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Working Party No. 2 on Competition and Regulation

STANDARD SETTING

-- United States --

14 June 2010

The attached document is submitted to Working Party No. 2 of the Competition Committee FOR DISCUSSION under item III of the agenda at its forthcoming meeting on 14 June 2010.

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COMPETITIVE ASPECTS OF COLLABORATIVE STANDARD SETTING

1. Introduction

1. This submission by the U.S. Federal Trade Commission ("FTC") and the U.S. Department of Justice ("DOJ") [hereinafter collectively the "Agencies"] sets forth U.S. competition policy perspectives on standard setting. It first provides general background on the nature and effects of standards and standard setting, before briefly addressing the U.S. standard setting environment. It notes the global leadership role played by the U.S. private sector in standard setting, recognizes the procompetitive benefits of standard setting and explains how the Agencies seek to promote a procompetitive and innovative collaborative standard setting environment, through law enforcement actions and policy guidance. It then briefly surveys non-antitrust legal enforcement actions that also relate to competition policy concerns.

2. General background on standard setting

2.1 The nature of standards and standard setting

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2.2 The U.S. Government and standard setting

4. The U.S. Government ("USG"), through the National Technology Transfer and Advancement Act, and its implementing policies such as those contained in Office of Management and Budget ("OMB")[11] Circular A-119,[12] expresses a general preference for federal agencies' reliance on voluntary consensus standards in lieu of government-unique standards to achieve regulatory and procurement objectives, except where inconsistent with law or otherwise impractical.[13] [14] Circular A-119 also provides (where appropriate) for federal government agency staff participation in the activities of SSOs which, however, remain free of government control.[15] The Standards Services Division ("SSD") within the U.S. Commerce Department's National Institute of Standards and Technology ("NIST") publishes information related to standards and conformity assessment as a service to producers and users of such systems—both in the government and in the private sector.[16]

5. In pursuit of public policy goals reflected in statutes and implementing regulations, U.S. Government agencies play a key role in establishing and overseeing standards that bind private parties.[17] One focus of standard setting by the U.S. Government (and other governments) is to ensure compatibility in cooperative endeavors where a lack of compatibility would spawn costly confusion or inefficient variety.[18] The U.S. Government favors "performance standards" that express requirements in terms of outcomes rather than specifying the means to those ends. They are generally superior to engineering or

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http://www.ftc.gov/opp/intellect/020418danieljgifford.pdf. Of course, as described *supra* note 9, multiple competing standards may coexist in certain industries, reflecting differences in consumer tastes.

11 OMB is the agency that oversees overall management of the Executive Branch of the U.S. Federal Government.

12 *See* OMB Circular A-119, *supra* note 2.

13 Encouraging reliance on voluntary standards supports the following USG goals: (1) it reduces USG costs associated with developing and maintaining standards and decreases the burdens of complying with agency regulation; (2) it provides incentives and opportunities to establish standards that serve national needs; and

antitrust issues that may arise in the context of collaboratively set standards. In a few cases, relative to the vast number of U.S.- based standards that have been set, they have found antitrust liability in circumstances involving the manipulation of the standard setting process or the improper use of the resulting standard to gain competitive advantage over rivals.[33] In addition to enforcing the law, the FTC and the DOJ also have described their policy positions in reports and advisory opinions[34] on key competition questions raised by standard setting. The Agencies apply the same general antitrust principles to all standard-setting activities regardless of industry sector. Generally, unless the standard-setting process is used as a sham to cloak naked price fixing or bid rigging, the Agencies analyze action during the standard-setting process under the rule of reason. Although antitrust law is the primary means of addressing competition concerns raised by standard setting, such concerns may be addressed under certain circumstances by other legal doctrines, such as patent, contract, and tort law.[35]

4.1 Competition case law development

11. As noted previously,[36] despite its potential procompetitive benefits, standard setting may also sometimes provide opportunities to distort the competitive process. U.S. court and agency decisions have long held that competition law may be applied to prevent harm to competition associated with standard setting. In particular, challenged conduct has included the anticompetitive exclusion of rivals; the achievement of monopoly power through anticompetitive "hold up" tied to standard setting; and the exercise of market power through reneging on contract terms that reflect standard setting bargains. Key cases representing these different categories are discussed below.

