



U.S. DEPARTMENT OF JUSTICE  
Antitrust Division

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November 27, 2019

Mr. Timothy Cornell, Esq.  
Clifford Chance US LLP  
2001 K Street NW  
Washington, DC 20006-1001

Re: GSMA Business Review Letter Request

Dear Mr. Cornell:

This letter responds to your request on behalf of GSM Association (“GSMA”) for a business review letter from the Department of Justice pursuant to the Department’s Business Review Procedure, 28 C.F.R. § 50.6. You have asked for a statement of the Department’s present enforcement intentions regarding GSMA’s proposal to adopt new procedures for development and promulgation of industry specifications;<sup>1</sup> those procedures are collectively referred to as AA.35 by GSMA.<sup>2</sup>

Your request follows the Department’s extensive investigation into the process GSMA used previously in the development of a specific standard, GSMA’s Remote SIM Provisioning (“RSP”) Specification for embedded SIMs (“eSIMs”). As a result of that investigation, the Department developed significant concerns that GSMA’s process was deeply flawed and enabled competitors to coordinate anticompetitively. GSMA provided its mobile network operator members (“operators”) certain privileges not available to other members and participants, allowing that single interest group to exercise undue influence in the standard-setting process.

As part of our investigation, the Department expressed to you concerns that this standard-setting process could be considered an agreement among competitors to limit options available in the market in such a way as to benefit the incumbent operator

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<sup>1</sup> While GSMA uses the term “Industry Specifications,” I will hereafter refer to these as standards except when referring to a specific GSMA industry specification.

<sup>2</sup> Letter from Timothy Cornell, Esq., Clifford Chance US LLP, to Makan Delrahim, Assistant Att’y Gen., U.S. Dep’t of Justice (July 25, 2019) [hereinafter Request Letter] and Request Letter Exhibit A [hereinafter Proposed AA.35].

members by reducing their competitive pressures. It is the Department's understanding that the GSMA responded to these concerns by considering ways to improve its standard-setting process. The resulting set of procedures, AA.35, is meant to allay competition concerns by yielding standards that limit the design of RSP and eSIMs only to the extent it would be beneficial to the diverse group of interested parties in the mobile wireless industry. It is the Department's understanding that the GSMA will promulgate a new version of the RSP Specification under these procedures, which standard will supersede and replace the existing standard that it promulgated under the problematic procedures.

Based on the information and representations you provided, both pursuant to your request and during the Department's investigation into the development of the RSP Specification, the Department has determined that it presently has no intention to challenge AA.35, if it goes into effect. The Department also has no present intention to challenge standards promulgated pursuant to that process, based solely on the process by which such standards were adopted.

The Department's task in the business review process is to advise the requesting party of the Department's present antitrust enforcement intentions regarding the proposed conduct. It is not the Department's role to assess whether AA.35 is the ideal process for the development of standards nor should this letter be read to suggest that the Department endorses any specific process as the correct approach to standards development. Indeed, variation among procedures for standard-setting organizations ("SSOs") could be beneficial to the overall standard-setting process. Other organizations, therefore, may decide to implement different procedures for the creation of standards.

Here, it remains to be seen whether AA.35 will, in effect, ensure that all interested parties have the opportunity to participate meaningfully in developing standards at GSMA that benefit consumers. The Department has concerns about potential abuses of the standard-setting process—particularly when conducted within trade associations controlled by a single constituency of competitors—to dampen the potential of new technologies to disrupt the status quo and ultimately discourage companies from competing through innovation.

For this reason, the Department will closely observe how AA.35 is applied and whether it succeeds in promoting interoperability without marginalizing non-operators' ability to represent their interests in preserving the maximum freedom to respond to consumer demand for innovation. Furthermore, there is always a threat that members of a standards-setting body may form agreements outside of the process, but which affect the process, and such agreements are always subject to independent antitrust scrutiny.

In sum, the Department believes that AA.35 includes sufficient protections to minimize the chances of anticompetitive self-dealing inside the GSMA if it is applied as contemplated; however, the present intention not to challenge AA.35 cannot provide an absolute safe harbor for all standards produced by the GSMA.

