Nascent Competition and Transnational Jurisdiction

The Future Markets Model Explains the Authorities' Actions

Lawrence B. Landman*

To be published in the European Competition Law Review: (2022) 43 E.C.L.R., Issue 6, p. 294

Regarding the draft block exemption and horizontal guidelines specifically, see nt. 39.

Protecting Nascent Competition is Protecting Future Markets

The American, European, and British competition authorities are aggressively protecting nascent competition, acquisitions in which a dominant firm purchases a smaller potential competitor.[1] Many have criticized the authorities for doing this, claiming that the authorities lack a methodology to effectively protect competition in nascent markets.[2] And in the face of even greater criticism, the authorities are aggressively asserting jurisdiction, with multiple authorities reviewing the same transaction. Authorities are even reviewing nascent competition acquisitions in which one of the parties does no business at all in the jurisdiction that authority regulates.

In my article *The Future Markets Model: How the competition authorities really regulate competition*,[3] I derive, from all the cases in which the competition authorities claimed that they act to protect competition to innovate, the methodology they actually use in these cases. As that article shows, the authorities actually protect competition in Future Markets, markets for products[4] which do not exist yet. And to protect competition in Future Markets, that article shows, the authorities use the Future Markets Model.

And, as that article also shows, nascent competition cases are really just a subset of the cases in which the authorities claim they are protecting competition to innovate.[5] In nascent competition cases a dominant firm is buying a smaller firm, and this smaller firm could grow into a serious future competitor. Many commentators have suggested—in effect—that competition authorities could or should apply the Future Markets Model particularly aggressively when a dominant firm is making such an acquisition. They fear that the relevant transaction will eliminate a future competitor. This fear is particularly appropriate if the acquirer is a dominant firm. If it is

---

*B.A., Stony Brook Univ.; Juris Doctor, Univ. of Calif., Berkeley; M.B.A., Columbia Univ.; Ph.D., Roskilde Univ., Denmark. Partner, The Interagan Technology Group. The author wishes to thank Henrik Buhl, Morten Broberg and Robert H. Lande for all their help; any errors, however, remain my own.

[1] Acquiring a nascent competitor is sometimes called making a "killer acquisition." This term was popularized by the pre-publication version of the article by Colleen Cunningham, Florian Ederer & Song Ma, *Killer Acquisitions,* 129 J. Pol. Econ. 649 (2021). I do not use this term because some believe it implies that the acquirer will kill the technology it has bought. *See, e.g*. John M. Yun*, Are We Dropping the Crystal Ball? Understanding Nascent & Potential Competition in Antitrust*, 104 Marq. L. Rev. 613, 629-31, (2021). But that is rarely true: the appropriate fear, as this article explains, is that the acquirer will use some, if not all, of the technology it acquires to dominate a Future Market.

[2] *See infra* nt. 36 and accompanying text.

[3] Lawrence B. Landman, *The Future Markets Model: how the competition authorities really regulate competition,* 42 E.C.L.R. 505 (2021).

[4] In this article I use the term 'product' to cover both goods and services.

[5] *Id.* nt. 33.

dominant, then, by definition, there are very few firms competing in the current market and thus, almost by definition, very few firms will compete in the relevant Future Market.[6]

And to protect competition in Future Markets the authorities, whether they admit it or not, apply the Future Markets Model. Thus when protecting future competition between a dominant firm and a nascent competitor, just as they do when protecting competition in any Future Market, the authorities apply the Future Markets Model.

This article, the fourth in a series in this journal analyzing competition to innovate,[7] examines the cases in which the American, European, and thanks to Brexit, also the British, competition authorities claimed that they acted to protect nascent competition. This article shows that the Future Markets Model does indeed explain how the authorities protect nascent competition.

The article also examines vertical restraints in the context of nascent competition. In one case, Illumina/Grail,[8] both the American and European authorities claim that the dominant firm would impose an improper vertical restraint so as to impede competition in a Future Market. As this article explains, the Future Markets Model also provides the methodology which shows when the authorities will conclude that a dominant firm may try to impose an improper vertical restraint so as to impede competition in a Future Market.

Finally, the article also examines the jurisdictional issues nascent competition cases raise. As this article shows, these issues are not restricted to just nascent competition cases, but apply to all competition to innovate, or Future Market, cases. Since by definition products which could compete in a Future Market do not yet exist, arguable no competition authority, or every competition authority, should have jurisdiction to review a transaction which will affect competition in a Future Market. The Future Market is, at the same time, both nowhere and everywhere. The cases this article examines show that the authorities offer a practical, but not necessarily intellectually satisfying, solution to this issue.[9]

---

[6] *See also, e.g.* C. S. Hemphill & Tim Wu, *Nascent Competitors*, 168 U. Pa. L. Rev. 1879 (2020) and Amy Klobuchar, *Antitrust: Taking on Monopoly Power From the Gilded Age to the Digital Age* (2021).

[7] The previous three are Lawrence B. Landman, *Innovation Markets in Europe* 19 E.C.L.R. 21 (1998); Lawrence B. Landman, *From Innovation Markets to Innovation Spaces in Europe: a new phrase is not innovation,* 42 E.C.L.R. 30 (2021); and Landman, *The Future Markets Model, supra* nt. 3.

[8] *See infra* text accompanying nts. 83 to 105. In addition, the UK's Competition Markets Authority (CMA) stopped Facebook from acquiring GIPHY in part because it feared the transaction would allow Facebook to impose improper vertical restraints. *See infra* text accompany nts. 106 to 122.

[9] *See infra* nt. 130 and accompanying text.

Protect Nascent Competition to Spur Economic Growth

European Commission

Digital Markets Act: High Profile Protection of Nascent Competition

As even the popular press has noted, the Digital Markets Act (DMA) will protect nascent competition, which it calls killer acquisitions.[10] The DMA will restrict acquisition of nascent competitors by dominant firms. Among other things, it will require dominant firms, which it calls gatekeepers, to provide information on potential acquisitions of, most importantly, potential nascent competitors. This will make it easier for the European Commission and Member States to challenge such potential acquisitions.[11]

But the European Commission is not waiting for the DMA. It is already acting to protect nascent competition. The DMA will therefore change, or augment, the Commission's current practices. To understand the DMA's impact in this area, therefore, one must first understand the Commission's, indeed all the authorities', current practices.

Article 22 Guidance: Please refer nascent competition cases.

In contexts beyond the DMA the European Commission has already said, as clearly as it possibly can, that it will aggressively protect nascent competition. On March 26, 2021 it issued its Article 22 Guidance.[12] In this Guidance it asked the member states to refer to it:

> transactions where the turnover of at least one of the undertakings concerned does not reflect its actual or future competitive potential.[13]

In other words, the Commission wants to review transactions which do not satisfy the turnover thresholds such transactions normally must meet to give the Commission jurisdiction. In this Guidance the Commission is saying that if one of the companies involved in the transaction is small, but would nevertheless be a likely strong competitor in the future, then it wants to review that transaction. In other words, the Commission wants to protect competition in Future Markets.

