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Comments of the
Software & Information Industry Association
on the
FTC Workshop on
Competition and Consumer Protection in the 21st Century
Second Session
Held September 21, 2018
Comments filed on November 13, 2018

The Software and Information Industry (SIIA) appreciates the opportunity to comment on Federal Trade Commission's (FTC) Workshop on Competition and Consumer Protection in the 21st Century, Second Session, held September 21, 2018. The workshop usefully framed important issues the FTC will need to resolve as it reorients its consumer protection and competition policy agenda for the coming years.

As the principal trade association of the software and digital information industry, the more than 500 members of SIIA develop and market software and electronic content for business, education, government, healthcare and consumers. SIIA's members are software companies, data analytics firms, compilers of data, information service companies, and digital publishers of business-to-business content. Software is a $425 billion industry that directly employs 2.5 million U.S. workers and supports millions of other jobs by driving American productivity.[1] As leaders in the global market for software and information products and services, our membership consists of some of the largest and oldest technology enterprises in the world, as well as many smaller and newer companies.

SIIA's comments will focus on the need for a rulemaking on unfair methods of competition, on the question of data ownership, on the significance and interpretation of Ohio v. Amex case and on the antitrust issues raised by standard essential patents.

Rulemaking on Unfair Methods of Competition

As part of session 1 of the workshops, FTC Commission Chopra submitted a comment to the workshop calling for a rulemaking to define more precisely the scope of the FTC's authority to prohibit unfair methods of competition. There was substantial discussion of the proposal in the second session on September 21.

While the FTC has had this authority from its inception, it has not sought to specify by rule which practices might be proscribed as unfair methods of competition. Commissioner Chopra suggests that in

[1] Software & Information Industry Association, The U.S. Software Industry: An Engine for Economic Growth and Employment, Prepared for SIIA by Robert J. Shapiro, 2014 at http://www.siia.net/index.php?option=com_docman&task=doc_download&gid=5446&Itemid=318

some circumstances enforcement might be streamlined if a rulemaking clarified that certain practices were unfair.

SIIA thinks this proposal might in certain cases produce enforcement efficiencies. The case-by-case method of determining unfairness through adjudication has produced ambiguity. There would be an advantage in issuing clear rules in certain cases to marketplace participants, enabling predictable enforcement in the areas covered by the rules. Indeed, explicating what is *not* an unfair method of competition would be an important clarification for many companies. Rules defining unfair conduct might also save litigation expenses and its openness to all participants would increase the democratic legitimacy of antitrust proceedings.

But rulemaking cannot be used in general. If the FTC is to use the rulemaking approach, it must identify particular practices that it thinks constitute unfair methods of competition. The question is when it is wise to use a rulemaking approach and when to remain with the traditional case-by-case adjudication framework.

The pay-for-delay example suggests that one criterion would be administrative efficiency. Instead of bringing a specific case each time a company engages in the same practice, the FTC would propose a rule defining that practice as unfair. When a company engaged in that practice, the FTC would be able to simply apply the rule to new case. These efficiencies would be most apparent when the FTC already has compiled an extensive factual record about the practice and its effects on the competitive process. Given its section 6(b) authority to collect confidential information from companies, the FTC could be in a position to compile these records in an efficient way.

In certain other areas, private litigants might be unable to bring action. Private litigation is not possible under Section V of the FTC Act. Commissioner Chopra suggests that class action lawsuits under the Sherman Act cannot reach non-compete clauses in employment contracts because these contracts often require arbitration and are regulated under employment law. If these provisions of employment contract are unfair, the best way to take action against them would be through a rulemaking.

Economist Dennis Carlton is right to raise the concern that rulemaking takes away flexibility and for that reason rulemaking should only be used in special cases. There is always some flexibility in applying a rule to a particular case, but the rule provides a general understanding of the limits of conduct. Only when there's an extensive record about the competitive harm associated with a particular practice, will the advantages of additional flexibility be much diminished.

Legal scholar Keith Hylton is right to suggest that adjudication is usually better than rules in handling the nuances of specific cases. Again, this point argues for rulemaking to be used sparingly. Nuance is less crucial than clarity only when the evidence for anticompetitive harm has been established through studies and an open rulemaking.

Pulitzer Prize winning economist Joseph Stiglitz suggests that there is a need for balance between adjudication and rulemaking, and perhaps he is right that when used sparingly rulemakings could set a better balance.

This need for balance between adjudications which have been endorsed by court decisions and rulemaking suggests another criterion to limit the use of rulemaking. The efficiencies Commissioner Chopra suggests from rulemaking should be adopted only to the extent that there is a judicial consensus regarding particular cases. This would suggest that it would not have been appropriate for the FTC to adopt a pay-for-delay rule before the Supreme Court approved the FTC action against a pay-for delay arrangement in FTC v Actavis. And in this case, where the Court declined to adopt the FTC's proposed presumption against such arrangements, the judicial opinion might counsel against moving to a rule.

