

COMMENTS OF THE AMERICAN BAR ASSOCIATION
ANTITRUST LAW SECTION AND INTERNATIONAL LAW SECTION

on the

EU COMMISSION CONSULTATION ON THE 2019 EVALUATION OF THE RESEARCH
AND DEVELOPMENT AND SPECIALIZATION BLOCK EXEMPTION REGULATIONS

February 11, 2020

The views stated in this submission are presented on behalf of the American Bar Association's Antitrust Law and International Law Sections. They have not been approved by the House of Delegates or the Board of Governors of the American Bar Association, and therefore should not be construed as representing the policy of the American Bar Association as a whole.

I. Introduction

The Antitrust Law Section and the International Law Section of the American Bar Association (the Sections) respectfully submit 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 Sections are available to provide additional comments or to participate in consultations with the EC as it may deem appropriate.

These comments reflect the Sections' collective experience and expertise with respect to the application of antitrust law and economics in the United States, the European Union, and other jurisdictions, as well as with international best practices. The Sections offer these comments to share our experience and provide suggestions to enhance the effectiveness of the regulations and guidance ultimately adopted.

The Antitrust Law Section of the American Bar Association 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 Section provides a broad variety of programs and publications concerning all facets of antitrust and the other listed fields. Numerous Section members have extensive experience and expertise regarding similar laws of non-US jurisdictions. For nearly thirty years, the Section has provided input to enforcement agencies around the world conducting consultations on topics within the Section's scope of expertise.²

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

The ABA International Law Section (ILS) is the ABA section focusing 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 17,000, including private practitioners, in-house counsel, attorneys in governmental and inter-governmental entities, and legal academics, and represent over 100 countries. The ILS's 55 substantive committees cover competition law, trade law, and data privacy and data security law worldwide as well as areas of law which often intersect with these areas, such as mergers and acquisitions and joint ventures. Throughout its century of existence, the ILS has provided input to debates relating to major international legal policy.³ With respect to competition law and policy specifically, the ILS has provided input for decades to authorities around the world.⁴

The Sections commend 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),⁵ Commission Regulation 1218/2010 on the application of Article 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),⁶ 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).⁷

II. General Questions

Members of the Sections have been involved in a full range of horizontal cooperation agreements since the current HBERs and the HGL were introduced, including R&D agreements, specialization agreements, agreements involving information exchanges, purchasing agreements, commercialization agreements, standardization agreements and other horizontal cooperation agreements. Our members have frequently had occasion to rely on the RBER and the SBER and to consult the HGL for guidance.

In the Sections' view, 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 Sections encourage the EC to extend the HBERs and to re-issue the HGL. That said, given the significant economic changes that have taken place since these measures were first promulgated, the Sections submit that the HBERs and HGL would benefit from being updated and revised in a number of respects.

The Sections set out these suggestions below, focusing on four major areas: the SBER; information exchange agreements; purchasing agreements; and standardization agreements.

³ https://www.americanbar.org/groups/international_law/policy/about/.

⁴ Past submissions may be accessed at https://www.americanbar.org/groups/international_law/policy/blanket_authorities_initiatives/.

⁵ 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.

⁶ •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) 43.

⁷ Eur. Comm'n, 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 HGL].

III. The SBER

The SBER provides a simple yet 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. In addition, Section 4 of the HGL provides useful guidance for companies in situations beyond the market share thresholds and in relation to issues not covered by the SBER. Without prejudice to the suggestions that follow in the paragraphs below, it would be useful for companies for the Commission to maintain a regulatory framework similar to the existing one.

A. *Scope – Horizontal Subcontracting*

One of the areas in which the current framework could be clarified is in relation to subcontracting agreements. The interface between the HGL and the Commission notice of 18 December 1978 concerning its assessment of certain subcontracting agreements (the “Subcontracting Notice,” one of the Commission’s oldest notices)⁸ may not be entirely clear and there is probably opportunity for a more consistent approach.

