

# Antitrust for IETF Participants

# Disclaimer

This training course is intended to educate IETF participants about how to reduce antitrust risks in connection with IETF activities. Nothing in this course changes existing IETF policies. Nothing in this document constitutes legal advice.

# Goals for this training

1. For IETF participants to understand
  - a. The fundamentals of antitrust law
  - b. The key topics of focus of antitrust regulators
  - c. How antitrust law applies to standards development
  - d. How the IETF structure and processes meet antitrust best practice
  - e. The linkage of antitrust to IPR and IETF IPR policies
2. Practical advice for IETF participants on
  - a. Topics to avoid and why in sufficient detail to be actionable
  - b. Discussions that are not intended to be caught by this
  - c. How to escalate concerns
3. Practical advice for IETF Leadership (WG Chairs, ADs, etc)
  - a. How to obtain further advice and support

# Fundamentals of antitrust/competition law

# Purpose and enforcement of antitrust laws

Antitrust/competition law aims to ensure that companies that should be **competitors** do not **conspire to undermine competition**, thereby **harming consumers**.

In some jurisdictions it also aims to ensure companies with **market dominance** do not **abuse their market power** to **exclude rivals** or **exploit customers** by using means **other than competing on the merits**.

Those **directly harmed by the violation**, including competitors, businesses and consumers, can take **civil action**.

Government **regulators** can take both **civil action** and **criminal enforcement**.

US law automatically provides for **treble damages**.

# International application of antitrust laws

While the IETF is an international organization, it is **incorporated in the US** and so all its activities are **governed by US law**.

Additionally, the US, along with the EU, UK, Canada, China, India, Brazil, Japan, South Korea and many other **jurisdictions**, follow the concept of **extraterritorial application** of competition law.

This means that regulators in those jurisdictions may take action against:

- Any anticompetitive agreement **made in that jurisdiction** even if it only **applies outside of the jurisdiction**.
- Any anticompetitive agreement that has **harmful effects** in that jurisdiction, **even if made outside** of it.

# Normally clear ("Per se") violations of US antitrust laws

1. **Price Fixing:** An agreement among competitors to raise, lower, maintain, or stabilize prices.
2. **Bid Rigging:** A form of price fixing where competitors agree on who will win a bid for a contract or project. This eliminates competition in the bidding process.
3. **Market Allocation (or Customer/Territory Allocation):** An agreement among competitors to divide markets, customers, or territories among themselves, thus agreeing not to compete in one another's assigned areas.
4. **Group Boycotts (or Refusals to Deal):** An agreement among competitors to refuse to deal with a specific supplier, customer, or another competitor to achieve an anticompetitive goal.

How antitrust/competition law applies to  
standards development

# Antitrust and standards development

The IETF as a Standards Development Organization (SDO) is one of the few places where **competitors work together** and that brings with it two **inherent risks**:

1. That **IETF participants** violate antitrust/competition law in their **direct interactions** between each other.
2. That someone with **“apparent authority”** in the IETF (participants or staff) violates antitrust/competition law when acting within the scope of their authority.

Several notable cases have shaped the way that SDOs operate in response to antitrust risks.

# Notable cases (1)

## **American Society of Mechanical Engineers (ASME) v. Hydrolevel Corp. (1982)**

Employees of a boiler manufacturer who were also active volunteers on an ASME code committee secretly conspired to issue an "unofficial interpretation" of the safety code that was then used to destroy a competitor's sales.

US Supreme Court held that the SDO, ASME, could be held liable for the antitrust violations committed by its volunteer agents acting with apparent authority, even if the organization did not know about the conspiracy.

This case placed a significant burden on SDOs to ensure due process and neutrality in their activities, as they can be held liable for the actions of their members who misuse the standard-setting mechanism.

## Notable cases (2)

### **Allied Tube & Conduit Corp. v. Indian Head, Inc. (1988)**

A manufacturer of steel conduit, packed a meeting of the National Fire Protection Association (NFPA) with paid representatives to vote against a proposal to include plastic conduit manufactured by a competitor in the electrical code.

The US Supreme Court held that a private group's collective effort to exclude a competitor's product from a standard constitutes a restraint of trade under antitrust law.

This case established that manipulating the internal procedures of a private SDO for anticompetitive gain can be an antitrust violation.

# Protection for SDOs in US antitrust law

The Standards Development Organization Advancement Act (SDOAA) mandates that any **"standards development activity" conducted by an SDO** is to be judged under the **Rule of Reason** standard.

This means that **standards development activities cannot be declared illegal simply by their nature**. Instead, a plaintiff must:

- **Prove** the standard-setting activity had a **substantial anti-competitive effect** (e.g., demonstrably resulted in higher prices, reduced output, or stunted innovation).
- The court must then **weigh the harm against the pro-competitive benefits** (e.g., enhanced safety, increased efficiency, or greater interoperability) to determine **if the restraint is unreasonable**.

Some classic "per se" offenses (e.g., price fixing, bid rigging, allocating customers) are definitionally not "standards development activity" under the SDOAA, so the Act does not provide blanket immunity.

