commercialized products." It thus recognized that the firms' "innovation efforts" were their efforts to develop new products. The Competition Bureau thus implicitly said that it would analyze the markets for the new products the firms would sell in the future.

And at the beginning of its analysis the Competition Bureau also referred to "the pace of technological change in the relevant

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[13] Lawrence B. Landman, From Innovation Markets to Innovation Spaces in Europe: a new phrase, is not innovation, 42 European Competition Law Review 30 (2021).

[14] Competition Bureau Canada, Position Statement, Merger between Dow and DuPont, https://competition-bureau.canada.ca/how-we-foster-competition/education-and-outreach/position-statements/merger-between-dow-and-dupont

[15] See Reviewing the Merger Enforcement Guidelines, nt. 67.

markets." It thus again implicitly said it would focus its analysis on Future Markets. The "the relevant markets," to which it refers in this passage, are, at the time it wrote this passage, the markets for the currently existing products, the products the firms were currently selling.

The Competition Bureau then said it would analyze how these markets were changing; and the markets were changing because the parties were trying to develop new, better, innovative, products. The Competition Bureau thus implicitly again said it would focus its analysis of the products the firms where developing, and which they hoped to sell in the future. It implicitly said it would try to determine what products the firms would sell in the future, and would try to determine if these products would, in the future, compete against each other. In other words, it would analyze competition in Future Markets. And although in this case the Bureau focused its analysis on current markets, it did, to at limited extent, also analyze competition in Future Markets.

After saying this the Competition Bureau, again at the beginning of its analysis, identified several products both Dow and DuPont made, and which competed against each other. In following sections of its position statement the Bureau analyzed three of these markets; it explained that each of these markets was already concentrated, and thus that the merger would improperly harm competition in these market. I analyze the Bureau's discussion of these markets *infra.*

In only one of these markets did the Bureau even claim that the parties were trying to make better versions of the currently existing products. The Bureau thus showed that regarding this one market, cereal broadleaf herbicides, the parties were trying to make better products which, were it not for the merger, may have competed against each other in the future. Thus, the Bureau showed, regarding this one market the transaction may also have harmed competition in a Future Market.

Most importantly, the Bureau never explained what an Innovation Space is, and it never claimed that in this case it found an Innovation Space, or anything close to it.

A. Cereal Broadleaf Herbicides

Cereal broadleaf herbicides, the Bureau makes very clear, are currently existing products. They are herbicides which kill the broadleaf weed without killing cereal crops. Since broadleaf weeds tend to grow in the same places these cereal crops grow,

these herbicide's ability to kill broadleaf weeds while not killing cereal crops is an important feature of these products.

The current market is concentrated: only three firms sell such herbicides in Canada. And since Dow and DuPont were two of these three competitors, naturally the Bureau saw competition concerns—in this current market.

Dow and DuPont also, the Bureau said, had "innovation efforts directed at expanding and enhancing their respective cereal broadleaf herbicide portfolios." These companies were thus trying to make new and better broadleaf herbicides. They were thus trying to make new and better versions of the currently existing product. As the Bureau said, this is an additional reason to protect competition in this market.[16]

Nevertheless, the Bureau's analysis focused on the current market. It wanted to ensure that the current market, the market for the versions of the broadleaf herbicides which the parties already sold, remained competitive. In addition, it also wanted to ensure that the Future Market, the market for better versions of these currently existing products, also remained competitive.

And, to repeat, the Bureau neither found an Innovation Space or claimed that it did.

B. Cereal Pre-seed Burn-off Additives

When the Bureau analyzed this market it, again, analyzed a current market, a market for currently existing products. Before farmers plant seeds they spread their fields with a herbicide which kills the weeds which have grown since the last harvest. They call this a "burn-off." When doing this farmers sometimes also use a second herbicide, which is known as an additive. Thus the second market the Bureau analyzed while reviewing this merger was that for pre-seed burn off additives.

This is, again, a current market. These additives exist. Regarding this market, the Bureau did not even claim that Dow or DuPont were trying to make better products. It also did not say how many firms competed in this market. It merely said that the transactions would improperly lower competition in this market. In fact it said that the

[16] In fact, whenever any competition authority protects competition in any market it does so, among other reasons, to protect the competitive forces which drive firms to innovate. See infra nt. 17 and related text.

transaction would lead to higher prices. It did not even claim the transaction would harm innovation.

