



Antitrust Compliance: Identifying the boundaries of permissible activities

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What Will We Cover Today?

- RACs in need of guidance on what are the contours of permissible discussions and activities under antitrust laws
- We will focus on two main activities:
 - What RAC members can share and discuss; and
 - What guidelines/recommendations RACs may discuss and produce.

Part I:

What Can RACs Discuss and Share?

Discussing Business Sensitive Information in RAC Meetings: Basics

- Information sharing can benefit the industry, downstream users and final consumers:
 - Creates necessary understanding on regulatory issues
 - Enables advocacy and representations to regulators/authorities
 - Surveys/studies can provide valuable input for stewardship/self-regulation by members
 - Can also help members to benchmark practices/behaviour
- But, if conducted/used improperly:
 - Data/information sharing may be used as a means to achieve collusive behavior
 - Foreclose market players who are significantly disadvantaged by not being party to the data sharing.
- **Red flag:** 'restriction of competition by object' (restriction presumed anti-competitive without detailed assessment of market effects/context): sharing intentions on future prices and sales
- **Orange light:** case-by-case analysis of potential restrictive effects → 'grey zone'

Data Sharing: Basics

- The rule of thumb: avoid sharing or disclosing information that you would consider of value to make decisions as to your business conduct
- You **cannot** share information about:
 - Specific customers, suppliers, transactions, investments
 - Recent, current, planned market shares or sales
 - Current or future prices, price components or other conditions
 - Current purchase prices
 - Current/future capacity and degree of capacity utilization
- You **may** share individual business specific information, however providing that this information is sufficiently:
 - Outdated, the rule of thumb is more than 1 year old
 - Aggregated: as a rule of thumb, involving 5+ firms

Data Sharing: Managing Surveys

- RACs may wish to conduct surveys or otherwise collect data amongst members:
- Q1. Who will collect/manage the data?
 - In-house?
 - Appoint data sharing officer(s) and select company employees on a “need to know” basis
 - Third party contractor?
 - Consider confidentiality agreement
 - Risk of inadvertent disclosure?
- Q2. What type of information is being requested (company/products/territory)?

Data Sharing: Managing Surveys

- Q3. How old is the data?
 - Historic or still useful for indicating competitors' future conduct or facilitating identification of focal point for collusion?
 - Consider leaving a time 'gap' prior to distribution

- Q4. How will the results of the survey be presented?
 - Low risk where 'genuinely aggregated' (recognizing individualised company data sufficiently difficult)
 - Assess risks: (i) reverse-engineering; (ii) data allows the parties to detect deviation from collusive outcome

- Q5. How often is a survey going to be conducted (monthly, annual)?
 - Frequency of data sharing sufficient to permit collusion
 - Once is enough, particularly if the survey is poorly managed

Sharing Business Sensitive Information with Third Parties/Consultants: Tips

- From time to time RAC members may wish to share confidential information with a third party to advance a project.

- When doing so:
 - The third party should not be another competitor (deal with conflicts of interest?)
 - The RAC member should have the third party sign a non-disclosure agreement
 - Any results of the project that are circulated among the competitors should be formulated in such a way that the RAC member's confidential information cannot be reverse engineered
 - When in doubt, please liaise with CLI staff or outside counsel

Data Sharing – What to Do If a RAC Must Share Sensitive Data

- When RAC members believe that they must share sensitive data they should consider the following questions:
 - What are we trying to achieve by sharing this data (what is the objective)?
 - The objective should be beneficial to e.g., consumers or the environment.
 - By sharing this data do we believe that will make progress towards achieving our objective?
 - The answer should be yes.
 - Is there a way to achieve our objective that includes sharing less sensitive information.
 - The answer should be no. If it is yes, then the alternative method should be used.
 - Are we limiting the number of people who get access to the data only those who need to see it to achieve the objective?
 - The answer should be yes.