## I. Background

GSMA is a non-profit association with its headquarters in London, United Kingdom, and additional offices throughout the world, including offices in Atlanta, Georgia, and San Francisco, California. GSMA is a trade association representing mobile operators worldwide, including more than 750 operators and over 350 companies in the broader mobile ecosystem. GSMA's membership encompasses all of the major mobile network operators worldwide, including the major national carriers in the United States. Only operators are eligible for full membership in the organization. GSMA rules limit many key membership functions to its full members, including the ability to run for and serve on GSMA's Board of Directors and many of its committees, which drive GSMA's agenda and control its processes.

GSMA has been developing a technical standard for RSP, which enables eSIMs on mobile devices. eSIMs are an innovation in how consumers obtain mobile service from an operator. Instead of having to physically obtain and swap a SIM card to sign up for or switch mobile service, consumers can download through the internet (i.e., "remotely") an operator's profile onto the eSIM to connect to the operator's network.

Though nascent, eSIMs have already benefitted consumers. In particular, consumers who travel frequently across operator coverage areas (i.e., internationally) can switch to the optimal provider seamlessly. eSIMs also relieve some of the barriers faced by innovative wireless service products that rely on switching between operator profiles—these products have the potential to create a significant new choice for consumers.

As GSMA and its members recognized,<sup>3</sup> eSIMs can benefit consumers through increased competition among wireless service providers—by enabling disruptive new entrants, by reducing the friction involved in comparing and switching wireless carriers, and by making it easier to choose a wireless provider that does not have a nearby physical location. eSIMs' propensity to facilitate easier consumer switching would likely incent operators to compete more aggressively to induce those customers to switch. Likewise, when international travelers have greater access to local service by temporarily switching to a local operator, the domestic operators are pushed to enhance their international roaming offers.

### a. GSMA's Existing Standard-Setting Activities

In 2011, as part of the RSP standards development process happening at a standard setting organization, the European Telecommunications Standards Institute ("ETSI"), GSMA began working on RSP. As the standard-setting process at ETSI stalled, GSMA began work to create its own RSP standard, designed to create a standard to allow

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<sup>3</sup> Draft GSMA presentation for 2017 mobile conference, October 23, 2017, (GSMABRL-ATR-0001168 at -174-176).

eSIMs to download and manage mobile credentials remotely. These efforts culminated in GSMA promulgating an RSP Specification, the most recent published version of which is version two (“RSPv2”).

The RSP Specification was intended to be, and has indeed become, the dominant standard for eSIMs.<sup>4</sup> Participants in the GSMA process report that they have no realistic choice of developing a standard that would be accepted by the industry in an alternative forum for standard setting.

By collaboratively setting the standard and promoting adherence to it, the participants in the GSMA process avoided the costs of a “standards war,” but also eliminated the benefits of competition among multiple, individually developed ways of remotely provisioning an eSIM.<sup>5</sup> Without the disciplining effect of competition, collaboratively set standards may serve the interests of the most powerful participants in the process, to the detriment of consumers. The Department has long recognized that the standard-setting process may risk anticompetitive outcomes, if proper safeguards are not practiced by the standard setting organization to ensure that the participants represent the market interests as a whole.<sup>6</sup>

Prior to your client’s request for a business review letter, the Department’s Antitrust Division had been investigating GSMA’s RSPv2 standard and the processes used to promulgate that standard as well as its proposed successor, RSPv3. The Department has significant concerns that GSMA and its operator members used an unbalanced standard-setting process, with procedures that stacked the deck in their favor, to promulgate an RSP Specification with self-dealing provisions designed to enhance or maintain the incumbent operators’ competitive position by entrenching network locking practices and otherwise deterring potentially disruptive competition. The resulting rule is especially concerning because it appears designed to blunt the competitive impact of a new technology—eSIM—that should facilitate easier consumer switching among operators.<sup>7</sup>

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<sup>4</sup> For instance, the Department understands that multiple incumbent operators in North America require smartphones they sell to be compliant with GSMA’s RSP Specification, if the smartphone contains an eSIM.

