

# ANTITRUST AND BALANCE OF INTERESTS IN STANDARDS DEVELOPMENT – LESSONS FROM *NSS LABS. v. SYMANTEC*



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CPI Antitrust Chronicle September 2019

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## I. INTRODUCTION

On August 13, 2019, in *NSS Labs. v. Symantec*, the District Court of the Northern District of California dismissed antitrust claims by the security software testing company NSS Labs against the Anti-Malware Testing Standards Organization, Inc. (“AMTSO”), as well as two of its members, security software vendors Symantec and ESET.<sup>2</sup> The case had gained prominence thanks to an intervention by the U.S. Department of Justice’s (“DOJ”) antitrust division on June 26, 2019,<sup>3</sup> wherein the DOJ recalled the need for Standard Development Organizations (“SDOs”) to abide by certain procedural principles – in particular the “balance of interests” – in order to benefit from the relief against antitrust liability provided by the Standard Development Organization Advancement Act (“SDOAA”).<sup>4</sup> In an apparent setback for the DOJ, the court refrained from ruling on the DOJ arguments, and proceeded to grant AMTSO’s motion to dismiss the claims on other grounds.

In this contribution, we argue that the DOJ was correct to insist that SDOs must respect the “balance of interests” principle in order to qualify for SDOAA relief.<sup>5</sup> The SDOAA defines an SDO as an organization that “plans, develops, establishes, or coordinates voluntary consensus standards using procedures that incorporate the attributes of openness, balance of interests, due process, an appeals process, and consensus.” The Act exemplifies a “procedural approach” to private standardization, whereby policy makers express a large degree of deference to SDOs and their procedures, provided that they abide by certain procedural principles.<sup>6</sup>

Nevertheless, we find that the DOJ put forward an overly narrow interpretation of the balance principle. There is limited precedent on the interpretation of the procedural principles found in the SDOAA. The SDO-

2 *NSS Labs, Inc v. Symantec Corporation*, No. 18-cv-05711 (ND Cal, filed Aug. 13, 2019).

3 *NSS Labs, Inc v. Symantec Corporation*, No. 18-cv-05711, Statement of Interest of the United States (ND Cal, June 26, 2019).

4 Standards Development Organization Advancement Act, Pub. L. No. 108-237 (2004), codified at 15 USC § 4301 et seq. Among other things, the SDOAA provides that standard development activity is to be assessed under a rule of reason standard (15 USC § 4302) and that, for SDOs that notified the DOJ and FTC, private damages are not trebled (15 USC § 4303).

5 At the procedural level, we leave aside whether Protected SDOs need to allege and prove their compliance with the procedural requirements of the SDOAA or whether the complainant should have the burden of disproving such compliance. The DOJ seemed to favor the former position, but there are also good reasons why the latter solution should be preferred.

6 Anton & Yao (1995) first observed the existence of such a procedural approach to standards development in US antitrust law. James J. Anton; Dennis A. Yao, *Standard-Setting Consortia, Antitrust, and High-Technology Industries*, 64 ANTITRUST L.J. 247, 266 (1995), p. 257. In a study of SDOs’ processes for making decisions on Intellectual Property Rights, we observed that the procedural approach is characteristic of public policy towards SDOs in various countries and different subject matters, and has generally served the system well. Justus Baron, Jorge Contreras, Martin Husovec & Pierre Larouche, “Making the Rules: The Governance of Standard Development Organizations and their Policies on Intellectual Property Rights”, JRC Science for Policy Report, European Commission, March 2019.

AA itself specifically refers to OMB Circular A-119.<sup>7</sup> Neither the Act nor the Circular introduced this set of procedural principles for SDO decision-making. Rather, they adopted an informal but well-established policy approach of the US government and courts towards existing SDOs, an approach which itself rested on an historically rooted and deeply entrenched SDO institutional culture.

In our view, three considerations are material in analyzing whether an SDO qualifies for the relief from antitrust liability provided by the SDOAA. First of all, the SDOAA is not meant to apply to any and all SDOs: its scope is limited to SDOs whose activities meet a number of procedural criteria, including the balance of interests. In this contribution, we will refer to the subset of SDOs that fall under the scope of the SDOAA as “Protected SDOs.” Extending the relief from antitrust liability provided by the SDOAA to organizations that do not meet these procedural criteria is unwarranted, and could invite abuses of standardization processes for anti-competitive ends. Secondly, the principle of balance of interests is relevant to antitrust law and must be construed in the light thereof: it requires SDOs to actively promote balanced representation of appropriately defined categories of interests. It is distinct from other antitrust considerations, which require standards organizations to provide safeguards against dominance and manipulation of standardization processes by SDO members. Third, there are many different viable strategies for SDOs seeking to uphold that principle. Whether individual SDO processes are appropriate should be assessed with reference to the full set of SDO procedural criteria, rather than any individual criterion taken in isolation.

