

Standards and Competition

5th September 2023 – Improving Web Advertising Business
Group

Agenda

- MOW introduction
 - Preiskel advice
 - Situations – poll & specific advice
 - Summary
 - Q&A
-
- There is a poll – **[Slido.com #1838254](https://www.slido.com/join/default.aspx?roomid=1838254)**

Opening the web for everyone

Today

Apple and Google abuse their role – e.g. bundle payments

They “tax” industry with their announcements

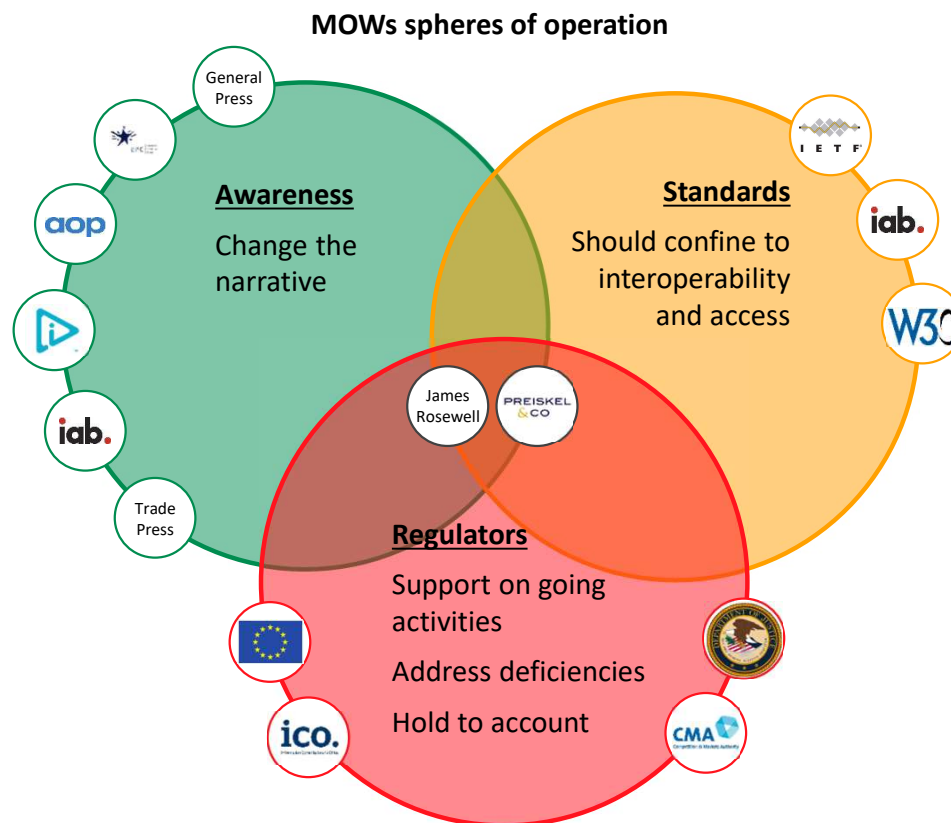
Third party “bad”, first party “good” narrative is dishonest and damaging

Regulators have a partial understanding of causes

W3C and IETF dominated by web browser interests and fail to enforce process

IAB and others ineffective due to Big Tech financial dependency

Plurality of the media threatened



Desired Outcomes

B2B (third party) and B2C (first party) treated equally in digital services

Role of web browser is limited to supporting access and interoperability

Standards making bodies ensure fair play

Regulatory oversight of standards and web browsers

Competition on the merits not standards

Plurality of the media protected

Note: Logos illustrative and may not be a complete list

World Wide Web (W3C) consortium:
Competition Law Compliance September
2023.

Tim Cowen Chair, Antitrust Practice

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Outline

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- General prohibitions
- Economic context/policy priorities.
- Guidelines
- Authority Guidance on Compliance
- Some cases
- Conclusions



General prohibitions in antitrust law

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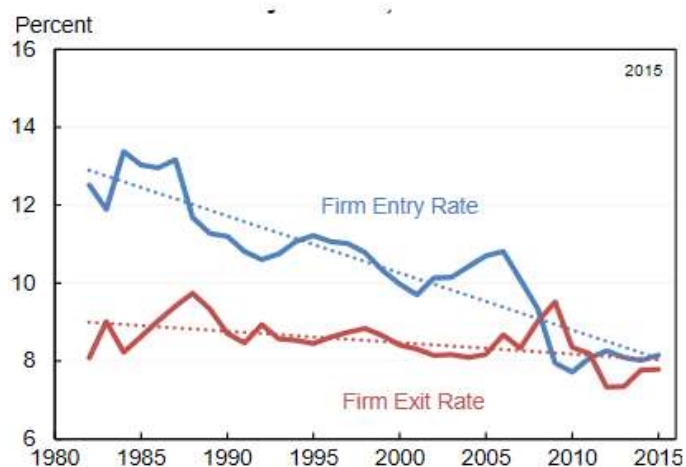
- Antitrust laws apply in US, EU, UK + 100 jurisdictions (including Russia and China)
- **Outlaw** anticompetitive agreements; (cartels) and
- Abuses of dominant market positions.
- Public enforcement: G7 quarterly meetings & ICN
- Offences under civil and criminal laws and sanctions include director disqualification, fines and damages.

