COMMENTS OF THE AMERICAN BAR ASSOCIATION ANTITRUST LAW SECTION AND INTERNATIONAL LAW SECTION ON THE EUROPEAN COMMISSION'S CONSULTATION DOCUMENT ON THE REVISION OF THE EU COMPETITION RULES IN RELATION TO HORIZONTAL AGREEMENTS BETWEEN COMPANIES

April 26, 2022

The Antitrust Law and International Law Sections (the "Sections") of the American Bar Association ("ABA") respectfully submit these comments in response to the European Commission's public consultation on the draft revised R&D Block Exemption Regulation ("R&D BER"), the draft Specialisation Block Exemption Regulation ("Specialisation BER") and the draft Guidelines on horizontal cooperation agreements ("Horizontal Guidelines," or "HGL").

The Antitrust Law Section is the world's largest professional organization for antitrust and competition law, trade regulation, consumer protection and data privacy as well as related aspects of economics. Section members, numbering over 7,600, come from all over the world and include attorneys and non-lawyers from private law firms, in-house counsel, non-profit organizations, consulting firms, federal and state government agencies, as well as judges, professors and law students. The Antitrust Law Section provides a broad variety of programs and publications concerning all facets of antitrust and the other listed fields. Numerous members of the Antitrust Law Section have extensive experience and expertise regarding similar laws of non-U.S. jurisdictions. For nearly thirty years, the Antitrust Law Section has provided input to enforcement agencies around the world conducting consultations on topics within the Section's scope of expertise.[1]

The International Law Section focuses on international legal issues, the promotion of the rule of law, and the provision of legal education, policy, publishing and practical assistance related to cross-border activity. Its members total over 10,000, including private practitioners, in-house counsel, attorneys in governmental and inter-government entities, and legal academics, and represent over 100 countries. The International Law Section has more than 50 substantive committees that cover competition law, trade law, and data privacy and data security law worldwide as well as areas of law that often intersect with these areas, such as mergers and acquisitions and joint ventures. Throughout its century of existence, the International Law Section has provided input to debates relating to

[1] Past comments can be accessed on the Antitrust Law Section's website at: https://www.americanbar.org/groups/antitrust_law/resources/comments_reports_amicus_briefs/.

international legal policy.[2] With respect to competition law and policy specifically, the International Law Section has provided input for decades to authorities around the world.[3]

The Sections respectfully refer to their February 2020 comments made in response to the European Commission's public questionnaire for the 2019 Evaluation of the Research & Development and Specialization Block Exemption Regulations, as well as their 5 October 2021 observations in relation to a number of proposed revisions to the R&D and Specialization BERs and updated guidance in the future Horizontal Guidelines.[4] The Sections are pleased to see that the majority of the Sections' suggestions are reflected in the draft revised BERs and Guidelines.

I. Executive Summary

The Sections support a widening of the R&D BER by removing the conditions of full access to the results of R&D and access to pre-existing know-how across the board. However, they are concerned that the Commission's proposal to no longer exempt agreements where less than three competing R&D efforts would remain in addition to those of the parties to the R&D agreement will prove difficult to apply without further guidance on how such R&D efforts would be identified and evaluated.

The Sections observe that the proposed expansion of the definition of unilateral specialisation to include agreements concluded between more than two parties may strengthen the incentives of parties to consider procompetitive unilateral specialisation agreements. Similarly, the Sections believe that including horizontal subcontracting may have beneficial effects.

With regard to the Horizontal Guidelines, the Sections support a revision of the information exchange section to bring it in line with the case law of the European Court of Justice and to provide additional guidance but submit that further guidance is required, in particular as regards the pooling and sharing of "big data." The Sections also are concerned that the proposed description of information that may be considered competitively sensitive may be difficult to apply and may result in an overbroad category of by object violations.

In relation to standardization agreements, the Sections would welcome additional guidance, in particular with respect to "Special Interest Groups" ("SIGs") and the role of standard development organizations ("SDOs") in determining where in the supply chain licensing should or should not take place.