## II. BALANCE OF INTERESTS, OMB CIRCULAR A-119 AND THE SDOAA

As mentioned above, the SDOAA merely lists procedural principles – including balance of interests – which SDOs are required to incorporate to qualify under the Act, and thereafter refers to OMB Circular A-119, in its 1998 version, for further details. OMB Circular A-119 did not introduce these principles out of a vacuum, however. It built on a long-standing tradition in the history of standardization.

Ever since the beginning of standardization in the 19<sup>th</sup> century, SDOs have sought a balanced representation of different interests in their activities.<sup>8</sup> Early on, engineering societies – where the standardization movement originated – realized that standard development and adoption was hampered by potential conflicts between different interest groups, such as the producers and users of a standardized good.<sup>9</sup> As a result, when the International Association for Testing Materials (“IATM”) – the first international association created solely for setting voluntary industry standards – was created in 1898, it established a policy “that its Technical Committees should be nearly equally divided between producers and consumers.” These policies created a widely observed precedent.<sup>10</sup>

To this day, a large number of SDOs worldwide seek a balance of interests in their standard development processes. The International Organization for Standardization (“ISO”) expects the 163 national standards bodies making up its membership to “provide for balanced representation of interest categories such as producers, buyers, consumers, etc.”<sup>11</sup> ISO member organizations are generally the best established and most representative standards organization in their respective countries, and often implement ISO requirements domestically.

In the U.S., unlike other countries, there is no single focal national standards body. The American National Standards Institute (“ANSI”) is the U.S. member of ISO. ANSI acts as the accreditation body for U.S.-based SDOs to become American Standards Developers (“ASD”), with 286 accredited ASDs currently. ASDs must comply with ANSI Essential Requirements (“ER”) for the development of American National Standards, including a requirement of balance between participants from diverse interest categories.<sup>12</sup>

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7 Off. Mgt. Budget, Federal Participation in the Development and Use of Voluntary Consensus Standards and in Conformity Assessment Activities, 81 Fed. Reg. 4673 (2016). As will be apparent in the text, earlier versions of the Circular are also relevant, especially the 1998 version to which the SDOAA referred at the time it was enacted.

8 JoAnne Yates & Craig Murphy, “Engineering Rules – Global Standard Setting Since 1880,” John Hopkins University Press, 2019; p. 9.

9 For example, the development of standards for rails was hampered by conflicts between railway companies, strongly represented in the American Society of Civil Engineers (ASCE), and steelmakers dominating the American Institute for Mining Engineers (AIME). Over time, the organizations developed processes for taking into account both groups in order to produce successful standards. According to Yates & Murphy, “this focus on the needs of producer and consumer would become a hallmark of private standard setting.” *Ibid.* p. 34. Similarly, the American Institute of Electrical Engineers (AIEE), formed in 1884, recognized that “there are three sides to the question, [...], the manufacturer, the purchaser and the consulting engineer, and leaving out any of them you do not necessarily produce any better result”; and appointed a Committee on Standardization composed of men from all three of the constituencies. *Ibid.* p. 39.

10 *Ibid.* p. 45.

11 ISO/IEC Guide 59 (“Code of good practice for standardization”), Article 6.5.

12 ANSI, *ANSI Essential Requirements: Due process requirements for American National Standards* (January 2019), available at [www.ansi.org](http://www.ansi.org), at p. 4., heading 1.3.



Up to the second half of the 1980s, the institutional norms of SDOs were well-understood and widely shared.<sup>13</sup> As noted by an observer in 1982, in spite of institutional heterogeneity, balance of interests was a “fundamental concept.”<sup>14</sup>

Since the 1980s, however, alternative models for standardization have emerged next to – or even in reaction to – the more established tradition exemplified by the ISO and its membership. As far as their stance on the principle of “balance of interests” is concerned, they can be grouped under two categories. On the one hand, consortia arose, because many firms viewed existing SDOs and their processes as inadequate for the complex interoperability needs of the new information and communication technologies.<sup>15</sup> Consortia may offer a simpler, yet unbalanced, alternative.<sup>16</sup>

On the other hand, organizations such as the Internet Engineering Task Force (“IETF”) introduced a new type of standards organizations with its own institutional norms; emphasizing the values of the widest possible openness and individual participation over attempts to create a balance between identified commercial interest groups.<sup>17</sup> In line therewith, the IETF and the Worldwide Web Consortium (“W3C”) have not sought to be accredited by ANSI; in practice, however, they do adhere to a notion of balance.<sup>18</sup>