---

[10] See European Commission, "Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act), Brussels, 15.12.2020, COM(2020) 842 final, 2020/0374 (COD), as amended by Amendments adopted by the European Parliament on 15 December 2021 on the proposal for a regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act) (COM(2020)0842 – C9-0419/2020 – 2020/0374(COD)) para. 64.

[11]. *Id.* Article 12**.**

[12] European Commission, *Commission Guidance on the application of the referral mechanism set out in Article 22 of the Merger Regulation to certain categories of cases*, C(2021) 1959 final. (March 26, 2021). See also Morten Broberg, *Reforming the Merger Control Regulation's Article 22 Referral Mechanism : On the Member States' Access to Refer Mergers to the European Commission*, 33 E.C.L.R 215 (2012).

[13] *Id.* para. 19

Protect nascent competition in environmental markets

In its *Competition Policy in Support of Europe's Green Ambition*[14] which the Commission released in September 2021, the Commission said it issued its Article 22 Guidance in order to:

> help tackle issues related to possible enforcement gaps for acquisitions of nascent competitors that may lead to a loss of innovation in, for example, a sustainability context.[15]

In other words, the Commission said it will aggressively protect competition in Future Markets so as to spur innovation, which will drive firms to achieve its policy goals. But protecting the environment is just one example. The Commission will protect nascent competition to help it achieve all its policy goals. Thus protecting nascent competition is a key part of the Commission's efforts to achieve all its policy goals.

United States

The United States has also said it will aggressively protect nascent competition. President Biden made this very clear when he issued his Executive Order on July 9, 2021, instructing his administration to, among other things, protect nascent competition.[16] And, not coincidentally, on that very same day the FTC and DOJ announced that they would review their merger guidelines "to determine whether they are overly permissive."[17] And, as part of this review, on September 15, 2021 the FTC revoked its approval of what were the joint FTC/DOJ Vertical Merger Guidelines.[18] It did so in part because it had come to disagree with the Guidelines' discussion of nascent competition. The FTC said it feared that a firm would enter into a transaction now, when standard antitrust analysis does not detect a problem, so as to dominate a market which does not

[14] European Commission, Directorate-General for Competition, *Competition policy brief: Competition Policy in Support of Europe's Green Ambition,* Competition Policy Brief No 1/2021 (Sept. 10, 2021).
[15] *Id.,* p. 7. On the question of establishing jurisdiction under the Merger Regulations, See Morten Broberg, *Broberg on the European Commission's Jurisdiction To Scrutinise Mergers*, Kluwer Law International, 4th ed., 2013 and Morten Broberg, *Improving the EU Merger Regulation's Delimitation of Jurisdiction – Re-defining the Notion of Union Dimension*, 5 Journal of European Competition Law & Practice, 261 (2014).
[16] Exec. Order, Promoting Competition in the American Economy, July 9, 2021.
[17] Statement of FTC Chair Lina M. Khan and Antitrust Division Acting Assistant Attorney General Richard A. Powers on Competition Executive Order's Call to Consider Revisions to Merger Guidelines, July 9, 2021.
[18] Statement of Chair Lina M. Khan, Commissioner Rohit Chopra, and Commissioner Rebecca Kelly Slaughter on the Withdrawal of the Vertical Merger Guidelines. Commission File No. P810034, Sept. 15, 2021, p. 1-2.

exist yet—a Future Market. [19] And at this same time DOJ also said it would protect competition in nascent markets.[20]

Indeed, on January 18, 2022 both the DOJ and FTC asked for public comments with would help them update their merger guidelines. These authorities asked for comments not only regarding nascent competition[21] but also regarding competition to innovate, or Future Markets, generally.[22] And very relatedly, several members of Congress have proposed legislation which would protect nascent competition.[23]

Yet to properly draft any possible new guidelines or legislation one must first appreciate the American authorities', indeed, again, all the authorities', current practices. But commentators are not paying proper attention to the authorities' current practices. For example, in an oft-cited article[24] Tim Wu, who is now a member of the White House's National Economic Council,[25] and his coauthor, questioned the FTC's and DOJ's authority under current law to protect nascent competition, but ignore the cases in which the American authorities have already acted to protect nascent competition.[26]

---

[19] *Id.*, pp.7-8. This passage involved an interesting bit of circular citations, if that is a phrase. The key citations in this passage, in footnote 45, are to Steven C. Salop, *Invigorating Vertical Merger Enforcement*, 127 Yale L.J. 1962, 1989 (2018) and Jonathan B. Baker et al., Comment Letter No. 21 on #798, at 18-20 (Feb. 24, 2020), https://www.ftc.gov/system/files/attachments/798-draft-vertical-merger-guidelines/vmg21_baker_rose_salop_scott_morton_comments.pdf. These commentators suggest, in the cited passages, that the authorities impose the burden of proof on a dominant firm that is to enter into a vertical transaction in which the antitrust harm which may occur would occur, if at all, in the future. In other words, such a dominant firm would have to prove that the vertical transaction is not anti-competitive. And Salop cites, as an example of an authority that would seemingly support at least the rule Salop advocates, and possibly an even more interventionist rule, Lina M. Kahn, Note, *Amazon's Antitrust Paradox*, 126 Yale L.J. 710, 792-97 (2017). This is, of course, the same Lina M. Khan who is the FTC Chair and one of the authors of the Statement.

[20] On Sept. 14, 2021, the day before the FTC revoked its approval of the Vertical Guidelines, the DOJ Associate Attorney General Vanita Gupta, in a major speech, said "Acquisitions involving potential or nascent competitors are one category of particularly concerning transactions." Associate Attorney General Vanita Gupta Delivers Remarks at Georgetown Law's 15th Annual Global Antitrust Enforcement Symposium, Sept. 14, 2021. *See also* Justice Department Issues Statement on the Vertical Merger Guidelines, Sept. 15, 2021 in which DOJ says, among other things, that it wants to examine: "Whether the Vertical Merger Guidelines unduly emphasize the quantification of price effects, which is not the only means to determine that a vertical merger is unlawful." DOJ leadership recently reconfirmed this commitment: *see* Assistant Attorney General Jonathan Kanter Delivers Keynote at CRA Conference, March 31, 2022. DOJ leadership recently reconfirmed this commitment, see Assistant Attorney General Jonathan Kanter Delivers Keynote at CRA Conference, March 31, 2022.

[21] "The agencies seek input on potential updates to the guidelines' discussion of potential and nascent competitors, which may be key sources of innovation and competition." Federal Trade Commission and Justice Department Seek to Strengthen Enforcement Against Illegal Mergers (Jan. 18, 2021).

[22] "The agencies seek input on potential updates to the guidelines' market definition analysis to better account for non-price competition." *Id.*

[23] *See, e.g.*, The Platform Competition and Opportunity Act, H.R. 3826, 117th Cong. (2021-2022).

[24] Hemphill & Wu, *supra* nt. 6.

[25] Special Assistant to the President for Technology and Competition Policy, National Economic Council.

[26] Hemphill & Wu, *supra* nt. 6, nt. 70, simply notes in passing that these cases exist, and thus that it is "not impossible" to litigate such cases under existing law.

