

Unclassified

DAF/COMP/WD(2015)54

Organisation de Coopération et de Développement Économiques  
Organisation for Economic Co-operation and Development

19-Jun-2015

English - Or. English

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS  
COMPETITION COMMITTEE**

**HEARING ON DISRUPTIVE INNOVATION**

-- Note by United States --

**16-18 June 2015**

*This document reproduces a written contribution from the United States submitted for Item 3 of the 123rd meeting of the OECD Competition Committee on 16-18 June 2015.*

*More documents related to this discussion can be found at [www.oecd.org/daf/competition/disruptive-innovationsand-competition.htm](http://www.oecd.org/daf/competition/disruptive-innovationsand-competition.htm)*

**JT03379154**

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## UNITED STATES

### 1. Introduction

1. Innovation is the hallmark of a dynamic and competitive economy, but can pose challenges for legislative and regulatory bodies trying to keep pace with rapidly evolving businesses. Disruptive innovation<sup>1</sup> (including new products, services, and business models), in particular, often results in new, better, and/or lower-priced products and services to consumers, but may not fit within existing regulatory frameworks, and thus, can raise challenges for regulators. Competition authorities can play an important role shaping the inevitable transitions caused by disruptive innovation, by advocating for regulatory responses that do not unduly restrain competition, enforcing competition rules to ensure that incumbents do not foreclose new rivals from the market, and using studies and other research methods to foster greater understanding of new technologies and business models.

2. This paper first describes policy issues that may arise when disruptive innovation occurs in regulated industries, and explains the advocacy approaches taken by the Federal Trade Commission (“FTC” or “Commission”) and the Department of Justice’s Antitrust Division (“DOJ”) (collectively, “the Agencies”). The paper then highlights enforcement actions taken by the Agencies to prevent incumbent firms from blocking the growth or development of disruptive technologies and business models. The concluding section discusses the emergence of the “sharing” economy as an area of recent FTC study, and suggests possible additional issues raised by disruptive innovation that might be suited to future competition-related examination in the OECD.

### 2. Disruptive Innovation and Regulation

3. Throughout the history of the United States, disruptive innovation has shaped and reshaped industries. Disruptive innovation often takes the form of wholly new products or services; in other instances, innovation may involve new ways of delivering existing products and services to consumers or new business models, often addressing unmet or under-served consumer needs. Recently, such innovations have transformed a number of U.S. industries, in ways that have benefitted consumers. Historically, disruptive innovation itself has posed little concern for competition enforcement agencies in the United States, because it tends to spur greater competition. However, the responses to disruptive innovation by incumbent rival firms, as well as by regulators at the state and local levels in the United States, can raise competition concerns for the Agencies.

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<sup>1</sup> “Disruptive innovations,” as defined in the Issues Paper for this session, drastically alter markets. They are not incremental technological developments nor regular, predictable improvements. Rather, they represent breakthroughs that bring radical changes unforeseen by the market. Furthermore, disruptive innovations typically threaten incumbent firms or create new markets. See DAF/COMP(2015)3 at 3-9. See also Joseph Bower & Clayton Christensen, *Disruptive Technologies: Catching the Wave*, 73 HARV. BUS. REV. 43 (1995).

4. Innovation by firms in regulated sectors may cause tension between the innovator and incumbent regulated firms, especially when the existing regulatory system is based on a business model or technology that the innovator does not use. In this scenario of regulatory mismatch, innovators may argue that they operate outside the existing regulatory framework and therefore are not subject to it. Incumbent firms may argue that these new competitors perform functions covered by the existing statutory and regulatory requirements or prohibitions, and that protection of the public and regulatory fairness require innovators be held to the same standards as incumbents.