With regard to joint purchasing agreements, the Sections appreciate the Commission's willingness to provide additional guidance on how to distinguish between

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[2] American Bar Association, International Law Section Policy, *available at* https://www.americanbar.org/groups/international_law/policy/about/.

[3] Past comments can be accessed on the International Law Section's website at: https://www.americanbar.org/groups/international_law/policy/blanket_authorities_initiatives/.

[4] See note 3 above, comment-eu-21120-combined.pdf (americanbar.org)

legitimate joint purchasing agreements and buyer cartels. They also support the inclusion of the proposed new section in the revised Horizontal Guidelines on horizontal collaboration designed to foster sustainability goals.

II. Suggested revisions of the R&D BER

The Commission proposes to no longer exempt R&D collaborations where less than three competing R&D efforts would remain in addition to those of the parties to the R&D agreement.[5] This revision was prompted by the Commission's conclusion that the current R&D BER "is not sufficiently adapted to agreements for the development of new products, technologies and processes and for R&D efforts directed primarily towards a specific aim or objective (so-called 'R&D poles')."[6]

The Sections acknowledge that the joint U.S. Department of Justice Antitrust Division ("DOJ") and Federal Trade Commission ("FTC") Antitrust Guidelines for Collaborations Among Competitors similarly define a safety zone for "research and development competition analyzed in terms of innovation markets" where three or more additional, independently controlled research efforts "possess the required specialized assets or characteristics and the incentive to engage in R&D that is a close substitute for the R&D activity of the collaboration."[7] Nevertheless, the Sections caution that it is often difficult to assess the competitive landscape for innovation because potentially substitutable R&D efforts may be at very early stages or because R&D efforts simply are not publicly known. This means that it is often difficult for the parties to an R&D agreement to identify competing R&D efforts. The Sections therefore recommend that the Commission offer guidance on how it would expect parties to identify and evaluate independent R&D efforts. For example, the U.S. Guidelines for Collaborations Among Competitors note that, in determining whether independently controlled R&D efforts are close substitutes, the U.S. agencies "consider, among other things, the nature, scope, and magnitude of the R&D efforts; their access to financial support; their access to intellectual

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[5] European Commission, *Revision of the Horizontal Block Exemption Regulations and Horizontal Guidelines – Overview of Main Proposed Changes*, paragraph 9. *See also* R&D BER Article 6(3).

[6] Pursuant to Article 1(18) "competition in innovation" refers to R&D of the same or likely substitutable new products and/or technologies as the ones to be covered by the R&D agreement; or R&D poles pursuing substantially the same aim or objective as the ones to be covered by the R&D agreement. It excludes competition for an existing product and/or technology. Article 1(19) defines "competing R&D effort" as an R&D effort in which a third party engages, alone or in cooperation with other third parties, or in which a third party is able and likely to independently engage, and which concerns: (a) the R&D of the same or likely substitutable new products and/or technologies as the ones to be covered by the R&D agreement; or (b) R&D poles pursuing substantially the same aim or objective as the ones to be covered by the R&D agreement.

[7] Federal Trade Commission and U.S. Department of Justice, ANTITRUST GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS (April 2000) at 4.3. available at https://www.ftc.gov/sites/default/files/documents/public_events/joint-venture-hearings-antitrust-guidelines-collaboration-among-competitors/ftcdojguidelines-2.pdf.

property, skilled personnel, or other specialized assets; their timing; and their ability, either acting alone or through others, to successfully commercialize innovations."[8]

With regard to the future conditions for exemption, the Sections observe the following:

In their 5 October 2021 observations, the Sections noted that the conditions for application of the current exemption set out in Articles 3(2) and 3(3) R&D BER may create a disincentive to enter into a procompetitive R&D agreement.[9] For example, the parties to an R&D project may, depending on the specifics of their collaboration and their respective investments and contribution, only be willing to provide the other party limited access to the results of the joint R&D. However, by requiring one party to give the other party "full access to the final results of the joint research for the purposes of exploitation as soon as they become available," on penalty of losing the benefit of the exemption, the R&D BER potentially has a chilling effect on R&D projects that provide for less than full access but are nonetheless procompetitive. In this respect, it appears that an intellectual property license under future intellectual property rights with a field of use restriction may not qualify as "full access."

