

## **Global Professional Blockchain Council of Canada**

### **GPBCC Antitrust Policy**

**Last Updated:** 18 January 2023

It is the express policy of the GPBCC (“GPBCC”) to require that all of its meetings, activities, and other forms of participation (“GPBCC Activities”) be conducted strictly in accordance with U.S. federal and state antitrust laws, and with all applicable foreign antitrust and competition laws (collectively, “Antitrust Laws”). Because Antitrust Laws are complex and differ across jurisdictions, it is not possible to summarize them in this policy, and it is important to consult appropriate legal advisors at your own company for detailed guidance.

The following rules shall apply in connection with all GPBCC Activities:

1. Agendas must be created, and minutes must be taken, for all GPBCC meetings. These agendas and minutes must then be submitted to GPBCC, along with any meeting materials.
2. Antitrust Statements. A statement regarding antitrust laws and compliance should be presented at the beginning of applicable GPBCC Activities.
3. Certain topics should never be discussed at, or in connection with, any GPBCC Activity, nor should any participant in GPBCC Activities (each an “Activity Participant”) ever form an agreement with any other competitor in connection with these topics. In particular, DO NOT, at any time, agree upon or discuss with any competitor any of the following:
  - Current or future prices, methods of determining or implementing prices, or strategies relating to pricing
  - Price or cost related information (e.g., price changes, quotations, policies, levels, differentials, markups, discounts, or allowances, delivery charges, credit or warranty policies, or other conditions of sale)
  - Output, capacity, inventory levels
  - Current or future business plans, strategies, innovations
  - Compensation and benefits of employees
  - Current or future sales conditions or volumes
  - Levels of investment or development, changes to such levels, or related strategies
  - Current or future design or marketing strategies
  - Customer and competitor details such as names, type, importance
  - How much or little an Activity Participant is capable of producing or will sell of any product or service
  - Whether an Activity Participant has submitted a bid, or will or will not bid, in any given situation
  - Where any Activity Participant will or will not sell any product or service
  - Whether any Activity Participant will or will not deal with any third party
  - The terms upon which an Activity Participant will make any intellectual property rights available, except to the extent permitted or required under the GPBCC IPR Policy

## **Global Professional Blockchain Council of Canada**

If you become aware of any activity that may be in violation of any of the above rules, please bring them promptly to the attention of a GPBCC representative.

For more information regarding Antitrust Laws, please see the GPBCC Antitrust Compliance Guidelines.

### **GPBCC Antitrust Compliance Guidelines**

These guidelines are provided by the GPBCC, LLC (“GPBCC”) and are intended for annual distribution to all participants in GPBCC meetings, activities and other forms of GPBCC participation (“Activity Participants”), including without limitation, all GPBCC Participants, and all participants in GPBCC’s Executive Committee, other Committees, Board of Advisors, Working Groups, Special Interest Groups and Task Forces.

It is the policy of GPBCC to require that all GPBCC meetings, activities and other forms of participation (“GPBCC Activities”) be conducted in accordance with U.S. federal and state antitrust laws, and with applicable foreign antitrust and competition laws. While the existence of organizations such as GPBCC is recognized by antitrust regulators as being beneficial to industry and consumers alike, there are activities which are not permissible for Activity Participants to engage in, and which are not endorsed or authorized by GPBCC. The objective of these guidelines is to enhance Activity Participant awareness of inappropriate conduct.

These Antitrust Compliance Guidelines (the “Guidelines”) are intended to help familiarize you with areas of U.S. law that you should know about in order to maintain compliance with U.S. antitrust laws. However, these Guidelines provide a general guide only; they are not intended to be a complete or definitive statement of all aspects of U.S. antitrust law, nor does it advise you with respect to the antitrust laws of other countries, which on a country-by-country basis can vary significantly. Although GPBCC Activities are subject to the antitrust laws of all countries where GPBCC may be active, a worldwide review of international antitrust laws is beyond the scope of these Guidelines. For this reason, these Guidelines should be viewed as being not only selective with respect to U.S. law, but also as an unreliable and inadequate guide to antitrust issues in any other country. Each Activity Participant must make its own decisions how and where it adopts and supports GPBCC standards around the world. These decisions may lead to different risks, and therefore to different precautions and practices being appropriate to consider from Activity Participant to Activity Participant.

