Volume 11 | Number 1 | Spring/Autumn 2015

New business models and competition enforcement: must we ride the tide of change?

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INTRODUCTION

New business models seem all-pervasive today, with the result that older forms of trade feel under constant threat.

There is undoubtedly a surge in more intangible forms of innovation that rely on new ways of selling existing goods or services. Recent examples of exponential growth in revenues and market capitalization come for the most part from these firms which have rolled out new ways of providing an existing service or supplying an existing product: AirBnB, founded in 2008, is reportedly valued at $20 billion; Uber's value, created in 2009, is now estimated at $50 billion.

By blurring the line between traded services and non commercial "sharing" activities or by eroding taxable revenues in the country where the service is consumed, these new business models have, in several instances, raised policy concerns that touch on the capacity for a "sovereign" to effectively regulate and raise taxes on services being traded on its soil.

Sector-specific rules established to frame a given market activity and operators are also destabilized when new business models create new layers (e.g., platforms) not foreseen by the sector regulation or lead to the removal of the traditional subjects of the regulation.

The debate is somewhat different for competition law and policy. The risk of circumventing or evading the application of competition law is limited, as enforcers rely on effects to assert jurisdiction rather than on the place of establishment. While the ongoing debate on platform regulation in Europe has led certain stakeholders to call for an adaptation or revisiting of competition law provisions or principles, the initiative is for the most part geared towards the establishment of a specific set of rules, lying outside the scope of competition enforcement, and pursuing alternative objectives. However, potential disruptions caused by new business models necessarily feed into our substantive assessments and cannot be ignored.

Let me begin by exploring what the denomination "new business model" actually encompasses (I), before I look at the impact of these models, first on the assessment carried out under competition law (II), then on the laws and regulations crafted to regulate certain economic sectors (III).

I. HOW TO SPOT A NEW BUSINESS MODEL

There are several features common to most successful new business models.

Firstly, as already underlined, new business models do not rely so much on product innovation as they do on innovative ways of combining or redefining existing techniques, products and services. Internet is often the springboard for such innovation, whether car-hire services, house rentals, film distribution or ride-sharing, to name a few and now familiar "digitalized" services.

Secondly, the aim is to "revolutionize the economic structure from within…destroying the old one, creating a new one," as aptly described by Joseph Schumpeter: the firm seeks to displace incumbents, on its own terms.

Thirdly, disruptive new business models are driven by charismatic, highly visible entrepreneurs whose success relies on (i) a new idea; (ii) a first mover advantage; (iii) a capacity to shore up capital and investment at the nascent stage of their activity, on the promise of high future returns.

Fourthly, the innovation brought about is radical rather than incremental or gradual in nature. Insiders did not see it coming and its very force is related to its unpredictable character.

Fifthly, new business models are the result of careful monitoring of demand to spot general or niche dissatisfaction: Uber thrived on individuals' frustration with local taxi services; Blablacar — a France-based "unicorn" offering a ride-sharing platform service — tapped an existing, unaddressed demand for cheap, long-distance domestic transport.

Finally, new models often favor strategies that allow them to circumvent barriers to entry and expansion. This is in particular the case with firms acting as intermediaries, such as Uber or AirBnB, which can limit upfront costs associated with developing a vehicle/chauffeur fleet or building and managing a hotel, by relying on "independent" providers. The franchising model is premised to some extent on the same logic but it is taken here at another level: it is not only entrepreneurs who are affiliated but individuals renting out their house or providing part-time car-hire services with their own car.

Adopting a broad-brush approach to the issues raised for competition by new business models, one can distinguish between two relevant subsets.

If the new business model is in fact a platform, whose function is to put in relation different users or users with professionals, effects likely to accrue are those more broadly associated with digital platforms:

direct and indirect network effects, self-reinforcing and prone to snowballing into a "winner takes all" situation; a tendency towards conglomeral or vertical integration with a view to building an entire ecosystem.

