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Future Markets Model is the Administrable Framework for Protecting Innovation

European Commission Consultation

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Future Markets Model is The Administrable Framework for Protecting Innovation[1]

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[1] Regarding Topic C: *Innovation and other dynamic elements in merger control* of the European Commission's consultation relating to its review of its merger guidelines

I. Guide Through Fifteen Articles

From the cases the Commission has actually decided I have derived the administrable framework the Commission seeks. The Commission seeks this framework so it can determine when it should act to protect competition to innovate. The Commission's search for this administrable framework is the central theme of its "Focus Paper" regarding "Topic C: Innovation and other dynamic elements in merger control." I will refer to this as the Focus Paper.

In Fifteen law review articles I have explained this administrable framework, the Future Markets Model. In this Statement I guide the Commission through these articles. The Statement shows how each article, or section of an article, analyzes a relevant issue the Commission raises in its Focus Paper. I analyze the issues the Commission raises which relate to its underlying theme, its search for this administrable framework. I invite the Commission to read the appropriate article or section, including my other articles that article or section cites.

II. Introduction: Future Markets Model Provides the Administrable Framework

In paragraph 51 of its Focus Paper the Commission says:

> The effects of mergers on innovation are often more difficult to predict than effects on price and thus the challenge is to further develop a *sufficiently accurate yet administrable framework* for assessing dynamic merger effects on innovation [Emphasis supplied].

The Future Markets Model provides the sufficiently accurate yet administrable framework the Commission seeks. It does so while recognizing that the effects of mergers on innovation are indeed difficult to predict.[2]

I derived the Future Markets Model from the cases both the Commission, and its American counterparts,[3] have decided. I derived this Model from the cases these authorities have decided over the past 30 years.[4] This is therefore the framework the Commission actually administers when it protects competition to innovate. In fact, it is the framework the Commission has been administering for the last three decades.[5]

A. Future Markets Model

The Future Markets Model recognizes that whenever any competition authority seeks to protect competition to innovate it protects competition in Future Markets, markets for products which do not exist yet. The Future Markets Model lays out, explicitly, the criteria competition authorities, implicitly, always use then they define a Future Market. The Future Markets Model asks a competition authority to answer the questions posed by each of its four prongs:[6]

> 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

[2] *See* Lawrence B. Landman, *The Future Markets Model: how the competition authorities really regulate innovation*, 42 E.C.L.R. 505 (2022).
[3] *See* Lawrence B. Landman, *Did Congress Actually Create Innovation Markets?,* 13 Berkeley Tech. L.J. 721 (1998).
[4] *See* Lawrence B. Landman, *Innovation and The Structure of Competition,* 84 J. Pat. Off. Soc. Part I, September, 728-740, Part II, October, 789-802, and Part III, November, 838-881 (1999); and Lawrence B. Landman, *Nascent competition and transnational jurisdiction: the future markets model explains the authorities' actions,* 43 E.C.L.R. 294 (2022).
[5] *See* Lawrence B. Landman, *Innovation Markets in Europe,* 19 E.C.L.R. 21 (1998).
[6] Landman, *The Future Markets Model, supra* nt. 2.

which are similar, but not identical, as future competing products?

B. Analyze all appropriate variables within the Future Market

After the Commission defines the Future Market, it must than analyze the market.[7] As I explain in greater detail in Section IV *infra*, the Commission, to comply with the standard of proof the Court of Justice established in *Commission v CK Telecoms*, must present a "sufficiently cogent and consistent body of evidence" which shows "that it is more likely than not" that it must act so as to prevent a significant impediment to effective competition.[8] And in *Dow/DuPont* the Commission said it applied analysis which "does not constitute [a] simple speculative exercise."[9]

As I show in Section IV *infra*, the Commission satisfies these standards (which are really one standard) by analyzing all the appropriate variables in the Future Market. After analyzing all these variables the Commission can present "a sufficiently cogent and consistent body of evidence" which shows whether "it is more likely than not" that the relevant transaction will cause a significant impediment to effective competition in the Future Market.

III. When the Commission Claims it Finds an Innovation Space it Actually Finds a Future Market

In paragraph 54 of its Focus Paper the Commission describes what it claims is the methodology it uses to protect competition to innovate. Although the Focus Paper does not say so, this is the methodology the Commission claims it uses to find, and protect competition in, an Innovation Space.