<sup>5</sup> See U.S. Dep’t of Justice & Fed. Trade Comm’n, Antitrust Enforcement and Intellectual Property Rights: Promoting Innovation and Competition (2007) 33–35, <https://www.justice.gov/sites/default/files/atr/legacy/2007/07/11/222655.pdf>

<sup>6</sup> *Id.* at 34–35 & n.10 (courts recognize antitrust liability for “circumstances involving the manipulation of the standard-setting process or the improper use of the resulting standard to gain competitive advantage over rivals”).

<sup>7</sup> The Department is aware that most major operators in the United States have voluntarily committed to the CTIA’s Consumer Code of Conduct, and have agreed to unlock consumers’ smartphones upon request under certain circumstances. Although the Department fully expects such commitments would apply to eSIM features that allow an eSIM to be locked to a particular operator, these commitments are insufficient to alleviate the Department’s concerns.

Although GSMA permitted non-operators to participate in the RSP Specification development process, at all times the process was controlled by, and ultimate decisions were approved by, operator-only committees. In fact, in explaining to its operator members “[w]hy eSIM included non-member voting,” GSMA assured its members that “[t]he final approval stage for all GSMA technical specifications rests with the GSMA Technology Group,” adding that “[t]he GSMA Technology Group comprises senior operator technology executives only.”<sup>8</sup> The Department is concerned that the GSMA’s operator-dominated process was used with the purpose and effect of altering what would otherwise have been competitive negotiations between the operators and smartphone manufacturers (“OEMs”) over the design and implementation of eSIMs.

Throughout the development of RSPv2, there was vigorous debate about certain provisions, including provisions discussed below, during which GSMA acted—consistent with its origins and board membership—as a defender of operator interests rather than a neutral arbiter.

For example, when a GSMA executive understood a U.S. operator to be “worried about OEMs playing the apparent role of consumer champion and driving tariffs,” he told the operator that “[o]perators drive our position and we will always support members first.”<sup>9</sup> Likewise, a senior GSMA executive assured a senior executive of a U.S. operator that “we are merely the vehicle for you, our members to use.”<sup>10</sup> The same senior GSMA executive received an email from the senior executive of a different U.S. operator stating, “[i]f the OEMs ([a leading smartphone manufacturer] is the leader) do not accept this requirement, we still expect GSMA and other operators to side with us.”<sup>11</sup> Repeatedly, GSMA recognized that it was creating an “operator friendly” standard<sup>12</sup> that included certain provisions desired by operators that do not appear technically necessary for a common method of remote SIM provisioning but were instead “business benefits.”<sup>13</sup>

A GSMA executive further illustrated what was meant by “operator friendly”:

In terms of whether RSP is an operator driven standard, there are very many examples of constraints accepted by **all** OEMs that prove the point when compared to what any available standards body would be able to permit. Examples are: Single active profile, no export, repeated user consent requirements in the user interface, notification to operators of the equivalent to throwing the SIM in the bin, no automatic switching of operational profiles, requirements to

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<sup>8</sup> GSMA presentation for operator members, (GSMABRL-ATR-0002858 at -886).

<sup>9</sup> Internal GSMA email communication, May 18, 2016 (GSMABRL-ATR-0001106).

<sup>10</sup> GSMA email communication with North American operator, May 30, 2016 (GSMABRL-ATR-0001268 at -269).

<sup>11</sup> GSMA email communication with North American operator, June 10, 2016 (GSMABRL-ATR-0001253).

<sup>12</sup> Draft presentation for GSMA Strategy Group (composed exclusively of operator members) (GSMABRL-ATR-0001336 at -338).

<sup>13</sup> Internal GSMA email communication, February 6, 2018 (GSMABRL-ATR-0001217).

support SIM based NFC, and more. If this work was being done in any other forum very few of these points would be agreed to.<sup>14</sup>

This flawed process began with an operator-only committee that set the requirements for the standard before a committee of manufacturers and other industry participants were tasked with designing the technical standard to implement those requirements. Although approval of both the requirements and the technical standard rested with a combined plenary body of all participants, approval only required a simple majority. Furthermore, a committee of operators supervised both committees and a separate committee of operators, comprised of representatives from companies on GSMA's board, had to approve anything that came out of the plenary, again by a simple majority.