According to paragraphs 153 and 154 of the HGL, (i) the HGL apply to all forms of joint production agreements and horizontal subcontracting agreements while (ii) vertical subcontracting agreements are not covered by the HGL but by the Vertical Cooperation Guidelines (VGL) (and Vertical Block Exemption Regulation (VBER)) and the Subcontracting Notice. Note that the Subcontracting Notice applies to “agreements under which one firm, called ‘the contractor,’ whether or not in consequence of a prior order from a third party, entrusts to another, called ‘the subcontractor,’ the manufacture of goods, the supply of services or the performance of work under the contractor's instructions, to be provided to the contractor or performed on his behalf.”

In relation to the above, the Subcontracting Notice would actually cover, in accordance with its own terms, all forms of subcontracting agreements, both horizontal and vertical. However, it is easy to read paragraph 153 of the HGL (also in light of the clearer paragraph 81 of the HGL) in the sense that the HGL alone, and not the Subcontracting Notice, would apply to horizontal subcontracting agreements (with the Subcontracting Notice applicable only to vertical subcontracting agreements). Certain rules contained in the Subcontracting Notice could reasonably apply to horizontal subcontracting agreements (which was the original intention of the Subcontracting Notice), including the following:

- Conditions for validity of the restrictions by the contractor on the subcontractor’s use of the particular technology or equipment that the contractor provides to the subcontractor, to whatever is necessary for the purpose of the agreement.
- Undertakings not to reveal manufacturing processes or know-how.
- Undertakings by the sub-contractor to pass on to the contractor on a non-exclusive basis technical improvements made during the currency of the agreements.

⁸ Commission notice of 18 December 1978 concerning its assessment of certain subcontracting agreements in relation to Article 85 (1) of the EEC Treaty, 1979 O.J. (C 1) 2.

- Exclusive undertaking by the sub-contractor in favor of the contractor where the improvements and inventions made by the subcontractor are incapable of being used independently of the contractor's secret know-how or patent.
- No restrictions on the subcontractor regarding the right to dispose of the results of his own research and development.
- Prohibition on the subcontractor to use the trademark of the contractor for goods or services not to be supplied to the contractor.

To the extent that these rules are also useful in the context of assessing horizontal subcontracting agreements, it could be clarified that the Subcontracting Notice also applies to horizontal subcontracting agreements, or alternatively to include a set of similar rules in the HGL (or, as the case may be, in the SBER).

B. Scope – Vertical Subcontracting

As mentioned, vertical subcontracting is currently not covered by the SBER and the HGL. However, there may be reasons to propose some changes to the legal framework for vertical subcontracting agreements, related to the current review.

Vertical subcontracting is, in principle, covered by the VBER⁹ and the VGL.¹⁰ However, the application of this framework to vertical subcontracting agreements is not entirely clear. For instance, the legal framework for vertical restraints does not properly address the use of intellectual property rights (IPRs) made available to the sub-contractor. The VBER covers agreements containing provisions that relate to the assignment to the buyer or use by the buyer of IPRs. In the case of subcontracting, however, the IPRs are assigned to the subcontractor (who would be in the position of the “seller,” not of the buyer, in terms of the vertical analogy). Indeed, the VGL (paragraph 34) make clear that the VBER is not available for subcontracting agreements including assignment of IPRs. Therefore, the shelter that the vertical legal framework provides for vertical subcontracting agreements is incomplete.s.

While vertical manufacturing agreements in many ways resemble vertical supply agreements to the extent that a party manufactures a product that is supplied to the other party, their economic role is different. For example, the owner of a trademark who wants to put in the market a product bearing its trademark may do so in three different ways:

1. It may manufacture and sell the product to a distributor of the final customer.
2. It may not manufacture the product, but subcontract its manufacturing to a subcontractor, obtain the product from the subcontractor and then sell it to a distributor or the final customer.
3. It may grant a trademark license (not a technology transfer agreement), under which the licensee will manufacture and sell the product.

In the current situation, Case 1 falls under the vertical legal framework. Case 2 does not fit well into the vertical legal framework and is covered by a Subcontracting Notice that was originally

⁹ Commission Regulation No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices, 2010 O.J. (L102) 1.