The reference to SDO procedural principles in OMB Circular A-119 must be understood in this historical context.<sup>19</sup> OMB Circular A-119 was – and still is – concerned with the use of voluntary, privately-developed standards by the federal government and the participation of federal agencies in SDOs. When OMB Circular A-119 was first introduced in 1980, it codified existing practices of federal agencies to use voluntary industry standards and participate in SDO processes. The fact that most SDOs at that time shared established institutional norms, including the requirement of balancing different interests, was an essential factor legitimizing these practices.<sup>20</sup> The Circular issued in 1980, formulated certain procedural requirements that SDOs should meet – including a form of balance requirement<sup>21</sup> – before federal agencies can *participate* in their work. The Circular however permitted the *use* of standards originating from non-compliant SDOs in federal procurement, even if federal participation in such non-compliant SDOs was not permissible.<sup>22</sup> With its 1982 revision,<sup>23</sup> OMB Circular A-119 continued to follow the same principles. Even though the detailed procedural requirements were removed from the Circular, the attached DOJ letter made it clear that, when they participate in the work of SDOs, federal agencies are expected to encourage SDOs to comply with antitrust law and trade law<sup>24</sup> through “consideration of all relevant viewpoints and interests, including those of consumers, and potential or existing industry participants.”<sup>25</sup> These provisions were not significantly changed with the 1993 revision to OMC Circular A-119.<sup>26</sup>

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13 Robert W Hamilton, “Prospects for the Nongovernmental Development of Regulatory Standards,” *Am. UL Rev.*, 1982, p. 461.

14 *Ibid.* p. 462.

15 Martin Weiss & Carl Cargill, “Consortia in the standards development process,” *Journal of the American Society for Information Science*, Volume 43, Issue 8; September 1992; pp. 559-565. “SDOs are, by their nature, inclusive groups. [...] As the preferences of the group members becomes more diverse, it becomes more difficult to reach consensus.” P. 563

16 “These must be small groups with a relatively uniform preference structure in order to be effective. Almost by definition, these must be exclusive groups.” *Ibid.* p. 563.

17 Andrew L. Russell, “Open Standards and the Digital Age: History, Ideology, and Networks,” *Cambridge Studies in the Emergence of Global Enterprise*, 2014.

18 IETF and W3C are among the inaugural signatories of the OpenStand Joint Statement of Affirmation, which stipulates five fundamental principles of standards development, including the principle of Balance, defined as follows: “Standards activities are not exclusively dominated by any particular person, company or interest group.”

19 Off. Mgt. Budget, Federal Participation in the Development and Use of Voluntary Consensus Standards, 45 Fed. Reg. 4326 (1980).

20 According to Hamilton, federal agencies such as the Occupational Safety and Health Administration (“OSHA”) had initially encountered problems in the use of voluntary standards, because they “uncritically” adopted standards developed before the solidification of the relevant institutional norms: “The procedures described above that are currently in effect have evolved only gradually. Twenty years ago the process was much more secretive and closed, and there was less emphasis on, and concern with, ‘balance’ and due process.” *Ibid.* p. Hamilton, *supra* note 13 at 465.

21 OMB Circular A-119 (1980), *supra* note 19, §6c.(1).

22 *Ibid.* §6a.(1).

23 Off. Mgt. Budget, Federal Participation in the Development and Use of Voluntary Consensus Standards, 47 Fed. Reg. 49496 (1982).

24 Following the adoption of the TBT Agreement in the Tokyo Round in 1979.

25 OMB Circular A-119 (1982), *supra*, note 23, at 49499.

26 Off. Mgt. Budget, Federal Participation in the Development and Use of Voluntary Consensus Standards, 58 Fed. Reg. 57643 (1993).

In 1998, OMB Circular A-119 was thoroughly redrafted; it is that version that was in force when the SDOAA was enacted. The redrafting primarily aimed to align the Circular with the National Technology Transfer and Advancement Act of 1995 (“NTTAA”).<sup>27</sup> While federal agencies and departments were, as before, expected to *participate* only in the work of SDOs that comply with procedural requirements,<sup>28</sup> the NTTAA henceforth also directed federal agencies to *use*, as a rule, standards developed by voluntary consensus standards bodies.<sup>29</sup> OMB Circular A-119 was revised to follow the provisions of the NTTAA on these points.<sup>30</sup>

The Circular was also expanded to include five procedural attributes in its definition of a “voluntary consensus standards body,” including balance of interests.<sup>31</sup> In addition, the Circular added a separate category of privately-developed standards.<sup>32</sup> The Circular therefore made it clear that its policy on use and participation applied only to a subset of SDOs, those of the traditional type with their established institutional norms. In practice, indeed, while federal regulations incorporate standards issued by a large number of non-governmental organizations, these standards still very predominantly originate from ANSI-accredited ASDs, formal international SDOs, and other well-established organizations.<sup>33</sup>

The SDOAA extends the policy set out in the NTTAA and OMB Circular A-119 by adding an antitrust dimension. The SDOAA is explicitly intended to provide protection from antitrust liability to SDOs impacted by government use of their standards pursuant to the NTTAA and OMB Circular A-119.<sup>34</sup> The institutional attributes widely shared by Protected SDOs – as listed in OMB Circular A-119 – significantly attenuate potential antitrust concerns.<sup>35</sup> The SDOAA explicitly recognizes that standardization need not follow the procedural attributes set out in the Circular, and accordingly it expressly provides that it does not benefit non-Protected forms of standard development.<sup>36</sup>

In *NSS Labs*, the DOJ was thus correct to insist that an SDO must qualify as a Protected SDO, i.e. it must present the institutional attributes referred to in the SDOAA, in order to benefit from the liability protections awarded by the SDOAA. The court however held that it did not need to rule on the SDOAA, as there are plausible pro-competitive justifications for the standards, and NSS Labs has failed to prove that the standard effectively cut them off from a relevant market. The court found that the potential pro-competitive benefits and voluntary nature of AMTSO’s standard warrants a rule-of-reason approach, regardless of whether AMTSO is a protected SDO.