The Sections are pleased to see that paragraph 113 of the draft revised Guidelines confirms that the parties to an R&D agreement will be allowed to impose restrictions upon each other regarding the exploitation of the results (such as restrictions in relation to certain territories, customers, or fields of use).

By requiring that "access to any pre-existing know-how" must be given in the case of joint R&D projects that do not involve exploitation and where that know-how is indispensable for the exploitation of the results, the current BER discourages ventures that may result in significant efficiencies, but that do not provide for licenses to pre-existing (foreground and background) know-how and intellectual property. This is particularly problematic as it may be uncertain which "results" the project may generate in the future and how those results may be "exploited."

In their 5 October 2021 observations, the Sections suggested that it would be preferable to rely on the parties' own incentives to enter into the R&D project at issue, instead of reserving the benefit of the BER to R&D projects that involve full access to pre-existing know-how and the results of the collaboration. In this regard, the Sections appreciate that Articles 3(2) and 3(3) of the R&D BER seek to ensure the actual exploitation of results. The Sections submitted that the parties' incentives will generally be

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8 *Id.*

9 The Sections have submitted similar observations in their joint comments of January 2009 in response to the questionnaire issued by the Commission in connection with its review of the then current regime for the assessment of horizontal cooperation agreements. See https://www.americanbar.org/content/dam/aba/administrative/antitrust_law/v12/comments_echorizontal.pdf.

aligned to exploit the results of their collaboration and bring about the associated efficiencies.

Paragraphs 114 and 115 of the draft revised Horizontal Guidelines explain that parties must provide access to pre-existing know-how if that is indispensable for exploiting the results. The Sections interpret this guidance to mean that, in the context of specialization in the exploitation of the R&D results, where fields of use or other restrictions are imposed on the parties, access to pre-existing know-how may be limited to what is indispensable for the (limited) exploitation. It would be helpful if the final version of the Horizontal Guidelines explicitly confirmed this.

III. Suggested revisions to the Specialisation BER

In their 5 October 2021 observations, the Sections suggested that the proposed expansion of the definition of unilateral specialisation under Article 1(1)(b) to include agreements concluded between more than two parties may strengthen the incentives of parties to consider procompetitive unilateral specialisation agreements between parties active on the same product market by virtue of which one party agrees to fully or partly refrain or cease production of certain products and to purchase them from the other party, who agrees to produce and supply those products to it. The Sections suggested that extending the benefit of the BER to multi-party agreements may be particularly helpful in industries with complex supply chains, in high-fixed cost industries and in other situations where tolling agreements and similar types of arrangements are common.

The Sections noted that it is conceivable that the additional demand that justifies investment in additional production capacity can be secured only if two or more companies agree to purchase the contract products from the producing party that agrees to carry out the investment. If the parties cumulatively fall below the market share threshold, the Sections considered that such a multi-party agreement was not likely to pose greater risk to competition than a unilateral specialization agreement between two parties. The Sections believed that the extension to multi-party agreements would not, in and of itself, increase the risk of improper collusion and market allocation and that the existing safeguards are sufficient to control for these risks.

The Sections are pleased to see that the draft revised Specialisation BER expands the exemption as set out above.

In their 5 October 2021 observations, the Sections supported the Commission's suggestion to expand the safe harbour to cover all types of horizontal subcontracting agreements and welcome the Commission's proposal to do so.

