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Draft Technology Transfer Guidelines Further Show that the Future Markets Model is the Administrable Framework for Protecting Innovation

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I. Confirms Previous Submission to Commission

I write to explain why the draft Guidelines to the Technology Transfer Block Exemption confirm what I said in my previous Statement to the Commission. On Sept. 3, 2025 I submitted *The Future Markets Model is The Administrable Framework for Protecting Innovation.* I submitted this Statement in reply to the Commission's request for comments regarding its proposed new merger guidelines.

As I explained in that Statement, the Future Markets Model is the administrable framework the Commission seeks. This framework guides the Commission when it analyzes a market,

and considers whether it may need to act to protect competition to innovate. The paragraph on competition to innovate in the draft Guidelines, paragraph 41, further shows that what I said in that Statement is correct: the Future Markets Model is the administrable framework the Commission seeks so it can protect competition to innovate.

This Statement, *The Future Markets Model is The Administrable Framework for Protecting Innovation*, is available on the website of the European Union Initiative of the GW Competition and Innovation Lab. I explain in that Statement that not only is the Future Markets Model the administrable framework the Commission seeks so it can protect competition to innovate, but it is the framework the Commission has in fact been using for the past three decades. In my Statement I summarized 15 article I have written on this subject. Yet all I did in those articles was show explicitly what the Commission has already been doing, implicitly, when it analyzes a market and considers whether it should act to protect competition to innovate. And, as I show, the Commission has been doing this for the past thirty years.

II. Para 41: Ensuring Sufficient Number of Competing R&D programs

Paragraph 41 of the draft Guidelines, including the relevant footnotes, says:

> Technology licensing agreements may affect competition in innovation[29]. In analysing such effects, however, the Commission will normally confine itself to examining the impact of the agreement on competition within existing product and technology markets. Competition on such markets may be affected by agreements that delay the introduction of improved products or new products that over time will replace existing products. In such cases, innovation is a source of potential competition which must be taken into account when assessing the impact of the agreement on product markets and technology markets. In a limited number of cases, however, it may be useful and necessary to also analyse the effects on competition in innovation separately. This is particularly the case for highly innovative markets characterised by frequent and significant research and development and where the agreement affects innovation aimed at creating new products or technologies[30]. In

> such cases, it can be analysed whether after the agreement there will be a *sufficient number of competing research and development projects* left for effective competition in innovation to be maintained.[31] [Emphasis supplied]
>
> (29) For instance, technology licensing agreements may affect the development of products or technologies that will (i) improve existing products or technologies; (ii) replace existing products or technologies, or that would (iii) create an entirely new demand. Technology licensing agreements may also affect (iv) early innovation efforts, namely R & D activities that are not closely related to a specific product or technology.
>
> (30) See e.g. paragraphs 90 et seq. of the Market Definition Notice, cited in footnote 26.

The first part of paragraph 41 says that the Commission will, normally, protect competition to innovate by ensuring that current markets, markets for currently existing products and technologies, remain competitive. And, indeed, this paragraph does describe what the Commission normally does. The Commission normally ensures that markets for currently existing products remain competitive. When doing this the Commission, among other things, preserves the competitive forces that drive firms to innovate. Thus, even when a Commission decision does not explicitly mention innovation in that decision the Commission will still, implicitly, be acting to protect competition to innovate. I explain this, in detail, in, among other articles, *The Economics of Innovation Spaces*, 48 World Competition: Law and Economics Review 195 (2025).

But paragraph 41 goes on to say that sometimes the Commission will also "analyse the effects on competition in innovation separately." When it does this, this paragraph says, the Commission will ensure that the relevant market remains competitive by ensuring that "after the agreement there will be a sufficient number of competing research and development projects left for effective competition in innovation." Thus the key questions are: How does the Commission determine if research and development projects are *competing*. How does the Commission determine if the market contains a *sufficient number* of competing research and development projects?