I have written an article showing explicitly that this methodology does no more than allow the Commission to find, and protect competition in, a Future Market. https://www.promarket.org/2023/07/13/the-european-commission-finds-not-innovation-spaces-but-future-markets/

[7] Lawrence B. Landman, *Refining Future Potential Competition: The Doctrine Allowing Courts to Protect Innovation*, 87 Antitrust Law Journal 1 (2025).
[8] Judgment of July 13, 2023, *Commission v CK Telecoms*, C-376/20 P, EU:C:2023:561, ¶ 87
[9] Case M.7932—Dow/Dupont, Comm'n Decision, ¶ 2036 (Mar. 27, 2017).

Further, I have written two law review articles which show, in detail, the whenever the Commission claims it protects competition in an Innovation Space it actually does no more than protect competition in a Future Market. *See* Lawrence B. Landman, *From Innovation Markets to Innovation Spaces in Europe: A New Phrase is Not Innovation*, 42 European. Competition L. Rev. 30 (2021) and Lawrence B. Landman, *The Economics of Innovation Spaces*, 48 World Competition: Law and Economics Review 195 (2025).

In sum, whenever the Commission tries to define and analyze an Innovation Space it identifies specific products the relevant firms are trying to make. It then determines if the transaction will improperly harm competition in the market to develop these products. If, after the transaction, and insufficient number of firms would be competing to develop these possible future products, then the Commission, in the relevant cases, has blocked the transaction. In other words, in the relevant cases, the Commission has acted to protect competition in a Future Market.[10]

IV. To Apply Nonspeculative Analysis the Commission Must Consider all Appropriate Variables

A. Commission must apply nonspeculative analysis

In paragraph 61 of its Focus Paper, and again in Questions C.15 and C.16, the Commission essentially asks how sure it must be of its conclusions before it may act to protect competition in a Future Market. Relatedly, the Commission asks how far in the future it may try to anticipate market developments.

In paragraph 61 the Commission asks how it can protect competition to innovate while still complying with the standard of proof the Court of Justice established in *Commission v CK Telecoms.*[11] The Commission asks when it may act while still complying with the standard this case established: that the Commission may act only if it has concluded that the relevant future events are "more likely than not" to occur.

[10] In fact, at one time the Commission itself not only acknowledged that it protected competition in Future Markets, but it used this is exact term. *See* Landman, *Innovation Markets in Europe, supra* nt. 5.

[11] *Commission v CK Telecoms*, *supra* nt. 8.

A longer quote from the paragraph from which the Commission took this "more likely than not" standard is more revealing:

> [I]n order to declare that a concentration is incompatible or compatible with the internal market, it is sufficient for the Commission to demonstrate, by means of *a sufficiently cogent and consistent body of evidence*, *that it is more likely than not* that the concentration concerned would or would not significantly impede effective competition in the internal market or in a substantial part of it. [Emphasis Supplied][12]

Thus the court really said that the Commission must present "a sufficiently cogent and consistent body of evidence" which shows that "it is more likely than not" that the relevant transaction will cause a significant impediment to effective competition. Regarding Future Markets this significant impediment to effective competition would be a significant impediment to effective competition in the Future Market.

This is consistent with the standard the Commission already applies when it acts to protect competition in Future Markets. In *Dow/DuPont* the Commission said that its conclusion that it needed to act to protect competition in that case "does not constitute [a] simple speculative exercise."[13] Thus the Commission said in *Dow/DuPont* that its conclusion that it must act was more than mere speculation.

And if the analysis were more than mere speculation then the Commission presented "a sufficiently cogent and consistent body of evidence" which shows that "it is more likely than not" that the relevant transaction will cause a significant impediment to effective competition in the Future Market. Thus these two standards are essentially the same.

In the United States, the Court of Appeal for the Fifth Circuit has established what is, in essence, the same standard. In *FTC v. Illumina*[14] when holding, for the first time, that the Clayton Act gave the American enforcers the authority to protect competition

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[12] *Id.* at ¶ 87.
[13] *See supra* nt. 9.
[14] Illumina, Inc. v. FTC, 88 F.4th 1036 (5th Cir. 2023).

in Future Markets, the court said that an American enforcer may act so long as its conclusion that it must protect competition in a Future Market is not "too speculative."[15]

Thus the Europeans and Americans have established essentially the same standard: the authority's conclusion that it must act to protect competition in the Future Market must be more than speculative. And the authorities on both sides of the Atlantic reached this same conclusion because, in the context of Future Markets, this standard makes sense.

