

December 9, 2019

Antitrust Division Issues Business Review Letter to End Standard-Setting Investigation

The Division Completed an Investigation of Standard-Setting Activities by Issuing a Business Review Letter, and Provided Guidance on Safeguards for Standard-Setting Organizations

SUMMARY

On November 27, 2019, the Antitrust Division of the U.S. Department of Justice (“Division”) announced that it had completed its investigation into the standard-setting activities of GSM Association (“GSMA”). The Division ended the investigation by issuing a business review letter, which provided guidance on procedural protections standard-setting organizations might use to protect their deliberations from anticompetitive influence. The letter is noteworthy because (i) it provides insight into the Division’s current thinking about standard-setting activities and (ii) it represents an unusual use of a business review letter, and suggests that business review letters could be part of a discussion about how to close future investigations.

BACKGROUND & BUSINESS REVIEW LETTER

Nearly two years ago, the Division began to investigate GSMA, a telecommunications trade association, for its role in developing voluntary technical specifications for the mobile phone industry. The investigation focused on GSMA’s role in coordinating the development of the Remote Subscriber Identity Module (“SIM”) Provisioning (“RSP”) Specification for embedded SIMs (“eSIMs”). eSIMs allow consumers to download SIM cards electronically. Since its creation, the RSP Specification developed by GSMA has become the dominant standard for eSIMs.

The Division believed that GSMA allowed mobile network operators to have an undue influence on the standard-setting process. For example, under the process used by GSMA, only mobile network operators

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could vote on certain key committees. The process used by GSMA thus potentially enabled mobile network operators to develop a standard favorable to their position within the industry.

On July 25, 2019, more than a year after the Division's investigation started, GSMA requested a business review by the Division,¹ a process under which the Division may provide a non-binding advisory opinion about the legality of a proposed business arrangement under U.S. antitrust laws. In the request letter, GSMA proposed new procedures to be used for developing technical standards. The procedures would open participation and increase transparency in standard setting while granting other industry participants more influence and allowing dissenters to seek an appeal.

On November 27, 2019, the Division issued the requested business review letter in closing its investigation of GSMA's past conduct.² The Division advised that it had no present intention to challenge GSMA's new procedures for developing standards, but emphasized that, while standard-setting activity has significant benefits for consumers, organizations that establish such standards are susceptible to anticompetitive pressures and susceptible to scrutiny under U.S. antitrust laws. Because of the potential for anticompetitive influence, the Division stated that it is "imperative" that standard-setting organizations implement "due process safeguards that promote competition on the merits during the process of setting the standard."³

The Division took particular note of six process improvements proposed by GSMA.⁴

- A two-stage approach to developing standards. *First*, an Industry Specification Issuing Group ("ISIG") creates the standards. *Second*, an Industry Specification Approving Group ("ISAG") approves the standards.
- The opening of membership on the ISIG and ISAG to non-operators.
- A dual-majority voting structure for the ISAG, which requires the separate approval of operator and non-operator members, to ensure that non-operators have influence on the final result.
- A requirement that a non-operator serve as chair or deputy chair of the ISIG.
- A 71% threshold to approve a proposal in the ISIG.
- The addition of an appeals mechanism that enables affected members to raise their claims to an independent panel.

IMPLICATIONS

Standard development and setting organizations should carefully consider the Division's business review letter, and consider whether to adopt the procedural safeguards of which the Division approved (or similar safeguards). As a general matter, the business review letter strongly suggests that standard development and setting organizations at least should review their procedures to make sure they do not grant too much influence to one particular segment of the industry.

The GSMA business review letter also is noteworthy because, with publication of the letter, the Division simultaneously closed an ongoing civil investigation (commenced before the request for the business

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review letter) and signaled that it does not plan to bring an enforcement action against GSMA (which is typical in a business review letter, but only for prospective conduct).⁵ Although business review letters traditionally are used to prospectively “clear” business conduct, the GSMA business review letter suggests that seeking a business review letter may be a mechanism to end certain types of antitrust investigations. Based on what the Division has disclosed about the circumstances surrounding the issuance of the business review letter to GSMA, it appears that relevant factors could include how clear the anticompetitive nature of past conduct is and whether the entity or organization under investigation is in a position to prospectively address the Division’s concerns.

Entities or organizations under investigation by the Division should consider whether seeking a business review letter from the Division could help the Division move toward closure of an ongoing civil investigation.

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ENDNOTES

- ¹ Letter from Timothy Cornell, on behalf of GSM Association, to Makan Delrahim, Ass’t Att’y Gen., Antitrust Div., Dep’t of Justice (July 25, 2019), <https://www.justice.gov/atr/page/file/1221331/download>.
- ² Response to GSM Association’s Request for Business Review Letter, Makan Delrahim, Ass’t Att’y Gen., Antitrust Div., Dep’t of Justice (Nov. 27, 2019), <https://www.justice.gov/atr/page/file/1221321/download>.
- ³ *Id.* at 9.
- ⁴ *Id.* at 10-11.
- ⁵ See Press Release, U.S. Dep’t of Justice, Justice Department Issues Business Review Letter to the GSMA Related to Innovative eSIMs Standard for Mobile Devices (Nov. 27, 2019), <https://www.justice.gov/opa/pr/justice-department-issues-business-review-letter-gsma-related-innovative-esims-standard>.

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