Trade and Investment

ICC Commission on Competition

COMMENTS OF THE COMPETITION COMISSION OF THE INTERNATIONAL CHAMBER OF COMMERCE ("ICC") ON THE EU COMMISSION CONSULTATION ON THE 2019 EVALUATION OF THE RESEARCH AND DEVELOPMENT AND SPECIALIZATION BLOCK EXEMPTION REGULATIONS AND ACCOMPANYING GUIDELINES ON HORIZONTAL COOPERATION

11 February 2020

The Competition Commission of the International Chamber of Commerce ("ICC") respectfully submits these comments in response to the European Commission's (EC's) public questionnaire for the 2019 Evaluation of the Research & Development and Specialization Block Exemption Regulations (Consultation Document).[1]

The International Chamber of Commerce (ICC) is the world's largest business organization representing more than 45 million companies in over 100 countries. Our members include many of the world's leading companies, SMEs, business associations and local chambers of commerce.

The ICC Commission on Competition ensures that business needs and the realities of markets are taken into account in the formulation and implementation of competition laws and policies. It also identifies key issues in competition policy facing the international business community and contributes the business voice to debates to resolve these. The commission brings together over 300 leading experts in the field of Antitrust from 42 countries, working together to develop cutting-edge policy for business. As such, the ICC Commission on Competition is recognized as a venue for exchange and innovation, and regularly shares the voice of business on antitrust issues with intergovernmental forums such as the European Commission, ICN, OECD as well as national antitrust regulators.

The ICC Commission on Competition commends the EC for seeking public comments on Commission Regulation 1217/2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of research and development agreements (the RBER),[2] Commission Regulation 1218/2010 on the application of Article

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1 EU Competition Rules on Horizontal Agreements Between Companies – Evaluation, EUR. COMM'N (Nov. 6, 2019), available at https://ec.europa.eu/info/law/better-regulation/initiatives/ares-2019-4715393/public-consultation_en.

2 Commission Regulation No 1217/2010 of 14 December 2010 on the application of Article 101(3) of the Treaty on the functioning of the European Union to categories of research and development agreements, 2010 O.J. (L 335) 36.

101(3) of the Treaty on the Functioning of the European Union to certain categories of specialization agreements (the SBER, and, together with the RBER, the HBERs), [3] as well as the EC's guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements (the HGL).[4]

General Observations

The ICC Commission on Competition submits that the HBERs and HGL have contributed significantly to promoting competition in the European Union (EU), including in particular by providing greater legal certainty to companies and antitrust practitioners. The ICC Commission on Competition encourages the EC to extend the HBERs and to re-issue the HGL. With that said, given the significant economic changes that have taken place since these measures were first promulgated, the ICC Commission on Competition submits that the EC considers whether the HBERs and HGL would require reconsideration in a number of respects.

The ICC Commission on Competition sets out its suggestions below, concentrating on five major areas, the RBER, Horizontal Cooperation involving Environmental Efficiencies, Standardization Agreements, Joint Purchasing, and Information Exchange.

The RBER

The RBER provides a simple but efficient framework for the development of joint production projects in different forms, allowing the achievement of efficiencies while ensuring that competition is preserved. In particular, the provision of a safe harbor for agreements between companies below certain market share thresholds is an approach that contributes to legal certainty, even if the identification of the affected relevant markets may sometimes be complex. In addition, Section 3 of the HGL provides useful guidance for companies in situations beyond the market share thresholds and in relation to issues not covered by the RBE. Without prejudice to the suggestion that follows in the paragraphs below, it would be useful for companies for the Commission to maintain a regulatory framework similar to the existing HGLs.

Especially when the research and development agreement provides only for joint research and development or paid-for research and development, the research and development agreement must stipulate that each party must be granted access to any pre-existing know-how of the other parties, if the know-how is indispensable for the purpose of its exploitation of the results. The agreement may foresee that the parties compensate each othe for giving access to their pre-existing know-how, but the compensation must not be too high to effectively impede such access.

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[3] Commission Regulation No 1218/2010 of 14 December 2010 on the application of Article 101(3) of the Treaty to categories of specialisation agreements, 2010 O.J. (L 335) 4

[4] European. Commission, Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, 2011 O.J. (C 11) 1 [hereinafter HGLs].