It is clear that, using this process, the incumbent operators effectively controlled GSMA's process for creating the RSP standard at every step.

b. Version Two of GSMA's Consumer RSP Specification Includes Provisions that Potentially Limit Disruptive Competition

The Department is particularly concerned about three RSPv2 provisions which were developed using GSMA's flawed process, and which seem to give the incumbent operator participants a reprieve from new forms of competition. Most problematic are the profile policy rules ("PPRs"). PPRs are provisions that may restrict the procompetitive potential of eSIMs without being necessary to achieve remote provisioning or to solve an interoperability problem. PPR1 and PPR2, in effect, give an operator the capability to lock a smartphone to its network. In RSPv2, both PPR1 and PPR2 are mandatory, meaning that a smartphone with an eSIM must contain the capability for operator-controlled locking in order to be considered compliant with the RSP Specification.

While working on version three ("RSPv3") of the RSP Specification, under GSMA's flawed process, the North American operators also tried to implement an additional policy rule, PPR4, that would facilitate a more durable network lock for consumer devices sold in North America.<sup>15</sup> In fact, after losing a vote that took place as part of GSMA's normal process that involved industry participants from all regions, the North American operators would not accept the outcome. Instead, the North American operators used their regional GSMA group to start a separate process, which was completely devoid of non-operator participation, to make the rule mandatory in North America only.

As one GSMA executive wrote at the time, "[t]he Global Spec is going to be written with the Policy Rule 4 implementation as optional within the specification. This is

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<sup>14</sup> GSMA email communication with foreign operator, April 17, 2016 (GSMABRL-ATR-0000900 at 900-901) (emphasis in original).

<sup>15</sup> Internal GSMA email communication, September 29, 2017 (GSMABRL-ATR-0001327).

not what [a leading North American operator] and [a leading North American operator] want.”<sup>16</sup> This tendency toward coordination among direct competitors, rather than consensus-building across the industry, shows that the GSMA’s prior process was prone to manipulation for the benefit of incumbent operators and to the detriment of competition.

There are two other provisions that similarly appear to potentially restrict disruptive competition.

First, RSPv2 requires consumer-users to express affirmatively their intent to switch profiles each time the eSIM toggles between profiles or networks, thereby preventing the eSIM from automatically switching (or optimizing) between profiles. Dynamic or automatic switching is a potential competitive threat because it could lead to a service where a device efficiently selects, on behalf of the user, which profile to use in any given situation. For example, the eSIM could switch services if it detects stronger network coverage or a lower cost network, providing consumers with better or less expensive service. The prohibition on automatic switching would tend to prevent at least one existing operator from offering a new innovative service using an eSIM. That is, in order to offer the new service, the operator would have to convince smartphone manufacturers to forego complying with the RSP Specification.

Second, RSPv2 prevents an eSIM from actively using profiles from multiple carriers simultaneously. Multiple active profiles is a potential competitive threat because it would allow a user to divide usage across operators. For instance, the user could actively maintain two profiles on one device if he or she wanted to receive work-related phone calls to one profile and personal phone calls to another profile, all while carrying only one phone. The user could also actively operate profiles optimized for different coverage areas or for international travel. Although there appear to be technical challenges to allowing multiple active profiles at present, the single active profile requirement in RSPv2 serves as a roadblock to additional disruptive innovation that could solve these technical challenges.

Although device manufacturers compete with each other to offer features that consumers want, they also have an interest in interoperability across networks. Accordingly, the ordinary give and take of negotiations between operators and manufacturers over smartphone functionality and features is critical to the overall competitive process. In the United States, competition among operators over the smartphones that they distribute and support on their network is particularly important because operators account for the vast majority of smartphone sales to consumers. This competition includes bilateral negotiation of distribution deals with manufacturers, including the functionality and features of new smartphones.

