SOFTWARE & INFORMATION INDUSTRY ASSOCIATION

COMMENTS

TO THE

FEDERAL TRADE COMMISSION

ON

HEARING #1 ON COMPETITION AND CONSUMER PROTECTION IN THE 21ST CENTURY

OCTOBER 12, 2018

The Software & Information Industry Association (SIIA) is the principal trade association for the software and digital content industries worldwide. The association provides global services in government relations, business development, corporate education, and intellectual property protection to its members, the leading companies that are setting the pace for the digital age.

SIIA is grateful for this opportunity to comment on the issues raised in Hearing #1 On Competition and Consumer Protection in the 21st Century - Sept. 13-14 at Georgetown University Law Center. The call for comments suggests that comments are welcome on the following topics:

1. The current landscape of competition and consumer protection law and policy;
2. Whether the U.S. economy has become more concentrated and less competitive;
3. The regulation of consumer data;
4. Antitrust law and the consumer welfare standard; and
5. The analysis of vertical mergers.

Our comments will cover topic 3, the regulation of consumer data and topic 4, antitrust law and the consumer welfare standard. They fall into three parts. First, we review the idea that competition policy should include larger issues than consumer welfare, and conclude that a properly understood notion of consumer welfare is the touchstone for competition policy.

Second, we discuss how privacy issues should be considered in the context of competition policy. We argue that privacy itself should not a competition policy issue. Rather, competition policy authorities can and should inquire into how data is amassed and used in the marketplace and review mergers with a view toward assessing whether merged data sets create a barrier to further competition. This is relevant to both topic 3 and topic 4.

Third, we review proposals that dominant companies should be required to disgorge subsets of their data to competitors, and conclude that such data sharing ideas serve no useful antitrust purpose and create substantial privacy and security risks. This is relevant to topic 3.

Antitrust and the Consumer Welfare Standard

Some antitrust advocates, such as Lina Khan, are concerned that the goals of antitrust policy are too narrow. They want to include issues such as inequality, wage stagnation, concern for small business, and political corruption within the purview of antitrust. SIIA disagrees. The future goal of antitrust policy should be what it has been for generations, namely, to protecting and safeguard the competitive process so that markets work well for consumers, including within that the competitive concerns of suppliers and workers.

The original goal of the antitrust movement was to curb the economic and political power of large corporations, a new organizational form that emerged in the late 19th and early 20th centuries and was proving to be an extraordinarily efficient institutional innovation. Small retailers, manufacturers and farmers wanted protection from these developments. Antitrust policy was their weapon.

But in the 1930s President Franklin Roosevelt's antitrust chief, Thurmond Arnold, changed the course of antitrust enforcement, establishing the goal of consumer welfare, not the protection of small companies, as the paramount objective. Carl Shapiro recently restated this goal as: "protecting the competitive process so consumers receive the full benefits of vigorous competition." Through the ups and downs of enforcement styles in the ensuing period, this objective has been the constant lodestar of antitrust.

The head of the Federal Trade Commission endorsed this consumer welfare standard, saying without qualification during his confirmation hearings: "The FTC is all about protecting and improving consumer welfare."

There is a real need for vigorous antitrust policy because markets by themselves might not automatically deliver an abundant supply of low-price, high-quality products and services. Antitrust policy should seek to maintain and foster competition so as to lower price, improve quality and increase the output of products and services. Conversely, it should avoid measures that harm consumers by denying them services or features that they value.

Many commentators are concerned about broader public policy issues and want to enlist antitrust as a policy lever to advance reforms in these areas. Among these goals are better wages for workers, greater equality in the distribution of income and wealth and constraints on the ability of large organizations to influence the outcomes of public policy debates.

These issues are important, perhaps more important than promoting competition, because they go to the question of the strength and legitimacy of our democratic political processes. But they should not be addressed by antitrust authorities and courts.