B. To apply nonspeculative analysis the Commission must balance all appropriate variables

Thus the key question is: How can the Commission determine when its conclusion that it must act to protect competition in a Future Market is more than speculative?

The answer is that the Commission must first define a Future Market, and must then balance all appropriate variables as it analyzes the Future Market. If, after balancing all appropriate variables, it concludes that it must act to protect competition in a Future Market then the Commission's analysis, most probably, would be more than speculative.

In the American context I have explained that the enforcers must balance all appropriate variables when they analyze a Future Market. I have explained that they must do this when they apply the new legal doctrine I say American courts must develop to allow the enforcers to protect competition in Future Markets. I call this doctrine Future Potential Competition, and I have explained it extensively.[16]

The Europe Commission must apply this same analysis. It too must balance all appropriate variables when it analyzes a Future Market. This would allow the Commission to present, in the right case, a "sufficiently cogent and consistent body of evidence" which shows "that it is more likely than not" that it must act to prevent a significant impediment to effective competition in the relevant Future Market. Doing so would also allow the Commission to show that it applied analysis which "does not constitute [a] simple speculative exercise."

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[15] *Id.* at 1050.

[16] *See* Lawrence B. Landman, *Competition to Innovate and Future Potential Competition,* 103 J. Pat. & Trademark Off. Soc'y 177 (2023) and Landman, *Refining Future Potential Competition*, *supra* nt. 7.

For example, the Commission may conclude "that it is more likely than not" that a Future Market would become concentrated if the only two firms trying to make the same possible future product merged. But if seven firms were trying to make the same possible future product, and two sought to merge, then, after the merger, six firms would still be trying to make the possible future product. The Commission may conclude that with six firms still competing in the market it was not "more likely than not" that the merger would cause a significant impediment to effective competition in the relevant Future Market.

C. Determine policies: How aggressive to apply Model? and How many firms must compete in the Future Market?

Even when applying analysis which is more than speculative the Commission still has a great deal of discretion. First, it could apply the Future Markets Model aggressively, or not aggressively. Second, and relatedly, it must determine how many firms, it believes, must compete in a Future Market to make that market competitive.

The Commission must first decide how aggressively it will apply the Future Markets Model. In other words, the Commission must decide how quick it will be to find a competitive problem in a Future Market. Since the Commission can only try to anticipate what may happen in the future, and cannot know for sure what will happen, it will face situations on the edge. To help it decide these difficult issues the Commission must adopt a policy, and must let this policy guide it as resolves these difficult issues.[17]

Relatedly, the Commission must decide how many firms it believes must compete in a Future Market to make that market competitive. As I have explained, the American merger guidelines[18] could be interpreted as requiring that at least four firms, and possibly as many as seven firms, compete in a Future Market to make that market competitive.[19]

In paragraph 52, note 34, the Commission extensively quotes the Draghi Report.[20] As the Commission notes:

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[17] Landman, *Refining Future Potential Competition, supra* nt. 7, at 29-31.
[18] U.S. Dep't of Just. & Fed. Trade Comm'n, Merger Guidelines (2023).
[19] Landman, *Refining Future Potential Competition, supra* nt. 7, at 32-33.
[20] Mario Draghi, The future of European competitiveness: a competitiveness strategy for Europe (2024).

> The Draghi report recognises the importance of dynamic competition stating that EU merger control should "emphasise the weight of innovation and future competition […], enhancing progress in areas where the development of new technologies would make a difference for consumers" and not be "too backward-looking, focusing on existing market shares, [because] in multiple sectors what matters much more is future potential competition and innovation."

This seems to show that Draghi believes the Commission should aggressively protect competition to innovate. Thus it seems that Draghi believes the Commission should be quick to find that a transaction will harm competition in a Future Market. This would be consistent with the Commission's belief, which it has repeatedly stated, that competition drives innovation.[21]

Second, and relatedly, this quote from Draghi also seems to show that Draghi believes a large number of firms must compete in a Future Market to make that market competitive. Thus it seems that Draghi would say that a Future Market with only a small number of competitors, say four or five, would not be sufficiently competitive.