4.1.1 Anticompetitive exclusion involving standard setting

12. The Supreme Court has condemned efforts by firms to use SSO proceedings as a means of excluding products produced by rivals. In the *Radiant Burners case*,[37] the Supreme Court considered allegations that manufacturers of gas burners had violated Section 1 of the She(r)8.3 10.5 ((rb8.7 (tu)18.6 (ed)8b whi

competitor. In *Hydrolevel*,[39] the defendant was the American Society of Mechanical Engineers ("ASME"), an SSO that developed safety codes for boilers and other heavy equipment. One of ASME's members (a competitor of the plaintiff) persuaded the chairman of one of ASME's subcommittees to provide an unofficial (and unjustified) letter stating that plaintiff's product was unsafe. Thereafter, the competitor used that response to discourage customers from buying the plaintiff's product. Hydrolevel sued the employer of the subcommittee chairman, the competitor, and ASME for violating Section 1 of the Sherman Act. The Supreme Court affirmed a jury verdict against ASME, holding the SSO liable for the actions of its subcommittee chairman because he acted on the "apparent authority" of ASME to discourage customers from purchasing one competitor's water boiler safety device. The Supreme Court noted that ASME had not enacted any "meaningful safeguards" to try and prevent such actions.nn 2n1338-1.0196240.0413 Tm409

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do not receive the price benefits that competition between technologies can provide.[48] Consumers of the products using the standard would be harmed to the extent those higher royalties were passed on in the form of higher prices.[49]

16. "To mitigate this type of hold up, some SSOs require participants to disclose the existence of IP rights that may be infringed by the potential users of a standard in development.[50] SSOs also may require SSO members to commit to license any of their IP that is essential to an SSO standard on "reasonable and nondiscriminatory" ("RAND") terms."[51] Some SSOs require or permit disclosure of maximum licensing terms "before selecting a particular technology as part of a standard."[52] A few SSOs (perhaps the most prominent being the World Wide Web Consortium, the international SSO that develops technical Internet standards) require that members' IP incorporated in standards be licensed on royalty-free terms.

17. The FTC has brought three cases that alleged anticompetitive manipulation of standards setting processes designed to achieve hold up under Section 5 of the FTC Act, which prohibits unfair methods of competition. In *Dell*,[53] "the FTC alleged that during an SSO's deliberations about a certain standard, Dell, a member of the SSO, had twice certified that it had no intellectual property relevant to the standard, and that the SSO adopted the standard based, in part, on Dell's certifications. After the SSO adopted the stande'

later might be enforced against those practicing the JEDEC standards. In addition, JEDEC members were obligated to offer assurances to license patented technologies on RAND terms, before members voted to adopt a standard that would incorporate those technologies.

19. The FTC found that Rambus violated section 5 of the FTC Act by engaging in deceptive conduct before JEDEC when it failed to disclose relevant patents and patent applications, and misled JEDEC members into believing that Rambus was not seeking patent rights that would cover implementations of JEDEC standards. The FTC further found that Rambus's actions contributed significantly to JEDEC's technology selections and that JEDEC's choice of standard contributed significantly to Rambus's acquisition of monopoly power. According to the FTC,

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reported they will use a flexible rule of reason approach to determine antitrust liability for the vast majority of conduct involving intellectual property rights. In particular, the Report assessed potential procompetitive and anticompetitive ramifications of *ex ante* licensing negotiations within SSOs that the Agencies would consider in applying a rule of reason analysis.[71]

28. The Report examined joint negotiation of licensing terms by participants in SSOs before the standard is set and determined that such negotiations can be procompetitive. "In most cases, it is likely that the Agencies would find that joint *ex ante* activity undertaken by an SSO or its members to establish licensing terms as part of the standard-setting process is like53obeyngo(s)10.9cooinfr binarcompetitive fits

4.2.2 DOJ business review letters on ex ante licensing

30. Competition policy guidance also is reflected in two DOJ business review letters[75] issued to specific SSOs. In October 2006, DOJ issued a business review letter to the VMEbus International Trade Association ("VITA") stating that it did not intend to challenge VITA's proposed patent policy for its standard setting activities. Under the terms of the proposed policy, patent holders would be required to declare their own most restrictive licensing terms. Such declarations could potentially decrease the price of licenses for use under the standard if patent holders compete to increase the chance that their patented technology would be selected by the working group setting the standard. DOJ concluded that the policy would preserve the benefits of competition between alternative technologies, helping VITA to avoid hold up and to improve its decision making by broaa2067 Ti262.1 (broaa6 (s)9.92.4 .3 (n(i)- (thenda)15.4 ((sby)19.3 (n)