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

October 4, 2021

The views expressed herein are presented on behalf of the Antitrust Law and International Law Sections. They have not been reviewed or approved by the House of Delegates or the Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the position of the Association.

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 stakeholder consultation document on the review of the R&D Block Exemption Regulation (R&D BER), the Specialisation Block Exemption Regulation (Specialisation BER) and the Guidelines on Horizontal Cooperation Agreements (Horizontal Guidelines).

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 9,000, 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 11,000, 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's fifty-six substantive committees 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 international legal policy.[2] With respect to competition law and policy

[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/.

[2] *About Section Policy*, AM. BAR ASS'N, *available at* https://www.americanbar.org/groups/international_law/policy/about/.

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.[4]

I. Executive Summary

The Sections commend the European Commission (the Commission) for seeking comments on the review of the R&D BER, the Specialisation BER (collectively, Horizontal BERs or HBERs) and the Horizontal Guidelines and agree with the Commission that horizontal cooperation in areas such as R&D, production, purchasing, commercialization or standardization between actual or potential competitors may in some cases give rise to restrictions of competition, but may also give rise to significant efficiencies, in particular if the companies involved combine complementary skills or assets.

The Sections support the majority of the proposed revisions to the R&D and Specialisation BERs and offer comments with respect to topics that they believe merit new or updated guidance in the revised Horizontal Guidelines.

In particular, the Sections support a widening of the R&D block exemption by removing the conditions in the R&D BER of full access to the results of the R&D and access to pre-existing know-how across the board. As these changes would also benefit SMEs, research institutes and academic institutes, the Sections believe that no specific rules for these entities are warranted. The Sections also believe that including horizontal subcontracting with a view to expanding production may have beneficial effects.

In relation to specialization agreements, the Sections support expanding the scope of the Specialisation BER to otherwise eligible unilateral or reciprocal specialisation agreements under which the parties agree that only one of them will distribute the contract products in the future. The Sections also 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 pro-competitive unilateral specialisation agreements. Similarly, the Sections believe that including horizontal subcontracting with a view to expanding production 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, for example regarding the question when the exchange of historic information can be deemed to be no longer potentially objectionable. The Sections also support additional guidance regarding the exchange of information in dual distribution settings and suggest

[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] 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 (Feb. 11, 2020), *available at* https://www.americanbar.org/content/dam/aba/administrative/antitrust_law/comments/february-2020/comment-eu-21120-combined.pdf [hereinafter ABA February 2020 comments].

that the future Horizontal Guidelines acknowledge that, absent the potential for collusion on downstream markets, the exchange of information required for a proper distribution of the contract products remains permissible.

In relation to standardization agreements, the Sections welcome additional guidance and propose certain areas of clarification for participating in standard development activities.

With regard to joint purchasing agreements, the Sections suggest that the Commission consider incorporating additional guidance on how to distinguish between legitimate joint purchasing agreements and buyer cartels.

The Sections note that the current lack of guidance may discourage businesses to enter into procompetitive horizontal cooperation agreements that pursue sustainability objectives and support a new section in the revised Horizontal Guidelines on horizontal collaboration designed to foster sustainability goals.

II. Introduction

The Sections note that the Commission is consulting stakeholders to assess a number of policy options for a revision of certain areas of the HBERs with the aim to have revised rules in place by December 31, 2022, when the current rules will expire.

In its consultation document the Commission observes that the policy options under consideration are aimed at improving the HBERs. The proposed policy options can be grouped into three categories:

(i) Options aimed at encouraging participation of SMEs, research institutes and academic bodies in R&D and production and specialization agreements that do not raise competition concerns. These options include *inter alia* the introduction of specific categories of R&D and/or specialization agreements that may benefit from the block exemption regulations;

(ii) Options to encourage the conclusion of R&D agreements by all types of market participants, including two options relating to the conditions for exemption; and

(iii) Options clarifying the scope and the conditions for exemption under the Specialization BER. The four options put forward in this category include the expansion of the definition of unilateral specialization; the inclusion of horizontal subcontracting agreements and the conditions for exemption as regards joint distribution for unilateral or reciprocal cooperation agreements.

In addition, the consultation document solicits input on how the Horizontal Guidelines may be improved. In particular, the Commission raises a number of questions in relation to topics that are either not dealt with in the current Horizontal Guidelines, such as agreements that pursue sustainability objectives, or that may require additional or updated guidance. These types of agreements include horizontal agreements involving information exchange, data pooling and data sharing, as well as information exchanges in dual distribution scenarios, standardization agreements, joint purchasing agreements, and commercialisation agreements.

Horizontal cooperation in areas such as R&D, production, purchasing, commercialization or standardization between actual or potential competitors (or between companies that are active in the same product market, but in different geographic markets without being potential competitors) may in some cases give rise to restrictions of competition but may also give rise to significant efficiencies, in particular if the companies involved combine complementary skills or assets.

The Sections agree with the Commission that the HBERs are useful legislative instruments that may provide companies that consider entering into R&D and specialization agreements sufficient certainty that their agreements do not raise anti-competitive concerns under Article 101 TFEU. However, the Sections believe that in a number of respects the HBERs are complex, lack clarity and fail to cover business transactions that are unlikely to raise any competitive concerns.