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27 National Technology Transfer and Advancement Act of 1995, Pub. L. 104-113.

28 NTTAA, s. 12(d)(2).

29 *Ibid.* s. 12(d)(1). It is true that the NTTAA still allowed federal agencies to use privately developed standards originating from SDOs that do not comply with procedural requirements: *Ibid.* s. 12(a)(3), codified at 15 USC § 272(b)(3). Nevertheless, the emphasis was clearly on the use of standards developed by SDOs that complied with procedural requirements, as a rule.

30 OMB Circular A-119, pt 6.a. and g., pp. 8554-8555.

31 *Ibid.* pt. 4.a.(1), p. 8554.

32 *Ibid.* pt. 4.b.(1), p. 8554. This category includes items such as “non-consensus standards,” “industry standards,” “company ‘standards’” and “*de facto* standards’.”

33 We analyzed 22,800 standards incorporated by reference into federal regulation by 2016, retrieved from the National Institute of Standards and Technology website. After excluding standards issued by single companies, governmental authorities, international or foreign formal SDOs, and standards for which the database lists a publishing company as source, we are left with 14,365 standards. At least 11,276 of these standards were issued by an organization currently accredited by ANSI as an ASD. The remaining 3,089 standards originate from a large number of different organizations. We researched the history of the 25 organizations with the largest number of standards; accounting for 2,686 or 87 percent of these remaining standards. On average, these 25 organizations are over 100 years old. We did not find IETF, W3C, or any other organization with “consortium” in the name among the sources of any standard incorporated by reference into federal code.

34 House of Representatives Report 108-125, report by Mr. Sensenbrenner from the Committee on the Judiciary accompanying H.R. 1086, May 22, 2003; at p. 9. See also the Congressional findings in the SDOAA itself.

35 *Ibid.* p. 4.

36 “This legislation shall not be construed to alter or modify the antitrust treatment under existing law of (1) parties participating in standards development activity of standards development organizations within the scope of this Act, (2) other organizations and parties engaged in standard-setting processes not within the scope of this legislation.” *Ibid.* pp. 27-28.

### III. THE PROPER INTERPRETATION OF BALANCE OF INTERESTS IN THE LIGHT OF ANTITRUST LAW

The reasoning of the court in *NSS Labs* points to the broader context in which the SDOAA operates, and illustrates our second point, namely that the institutional attributes of SDOs, including balance of interests, are relevant not only for the applicability of the SDOAA, but for the antitrust approach to SDOs more generally.

The Supreme Court clearly recognized that standardization could potentially have anti-competitive effects, such that it warrants antitrust scrutiny.<sup>37</sup> While acknowledging the pro-competitive effects of standardization, the Supreme Court underlined the responsibility of SDOs themselves to take on procedural attributes – among which the balance of interests – that mitigate the potential for anticompetitive outcomes.<sup>38</sup> Once they do so, a rule-of-reason approach is warranted.<sup>39</sup> The SDOAA therefore did not create, but merely codified a rule-of-reason approach to SDOs, and re-emphasized the importance of the traditional institutional attributes of SDOs formalized by OMB Circular A-119.<sup>40</sup>

Nevertheless, neither the SDOAA itself nor OMB Circular A-119 in its 1998 version provided a definition of “balance of interests.” In order to gain a better understanding of that principle, it is necessary and useful to look at the broader antitrust picture.

In his analysis of the balance requirements applicable to SDOs, Prof. Contreras argues that SDOs wishing to benefit from the SDOAA should avoid domination of standardization processes, whereas general antitrust law merely requires an absence of abusive imbalance.<sup>41</sup> As for the newest version of OMB Circular A-119, it bundles balance of interests and lack of dominance together, when it defines balance as follows: “The standards development process should be balanced. Specifically, there should be meaningful involvement from a broad range of parties, with no single interest dominating the decision-making.”<sup>42</sup> Similarly, the OpenStand standardization principles state that a standardization process is balanced if it is not “exclusively dominated by any particular person, company or interest group.”

By contrast, we argue that the balance of interests requirement must be understood to protect qualified interest *categories* from being injured<sup>43</sup> in the standardization process by another interest category. Hence, it is distinct from, and goes beyond, a mere requirement to avoid “dominance” by a single entity or a group of colluding entities.<sup>44</sup> Both requirements are grounded in antitrust law. In the following paragraphs, we explore the “lack of dominance” requirement first, and then the “balance of interests” requirement.