For these reasons, each Activity Participant should seek advice from its own antitrust counsel and consult with that counsel as necessary or appropriate in connection with participation in GPBCC Activities. Any specific question relating to antitrust compliance not addressed in these Guidelines should be referred to legal counsel for GPBCC or to the Activity Participant’s antitrust counsel. An Activity Participant’s failure to consult with antitrust counsel may be injurious to the Activity Participant and/or to GPBCC. For additional information on the applicability of antitrust laws to trade association activities, please see the Laws, Cases and Regulations section of ConsortiumInfo.org, a consortium information website created by our legal counsel, Gesmer Updegrave LLP, which prepared these Guidelines.

### **I. The Antitrust Laws**

Broadly stated, the basic objective of the U.S. antitrust laws is to preserve and promote competition and the free enterprise system. These U.S. laws are premised on the assumption that private enterprise and free competition are the most efficient ways to allocate resources, to

## **Global Professional Blockchain Council of Canada**

produce goods at the lowest possible price and to assure the production of high-quality products. These U.S. laws generally require that business people make independent business decisions without consultation or agreement with competitors. The success of GPBCC requires that free and open competition be adhered to as the policy of GPBCC and that this policy be followed by all Activity Participants.

GPBCC's insistence upon full compliance with the antitrust laws is based not solely on the desire to stay within the bounds of the law, but also on GPBCC's conviction that the preservation of a free, competitive marketplace is essential to the welfare of the industry and GPBCC.

### **(a) Antitrust Laws Applicable to Activities of Associations**

The U.S. antitrust statutes of principal concern to companies and individuals that take part in trade association activities are Section 1 of the Sherman Act and Section 5 of the Federal Trade Commission ("FTC") Act. These laws make illegal all contracts, combinations, and conspiracies which are deemed to be in restraint of trade.

Broadly speaking, the courts have interpreted these laws as prohibiting those agreements, contracts and combinations that have the effect of unreasonably restraining trade. With some exceptions, a court considering an antitrust claim will examine all the facts and circumstances surrounding the conduct in question in order to ascertain whether the contract or combination is in violation of the law by restraining trade unreasonably.

Some activities are, however, regarded as unreasonable by their very nature and are, therefore, considered illegal "per se," meaning that they are illegal regardless of any rationale or mitigating factors asserted by the actors. Companies and individuals are conclusively presumed to engage in these activities for no other purpose than to restrain trade. Practices within the per se category include agreements among competitors to fix prices, agreements to boycott competitors, suppliers or customers; agreements to rig bids; agreements among competitors to allocate markets or limit production; and certain tie-in sales. A tie-in sale is one in which the customer is required to purchase an additional item in order to purchase the product or service desired.

The legality of activities of GPBCC and its Activity Participants under the antitrust laws will be determined by the application of standards no different from those used to determine the legality of the activities of other groups of persons or firms.

### **(b) Penalties for Violations**

The U.S. antitrust laws are enforced at the Federal level by the Antitrust Division of the Department of Justice and the Bureau of Competition of the Federal Trade Commission.

A criminal conviction for an antitrust law violation may result in stiff fines for GPBCC and its Activity Participants, jail sentences for individuals (including an individual acting in his or her capacity as a corporate employee or officer) who participated in the violation, and a court order disbanding GPBCC or severely limiting its activities. In the past, several foreign nationals have been sentenced to serve jail time in the U.S., and corporations convicted of such a criminal offense have been fined hundreds of millions of dollars.

In addition, private persons or firms may sue for damages under the Federal laws and a company found liable may be required to pay up to three times the actual damages suffered by

## **Global Professional Blockchain Council of Canada**

the plaintiff, as well as all of the plaintiff's costs of litigation and attorneys' fees. Finally, State court actions may be brought by U.S. State attorneys-general or injured parties.

### **II. Detailed Discussion**

#### **(a) Standard Setting Activities**

##### *1. Generally*

Standard setting is recognized as being potentially "pro-competitive" in the U.S. Nevertheless, great care must be taken in the setting of standards. When participants of a standards setting body submit or vote on technology or specifications, there is the potential for one company, or a group of companies, to act in ways deemed to be unfair to other companies.