The search of examples where rulemaking makes sense is thus an important new avenue for the FTC to pursue. But the real question is where including the cited examples of pay-for-delay and non-compete employment contracts, the rulemaking approach might be desirable.

SIIA encourages the FTC to proceed, but to proceed cautiously in the direction of rulemakings to clarify and define unfair methods of competition.

Data Ownership

The question of data ownership arose at several points in session two. Economist Dennis Carlton treated the question of ownership of data as key to both competition policy and privacy. Who owns information, the customer or the firm? Once that is decided, he suggested, then competition policy and privacy policy can proceed on a strong footing.

Joseph Stiglitz seemed to agree that defining property rights was important and seemed to think that it was most sensible to assign data ownership to the data subject. But he thought this was not the end of the story, since consumer protection and privacy needed to go well beyond just assigning data ownership rights, to fully protect people from marketplace harm related to the collection and use of data.

SIIA thinks that Professor Stiglitz is closer to the truth. It is an old idea that data protection becomes a lot easier if we just assign ownership of personal information to the data subject. But privacy scholars have debunked this idea from many different perspectives over the years. A recent SIIA commentary - Privacy Is Not A Property Right In Personal Information – summarizes this criticism.

Assigning ownership in data is an intractable problem because almost all information about people concerns their interaction with others. If I bought something from you, then you sold it to me. People are social creatures and most of what they do is in relationship with other people.

Author Larry Downes emphasizes the point that when information is about more than one person, it is impossible to determine how a property right should be allocated: "Would it be shared property, owned equally by everyone referenced? If not, would any one person hold a veto?"

Moreover, defining privacy as data ownership Is economically foolish. Privacy scholar Helen Nissenbaum suggests that the cost of getting consent from people who own their data might make it impossible to engage in even the most socially beneficial uses such as medical research that can put an end to dangerous diseases.

Former Seventh Circuit Court Judge Richard Posner thinks privacy as ownership would impose unmanageable transaction costs. How, for example, could a magazine exploit the economic value of its subscriber list if it needed permission from each subscriber to sell it? The cost of obtaining consent would exceed the economic value of the list. As Larry Downes puts it, data-subject ownership of information would almost always create "transaction costs higher than the value of the transaction."

Downes further points out the dangers to freedom of expression in allocating to individuals "a property right to any fact that relates to or describes them." How would journalists ever write about people if they had to get individual consent? Court cases like Haynes v. Knopf hold that general privacy rights do not prevent authors from using factual information about people in their writings. And the Supreme Court case Sorrell v. IMS stands for the proposition that the collection, dissemination and use of information, even personal information, is protected by the First Amendment.

These are not abstract or idle questions, but have policy consequences. They have, for instance, implications for the interpretation and extend of data-portability provisions that would allow people to transfer "their" information to third parties

Does this mean that that a customer could ask to transfer his entire transaction history from Walmart to Target? If so, it is not hard to imagine companies offering incentives for customers to bring with them "their" records from other businesses. Indeed, they might start to make it a condition of doing business with them at all. Furthermore, information intermediaries are likely to develop who could compile vast amounts of commercial records by persuading people to transfer "their" records from the companies with whom they do business.

The commercial implications of this right have hardly been appreciated yet, and privacy regulators might still be persuaded that this is not what they had in mind after all. But one thing is certain: this version of data portability will not increase the level of privacy protection.

Ohio v. American Express

Panelists in the second session were almost uniformly hostile to the recent Supreme Court decision in Ohio v. American Express.. One criticism was that the underlying theory of two-sided markets does not represent a really different mode of economic analysis than the traditional vertical analysis of markets. Another is that it immunizes anticompetitive conduct because any marketplace competitor could claim to be operating in a two-sided market and so could defend itself more easily against charges that their conduct was anticompetitive by asserting that the practice had beneficial results for participants on the "other side" of the market.

In fact, the decision is more sensible than these critics allow. The case concerned credit card markets, where merchant demand for payment service is heavily dependent on consumer demand for the same transaction service, and vice versa. Pricing to one side of the market makes a difference to the demand on the other side of the market. Price increases to merchants, for instance, can increase sales, something that would rarely happen in one-sided markets.

The court took into account this two-sided feature of the credit-card market to assess the reasonableness of Amex's anti-steering rule, which prevented merchants from nudging their customers into using a cheaper form of payment such as their Visa or MasterCard cards. The rule supported the Amex business model, preventing merchants from eroding the higher Amex merchant fee, and promoting larger Amex card usage.