United Kingdom

The United Kingdom laid the foundation for its current aggressive efforts to protect nascent competition in what became known as the Furman Report.[27] This report said, among many other things, that the Competition and Markets Authority (CMA) should update its analysis of transactions to take account of potential future competition.[28] And when saying this the Report clearly had nascent competition in mind.[29] And immediately after the British government issued this report, the CMA's Chief Executive said: "the elimination of even a very small or nascent competitor could remove an important source of competition."[30]

On March 18, 2021 the CMA issued its new Merger Assessment Guidelines, which clearly say that the CMA will examine nascent competition.[31] The CMA then proved that it will aggressively protect nascent competition when, as discussed *infra*, it went on to block Illumina's attempted acquisition of Grail[32] and Facebook's attempted acquisition of GIPHY.[33]

All Authorities: Protect Nascent Competition to Promote Economic Growth

This focus on nascent competition is certainly key to the authorities' attempts to protect competition in Future Markets and thus spur innovation. While there will certainly be important transactions involving large firms, such as Dow/Dupont,[34] the greater number of nascent competition cases makes this effort to protect nascent competition a key component of the authorities' broader efforts to protect competition and spur innovation and economic growth.[35]

When Protecting Nascent Competition the Authorities Apply the Future Markets Model

Many commentators say the authorities lack a methodology to analyze nascent competition

[27] Unlocking digital competition: Report of the Digital Competition Expert Panel. (March 2019).
[28] *Id*. S*ee, e.g,* paras. 3.3, 3.79 and, in particular, para. 3.21, which says "The consumer welfare standard can and should be considered dynamically."
[29] *Id*. S*ee, e.g,* paras. 1.109, 3.51. and 3.80-87.
[30] Andrea Coscelli, *Competition in the digital age: reflecting on digital merger investigations.* Speech delivered to the OECD/G7 conference on competition and the digital economy, June 3, 2019.
[31] CMA. *Merger Assessment Guidelines*, CMA 129, March 18, 2021, *see e.g.* paras. 2.18(e), 2.28, and 7.37.
[32] *See infra* text accompanying nts. 83 to 105.
[33] *See infra* text accompany nts. 106 to 122.
[34] 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). *See also* Landman, *From Innovation Markets to Innovation Spaces in Europe: a new phrase is not innovation, supra* nt. 7.
[35] The FTC's recent action seeking to block Nvidia's $40 billion acquisition of ARM, while arguably an action the FTC took to protect competition in a Future Market, is not a nascent competition case and is thus beyond the scope of this article. *See* Complaint, *Nvidia Corp. et. al*. Docket No. 9404. (Dec. 2, 2021).

Particularly in the United States, many commentators have proposed various methodologies which they say the authorities should use to protect nascent competition.[36] These commentators imply that the authorities currently lack a methodology to regulate nascent competition. But since the authorities are regulating nascent competition now, they must be applying some methodology as they do so.

Authorities Use the Future Markets Model

When competition authorities protect nascent competition they are protecting competition to innovate. The authorities imply that this is so—but they do not say so explicitly. The European Commission, for example, came close to saying this in its *Competition Policy in Support of Europe's Green Ambition.*[37] In this policy statement, immediately after saying it will protect competition to innovate by protecting nascent competition, the Commission says it will protect competition to innovate by protecting competition in Innovation Spaces. Further, the Commission says, to protect competition to innovate it will use the same methodology it used in Dow/Dupont,[38] where it claims to have developed a methodology to protect competition in Innovation Spaces. Thus, the Commission implies, it will use the methodology it uses to protect competition in Innovation Spaces to also protect nascent competition.

As I show in *From Innovation Markets to Innovation Spaces in Europe*, in Dow/Dupont the Commission, although it claims to have protected competition in Innovation Spaces, really protected competition in Future Markets.[39] Accordingly, when the Commission protects

---

[36] *See e.g.* Hemphill & Wu, *supra* nt. 6; Klobuchar, *supra* nt. 6; John Ceccio & Christopher Mufarrige, *Competition in the Digital Economy,* 30 Competition: J. Antitrust., UCL & Privacy Sec. Cal. L. Assoc. 52 (2020), and Yun, *supra* nt. 1. These later two articles typify much writing in this area: they provide a good overview of the various proposals for methodologies to regulate nascent competition, say these methodologies are not needed because current law can adequately protect nascent competition, but ignore the methodology the authorities are actually using to aggressively protect nascent competition.

All these authors also ignore the trans-jurisdictional aspects of regulation in this field; as this article shows that is something practitioners in this field most emphatically cannot do.

[37] *See supra* nt. 14.

[38] *Id.*, p. 7 referring to Dow/DuPont, *supra* nt. 34.

[39] *See* Landman, *From Innovation Markets to Innovation Spaces in Europe*, *supra* nt. 7. The Commission's new draft guidelines still, very inconsistently, both claim that the Commission can regulate competition to innovate directly, and that when firms compete to innovate they are competing to create the same future product, in other words that they are competing in a Future Market. For example, the new Draft Horizontal Guidelines, para. 59 says "R&D cooperation may not only affect competition in existing product or technology markets, but also competition in innovation." Yet para. 79, of these draft Guidelines, nt. 80, approving quotes Article 1 paragraph 1(18) of the new draft R&D Block Exemption Regulation, which "defines an undertaking competing in innovation as 'an undertaking that is not competing for an existing product and/or technology and that independently engages in or, in the absence of the R&D agreement, would be able and likely to independently engage in R&D efforts which concern: (a) the R&D of the same or likely substitutable new products and/or technologies as the ones to be covered by the R&D agreement; or (b) R&D poles pursuing substantially the same aim or objective as the ones to be covered by the R&D agreement." (emphasis added). See Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, March 1, 2022, draft; and Approval of the content of a draft for a Commission Regulation on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of research and development agreements, March 1, 2022.
These two quotes illustrate, in summary fashion, the general point that in these two documents the Commission is just saying in an absurdly convoluted manner that when firms compete to innovate they compete in a Future Market.

competition to innovate by protecting nascent competition, it does so, not by protecting competition in Innovation Spaces, but by protecting competition in Future Markets. And the European Commission, like all competition authorities, protects competition in Future Markets by applying the Future Markets Model.[40]

The Commission therefore implies, but does not explicitly say, that it uses the Future Markets Model to protect nascent competition. This article will show that this is indeed the case. In fact this article will show that to protect nascent competition all the authorities apply the Future Markets Model.

To show this, this article will review the cases in which all the relevant competition authorities have protected nascent competition. These are all recent cases because the authorities' attempts to protect nascent competition is, as shown *supra,*[41] new. The authorities have adopted this new policy in response to what many, including many current officials, believe was too lax enforcement in the past. Indeed, in the not-too-distant past the authorities did not aggressively protect nascent competition. To pick just one of many possible examples, some consider Google's purchase of Doubleclick to be a nascent competition case.[42] And as I have shown, the FTC and the European Commission were, to their later regret, very lax in that case.[43]

"Standard" nascent competition cases

There are two what might be called standard nascent competition cases. These are standard nascent competition cases because, in contrast to other cases,[44] they do not involve vertical restraints. In these cases the acquiring firm, which dominated its current market, sought to acquire a smaller firm. The smaller firm's technology would probably make it a strong future competitor. The smaller firm, the nascent competitor, therefore threatened the larger firm's ability to dominate the relevant Future Market.[45] In both of these cases after the American antitrust authority challenged the acquisition the parties abandoned their transaction.