Policy: Professor Jason Furman CEA and OECD 2016

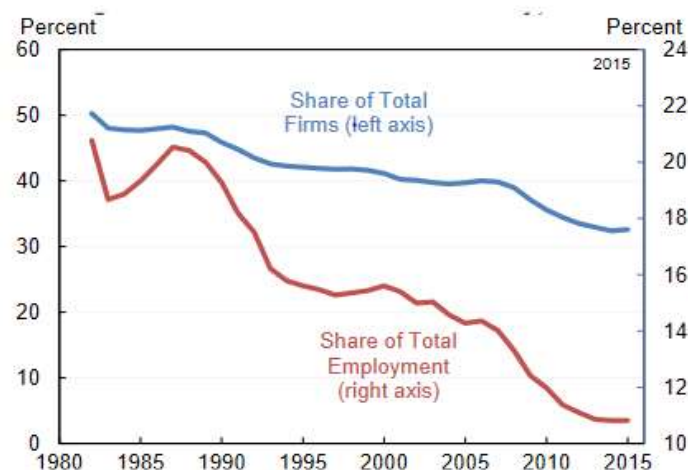
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[https://one.oecd.org/document/DAF/COMP/WD\(2018\)67/en/pdf](https://one.oecd.org/document/DAF/COMP/WD(2018)67/en/pdf)

4a. Firm Dynamism, 1982-2015



4b. Young Firms as a Share of the Economy,
1982-2015



Source: Census Bureau, Business Dynamics Statistics; author's calculations.



HM Treasury (UK) Furman Report 2019 & House of Commons Evidence 2023 (cf DMA)

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“There is one thing that motivated us. It is very hard to see the future of this space, but four years ago we thought the next big thing would involve artificial intelligence and machine learning. Unlike the past waves of innovation—where IBM was dominant, and then it became about PCs so it was Microsoft, and then it was about the internet so it became Google, and we saw one wave after the next displacing the previous.”

He went on to say..

“We were very worried that because artificial intelligence required large amounts of data, it would not necessarily lend itself to a new upstart competitor but would instead entrench the power of the existing ones. So far, what we are seeing with OpenAI and the role that Microsoft plays in it, and with what Google is doing in this space, is that it is largely playing out along the lines that we were concerned about.”

In sum, without intervention, competition and innovation won't exist.

“Our central conclusion is that digital markets will only work well if they are supported with strong pro-competition policies that open up opportunities for innovation and counter the forces that can lead to high concentration and a single winner”.

Proposed open interoperability and use of open standards

What you should watch out for

There are 3 key things to be vigilant about in business, which are:

1. Cartels
2. Other anti-competitive agreements or concerted practices; (e.g. exchange of information and market sharing).
3. Abuse of dominant position: exploitation and exclusion

<https://www.gov.uk/government/publications/competition-law-dos-and-donts-for-trade-associations/what-do-trade-associations-need-to-know-about-competition-law>

See the EU Commission Guidelines on the Applicability of Article 101 of the TFEU to horizontal cooperation agreements: https://competition-policy.ec.europa.eu/system/files/2023-07/2023_revised_horizontal_guidelines_en.pdf and the UK Guidance on the Application of the Chapter I prohibition in the Competition Act 1998 to horizontal agreements:

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1178791/Horizontal_Guidance_FINAL.pdf



Key issues:

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- standard setting can benefit a small number of businesses, excluding rivals or imposing disadvantages on rival and fixing prices, terms or “non-price factors of competition.”
- standard setting involves a group of competitors establishing common practices amongst rivals. The economic incentive to restrain competition is high, making neutrality and objectivity vital for SDO processes and procedures.
- As Apple stated in its 8 March Submission to the Competition and Markets Authority (‘CMA’) consultation on standard-setting that limitations need to be in place in *‘order to prevent participants from imposing their will on the market and creating anticompetitive conditions.’*