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37 *American Soc’y of Mech. Eng’rs v. Hydrolevel*, 456 U.S. 556 at 571 (1982), and *Allied Tube v. Indian Head, Inc.*, 486 U.S. 492 at 500 (1988). The OMB was also well aware of the potential antitrust implications of standardization, as the 1980 version of OMB Circular A-119 already evidences: *supra*, note 19 at pt 6, p. 4326. By the time of the 1982 revision of OMB Circular A-119, the Supreme Court had decided *ASME v. Hydrolevel*, and the OMB made sure that the antitrust implications were fully taken into account by attaching a letter from the DOJ to its Circular: *supra*, note 23 at 49499.

38 “Only ASME can take systematic steps to make improper conduct on the part of all its agents unlikely, and the possibility of civil liability will inevitably be a powerful incentive for ASME to take those steps. Thus, a rule that imposes liability on the standard-setting organization – which is best situated to prevent antitrust violations through the abuse of its reputation – is most faithful to the congressional intent that the private right of action deter antitrust violations.” *American Soc’y of Mech. Eng’rs v. ASME v. Hydrolevel*, *ibid.* at 573.

39 *Allied Tube v. Indian Head, Inc.*, *supra*, note 37 at 501.

40 “Antitrust challenges to standard-setting activities are currently evaluated under the “rule of reason” [...] The rationale for this antitrust standard is that SDOs, as non-profits serving a cross-section of an industry, are unlikely to engage in anti-competitive conduct creating market dominance. Potential anti-competitive conduct is also mitigated by the manner in which voluntary consensus standards are developed and implemented. In order to be used by Federal agencies, the process of developing voluntary standards must adhere to principles of openness, voluntariness, balance, cooperation, transparency, consensus, and due process. These requirements were most recently articulated in OMB Circular A-119 (February 19, 1998).” House of Representatives Report 108-125 *supra* note 34 at 3-4.

41 Jorge L. Contreras, “Understanding “Balance” Requirements for Standards-Development Organizations,” CPI Antitrust Chronicle, September 2019.

42 *Supra*, note 7 at pt 2.e.(ii).

43 In the antitrust sense of “antitrust injury”: *Brunswick Corp. v. Pueblo Bowl-O-Mat Inc.* 429 US 477 (1977).

44 The use of “dominance” in this context is not felicitous, suggesting as it does that s. 2 of the Sherman Act (15 USC § 2) is involved, whereas the antitrust analysis made here is based on s. 1 of the Act (15 USC § 1).

Allegations that standardization processes are biased or stacked in favor of certain outcomes or interests are common reasons for anti-trust complaints.<sup>45</sup> In these cases, SDO participants were frustrated with a particular standardization decision; and argued that the standardization process was biased against a rival solution that they favored. Such was the case in *Allied Tube*,<sup>46</sup> where the Supreme Court stated that “[w]hat petitioner may not do (without exposing itself to possible antitrust liability for direct injuries) is bias the process by, as in this case, stacking the private standard-setting body with decisionmakers sharing their economic interest in restraining competition.”

While standardization processes should allow for an unbiased review of different technical solutions, it would be illogical and unfeasible to define any group of companies with vested interests in a certain technology as an “interest category” that SDOs would need to protect through a balancing process. SDOs exist precisely so that such technological choices can be made. Requiring SDOs to balance standardization processes between, for instance, makers of plastic and steel conduits in *Allied Tube*, would very often make it impossible for SDOs to make such decisions. The problem with these cases was not that the SDO decided against the interests of certain stakeholders, but rather that the SDO reached this decision through allegedly improper processes, which were “dominated” or manipulated by a single firm or group of colluding firms.

Requirements of balance of interests in SDO processes are not intended to balance the influence of proponents of rival solutions for a technical standard, who stand in a horizontal competitive relationship to one another. Rather, as the historical review above indicated, these requirements emerged very early in the history of SDOs to balance the interests of stakeholder groups that are vertically related to each other. Very often, these groups are producers and users of a standardized good or service, respectively. Among each stakeholder group, there is a shared interest in using standardization to soften competition within the group, whereas between the two groups, the vertical relationship can be rivalrous: the softening of competition will be at the expense of the other group. Hence the need for these interests to be balanced. ANSI's Essential Requirements stipulate, for example, that “In defining the interest categories appropriate to a standards activity, consideration shall be given to at least the following: a) producer; b) user; c) general interest.” ISO's code of good practice for standardization, as we have seen, calls for “balanced representation of interest categories such as producers, buyers, consumers, etc.” SDOs whose standards affect a variety of inter-related industries may define more elaborate and/or more specific categories of interest. The Digital Video Broadcasting (“DVB”) project, for example, seeks to ensure “balanced representation of views from broadcasters, operators, manufacturers and administrations.”<sup>47</sup>