If firms are competing to make substitutable new products, then they are competing to make new products which will compete in a Future Market. And "R&D poles" are exactly the same thing; the objective the "R&D poles" are pursing is the creation of future products which will compete in the same Future Market. Regarding R&D poles *see* Landman, The Future Markets Model, supra nt. 3, p. 35.

[40] *See* Landman, *The Future Markets Model, supra* nt. 3.

[41] *See supra* text accompanying nts. 10-34.

[42] Carl Shapiro, *Antitrust in a Time of Populism*, 61 Int. J. of Indus. Org. 714 (2018), p. 740.

[43] Landman, *The Future Markets Model, supra* nt. 3, pp. 511-512.

[44] *See infra* text accompanying nts. 83 to 122.

[45] Some commentators have described Edgewell's (Schick's) attempted purchase of Harry's, an upstate razor company, as a nascent competition case. But since in this case the FTC did not analyze a market for products which did not exist yet, even if one were to consider this a nascent competition case, it is still not one relevant for this article. *See* Complaint, *Edgewell Personal Care Company et. al*. Docket No. 9390. (Feb. 2, 2020).

Visa/Plaid

In his speech,[46] DOJ Associate Attorney General Vanita said Visa/Plaid illustrated the type of nascent competition case the department will bring.[47] As the DOJ Complaint's says at its very beginning, Visa monopolizes the online debit market. [48] Plaid is a financial start-up which has direct connections to thousands of banks. As the Complaint later says, Plaid's system could replace Visa's; Plaid's technology could allow customers, when they make an online purchase, to connect directly with their banks. Customers would thus not need an intermediary such as Visa.[49] Further, the Complaint alleges, Visa is acquiring Plaid just so it can eliminate this future competitor.[50]

DOJ applied the Future Markets Model

In this case the DOJ applied the Future Markets Model. As this case illustrates, applying the Future Markets Model to a standard nascent competition case is simple and straight-forward. I explain the Future Markets Model in detail in *The Future Markets Model: how antitrust authorities really regulate innovation.*[51] This article will reproduce just the key elements of the Model:

A. Does a current product exist?

Yes, that of the dominant firm Visa.

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

One, the nascent competitor, Plaid.

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

Yes, Plaid did not have the ability to connect customers directly with banks at the time DOJ filed the Complaint, but the department did not doubt that Plaid would, in the future, be able to do so.

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?

Here the future products are technologies which allow customers to pay online. Plaid's product would, at a minimum, be able to compete with Visa's. Yet, possibly, Plaid's product would more than compete with Visa's, it would eliminate Visa's product because it would be more efficient.

---

[46] *See supra* nt. 20.
[47] *Id.*
[48] Complaint, *United States v. Visa and Plaid,* No. 3:20-cv-07810 (N. Dist. Calif. filed May 11, 2020). The Preamble of the Complaint calls Visa a monopolist; para. 1 of the Complaint explains that Visa controls 70% of the online debit payment market.
[49] The Preamble of the Complaint says that Plaid offers a "more innovative online debit service;" paras. 7, 8 and 38 in particular explain that Plaid's technology could make Visa's dominant online payments infrastructure redundant. *Id.* paras. 7, 8 and 38.
[50] *Id.*, paras. 9 to 12.
[51] *See* Landman, *The Future Markets Model, supra* nt. 3, at pp. 506-7.

Illumina/Pacific Biosciences

Illumina/Pacific Biosciences is very similar to Visa/Plaid. Again, a smaller company with better technology threatened a dominant firm's business. In contrast to Visa/Plaid, however, in this case the smaller firm had advanced its business a bit further. Thus, the smaller firm was already taking some business from the dominant firm. Still, the real competitive threat of the upstart was not in the current market, but rather, as in Visa/Plaid, in the Future Market.

The FTC alleged that Illumina was a dominant firm, controlling over 90% of the market for next generation DNA sequencing. DNA sequencing identifies the order of nucleotides, which are the building blocks of DNA.[52] Pacific Biosciences (PacBio) had developed a system which can identify longer sequences of nucleotides, but a lower throughput (processing speed) and higher price.[53] These improvements had already led some customers to switch from Illumina to PacBio.[54] And as PacBio's technology improves, and its costs decrease, the FTC said, more customers would switch from Illumina to PacBio.[55]

FTC applied the Future Markets Model

In this case as well the FTC applied the Future Markets Model:

A. Does a current product exist?

One product clearly existed, that of the dominant firm, Illumina. Arguably, two products existed, since PacBio was already beginning to attract some customers from Illumina.

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

One, the nascent competitor, PacBio, was developing a competing future product.[56]

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

Yes, PacBio was already attracting some Illumina customers. Further, the FTC did not doubt that PacBio's technology would improve, and it would therefore in the future attract more Illumina customers.

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 FTC defined the relevant market as DNA sequencing. Illumina sold a current product. PacBio was in the process of developing a similar, and perhaps better, product. The FTC found that the two companies already competed, and that PacBio

[52] Complaint, *Illumina et. al.* Docket No. 9397 (Dec. 17, 2019), para. 1.
[53] *Id.,* para. 2.
[54] *Id.,* paras. 3, 4.
[55] *Id.,* para. 21.
[56] The Complaint, in para. 24, says there are also "a few other small participants." These other participants, the FTC obviously concluded, did not present a future competitive threat. *Id.* para. 24.

would become an even stronger competitor. The FTC therefore would not allow one competitor to acquire the other and thus dominate the Future Market.

One and two sided platforms: Sabre/Farelogix

Sabre's attempted acquisition of Farelogix illustrates both the complex market definition issues this area of law raises, and also the complex jurisdiction issues it also raises. Both the DOJ and the CMA reviewed this transaction. The CMA did so although Farelogix, while doing business in the US, did no business in the United Kingdom.

Sabre provides computer support to airlines, allowing them to offer tickets to travel agents. Sabre was one of three major firms offering such a service.[57] Farelogix was an upstart with a small market share. But its technology could allow the airlines to connect directly with travel agents, and thus eliminate the need for intermediaries such as Sabre.[58] Farelogix is an American company and, as discussed in greater detail *infra,* did no business in the UK.[59]

United States

DOJ Applies Future Markets Model, Blocks transaction

DOJ challenged this transaction, claiming that Farelogix was a "disruptive competitor,"[60] which competed to innovate with Sabre.[61] DOJ's Complaint applied the Future Markets Model:

A. Does a current product exist?

Yes, three firms provided the current product: computer services which connect airlines and travel agents. Sabre dominated the market, the Complaint said, with a market share of greater than 50%.[62]

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

One, Farelogix, the nascent competitor, was beginning to offer services that allow airlines to connect their computers directly with travel agents (and thus make an intermediary unnecessary).

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

Yes, Farelogix was already beginning to offer this service.