Cases on Standards-making practices

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<u>Checklist of due process requirements for SDOs</u>	<u>EU Guidance on Standard-Setting (June 2023)⁵</u>	<u>UK Guidance (August 2023)⁶</u>	<u>US case law and FTC recommendations</u>	<u>How to implement in practice:</u>
Unrestricted participation for all competitors in the market/markets affected by the standard	See para 452 See also COMP/39.416 — Ship classification, procedure for membership. Commission Decision Case IV/31.458, X/Open Group, OJ L 35, 6.2.1987: membership <u>policy prevented</u> nonmembers from influencing the results of the work of the group and access to know-how about standards	See para 9.18, 9.35-9.39	Federal Trade Commission, Christine Varney⁷: ‘... the interested parties’ opportunity to be heard will be considered.’ when determining whether an antitrust violation has occurred.	Open membership and open access to results
Objective and non-discriminatory procedures/voting rights	See para 452	See para 9.18	Allied Tube: The makers of steel conduits packed the annual meeting of the National Fire Protection Agency with new members who voted against an <u>unfavourable</u> standard: liability found.	Objective and non-discriminatory procedures/voting rights
Objective assessment criteria for selecting the technology for the standard	See para 452	See para 9.18	Radiant Burners: US Supreme Court found that the American Gas Association’s manipulated tests to exclude a rival product from the market. The tests were not based on objective standards.	Objective assessment criteria for selecting the technology
Procedures <u>allowing stakeholders</u> to be informed in good time at each stage of the development of the standard.	See para 453 See also COMP/39.416 — Ship classification, one of the antitrust concerns was the lack of transparency in accessing resolutions and corresponding background technical materials	See para 9.19		Stakeholder engagement and information process.

Authority Guidance on compliance

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Additional measures: Business Review Letters:
see *IEEE*

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Year	Standard/SDO
1997	MPEG-2
1998	3C DVD
1999	6C DVD
2002	3GPP
2006	VITA
2007	IEEE (1)
2008	RFID
2013	IPXI
2015	IEEE (2)



Conclusions

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- Antitrust applies especially to horizontal relationships.
- W3C standards making affects the tech stack: definitions and permissions shape markets so small changes can have big consequences.
- Process risk if not open and objective, and objective dispute resolution.
- Guidelines and guidance is extensive: more homework is available.

Situations Poll

Use **Slido.com #1838254** to join in.

You'll see a statement that might be said by someone else in any W3C or IETF group meeting.

Decide if the statement is a) okay; b) anti-competitive; or c) you can't tell.

All participation is anonymous.

Tim will then explain the options before we move to the next situation.

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Let's agree that the price for this service has to be \$100 USD per month.

ⓘ Start presenting to display the poll results on this slide.

slido



We need to limit this implementation to major service providers A, B, and C only.

ⓘ Start presenting to display the poll results on this slide.

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A new proposal has been started which we (as a dominant industry player) don't agree with. We must take action together to impair it.

ⓘ Start presenting to display the poll results on this slide.

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**Cookies might be used to share personal data and harm people.
We must remove only third-party cookies from the internet and
web to protect people.**

ⓘ Start presenting to display the poll results on this slide.

What to do if you observe this?

Participants

- You are representatives of your companies and could be creating liability for your employer. Take written advice.
- Standard advice - noisy withdrawal
- Refer the chair to the fact you've heard/read something problematic, explain what it is, and then leave the meeting
- If you stay in the meeting/forum you may be considered to have participated in the follow-on debate

Chairs

- Obtain written legal advice.
- Focus on technical standards making to improve a technical process
- Ensure unrestricted participation – always ask “quiet” people for their point of view
- If not 100% agreement, then must have an objective dispute resolution method
- Stay away from non-technological justifications – avoid value-based statements
- [W3C application to Antitrust Division of DoJ](#) – limit activity to this document

Notice Pursuant to the National Cooperative Research and Production Act of 1993-World Wide Web Consortium, Inc.

A Notice by the [Antitrust Division](#) on 05/12/2023



PUBLISHED DOCUMENT

Notice is hereby given that, on March 15, 2023, pursuant to section 6(a) of the National Cooperative Research and Production Act of 1993, [15 U.S.C. 4301 et seq.](#) ("the Act"), World Wide Web Consortium, Inc. ("W3C") has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing (1) the name and principal place of business of the standards development

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organization and (2) the nature and scope of its standards development activities. The notifications were filed for the purpose of invoking the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances.

Pursuant to section 6(b) of the Act, the name and principal place of business of the standards development organization is: World Wide Web Consortium, Inc., Wakefield, MA. W3C was formed as a Delaware non-stock member corporation, organized exclusively for exempt purposes within the meaning of section 501(c)

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Summary

Web standards are at the epicentre of global antitrust enforcement today.

Definitions shape markets. W3C and IETF are critical to those definitions.

Antitrust laws apply globally.

Take great care when seeking to ensure others compliance with the law. Police and authorities do enforcement, not standards bodies.

Current practice cannot continue.

If you observe anti-competitive activity you have to intervene to stay safe.

What worked in 1999 won't work today.

Q&A