As Carl Shapiro says "the corrupting power of money in politics…is far better addressed through campaign finance reform and anti-corruption rules than by antitrust." As for income inequality, "other public policies are far superior for this purpose. Tax policy, government programs such as Medicaid, disability insurance, and Social Security, and a whole range of policies relating to education and training spring immediately to mind."

Moreover, as Herbert Hovenkamp says, the larger goals that antitrust might foster "often operate at cross purposes with one another. For example, to the extent that large firms are more efficient, their output will be higher and they will provide more jobs. Further, large firms historically pay substantially higher

wages and salaries than smaller firms." Do we really want to break up large firms if the result is lower wages for workers?

Vigorous antitrust enforcement should target price increases and declines in the quality and output of goods and services created by failures of the competitive process. Companies should not be allowed to take advantage of their market position to harm the consumer interest in low-price, high-quality goods and services. Antitrust officials should keep their eye on the consumer welfare ball, rather than trying to remedy real problems that are outside the scope of their knowledge and expertise.

Privacy and Competition Policy

Antitrust officials in the United States are beginning to think about privacy as an antitrust issue. Coming out of a meeting on September 25 between the U.S, Justice Department and state attorneys general, Jim Hood, Mississippi's AG, said, 'We were unanimous. Our focus is going to be on antitrust and privacy. That's where our laws are.'

Some antitrust reformers such as Marshall Steinbaum and Maurice E. Stucke echo this idea, urging antitrust authorities to consider a merger's likely effect on privacy when conducting an antitrust review.

Jacob Weisberg makes the same appeal to antitrust authorities, urging "the FTC to expand its definition of "consumer harm" to explicitly include violations of data privacy."

The idea is mistaken at a fundamental level. Antitrust authorities are not in the business of producing substantive market outcomes that might be socially desirable. Perfectly competitive markets are not necessarily perfect. Similarly, not all market failures are the result of insufficient competition. Competitive, but unregulated, markets do not automatically produce safe consumer products, energy efficient appliances, information security, clean water, or data practices that respect privacy norms. People might very well be willing to trade off privacy protections for attractive, low cost products and services, just as they might opt for products that pollute the environment. Competition policy authorities are perhaps authorized in certain circumstances, which we discuss below, to address mergers or unfair methods of competition that reduce consumer privacy choices, but they are not empowered to make those choices for consumers. These market failures are not failures of competition and need to be remedied through substantive regulation.

Nevertheless, this idea was likely behind the dissent from U.S. Federal Trade Commissioner Pamela Harbour in the approval of the Google-DoubleClick merger. She said: 'The truth is, we really do not know what Google/DoubleClick can or will do with its trove of information about consumers' Internet habits. The merger creates a firm with vast knowledge of consumer preferences, subject to very little accountability.' She objected to the merger analysis used that relied on traditional antitrust principles because it 'does not reflect the values of the consumers whose data will be gathered and analyzed' and because it contains 'no adequate proxy for the consumers whose privacy is at stake.' As a result, she prefers an approach that would 'make privacy 'cognizable' under the antitrust laws, and thus would have enabled the Commission to reach the privacy issues as part of its antitrust analysis of the transaction.'

The U.S. antitrust laws certainly allow and indeed require enforcement authorities to consider data issues. Section 7 of the Clayton Act, for instance, prohibits mergers that would be likely 'substantially to lessen competition, or to tend to create a monopoly.' That standard can be applied to combinations of data sets post-merger and fully authorizes antitrust authorities to examine data issues.

Data is an asset that could act as a barrier to entry. As the Economist puts it, "Vast pools of data can…act as protective moats." Some competition policy authorities have suggested that "….the collection of data may result in entry barriers when new entrants are unable either to collect the data or to buy access to the same kind of data, in terms of volume and/or variety, as established companies."

In theory, one company's control of data might in certain circumstances leave such a limited supply left for others that competition has a hard time thriving.