---

[57] Complaint, *United States v. Sabre Corp*., No. 1:19-cv-01548-UNA (D. Del. filed Aug. 20, 2019), para. 2.
[58] *Id.,* para. 4.
[59] *See infra* text accompanying nts. 75 to 82.
[60] Complaint, *United States v. Sabre Corp supra* nt. 57*,* para. 10.
[61] *Id., e.g.,* paras. 56-58.
[62] *Id.,* para. 27.

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 Sabre Complaint essentially said that Farelogix offered a better version of the service Sabre offered. Farelogix's system, the Complaint acknowledged, would allow the airlines to offer ancillary products and services, such as in-flight Wi-Fi or lounge access, which Sabre could not offer.[63] But the central point of the Complaint was that Farelogix would allow airlines to contact travel agents directly, and the airlines would therefore no longer need Sabre's services.[64] Thus the DOJ alleged that the products were very similar, but not identical—both allowed the airlines to connect with travel agents, but Farelogix's product offered greater efficiency. Certainly, the DOJ concluded, the products were close enough that it would consider them competitors.

And the DOJ would not allow the market to go from the four competitors which there would be if the transaction were blocked, to the three there would be if the transaction were allowed. This is particularly true because the competitor the transaction would eliminate would offer a superior product.

District Court says Sabre and Farelogix are not competitors

In this case, instead of abandoning their transaction, the parties challenged the DOJ.[65] And unfortunately for the DOJ, the District Court did not agree that the relevant market was only that of connecting airlines to travel agents. Applying the U.S. Supreme Court's decision in *Ohio v. American Express Co.*,[66] the District Court found that Sabre and Farelogix were not competitors. The court found that Sabre competed in the market for connecting airlines to travel agents.[67] By contrast, the court found that Farelogix only sold computer systems and technology to airlines.[68] The court found that the market for connecting airlines to travel agents, in which Sabre competed, was a two-sided market. And the court found that the market for selling computer systems, in which Farelogix competed, was only a one-sided market. Applying *Ohio v. American Express* the court found that, as a matter of law, the two companies were not competitors.[69] The court would therefore not allow DOJ to block the transaction.

The UK's Competition and Markets Authority

One-sided Market

Unfortunately for Sabre and Farelogix, the CMA did not agree with the District Court. Two days after these companies prevailed in Delaware they lost in London. And since the British authorities would not allow them to complete their transaction they abandoned it everywhere. Thus, as this

[63] *Id.,* paras. 30-1.
[64] *See, e.g. Id*., paras 29, 36, 37, 43.
[65] *United States v. Sabre Corp*., 452 F. Supp. 3d 97 (D. Del. 2020).
[66] *Ohio v. American Express Co.* 138 S. Ct. 2274, 585 U.S. ___, 201 L. Ed. 2d 678 (2018).
[67] *United States v. Sabre Corp*, *supra* nt. 65, at 108-9.
[68] *Id.* at 112-3.
[69] *Id.* at 136-8.

article will discuss in greater detail *infra,*[70] the British authority blocked, throughout the world, a transaction among two American companies, one that the American court had just approved, and where one of the companies only did business in the United States.

To block this transaction the CMA applied, essentially, the same one-sided analysis as did the DOJ. The CMA said that Farelogix's technology was "nascent,"[71] and said the transaction would harm "innovation."[72] The CMA, like the DOJ, but unlike the District Court, found that Sabre and Farelogix competed in the same one-sided market. The CMA essentially tracked the DOJ's analysis, applied the Future Markets Model outlined *supra*, and blocked the transaction.[73]

If there is any difference in the analysis of the two competition authorities, perhaps the CMA saw Sabre's and Farelogix's products as being slightly more different than did the DOJ. The CMA said the two companies were "differentiated competitors." Since Sabre worked with travel agents and airlines, it did not offer exactly the same service that Farelogix offered, the CMA said.[74] Still, the CMA said, the services were sufficiently similar that it would consider the firms to be competitors. Thus when applying the fourth test of the Future Markets Model, (prong D), the CMA may have considered the products to be slightly less similar than did the DOJ, but it nevertheless still found that the two firms were competitors.

Jurisdiction in the UK

Sabre and Farelogix were particularly upset with this decision because Farelogix did no business in the UK. How, these companies asked, could the CMA assert jurisdiction to review this transaction?

To determine its jurisdiction the CMA applies, among other tests, the "share of supply" test. In this case the CMA applied this test very aggressively. The share of supply test allows the CMA to assert jurisdiction over transactions in which the merged firm would acquire or supply 25% of a "product" in the UK. The CMA can define this "product" broadly, and it does not have to correspond to what would be a "product" for substantive antitrust analysis.

In this case Sabre, the dominant firm in the industry, by itself provided 25% of the share of supply of the relevant product, which the CMA defined as computer services to airlines to help them sell reservations.[75] But Farelogix did no business in the UK. The CMA nevertheless concluded that it did have jurisdiction because Farelogix had an agreement with American Airlines, which cooperates with British Airways. Thus, the CMA concluded, Farelogix, albeit indirectly, did provide services in the UK. Further the CMA noted, Farelogix did have an agreement with British

[70] *See supra* text accompanying nts. 75 to 82.
[71] CMA, *Anticipated acquisition by Sabre Corporation of Farelogix Inc*., Final report, April 9, 2020, Summary para. 24, and paras. 10.114 and 11.12.
[72] *Id. passim.*
[73] *Id*.
[74] *See e.g. Id,* at Summary para. 79.
[75] *Id.* para. 5.16.

Airways; [76] the CMA found this relevant although it offered no evidence that either party had actually implemented this agreement.[77]

Since Sabre had already reached the 25% share of supply threshold, and Farelogix increased the total share of supply, even if ever so slightly, the CMA concluded that it did have jurisdiction to review this transaction.[78] The CMA reached this conclusion although the additional share of supply which Farelogix added to this total was *de minimis*.[79] The CMA certainly did apply this test aggressively.

The two American companies, understandably upset, appealed. But the Competition Appeals Tribunal rejected their arguments, holding that the CMA has broad discretion to determine its own jurisdiction. The CMA must simply act rationally, the Appeals Tribunal said, and in this case the CMA did just that.[80]

The CMA chose to act aggressively, determine that it had jurisdiction, and block the transaction. [81] This clearly shows how intertwined the analysis of substance and jurisdiction is in this field. The implications of this are discussed *infra*.[82]

Jurisdiction and Vertical Restraints: Illumina/Grail

Illumina's attempted purchase of Grail shows that both the FTC and the European Commission will not allow a dominant firm to use vertical restraints to dominate a Future Market. Since the authorities have, for the past several years, only rarely even alleged that a merger or acquisition would impose an improper vertical restraint,[83] this case certainly shows that these days the authorities will act aggressively to protect nascent competition.[84] This case also, like Sabre/Farelogix, illustrates the multi-jurisdictional nature of this area of law.

