



August 18, 2018

United States Federal Trade Commission
Office of the Secretary
600 Pennsylvania Avenue NW, Suite CC-5510
Washington, DC 20580

Re: Competition and Consumer Protection in the 21st Century Hearings, Project Number P181201

Issue 11: The agency's investigation, enforcement and remedial processes

I. Introduction

These comments are submitted in response to the U.S. Federal Trade Commission (FTC)'s announcement on the hearings on competition and consumer protection in the 21st Century. The Computer & Communications Industry Association (CCIA)¹ commends the FTC's study of the legal and policy challenges and opportunities that arise with the digitalization of the economy, and welcomes the opportunity to provide views on the issues identified by the Commission.

To ensure that tech-related innovation continues to drive the economy, sound competition policy and antitrust enforcement both must play a crucial role in ensuring that competition exists across markets. Likewise, institutional design, including antitrust agencies' investigation, enforcement and remedial processes, shapes policy outcomes. This response addresses: (1) the possibility to improve the FTC's investigative process, and (2) the efficacy of the FTC's current use of its remedial authority.

II. The FTC's investigative process

CCIA has identified several areas for improvement of the FTC's investigative processes concerning the approval of deals, closure of investigations, and/or conclusion of settlements. In contrast with other competition systems, the U.S. regime is prosecutorial in nature, and has no tradition of publishing much information regarding deals that are approved, investigations that are closed, or settlements beyond a press release.

¹ CCIA represents large, medium and small companies in the high technology products and services sectors, including computer hardware and software, electronic commerce, telecommunications and Internet products and services. Our members employ more than 750,000 workers and generate annual revenues in excess of \$540 billion. A list of CCIA members is available at <https://www.cciagnet.org/members>.



A. Provide more public information regarding the enforcement and investigative efforts.

CCIA encourages the FTC to endeavor to provide more public information regarding its enforcement and investigative efforts for three main reasons.

First, the FTC should provide more information regarding the evidence (or lack thereof) underlying a decision to approve a deal, close an investigation, or reach a consent decree. This will have the effect of providing informal guidance to other businesses similarly situated, and also has the benefit of mitigating political speculation around the bases for the FTC's conclusions.

Second, providing more information on the FTC's investigative efforts, including when a deal is approved or an investigation is closed, will provide interested parties with more detailed information around the Commission's reasoning. Furnishing information regarding the analytical work that the agency has undertaken will bolster the FTC's position as a robust antitrust enforcement agency and mitigate concerns about politically-driven outcomes.

Finally, given the increasing number of competition systems that are emerging worldwide, the FTC's explanations on its decisions would provide these foreign jurisdictions with a data source to reference. This is particularly relevant for the purpose of advocating for antitrust enforcement under the consumer welfare standard where the FTC should be regarded as a leader in international antitrust policy.

B. Reassess and reform the FTC investigatory and enforcement processes.

CCIA also encourages the FTC to use this review to reassess current investigatory and enforcement processes.

First, the FTC should consider current investigative processes to assess whether they remain appropriate and fair. For example, investigative demands should not lead to broad and costly discovery that does not further the investigation itself. Similarly, investigative demands should provide recipients with sufficient explanation of the investigation's purpose, to avoid waste and expedite meaningful responses to the agency. More generally, the FTC should consider whether streamlining investigative processes could achieve similar results while alleviating unnecessary burdens on recipients.

In addition, the FTC should reassess the orders that it issues to companies. Federal courts have called into question certain aspects of FTC orders, and a reevaluation should incorporate these



lessons into FTC orders.² In addition, the FTC’s standard, boilerplate 20-year settlements can impose unnecessary burdens, and the FTC should instead tailor settlement terms to the circumstances of each case. These and other aspects of the FTC’s orders should be assessed to avoid needlessly burdening companies with orders that may invite challenges to the legal authority of the agency.

III. The FTC’s remedial authority

CCIA is concerned by the possibility of the FTC’s antitrust mandate bleeding into privacy-related matters. The digital economy has led to many questions relating to the use of data, and the best way to protect consumer privacy. These are critical issues, but such debate should remain under the privacy sphere, and not be conflated with orthogonal policy considerations.

Data-related concerns, particularly relating to privacy, are most effectively addressed under the FTC’s consumer protection and privacy mandates, via Section 5’s prohibition on unfair and deceptive acts and practices, and the FTC should exclusively apply privacy-related remedies to such concerns. These matters are discussed at greater length in CCIA’s response to Issue 5.

Under its antitrust mandate, the FTC may, as part of its remedial actions, require a firm to cease certain conduct. The Supreme Court has left undecided whether, in an exceptional case, enforcers could require a firm to grant access to a particular asset, under the so-called “essential facilities” doctrine.³

Proposals to classify data as an essential input are unfounded and rest on a misunderstanding of the concept of data that is, among other things, non-rivalrous. These matters are discussed at greater length in CCIA’s response to Issue 4. The scenario where the accumulation of data by a firm would raise an antitrust concern under the essential facilities doctrine is very unlikely, if not implausible.

Therefore, the FTC should refrain from conflating antitrust remedies and privacy matters. Each of these two critical issues warrants an independent domain. Should the FTC expand its antitrust mandate to tackle privacy concerns, and impose quasi-structural remedies on data-driven businesses, it would limit incentives to innovate, to the detriment of consumer welfare.

² See, e.g., *LabMD, Inc. v. Federal Trade Commission*, 894 F.3d 1221 (11th Cir. 2018) (granting LabMD’s petition for review and vacating the Commission’s order); *Federal Trade Commission v. Shire ViroPharma, Inc.*, No. 17-cv-00131, 2018 WL 1401329 (D. Del. Mar. 20, 2018) (granting Shire ViroPharma’s motion to dismiss the Commission’s lawsuit).

³ *Verizon Commc’ns Inc. v. Law Offices of Curtis V. Trinko*, 540 U.S. 398 (2004).