¹⁰ Eur. Comm’n, Guidelines on Vertical Restraints, 2010 O.J. (C 130) 1.

intended to cover both horizontal and vertical subcontracting manufacturing agreements. Moreover, Case 3 is in a legal limbo where vertical provisions are applied by analogy.

It can be argued that subcontracting agreements and trademark licenses have more features in common with other production agreements (including horizontal production agreements, particularly unilateral specialization) and that all types of production/manufacturing agreements (not falling in the category of technology licenses) could have a common backbone of regulation, regardless of whether they are horizontal or vertical. A good example of this approach is precisely the Block Exemption Regulation for Technology Transfer Agreements,¹¹ which covers both agreements between competitors and non-competitors.

From this perspective, it may be worth exploring whether it would be possible to create a common set of rules for all types of agreements whereby company A entrusts company B with the manufacturing of a product with certain features or under certain specifications, needs or requirements of company A (let alone under the trade mark of company A), be it vertical or horizontal, which do not constitute technology transfer agreements.

C. *Intellectual Property Rights*

In any case, it would be useful for the SBER and the HGL to include provisions on the use of intellectual property and/or know-how of one party by the other party in the manufacturing of the products, along the lines of the Subcontracting Notice, duly modernized, also taking into account the specific challenges of technology markets.

IV. **Information Sharing**

While the HGL contains several specific provisions on information exchange that merit comment and possible revision/updating, as hereafter explained, there is an important preliminary question: is it appropriate at this time to undertake a revision of the HGL? The HGL, whether as a whole or focusing specifically on information exchange, make countless references to the pertinent “relevant market” within which a particular horizontal cooperative agreement is to be assessed, including in relation to information exchanges, production agreements, joint purchasing, etc. The HGL rely upon the Commission’s 1997 notice on the definition of relevant market for purposes of Community law.¹² On December 9, 2019, the EC announced that it plans to review and revise this notice on the definition of relevant market.¹³ Given the central importance of market definition to the assessment of horizontal cooperation agreements, the

¹¹ Commission Regulation No 316/2014 of 21 March 2014 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of technology transfer agreements, 2014 O.J. (L 93) 17.

¹² Commission notice on the definition of relevant market for the purposes of Community competition law, 1997 O.J. (C 372) 5.

¹³ Margrethe Vestager, *Defining Markets in a New Age* (Dec. 9, 2019) *available at* https://ec.europa.eu/commission/commissioners/2019-2024/vestager/announcements/defining-markets-new-age_en. In her speech, Commissioner Vestager said that “a lot has changed since” the 1997 notice. *Id.* “Changes like globalization and digitisation mean that many markets work rather differently from the way they did, 22 years ago.” *Id.* Indeed, there is increasing discussion whether the analytical formula for market definition of demand and supply substitutability as well as the corollary SSNIP test remain sufficient. Some question whether market definition is always necessary in assessing, for example, a proposed merger of two firms that are each other’s closest substitutes. Further, one wonders whether competition in the electronics sector, for example, depends less on responses to price increases and more on vertical foreclosure.

Sections recommend that the EC defer revision of the HGL until the new relevant market standards are established.

In addition to the EC's proposed review/revision of the definition of a relevant market, there is another important consideration in approaching revision of the HGL. As underscored by the 2017 *Intel* decision of the European Court of Justice (ECJ), European competition law must focus on competitive effects rather than formalistic predispositions.¹⁴ Thus, *Intel* requires the EC and national courts to assess in a much more rigorous and granular way the actual economic consequences in a marketplace of conduct challenged as anticompetitive. While the *Intel* decision dealt with an alleged abuse of dominance under Article 102 TFEU, the Court's mandate reads broadly. The ECJ's emphasis on economic analysis applies as much to the interpretation of the competitive consequences of horizontal information exchange under Article 101 TFEU as it does to an abuse of dominant position challenged under Article 102 TFEU. Thus, the Sections submit that any revision of the HGL should take this important legal change into account.