---

[76] *Id.* para. 5.20.
[77] Farelogix told the CMA it did no business directly with British Airways. *Id.* para. 5.41. This did not persuade the CMA, *see Id.* paras. 5.44-53.
[78] *Id.* para. 5.90.
[79] See *Id.* para. 5.72: "The merger must result in an increment to the share of supply or acquisition. The Act does not prescribe a minimum increment and the Guidance explicitly recognises that where an enterprise already supplies or acquires 25% of any particular goods or services, the test is satisfied so long as its share is increased as a result of the merger, regardless of the size of the increment." [footnote omitted]
[80] Sabre Corporation v. Competition and Markets Authority [2021] CAT 11, judgment of May 21, 2021. (*Sabre v. CMA*).
[81] In Roche/Spark Therapeutic the CMA found that a company was making a pipeline product with it could sell in the UK, and it therefore concluded that it had jurisdiction. But since the CMA approved this transaction, no party challenged the CMA's decision to find jurisdiction. *See* CMA, *Anticipated acquisition by Roche Holdings, Inc. of Spark Therapeutics, Inc*., Final report, Feb. 10, 2020.
[82] *See infra* text accompanying nts.123 to 132.
[83] *See* Steven C. Salop, *Invigorating Vertical Merger Enforcement* 127 Yale L.J. 1962, 1964 (2018) ("A major consequence of the Chicago School commentators' flawed economic theories with respect to vertical merger enforcement is that this body of law has remained undeveloped for the past forty years.")
[84] Regarding the United States, *see* Darren S. Tucker & Thomas W. Bohnett, *The Perfect Storm: Antitrust in a Time of Crisis,* 34 Antitrust 58, 58-59 (2020), explaining that FTC Commissioners appointed by Democratic presidents are more likely to see vertical restraints as anti-competitive than are commissioners Republican presidents have

Grail is developing kits which provide for the very early detection of cancer.[85] The kits allow for this very early detection of over 50 different types of cancer.[86] Grail is one of "several" competitors developing such kits.[87]

All these competitors need, for their kits to work, DNA sequencing instruments.[88] Illumina controls 90% of the market in the United States for DNA sequencing instruments.[89] Thus, the FTC alleged in the Complaint it filed with the hope of blocking this transaction, if Illumina were to purchase Grail, then it would be able to improperly foreclose the market from other manufactures of comparable kits, which would no longer be able to obtain the DNA sequencing technology they need to make their kits work.[90] This would harm innovation, the FTC said.[91]
When the FTC filed its Complaint on March 30, 2021 it had also sought a preliminary injunction, seeking to enjoin the parties from completing their transaction until after the coming administrative trial. But on April 20, 2021 the European Commission announced that it was accepting a referral from Belgium, France, Greece, Iceland, the Netherlands, and Norway pursuant to Article 22,[92] and would investigate whether the transaction would violate EU competition law.[93] On May 21, 2021 the FTC therefore dropped its request for a preliminary injunction. Since European law forbad the parties from completing their transaction while the Commission was investigating the possible acquisition, the FTC said, an injunction was no longer necessary.[94]

Yet, on August 18, 2021, after the FTC dropped its request for a preliminary injunction, Grail and Illumina announced that they had completed their transaction, and Illumina had acquired Grail. The two companies claimed that the European Commission could not exercise jurisdiction to review their transaction.[95] Indeed, the two parties then, on April 28, 2021, asked the General Court of the European Union to find that in this case the European Commission lacked jurisdiction. The thrust of Illumina's argument is that since it began the process of acquiring Grail before the Commission implemented its new Article 22 procedure, that procedure should not apply to this transaction. Given this, Illumina's jurisdictional challenge may therefore not have the broad impact on this field generally as one may at first believe.[96]

---

appointed. Regarding the European Commission *see* Landman, *The Future Markets Model, supra* nt. 3, showing that, regarding Future Markets generally, the Commission acts more aggressively now than it has in the past.
[85] Complaint, *Illumina et. al.* Docket No. 9401 (March 30, 2021), para. 3.
[86] *Id.*, para. 22.
[87] *Id.*, para. 4.
[88] *Id.*, paras. 3 and 5.
[89] *Id.*, para. 6.
[90] *Id.*, para. 12.
[91] *Id.*, para. 14.
[92] *See supra* text accompanying nts. 12-15.
[93] European Commission Daily News, April 20, 2021.
[94] *See* Plaintiff's *Ex Parte* Application to Dismiss the Complaint Without Prejudice, *FTC v. Illumina and Grail*, Case No. 3:21-cv-800-CAB-BGS (S.D. Cal. May 21, 2021).
[95] Illumina Acquires GRAIL to Accelerate Patient Access to Life-Saving Multi-Cancer Early-Detection Test, available at https://investor.illumina.com/news/press-release-details/2021/Illumina-Acquires-GRAIL-to-Accelerate-Patient-Access-to-Life-Saving-Multi-Cancer-Early-Detection-Test/default.aspx
[96] Action brought on 28 April 2021 — Illumina v Commission (Case T-227/21) (2021/C 252/37).

Finally, although the two parties have completed their transaction, the FTC is still challenging the acquisition. The administrative trial began on August 24, 2021, and as of the date of this writing the trial is ongoing.

FTC Applies the Future Markets Model While Alleging an Improper Vertical Restraint.

The FTC protected competition in a Future Market, the Future Market for kits which can easily detect many types of cancer. Standard Future Markets Model analysis shows that if the FTC did not act, then this Future Market, which would be competitive if Illumina did not purchase Grail, would instead become uncompetitive:

A. Does a current product exist?

No

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

Several.[97]

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

Yes.

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 FTC clearly believes that other companies, besides Grail, are developing kits which will probably compete with Grail's product. The authorities do not say exactly what types of cancers these other kits will test for, but since they also need Illumina's DNA sequencing instruments the FTC clearly considers these products to be comparable to Grail's.[98]

The key distinction between this case and the others, obviously, is that in this case the dominant firm would use its current dominance to block access, not to a Future Market for a better version of the product it already sells, but the Future Market for a product in an adjacent market.

This distinction makes no difference to Future Markets analysis. Assuming the FTC is correct, and no firm could sell test kits without Illumina's DNA sequencing instruments, then, if this transaction were allowed, Illumina certainly could use its dominance to make a Future Market uncompetitive. The FTC therefore should apply the Future Markets Model: the purpose of the Model is to ensure that Future Markets are competitive, and that is exactly what the FTC is doing.

Further, to say that the FTC should not act because it is protecting competition in a market adjacent to that of the dominant firm is to look for a reason why the FTC, or any authority, should not act.

---

[97] *See supra* nt. 87.

[98] Complaint, *Illumina et. al.,* supra nt. 85. paras. 3 and 31-6.

It is to look for gaps in the tools the authorities can use to protect competition, and then say that since these gaps exist the authorities are powerless to act. But, regarding nascent competition, the purpose of the Future Markets Model is to close at least one of these gaps—the gap created by a dominant firm acting early, while the revenant technology is still nascent, and before a competition authority would, at least before the current era of more aggressive enforcement, have acted to block the transaction. The Future Markets Model closes this gap. And the Future Markets Model closes this gap, and thus protects competition, in both a Future Market for a better version of a product a dominant firm already sells, and a better version of a product in a market adjacent to that of the dominant firm. In both cases the policy goal is the same: ensuring that Future Markets are competitive. And that certainly is an appropriate goal of a competition authority.

