



10 January 2022

When the Commission Protects Innovation it Applies the Future Markets Model

Statement of Lawrence B. Landman Regarding the European Commission's Draft Market Definition Notice

When the European Commission claims it is protecting competition to innovate it is, in reality, protecting competition in a Future Market. When the European Commission protects competition in a Future Market it applies the Future Markets Model. And when the European Commission claims it is protecting competition in an Innovation Space it is, in reality, simply applying the Future Markets Model aggressively. A series of four articles I have published in the European Competition Law Review shows this clearly.

In *Innovation Markets in Europe*, 19 E.C.L.R. 21 (1998), I show that just as the American antitrust enforcers cannot find and protect competition in an Innovation Market, neither can the European Commission. In fact, as I show in this article, the Commission does not claim it can. The Commission itself says that rather than protect competition in an Innovation Market, or protect competition to innovate more broadly, it protects competition in Future Markets, markets for products which do not exist yet.

In *From Innovation Markets to Innovation Spaces in Europe: a new phrase is not innovation* 42 E.C.L.R. 30 (2021) I show that just as the American and European competition authorities cannot protect competition in an Innovation Market, neither can they protect competition in an Innovation Space. I show in this article that despite what the Commission says in *Dow/Dupont*, when it claims to protect competition in an Innovation Space it is actually protecting competition in a Future Market.

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In *The Future Markets Model: how antitrust authorities really regulate innovation*, 42 E.C.L.R. 505 (2022) I lay out the methodology the competition authorities, on both sides of the Atlantic, actually use to protect competition in Future Markets. The following is therefore the methodology the Commission actually applies when it claims to protect competition in an Innovation Space:

- A. Does a current product exist?
- B. How many firms are trying to develop a future product?
- C. For each possible future product, is it sufficiently developed that the authority will consider it a possible future product?
- D. How broad will the authority define the Future Market?
Will the authority consider future products which are similar, but not identical, as future competing products?

In Dow/Dupont while the Commission claimed it was protecting competition in an Innovation Space, it was actually applying this methodology aggressively. Given the inherent uncertainty in trying to determine how markets will develop, in every relevant case the relevant competition authority must decide how aggressively it will apply this methodology. Saying the same thing another way, the authority must decide when, given its inherent inability to predict the future with 100% certainty, it will nevertheless act to preserve future competition. In Dow/Dupont the Commission chose to act aggressively. It assumed that the merging firms would successfully develop at least a significant number of the products which they were then developing, and it chose to define the Future Market broadly. It therefore assumed that a significant number of the relevant products would, if the firms did not merge, compete against each other in the future.

And, finally, in *Nascent competition and transnational jurisdiction: the future markets model explains the authorities' actions*, 43 E.C.L.R. 294 (2022) I show that the Future Markets Model explains why not just the US and EU, but also why the UK competition authorities are reviewing so many of the same transactions which involve Future Markets. Future Markets are nowhere and everywhere at the same time. Therefore even if a relevant firm (such as one of the firms involved in Illumina/Grail) are not currently selling products in the relevant jurisdiction, it may in the future. Thus every competition authority throughout the world may seek to ensure that every Future Market through the world remains competitive.

Accordingly, when the Draft Market Definition Notice claims in paragraphs 91-93 that the Commission can protect innovation in a broader sense than simply applying the Future Markets Model aggressively the Draft Notice does not correctly describe the Commission's actual practice. To ensure that the Commission can work effectively with all market participants the Commission should clearly state what it actually does.