V. Trying to Analyze Factors Outside the Future Markets Model is Inadministrable

A. Questions based on false premises

The Commission cannot analyze factors other than the variables it must consider when it analyzes competition in a Future Market. Any conclusions it would draw while trying to analyze these other factors would be too speculative. In other words, if the Commission tried to analyze these other factors it would not be able to present "a sufficiently cogent and consistent body of evidence" which would show whether or not "it is more likely than not" that the relevant transaction will cause a significant impediment to effective competition.

[21] *See e.g.* Lawrence B. Landman, *The Economics of Future Goods Markets,* 21 World Competition: Law and Economics Review 63 (1998) and Lawrence B. Landman, *The Economics of Innovation Spaces*, 48 World Competition: Law and Economics Review 195 (2025).

The Commission bases many of the questions it asks on the premise that it can analyze these other factors. For example, in Question C.3.c the Commission asks:

> What are the elements, including relevant factors, evidence and metrics, that the Commission could use to assess the potential reduction of the companies' ability and incentives to innovate post-merger?

All the Commission can do is ensure that a Future Market is sufficiently competitive. It can assume, for example, that if a merger lowered the number of competitors in a Future Market, and thus made that market insufficiently competitive, then, post-merger, not just the merged firm, but all the remaining firms in the market will not have a sufficient incentive to innovate.

Beyond this, the Commission cannot assess how a merger will reduce a company's ability[22] and incentive to innovate. Yet this question seems to assume that the Commission can. Thus, to the extent this question assumes the Commission can do more than ensure that a Future Market is sufficiently competitive this question is based on a false premise.

In this Statement I will not reply directly to every question the Commission asks which is based on such a false premise. As I said, three decades of practice has proven that the Commission can and does use the Future Markets Model to protect competition in Future Markets. But three decades of practice has also proven that the Commission can do no more than this.

B. Commission cannot identify possible future products firms are not even trying to make

In various ways the Commission asks, essentially, how it can identify firms not trying to make a possible future product, but which may, in the future, try to make this possible product. In this subsection I describe the various ways in which the Commission asks if it can identify such firms. Then in both this and the following subsection I show that in reality the Commission cannot identify such firms.

In paragraphs 52 of its Focus Paper, and again in Questions C.9 and C.10, the Commission essentially asks when and how it can

[22] Regarding the Commission's inability to analyze firms' capabilities, *see infra* Section V.C.

analyze the competitive impact of firms not currently selling a relevant product. The Commission calls these firms potential competitors.

In paragraph 56 and Question C.3.c the Commission lists various factors it says it may be able to use to identify firms which, while not currently making a possible future product, may try to make such a product in the future.[23]

And in paragraph 58 and Questions C.4 and C.5 and C.8 the Commission asks if it can evaluate firms' investments. In this paragraph, and in these questions, the Commission lists various types of investments. Regarding all these investments it asks, essentially, if it can evaluate how these possible investments may impact firms' future innovation efforts, and thus their ability to make future products. In none of these examples, however, are the firms actually trying to make these possible future products.

In truth the Commission can only analyze the competitive impact of firms which are trying to make the relevant possible future product. These are the firms the Commission must identify when it answers the question prong C of the Future Markets Model poses. These firms are not potential competitors. The are actual competitors; they are actually competing in the relevant Future Market.

The Commission cannot identify firms which are not trying to make the relevant possible future product, but which may try to do so in the future. The universe of such possible firms is too great. There are too many firms which could, in the future, possibly, try to make just about any product.[24]

If the Commission tries to identify firms not even trying to make the relevant product it will violate the standard of proof the Court of Justice established in *Commission v CK Telecoms*. *See supra* Section IV.

C. Cannot identify capabilities

As this implies, the Commission cannot identify capabilities. The Commission cannot identify firms which, while not currently trying to make the relevant possible future products, may have the capabilities to, possibly, in the future, try to

[23] In this paragraph and this question the Commission mentions patents. Regarding patents *see infra* Section V.C.