5. Incumbent firms sometimes attempt to use the existing regulatory process to make it more difficult for new products, services, and business models to compete by encouraging regulators to amend existing regulations to more explicitly cover the innovative product, service, or business model or to put in place regulations with which new businesses cannot comply. They also may advocate for regulations that raise the innovator's cost of entry or create rules that entirely prevent entry, as has been occurring in transportation services, where incumbents and trade associations have argued against disruptive ride-sharing applications such as Uber, Lyft, and Sidecar.<sup>2</sup> Conversely, disruptive firms may begin providing service without complying with existing regulatory protections, arguing that they do not apply and compliance is not necessary to protect the public in light of the other mechanisms for protection they offer. This can potentially undermine the achievement of safety, consumer protection or other public policy goals, while disadvantaging incumbent firms who continue to be subject to existing regulations. In formulating a regulatory response to disruptive innovation, policymakers must strike a careful balance between promoting legitimate policy objectives, such as protection of consumers from unsafe, unfair, and deceptive practices, and adopting approaches that predominantly serve to protect incumbent providers and potentially lead to regulatory capture.

### 3. Possible Competition Agency Approaches

#### 3.1 Competition Advocacy

6. The Agencies routinely provide comments to regulators urging consideration of the competitive implications of regulations and regulatory proposals.<sup>3</sup> These comments have included competition advocacy relating to rules that may limit competition from innovators. In this work, the Agencies take into account the potential competitive impact of regulations, as well as potential health and safety benefits or other policy objectives, the likelihood that the regulations are well-suited to address any well-founded concerns, and the availability of a less restrictive means to achieve the same legitimate policy goals

<sup>2</sup> See, e.g., Andrew Zaleski, *Welcome to the Uber Wars*, POLITICO MAGAZINE (Sept. 2, 2014), <http://www.politico.com/magazine/story/2014/09/welcome-to-the-uber-wars-110498.html#.VWcQhrHD83E>; *Community-wide Taxi Service Endangered by "Ridesharing," WHO'S DRIVING YOU?* (June 30, 2014), available at <http://www.whosdrivingyou.org/uploads/2/5/1/4/25145532/community-wide-access-fact-sheet.pdf> (“Uber, Lyft and Sidecar simply do not serve all areas of a community at all hours of the day. By stealing more lucrative fares, they will ultimately leave transportation deserts in underprivileged neighborhoods where people rely on taxicabs for daily errands.”—Robert Werth, President of the Taxicab, Limousine & Paratransit Association.”)

<sup>3</sup> Many relevant regulations in the U.S. are at the state and local levels. As part of their mission, the Agencies consider how disruptive technologies impact competition and, for the FTC, consumer protection. See, e.g., the DOJ/Patent and Trademark Office Joint Policy Statement on Remedies for Standards-Essential Patents Subject to Voluntary F/RAND Commitments (January 2013), available at <http://www.justice.gov/atr/public/guidelines/290994.pdf>.

without unduly restraining competition.<sup>4</sup> Vigorous competition can serve to enhance, rather than undermine, the quality of products and services, and underscores that policymakers do not necessarily have to choose between protecting consumers and promoting competition; rather, appropriate consumer protection and increased competition can occur at the same time. The role of the competition authority is to encourage regulators to take competition values and economic analysis into account and to determine whether the proposed regulation may impede competition. As highlighted in FTC and DOJ advocacy letters in a number of industries, including passenger motor vehicle transportation services, automotive distribution, mobile spectrum allocation, and real estate, described below, the regulator's goal should be to avoid imposing restraints that may impair competition in a way that is greater than necessary to address legitimate public interest concerns.<sup>5</sup>

### 3.1.1 Transportation Regulation

7. Traditionally, the market for passenger motor vehicle transportation services in the United States has been heavily regulated at the state and local levels, and the regulatory structures have remained largely unchanged for decades.<sup>6</sup> In the past few years, however, this marketplace has been transformed by the introduction of new smartphone-based applications and platforms, such as Uber, Lyft, Sidecar, and Hailo. These platforms enable drivers and consumers to arrange and pay for commercial passenger motor vehicle transportation services in new ways, raising challenges when their business models may not fit well within existing regulatory frameworks. For example, the applications use the GPS capabilities of smartphones to enable consumers to locate nearby vehicles and track their arrival on a map. They also utilize smartphone capabilities to enable new fare calculation methods based on factors such as distance, time, or demand. In addition, the applications use credit card payments and electronic receipts, and allow riders to rate their experience with particular drivers. These applications may be more responsive to consumer demand, may promote a more efficient allocation of resources (*e.g.*, vehicles and drivers) to consumers, and may reduce consumers' payment transaction costs. At the very least, they provide new alternatives for consumers.