In any event, the appropriate analytic framework for assessing the legality of information exchanges remains by and large the same today as in 2011: does the agreement, decision or concerted practice in question restrict competition whether by producing collusive outcomes, anti-competitive foreclosure or restrictive effects on competition? It remains to be seen whether the HGL focus on agreements, decisions or concerted practices that have, as their object, the restriction of competition will retain the same importance after *Intel*'s emphasis on the centrality of anticompetitive effects.

Similarly, the HGL's standards for assessing any possible restriction on competition under Article 101 TFEU—market characteristics (concentration, transparency, non-complex, stable and symmetric)—remain as pertinent as before. So too is the HGL's overall enumeration of essential characteristics of the information exchange (i.e., the strategic character of the information being exchanged, such as prices, discounts, customer lists, production costs, turnover, sales, capacities, investment, etc.). Further, the HGL set forth the criteria for competitive assessment (market coverage, aggregation, age of data, frequency of exchange and the public/non-public nature of the data, etc.). The Sections believe that the HGL have served well countless trade associations, for example, that have developed and implemented lawful and useful statistical data and benchmarking programs for their industries.

Nevertheless, when the EC undertakes a review and revision of the HGL on information exchange, it will be important to consider carefully at least several important issues that need clarification, including the age of the data exchanged and its public/private nature. While exchange of future strategic information (e.g., prices) remains properly problematic, the Sections believe the HGL's current "bright line" for when data becomes "historic" (and, thus, presumably exchangeable), should be reconsidered.¹⁵ In addition, the HGL's efforts to articulate when information becomes "public" and, how such public information may be exchanged require clarification as well.¹⁶

¹⁴ Case C-413/14 P, *Intel Corp. Inc. v. Comm'n*, ECLI:EU:C:2017:632 (CJ Sept. 6, 2017).

¹⁵ HGL, *supra* note 7, ¶ 90. The Guidelines state "data can be considered as historic if it is several times older than the average length of contracts in the industry." *Id.* This seems too restrictive.

¹⁶ *Id.* ¶¶ 92-94 and ¶109.

V. Joint Purchasing

The HGL provide guidance on evaluating the competitive effects of joint purchasing agreements. The HGL recognize that competitive concerns relating to joint purchasing arrangements generally arise where the parties have market power in either the selling or purchasing markets and that parties are unlikely to have market power where their combined market shares do not exceed 15% in these markets. The U.S. Federal Trade Commission and Department of Justice have established higher safety zones for competitor collaborations. In their 2000 *Antitrust Guidelines for Collaborations Among Competitors*, the agencies state that they will generally not challenge collaborations where the parties account for 20% or less share in the relevant market or markets.¹⁷ In addition, the U.S. 1996 *Statements of Antitrust Enforcement Policy in Health Care* state that the agencies will generally not challenge joint purchasing agreements among health care providers where “(1) the purchases account for less than 35 percent of the total sales of the purchased product or service in the relevant market; and (2) the cost of the products and services purchased jointly accounts for less than 20 percent of the total revenues from all products or services sold by each competing participant in the joint purchasing arrangement.”¹⁸

The Sections respectfully recommend that the EC increase its safe harbor for joint purchasing agreements to at least 20% combined market share in the selling or purchasing markets because a purchasing arrangement whose members’ market share is 20% or less is unlikely to have a substantial adverse effect on competition.¹⁹

The Sections also urge the EC to consider incorporating additional guidance on how to distinguish between legitimate joint purchasing agreements and buyer cartels. According to the HGL, joint purchasing agreements that involve the fixing of prices can restrict competition by object. Joint purchasing agreements that do not restrict competition by object are analyzed for their effect on competition under Article 101(3) TFEU. Joint purchasing arrangements are generally recognized to be “designed to increase economic efficiency and render markets more, rather than less, competitive.”²⁰ The Sections believe that some restraints, including under certain circumstances those on price, may be necessary to realize the procompetitive benefits accompanying joint purchasing agreements. The HGL are unclear about how the degree of integration of buyer activity or other factors that distinguish an agreement on price affect the antitrust analysis for categorizing a joint purchasing arrangement as a legitimate, procompetitive collaboration as opposed to a cartel. The Sections respectfully recommend that the EC (i) clarify its approach for evaluating when joint purchasing arrangements that involve an agreement on price would be evaluated under Article 101(3) TFEU for their likely effects on competition; and