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<sup>16</sup> *Id.*

GSMA and its operator members appear to have used the RSP Specification to alter the course of these negotiations and to prohibit manufacturers from offering a version of the eSIM experience that consumers may have preferred. One way that the GSMA and its operator members ensured their RSP Specification would be the only market-adopted standard is by testing compliance through the PTCRB. The PTCRB is an operator-controlled testing and certification organization in the United States that, until recently, required its operator members to agree to boycott the distribution of non-certified smartphones.<sup>17</sup> When the PTCRB, with GSMA's support, adopted the RSP Specification as part of its compliance test, it was likely inevitable that the market would tip to the RSP Specification.

Because operators distribute the overwhelming majority of smartphones sold in the United States, obtaining certification of compliance from testing organizations like PTCRB is critical for smartphone manufacturers. Moreover, all major operators in the United States, along with other large global operators, were heavily involved in the GSMA's process to create the RSP Specification. In order to depart from the RSP Specification, therefore, a manufacturer would have put its operator channel device sales in jeopardy. In this way, agreement among the major operators in the United States on the RSP Specification replaces competition on the merits.

The Department has long recognized that standard-setting activity that increases interoperability, or facilitates some otherwise impossible feature, has significant benefits for consumers and plays an important role in the wireless telecommunications industry. The Antitrust Division's Antitrust Guidelines for Collaborations Among Competitors note that "[s]uch collaborations often are not only benign but procompetitive."<sup>18</sup>

It is equally axiomatic, however, that horizontal competitors involved in standard setting have incentives to eliminate quality competition and can sometimes even use the process to block or disadvantage competitors or potential competitors who do not have as much influence. As the Supreme Court has observed, "[t]here is no doubt that the members of [private standard-setting] associations often have economic incentives to restrain competition and that the product standards set by such associations have a serious potential for anticompetitive harm." *Allied Tube & Conduit Corp. v. Indian Head*, 486 U.S. 492, 500 (1988). *See also Am. Soc'y of Mech. Eng'rs v. Hydrolevel Corp.*, 456 U.S. 556, 571–72 (noting that "a standard-setting organization like ASME can be rife with opportunities for anticompetitive activity" and criticizing the lack of "any meaningful safeguards" to prevent it).

The coordinated elimination of competition that would otherwise exist is the core concern of Section 1 of the Sherman Act. After a standard has been promulgated and

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<sup>17</sup> After the Division made PTCRB aware of its concerns with this provision, the PTCRB eliminated it from the membership agreement.

<sup>18</sup> U.S. Dep't of Justice & Fed. Trade Comm'n, Antitrust Guidelines for Collaborations Among Competitors (2000), at 1, available at <https://www.justice.gov/atr/page/file/1098461/download>.



adopted by the market, it displaces future competition.<sup>19</sup> It is therefore imperative that the process to create that standard is designed with due process safeguards that promote competition on the merits during the process of setting the standard. Safeguards prevent a single interested group from hijacking the process, keeping the focus instead on goals that benefit the industry and consumers overall. In short, due process safeguards can prevent “mission creep” that unnecessarily restricts consumer choices. This also minimizes the potential for standard setting to be used to reduce the competitive pressures on incumbents who set the standard.

Particularly where a standard-setting process lacks adequate safeguards,<sup>20</sup> it is imperative to prevent such standards from straying away from the legitimate goal of promoting interoperability, innovation, or any other consumer benefit for which such coordination is necessary. Standard setters are not allowed to create and leverage unbalanced processes to adopt favorable self-regulation that constitute a competitive advantage for the incumbent participants, to the detriment of consumer choice. “Indeed, prohibitions against anticompetitive self-regulation by active market participants are an axiom of federal antitrust policy.” *N. Carolina State Bd. of Dental Examiners v. FTC*, 574 U.S. 494, 135 S. Ct. 1101 (2015) (citing *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 501, 108 S.Ct. 1931, 100 L.Ed.2d 497 (1988); *Hoover v. Ronwin*, 466 U.S. 558, 584 (1984) (Stevens, J., dissenting) (“The risk that private regulation of market entry, prices, or output may be designed to confer monopoly profits on members of an industry at the expense of the consuming public has been the central concern of ... our antitrust jurisprudence.”); Elhauge, *The Scope of Antitrust Process*, 104 *Harv. L. Rev.* 667, 672 (1991)).

