

Antitrust Laws and Standards Development

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What are Antitrust/Competition Law about?

- ▶ In the US, they:
 - ▶ Are intended to preserve and promote competition and the free enterprise system
 - ▶ Are based on the assumption that free competition is the most efficient way to:
 - ▶ Allocate resources
 - ▶ Produce goods at the lowest prices
 - ▶ Ensure the highest quality

What are Antitrust/Competition Law about?

- ▶ In other Countries:
 - ▶ The laws can in many ways be similar, but are not identical
 - ▶ Goals, enforcement and policies may differ
 - ▶ For example, in contrast to the US, EU competition law focuses:
 - ▶ More on encouraging competition and fairness between firms
 - ▶ Less on impacts on consumers

Penalties

- ▶ A violation of the antitrust laws can have serious consequences for a standards development consortium and its members
- ▶ What do we mean by serious penalties?
 - ▶ Criminal fines ranging from minor ones to upwards of \$1,000,000 for individuals, their companies, and the foundation
 - ▶ Criminal penalties of up to 10 years in prison
 - ▶ Usually requires a *per se* violation, such as price fixing or market allocation schemes
 - ▶ Civil money judgments against individuals, their companies and/or the foundation
 - ▶ Consent orders from the FTC and Department of Justice that may bar or limit individuals and companies from participation in foundations

Level of Enforcement Activities

- ▶ In the United States, regulators have been far less active during the last fifteen years than they have been before
 - ▶ Major actions in the past were brought against AT&T, IBM Microsoft and others
 - ▶ IBM, after many years of expensive litigation, escaped
 - ▶ AT&T, after a similarly long process, was broken up
 - ▶ Microsoft narrowly escaped likely dismembering because of a change of administrations
- ▶ The European Commission continues to be much more activist
 - ▶ Major actions have been brought against Microsoft, Intel, Qualcomm and others, often exacting penalties in the billions of Euro
 - ▶ The EC launched at least one action against a standards consortium
- ▶ China is an evolving landscape

General Conduct Concerns

- ▶ A principal concern of Antitrust laws is the regulation of abuses by competitors
- ▶ Competitors can engage in unfair practices against each other
- ▶ Competitors can collude to the disadvantage of consumers
- ▶ *Open standards are jointly developed by competitors*

The Good News

- ▶ The antitrust laws also encourage “Pro-Competitive Activities”
- ▶ “A trade association by its nature involves collective action by competitors. Nonetheless, a trade association is not by its nature a “walking conspiracy”, its every denial of some benefit amounting to an unreasonable restraint of trade.”

Further:

“In particular, it has long been recognized that the establishment and monitoring of trade standards is a legitimate and beneficial function of trade associations.”

Fifth Circuit Court of Appeals, *Consolidated Metal Products v. American Petroleum Institute*, 1988

Operational Matters

- ▶ When should you be alert?
 - ▶ Board of Directors Support
 - ▶ Concern is greatest here, as this is where management representatives meet and agree on strategy, roadmaps, membership matters, etc.
 - ▶ Review of all Board agendas and materials to avoid inappropriate proposals before they are distributed
 - ▶ Legal review of Board minutes before they are distributed (attorney client privilege may not apply thereafter)
 - ▶ Face to Face meetings
 - ▶ Virtual working group activities
- ▶ Generally, not responsible for what happens “in the hallways” (i.e., one on one discussions among project participants)

Things you should NOT discuss:

- ▶ Pricing or information that bears on prices, such as markups, discounts, allowances, credit terms, pricing methods, profits, or margins
- ▶ Terms or conditions of sales or distribution
- ▶ Individual companies' competitive strategy
- ▶ Individual companies' market shares or sales territories
- ▶ Allocation of customers, markets, production levels, or territories; or restricting the customers to whom, or territories in which, a company may sell or resell products
- ▶ Confidential or otherwise sensitive business plans or strategy (e.g., product development plans)

Dos and Don'ts

- ▶ ***Don't*** disclose or discuss any information that your company would ordinarily hold confidential unless its disclosure is necessary to a legitimate activity of the foundation
- ▶ ***Don't*** allocate markets, territories, or customers (“you stay out of my territory and I’ll stay out of yours”)
- ▶ ***Don't*** exclude others from joining or contributing
- ▶ ***Don't*** use software, certification programs, or the concerted force of members or contributors to exclude suppliers or competitors from the marketplace

More Dos and Don'ts

- ▶ **Don't** agree to refrain or encourage others to refrain from purchasing any products or services from any supplier or vendor, or from dealing with any supplier or vendor
 - ▶ This does not restrict members and contributors from asserting their intellectual property rights
- ▶ **Don't** restrict any company's independence in setting prices, establishing production and sales levels, choosing the markets in which it operates, or the manner in which it selects its customers and suppliers

More Dos and Don'ts

- ▶ *Don't* promote standardization of commercial terms, such as terms for proprietary licensing and sale (beyond choosing the inbound and outbound license for any open source deliverables)
- ▶ *Don't* make any standard or technical requirement mandatory. All such standards and technical requirements must be optional
 - ▶ However, compliance with a standard, technical requirements, or certification requirements developed by the foundation may be required as a condition to using the Foundation's trademarks

More Dos and Don'ts

- ▶ **Do** participate in joint marketing planning
- ▶ **Do** prepare and keep to agendas
- ▶ **Do** keep minutes and records and distribute them to all participants
- ▶ **Do** be sure that Chairs are familiar with rules of proper conduct, and enforce them
- ▶ **Do** ask your company's or the Foundation's legal counsel questions when in doubt

Questions?