The ICC Commission on Competition submits that the obligation to give access to their pre-existing know-how requires reconsideration. Indeed, while the objective of the RBER is to stimulate joint research and development and the dissemination of jointly developed products and technology, the ICC Commission on Competition believes that parties may sometimes be reluctant to enter into such agreements as they may be confronted with far-reaching and commercially unreasonable requests to provide access to their pre-existing know-how and intellectual property rights. This can be particularly intrusive if the results of the collaboration are not clearly identifiable at the outset of the project. In sum, the ICC Commission on Competition encourages the EC to consider how the obligation to give access to pre-existing know-how can be tempered and be made more specific to avoid any chilling effects on pro-competitive research and development projects.

Horizontal Cooperation involving Environmental Efficiencies

The current HGLs do not contain any guidance on how the legal and economic competition framework can accommodate an analysis of the effects of conduct or transactions consistent with sustainability and environmental goals. The ICC Commission on Competition believes that it would potentially be very beneficial for the international business community if the future HGLs would provide guidance on this important issue, especially in light of the European Community's policy goal to migrate towards a greener economy.

The ICC Commission on Competition respectfully submits that any future guidance should clearly articulate which environmental and sustainability goals would "count" and how the EC intends to conduct its analysis both under Articles 101(1) and 101(3) TFEU. In particular, it would be helpful if any furure guidelines would provide guidance on how to establish the net effect of proposed horizontal cooperation where the cooperation may give rise to static price in-efficiencies, *i.e.* price increases, but is also expected to result in (static and dynamic) environmental efficiencies. The future GLs should preferably also make clear how the EC intends to treat matters which involve effects that affect different markets or groups of customers (for instance where the price effects affect one market, but the environmental effects may affect another class of customers).

Standardization Agreements

Section 7 of the current HGLs concentrates specifically on standardization agreements, *i.e.* agreements that seek to define the technical or quality requirements with which products, production processes, services or methods may comply, that give result in industry standards. The HGLs acknowledge that standards may (indirectly) involve intellectual property rights. Indeed, once a standard is established, the actual implementation of the standard – for instance through the manufacture of products that comply with the standard – may necessitate the use of intellectual property rights ("IPRs").

The ICC Commission on Competition is pleased to see that, in a number of respects, the current HGLs already recognize the dynamic competition-enhancing nature of IPRs. They also

affirm that standard setting and IP-related conduct only exceptionally raise anti-competitive concerns.[5]

In particular, the HGLs presume that standardization agreements facilitate technical inter-operability and compatibility and give rise to efficiencies that are passed on to consumers. In addition, the HGLs explicitly acknowledge that different types of companies with different business models, incentives and interests in standardization and standard-setting organizations exist and that standardization agreements should not favor one business model over another. With respect to royalty rates charged for the use of SEPs, the HGLs state that high royalty rates need not be regarded as excessive unless they are unrelated to the value of the IPR and 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.

The ICC Commission on Competition considers that these statements of principle provide valuable and helpful guidance that should be maintained in any revised version of the HGLs.

However, despite the foregoing, the Sections believe the HGLs lack coherence in a number of important respects or give rise to unnecessary uncertainty. The ICC Commission on Competition therefore respectfully invites the EC to address and clarify its position on the following issues.

First, the ICC Commission on Competition notes that the HGL, in particular paragraph 294, have given rise to some debate about the notion of providing (effective) access to the standard.

Paragraph 294 provides that if the essential IPR for implementing the standard(s) is not at all accessible, or accessible only on discriminatory terms for members or third parties (that is to say, non-members of the relevant standard-setting organization), this may discriminate or foreclose or segment markets.

This statement is sometimes relied upon to argue that IPR owners, having agreed to license their SEPs on FRAND terms, are under an obligation to license their patents to any party who desires a license. Such an obligation would severely restrict IPR owners to license their SEPs only to implementers that are active at a certain point in the production chain, for example the manufacture of final products, as opposed to the manufacture of components. In addition, it may subject component suppliers and other market partcipants who are to date not licensed and are free to manufacture their products, to obligations to enter into license agreements.