Competition law dictates that the fate of such self-dealing provisions in product design be left to the ordinary competitive process—not collective standard setting

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<sup>19</sup> In *Rambus Inc. v. FTC*, 522 F.3d 456 (D.C. Cir. 2008), the D.C. Circuit observed that despite the elimination of future competition, standard setting can be procompetitive when competition on the merits occurs as part of the standard setting process itself. “Before an SSO adopts a standard, there is often vigorous competition among different technologies for incorporation into that standard.” *Id.* at 459.

<sup>20</sup> Office of Management and Budget Circular Number A-119, as revised February 10, 1998, defines the key attributes of voluntary SSOs. These attributes are openness, balance of interest, due process, an appeals process, and consensus. ANSI, the American National Standards Institute, has considered and published guidance building on these attributes to develop principles designed to minimize the chance that an SSO’s processes will raise antitrust concerns. These principles include openness to all interested parties, a balance of interests, a lack of dominance, the adoption of written procedures, and a formalized and impartial appeals process. These principles reduce the opportunity for anticompetitive behavior within an SSO, although they may not eliminate it entirely. Where, as here, there is a single group of competitors that have been afforded certain privileges not available to other members, and that single group has outsized voting power on committees due to their numbers, the concept of a balancing of interests is particularly relevant. Indeed, without balancing interests of different members there is little value in a group having openness, due process, or an appeals process, as there would be no diversity of opinion that would leverage such principles into reaching consensus.

designed to unify the market around one technical solution.<sup>21</sup> Moreover, when an organization knows the anticompetitive goals of its members, and facilitates horizontal competitors' use of the organization's process to promulgate a dominant standard that promotes those goals, both the organization and its members can be liable under Section 1 of the Sherman Act, regardless of whether the conduct occurs under the umbrella of standard-setting activity.<sup>22</sup>

## II. Analysis of AA.35

The Department is encouraged that, in light of the concerns raised during the investigation, GSMA will be adopting new procedures designed to remedy its operator-dominated process for promulgating standards going forward. We applaud GSMA's efforts to ensure that its new process provides for an adequate balance of interests among those involved in the process so that negotiations prior to the adoption of the standard resemble the benefits of competition.<sup>23</sup>

AA.35 has made some specific improvements that make it less likely that its operator members can dominate the process as was done in promulgating the existing RSP specification.<sup>24</sup> First, AA.35 creates a two-stage process, with an Industry Specification Issuing Group ("ISIG") that creates the standards<sup>25</sup> and an Industry Specification Approving Group ("ISAG") that approves the standards.<sup>26</sup>

Second, it opens membership on the ISIG to all members, ensuring that there will not be operator-exclusive committees driving the process.<sup>27</sup> Instead, these bodies will have Chairs and Deputy Chairs, limiting operators to holding only one of these roles in each group.<sup>28</sup>

Third, AA.35 allows non-operators the opportunity to become members of the ISAG, the new group that ultimately approves the standards.<sup>29</sup> This eliminates the

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<sup>21</sup> See U.S. Dep't of Justice & Fed. Trade Comm'n, *Antitrust Enforcement and Intellectual Property Rights: Promoting Innovation and Competition* (2007) 33–35, <https://www.justice.gov/sites/default/files/atr/legacy/2007/07/11/222655.pdf>.

<sup>22</sup> E.g., *Am. Soc'y of Mech. Eng'rs v. Hydrolevel Corp.*, 456 U.S. 556, 574 (1982) (finding SSO liable for actions of its agents acting with apparent authority to discourage customers from purchasing one competitor's water boiler safety device, stating that it did not comply with the SSO's safety code, even though it did). See also *Osborn v. Visa Inc.*, 797 F.3d 1057, 1067 (D.C. Cir. 2015) (holding that a complaint against the organization could go forward because the members allegedly "used the bankcard associations to adopt and enforce a supracompetitive pricing regime"); *Wilk v. Am. Med. Ass'n*, 719 F.2d 207 (7th Cir. 1983) (affirming judgment against trade association for rules imposed on the members).

<sup>23</sup> See generally Request Letter, *supra* note 2, at 5–9.