If the new business model is a low cost model, such as that of Easyjet or Ryanair in the airline industry, we may be attentive, for instance, to the ability, for a new entrant, to replicate the cost structure of the first low cost carriers in order to compete effectively. Overtime, for precursors of the low cost model reaping the benefits of first mover advantage and consolidating their customer base and market share, regulatory barriers may turn from an obstacle to an advantage if they limit the opportunities of potential low cost alternatives.

II. WHICH CHANGES, IF ANY, DO NEW BUSINESS MODELS BRING TO THE APPLICATION OF COMPETITION LAW?

Competition law enforcement operates on a case-by-case basis, adjusting to market evolutions and revisiting, where necessary, precedents. The approach taken is both static and dynamic, thereby excluding the assumption on the part of agencies that the current state of play is the only relevant reference point.

The advent or prospect of new business models thus feeds into our analysis and is duly taken into account before adjudicating on a matter, whether for purposes of antitrust enforcement or merger control. This notwithstanding, agencies must also tread cautiously, for fear of giving too much weight to a phenomenon which, while a possible game-changer, does not necessarily imply that solidly grounded findings reached in the past no longer hold true for our relevant time horizon.

For instance, with respect to market definition, because of the primacy of demand-side substitution in the delimitation of the relevant market, new business models really have a bearing on market definition only once they result in significant and lasting changes in demand and consumer patterns.

One example is the market for "multiple play" bundles, which includes three or more of the following services: fixed telephony services, mobile services, fixed Internet access services and TV services. These bundles reflect the commercial convergence at work between mobile and fixed services, but also between content and network, on the back of the "despecialization" of telecom infrastructures that can carry voice and heavy data services, both at home and on the go via mobile phone. Agencies currently have the choice between upholding the existence of a separate "multiple play" services market, which either co-exists with or absorbs current unbundled markets, or to deal with "multiple play" services directly within their competitive assessment, in particular when looking at the conglomeral effects of a merger. For the time being, neither the French Autorité (Numericable/SFR, 2014) nor the European Commission (Liberty Global/Ziggo, 2014) have gone so far as to uphold a distinct "multiple play" services market, an evolution that ultimately depends on the rate of multiple-play bundle take-up in a given geographic market and the resilience of distinct unbundled offerings.

Another example relates to the rise of subscription-based video-on-demand (SVoD) services offered by so-called "over the top" ("OTT") providers, such as Netflix. In the context of merger reviews involving pay-TV providers, parties to the transaction often argue that these new non-linear services are in direct competition with linear pay-TV services and accordingly belong to the same market, or alternately exercise strong competitive pressure that mitigates the risk of horizontal and vertical effects. However, these claims have, to date, been rebutted by competition agencies, including in France (Canal +/TPS, 2012), in light of the nascent character of SVoD services, their limited take-up or the difference in quality and lack of premium content. Interestingly, these decisions reflect the truth that incremental changes, such as those brought about by the development of non-linear services, do not instantly remove the competitive concerns attached to the exercise of market power in the more "traditional" segments. Indeed, the flurry of channels, distributors and broadcasting technologies has not put an end to concerns that may arise with respect to the concentration of buyer power for certain broadcasting rights in the hands of a few pay TV behemoths. Concerns thus remain, if only during a transitional period.

Yet another example are digital music streaming services, which present technological specificities that are distinct from digital music download, but that can also be looked at as a new business model (subscriber-based rather than pay per download). They were envisaged as a separate segment in the Commission's Universal/EMI (2012) case but ultimately brought together with download services within a single relevant market, in light inter alia of the "competitive interaction" between the two segments.

Once the relevant market is delineated, the question is then the relevance of market shares. Either a new model is a market in and of itself, with the result that the innovator holds ipso facto a dominant or monopoly position. Alternatively, it is subsumed within a larger differentiated market; the specificity of the new model must then be accounted for. As regards to low cost models that rely on a strategy of aggressive pricing, they can be seen as holding a special role in animating competition: accordingly, the effects of a takeover by a competitor of such a market player will tend to be scrutinized carefully. Agencies will look beyond prima facie limited market shares to ascertain the impact on competitive interactions.