8. Providers of passenger motor vehicle transportation services compete on a variety of dimensions, including price, availability, timeliness, convenience, quality, vehicle type, payment mechanism, and other amenities. FTC staff has recently submitted several advocacy letters to various jurisdictions in the United States suggesting that they carefully consider the potential direct and indirect competitive impact of

<sup>4</sup> FTC and staff advocacy comments, testimony, and letters are available on the FTC's advocacy filings web page at <http://www.ftc.gov/policy/advocacy/advocacy-filings>. DOJ comments and testimony are available at <http://www.justice.gov/atr/public/comments-testimony.html>.

<sup>5</sup> A number of recent FTC advocacies address innovation in health care service delivery methods. *See, e.g.*, FTC Staff Comment Before the Maine Board of Dental Examiners Concerning Proposed Rules to Allow Independent Practice Dental Hygienists to Take X-Rays in Underserved Areas, November 2011, available at <https://www.ftc.gov/policy/policy-actions/advocacy-filings/2011/11/ftc-staff-comment-maine-board-dental-examiners>; FTC Staff Comment Before the Louisiana House of Representatives Concerning Amendments to Louisiana House Bill 687 on the Practice of In-School Dentistry, May 2009, available at <https://www.ftc.gov/policy/policy-actions/advocacy-filings/2009/05/ftc-staff-comment-louisiana-house-representatives>. *See also* FTC Staff, "Policy Perspectives: Competition and the Regulation of Advanced Practice Nurses," March 2014, available at <https://www.ftc.gov/system/files/documents/reports/policy-perspectives-competition-regulation-advanced-practice-nurses/140307aprnpolicyaper.pdf>.

<sup>6</sup> Regulations typically provide strict controls on entry, fares, and service. Mark W. Frankena & Paul A. Pautler, *An Economic Analysis of Taxicab Regulation* 15 (1984) (FTC Bureau of Economics Staff Report), available at <http://www.ftc.gov/be/econrpt/233832.pdf>. *See also* Organisation for Economic Co-operation and Development ("OECD"), Directorate for Financial and Enterprise Affairs, Competition Committee Working Party No. 2 on Competition and Regulation, *Taxi Services Regulation and Competition* 200 (Sept. 11, 2008) (submission of the United States), available at <http://www.oecd.org/regreform/sectors/41472612.pdf>.

proposed transportation regulations.<sup>7</sup> The letters emphasize that unwarranted restrictions on competition should be avoided and that any restrictions on competition should be no broader than necessary to address legitimate subjects of regulation, such as safety and consumer protection, and narrowly crafted to minimize any potential anticompetitive impact.<sup>8</sup> Accordingly, FTC staff recognized that regulation might properly focus on ensuring qualified drivers, safe and clean vehicles, sufficient liability insurance, transparency of fare information, and compliance with other applicable laws, and that regulation of new smartphone applications should focus primarily on these issues as well as other consumer protection issues, such as privacy, data security, and the prevention of identity theft.<sup>9</sup> The FTC advocacies also highlight that any resulting regulation should not, in purpose or effect, favor one group of competitors over another.<sup>10</sup>

9. In the field of civil aviation, the entry of low-cost carriers has proven to be a disruptive innovation to the business model of established legacy carriers. DOJ has sought to facilitate entry of low-cost carriers through advocacy directed at pro-competitive allocation of slots by government agencies. In 2010, for example, DOJ filed comments with the Federal Aviation Administration with respect to an exchange of slots involving airports in Washington, DC and New York City.<sup>11</sup>