In sum, while the ICC Commission on Competition is aware of the current debate on this issue in a number of jurisdictions, it considers that it would be untimely and inappropriate for the EC to mandate particular FRAND licensing models in the future HGLs and, in particular, to suggest that IP owners must offer licenses to any party that expresses an interest. Such a general obligation would not be in line with the Courts' case law under Article 102 TFEU and well-establishedindustry practice. The ICC Commission on Competition respectfully submits therefore that the EC eliminates any uncertainty in this respect. In relation to paragraph 285,

[5] The HGLs also make clear that holding or exercising standard-essential patents (SEPs) does not necessarily equate to the possession of market power.

this could be achieved by deleting the words “to all third parties”.

Second, the HGLs seek to provide guidance on the meaning of FRAND commitments and provides a number of methodologies to establish whether royalty rates offered by IP owners are FRAND, in particular by relying on independent experts’ assessment of the relevant IPR portfolio’s objective quality and centrality to the standard at hand, a comparison with rates charged for IPR in other comparable standards, as well as comparisons based on ex ante licensing terms.

While the ICC Commission on Competition appreciates the complexities involved in determining whether royalty rates offered for SEPs are FRAND, it is of the opinion that the HGLs should refrain from providing any detailed guidance on the methodologies that may be applied in the context of Article 101 TFEU and, in addition, reconsider the guidance provided in the current HGLs.

The ICC Commission on Competition notes in this respect that when considering possible amendments to Section 7 of the HGLs, the Commission should be mindful of its own work in the area of standard essential patents. In particular, in 2017, the EC considered including far-reaching and prescriptive norms for the licensing of standard essential patents at fair, reasonable and non-discriminatory (“FRAND”) conditions should be included in the Commission’s Communication “Setting out the EU approach to Standard Essential Patents”. Eventually, the EC chose not to do so and, instead, to establish a group of experts on licensing and valuation of standard essential patents, attended by multiple services including DG GROW and DG CNCT to study these and related issues in more detail. Any revisions to the HGLs should steer away from preempting the work of the expert group.

Finally, the ICC Commission on Competition believes that it would be helpful to consider including in the future Section of the HGLs agreemenst for the the development of open source software (“OSS”). OSS development is a collaborative effort similar to collaborative standard development in SDOs. The reason for including OSS in the HGLs woud be that OSS development currently lacks the safeguards that are typically associated with standardization, in particular with regard to opnessa and transparency.

The ICC Commission on Competition believes that this issue could best be addressed by extending the scope of Section 7 of the Horizontal Guidelines to agreements covering OSS development. Such an approach would also be in line with the recommendation included in a recent Science for Policy report by the Commission’s Joint Research Centre, which explicitly recommended developing specific requirements for horizontal cooperation that apply to both SDOs and OSS.

Joint Purchasing

The ICC Commission on Competition is pleased that the current HGLs provide guidance on the assessment of the competitive effects of joint purchasing agreements. The HGLs acknowledge that competitive concerns relating to joint purchasing arrangements generally arise where the parties have market power in either the selling or purchasing markets, or both,

and that competitive concerns are unlikely to arise where their combined market shares do not exceed 15% in these markets. The ICC Commission on Competition would be in favour of broadening this “soft” safe harbor to include joint purchasing agreements involving higher market shares, for example 20 or 25%.

The ICC Commission on Competition also submits that it would be helpful for the EC to consider incorporating additional guidance on how to distinguish between legitimate joint purchasing agreements and buyer cartels, in particular in light of recent EC decision practice.

Information Exchange

Section 2 of the current HGLs contains several specific provisions on information exchange. The ICC Commission on Competition notes that the exchange of information between market participants may bring about important efficiencies. However, in practice, and with the help of the current guidance offered, it is often complex to identify potentially problematic information exchanges with a sufficient degree of certainty. As a result, the international business community would potentially benefit greatly from enhanced guidance in this regard. For example, it would be helpful if clearer guidance would be available when information can be deemed to have entered into the public domain and when it can be considered as “historic” information. In addition, the EC may want to consider whether additional guidance in relation to online markets would be required.

Having said this, the ICC Commission on Competition notes that the issue of data and information sharing, especially in platform-based industries, is currently subject to debate. It would urge the EC to evaluate the forced sharing of data in cases involving market participants with significant marke power separately from the revision of the HGLs, and solely in light of the case law under Article 102 TFEU. The ICC Commission on Competition also notes that the (forced) exchange of commercially senstitive information may also give rise to collusion concerns.