As regards antitrust enforcement, the appraisal of potentially anticompetitive behavior in relation to a new business model is probably more fraught, at least in its nascent stages. The Autorité thus adopted a decision in 2004 rejecting VirginMega's claim to access Apple's proprietary digital rights management system ("DRM"), Fairplay, to allow for the direct transfer of music downloaded from Virgin's platform onto an iPod. The rejection was based on the nascent character at the time of the market for the sale of digital music and the fact that Apple's DRM could not be said to constitute a facility essential to the development of a music platform. Holding otherwise would have led the Autorité to anticipate on whether the market would evolve into silo-like competition or not, a conjecture it could not make on the basis of the evidence adduced to it during the investigation and at the time it adjudicated on the case.

However, if and when they become prominent, there is a temptation for firms that prospered through a breakthrough to foreclose access to the market by future potential innovators. The example of online travel agencies ("OTA") is a case in point. The price parity clauses that they imposed on their hotel clients had the effect of freezing price-competition between OTAs to the detriment of new entrant OTAs that did not benefit from the notoriety, scale and scope of incumbents and could mostly rely on price differentiation as a tool to gain access to the market — a tool made ineffective by virtue of the price-parity clauses. The Autorité addressed these parity clauses jointly with its Italian and Swedish colleagues and in close coordination with the European Commission. This led to commitment decisions being adopted vis-à-vis Booking.com on the same day, April 21, 2015, in the three countries. The arrangement provides a satisfactory balance since it makes it possible to improve competition between platforms and consequently promote a reduction in the fees applied to hotels. It further reassigns a counterbalancing power to hotels by perceptibly improving their commercial and pricing freedom while preserving the efficiency gains that the platforms' economic model has permitted.

Moreover, competition law serves to curtail strategies by incumbents to prevent, in the first place, the entry on the market of offers built around a new business model. This can be illustrated by a decision of 2014 in which the Autorité considered that the practice implemented by the publishing group Amaury of closing off the market to a new entrant (Le 10Sport.com) in order to reinforce the monopoly of its newspaper (L'Équipe) constituted an abuse of dominance, and imposed as a consequence a fine of EUR 3.5 million against the group. Amaury launched on the same day as Le 10Sport.com the daily news Aujourd'hui Sport, which was of the same format and targeted the same audience as Le 10Sport.com. After a few weeks of operation, due to poor financial results, Le 10Sport.com ceased its publication, which was then released on a weekly basis.

The Autorité established the exclusionary practice on the basis of a number of factual elements: the clear intention to drive the new entrant out of the market (as evidenced by documents seized during dawn raids), the lack of economic rationality of the implemented strategy (that implied a financial sacrifice and was suboptimal compared to other response scenarios, but inflicted the most damage to the competitor), the launch of a similar competing newspaper on the same day, the purposely limited lifetime of the newly created newspaper conceived as pure retaliation to the imminent threat of the new entrant, and the exit of Le 10Sport.com from the market as a consequence of the drying-up of its readership base.

Another related issue concerns the strategy pursued by certain firms to systematically buy out potentially innovative rivals, whether innovation is already materialized through a recently launched product or service or has yet to materialize (pipeline products). These situations can be looked at and are addressed by competition agencies in the context of a merger review. More generally, the wide-spread adoption of the Significant Impediment to Effective Competition/Substantial Lessening of Competition ("SIEC/SLC") test in merger control can be credited for stimulating an effects-based approach and a careful analysis, on a case-by-case basis, of the incentives and ability of merging parties to increase prices notwithstanding the absence of dominance and depending on the dynamics of the specific market at hand.