The Court viewed Amex as a two-sided platform "supplying only one product—the transaction." The anti-steering rule increased prices to merchants, but it provided countervailing benefits to cardholders on the other side of the very same transactions. The substantial benefits to cardholders were large enough to outweigh merchant losses. The Court decided that the anti-steering rule had an overall positive effect and so was not an unreasonable restraint on trade.

The charge that this two-sided market analysis is bad economics is dubious. The notion of a two-sided market has been thoroughly explored since the classic article by Jean-Charles Rochet and Nobel Prize-winning economist Jean Tirole set out the basic notion in 2003. There are different technical tests for determining whether a market is two sided, but they all agree in particular cases.

Like all economic models, the utility of using a two-sided model in a particular case depends on the extent to which it can explain otherwise puzzling economic phenomena. Most use cases involve puzzling pricing practices that depart from standard marginal cost prices. Two-sided market models allow us to see that below-cost pricing to one side of the market and above cost pricing to the other is a rational way to get both types of actors to join the platform.

Even though the concept is clear and useful as an economic model, its use in antitrust litigation might still be overbroad, allowing any conduct to escape scrutiny as long as it is somehow connected to a two-sided market.

But the Amex decision does not immunize companies from antitrust complaints. For one thing, the court applied the decision only to "a special type of two-sided platform known as a 'transaction' platform," where the interaction between the two sides is a "single, simultaneous transaction between participants."

As a result, both FTC Chairman Joe Simons and Justice Department Antitrust chief Makan Delrahim embrace a narrow reading of the case.

But a narrow reading does not mean a reading limited to the facts of the case. Many markets might qualify as two-sided if the facts support that analysis. The court articulated a standard to apply in future cases, namely that a market should be treated as one-sided “when the impacts of indirect network effects and relative pricing in that market are minor.”

Using that standard, the court evaluated a potential claim from a newspaper that it operated in a two-sided market because it linked advertisers with readers. The court rejected this hypothetical claim because “newspaper readers are largely indifferent to the amount of advertising that a newspaper contains.” The indirect network effects in this market are “weak”; it “behaves much like a one-sided market and should be analyzed as such.”

As many observers have noted, including Tim Wu (p. 262), who is hostile to attention merchants, the aim of much online advertising is to furnish added value to online users by providing them with offers that match their current needs and preferences. For this reason, it may be the case that the two-sided network analysis does have more bearing for an online platform where consumers may care about the amount of advertising contained on a website and the consumer's ability to interact with the online advertisement more closely resembles the instantaneous transaction of a credit card.

So, the decision will not shield anyone from antitrust scrutiny. How two-sided market analysis applies to other cases depends on application of the court’s mandate to look at the strength of the indirect network effects at play and the facts of the particular case.

Standard Essential Patents

Recent remarks from Antitrust Division head Makam Delrahim create difficulties for enforcing standard essential patents. He said that “A unilateral violation of a FRAND commitment should not give rise to a cause of action under Section 2 of the Sherman Act, even if a patent holder is alleged to have misled or deceived a standard-setting organization with respect to its licensing intentions.” This would leave only “remedies under contract law” as a way to deter this conduct.

The speeches on standard essential patents elicited a response from a large group of leading law professors and former government antitrust enforcement officials arguing that past administrations and the courts have acknowledged the anticompetitive harms from patent holdup and that a patentee who obtains increased market power by breaching a FRAND commitment should be liable for monopolization.

SIIA agrees that in some circumstances action under the antitrust laws is the most effective way to prevent a company from falsely promising to abide by a FRAND commitment as a way to incorporate its technology into a standard. The position that no antitrust action in these circumstances is ever justified is too extreme and would lead to competitive abuses, followed by the decline of the use of patented technologies in standard setting as companies learned their lesson from the unenforceability of FRAND commitments.

In session two, economist Dennis Carlton urged standard setting organizations to take responsibility for enforcing FRAND clauses through mandatory arbitration mechanisms. He acknowledged that the standard setting organizations might be leery of becoming the target of antitrust enforcement actions if they did that. As if to underscore the legitimate concern that standard setting organizations have in taking on a mandatory enforcement role, antitrust practitioner Eric Citron immediately followed these comments with a warning that standard setting organizations are already on thin ice and their conduct needs to be examined for “price-fixing” and to determine whether the standard setting effort is even legitimate or rather just an “unnecessary” conspiracy of competitors.

The burden of enforcing FRAND agreements cannot be outsourced to the standard setting organizations or effectively resolved under contract law. There needs to be a role for antitrust enforcement in the right circumstances.