

**Comment on
“Competition and Consumer Protection in the 21st Century Hearings, Project Number
P181201.”**

On June 20, 2018, the Federal Trade Commission announced its intention to hold *Hearings on Competition and Consumer Protection in the 21st Century*.¹ This notice identified eleven topics that it believes should be addressed in these hearings. In this comment we suggest a topic that implicates the matters directly in item 8 (The role of intellectual property and competition policy in promoting innovation), and also in items 2 (Competition and consumer protection issues in communication, information, and media technology networks) and 11 (The agency’s investigation, enforcement, and remedial processes). In particular, we urge the FTC to include the intersection of antitrust law and the activities of Standard Development Organizations (SDOs) as the topic of one or more of its hearings.

Technology standards play an important role for innovation, competition, and consumer welfare. At the same time, antitrust agencies around the world have long been concerned about the potential for anticompetitive abuses in SDOs. Over the last decades, the focus of antitrust enforcement activities primarily has been on allegations that owners of Intellectual Property Rights (IPR) opportunistically exploit SDO processes to extract excessive royalty payments from standard implementers. Recent communications from the Department of Justice (DoJ) call for a reappraisal of the proper application of antitrust laws to standard setting, assert that past enforcement practices have contributed to weakening intellectual property rights in this setting, and claim that past enforcement practice has been overly lenient towards potentially anticompetitive SDO policies and processes. These recent communications from the DoJ have sparked a significant debate among stakeholders and academic researchers. In its communications, the DoJ furthermore invites SDOs to review their own processes to ensure their compliance with antitrust laws. Nevertheless, there currently is only limited guidance from the antitrust agencies that could assist SDOs in this assessment.

In view of the formidable importance of technology standards for the objectives of antitrust policy, we believe that it is time to reassess whether existing antitrust guidance and enforcement practice with respect to standard setting are up to the challenges of the 21st century. The Searle Center on Law, Regulation, and Economic Growth has collected large amounts of information on SDOs, standard-essential patents, and standardization processes. We have found a large diversity of SDO policies on IPR, and an even larger diversity in SDO processes for making decisions on policies. These decisions shape the competitive processes in important markets around the world. We would be happy, if the Commission desires, to explain at any FTC Hearing the content of the Searle Center data sets, all of which can be made available to qualified academic researchers with a valuable project, as well as to FTC staff. Explanation and dissemination of these data should prompt new scholarship that will illuminate the crucial questions surrounding SDOs.

In light of the far-reaching impact of SDO policy making and the intrinsic potential for anticompetitive outcomes, there is surprisingly little legal guidance on SDO decision making processes. Thus, SDO participants are left uncertain as to the line between those policies that are violations of antitrust and those policies that do not violate the antitrust laws, but rather promote competition in technology and

¹ See <https://www.ftc.gov/news-events/press-releases/2018/06/ftc-announces-hearings-competition-consumer-protection-21st>.

product markets relying on standardization. We urge the FTC to address the proper resolution of the issues surrounding SDOs and the attendant uncertainty in one of its Hearings.

The following is a non-exhaustive list of open questions that we believe should be addressed in order to provide more comprehensive and up-to-date guidance to SDOs and SDO participants for standard development processes that do not risk violating antitrust laws.

- ***Processes for developing rules and policies:*** The specific rules for standard development vary from one SDO to the other, and are defined by SDOs and their members through internal governance processes. Recent debates and DoJ communications suggest that not only standard development processes, but also processes for defining SDO rules and policies, present opportunities for anticompetitive abuses and deserve antitrust scrutiny. Nevertheless, there is currently no guidance from antitrust agencies or courts how to evaluate processes for developing SDO rules and policies. We have studied both processes for developing standards and SDO rules and policies, and found significant differences between both processes. We recommend that antitrust agencies complement existing guidance on standard development processes with guidance regarding good practices for SDO policy development.
- ***Competition between SDOs:*** There is a large number of SDOs with different processes, characteristics, and policies. Our research and ongoing policy discussions with respect to the antitrust implications of SDOs highlight the important benefits of this diversity for consumer welfare. Nevertheless, influential strands of economic research caution that competitive pressure from other SDOs ('forum shopping') may prevent SDOs from adopting welfare-enhancing rules. We would welcome a general discussion whether antitrust agencies should be concerned with preserving competition among SDOs (and between SDOs and other means of achieving interoperability). We believe that there is currently only very limited guidance to assess whether cooperation among SDOs, SDO coordination on common rules, SDO mergers, and other collaborative schemes may unduly restrict the range of competitive options available for developing technological standards.
- ***Ancillary organizations:*** Existing guidance often focuses on the conduct of firms in open SDOs. There is however a very large number of organizations participating in standard development processes in a variety of ancillary roles. These organizations include e.g. consortia, special interest groups, trade associations and industry forums; and may be primarily concerned with technical or policy aspects of SDO activities. Our research reveals that these organizations can play an important role in facilitating consensus-building among SDO members. Nevertheless, in several recent cases, SDO members complained that coordination among other SDO members in ancillary forums restricted their effective ability to participate in standard development. The DoJ in its recent communications also expressed concern with "bloc voting" by subsets of SDO members. Given the large number of cases in which subsets of SDO members also participate in additional forums to reach agreements on technical and policy questions related to standard development, we see a need to formulate best practices and legal guidance for this interaction.
- ***Consensus v. Diversity of processes:*** Processes in which SDOs reach decisions based on a broad consensus of their members and other stakeholders are less likely to give rise to antitrust concerns than decisions reached by closed and unbalanced governance bodies against the explicit resistance of an important SDO constituency. Nevertheless, a policy approach that requires each SDO to seek general industry consensus on its rules and processes may conflict

with the important goal of encouraging a meaningful diversity of SDO processes. Furthermore, SDOs may have to play an important role in preventing and/or sanctioning anti-competitive conduct of SDO members. It thus seems that there are at least some decisions that SDOs must be able to reach also in the absence of consensus among SDO members and/or stakeholders. We believe that there is currently insufficient guidance to distinguish SDO decisions that should be reached through open, balanced, and consensus-driven processes from situations in which SDOs should be allowed or even required to make important decisions in the absence of broad consensus.

The importance of these and other questions related to SDO decision making has become salient in the context of discussions on SDO policies for IPR. Nevertheless, we believe that questions regarding the proper application of antitrust policy to SDOs are relevant for a much larger range of issues. We trust that the FTC is already well aware of the specific questions relating to the disclosure and licensing of Standard-Essential Patents. We do however see a need for more encompassing guidance regarding the analysis of coordination and collusion in SDOs, and encourage the FTC to use the upcoming hearings to initiate an overdue debate on the complicated and important questions raised by evolving industry practices in the development of technology standards.

Sincerely,

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