### 3.1.2 Automotive Distribution

10. In the U.S. auto industry emerging sales methods are disrupting the entrenched distribution model where auto manufacturers sell their products through networks of franchised third party dealers who also provide warranty and other services for auto purchasers. In response to dealer allegations that manufacturers had abused the franchise relationship, every state legislature has enacted increasingly

<sup>7</sup> FTC advocacy letters are issued by staff and do not necessarily represent the views of the FTC or of any individual Commissioner. The Commission, however, votes to authorize staff to submit these comments. *See, e.g.*, Federal Trade Commission Staff Letter to Alderman Brendan Reilly, Chicago City Council regarding Proposed Ordinance O2014-1367 (Apr. 15, 2014), available at <https://www.ftc.gov/policy/policy-actions/advocacy-filings/2014/04/ftc-staff-comment-honorable-brendan-reilly-concerning>; Federal Trade Commission Staff Letter to Jacques P. Lerner, General Counsel, District of Columbia Taxicab Commission regarding Second Proposed Rulemakings regarding Chapters 12, 14, and 16 of Title 31 (June 7, 2013), available at <https://www.ftc.gov/policy/policy-actions/advocacy-filings/2013/06/ftc-staff-comments-district-columbia-taxicab>; Federal Trade Commission Staff Letter to Colorado Public Utilities Commission regarding Docket No. 13R-0009TR (Mar. 6, 2013), available at <https://www.ftc.gov/policy/policy-actions/advocacy-filings/2013/03/ftc-staff-comment-colorado-public-utilities>.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* See also Maureen K. Ohlhausen, Comm'r, Fed. Trade Comm., *Brother, May I?: The Challenge of Competitor Control Over Market Entry* 21, The Global Economics Conference, George Mason University School of Law, Arlington, VA (May 29, 2015), available at [https://www.ftc.gov/system/files/documents/public\\_statements/645861/150529gmukeynote.pdf](https://www.ftc.gov/system/files/documents/public_statements/645861/150529gmukeynote.pdf); Joshua D. Wright, Comm'r, Fed. Trade Comm'n, *Regulation in High-Tech Markets: Public Choice, Regulatory Capture, and the FTC* 23-25, Big Ideas about Information Lecture, Clemson, SC (Apr. 2, 2015), available at [https://www.ftc.gov/system/files/documents/public\\_statements/634631/150402clemson.pdf](https://www.ftc.gov/system/files/documents/public_statements/634631/150402clemson.pdf); Andy Gavil, Debbie Feinstein & Marty Gaynor, Fed. Trade Comm'n, *Who decides how consumers should shop?* (Apr. 24, 2014), available at <https://www.ftc.gov/news-events/blogs/competition-matters/2014/04/who-decides-how-consumers-should-shop>.

<sup>11</sup> See <http://www.justice.gov/atr/public/comments/257463.htm> and <http://www.justice.gov/atr/public/comments/257467.pdf>.

restrictive statutory regimes.<sup>12</sup> The initial purpose of these systems, when enacted decades ago, was to provide protections to dealers.

11. In many states, the statutory system is no longer limited to regulating the franchise relationship but now also includes prohibitions on manufacturers' direct sale of vehicles to consumers. These prohibitions require that new cars can only be sold through franchised third-party dealers, discouraging new, innovative ways of selling cars.<sup>13</sup>

12. Blanket prohibitions on direct manufacturer sales to consumers are an anomaly within the larger economy. Most manufacturers and suppliers in other industries make decisions about how to design their distribution systems based on their own business considerations and consumer demand. These competitive dynamics weed out inefficient, unresponsive, or otherwise inadequate distribution practices without government intervention. Prohibitions on direct sales in most states has inhibited plans by at least two new auto manufacturers, Tesla and Elio, to distribute their products through alternative means rather than through a network of franchised dealers.<sup>14</sup>