IV. Other topics addressed in the draft revised Horizontal Guidelines

The Sections support the Commission's effort to augment the guidance for certain types of horizontal agreements that the Guidelines currently do not discuss, or in relation to which companies would benefit from more detailed or updated guidance regarding the

Commission's interpretation of Articles 101(1) and (3) TFEU. Below, the Sections will briefly comment on (a) mobile infrastructure agreements, (b) joint purchasing agreements generally, (c) joint purchasing agreements and buyer cartels, (d) information exchange, (e) standardization agreements, and (f) horizontal agreements with sustainability objectives.

a. Mobile infrastructure agreements

The Horizontal Guidelines introduce a new category of production agreements, called "mobile infrastructure agreements." The Sections agree that infrastructure sharing agreements can help provide the benefits of a large, efficient network without the need for consolidation. Such benefits are not limited to mobile telecommunications infrastructure, however. The Sections respectfully recommend that the final Horizontal Guidelines address the assessment of infrastructure sharing agreements more generally, rather than singling out a particular industry in a document of general application such as the Horizontal Guidelines.

b. Joint purchasing agreements generally

The draft HGL's provide guidance on evaluating the competitive effects of joint purchasing agreements. The draft HGL's recognize that competitive concerns relating to joint purchasing arrangements generally arise where the parties have market power in either the selling or purchasing market and that parties are unlikely to have market power where their combined market shares do not exceed 15% in these markets (paragraph 329). The Sections suggest that the Commission reconsider the market share percentage below which competition concerns are deemed unlikely to arise and suggest that threshold to be set at 20% (as in the case of specialisation agreements) or 30% (as in the case of vertical agreements).

The Sections are skeptical that cooperation between users of standard essential technology in Collective Licensing Negotiations Groups ("LNGs") would readily result in lower transaction cost and other efficiencies (paragraph 312). At minimum, and in light of the absence of any meaningful enforcement practice, such initiatives require careful assessment.[10]

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10 Suggestions have been made, in particular by the SEP Expert Group, that LNGs may be beneficial. See Group of Experts on Licensing and Valuation of Standard Essential Patents, "SEPs Expert Group," page 168. The Commission may want to consider the extent to which context-specific factors impact the competition law analysis the Commission has applied to past joint purchasing groups. Such factors may include potential differences between joint purchasing agreements and LNGs as well as factors pertinent to the licensing context, such as the availability of alternative sources of supply or alternative consumers of licenses; requirements that SEP licenses comply with FRAND principles; and whether intellectual property rights, being non-rivalrous, raise the same concerns with reducing downstream output that have informed concerns with monopsony power in contexts other than intellectual property licensing.

c. Joint purchasing and buyer cartels

The Sections welcome the additional guidance on by-object restrictions intended to clarify the distinction between buyer cartels and joint purchasing agreements (paragraph 325).

By combining purchasing efforts of multiple buyers, joint purchasing arrangements generally aim at achieving procompetitive effects, i.e., lower cost on the purchasing market, as opposed to seller cartels, where the objective is to increase prices on the supply side of the market. Against this background, the Sections believe it is important that the future HGLs articulate clearly why and under which circumstances "purchasing cartels" are sufficiently harmful to competition so as to be viewed as by object infringements. The ECJ judgment in *Cartes Bancaires* confirms that the scope of "by object" restrictions must be interpreted restrictively, and that the agreement must be considered in light of its proper economic context and objectives.

The Sections generally agree that the non-exhaustive list of factors set out in paragraph 319 will be helpful in distinguishing buyer cartels and joint purchasing agreements. Notably, (i) a clear definition of the buyers' purchasing agreements and (ii) the communication to suppliers that the parties at issue negotiate jointly, appear to be workable parameters to make that distinction, subject to case-by-case assessment.

Nonetheless, the Sections invite the Commission to consider whether it can provide additional guidance, particularly in relation to the requirements of the joint purchasing agreement mentioned in paragraph 319(b) and the application of the proposed market share tests. For example, where the parties to a joint purchasing agreement purchase a variety of different products from suppliers who produce only one or a few products (e.g., a supermarket chain purchasing seasonal fruit or vegetables from farmers), the purchasers' downstream shares in their product and geographic markets may not be a good indicator of the likelihood that savings will be passed on to consumers.