But data is only one element in the production process. As the Centre on Regulation in Europe says, "The first principle is that data are one input, which is important but not unique, to develop successful applications and algorithms. Other inputs are also important such as skilled and creative labour force (in particular computer scientists and engineers), capital and distribution channels."

Data is important in a special way – processing data provides insights that help improve the quality of a service. Much business-critical data is easily available to tech companies and to the many other industries that rely on data. The Internet itself is the source of large amounts of commercially important information freely available for anyone who wants to use it. Service providers make enormous amounts of additional information commercially available for business uses. The flood of data is so large that companies such as Oracle have begun to set up data marketplaces to help companies find and buy what they need.

Moreover, data is not destiny. For one thing, more is not necessarily better. At some point having additional data adds no additional value. Moreover, for many applications, the value of data declines quickly; it is transient. Applications live off new data, not stockpiles of historical data. For instance, 15 percent of queries submitted each day have never been seen before by Google's search engine. And some advanced algorithms such as the machine learning programs that learned to play Go merely from the rules of the game itself, do not rely on data at all.

The start-up dating service, Tinder, overcame the data lead of established providers Match.com, eHarmony, and OkCupid with innovative features such as the "double opt-in." As economist Hal Varian puts it, it is the recipe not the data that matters. And the recipe – the algorithm, the idea – comes from high quality data scientists and creative entrepreneurs.

Finally, it is not the amount of data that is crucial. Data matters for competition analysis only if it is scarce and cannot be replicated. The philosopher John Locke said it would be legitimate to acquire property in the state of nature as long as "there was still enough, and as good left" for others. In the data economy, the question isn't whether data is valuable but whether there's enough good data available for competitors to use.

It is legitimate for competition policy authorities to examine possible harmful effects on the interests of consumers from the collection or combination of data sets. But the abundant supply of data in the Internet ecosystem and the ease with which valuable data can be replicated by competing firms suggest that the examination will routinely reveal a lack of harm.

In the Google-DoubleClick case, for instance, the FTC majority examined the data issues in the context of the online advertising market and concluded that 'the evidence failed to show that the accessibility to Google of any additional data would likely enable it to exercise market power.' It found that the combined data set would not constitute 'an essential input to a successful online advertising product' because

several competitors have 'have access to their own unique data stores.'

European competition authorities use a similar standard in merger reviews involving merged data sets. For instance, in 2016, the European Commission approved the Microsoft merger with LinkedIn, saying that 'the combination of their respective datasets does not appear to result in raising the barriers to entry/expansion for other players in this space, as there will continue to be a large amount of internet user data that are valuable for advertising purposes and that are not within Microsoft's exclusive control.'

In 2008, the European Commission found that "the combination of (Google's) data about searches with (Doubleclick's) data about users' web surfing behaviour is already available to a number of Google's competitors today."

In its 2014 consideration of the merger of Facebook and WhatsApp, the European Commission determined that "…regardless of whether the merged entity will start using WhatsApp user data to improve targeted advertising on Facebook's social network, there will continue to be a large amount of Internet user data that are valuable for advertising purposes and that are not within Facebook's exclusive control."

Finally, in its 2017 study of the online video streaming marketplace, the Netherlands Authority for Consumers and Markets found that "large quantities of data are not an insurmountable barrier for being able to enter the market."

However, there is one way for antitrust authorities to consider privacy in merger reviews. Companies differ in their data practices; some might be more protective of privacy than others. If potentially competitive companies merge, then this diversity of privacy practices could be lost. Agencies should examine this non-price aspect of competition, just as much as they should examine diminished quality, selection or service in evaluating a merger. They must be sure, however, that privacy is a genuine element of competition, not a difference between companies that is not material to consumers.

But, going beyond these competition issues to review conduct or mergers based on non-competition issues like privacy itself is not warranted under either U.S. or European competition policy standards. Both jurisdictions ground competition policy law in protecting the consumer interests in low-prices, quality and variety of products, choice and innovation. Other policy goals need to be attained with other policy tools.