13. FTC staff recently submitted a number of advocacy letters to various state legislators considering legislation on direct car sales.<sup>15</sup> The FTC has not suggested that new methods of automotive sale are necessarily superior to traditional methods, but that the determination should be made through competition and the competitive process. FTC staff has cited economic literature showing that a manufacturer's decision concerning the distribution of its products is context specific, and that manufacturers compete to respond to consumer needs by choosing from among direct sales to consumers, reliance on independent

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<sup>12</sup> Auto dealers are significant local constituents of most state legislators; their trade associations regularly propose bills favoring their interests (several hundred bills relating to auto distribution issues in the past five years that resulted in laws that regulate auto manufacturers' ability to terminate dealers, to establish or locate new dealerships, and to set the pricing of reimbursements for warranty work).

<sup>13</sup> See Andy Gavil *et al.*, *supra* n. 10.

<sup>14</sup> Tesla Motors has been blocked in several states from establishing company-owned dealerships for its luxury electric cars. More recently, Elio Motors has announced plans to distribute innovative low-cost, high-mileage, three-wheeled vehicle through company-owned outlets starting in 2016.

<sup>15</sup> See, e.g., Federal Trade Commission Staff Letter to Senator Darwin L. Booher, Missouri Senate regarding Senate Bill 268 (May 7, 2015), available at [https://www.ftc.gov/system/files/documents/advocacy\\_documents/ftc-staff-comment-regarding-michigan-senate-bill-268-which-would-create-limited-exception-current/150511michiganautocycle.pdf](https://www.ftc.gov/system/files/documents/advocacy_documents/ftc-staff-comment-regarding-michigan-senate-bill-268-which-would-create-limited-exception-current/150511michiganautocycle.pdf) (advocacy commenting on a bill in the Michigan legislature exempting a category of vehicles from that state's prohibition on direct car sales by all manufacturers); Federal Trade Commission Staff Letter to Assemblyman Paul D. Moriarty, General Assembly of the State of New Jersey regarding Several Bills Pending in the New Jersey Legislature (May 16, 2014), available at [https://www.ftc.gov/system/files/documents/advocacy\\_documents/ftc-staff-comment-new-jersey-general-assembly-regarding-assembly-bills-2986-3096-3041-3216-which/140516nj-autoadvocacy.pdf](https://www.ftc.gov/system/files/documents/advocacy_documents/ftc-staff-comment-new-jersey-general-assembly-regarding-assembly-bills-2986-3096-3041-3216-which/140516nj-autoadvocacy.pdf) (advocacy relating to a proposed partial repeal of New Jersey's prohibition on direct car sales by all manufacturers); Federal Trade Commission Staff Letter to Rep. Michael J. Colona, Missouri House of Representatives regarding House Bill No. 1124 (May 15, 2014), available at [https://www.ftc.gov/system/files/documents/advocacy\\_documents/ftc-staff-comment-missouri-house-representatives-regarding-house-bill-1124-which-would-expand/140515mo-autoadvocacy.pdf](https://www.ftc.gov/system/files/documents/advocacy_documents/ftc-staff-comment-missouri-house-representatives-regarding-house-bill-1124-which-would-expand/140515mo-autoadvocacy.pdf) (advocacy concluding that the proposed legislation, that would have expanded Missouri's prohibition on direct-to-consumer sales, requiring all new motor vehicles in the state to be sold through independent dealers, would render consumers unable to choose how and from whom they want to purchase their cars).

dealers, or some combination of the two.<sup>16</sup> Staff underscored that the vast majority of economic literature suggests that allowing firms in competitive marketplaces to decide how to distribute their products leads to better outcomes for consumers.<sup>17</sup> Accordingly, the FTC auto distribution advocacy letters emphasized that absent countervailing public policy considerations, automobile manufacturers should be permitted to choose their distribution method to be responsive to the desires of consumers.<sup>18</sup>