The balancing of interests is essential not only to the SDO's external legitimacy and acceptability under international trade law and a variety of national regulations,<sup>48</sup> but also for antitrust law. A requirement to preserve a balance of interests between interest groups, and in particular users and producers of the standardized good or service, serves two well-recognized antitrust goals. Firstly, a traditional antitrust concern with standard development is the potential for producers to use standards to foreclose the market to a competing technology.<sup>49</sup> This potential for foreclosure can be resolved by guaranteeing sufficient representation of the users of the standardized goods or services, who have no interest in foreclosing a more efficient technology. Secondly, an equally important concern is the potential to use standard-setting as a vehicle for collusion in order to influence the terms of trade to the detriment of one level in the vertical chain, e.g. to force sellers (producers) to offer their goods or services on certain terms or lose access to the entire market, potentially harming consumer welfare. Such concerns over collusion among prospective buyers of the standardized good or service are attenuated by SDO processes that allow for sufficient representation of the prospective sellers.<sup>50</sup> SDO processes that provide for a balanced representation of different interests thus provide safeguards against anticompetitive effects.

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45 TruePosition complained, for example, that Ericsson and other ETSI members subverted the standardization process, notably through a biased exercise of the chair function in the working group, to exclude TruePosition's contributions from the standard. In 2016, an employee of SR Technologies complained that members of a Special Interest Group called DensiFi had concerted their voting behavior in IEEE-SA standards development, thus effectively stacking the process against other IEEE-SA participants' contributions.

46 *Allied Tube v. Indian Head, Inc. supra*, note 37.

47 See [https://www.dvb.org/resources/public/documents\\_site/dvb\\_mou.pdf](https://www.dvb.org/resources/public/documents_site/dvb_mou.pdf).

48 Olia Kanevskaja, Governance of ICT Standardization: Due process in technocratic Decision-making, North Carolina Journal of International Law, Volume 45 (2020).

49 Steven C. Salop & David T. Scheffman, Raising Rivals' Costs, The American Economic Review Vol. 73, No. 2, Papers and Proceedings of the Ninety-Fifth Annual Meeting of the American Economic Association (May, 1983), pp. 267-271; Anton & Yao (1995), see *supra*, note 6.

50 The accusations against IEEE-SA of imbalance in the process of revising its patent policy reflect this concern. In its business review letter of the IEEE-SA patent policy, the DOJ (under the previous administration) approvingly analyzed the process through which the policy was adopted, and emphasized that processes that fail to strike an adequate balance between sets of interests would raise antitrust concerns.

The requirement of balance of interests, properly understood as in the above paragraphs, is thus distinct from, and additional to, the concept of “lack of dominance.” Balance of interests focuses on the vertical relationship between interest categories or groups, whereas lack of dominance touches on the horizontal relationship between competing technology providers. *NSS Labs Inc.* itself illustrates the difference well. The complainant NSS Labs frames the case as a balance of interests problem: using AMTSO as a vehicle, security software vendors (‘Non-Testers’ in AMTSO parlance) would have conspired to formulate a testing standard that mandated advance disclosure of testing plans by testing firms (‘Testers’) such as NSS Labs, thereby leaving out testing done with unannounced testing protocols and changing the market terms for testing firms.<sup>51</sup> According to the complaint, this anti-competitive outcome resulted from the failure of AMTSO to strike an appropriate balance between its Tester and Non-Tester members.<sup>52</sup> The DOJ in its Statement of Interest espoused NSS Labs’ framing.<sup>53</sup> In their motion to dismiss, however, AMTSO and the security software vendors present the case rather as an unmeritorious dominance claim: NSS is dissatisfied with the outcome of the standardization process, where it was on the losing end of a technical debate which divided both vendors and testers.<sup>54</sup> In its judgment, the court appeared to side with AMTSO’s perspective on the case.<sup>55</sup>

The need to distinguish these two cases carefully is emphasized by ANSI in its guidance on balance: “Balance and a lack of dominance are two distinct considerations. The existence of a balanced consensus body does not preclude the exercise of dominance. Similarly, the existence of a less than perfectly balanced consensus body does not necessarily reflect a process in which dominance automatically occurs.”<sup>56</sup>

## IV. ASSESSING COMPLIANCE WITH THE BALANCE OF INTERESTS REQUIREMENT APPLICABLE TO SDOS

As set out above, we argue that the DOJ was correct in stating that SDOs should meet the balance of interests requirement in order to benefit from SDOAA protection. Furthermore, this balance requirement goes beyond preventing dominance and requires SDOs to take active steps to balance the interests of different groups, such as software vendors and software testers, in the case of AMTSO. Nevertheless, by focusing exclusively on whether the composition of AMTSO membership is balanced between these two groups, the DOJ put forward an excessively narrow approach to assessing balance of interests.<sup>57</sup>

Many SDOs explicitly rely on membership (or committee) composition as an indicator of balance.<sup>58</sup> Nevertheless, balanced composition is often recognized as an *objective* that cannot be attained without encroaching on other procedural requirements,<sup>59</sup> such as openness and voluntary participation. SDOs are not able to close or coerce participation in standardization, thus leaving them with limited means to control their membership composition.

