



Competition Enforcement vs. Competition Advocacy

What Role for Antitrust Enforcers Regarding Disruptive Innovation?

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Introduction

- What is disruptive innovation?
 - It's a broad and imprecise term –
 - Joseph Schumpeter's "gale of creative destruction"
 - Omnipresent in economy as competition drives innovators to develop new technologies and business models as way to compete
 - Not necessarily new
 - airplanes vs. trains;
 - word processors vs. typewriters;
 - smartphones v. mobile phones v. landlines

Disruptive Innovation

- Recently a lot of attention on certain types of “disruptive innovation”
 - Uber/Lyft/Didi Chuxing, Airbnb, other “sharing economy” businesses
- But creating trading and matchmaking platforms, even online, isn’t new either
 - Shopping malls, B2B exchanges, eBay, Amazon, Open Table

Disruptive Innovation

- Common element that leads to interest: innovation in industry with regulation
 - Ride-sharing – taxis typically highly regulated
 - Room-sharing – hotels/rental housing typically highly regulated
 - Compare smartphones - limited regulation
- Existing regulations may not be equipped to address the innovative approach
 - Or innovative approach may gain competitive advantage by exploiting regulatory gaps

Disruptive Innovation

- Innovation in industries subject to regulation often occurs outside “sharing economy” industries as well
 - Teeth whitening provided in mall kiosks instead of dentist offices (*e.g.*, N.C. Board of Dental Examiners)
 - Prescription issuance via telemedicine (*e.g.*, Teladoc case)
 - Direct-to-consumer automobile sales
- These cases can pose similar issues – an innovative way of providing a service that falls outside the bounds of traditional regulation

Disruptive Innovation

- Nature of problem is the same, whether a disruptive “sharing” technology or a different business model
 - Creation and enforcement of government regulatory restraints can have stronger negative effects on competition than private restraints (vertical agreements, abuse of dominance)
 - Such restraints may reflect entrenched businesses seeking to avoid new competitive challenges
 - On the other hand, regulatory restraints may shelter sectors from innovative competition, leaving them particularly ripe for new, competing models

Competition Advocacy

- Tools the same in US for both sharing economy and other types of cases involving regulatory limits on competition:
 - Competition advocacy
 - Letters, formal comments, testimony, amicus briefs in private litigation
 - Reports and studies
- Goal in each instance is to inform government and public of costs of the restrictive regulation

Competition Advocacy - Examples

- FTC advocacy letters to state legislatures supporting elimination of restrictions on direct-to-consumer sales of automobiles (Missouri, Michigan, New Jersey)
- Advocacy letters regarding ride sharing (Chicago, Anchorage, Colorado, D.C.)
- Sharing Economy Report
- FTC/DOJ *Teladoc* amicus brief and FTC telemedicine advocacy letter (Delaware)

Competition Advocacy - The Challenge

- For most regulations, the government typically offers non-competition policy goals it seeks to advance, such as health and safety or protection of consumers
 - These justifications often, but not always, support the regulation
- Our view is that any regulations should be narrowly tailored to the specific public policy goals that are identified to justify the regulation
 - Moreover, any regulations should be flexible enough to allow for new forms of competition

Using Enforcement to Promote Innovation?

- US antitrust laws provide limited enforcement authority with respect to government restrictions on competition
 - While FTC can challenge some state restrictions, that authority is limited by state action doctrine
 - No authority to challenge restrictive federal regulations
- Other countries may have more robust authority
 - China – AML Chapter 5 (administrative monopolies) plus Fair Competition Review System
 - EU – Article 106

Or Does Non-enforcement Promote Innovation?

- FTC's role is limited as law enforcer
 - Not a regulator, not an industrial planner
- Objective is to allow market to operate freely, intervening only when conduct or mergers would harm competition, including by reducing or stifling innovation

Sometimes Enforcement is Necessary . . .

- Nielsen/Arbitron (2013) – Merger between TV ratings company and radio ratings company. Both companies were developing ratings systems for cross-platform (online) audience measurement. FTC sought divestiture of certain Nielsen assets to a third party to allow development of competing cross-platform audience measurement technology.

Sometimes Enforcement is Necessary . . .

- North Carolina Board of Dental Examiners (2015) - State licensing board comprised of dentists prohibited non-dentists from performing teeth whitening services, who often provided services at lower costs without apparent negative health consequences. FTC successfully stopped board's prohibition.
 - *Note: primary issue in case was whether board's position as authorized state regulator immunized its prohibition from antitrust challenge.*

Sometimes Enforcement is Necessary . . .

- Steris/Synergy (2015) – Steris provides sterilization services for medical devices in US; Synergy had a competing innovative technology it offered in Europe, and was considering building similar facilities in US. FTC challenged merger in court, but lost because FTC failed to prove Synergy would likely build facilities in the U.S. if the merger were not completed.

... But not Always!

- Zillow/Trulia (2015) – Merger between two companies operating online home buying sites, a developing business model; while FTC investigated concerns they competed for real estate agent advertising spending, evidence suggested it was one outlet of many for such advertising, so FTC closed investigation.

... But not Always!

- Google online search (2013) – Investigation into Google’s alleged promotion of its own content in search results along with possible “demotion” of certain competitors in results -- “search bias”. FTC investigation concluded that Google’s changes to search algorithms were generally to improve result quality, with any negative impact on competitors being incidental.

Resources

Competition Advocacy

- [Sharing Economy Report](#) (2016)
- [U.S. Note to OECD on Disruptive Innovation](#) (2015)
- [Teladoc v. Texas Medical Board *Amicus* Brief](#) (2016)
- [Telemedicine Letter](#) (2016)
- [Ride Sharing Letter \(D.C.\)](#) (2013)
- [Automobile Distribution](#) (2014)

Enforcement

- [Nielsen/Arbitron](#) (2013)
- [North Carolina Board of Dental Examiners](#) (2015)
- [Steris/Synergy](#) (2015)
- [Zillow/Trulia](#) (2015)
- [Google Search](#) (2013)

Thank you!

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