In the last several years, additional lawsuits have been brought by private parties, and enforcement actions and investigations have been brought by regulators in the United States and in Europe, that have been based upon standards-development behavior. Several of these cases, actions and investigations have focused on the behavior of individual companies, and on whether standards development participants have honored the licensing obligations that they, or prior owners of patents, have made to standards development organizations.

In light of the foregoing, it is important that standard setting, and other collaborative activities be conducted under close legal supervision, and that policies and procedures created to administer such processes be scrutinized to ensure that they do not lend themselves to situations which could result in antitrust exposure. This is the policy of GPBCC.

##### *2. Specific Standard Setting Activities*

There are a variety of activities that are commonly conducted within standards development organizations that have acknowledged pro-competitive benefits, but which must be conducted in an appropriate fashion to avoid inadvertent violations of law. They include:

- **Disclosures of patent claims and the making of licensing commitments:** This common activity must be conducted within well-acknowledged and easily followed guidelines that preclude, for example, the negotiation of the prices upon which patents will be licensed, but require that such licenses will be available on "reasonable and non-discriminatory terms." **Creation and management of product and service certification programs to demonstrate conformity to standards:** Activity Participants should not discuss whether and how to enforce, or incentivize, compliance with a standard or whether exceptions will be granted. To the extent, Activity Participants independently choose to comply with a standard, certification programs must be available to all, and conducted in a non-discriminatory fashion.
- **Participation by trade association members and rules relating to the expulsion of participants for cause:** Participation must be available to all that qualify under objective standards on a non-discriminatory basis and any rules relating to expulsion or rejection of membership renewals must be reasonable and applied in a non-discriminatory fashion. GPBCC has agreed to permit participation based on the applicable objective criteria for each category of Activity Participant (e.g. Founding Member, Strategic Member, Affiliate Member, or GPBCC Participant), and applies these criteria on a non-discriminatory basis.

## Global Professional Blockchain Council of Canada

- Honoring licensing obligations under IPR Policies: Activity Participants may only assert patent infringement with respect to technology approved or adopted by the organization in accordance with a participant's obligation under the organization's policies, and/or the participant's disclosures and statements during the development process.
- Joint purchasing: Joint purchasing activities by or with members may be acceptable but should be reviewed in advance by counsel.

The Executive Committee will consult with legal counsel to ensure that the proper guidelines are followed with respect to each of the above areas.

### (b) Antitrust Problem Areas

From a practical standpoint, Activity Participants should take care to avoid the following principal antitrust problem areas:

#### 1. *Price-Fixing*

Experience shows that trade association participants may be susceptible to violations of price-fixing prohibitions of the Sherman Act, and for this reason, the government is focused on the activities of these types of entities. Price fixing, as noted above, is illegal per se.

Trade association meetings (including committee meetings) may be considered by enforcement agencies as convenient places for price-fixing discussions. Whenever competitors get together, it is natural for them to discuss common problems, and, unless care is taken, the discussion could turn to price. This is even truer at informal meetings before or after a trade association meeting, when participants get together socially.

To avoid the risk of liability, Activity Participants should never discuss prices, pricing systems, discounts, commission rates, employee salary information, or the like, nor should GPBCC ever be involved in Activity Participants' pricing practices.

A formal agreement is not necessary for a finding of antitrust liability. Antitrust cases often are proven by circumstantial rather than direct evidence. Although there may be perfectly innocent explanations for business conduct, antitrust enforcement agencies, judges or juries may interpret contacts with competitors followed by similarity in conduct as circumstantial evidence of an "agreement." It is, therefore, of the utmost importance to avoid any discussions or other conduct with competitors that might support an inference of illegal agreement. That means an Activity Participant's relations with competitors should always be conducted as if the parties are at all times in the public view.

Activity Participants should also be aware that the antitrust prohibition on price-fixing is extremely broad. The Sherman Act itself defines price-fixing as any "combination" formed for the purpose and with the effect of raising, depressing, fixing, pegging or stabilizing "prices."