¹⁷ U.S. DEP’T OF JUSTICE & FED. TRADE COMM’N, ANTITRUST GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS § 4.2 (2000), available at https://www.ftc.gov/sites/default/files/documents/public_events/joint-venture-hearings-antitrust-guidelines-collaboration-among-competitors/ftcdojguidelines-2.pdf. The safe harbor does not apply to agreements that are per se unlawful, would not require a detailed market analysis, or would be analyzed as a merger. *Id.*

¹⁸ U.S. DEP’T OF JUSTICE & FED. TRADE COMM’N, STATEMENTS OF ANTITRUST ENFORCEMENT POLICY IN HEALTH CARE 54-55 (Aug. 1996), available at <https://www.justice.gov/sites/default/files/atr/legacy/2007/08/15/1791.pdf>.

¹⁹ See, e.g., U.S. Dep’t of Justice, Business Review Letter to Nat’l Cable Television Cooperative, Inc. (Oct. 17, 2003), available at <https://www.justice.gov/atr/public/busreview/201379.pdf> (referencing the 35% share threshold in concluding that joint negotiations for purchases of cable television programming will not have anticompetitive effects).

²⁰ *Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co.*, 472 U.S. 284, 295 (1985) (quoting *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 20 (1979)).

(ii) consider relevant in its analysis the nature and purpose of the restraint as well as any procompetitive efficiencies.

VI. Standardization Agreements

The HGL include a detailed chapter on the assessment of standardization agreements, i.e. agreements that seek to define the technical or quality requirements with which products, production processes, services or methods may comply. Section 7 of the HGL concentrate specifically on standardization agreements involving IPRs that give rise to a de facto industry standard.

In a number of respects the HGL recognize the dynamic competition-enhancing nature of IPRs and reaffirm that standard setting and IP-related conduct only exceptionally raise anticompetitive concerns that, in any event, require a rigorous assessment before a violation can be established with sufficient certainty.

In particular, the HGL presume that standardization agreements facilitate technical interoperability and compatibility and give rise to efficiencies that are passed on to consumers. The HGL also make clear that holding or exercising standard-essential patents (SEPs) does not necessarily equate to the possession of market power. In addition, the HGL 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 HGL 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 Sections consider that these statements of principle provide valuable and helpful guidance that should be maintained in any revised version of the HGL. Similarly, the Sections generally agree with the following three observations included in the HGL.

First, agreements that form part of a broader exclusionary agreement and agreements that use the disclosure of licensing terms to collude constitute infringements by object. Second, agreements in which participation in standard-setting is unrestricted and the procedure for adopting the standard in question is transparent, and standardization agreements that contain no obligation to comply with the standard and provide access to the standard on fair, reasonable and non-discriminatory (FRAND) terms, will normally not restrict competition. Third, standards where IPR is licensed royalty-free, or that face several competing standards or effective competition from non-standardized solutions are unlikely to produce negative effects on competition.

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

First, the HGL do not provide clear guidance with respect to the assessment of standardization agreements that do not require IPR holders to offer FRAND commitments. The

HGL suggest that such agreements may infringe Article 101 TFEU, while also acknowledging that this will depend on the likely effects on the markets concerned. The Sections respectfully suggest that any revised HGL make clear that standardization agreements that do not provide for FRAND commitments do not necessarily infringe Article 101 TFEU.

Second, and relatedly, the Sections note 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. While the Sections are well aware of the current debate on this issue in a number of jurisdictions, they consider that it would be untimely for the EC to mandate particular FRAND licensing models in the future Guidelines and, in particular, to suggest that IP owners must offer licenses to any party that expresses an interest.

Third, the HGL 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 Sections appreciate the complexities involved in determining whether royalty rates offered for SEPs are FRAND, they believe that the HGL 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 HGL.

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.