

Konkurrensverket  
The Pros and Cons of Standard Setting

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**“On the Implications of  
Competing Standards”  
- Comments -**

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# Annoying Disclaimer

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All views expressed are solely those of the author ...

# The troubling questions

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- Is competition a bad thing to have, when it comes to setting committee standards?
- Do we have to step in?
- By what means?
- What can Antitrust Law demand of committee standards?
- Is there a case for antitrust intervention?

# Analytical Starting Point

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- Art. 101 TFEU
- Task: Weighing the efficiencies of committee standards
  - Which efficiencies are at stake?
  - Do the virtues always outweigh the dangers?
  - Or do we need some safeguards?

# Which efficiencies are at stake? - 1

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- Efficiencies gained by committee standards
  - Efficiencies threatened by committee standards wars
    - Network effects
    - Compatibility advantages
    - Investment security -> slower market development
    - Double efforts
  - = Efficiencies gained by committee standards

# Which efficiencies are at stake? - 2

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- Efficiencies lost by committee standards
  - Long-term dynamic efficiencies
  - Lost protection from hold-up situations
  - Consumer choice
- Lost in standard wars
- Lost compared to no standard at all

# Which efficiencies are at stake? - 3

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- Great gains
- Serious losses
- => necessity to weigh them against each other

# Weighing the efficiencies - 1

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- Analytical Framework: Art. 101 TFEU
- “Agreement”
- “Prevention, restriction or distortion of competition”
- Art. 101 para 1 vs. para 3?
- It’s policy – not dogmatics, stupid!
- Core Question:  
What can Antitrust Agencies demand from SSOs ?



# Weighing the efficiencies - 2

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- The Old Days: 2001 Horizontal Guidelines
- Lenient procedural requirements:
  - Participation unrestricted and transparent
  - No obligation to comply with the standard
  - Assumed, when standard was adopted by recognised SSO
- => Factual per-se rule in favour of committee standards

# Weighing the efficiencies - 3

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- The rude awakening
  - "Rambus"
  - "Qualcomm"
  - XY

# Weighing the efficiencies - 4

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- The Draft 2010 Horizontal Guidelines
- Lessons learned
  - There is a problem
  - Art. 102 TFEU is not the solution
    - Timeframe
    - Deterrent Effect
    - Ressources

# Weighing the efficiencies - 5

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- “Kill it before it grows”-approach
  - Prevention of later abuse by binding rules
  - Good faith ex-ante disclosure (“should”)
  - Written FRAND commitment (“should”)
  - Art. 101 para 1 or 3 TFEU?
- Answer to the core question:
  - Agencies can demand specific safeguards
  - There is a case for a tougher stance
    - From bad experience
    - From the need to weigh the effects case by case

# Weighing the efficiencies - 6

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- What to do with standards wars?
  - Efficiencies of standardisation endangered
  - Efficiencies of competition resume
  - Hands off!
  - Sole exception:
    - 2<sup>nd</sup> standard defends downstream dominance
    - Case for Art. 102 TFEU

**Many thanks for your  
attention!**



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