[24] *See* Landman, *Did Congress Actually Create Innovation Markets?, supra* nt. 3, at 734.

develop these possible products. As I discuss in *From Innovation Markets to Innovation Spaces,*[25] in *Dow/DuPont* the Commission claimed that it analyzed the relevant firms' capabilities. In this case the Commission claimed that it used the firms' patent portfolios as a metric to evaluate the firms' capabilities.[26]

But the Commission actually evaluated the firms' patent portfolios. It would not allow the firms to merge, among other reasons, because the combined firm would have such a broad and deep patent portfolio that it would be able to block access to the relevant market. Indeed, the Future Markets Model already says that competition authorities should block transactions which would give the merged firm such a broad and deep a patent portfolio that it could improperly block access to a market.[27]

In *Dow/DuPont* the Commission said it used the firms' patent portfolio as a metric to determine the firms' capabilities. It did not say it actually evaluated the firms' capabilities. Thus, in reality, in this case the Commission did not evaluate the firms' capabilities. Instead it analyzed the merging firms' patent portfolios.

In *Dow/DuPont* the Commission did not evaluate the firms' capabilities because it could not.[28] Commission officials cannot determine which capabilities firms must have to make an almost infinite array of possible products, including products which do not even exist. In fact, neither can the firms themselves. As I said in *The Future Markets Model:*

> Antitrust authorities cannot effectively evaluate a firm's capabilities; it may be capable of developing the product, but it may not. Indeed, if any of us knew what development projects would succeed, then instead of reviewing transactions, advising clients, or analysing these issues, we would buy the right stocks, go to the French Riviera, and order a nicely chilled glass of champagne.[29]

D. Firms cannot simply avoid making a product

[25] Landman, *From Innovation Markets to Innovation Spaces in Europe: a new phrase is not innovation,* 42 European. Competition L. Rev. 30 (2021) at 37-38.
[26] Case COMP/M.7932—Dow/DuPont, *supra* nt. 13, ¶¶ 387–95.
[27] *See* Landman, *The Future Markets Model, supra nt*. 2, at 506.
[28] *See also* Landman, *Refining Future Potential Competition, supra* nt. at 43-47.
[29] *Id.* at 507.

As I have shown, the Commission cannot identify firms which are not trying to make a possible future product, but which may try to do so in the future. At first glance it may seem that a firm could exploit this reality to enter into an anti-competitive transaction. A firm may decide to not even try to make the relevant possible future product. The firm may do this believing that if it were not even trying to make the relevant possible future product, then the Commission would not be able to stop this firm from acquiring another firm, one which was trying to make the relevant possible future product. While firms may certainly employ this strategy, doing so successfully will not be as easy as it may seem.

If a firm not making the relevant possible future product sought to acquire a firm which was trying to make this possible future product, then the Commission could still block the transaction. It could conclude that both firms competed in the same Future Market. Assuming it were not mere speculation, the Commission could answer the questions prong D of the Model poses in a way which would lead it to define the Future Market broadly. The Commission would find that both firms competed in the same broadly-defined Future Market. It would find that the products the acquirer already sold (or was trying to make) were sufficiently similar to the products the other firm was trying to make that the firms competed in the same Future Market. And if the Future Market were insufficiently competitive then the Commission could block the transaction.

VI. Horizonal Merger Guidelines Consistent

In paragraphs 54 and 58-60 of the Focus Paper, and again in Question C.1, the Commission essentially asks if the current Horizonal Merger Guidelines[30] are adequate. These Guidelines do essentially say the Commission protects competition in Future Markets, but could certainly be clearer.

A. Analyzing markets for pipeline products is analyzing Future Markets

The Guidelines do, essentially, say that the Commission protects competition in Future Markets. In paragraph 38 the Guidelines discuss how the Commission analyses what it calls "pipeline products." Pipeline products are products firms are developing. Thus when the Commission says in this paragraph the it will

[30] Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings (2004/C 31/03).

analyze markets for products firms are developing, it says it will analyze competition in Future Markets.

B. No checklist: balance all appropriate variables

In paragraph 13 the Guidelines say that when the Commission analyzes competition there is no simple "checklist" it can use. Applying this general statement to Future Markets specifically, when the Commission says it applies no such "checklist," it also says that when it analyzes a Future Market it does not apply a rigid formula. It balances all appropriate variables. It thus implies that it performs the analysis which I describe in Section IV.B.

