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DOJ Business Review Letter Provides Insights into Appropriate Safeguards for Standard-Setting Organizations

Last week, the Antitrust Division of the U.S. Department of Justice (DOJ) issued a business review letter stating that it "has no present intention to take antitrust enforcement action against" proposed "procedures for development and promulgation of industry specifications" by the GSM Association (GSMA), a trade group comprising mobile network operators and related companies. The GSMA standard-setting process reviewed by the DOJ was developed after the DOJ raised "significant concerns" with the GSMA's prior process. The DOJ's letter provides an important reminder that standard-setting activity should be governed by appropriate safeguards and that members of standard-setting organizations (SSOs) should be vigilant in ensuring that their SSOs do not engage in anticompetitive behavior.

Background

According to the DOJ's letter, remote SIM provisioning "enables eSIMs on mobile devices. eSIMs are an innovation in how consumers obtain mobile service from an operator. Instead of having to physically obtain and swap a SIM card to sign up for or switch mobile service, consumers can download through the internet (i.e., 'remotely') an operator's profile onto the eSIM to connect to the operator's network." This technology "can benefit consumers through increased competition among wireless service providers—by enabling disruptive new entrants, by reducing the friction involved in comparing and switching wireless carriers, and by making it easier to choose a wireless provider that does not have a nearby physical location."

The DOJ became concerned that the GSMA's earlier process for developing an industry standard for remote SIM provisioning for eSIMs "was deeply flawed and enabled competitors to coordinate anticompetitively" by providing "mobile network operators . . . certain privileges not available to other members and participants, allowing that single interest group to exercise undue influence in the standard-setting process" and that the process could be used "to limit options available in the market in such a way as to benefit the incumbent operator members by reducing their competitive pressures." The GSMA "propos[ed] to adopt new procedures for development and promulgation of industry specifications." These proposed procedures are known as AA.35.

The DOJ's Competitive Analysis of Standard-Setting Organizations

In its letter, the DOJ wrote that "[i]t is not the Department's role to assess whether AA.35 is the ideal process for the development of standards" and cautioned that the letter should not "be read to suggest that the Department endorses any specific process as the correct approach to standards development." The DOJ

observed that "variation among procedures for standard-setting organizations . . . could be beneficial to the overall standard-setting process," and that "[o]ther organizations, therefore, may decide to implement different procedures for the creation of standards." The DOJ also wrote that "it remains to be seen whether AA.35 will, in effect, ensure that all interested parties have the opportunity to participate meaningfully in developing standards at GSMA that benefit consumers." Nevertheless, the DOJ's letter highlights several principles which inform the DOJ's competitive analysis of standard-setting activity:

- **The DOJ is concerned about the potential misuse of standard setting to stifle innovation or favor certain firms.** In the letter, the DOJ wrote that it "has concerns about potential abuses of the standard-setting process—particularly when conducted within trade associations controlled by a single constituency of competitors—to dampen the potential of new technologies to disrupt the status quo and ultimately discourage companies from competing through innovation." As the DOJ has written before, it "will be skeptical of standard setting organizations that allow blocks of implementers or innovators to engage in concerted action and skew those organizations' rules and policies in their favor." In the letter, the DOJ cited documents produced during its investigation of the GSMA's earlier standard-setting procedure which, according to the DOJ, indicated that "GSMA acted—consistent with its origins and board membership—as a defender of operator interests rather than a neutral arbiter."

- **In evaluating issues relating to standard setting, the DOJ weighs procompetitive justifications and possible anticompetitive effects.** According to the letter, "the Department will closely observe how AA.35 is applied and whether it succeeds in promoting interoperability without marginalizing non-operators' ability to represent their interests in preserving the maximum freedom to respond to consumer demand for innovation." In the letter, the DOJ cited concerns with provisions of the earlier GSMA standard "that may restrict the procompetitive potential of eSIMs without being necessary to achieve remote provisioning or to solve an interoperability problem." The DOJ wrote that those provisions "in effect, give an operator the capability to lock a smartphone to its network" and "potentially restrict disruptive competition."

  As Assistant Attorney General for Antitrust Makan Delrahim said this past summer, "[s]tandard setting enables the spectrum of industry participants cooperatively to create solutions to technical problems. Standards can make products less costly for firms to produce and more valuable to consumers. They can foster public health and safety; increase innovation, efficiency, interoperability, and consumer choice; and serve as a fundamental building block for international trade," but "collaborative standard setting is not free of risks." For example, "[c]ompetition and consumers may suffer if alternative standards, approaches, or solutions are prevented arbitrarily from competing in the marketplace."

- **Standard-setting processes must contain safeguards, but process alone will not immunize the standards set by an SSO.** The DOJ wrote that "it is . . . imperative that the process to create [a] standard is designed with due process safeguards that promote competition on the merits during the process of setting the standard. Safeguards prevent a single interested group from hijacking

the process, keeping the focus instead on goals that benefit the industry and consumers overall. In short, due process safeguards can prevent 'mission creep' that unnecessarily restricts consumer choices. This also minimizes the potential for standard setting to be used to reduce the competitive pressures on incumbents who set the standard." The letter cites key attributes of "openness to all interested parties, a balance of interests, a lack of dominance, the adoption of written procedures, and a formalized and impartial appeals process" while noting that "[t]hese principles reduce the opportunity for anticompetitive behavior within an SSO, although they may not eliminate it entirely."

Significance

Importantly, as the DOJ's letter states, "when an organization knows the anticompetitive goals of its members, and facilitates horizontal competitors' use of the organization's process to promulgate a dominant standard that promotes those goals, both the organization and its members can be liable under Section 1 of the Sherman Act, regardless of whether the conduct occurs under the umbrella of standard-setting activity." This serves as an important reminder that companies participating in SSOs can benefit by periodically evaluating the procedures implemented by those SSOs to ensure that proper safeguards are in place to help ensure that they–and their SSOs–avoid engaging in anticompetitive conduct.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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