<sup>24</sup> Proposed AA.35, *supra* note 2, §§ 6–8.

<sup>25</sup> *Id.* at § 6.

<sup>26</sup> *Id.* at § 7.

<sup>27</sup> *Id.* at § 6.1.1.

<sup>28</sup> *Id.* at § 9.1.

<sup>29</sup> *Id.* at § 7.3.

complete control that operators previously had and instead gives all parts of the industry an opportunity to be represented.

Fourth, AA.35 fundamentally changes how standards are approved. At the ISIG level, it requires the group to seek consensus and, when consensus cannot be achieved, it requires a 71% threshold to approve the proposal.<sup>30</sup> At the ISAG level, it requires approval of standards by separate majorities of the ISAG operator- and non-operator members.<sup>31</sup> Both bodies require an explanation of negative votes, another improvement that increases transparency and indicates meaningful attempts to reach consensus.<sup>32</sup>

Fifth, AA.35 increases due process for affected members. AA.35 provides for appeals,<sup>33</sup> which are to be heard by an independent panel.<sup>34</sup> Moreover, the appeals process applies to any aspect of GSMA's Industry Specification development process—not just to the ultimate approval of the Industry Specification.<sup>35</sup>

Finally, AA.35 has added safeguards to ensure that operators cannot bypass or modify this process without the support of non-operator members. Instead, only the ISAG, with its dual-majority voting structure, can modify this procedure once it is in place.<sup>36</sup>

### III. Conclusion

Based on GSMA's representations regarding AA.35, the Department has no present intention to take antitrust enforcement action against GSMA's proposed conduct. The Department's view is that AA.35 has the potential to be a significant improvement over the deeply flawed process that allowed GSMA's operator members to control the development of the current eSIMs standard. This letter expresses the Department's present enforcement intention and is predicated on the accuracy and completeness of the information and assertions that you have made to the Department, as well as the additional qualifications set forth in this letter. In accordance with its normal practices, the Department reserves the right to bring an enforcement action in the future if, among other things, the actual operation of the proposed conduct proves to be anticompetitive in purpose or effect.

The Department will be monitoring AA.35's practical operation and, in particular, whether AA.35 ensures that operators do not overwhelm the interests of non-operators in GSMA's standard development activities. The Department will take a special interest in whether RSPv3 includes provisions that are motivated only by the incumbent operators'

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<sup>30</sup> *Id.* at § 8.7.7.

<sup>31</sup> *Id.* at § 8.8.

<sup>32</sup> *Id.* at § 8.5.

<sup>33</sup> *Id.* at § 10.

<sup>34</sup> *Id.* at § 10.7.

<sup>35</sup> *Id.* at § 10.1.

<sup>36</sup> *Id.* at § 7.1.

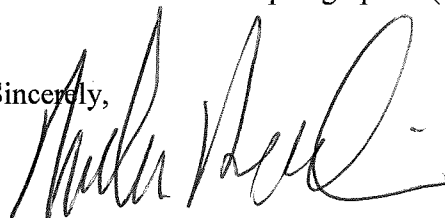
Mr. Timothy Cornell

12

interest in gaining a competitive advantage or stifling new sources of competition. Although RSPv2, which governs the design of eSIMs in the market today, was passed under the operator-controlled process, GSMA represents that RSPv3 will supersede RSPv2, and with RSPv3 we expect that GSMA will reconsider several key features that have restricted the disruptive potential of eSIMs to date. Specifically, we will take a close look at whether the existing and proposed Profile Policy Rules are included as mandatory features of RSPv3, as well as whether provisions that restrict the number of active profiles on an eSIM or impede the user's ability to consent to dynamic profile switching are included as mandatory provisions.

This statement is made in accordance with the Department's Business Review Procedure, 28 C.F.R. § 50.6. Pursuant to its terms, your business review request and this letter will be made publicly available immediately, and any supporting data you submitted will be made publicly available within 30 days of the date of this letter, unless you request that part of the material be withheld in accordance with paragraph 10(c) of the Business Review Procedure.

Sincerely,

A handwritten signature in black ink, appearing to read 'Makan Delrahim', written in a cursive style.

Makan Delrahim