Finally, the Sections are concerned that the draft HGL's do not properly set out the potential harm of a joint purchasing arrangement between non-competitors, where there can be no coordination on the downstream selling market. In particular, since the HGL's specify in section 4.2.3.2 that the existence of market power appears to be the determining factor for downstream harm, e.g., as to whether or not cost savings are passed on to consumers, it is unclear how such harm could occur where the parties to the agreement do not compete and where their commercial incentives cannot be aligned.

d. Information exchange

The exchange of competitively sensitive information can result in anticompetitive effects. Nonetheless, the Sections note that the exchange of information is a common feature in many competitive markets and may generate efficiency gains, for example in the form of cost savings.

The Sections support a revision of Section 2 of the current Horizontal Guidelines in line with the above principles. However, they note that the Horizontal Guidelines should concentrate on situations where information exchange in horizontal settings may result in negative effects.

Similarly, the Sections welcome the draft HGL's efforts to clarify how the collection and sharing of "data" fit in the traditional antitrust framework for information exchanges. As the draft HGL's recognize, data pooling and sharing often allow companies to develop better products and services and to compete more effectively. However, the criteria for identifying competitively sensitive information may be different in the "big data" context. For example, a single data point in a large data set may not be competitively sensitive even if it is (for example) recent and price related, while a large volume of data may be competitively sensitive even if the data in question are older and not price related.

The Sections recommend a fuller discussion of the characteristics that may make datasets competitively sensitive. In this respect, the Sections suggest expanding and clarifying paragraph 411 of the proposed draft Guidelines. The Sections also suggest that the Commission (re-)consider the age of the data exchanged and its public/private nature as indicators for potentially problematic conduct (6.2.3.4). While exchange of future strategic information (e.g., prices) should be considered problematic, the Sections believe the HGL's current "bright line" for when data becomes "historic" (and, thus, presumably exchangeable), should be reconsidered.

The Sections do not recommend addressing situations where the absence of data sharing would potentially be objectionable under Article 102 TFEU.

The Sections support several of the proposed changes to the current section of the Horizontal Guidelines in relation to information exchange. In particular, the additional guidance on exchanges in the context of acquisitions (paragraph 410) and the new sections on measures to limit and control how data is used (6.2.4.4) and on access to collected information (6.2.4.5) are helpful.

The Sections appreciate the Commission's effort to provide additional guidance on the notion of "commercially sensitive information" (6.2.3.1). However, the Sections are concerned that aspects of the proposed assessment will be difficult to apply in practice and may result in innocuous information exchanges potentially being found objectionable. In particular, the proposed Horizontal Guidelines include current pricing in the category of competitively sensitive information (paragraphs 424 and 431), while at the same time making clear that information may often not qualify as "genuinely public information" within the meaning of section 6.2.3.2. The draft HGL's indicate that unilateral disclosures of commercially sensitive information may be objectionable (6.2.4.) and that information exchange through third parties may give rise to a violation of Article 101 TFEU (6.2.4.2). The Sections are concerned that the combined effect of these approaches may be over-inclusive and unnecessarily restrictive for companies for instance in the event semi-public price lists are used, or companies share current prices with their potential customers. The Sections respectfully suggest that the Commission revisit these sections.

As noted recently in the case law,[11] information exchanged concerning a party's "current state and its business strategy" may be problematic to the extent that it is "inherently confidential and commercially sensitive" and is "capable of influencing the conduct of its competitor"; there is however no implication that all information regarding a party's current state and business strategy is commercially sensitive, and thus improper to disclose.