C. Potential competition: fails to distinguish between existing products and products in development

In paragraphs 58-60 the Guidelines analyze potential competition. The discussion in these paragraphs assumes the relevant products exist. In Future Markets, however, the relevant products do not exist. These paragraphs are therefore, regarding Future Markets, both irrelevant and confusing.

These paragraphs are irrelevant because they do not explain how the Commission analyzes markets for products which do not exist. They are confusing because the Commission not only fails to explain that these paragraphs only relate to markets for existing products, but the Commission itself has tried to apply the principles these paragraphs lay out to markets for products which do not exist.[31] But principles which help the Commission analyze markets for existing products do not help the Commission analyze markets for products which do not exist.[32]

D. American Guidelines acknowledge Future Markets Model

In their 2023 Merger Guidelines[33] the American authorities acknowledge that they protect competition in Future Markets.[34] New European horizontal merger guidelines show do this as

[31] *See* the discussion of *Adobe/Figma infra* in Section IX.
[32] *See* Landman, *Competition to Innovate and Future Potential Competition, supra* nt. 16, at 192-207. *See also* Landman, *Refining Future Potential Competition, supra* nt. 7, at 21-27.
[33], Merger Guidelines *supra* nt. 18, at § § 4.2.E and 4.3.D.7.
[34] *See* Landman, *Refining Future Potential Competition, supra* nt. 7, at 10-13.

well. Further, new European guidelines should be clearer than the American guidelines.

VII. Killer Acquisitions Are Future Market Cases

In paragraph 55 of the Focus Paper, and again in Questions C.6.b, C.6.c and C.6.d, the Commission asks how it should protect competition relating to killer acquisitions, or, as the Commission also calls them, nascent competition cases. In these cases, typically, a larger company is buying a smaller company. The smaller company, again typically, is developing a product which will be better than the larger company's product. The smaller company thus threatens to successfully compete against the larger company in the Future Market, the market for the better version of the product the larger company makes.

These are therefore simply Future Markets cases. In fact, in the typical case, only two firms, the larger firm and the smaller firm, compete in the Future Market. The relevant competition authority has therefore, not surprisingly, challenged these mergers.[35]

VIII. Commission Should Protect Vertical Markets

In paragraphs 52 and 54 of the Focus Paper, and Questions C.3.a and C.3.b, the Commission essentially asks if firms could use vertical foreclose tactics to harm competition in a Future Market. The answer is most certainly yes. In fact the Commission's analysis of *Illumina/Grail* shows this.[36] While the Court of Justice was later to find that the Commission lacked jurisdiction to review this transaction,[37] the Commission's substantive analysis in this case was sound.

Further, the Future Markets Model says a competition authority should block a transaction which would allow the combined firm to use a broad patent portfolio to block access to a market.[38] This is saying essentially the same thing: the products that patent

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[35] *See*. Landman, *Nascent competition and transnational jurisdiction*, *supra* nt.4. See also Landman, *Competition to Innovate and Future Potential Competition, supra* nt. 16, at 180-188.

[36] Commission prohibits acquisition of GRAIL by Illumina, European Commission (Sept. 6, 2022), https://ec.europa.eu/commission/presscorner/detail/en/ip_22_5364.

[37] Judgment of September 3, 2024, Illumina v. Commission, Case C-611/22.

[38] *See supra* nt. 27.

portfolio might block could be horizontal or vertical to the products the combined firm makes.

IX. Pulling it All Together: Improper Potential Competition Analysis in *Adobe/Figma*

In paragraph 59 of its Focus Paper, and in particular footnote 39, the Commission discusses potential competition, and implies that it uses the potential competition doctrine to protect competition to innovate. In this same paragraph the Commission refers to *Adobe/Figma.* And in the Competition Policy Brief in which the Commission discusses this case it refers to it as a potential competition case.[39]

Yet to describe *Adobe/Figma* as a potential competition case is misleading. I analyze this case, first, to show how the Commission actually protected competition in this case. I also analyze this case because it illustrates many of the principles I have discussed in this Statement, and thus my analysis of this case serves as a good conclusion to this Statement.

As the Competition Merger Brief describes this case, the Commission in *Adobe/Figma* analyzed three markets: those for interactive product design tools (tools to design, among other things, websites),[40] vector editing tools (such as Adobe's Illustrator), and raster editing tools (such as Adobe's Photoshop). Adobe made all three products. Figma made interactive product design tools. The Commission believed Figma could, in the future, make vector editing tools and raster editing tools.

