

Disrupt, Compete and Innovate: Should Hong Kong competition law be a gatekeeper for disruptive innovation?

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With the exponential growth of technological advancement, our legal, social and economic systems need to respond promptly to creative incentives for disruptive innovators in the marketplace. In a speech delivered in February 2018, Deputy Assistant Attorney General Roger Alford of the US Department of Justice Antitrust Division advocated that "those countries that have designed their laws and regulations to promote innovation and foster competition are the beneficiaries of innovation arbitrage." As its name suggests, disruptive innovation looks to disrupt the status quo with a view to replacing established operators, such competition is a clear threat to the incumbent firms which may then look at ways to reduce that threat. In the local context, does Hong Kong competition law respond to disruptive innovation and foster competition?

Competitively Sensitive Information Exchange

In Hong Kong's knowledge-driven community, exchange of business intelligence and practices is indispensable for commercial operations. However, when existing key market players feed one another with competitively sensitive information like pricing, technologies and innovation, which may have the object of harming or reducing competition, this can be a concern under the First Conduct Rule. Established firms may also use a third-party conduit, such as a supplier or distributor, for any indirect information exchange.

Disruptive innovation initially targets low-end consumers. For instance, an e-hailing app that can provide pre-booked private vehicles on an online platform is a cheaper alternative to taxis and hire car operators. If existing transport service providers exchange confidential future marketing strategies with an aim to counter the threat of the disruptive innovators and hamper innovation, this could be considered a "concerted practice" and may constitute a breach of competition law. Incumbent market players should avoid exchange of information that is individualized, non-public or forward looking in nature.

Market Power Abuse

While being "powerful" in a market *per se* is not a breach of the Second Conduct Rule, abuse of a substantial degree of market power with the object or effect of the prevention, restriction or distortion of competition may raise antitrust concerns. Abusive behaviors to exclude disruptive innovators from the market include anti-competitive tying and bundling, predatory pricing and refusal to deal. This can lead to an increase in the prices of products and services and limitation of choices available to consumers.

A classic illustration is the *Microsoft* case in the 1990s. The computing giant "bundled" its own internet browser, Explorer, with its dominant Windows operating system. This was an attempt to prevent a new entrant, Netscape, from gaining a foothold in the browser market. The US and European competition authorities therefore took substantive enforcement actions and intervened to prevent such anti-competitive behavior. Such regulatory responses are beneficial to disruptive innovators as they provide protection in the early stages of innovative development for SMEs and startups.

Concluding Lines

Competition law proceeds on the basis that competition is good for consumers: competitive tension drives suppliers of goods and services to improve their offerings in order to retain and win customers. Because disruptive innovation (by its nature of being new and untested) can be snuffed out quickly, some argue that competition law and those agencies and bodies which enforce it should do more to protect innovators. However, to introduce such a requirement may prove to be too subjective, requiring administrative bodies to make value judgements as to what may be considered truly disruptive. Although there is no "one-size-fit-all" approach, the Hong Kong antitrust regulator can learn from overseas experience and adapt the local competition policy to accommodate new business models and incentivize disruptive innovation.

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