More generally, the Sections appreciate the Commission's efforts to reflect recent case law on information exchange in the draft Horizontal Guidelines but believe that the proposed Horizontal Guidelines potentially result in the treatment of many information exchanges as "by object" restrictions, with limited concrete guidance on situations where information exchanges may have restrictive effects on competition (6.2.7), and the assessment under Article 101(3) TFEU (6.3).

In addition to clarifying the characteristics of "data" that are likely to make big datasets or portions thereof competitively sensitive, it would be useful for the definitive Horizontal Guidelines to clarify data holders' competition law obligations when sharing data pursuant to the EU's increasingly complex digital regulatory framework. New EU rules such as the Data Governance Act, Digital Markets Act, and Data Act will include a variety of voluntary and mandatory data sharing provisions, which may overlap. Some of these measures indicate that precautions must be taken to avoid sharing competitively sensitive information (the Data Governance Act), while others indicate that data recipients cannot use data they receive for competitive purposes (the Data Act). It would be helpful for the final Horizontal Guidelines to discuss the application of the antitrust rules in these cases, such as the protections that data holders should apply when sharing data with actual or potential competitors.

With regard to the public/private nature of information as an indicator for potentially problematic conduct, the Sections suggest that the future Horizontal Guidelines indicate more directly that for the sharing of public information to be problematic additional elements are necessary. As the draft revised Horizontal Guidelines exemplify, it is not the sharing of public information itself that constitutes potentially problematic conduct, but its sharing in a consolidated and systematized format only between competitors, or complementing public information with additional private information, or the existence of a collusive agreement on future behaviour between competitors based on public information. The draft revised Horizontal Guidelines already provide these examples, so the Sections suggest the future Horizontal Guidelines indicate more clearly that these additional elements are required for public information exchanges to be analysed as potentially problematic.

The Sections encourage the Commission to consider omitting the reference to "customers" in the context of the parties through which an indirect information exchange

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11 Case T-758/14 RENV, Judgment of the General Court of 8 July 2020, Infineon Technologies v Commission, EU:T:2020:307, paragraph 70.

between competitors can take place, or at a minimum, to provide additional guidance.[12] Customers often disclose a supplier's pricing information to other suppliers during price negotiations. As such, the new guidance risks endangering legitimate market practice, and could prevent customers from receiving lower prices. While the HGL's state that "*indirect exchange of commercially sensitive information*" will be subject to a "case by case analysis of the role of each participant,"[13] it should be stated explicitly that a customer's efforts to obtain lower prices are not prohibited by competition law.

e. Standardization agreements

The Sections respectfully refer to their 5 October 2021 observations in relation to a number of proposed revisions to the R&D and Specialisation BERs and updated guidance in the future Horizontal Guidelines.

The draft Horizontal Guidelines recognize that IP laws and competition laws promote innovation and enhance consumer welfare. They also recognize the dynamic competition-enhancing nature of IPRs. They further recognize that standard setting and IPRs are generally procompetitive, but that anticompetitive concerns may arise in specific circumstances, including some related to IPR-related conduct.[14] An effects-based assessment is generally required to determine whether the agreement restricts competition and constitutes a violation of Article 101 TFEU.[15]

In particular, the Horizontal Guidelines presume that standardization agreements facilitate technical interoperability and compatibility and give rise to efficiencies that are passed on to consumers.[16] The Horizontal Guidelines state that there is no presumption of market power by holding or exercising essential IPR and that market power will be assessed on a case-by-case basis[17] In addition, the Horizontal Guidelines explicitly acknowledge that different types of companies with different business models, incentives and interests in standardization and standard-development organizations exist.[18] With respect to fees charged for the use of IPRs, the Horizontal Guidelines state that they should be assessed based on whether they bear a reasonable relationship to the economic value of the IPR[19] and that determining whether royalty rates are excessive must meet the conditions for an abuse of dominant position as set out in Article 102 TFEU and the case law of the Court of Justice.[20]

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12 Draft revised HGL, paragraph 435.
13 Draft revised HGL, paragraph 436.
14 Draft revised HGL, ¶¶ 465-471.
15 Draft revised HGL, ¶¶ 474-500.
16 Draft revised HGL ¶ 501.
17 Draft revised HCG ¶ 471.
18 Draft revised HCG ¶ 469.
19 Draft revised HCG ¶ 486.
20 Draft revised HCG ¶ 486.