In this case, therefore, regarding interactive product design tools, the Commission analyzed a current market, a market for currently existing products. Regarding vector editing tools, and raster editing tools, Adobe already made relevant products, and the Commission believed that, in the future, Figma could also make these products.

The Commission never said the products Figma may make in the future, the vector editing tools and raster editing tools, would, if they ever existed, be better than Adobe's comparable products. But the Commission said both firms compete in "dynamic and

[39] Competition Merger Brief No 2/2024, M.11033 – Adobe/Figma, p. 1.
[40] More accurately this market for "interactive product design tools" is the market for software tools used to design websites, mobile applications, and other digital products with a user interface or user experience elements.

fast-moving technology markets."[41] The Commission also said that it expected Figma to, over time, make new products[42] and thus be able to sell products comparable to the products Adobe would then be selling. Thus, regarding vector editing tools and raster editing tools the Commission implied that the firms competed in Future Markets.

Regarding the number of competitors in the relevant markets, while the Commission does not say how many firms competed in these markets, the Commission implies that this number is small. The Commission said that Adobe was the dominant firm in the relevant markets. Further, the Commission said that Adobe has developed an ecosystem which protects it from competition.

Assuming this is true, then almost by definition very few firms competed in the relevant markets. I have already explained that when competition authorities protect competition in digital markets they must consider how ecosystems and other factors unique to digital markets may limit competition.[43] Nevertheless the key fact in this case is not why Adobe and Figma were two of only a few firms competing in the relevant markets (assuming that is true). The key fact is simply that these were two of only a few firms competing in the relevant markets.[44]

Regarding the market for interactive product design tools, the Commission said that Figma's product was the best in class and Adobe's was its closest competitor. The Commission obviously could not allow a merger of two of only a few firms competing in a market. Thus, depending on the number of competitors in this market, the Commission could very well have reasonably concluded that it needed to act to protect competition in this market. In fact, the Commission may reasonably have blocked this transaction simply to protect competition in this market for interactive product design tools.[45] And if the Commission had done this, then it would have acted to protect competition in a current market, a market for currently existing products.

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[41] Competition Merger Brief, *supra* nt. 39, at 6.

[42] "Figma would be significantly likely to grow gradually but steadily, whether through the addition of new products or functionalities or the improvement of the existing features of its software, into a player able to effectively compete against existing players including Adobe over time." *Id.* at 4.

[43] *See* Landman, *The Future Markets Model: how the competition authorities really regulate innovation, supra* nt. 2.

[44] Regarding the number of firms needed to make a Future Markets competitive, *see supra* nt. 19 and accompanying text.

[45] Formally, the Commission did not block this transaction. After the Commission issued its Statement of Objections the parties abandoned their transaction.

Yet even if the Commission had blocked this transaction so as to protect competition in a current market, it would still have been acting to protect competition to innovate. Whenever the Commission acts to protect competition in any market it does so, in part, to preserve the competitive forces that drive firms to innovate.[46]

The Commission's discussion in its Competition Merger Brief in which it tried to decide if this was a "killer acquisition" or a "reverse killer acquisition" is irrelevant. Whether Adobe, if it had bought Figma, would have stopped selling its own interactive product design tools, would have stopped selling Figma's interactive product design tools, or would have combined the two into one product, does not matter. After the transaction there would be one less company selling interactive product design tools. This would be true under any of these three scenarios. Adobe's future actions would not have changed the fact that this transaction would lower, by one, the number of firms competing in the market.[47]

Regarding vector editing tools, Adobe already sold this product. Figma incorporated some vector editing functions into its interactive product design tools. Thus Figma to an extent already made vector editing tools. The Commission said that Figma would probably improve the vector editing functions it offered and would thus, in the future, probably sell vector editing tools comparable to Adobe's product. The Commission thus implied that Figma was already trying to make vector editing tools. (It answered "yes" to prong C of the Future Markets Model.)

Assuming Figma would, in the future, make vector editing tools comparable to Adobe's product, then the transaction would, in this second market as well, remove a competitor from the market. Assuming only a few firms competed in this market, then the Commission would probably have been acting reasonably if it had acted to protect competition in this market. And, regarding this market, it would have been protecting competition in a Future Market.