SDOs may take active steps to *attempt* to achieve balance in its membership, e.g. through active outreach.<sup>60</sup> Additional measures may include a fee structure that encourages participation by underrepresented groups, an appropriate choice of meeting venues, and measures to facilitate participation by stakeholders with limited standardization experience. In *NSS Labs*, it seems that none of these steps would have reme-

<sup>51</sup> *NSS Labs, Inc v. Symantec Corporation*, No. 18-cv-05711, Complaint (ND Cal, September 18, 2018).

<sup>52</sup> AMTSO’s bylaws provide for two types of membership (Testers and Non-testers), and acknowledges the need to establish a balance between the two: <https://www.amtso.org/wp-content/uploads/2019/06/AMTSO-Bylaws-Amendment-3-22-May-2019.pdf>.

<sup>53</sup> *Supra*, note 3.

<sup>54</sup> *NSS Labs, Inc v. Symantec Corporation*, No. 18-cv-05711, AMTSO Motion to Dismiss (ND Cal, February 7, 2019).

<sup>55</sup> *Supra*, note 2.

<sup>56</sup> See ANSI, “Guidance on ‘Balance’ and Outreach within the American National Standards (ANS) process, ExSC 042\_2016 (June 8, 2016), available at [www.ansi.org](http://www.ansi.org).

<sup>57</sup> DOJ Statement of Interest, *supra*, note 3.

<sup>58</sup> For example, ANSI’s Essential Requirements stipulate: “Historically the criteria for balance are that a) no single interest category constitutes more than one-third of the membership of a consensus body dealing with safety-related standards or b) no single interest category constitutes a majority of the membership of a consensus body dealing with other than safety-related standards.”

<sup>59</sup> For example, ANSI, in its guide on balance, *supra*, note 56: “Balance is a goal for all ASDs in relation to a consensus body and outreach to achieve balance in accordance with a developer’s accredited procedures is a requirement.”

<sup>60</sup> An early FTC staff notice on the topic emphasizes the importance of *notice* to different stakeholder groups. Federal Trade Commission, Standards and Certification – Final Staff Report 159 (1983), pp. 161-162.



died the imbalance in AMTSO's membership. AMTSO claims that software vendors outnumber testers in AMTSO's membership and the industry. If that is true, AMTSO could only have achieved a balanced membership composition by denying access to certain vendors, thereby falling short on the attribute of openness required by the SDOAA.

On a proper view, there is more to balance of interests than membership composition. As seen above, the balance of interests requirement protects interest categories from anti-competitive injury at the hand of another interest category. Many SDOs achieve such balance through a combination of openness and consensus decision making.

First, SDOs need to be *open*, i.e. to offer interest categories meaningful opportunities to participate at every step of the process. AMTSO argued that its processes respected this requirement, as representatives of both Testers and Non-Testers participated in the working group that developed the standard, the entire membership of AMTSO (including Testers) provided feedback throughout the development process, and a Tester performed the public pilot test of the standard.<sup>61</sup> Taken as true, these statements suggest that the process was adequately open to testers.

Second, SDOs must make decisions by *consensus*. The DOJ in its statement of U.S. interests suggests that consensus decision making by an SDO with unbalanced membership may fail to produce a balance of interests.<sup>62</sup> Nevertheless, the DOJ here uses a limitative definition of consensus. Even if many SDOs have processes requiring a certain majority threshold to “demonstrate” consensus, consensus is distinct from majority or supermajority voting, and not defined by a percentage of votes. While definitions of consensus differ from one SDO to the other, most definitions include a notion of absence of qualified opposition.<sup>63</sup> Consensus does not mean unanimity; an SDO may thus reach a decision by consensus against the opposition of some parties. Nevertheless, consensus requires that all relevant interests are taken into account, and that legitimate and well-founded objections are resolved. An SDO that is sufficiently open to allow all relevant interest groups to participate in the process and provides for a robust consensus decision-making process would thus usually be immune to standards being imposed by one interest group against the legitimate objections of another.

AMTSO's bylaws provide for decision-making by a qualified majority, and do not mention consensus. Nevertheless, the bylaws provide for yet another means of achieving balance of interests. In particular, the bylaws provide for a process of balancing interests of software testers and vendors by requiring a majority of approvals and sufficient quorum within each of these interest categories to approve any test-related standard.<sup>64</sup> Such a provision is not exclusive to AMTSO (e.g. DVB has a similar policy for achieving balance between its different constituencies); and is in principle adequate to ensure a balance of interests.