The Sections consider that these statements of principle provide valuable and helpful guidance.

The Sections also respectfully invite the Commission to address and clarify its position on the following two specific issues.

First, as set forth in the 5 October 2021 observations, the Sections note the current debate about where in the supply chain licensing should or should not take place. While the draft Horizontal Guidelines note that SDOs may adopt different IP policies (paragraph 476), the draft revisions have not clarified the issue (e.g., paragraphs 480, 482, 483 and 491). As noted in the 5 October 2021 comments, the Sections respectfully recommend that the Commission note that standard organizations (SDOs) may address this issue, as needed, in their respective IPR policies, subject to a by-effect review under Article 101 TFEU.

Second, the Sections already suggested that additional guidance would be useful in relation to Special Interest Groups composed of SDO members that operate with restricted membership to influence consensus-based standards-development activities. The Sections suggest that the Commission consider offering guidance on how to analyze and, if appropriate, balance the potential procompetitive benefits that SIGs may have in providing a forum where like-minded participants can reach common positions regarding issues in the standard development process, versus the potential anticompetitive harm that could occur if members of such SIGs collectively can exercise effective control over the standards-development process.

f. Agreements that pursue sustainability objectives

As noted in the 5 October 2021 observations, the Sections support the Commission's suggestion that the revised Horizontal Guidelines provide guidance on the assessment of horizontal cooperation agreements that pursue sustainability objectives. Notwithstanding the latitude that competitors are afforded to collaborate in ways that are procompetitive, some collaborations may raise antitrust concerns. Examples of sustainability collaborations that could trigger scrutiny include mandatory, industry-wide agreements to either phase out unsustainable products or create sustainable products at scale. The legal uncertainty surrounding those agreements arises out of lack of clarity regarding, among other things, which consumers must be shown to benefit, how to weigh future cost decreases against current cost increases, and how to quantify sustainability benefits. Given this uncertainty, businesses may forego beneficial sustainability collaborations out of fear of antitrust scrutiny. [21]

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[21] In its 11 August 2021 Report "Sustainability and Competition Law," the International Developments and Comments Task Force of the Antitrust Section of the ABA set out detailed suggestions on sustainability agreements and other business transactions. *See* Sustainability and Competition Law, Report of the International Developments and Comments Task Force (11 August 2021) available at https://www.americanbar.org/content/dam/aba/administrative/antitrust_law/comments/august-2021/comments-82621-greece.pdf

The Sections appreciate that the Commission has proposed the adoption of guidelines on how sustainability initiatives will be assessed, including the substantive standards it will apply, the economic framework and tools it will utilize to assess the competitive impact of sustainability claims and procompetitive benefits to assist businesses to distinguish lawful from unlawful sustainability efforts.

The Sections agree that competition law enforcement contributes to sustainable development by ensuring effective competition, but that cooperation among companies may be needed to address negative externalities or market failures that are not fully addressed by public policies and regulations or can be addressed more efficiently through cooperation. Although sustainability agreements are not a distinct type of cooperation agreement, the application of the conditions set out in Article 101(3) TFEU to such agreements can raise questions specific to such agreements, including the identification and quantification of efficiencies generated by such agreements, the treatment of qualitative benefits and benefits realized over long time periods, as well as how to determine whether a fair share of those benefits are passed on to consumers.

The Sections support the Commission's proposal to apply a broad notion of sustainability (paragraph. 543), the recognition that first-mover disadvantages can limit companies' incentives and ability to achieve sustainability objectives through individual action (paragraph 585), and the notion that reductions of negative externalities can qualify as benefits in the sense of Article 101(3) TFEU (paragraphs 578 - 579).