### 3.1.3 Mobile Spectrum Allocation

14. In the telecommunications sector, DOJ has advocated for policies to increase smaller networks' access to valuable wireless spectrum. The two largest wireless carriers in the United States are successor companies of the Bell monopoly, and received allocations of spectrum in the early stages of the wireless industry's development. Now that the Federal Communications Commission ("FCC") plans to auction off additional spectrum for wireless use that was previously used for other purposes, DOJ has expressed concern that the two largest wireless carriers may have incentives to bid more for certain spectrum in order to foreclose the smaller carriers from acquiring it and using it to compete more aggressively, including through potential use of disruptive business models.<sup>19</sup> Therefore, DOJ has commented that improving access to low-frequency spectrum for the smaller wireless carriers, some of which have challenged the incumbent carriers with innovative and potentially disruptive business models and aggressive pricing, has significant potential to improve the competitive dynamics among nationwide carriers and benefit consumers. DOJ has filed comments with the FCC in 2013 and 2014.<sup>20</sup>

### 3.1.4 Real Estate

15. The widespread use of the Internet has led to the proliferation of new technologies and business models that transformed the U.S. real estate industry by enabling consumers themselves to perform some services previously available only from traditional real estate brokers. These new technologies and business models include "limited service brokers" who provide a limited range of services compared to traditional full-service brokers, often for a reduced commission or on a "fee for service" basis; "virtual office websites" through which brokers give clients direct access to listings of multiple listing services ("MLSs");<sup>21</sup> and services for sellers who market their homes without a broker. As new technologies and business models appeared, so did anticompetitive attempts to impede them. In response to these threats to

<sup>16</sup> See, e.g., Jean-Jacques Laffont & David Martimort, *THE THEORY OF INCENTIVES: THE PRINCIPAL-AGENT MODEL* (2009).

<sup>17</sup> See, e.g., Francine Lafontaine & Margaret Slade, *Exclusive Contracts and Vertical Restraints: Empirical Evidence and Public Policy*, in *HANDBOOK OF ANTITRUST ECONOMICS* (Paolo Buccirossi, ed., 2008); James C. Cooper *et al.*, *Vertical Antitrust Policy as a Problem of Inference*, 23 *INT'L J. INDUS. ORG.* 639-64 (2005).

<sup>18</sup> *Supra*, n. 15. See also Marina Lao, Debbie Feinstein, & Francine Lafontaine, Fed. Trade Comm'n, *Direct-to-consumer auto sales: It's not just about Tesla* (May 11, 2015), available at <https://www.ftc.gov/news-events/blogs/competition-matters/2015/05/direct-consumer-auto-sales-its-not-just-about-tesla>.

<sup>19</sup> In addition, DOJ has noted that different types of spectrum have different competitive significance. In particular, low-frequency spectrum, with propagation characteristics that make it suitable for rural areas and building interiors, is an effective way for wireless carriers to meet growing consumer demand for data intensive applications and services across wide coverage areas. Moreover, there are some potential capacity and capital efficiencies associated with deploying larger blocks of spectrum.

<sup>20</sup> See <http://www.justice.gov/atr/public/comments/295780.pdf> and <http://www.justice.gov/atr/public/comments/305961.pdf>.

<sup>21</sup> MLSs are local or regional joint ventures of real estate brokers, typically affiliated with the National Association of Realtors, that maintain a database containing almost all homes for sale in an area.



competition, the Agencies have undertaken a variety of actions, including competition advocacy to persuade states not to adopt laws that would restrict competition between non-traditional and traditional brokers<sup>22</sup> and publishing a report on competition issues in the real estate industry.<sup>23</sup>

### 3.2 Enforcement

16. The Agencies have brought enforcement actions to prevent incumbent firms from blocking the growth or development of disruptive technologies and business models in a number of industries. The Agencies' enforcement history provides numerous examples of enforcing competition rules to ensure that incumbents do not foreclose new rivals from the market.<sup>24</sup> In recent years, the Agencies have successfully challenged rules by incumbent credit card networks that have impeded development of new payment solutions<sup>25</sup> and from conspiring with competitors to protect existing business models in the publishing industry.<sup>26</sup> They have also taken enforcement action when incumbents could potentially limit the emergence of new business models through state actors.<sup>27</sup> Complementing their real estate industry advocacy described in the previous section, the Agencies have challenged a number of restrictive rules that discriminated against low-cost and discount non-traditional brokers.<sup>28</sup>