# Requirements for being considered an SDO

These are set out in the SDOAA and OMB Circular A-119.

Criterion	IETF Implementation
<b>Openness</b>	The IETF is completely <b>open</b> to worldwide participation by anyone. Its work is done primarily via <b>publicly accessible mailing lists</b> , and all drafts and RFCs are freely available on the Internet. <b>Meetings are open to the public.</b>
<b>Balance of Interest</b>	The IETF ensures a broad <b>balance of interest</b> because participants act as individuals, not as official representatives of their employers.
<b>Due Process</b>	The process is <b>formally defined</b> in multiple BCPs. Adequate notice is given of meetings and final decisions. View and objections are publicly recorded.
<b>Appeals Process</b>	The IETF has a clear <b>appeals process</b> for participants.
<b>Consensus</b>	Decisions in the IETF are based on rough consensus. <b>Consensus</b> is defined as general agreement, but not necessarily unanimity.

# Intellectual Property Rights (IPR) and SDOs

## Background: The IETF approach to IPR (BCP 79)

The IETF prefers technologies with no known IPR claims or, for technologies with claims against them, an offer of royalty-free licensing.

To solve a given technical problem, IETF working groups have the discretion to adopt a technology as to which IPR claims have been made if they feel that this technology is superior enough to alternatives with fewer IPR claims or free licensing to outweigh the potential cost of the licenses.

The IETF requires participants to disclose IPR under a detailed set of rules, as set out in RFC 8179 Intellectual Property Rights in IETF Technology.

# Patents (IPR) and their relation to antitrust in SDOs

Potential misuse of the standards development process by IPR holders to gain an unfair competitive advantage may implicate antitrust laws. Examples include:

1. **Deceptive IPR Disclosure (Patent Ambush):** A participant fails to disclose a patent covering a technology being incorporated into a standard, only to assert the patent against implementers after the standard has been adopted and widely implemented.
2. **Violation of License Commitments:** Refusing to license standards-essential-patents on promised terms (e.g., committing to license on Fair, Reasonable, and Non-Discriminatory (FRAND) terms in a licensing declaration but then demanding exorbitant or discriminatory royalties).

**However,** IETF standards are **voluntarily adopted** AND the **IETF does not mandate** specific licensing terms for encumbered technology to be standardized.

**Therefore,** Any violations are likely to be addressed by civil action **between** participants rather than any form of action against the IETF.

# Practical considerations for IETF participants

# Discussion topics to avoid

The following topics are generally **inappropriate** for **competitors to discuss** with each other in the IETF, whether **privately** (e.g. in the corridor of an IETF meeting) **or in an open forum** (e.g. on an IETF mailing list).

While not all discussions of these topics would necessarily be antitrust violations, avoiding these specific topics best mitigates antitrust risks for the IETF and its participants.

This expands on the guidance in **RFC 9680 Antitrust Guidelines for IETF Participants**.

# Topics to avoid - Pricing

IETF participants should avoid discussing **product pricing** as that may be considered **price fixing**.

US law does not require a specific agreement to fix prices to find that price fixing has taken place, the mere act of sharing **pricing/cost** information is sufficient.

This does not mean that participants cannot discuss the **general cost of implementing a particular technology**, so long as that does **not extend into** discussion of:

- **profit margins** because that effectively discloses product pricing
- the **specific cost** a company will incur to implement because that allows coordination on a minimum price floor

# Topics to avoid - Markets, Customers, Supply Chains

IETF participants should avoid discussing **market opportunities for specific companies** as that may be considered **market allocation**.

IETF participants should avoid discussing details of **business relationships between specific vendors and customers** as those can be used for market allocation, price fixing and group boycotts.

IETF participants should avoid discussing **details about the supply chains of specific companies** as those can be used for price fixing and group boycotts.

In general any sharing of any **competitively sensitive information** that can **facilitate collusion** on prices, costs, or market allocation, directly or indirectly, is to be avoided.

# Topics to avoid - Employees

IETF participants should avoid discussing **employee compensation** or **benefits** as that may be considered as facilitating a **wage fixing agreement**.

IETF participants, who could be considered competitors, should avoid discussing **hiring plans, practices and terms and conditions** as that may be considered facilitating a **non-solicitation agreement**.

In general any sharing of information that **suppresses competition for labor**, thereby harming employees by suppressing wages and limiting job mobility, is to be avoided.

This does not mean that individual participants cannot discuss their terms and conditions with other participants.

# Addressing potential violations of antitrust laws

IETF participants who **suspect** that a **violation of antitrust law** has taken place in the context of an IETF activity, should **contact IETF legal counsel** at [legal@ietf.org](mailto:legal@ietf.org) or via the IETF LLC whistleblower service

<https://www.ietf.org/administration/policies-procedures/whistleblower/>

NOTE: The **IETF does not provide legal advice to participants**, and instead recommends that participants **obtain independent legal advice** as needed.

WG Chairs, or others in a leadership role, who require advice or guidance should contact either the IETF Executive Director at [exec-director@ietf.org](mailto:exec-director@ietf.org) or IETF legal counsel at [legal@ietf.org](mailto:legal@ietf.org).