Part II:

Industry-Wide Recommendations/ Guidance

Basics

- Standard setting to be distinguished from industry guidance/recommendations, yet the lines are sometimes blurred
- Useful to understand the antitrust pitfalls of standard setting to assess potential concerns when CLI engages in discussions about devising best industry practices
- Main feature of standard setting bodies: several actors (competitors) of an industry choose the technology to be included in a standard
- Potential restrictive effects on competition:
 - Anti-competitive discussions in the context of the standard setting process (e.g. agree on prices of the product that will include the technology)
 - Foreclosing companies from using an alternative (more innovative) technology
 - Preventing companies from accessing the standard
- Safe-harbor assessment according to three criteria:
 - Participation in the standard setting process is **open to all relevant competitors**
 - **Stakeholders are informed** at each stage of the development of the standard
 - Participant in the standard provide an irrevocable commitment to offer their **essential** intellectual property rights on **Fair Reasonable and Non-Discriminatory (FRAND)** terms.

Focus on FRAND: the Smartphone Wars

- Standard **Essential** Patents = patents without which a standard cannot be used/implemented
- Both **Samsung** and **Google/Motorola** hold SEPs pertaining to mobile communication technology. They committed to licence their SEPs under “**FRAND**” terms in accordance with the rules of the relevant standard setting organisation
- Both companies sought court injunctions against Apple:
 - Court injunctions would prevent Apple from selling allegedly infringing products in certain EU countries (*e.g.* Germany, France)

Standard Setting: Standard Essential Patents (SEPs)

- Apple was deemed “willing” to enter into a licensing agreement on FRAND terms, despite Apple challenging the validity/scope of the patent or claiming that SEPs were not infringed
 - Recourse to injunction under such circumstances may:
 - Unduly distort FRAND licensing negotiations
 - Allow SEP holder to charge higher royalties
 - Allow SEP holder to impose abusive licensing terms
- EC’s non-exhaustive list of “objective justifications”- companies can block rivals from having a license to the SEP if the potential licensee:
 - Cannot pay;
 - Does not have the assets to exploit the innovation; or
 - Is unwilling to negotiate

Standard Setting: SEP /Letter of Access Analogy

- Certain similarities between SEPs debate and Letters of Access:
 - Chemical regulations in the EU increasingly mandate data sharing among competitors, particularly where this involves vertebrate testing.
 - A data holder (company or group of companies) may abuse of its dominant position if it refuses to deal with as efficient competitors in relation to something that is “indispensable” for the supply of the product in question.
 - Indispensability means that (i) there are no actual or potential substitutes and (ii) technical, economical or legal obstacles make duplication of the input prohibitively expensive.
 - The refusal to deal must lead to elimination of competition in relation to the product in question.
- When considering granting an Letter of Access, among other things:
 - Do not discriminate among potential signees
 - Do charge a fair/equitable prices for access to the data (e.g., cost of study + risk premium)

CLI's Approach: Recommendations – Not Standards

- Standard setting is fraught with competition issues. CLI makes non-binding recommendations.
- When making recommendations all communications should make it clear that the practices/guidelines are recommendations not standards.
 - Do not to advocate for one specific type of technology or product.
 - Do not use language that would suggest that the recipient cannot work outside of the recommendation
 - Do not disparage other solutions
- The more stakeholders involved in creating recommended practices/guidelines the better.
 - This would include stakeholders downstream in the supply chain as well
- Do communicate guideline/recommendation to stakeholders and help them understand what they are purported to achieve and how they can be used and in what context :
 - This is to avoid raising barriers to entry/expansion by competitors

CLI's Approach: Recommendations – Not Standards

- When discussing technical issues in preparation for recommendation keep in mind previous slides on data sharing.
 - Rule of thumb – if it is something that would affect your own decisions if a competitor shared it do not share it.
 - Avoid sharing information that is valuable or business sensitive such as:
 - Specifics of current R&D projects
 - Amount of money spent on R&D
 - Ramp-up from R&D to manufacturing
 - Plans to reduce or expand output

Questions?