And again, regarding this market the Bureau did not claim that it was protecting competition in what the European Commission calls an Innovation Space. And it most certainly did not.

C Acid Copolymers and Ionomers

Acid copolymers and ionomers, the Bureau said, are two types of plastics which plastic manufacturers use to give their plastics desirable features, such as making them glossy or sticky. Dow and DuPont both currently sell acid copolymers and ionomers. Thus when it acted to protect competition in the markets for these two products the Bureau acted to protect competition in two current markets.

Not only do Dow and DuPont both currently sell these products, but, the Bureau said, they are the only two companies selling these products in North America. Obviously the merger would harm competition in these markets, and obviously the Bureau correctly acted to protect competition in these markets. But when the Bureau did this it, again, acted to protect competition in current markets.

The Bureau never said the parties competed to make better versions of these products. Thus, regarding these two products, the Bureau did not say it was acting to protect competition to innovate, or competition in a Future Market.

Most importantly, regarding these two markets the Bureau, once again, did not claim it found what the European Commission calls an Innovation Space. Nor did it say in protected competition in any Innovation Space.

2. Bayer/Monsanto: Competition Bureau Focuses on Current Markets

Just as it did in *Dow/DuPont*, in *Bayer/Monsanto* as well the Bureau focused its analysis on current markets, markets for currently existing products. In this case the Bureau only explained its analysis of one market, that for technology to make canola seeds resistant to certain herbicides.

A Hebicide Resistant Canola Seeds

Canadian farmers grow more canola any other crop. Manufacturers genetically modify canola seeds so the seeds resist certain herbicides. Farmers can thus spread this herbicide in their fields knowing the herbicide will not harm their canola crops.

Three varieties of canola seeds are sold in Canada, and each is genetically modified to resist a different herbicide. Bayer leads this market: 55% of seeds sold in Canada are resistant to its herbicide. Monsanto is second: 40% of the seeds sold in this market are resistant to its herbicide. And BASF trails: only 5% of the seeds sold in Canada are resistant to its herbicide.

The Bureau, not surprisingly, would not allow Bayer and Monsanto to combine, and thus essentially monopolize this market for technology which allows canola seeds to resist a certain herbicide. The Bureau reasonably feared the combination would harm competition in the current market, that for the currently existing technology to make canola seeds resistant to a certain herbicide.

But the Bureau also said in feared that the combination would harm what it called "innovation rivalry," which is competition for technology to make better herbicide-resistant seeds. Yet, as I have said many times before, whenever any competition authority protects competition in any market it does it so, among other reasons, to protect the competitive forces which drive firms to make better versions of currently existing products. All competition authorities act to protect competition in markets not just to lower prices, but also to drive firms to innovate. [17]

Thus in this market the Bureau did nothing new. It did nothing it does not do whenever it protects competition in any market. And it most certainly did not, and did claim to, protect competition in an Innovation Space.

3. Thoma Bravo/Aucerna: Competition Bureau Focuses on Current Markets

A Reserves Software

Thoma Bravo is a private equity firm which, prior to the transaction, had in its portfolio a company which made MOSAIC Reserves

[17] See Lawrence B. Landman, The Economics of Future Goods Markets, 21 World Competition: Law and Economics Review 63 (1998).

Software. Thoma Bravo then sought to acquire Aucerna, the only other company selling reserves software. Reserves software is software which helps oil and gas companies determine the value of their reserves. As the Bureau recognized, the transaction action would thus give Thoma Bravo a monopoly in the market for reserves software. And the Bureau, of course, could not allow a merger to monopoly.

The Bureau said that if it allowed this transaction to proceed then in this market would lose both the "the price and non-price benefits of competition." The price benefit of competition is, obviously, lower prices. The non-price benefit of competition is, equally obviously, the pressure competition creates which drives firms to improve the products they offer. But, as I just showed, whenever any competition authority acts to protect competition in any market it does so, among other reasons, to protect the competitive forces which drive firms to make better products.

Thus, in this market the Bureau, again, acted reasonably but did nothing new. It would not allow a merger to monopoly. It acted to preserve the competitive pressure which drives firms to innovate. It did not, and did not claim to, protect competition in an Innovation Space.