However, the monitoring, by agencies, of these strategies of systematic acquisition may sometimes stumble upon jurisdictional thresholds not necessarily attuned to the economic reality of high potential/low turnover targets. The Facebook /Whatsapp case (2014) is to some extent a case in point: with Whatsapp valued at $22 billion but achieving a global turnover of around $15 million, turnover thresholds alone were not able to capture this transaction, which nonetheless raised competition concerns exceeding many transactions which do fall under the purview of competition agencies. Ultimately, the case was referred to the European Commission by the British Competition and Markets Authority, the latter asserting jurisdiction on the basis of market share thresholds. Drawing from this experience, the German Monopolkommission suggested in early June 2015 applying a size of transaction threshold to capture transactions involving start-ups with no or limited revenue at the time they are bought out. The proper design of jurisdictional thresholds is of course complex and requires a careful balance between legal certainty for stakeholders, the avoidance of excessive administrative burdens, the need for a sufficient local nexus and the effective monitoring and remedying of undesirable outcomes for competition. The debate remains however open as to the need to adjust current rules, in order to ensure preemptive acquisitions do not become, in the future, the tool of choice to circumvent merger control.

III. DO NEW BUSINESS MODELS REQUIRE NEW REGULATIONS?

The emergence of new business models oftentimes calls into question the existing legal environment, either with a view to enable these new models to reach their full potential or, conversely, to erect hurdles with the aim of protecting incumbents.

Competition agencies routinely deal, in the context of their advocacy work, with the review of draft or existing regulations, to identify possible constraints on competition and examine the justifications brought forward by decision-makers for these constraints, in light of their necessity and proportionality.

Competitive constraints may become apparent only once the new business model has been rolled out and the inadequacy of rules fashioned for traditional models is thereby revealed. For instance, E.U. rules paved the way in 2013 for the opening up of online sales of non-prescription medicine in France. However, national obligations weighing on chemists, irrespective of the sales channel used (e.g., brick and mortar or online), have the effect of stifling the development of online sales and prevent professionals from making the most of the cost savings and increase in bargaining position expected from a pick-up in web-based sales. Such a situation requires proactive steps to revise regulations and enable market players to fully benefit from the new opportunities conferred on them by this market opening. Regulatory changes are thus instrumental in bringing about positive market outcomes resulting from the emergence of new business models.

Unfortunately, new regulations do not always seek to create an enabling environment but rather strive to protect incumbents by tightening conditions for market access and activity. This is a reflection of the sway "insiders" hold over policy-makers, by emphasizing immediate threats on their activity and employees and contrasting these with the more diffuse benefits of innovation, spread through millions of consumers and users. The case of Uber in France is a telling example of the implementation of protective regulations that aim in practice to extend taxis' de jure monopoly on street-hailed car-hire services to services provided with a prior booking. The Autorité sought, in three successive opinions issued in 2013, 2014 and 2015, to distinguish legitimate regulatory intervention aimed at stepping-up the training and insurance obligations of Uber-type services from intervention that artificially impedes their activity (15-minute lapse between booking and passenger pick-up; obligation for the driver to return to its "base" once the passenger reaches its destination). The Autorité also suggested leveling the playing field for taxis by allowing them to charge fixed-rates rather than metered rates, in order to adapt their pricing to consumer demand. These opinions exemplify the Autorité's approach, which seeks to promote a healthy, competition-inducing environment, in the interests of all actors, whether new or traditional.

Beyond tweaking regulations to address the challenges posed by new business models, certain stakeholders put forward reform proposals that seek to cover a wider array of actors, defined precisely by the model they rely on, namely the provision of "platform" services. It is beyond the scope of this contribution to provide a comprehensive and definitive view on this issue, which is still being debated and whose scope and objectives are, to date, still uncertain. A provisional conclusion can nonetheless be drawn from the above considerations, which is that strong economic assumptions cannot be made per one broad category of actors, defined loosely as "new business models" or even as "platforms." The implications for competition of the emergence of such actors depend heavily on the markets concerned and their specific features as well as on the impugned behavior. Competition law, with its universal remit, plastic legal concepts and case-by-case approach, provides a satisfactory basis on which to construct principles of economic regulation that preserve the incentives to innovate while mitigating the risks of market preemption.

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