And further still, even a market for a better version of a product a dominant firm already sells is, in a sense, a market adjacent to the current market. The Future Market is adjacent in time to the market in which the dominant firm already sells products. The Future Market is the coming market, the market which will exist in the future, but does not yet exist. So in a sense the Future Markets Model always protects competition in markets which are adjacent to the current market. Thus, in a sense, when an authority acts to stop a dominant firm from imposing a vertical restraint which would allow the dominant firm to dominate a market adjacent to that of the market in which the dominant firm already sells products, that authority is not acting differently than when it applies the Future Markets Model to protect the Future Market for better versions of the product the dominant firm is already selling.

In this case, therefore, the FTC acted reasonably. And if the relevant Vertical Restraint Guidelines do not say that an American authority will block a transaction such as the one Grail and Illumina proposed to enter, then the FTC is correct to say that it would no longer follow such Guidelines. The FTC is correct to say that it will no longer apply at least the section of the Guidelines which would stop it from acting in this and similar cases.[99]

European Commission Substantive Analysis

The Commission's substantive analysis mirrors that of the FTC. The Commission also would not allow a dominate firm to buy a nascent competitor and, by imposing a vertical restraint, dominate an adjacent Future Market. The Commission said that it:

> is concerned that, as a result of its combination with GRAIL, Illumina could engage in vertical input foreclosure strategies.[100]

European Commission Assertion of Jurisdiction: The Future Market is Everywhere

The Commission accepted jurisdiction, it said, because if Illumina were to impose the vertical foreclosure strategies it feared Illumina might, then the firm would cause harm in Europe. The

[99] *See supra* text accompanying nts. 18-19.

[100] European Commission, Press release, Commission opens in-depth investigation into proposed acquisition of GRAIL by Illumina, July 22, 2021.

Commission said that it had jurisdiction to review the transaction pursuant to the Article 22 referral the various countries had made,[101] and not because the transaction met the Merger Regulation's[102] turnover thresholds.[103] The Commission said:

> Such foreclosure strategies could have an adverse impact on GRAIL's rivals and European patients, in particular by hampering innovation, reducing the choice, innovative features and performance of products available to patients, doctors and health systems, and increasing barriers to enter the NGS [next generation sequencing] based cancer detection tests space.[104]

But the Commission makes no assertion that Grail does any business in Europe. And the Commission's Article 22 Guidance, actually imposes no such requirement. Instead it contains a number of broad "guiding principles," which could be interpreted as applying to companies which do not (or, perhaps, do not yet) do business in Europe. For example, paragraph 19 says that the Commission will accept a referral if one of the companies to the transaction:

> (1) is a start-up or recent entrant with significant competitive potential that has yet to develop or implement a business model generating significant revenues (or is still in the initial phase of implementing such business model); or
> (2) is an important innovator or is conducting potentially important research.

This logic allows the Commission (and by extension any competition authority) to assert jurisdiction over just about any transaction, involving companies from just about any territory, which involves what the Commission itself determines is an "important innovator." Any such "important innovator" would, of course, sell products it used its innovation to produce, if at all, in the future. This is particularly true if it is now merely "conducting potentially important research." In other words, the Commission seems to be saying that it (and by extension any competition authority) can assert jurisdiction to regulate just about any Future Market.[105] And this is true no matter where the firms compete, if at all, in any current market.

---

[101] *See supra* text accompanying nts. 92-93.
[102] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings.
[103] *See* Broberg, *Broberg on the European Commission's Jurisdiction To Scrutinise Mergers*, *supra* nt. 16.
[104] European Commission, Press release, *supra* nt. 100.
[105] This is particularly true because the Commission reportedly informally encouraged France to make the Article 22 referral.

Jurisdiction and Vertical Restraints in the UK: Facebook/GIPHY

On November 30, 2021 the CMA blocked Facebook's[106] proposed acquisition of GIPHY.[107] GIPHY claims to be the world's largest curator of GIFs,[108] those short, repeating video loops ubiquitous throughout the internet. GIPHY's website allows users to share or embed GIFs in their own content, including those they post on Facebook and its subsidiaries.[109] GIPHY earns money through advertising. Compared to Facebook's, this business was, according to the CMA, "nascent."[110] The CMA feared that its acquisition of GIPHY would allow Facebook to expand its dominance of the social media market.

CMA acted primarily to protect competition in the future social media market

The CMA struggled with its analysis of this case. While both companies sold advertising, the services the companies provided, which attracted users, were similar but not identical. Yet, while the companies were arguably current competitors, the CMA primarily acted to protect competition in a Future Market, one it defined broadly as new social media services:

A. Does a current product exist?

Yes. Both companies sold advertising.

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

Two. GIPHY's only close competitor is Tenor, which Google owns.[111]

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

Yes.

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 CMA struggled to define the relevant Future Market, but essentially concluded that it is the market for future social network services. The CMA said the two companies were in a sense horizontal competitors, since they both sold internet-based display advertising.[112] And, the CMA said, the companies were in a sense vertical competitors,[113] since users could embed GIPHY's GIFs in Facebook posts.

---

[106] While the company has formally changed its name to Meta Platforms, Inc, this article will use this company's more well-known name.

[107] CMA, *Completed acquisition by Facebook, Inc (now Meta Platforms, Inc) of Giphy, Inc.*, Final report, Nov. 30, 2021 (Facebook Final Report). On Dec. 23, 2021 Facebook appealed against this decision. *See* Competition Appeal Tribunal, *Summary of Application Under Section 120 of the Enterprise Act 2002 Case No. 1429/4/12/21,* (Jan. 5, 2022).

[108] Graphics Interchange Format.

[109] Facebook's subsidiaries are Instagram, Messenger, and WhatsApp.

[110] Facebook Final Report, *supra* nt. 107, para. 5.162.

[111] *Id.*, *e.g.* Summary para. 27.

[112] *Id.* Summary para. 36. *See also Id.* paras. 7.1 to 7.255.

[113] *Id.* Summary para. 46. *See also Id.* paras. 8.1 to 8.169.

> But the CMA was mostly concerned about future competition. As an independent company, the CMA said, GIPHY would probably develop new products which would compete with Facebook and its subsidiaries.[114] The CMA thus protected competition in a broad Future Market, one for social media services. [115]

Jurisdiction: CMA blocked a transaction between two American firms.

In this case the CMA again showed its long jurisdictional reach. Facebook and GIPHY are both American companies. Yet no American competition authority even reviewed this transaction. The CMA nevertheless seemed to have no trouble concluding that it had the authority to stop one American company from buying another.

The CMA concluded that the transaction satisfied the share of supply test, described *supra.*[116] The CMA recognized that it has wide discretion to determine its jurisdiction,[117] and could review a transaction among non-British firms.[118] The CMA applied a broad definition of the services the two firms offered,[119] and while the CMA claimed that this test corresponded to its horizonal competition concerns,[120] the CMA, relying on *Sabre v. CMA*[121] also claimed that it could devise a share of supply test which allowed it to also respond to its broader competition concerns, including its vertical concerns.[122] And in this case the CMA certainly did that.