III. Future Markets Model Allows Commission to Answer the Key Questions

A. Identifies Competing Research and Development Protects

To determine if the relevant research and development projects are competing the Commission must identify the products these projects are trying to produce. It must determine if these products, if they ever exist, will be sufficiently similar that they will compete against each other. In other words, the Commission must define a Future Market, a market for products at least some of which do not exist yet. And to determine if research and development projects are competing the Commission must answer the question prong D of the Future Markets Model poses:

> 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?[1]

B. Determines Sufficient Number of Projects

Further, to determine if, after the agreement is implemented (assuming it is), a sufficient number of research and development projects will compete against each other in the Future Market the Commission must answer the questions the other prongs of the Future Markets Model pose:

> A. Does a current product exist?
> B. How many firms are trying to develop a future product?
> C. For each possible future product, is it sufficiently developed that the authority will consider it a possible future product?[2]

To decide if a sufficient number of research and development projects compete in a Future Market the Commission must first determine if any firms are already selling products which will compete against the products these research and development projects are trying to develop, should these programs

[1] *See* Lawrence B. Landman, *The Future Markets Model: how the competition authorities really regulate innovation*, 42 E.C.L.R. 505, 506 (2022).
[2] *Id.*

successfully develop products. The Commission must thus must first answer the question prong A poses.

As the Commission begins the process of determining if a sufficient number of research and development projects compete against each other it must first identify all the research and development projects which may just, possibly, compete against each other. And to do this the Commission must answer the question prong B poses.

After identifying all the research and development projects which just may compete against each other, the Commission must then determine, for each possibly relevant project, whether the product that project is trying to produce is sufficiently developed that the Commission will consider that project to be a competing project. And to do this the Commission must answer the question prong C poses.

A project could be trying to develop a product which, if it exists, will compete against the products other research and development projects are trying to develop. But this possible future product could be in such an early stage of development that the Commission may conclude that it should not consider this project to be a competing project. The possible future product this project is trying to develop may be in such an early stage of development that the Commission may conclude that the chance that this project actually produces a product is so small that the Commission will not consider this project to be a competing project.

After the Commission identifies, first, the currently existing products which compete in the relevant market, and, second, the identifies the competing research and development projects, then the Commission will know how many products, and projects, are competing in the relevant Future Market. It could then determine if this number is sufficient, and thus whether the Future Market will remain competitive. In other works, the Commission will be able to determine if, "after the agreement there will be a *sufficient number of competing research and development projects* left for effective competition in innovation."

And of course to make this determination the Commission will have to determine how many firms must compete in a Future Market to make that market competitive. As I explained in my Statement, *The Future Markets Model is The Administrable Framework for Protecting Innovation*," on page 7, while the Commission has not explicitly said how many firms must compete in a Future Market to make that market competitive, the American merger guidelines could be interpreted as

requiring from four to seven firms to compete in a Future Market to make that market competitive.[3]

C. Market Definition Notice defines a Future Market

Paragraph 41, in its footnote 30, either says explicitly that it will protect competition to innovate in the manner the Market Definition Notice describes, or at the bare minimum, it strongly implies that it will protect competition to innovate in the way the Notice describes. And in the Market Definition Notice the Commission says it will protect competition to innovate by, when necessary, protecting competition in what it calls an Innovation Space.

In *The Economics of Innovation Spaces*, *supra,* on pages 198-201 I analyze, in detail, the paragraphs of the Market Definition Notice which footnote 30 cites. These are the paragraphs of the Market Definition Notice in which the Commission explains how it will analyze competition to innovate. As I show in that article, in its Market Definition Notice the Commission claims that it protects competition to innovate by, at times, protecting competition in an Innovation Space. But as I also show in that article, in reality whenever the Commission protects competition to innovate it protects competition, not in an Innovation Space, but in a Future Markets.

As this shows, whenever the Commission acts to protect competition to innovate it protects competition in a Future Market. And to analysis this Future Market the Commission applies the Future Markets Model. In fact, as I have shown in the fifteen articles which I summarize in *The Future Markets Model is The Administrable Framework for Protecting Innovation*, the Commission has been doing this for the last thirty years.

[3] Issues regarding firms' possible agreements to delay developing or selling products are beyond the scope of this Statement. I will observe in passing, however, that for the Commission to regulate such agreements in any way it must first determine whether the relevant firms would, absent the agreement, try to develop or sell competing products. The Commission would therefore, it would seem, have to answer the questions the Future Markets Model pose.