<sup>22</sup> See, e.g., Letter from the FTC and the Justice Department to Loretta R. DeHay, Gen. Counsel, Texas Real Estate Comm'n (Apr. 20, 2005), available at [https://www.ftc.gov/sites/default/files/documents/advocacy\\_documents/ftc-and-doj-comment-texas-real-estate-commission-concerning-proposed-amendments-22-tex.admin-code-%C2%A7-535.2-impose-minimum-service-requirements-real-estate-brokers/050420ftcdojtexasletter.pdf](https://www.ftc.gov/sites/default/files/documents/advocacy_documents/ftc-and-doj-comment-texas-real-estate-commission-concerning-proposed-amendments-22-tex.admin-code-%C2%A7-535.2-impose-minimum-service-requirements-real-estate-brokers/050420ftcdojtexasletter.pdf); Letter from the FTC and the Justice Department to Alabama Senate (May 12, 2005), available at [https://www.ftc.gov/sites/default/files/documents/advocacy\\_documents/ftc-and-department-justice-comment-alabama-senate-concerning-alabama-h.b.156-impose-minimum-service-requirements-real-estate-brokers/050512ltralabamarealtors.pdf](https://www.ftc.gov/sites/default/files/documents/advocacy_documents/ftc-and-department-justice-comment-alabama-senate-concerning-alabama-h.b.156-impose-minimum-service-requirements-real-estate-brokers/050512ltralabamarealtors.pdf); Letter from the FTC and the Justice Department to the Honorable Alan Sanborn, Michigan Senate, and David C. Hollister, Michigan Dep't of Labor & Economic Growth (Oct. 19, 2005), available at <https://www.ftc.gov/policy/policy-actions/advocacy-filings/2005/10/ftc-and-department-justice-comments-honorable-alan>.

<sup>23</sup> FTC & DOJ, *Competition in the Real Estate Brokerage Industry* (Apr. 2007), available at <https://www.ftc.gov/sites/default/files/documents/reports/competition-real-estate-brokerage-industry-report-federal-trade-commission-and-u.s.department-justice/v050015.pdf>.

<sup>24</sup> See, e.g., *United States v. Microsoft*, 253 F.3d 34 (D.C. Cir. 2001) (establishing that Microsoft had unlawfully inhibited the development of alternative platforms to its Windows operating system monopoly).

<sup>25</sup> See, e.g., *United States v. American Express*, No. 10-CV-4496, slip op. at 100 (E.D.N.Y. Feb. 19, 2015) (court finding American Express's, Visa's and MasterCard's anti-steering rules "responsible for impeding development of novel payment solutions").

<sup>26</sup> See *United States v. Apple, Inc.*, 952 F. Supp. 2d 638 (S.D.N.Y. 2013).

<sup>27</sup> The U.S. Supreme Court recently upheld the FTC's challenge to such a restraint. See *North Carolina State Bd. of Dental Exam'rs v. FTC*, 135 S. Ct. 1101 (2015).

<sup>28</sup> See, e.g., *U.S. v. National Ass'n of Realtors*, <http://www.justice.gov/atr/cases/nar.htm>; *Realcomp II*, 635 F. 3d 815 (6<sup>th</sup> Cir. 2011); FTC Press Release, *FTC Charges Pittsburgh-Area MLS With Illegally Restraining Competition* (Jan. 9, 2009), available at <https://www.ftc.gov/news-events/press-releases/2009/01/ftc-charges-pittsburgh-area-mls-illegally-restraining-competition>; FTC Press Release, *FTC Rules Michigan Realtors' Group Reduced Competition, Harmed Consumers by Restricting Access to Discount Realtors; Listings on its Multiple Listing Service and Public Web Sites* (Nov. 2, 2009), available at <https://www.ftc.gov/news-events/press-releases/2009/11/ftc-rules-michigan-realtors-group-reduced-competition-harmed>.