The U.S. FTC majority said as much in approving the Google-DoubleClick merger. It expressed reservations about intervening 'in transactions for reasons unrelated to antitrust concerns, such as concerns about environmental quality or impact on employees.' It said clearly that 'the sole purpose of federal antitrust review of mergers and acquisitions is to identify and remedy transactions that harm competition' and concluded that the Commission lacks 'legal authority to require conditions to this merger that do not relate to antitrust.'

Competition policy and data sharing

Recently, Prof. Myer-Schonberger proposed that companies above a certain size should be required to disgorge subsets of their data to competitors. Amazon, for example, would be required to make available its sales data so that anyone could create an alternative recommendation engine.

Voluntary data sharing arrangements among competitors have existed for generations. The most

prominent example in the U.S. is credit bureaus, where banks and others voluntarily pool information in order to get a more accurate picture of risks for potential lenders, insurers and employers.

But mandatory data sharing suffers from many flaws. For one thing, it creates substantial privacy risks. If people are willing to share their information with one company, it doesn't follow that they want to share it with all the competitors of these companies. Forced data sharing runs against any notion of effective privacy protection. It deprives consumers of their choice of more or less privacy protective arrangements. Companies with data management practices that go above current legal requirements and that many consumers find attractive would be required to pass personal information on to other companies who do the minimum to comply, thereby defeating consumer choice in data protection practices.

This risk might be mitigated if companies were required to deidentify the information before passing it on. But competitors don't want anonymous data; they want the list of their rival's users and everything the rival knows about them. Search engine competitors want individual-level data, identified by IP address, device ID and other identifiers that privacy regulators treat as personal information.

The non-rivalrous nature of information often gives rise to the feeling that there would be no loss and all gain from data sharing. But mandated data sharing would create overwhelming disincentives to invest in data base construction. The construction and maintenance of accurate, up to date relevant systems of records is an enormously expensive tasks characterized by steep economies of scale. These data bases are often a treasured company asset, with values at transfer in the billions of dollars. It is hard to see why any company would invest in this effort if the fruit of its work would be immediately made available to all competitors at no or minimal charge.

Myer-Schonberger thinks data sharing is needed to ward off system failures that could arise from centralization. For instance, when one company provides the best recommendation engine that most people want to use, what happens when the service makes a mistake? There's nowhere to go to get an alternative answer that could correct the mistake. The result could be catastrophically misleading search results, consumer recommendations, and news feeds. In addition, centralization could create data security risks. When one company controls all the data, what happens if there's a security breach? It's a single point of failure that could have catastrophic results for the entire system.

But upon examination these risks are illusory. Forced data sharing doesn't make the data vanish from the original data collector. So whatever security risks were present are still there. And with data sharing, every new entity who receives the original data is a new point of failure.

Moreover, if a company gets its personalized results wrong, consumers don't need to go to a competitor to be informed of the mistake. It's like getting the wrong sized shoe; you know it doesn't fit because it hurts. So, what happens with personalization mistakes? You don't read the suggested article, you don't buy the recommended product and you don't click on the proffered search results. And the algorithm learns from that and tries to get it better next time.

If it doesn't, then there are alternatives. Perhaps the biggest blind spot in the centralization argument is the idea that the large tech companies have no competition at all, as if Amazon doesn't have competitors like Wal-Mart, Facebook doesn't have competitors like Snapchat, Twitter and LinkedIn, and Google doesn't have competitors in search like Bing, DuckDuckGo, Yelp, and Travelocity and competitors in advertising such as Facebook and Amazon. Systematic, regular and widespread failure of these services would not be catastrophic except for the companies themselves, who would immediately see their market

share eroded as people exit in mass to these alternatives.

The existence of these competitive alternatives suggests that data sharing, with its substantial flaws for other policy objectives, should be considered as a competition policy tool only with substantial proof of anticompetitive conduct, and only after less draconian measures have been determined to be ineffective in protecting consumers from this conduct.