Regarding the third market, the raster editing tools market, Adobe made this product. Figma did not make this product, did not offer any raster editing functions in any of its other products, and, at least according to the Competition Merger Brief, was not

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[46] *See, e.g.* Landman, *The Economics of Future Goods Markets, supra* nt. 21.

[47] This shows that killer acquisitions are Future Markets cases, as I explain *supra* in Section VII.

trying to make raster editing tools. Thus it is not clear that the Commission could have, reasonably, decided to block this transaction simply to protect competition in this third market. Figma was not trying to make the relevant possible future product, and the Commission's conclusion that, in the future, it may try to make this product seems to be, based on the information the Competition Merger Brief provides, mere speculation.

While the parties abandoned their transaction, if the Commission had blocked this transaction then, in at least two of the three relevant markets, its conclusion that it had to act could very well have been reasonable, and more than mere speculation. In other words, if the Commission had blocked this transaction, then the Commission could very well have offered "a sufficiently cogent and consistent body of evidence," which would have shown "that it is more likely than not" that if it had not acted then the transaction would have significantly impeded effective competition in at least two of the three relevant markets.

But this would not have been true of the raster editing tools market. In this market Figma made no product and was not trying to make a product. If the Commission had blocked this transaction so as to protect competition in this market then its claim that it must act would, based on the information the Competition Merger Brief provides, not have met the standard of proof which, as Section IV of this Statement shows, the Commission must meet.

Indeed, it would not have met the standard of proof the Commission itself established in it Competition Merger Brief. The Commission said:

> The Commission's assessment of potential competition must be based on objective evidence rather than mere theoretical possibilities.[48]

The claim that Figma would actually make raster editing tools in the future is certainly a theoretical possibility. But the Commission has not offered sufficient objective evidence which shows that Figma would actually be likely to do so.

Said another way, the Commission cannot apply an administrable framework to protect competition to innovate which tries to consider the competitive impact of firms which are

[48] Competition Merger Brief, *supra* nt. 39, at 4.

not trying to make a product but which, in the future, may try to do so. The number of such possible firms is just too great. Trying to identify these firms, and trying to determine which products these firms may try to make in the future, is inadministrable.[49]

In both its Competition Merger Brief and paragraph 59 of its Focus Paper the Commission asks where, in this case, actual competition ends and potential competition begins. The answer is that in the markets for interactive product design tools and vector editing tools the firms were actually competing. Both firms made interactive product design tools; this was a current market in which both firms sold currently existing products. Regarding vector editing tools, adobe made this product and Figma, the Commission concluded, made parts of this product and was trying to make this product. This was thus a Future Market, and both firms actually competed in this Future Market.

Regarding the third market, the raster editing tools market, Figma did not make a relevant product and was not trying to. Thus in this market the Commission cannot conclude that the firms were actual competitors. In some theoretical sense they may have been potential competitors, but any conclusion the Commission may draw in this market regarding Figma's possible future actions would be mere speculation. Any such conclusions would be too speculative for the Commission to use to meet the standard of proof which, as Section IV of this Statement shows, the Commission must meet.

In its Competition Merger Brief the Commission failed to properly analyze this case. It did so because it failed to properly apply the concept of potential competition. It failed to distinguish between markets for existing products and markets for products which do not exist. It tried to use the framework it uses to analyze markets for products which exist to help it analyze markets for products which do not exist.[50] It cannot do this.[51]

When the Commission analyzes markets for products which do not exist it analyzes Future Markets. And to analyze Future Markets it applies the Future Markets Model. This is the framework the Commission already administers. In fact, it is the framework the Commission has been administering for the last

[49] *See supra* text accompanying nt. 24.
[50] *See supra* nt. 16.
[51] The Horizontal Merger Guidelines suffer from this same fault. *See supra* Section VI.C.

three decades. The test of time has proven that the Future Markets Model is the sufficiently accurate yet administrable framework the Commission has used, and undoubted will continue to use, for assessing dynamic merger effects on innovation.[52]

The Americans have acknowledged this[53] and it is time for the Europeans to do so as well.

[52] *See supra* nt. 2 and accompanying text.
[53] *See* Landman, *Refining Future Potential Competition, supra* nt. 7.