IV. CMA Protects Competition in Future Markets

The Competition Bureau's discussion paper also cites § 5.21 of the CMA's Merger Assessment Guidelines. According to this section the British competition authority may assess:

> a broader pattern of dynamic competition in which the specific overlaps may not be identified *easily* at the point in time of the CMA's assessment [Emphasis Supplied].[18]

But all this section says is that the CMA may, at times, not be able to *easily* define a Future Market. This is true. In fact, in many cases not just the CMA but all competition authorities cannot easily define a Future Market. They cannot do so easily because, in many cases, they cannot *easily* answer, in particular, the questions prongs C and D of the Future Markets Model pose.

[18] Competition and Markets Authority, Merger Assessment Guidelines (March, 18 2021), § 5.21.

Whenever any competition authority analyzes a Future Market it must, as a matter of logic, answer the questions the Future Markets Model poses.[19] The Model requires any authority, indeed any party, to answer the questions its four prongs pose:

> 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?

Since no competition authority can predict the future, all competition authorities will, at times, not be able to easily answer these questions, in particular the questions prongs C and D pose. It therefore must adopt a policy; it must decide how aggressive it will act in the face of uncertainty, and thus how quick it will be to block a transaction which may cause anticompetitive harm in a Future Market.

But whether the authority decides to act or not, when it analyzes the Future Market it must answer the questions the Future Markets Model poses. Again, it is a matter of logic.[20] For example, in the passage the CMA quotes above the "specific overlap" to which the section refers would be the possible future product both parties are trying to make. The authority would first have to identify one "specific" product both firms are trying to making; it would then, second, determine if there were an "overlap" between these specific products. In other words, the authority would have to decide if these specific products, which both parties were trying to make, would, if they came to exist, compete against each other in the future. This is just a more confusing way of saying the authority would have to answer the questions prongs C and D of the Future Markets Model pose.

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[19] See supra nt. 3: see also Lawrence B. Landman, Nascent competition and transnational jurisdiction: the future markets model explains the authorities' actions, 43 E.C.L.R. 294 (2022), which applies the Future Markets Model to numerous American, European Commission, and CMA cases.

[20] See supra nt. 3.

And indeed, at times a competition authority will have difficulty answering these questions. Since a possible future product will almost by definition only be partially developed the authority will, in many cases, have difficulty deciding if the product is sufficiently developed that it will consider it a "product." In other words, the authority may have difficulty answering the question prong C poses.

And the competition authority may also have difficulty determining if the relevant possible future products will compete against each other in the future. Since the products are still in development the authority, indeed even the manufacturers, may not know what features these possible future products will have, and thus if they will compete against in the future. In other words, the authority will have difficulty answering the questions prong D poses.

The section to which the Canadian position statement refers, § 5.21 of the UK's Merger Assessment Guidelines, cites only one case. This case, which is from 2014, does not at all show that the CMA can do anything other than protect competition in a current market or Future Market. In *Pure Gym/The Gym*,[21] the relevant product was low-cost gyms. The CMA feared that the merger of the two largest chains of low-cost gyms in the UK would, among other things, stop the chains from expanding into cities in which only one of the chains competed. In other words, the CMA feared, the merged firm would dominate a number of local markets. This fear may well have been justified, but this case does not involve true innovation. If the chains did open new low-cost gyms these new gym would be comparable to the gyms the firms already operated. The case therefore does not support the claims of § 5.21. It certainly does not show that the CMA can protect competition to innovate in any way other than protecting competition in Future Markets.

Thus, to conclude, any competition authority analyzing a Future Market must, implicitly or explicitly, apply the Future Markets Model. It must identify possible future products, and it must decide how likely it is that these possible products will compete against each other in the future. It will be trying to identify the "specific overlap," to use the CMA's term. And it will be analyzing competition in a Future Market. It will not be finding, or protecting competition in, an Innovation Space.

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[21] CMA, Anticipated combination of Pure Gym Limited and The Gym Limited (Sept. 11, 2014)
https://assets.publishing.service.gov.uk/media/5411599fed915d12db00000b/Pure_Gym-The_Gym-full_text_decision.pdf