Conclusion: Most Aggressive Authority Has the Power

The CMA applied its jurisdiction rules aggressively first in Sabre/Farelogix,[123] and then again in Facebook/GIPHY.[124] Clearly the CMA wanted to review these transactions. And in Illumina/Grail the European Commission is aggressively applying its jurisdictional rules. The Commission clearly wants to review this transaction.

---

[114] *See Id., e.g.* paras. 35 and 50.
[115] *See Id.* para. 8.187, referring to possible vertical foreclosure: "[T]he effect of such foreclosure would be the weakening of the competitive constraints exerted by Facebook's existing and future rivals in the supply of social media services." This social media services market is much broader than the market for internet-based display advertising, which is the horizonal market in which the CMA believed the parties also competed, and in which the transaction would also harm competition. *See Id.* para. 7.255.
[116] *See supra* text accompanying nt. 75.
[117] Facebook Final Report, *supra* nt. 107, paras. 3.22 and 3.23.
[118] *Id.*, para. 3.24.
[119] *Id*, para. 3.25. The CMA defined these services as "the supply of apps and/or websites that allow UK users to search for and share GIFs". Since these websites could be stored on computers located outside the UK, this definition is indeed broad.
[120] *Id.*, para. 3.42.
[121] *See supra* nt. 80.
[122] Facebook Final Report, *supra* nt. 107, para. 3.41.
[123] *See supra* text accompanying nts. 75-81.
[124] *See supra* text accompanying nts. 116 to 122.

Indeed, throughout the history of the authorities' attempts to regulate competition to innovate the authorities have applied their jurisdictional rules aggressively. Jurisdiction was a prime issue in what might be called the founding case of the Innovation Market concept, General Motors/ZF Friedrichshafen (GM/ZF).[125] The two parties to that transaction, an American company and a German company, had a long history of competing to make better heavy duty automatic transmissions. But in the US the companies competed in only two narrow segments, those to make better bus and refuse truck automatic transmissions. [126] As I wrote about that case back in 1998:

> The DOJ feared, however, that the transaction would not only harm competition in these two narrow markets, but also that it would harm competition in the broad transmission market. Yet if the DOJ had only alleged that the firms competed in these two narrow markets, then ZF would simply have sold GM's businesses in these two narrow markets, and then completed its purchase of GM's division. By alleging that the firms competed in a broad innovation market, the DOJ forced ZF to respond to its broader antitrust concerns.[127]

These cases, Sabre/Farelogix, Illumina/Grail, Facebook/GIPHY, and GM/ZF, show that all the competition authorities, when they want to, will apply their jurisdictional rules aggressively. And they will do so when they want to address what they believe are important competition to innovate issues. In other words, the authorities will apply their jurisdiction rules aggressively so they can protect competition in the appropriate Future Market. In all these cases the actual impact of the transaction on the relevant current market in the relevant jurisdiction was, at best, minimal. Yet in each case the authority used this minimal impact as an excuse to assert jurisdiction. In each case the authority really wanted to protect competition in the relevant Future Market—the market, in its jurisdiction, for products which did not exist yet.

On one hand it is hard to fault an authority for doing this. It should act to ensure that firms sell in its jurisdiction the best possible product at the lowest possible price. And it should ensure that firms do this both now, and in the future. This will ensure, in its jurisdiction, the highest possible rate of economic growth.

But on the other hand, this logic, taken to its extreme, allows every competition authority throughout the world to regulate every transaction which may impact any Future Market. For example, while the European Commission is correct to say that Illumina's purchase of Grail will probably impact the future availability, price and quality of early detection cancer kits in Europe, that is also true for, among other places, South Korea and Brazil. This same logic, therefore,

[125] *United States v. General Motors Corp.*, No. 93-530 (D. Del. filed Nov. 16, 1993).
[126] *Lawrence B. Landman, Did Congress Actually Create Innovation Markets?, 13 Berkeley Technol. Law J. 721, 759-767 (1998).*
[127] *Id.* at 760.

allows, among other authorities, the South Korean and Brazilian competition authorities to review Illumina's purchase of Grail.[128]

Thus, while on one hand, as a practical matter, every competition authority throughout the world cannot review every transaction which may impact every Future Market, practitioners should expect the authorities to aggressively assert their jurisdiction. This is consistent with, and indeed an important part of, the authorities' increasingly aggressive actions to protect competition in Future Markets.

I have previously written that DOJ should not have asserted jurisdiction over GM/ZF.[129] Yet the European Commission and CMA now clearly agree with what their American counterpart did back in 1993. In the current era of aggressive enforcement, the authorities will not only continue to aggressively protect competition in Future Markets, including those involving nascent competition, but they will continue to aggressively assert jurisdiction. They will continue to review transactions in which not only are no firms selling the future products, but in which firms which may sell future products are not even selling current products in the territory the relevant competition authority regulates. At best, to assert jurisdiction, the authorities will need to find a possible small, possibly even *de minimis*, impact of a transaction on a current market in the territory they regulate.[130] But they will be using this merely as an excuse, a justification, so they can do what they really want to do: protect competition in a Future Market.[131]

And in this multi-jurisdictional era, the most aggressive authority will, as a practical matter, determine if a transaction may proceed. In this context the new Market Definition Notice, which the European Commission is currently drafting, will be critical.[132] Many future transactions, of companies based outside Europe, will only be able to proceed, as a practical matter, if the European Commission—and probably the CMA and other competition authorities as well—approve the transaction.

---

[128] For an extensive analysis of competition to innovate cases in many jurisdictions throughout the world *see* European Commission, *Support study accompanying the Commission Notice on the evaluation of the definition of relevant market for the purposes of Community competition law,* pp. 110-34 (June 12, 2021).

[129] I said the appropriate authority to regulate this transaction was in Europe. Landman, *Did Congress Actually Create Innovation Markets?*, *supra* nt. 126, at 760-767.

[130] Regarding Illumina/Grail the European Commission may not even satisfy this *de minimis* test.

[131] On April 20, 2020 the British Government said it would establish new jurisdictional thresholds which the CMA will use to determine when it may review what it called "killer acquisitions." In this context, the government said it would increase the share of supply threshold from 25% to 33 %, and the government also said it would create a new "clearer UK nexus test." "More details on these proposals will be spelled out in due course," the government promised. See Reforming competition and consumer policy: government response, April 20, 2020.

These new thresholds will probably have little or no impact on the DMA's behavior. First, as nts. 75 to 79 supra and accompanying text show, transactions easily satisfy the share of supply test; the slightly increased percentage requirement will therefore probably have little or no practical impact. Second, while the government has not yet established the new UK nexus test, given the great current concern regarding nascent competition, the government will probably create a test which is also easy to satisfy. And in any case the CMA has the discretion to define its jurisdiction aggressively (see nt. 80 supra and accompanying text); the CMA will therefore probably apply this new test aggressively and thus find that it has jurisdiction to protect competition in just about any Future Market in which it feels it should.

[132] *See* Landman, *The Future Markets Model, supra* nt. 3, p. 514.