Competitors violate this law if, for example, they:

- Agree on a range of prices within which purchases, or sales may be made;
- Agree that prices charged or paid are to fall within any sort of formula;
- Agree to fix or stop giving discounts;
- Agree to increase or limit supply; or

## **Global Professional Blockchain Council of Canada**

- Agree on the compensation, benefits, or commission rates they will pay employees.

Because price-fixing is illegal per se, it is not a defense that the prices set are reasonable. Nor is it necessarily a defense that competitors fixed maximum prices, rather than minimum prices.

Although the discussion thus far has focused on so-called “horizontal” price fixing — that is, agreements among competitors selling the same or similar products — it also may be illegal to engage in “vertical” price fixing: an agreement to fix the price at which a purchaser will resell a product. Where a product is sold for resale, the seller is permitted to suggest resale prices to customers, but any agreement, whether formal or informal, express or implied, should always be reviewed in advance by legal counsel.

For all of the reasons above, Activity Participants should assume that no mention of prices, or price related business terms, should occur in the course of GPBCC Activities unless the topic, scope and purpose of the discussion has been cleared in advance with GPBCC legal counsel, and appropriate controls have been put in place if the discussion is permitted to occur at all.

### ***2. Agreements To Allocate Markets***

An agreement among participants of a trade association to allocate markets or customers may be, in and of itself, an antitrust violation. The antitrust laws expressly prohibit any understanding or agreement between competitors or participants of an association involving division or allocation of geographic markets or customers, or an agreement to divide sales by product type. Even an informal agreement whereby one participant agrees to stay out of another’s territory could constitute a violation of the antitrust laws.

### ***3. Exclusive Selling and Dealing***

An exclusive selling agreement involves the appointment of a sole distributor for the supplier’s product for a defined territory over a defined period of time, usually with the understanding that the supplier will not make separate deliveries or sales of his own into the distributor’s territory. The appointment of an exclusive distributor is generally considered to be legal, but counsel should be consulted if considering such an approach.

Exclusive dealing is an agreement where the purchaser agrees to buy exclusively from one supplier for a certain period of time.

A seller’s exclusive dealing contract may be unlawful where it covers a substantial dollar volume or forecloses a substantial market share to competitors. However, where there is a significant amount of competition from other companies that is not impacted by the exclusivity, it is less likely that an exclusive dealing agreement will be deemed illegal. Again, prior legal review of such arrangements is required.

### ***4. Tying Arrangements***

Tying is the practice whereby a seller refuses to sell the desired product or service (the tying item) to a customer unless the customer also agrees to buy a second product or service from the seller.

Tying arrangements may be illegal if the supplier occupies a dominant position in the market for the tying item or if the uniqueness of the tying item bars other sellers from producing an equivalent product.

### ***5. Concerted Refusals to Deal***

## **Global Professional Blockchain Council of Canada**

Activity Participants should avoid participating in “concerted” refusals to “deal,” more commonly known as boycotts. Activity Participants should be careful not to make agreements that in effect result in the exclusion of a competitor from a market or a competitive activity. For example, an agreement among two or more Activity Participants of GPBCC to no longer buy from (or sell to) a particular supplier or distributor, or to work with a particular third party service provider, might constitute such a boycott. To avoid this risk, Activity Participants should avoid any discussion of or joint conduct that involves the refusal to deal with a particular supplier or customer.

GPBCC itself, as a group of competitors and by virtue of the nature of its work, is at risk of falling into activities that might be challenged as a boycott. For this reason, counsel must have the opportunity to review any proposed changes to participation rules and any proposed rules that might disadvantage those who are not Activity Participants.

### ***6. Price Discrimination***

Price discrimination occurs when identical products are sold at different prices to different purchasers. It may be unlawful to discriminate in price between different purchasers of goods of like grade and quality where such goods are sold for use, consumption, or resale within the U.S. if the discrimination substantially lessens competition. However, price differences based on certain factors, such as a variance in costs, quantity discounts, prompt payment, or shipment fees generally are acceptable and do not violate the antitrust laws.

If you have questions regarding any of these matters, contact your company antitrust counsel, or if you are a GPBCC member, please contact Andrew Updegrave, of the firm of Gesmer Updegrave LLP, which provides legal counsel to GPBCC, at [andrew.updegrave@gesmer.com](mailto:andrew.updegrave@gesmer.com).