The Sections note the observation that sustainability agreements may be unnecessary where "market failures are addressed by appropriate regulation" (paragraph 546) and that "[p]ublic policy and regulations often take care of negative externalities" (paragraph 583). In the final version of the Horizontal Guidelines, the Sections suggest that the Commission clarify several points in this regard. First, sustainability agreements may be an appropriate way of addressing negative externalities that may not be suitably addressed by regulation, e.g., because the externalities occur at a level (e.g., globally) or in jurisdictions lacking the democratic legitimacy, expertise or enforcement resources needed for appropriate regulation. Second, the existence of appropriate regulation commensurate with the market failures or negative externalities sought to be addressed by a sustainability agreement should not imply any presumption against the agreement's validity if the conditions for approval are otherwise met. In addition, the Sections believe that it would be incorrect to assume that collaborating is always unnecessary where regulation is in place or where some companies have already acted individually. Third, although the involvement or encouragement of public authorities in a sustainability agreement does not release the parties from the application of Article 101(1) TFEU (paragraph 615), such involvement may be relevant to establishing whether the agreement pursues a genuine sustainability objective (cf., paragraph 560) and may result in legitimate expectations cognizable under EU law.

The Sections also commend the Commission for the new proposed guidance on the identification and assessment of different types of sustainability agreement benefits, individual use value benefits, individual non-use value benefits and collective benefits. The Sections invite the Commission to provide further guidance in the final

Horizontal Guidelines, for example regarding the treatment of benefits realized over long periods of time and those that are difficult to quantify. Considering that sustainability agreements commonly have an important vertical element (because they are intended to reduce externalities in supply chains), the Sections recommend that the final Horizontal Guidelines address the interplay between sustainability benefits and potential competitive harms in upstream and downstream markets (which may have different geographic scopes).

The Sections suggest that the Commission clarify and revisit the requirement that consumers in the "relevant market substantially overlap with the beneficiaries or are part of them" (paragraph 606), bearing in mind that antitrust "markets" are a legal construct defined for purposes of particular economic analyses and may not bear a close relation to the negative externalities or market failures a sustainability agreement is intended to address. The Sections are aware that the Commission is currently reviewing its notice on the definition of relevant markets, which in the future can be expected to address more fully the dynamic nature of many markets. The Sections invite the Commission to also address the role of sustainability in market definition. In that regard, the Sections respectfully disagree with the statement in para. 582 that sustainability agreements are not necessary for the attainment of sustainability benefits where there is demand for sustainable products. It may be the case that demand for sustainable products will provide sufficient incentives for companies to achieve the relevant objectives by competing to satisfy this demand, but this cannot be assumed.

The Sections also note that future users' benefits are not taken into account and suggest that the final Horizontal Guidelines do so.

With respect to individual use-value benefits, the Sections suggest that the Commission expand on consumers' willingness to pay as a means of identifying the legality of the cooperation and to clarify that collaborations may still meet the indispensability requirement under Article 101(3) TFEU where consumers are willing to pay for more sustainability (paragraphs 596 – 598)). In particular, additional guidance on the methodology that the Commission would find persuasive, perhaps coupled with one or more practical examples, may be helpful.

Finally, and in view of the above, the Sections respectfully recommend that the Commission revisit its approach to determining whether a "fair share" of benefits will likely be passed on to consumers. The Section suggest that the Commission address which benefits, which markets, and which consumers must benefit. The Sections submit that – especially in view of the variety of markets likely to be involved in a sustainability agreement, and the mixed horizontal and vertical nature of such agreements, the apparent position in para. 588 that the "fair share" of benefits passed on to consumers in a single, potentially narrow, downstream market be 100% is unrealistic and inconsistent with Article 101(3) TFEU.

V. Conclusion

The Sections appreciate this opportunity to provide their views on the Consultation Document and are available for any further consultation the EC may deem appropriate.