



# DOJ resolves antitrust investigations into trade association standards-setting activity

13 December 2019

On 12 December 2019, the Department of Justice Antitrust Division (DOJ) announced that it has entered into a proposed consent decree with the National Association for College Admission Counseling (NACAC) settling charges that the NACAC's Code of Ethics and Professional Practices (NACAC Code of Conduct) violated the antitrust laws. The NACAC settlement is a reminder that a code of ethics can violate the antitrust laws if it restricts legitimate competition. The consent decree comes just a few weeks after DOJ concluded another investigation related to antitrust concerns over the standard-setting activities of the GSM Association (GSMA), a trade association for mobile network operators. These two cases are the latest examples of how the U.S. antitrust regulators apply antitrust law to a trade or industry organization's standard-setting rules, codes of conduct, and ethical guidelines if they may have anti-competitive effects in a particular industry.

## **NACAC settlement**

DOJ's settlement with the NACAC concludes the agency's nearly two-year investigation into whether certain provisions of the NACAC Code of Conduct violated federal antitrust laws. The provisions at issue forbade NACAC members from engaging in the following activities: (1) offering incentives to students who applied for early admission; (2) recruiting students who had already committed to attend another institution; and (3) soliciting transfer applications using a previous year's applicant pool unless a transfer inquiry was initiated by the students themselves. In September 2019, in anticipation of a possible DOJ lawsuit, the NACAC removed these provisions from its Code of Conduct to address the DOJ's concerns regarding restraints of trade in college recruitment. The consent decree formalizes the removal of these provisions from the NACAC Code of Conduct. Announcing the consent decree, Assistant Attorney General Makan Delrahim stated that while "trade associations and standards-setting organizations can and often do promote rules and standards that benefit the market as a whole, they cannot do so at the cost of competition."<sup>1</sup>

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<sup>1</sup> Press Release, DOJ, "Justice Department Files Antitrust Case and Simultaneous Settlement Requiring Elimination of Anticompetitive College Recruiting Restraints" (December 12, 2019), *available at* <https://www.justice.gov/opa/pr/justice-department-files-antitrust-case-and-simultaneous-settlement-requiring-elimination>.

### **GSMA standard-setting related to eSIM technology**

The NACAC consent decree follows DOJ's recent announcement of the conclusion of a nearly two-year investigation into the standard-setting activities of the GSMA with respect to eSIM technology. The investigation looked into whether a subset of GSMA members used their influence in the industry to limit or hinder the adoption of eSIM technology, which allows a mobile device user to use multiple mobile networks without having to physically switch a SIM card in their device. In response to the investigation, the GSMA has drafted new standard-setting procedures that the DOJ believes will "have a greater likelihood of creating procompetitive benefits from consumers of mobile devices."<sup>2</sup> DOJ characterized these new standard-setting procedures as being designed to "incorporate more input from non-operator members of the mobile communications industry . . . [and] curb the ability of mobile network operators to use the GSMA standard as a way to avoid new forms of disruptive competition that the [eSIM] technology may unleash."<sup>3</sup> On 27 November 2019, DOJ issued a business review letter to the GSMA criticizing past standard-setting procedures while indicating that the DOJ does not intend to take action against the group or its members based on the revised standard-setting protocol.

### **Key takeaways**

The recent conclusion of DOJ's investigations into the NACAC Code of Conduct and the eSIM standard-setting process resulted in both organizations agreeing to revise their policies in response to DOJ concerns. Other trade associations and standards-setting organizations should note that the rules, guidelines, and procedures that they issue are likely to be analyzed by government regulators for potential anticompetitive effects, and should be drafted in consideration of compliance with the federal antitrust laws. Experienced outside counsel can work with organizations to draft these rules and guidelines to avoid triggering antitrust scrutiny from federal regulators.

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<sup>2</sup> Press Release, DOJ, "Justice Department Issues Business Review Letter to the GSMA Related to Innovative eSIMs Standard for Mobile Devices" (December 12, 2019), *available at* <https://www.justice.gov/opa/pr/justice-department-issues-business-review-letter-gsma-related-innovative-esims-standard>.

<sup>3</sup> *Id.*

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