Ultimately, the motion to dismiss was granted not on SDOAA-related grounds, but because the basic elements of an antitrust claim (conspiracy, antitrust injury) had not been proven. Indeed, SDOs that do not evidence the institutional attributes of the SDOAA do not necessarily breach antitrust law when they develop standards. Unbalanced standards consortia can often offer more expedient fora for standardization than Protected SDOs. They may also complement Protected SDOs, e.g. by facilitating research and development (“R&D”) coordination among SDO members.<sup>65</sup> An essential reason why SDOs falling outside the SDOAA would not breach antitrust law lies in the voluntary character of the standard. If compliance with the standard is strictly voluntary, then presumably competitive processes will discipline SDOs that would provide cover for anti-competitive conduct. In *NSS Labs*, the court emphasized the voluntary nature of AMTSO standards when dismissing claims of per-se violations. Nevertheless, the court might have been too lenient: while industry standards are generally voluntary, they can often acquire signifi-

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<sup>61</sup> *NSS Labs, Inc v. Symantec Corporation*, No. 18-cv-05711, AMTSO Motion to dismiss (February 7, 2019) at 5-6.

<sup>62</sup> “As an example, an SDO's consensus requirements (i.e. 70 percent of votes) may be overcome when one group holds overwhelming voting power, even though no actual consensus among interest groups was reached.” DOJ Statement of Interest, *supra* note 3 at 3.

<sup>63</sup> OMB Circular A-119 defines consensus as “general agreement, but not necessarily unanimity, and includes a process for attempting to resolve objections by interested parties” ISO/IEC define consensus as “General agreement, characterized by the absence of sustained opposition to substantial issues by any important part of the concerned interests and by a process that involves seeking to take into account the views of all parties concerned and to reconcile any conflicting arguments.” (ISO/IEC Guide 2:2004). The IEEE-SA Standards Board bylaws define consensus as “substantial agreement by directly and materially affected interest categories.” “Consensus requires that all views and objections be considered, and that a concerted effort be made toward their resolution.”

<sup>64</sup> See <https://www.amts.org/wp-content/uploads/2019/06/AMTSO-Bylaws-Amendment-3-22-May-2019.pdf>.

<sup>65</sup> Baron, Justus, Yann Meniere & Tim Pohlmann. “Standards, consortia, and innovation.” *International Journal of Industrial Organization* 36 (2014): 22-35.; Delcamp, Henry & Aija Leiponen. “Innovating standards through informal consortia: The case of wireless telecommunications.” *International Journal of Industrial Organization* 36 (2014): 36-47.

cant binding force through the actions of firms<sup>66</sup> and public authorities.<sup>67</sup> The Supreme Court has made it clear that it is the effective power of standards to bind industry participants, rather than their formal voluntary character, that should guide a court's assessment of their competitive effects.<sup>68</sup> When a formally voluntary standard effectively has the potential to bind industry members, rigorous procedural safeguards are essential to preserve the presumption of pro-competitive benefits of standardization.

## V. CONCLUSION

The case discussed here raises important questions regarding the institutional attributes that are required from SDOs to benefit from the antitrust protection of the SDOAA and, more generally, from a traditionally lenient antitrust approach to standardization. We argued that the DOJ was correct in emphasizing the significance of the balance of interests requirement, under the SDOAA and also for antitrust law in general. We explained why and how the balance of interests requirement is distinct from other antitrust considerations, such as lack of dominance. That requirement aims to prevent that different interest categories – usually in a vertical relationship with one another - could use the standardization process to inflict anti-competitive injury upon one another. Nevertheless, narrowing balance of interests to SDO membership composition only would be overly restrictive, and lead to conflict with other important SDO procedural requirements. SDOs may adequately provide for a balance of interests through a robust consensus process, and/or appropriately defined qualified majority voting thresholds.

By ruling that the stated pro-competitive intent and formally voluntary nature of AMTSO's standards was sufficient to dismiss the antitrust complaints, the court however implied that the procedural quality of the standard development process could be immaterial to its acceptability under antitrust law. Such an approach seems difficult to square with the well-understood anti-competitive risks of standardization, which have been mostly kept at bay in the last decades through emphasis on procedural requirements. While curtailing variation in SDO procedures would be contrary to the interests of the users of the standardization system, antitrust oversight still has an important role to play in encouraging SDOs to comply, in their respective ways, with basic procedural requirements.

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66 For example, the International Telecommunications Union ("ITU-T") states: "ITU-T Recommendations are non-binding, however they are generally complied with due to their high quality and because they guarantee the interconnectivity of networks and enable telecommunication services to be provided on a worldwide scale." See <http://www.itu.int/en/ITU-T/publications/Pages/default.aspx>.

67 Clearly, a voluntary industry standard ceases to be voluntary when it is incorporated by reference into binding regulation; further underscoring the necessary relationship between the antitrust approach to SDOs and OMB Circular A-119. Outside the U.S., the Horizontal Guidelines of the European Commission explicitly place greater emphasis on the procedural guarantees of those SDOs whose standards are not entirely voluntary, e.g. because they lack competition: "In the absence of market power, a standardisation agreement is not capable of producing restrictive effects on competition. Therefore, restrictive effects are most unlikely in a situation where there is effective competition between a number of voluntary standards." For other standard-setting agreements, which are capable of creating market power, the guidelines describe institutional attributes of SDOs attenuating competition concerns, such as openness, transparency, and an Intellectual Property Rights policy.

68 *ASME v. Hydrolevel*, supra, note 37 at 571.

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