### 3.3 Study – “Sharing” Economy and Additional Issues for Consideration

17. “Sharing” economy platforms, which enable commercial transactions by connecting suppliers of products or services with buyers of those products and services and allowing them to do business with each other, have arisen in several regulated industries. Despite the recent focus, peer-to-peer Internet marketplaces are not new, having existed at least since eBay began, nor are the competitive concerns that they raise. However, the availability of products and services on “sharing economy” platforms has expanded dramatically in recent years,<sup>29</sup> and the rapid growth of these business models and their potential to benefit the economy and consumers warrant further study.<sup>30</sup> As part of its ongoing examination of disruptive innovations, on June 9, 2015, the FTC hosted a workshop entitled: “The ‘Sharing’ Economy: Issues Facing Platforms, Participants, and Regulators.”<sup>31</sup>

18. The FTC workshop brought together academics, policy makers, and industry participants that are active in the “sharing” economy. The panel discussions explored: the economics of platform design and implications for market structure; the structure and operation of reputation systems that platforms adopt to address the issue of trust needed for parties to transact; the interplay between competition, consumer protection, and regulation from the perspective of disruptive industry participants and regulated industry incumbents; and policy issues facing regulators in the “sharing” economy. Based on this preliminary work, it is clear that the “sharing” economy presents important policy questions that either as a whole or focusing on one particular industry (*e.g.*, transportation, accommodations) are likely to be of interest to OECD members for discussion in a future session.

19. We believe that additional roundtable discussions on disruptive innovation would be fruitful. For example, if, as anticipated, the June Competition Committee discussion focuses on advocacy initiatives, it may prove interesting to focus a second roundtable on enforcement issues<sup>32</sup> raised by incumbent firms’ reactions to disruptive innovation, including a discussion about whether relaxing existing regulation could continue to serve necessary regulatory goals while creating a competitive playing field fair to all participants. In addition, disruptive innovation raises novel issues at the intersection of competition and consumer protection, such as consumers’ understanding of information communicated via a peer-to-peer application regarding fares. Such issues may relate to customer and provider safety and platform and provider liability and insurance. They also might encompass customer and provider ratings as a partial or complete alternative to regulation for establishing trust in the platform and individual service provider. Finally, such issues may relate to the privacy and security of information collected by platforms, and when and with whom it may be shared. Exchanging views about and experience with the relationship between competition, consumer protection, and data privacy in a roundtable session likely would benefit OECD members as they formulate policy responses to these issues.

<sup>29</sup> See Jeremiah Owyang, *Collaborative Economy Honeycomb 2—Watch it Grow* (Dec. 7, 2014), <http://www.web-strategist.com/blog/2014/12/07/collaborative-economy-honeycomb-2-watch-it-grow/>.

<sup>30</sup> *Id.* See also PWC, *The Sharing Economy*, <http://www.pwc.com/us/en/industry/entertainment-media/publications/consumer-intelligence-series/assets/pwc-cis-sharing-economy.pdf>; Sara Cannon & Lawrence H. Summers, *How Uber and the Sharing Economy Can Win Over Regulators*, BUS. REV. BLOG NETWORK (Oct. 13, 2014), <https://hbr.org/2014/10/how-uber-and-the-sharing-economy-can-win-over-regulators/2>. In the accommodations sector, Airbnb has more than one million listings around the world. <https://www.airbnb.com/about/about-us>. In the transportation sector, Uber operates in fifty-seven countries. <https://www.uber.com/cities>.

<sup>31</sup> See <https://www.ftc.gov/news-events/events-calendar/2015/06/sharing-economy-issues-facing-platforms-participants-regulators>. The webpage includes comments filed before the event and will continue to be updated with comments filed before August 4, 2015.

<sup>32</sup> Including the enforcement actions mentioned above in footnotes 24-28.