For example, the Sections would welcome an extension of the scope of the R&D BER to early stages of (basic) R&D where any prospect of commercialization is remote and no determination of R&D poles is reasonably possible. The Sections also believe that the requirements to provide "full access" to R&D results and access to "pre-existing know-how" may create disincentives for companies to enter into R&D projects that may, on balance, be pro-competitive. In addition, the Sections have previously recommended that the market share threshold of twenty-five percent for R&D agreements be increased.[5]

Below, the Sections will provide a brief overview of the treatment of horizontal agreements between competitors under U.S. law (Section III), followed by comments in relation to the options suggested for SMEs, the R&D and Specialization BERs (Section IV) and topics that lend themselves for additional guidance in the Horizontal Guidelines (Section V).

III. Treatment of R&D Collaboration and Specialization Collaboration under U.S. Law

A. Research and Development Collaborations

Research and development collaborations among competitors are generally viewed as potentially pro-competitive and are typically subject to review under the rule of reason. U.S. courts and the antitrust agencies recognize that such arrangements have the potential to lower innovation costs and bring new technologies or processes to market more quickly through the combination of complementary assets and know how.[6] However, in the U.S. the agencies have challenged research collaborations over concerns that they reduced incentives for independent innovation or included allegedly overbroad restrictions on research outside of the venture.[7]

The U.S. Department of Justice and Federal Trade Commission have stated that "[a]bsent extraordinary circumstances" they will generally not challenge a legitimate research and

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[5] *See* Section I.3 of Joint Comments of the American Bar Association's Sections of Antitrust Law and International Law Response to Questionnaire Issued by the European Commission in connection with its review of the Current Regime for the Assessment of Horizontal Cooperation Agreements (Jan. 2009) ("2009 Comments"), *available at* https://www.americanbar.org/content/dam/aba/administrative/antitrust_law/v12/comments_echorizontal.pdf

[6] FED. TRADE COMM'N & U.S. DEP'T OF JUSTICE, ANTITRUST GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS § 3.31(a) (Apr. 2000), *available at* https://www.ftc.gov/sites/default/files/documents/public_events/joint-venture-hearings-antitrust-guidelines-collaboration-among-competitors/ftcdojguidelines-2.pdf [hereinafter Competitor Collaboration Guidelines]; Addamax Corp. v. Open Software Found., Inc., 152 F.3d 48 (1st Cir. 1998).

[7] *See e.g.*, United States v. Verizon Commc'ns, Inc., 959 F. Supp. 2d 55, 60 (D.D.C. 2013).

development competitor collaboration "on the basis of effects on . . . innovation" where there are three or more research efforts independent of the collaboration that have the assets and incentives to engage in "R&D that is a close substitute for the R&D activity of the collaboration."[8] On the other hand, non-ancillary restrictions among research collaborators—i.e., ones that fix prices or reduce output that are not reasonably related to a legitimate research collaboration or are reasonably necessary to accomplish its procompetitive purposes—may be challenged as per se illegal.[9]

The National Cooperative Research and Production Act of 1993 (NCRPA) requires rule of reason treatment for qualifying research joint ventures.[10] Qualifying research includes "basic" research as well as joint product development.[11] Activities that are likely to restrict competition beyond the scope of the venture among the joint venture parties—e.g. exchanging competitively sensitive information not necessary to effectuate the venture or agreements to restrict competition on products outside the venture—are excluded from the statute's requirement of rule of reason treatment.[12]

B. Specialization/Joint Production Collaborations

Production collaborations formed for the purposes of lowering manufacturing or input costs or producing higher quality products are generally viewed as procompetitive and are typically reviewed under the rule of reason.[13] Collaborations presumed to be potentially procompetitive will generally involve the creation of new facilities or other integration of assets.[14] Certain production joint ventures are afforded rule of reason treatment under the NCPRA, although restrictions on competition among the participants can remove the collaboration from coverage under the statute.[15] Reasonably necessary restrictions on competition related to the product of the collaboration may be treated as ancillary restraints whether or not they are covered under the NCPRA.[16] Non-ancillary restrictions among production collaborators—i.e., ones that fix prices or reduce output that are not reasonably related to a legitimate research collaboration or are reasonably necessary to accomplish its procompetitive purposes—may be challenged as per se illegal.[17]

Specialization agreements—i.e., agreements under which one competitor agrees to source solely from its competitor and refrain from independent production—may be challenged as per se illegal or reviewed under the rule of reason depending on the broader circumstances. The U.S. antitrust agencies have taken the position that specialization agreements that are not part of legitimate integration may be challenged under the per se rule, even if they result in cost savings to the parties individually.[18] U.S. courts have rejected per se treatment of agreements to refrain

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8 Competitor Collaboration Guidelines, *supra* note 5, § 4.3.
9 *Id.*, § 3.2.
10 15 U.S.C. § 4302.
11 15 U.S.C. § 4301(a)(6).
12 Competitor Collaboration Guidelines, *supra* note 5, § 3.31(a).
13 *Id.*
14 *Id.*, Appendix Examples 5 and 6.
15 15 U.S.C. §§ 4301-02.
16 Competitor Collaboration Guidelines, *supra* note 5, § 3.2; In re Sulfuric Acid Antitrust Litig., 703 F.3d 1004 (7th Cir. 2012).
17 Competitor Collaboration Guidelines, *supra* note 5, § 3.2.
18 *Id.*, Appendix Example 5.

from independent production where they were reasonably necessary to a broader, legitimate collaboration with potential pro-competitive benefits.[19]

The U.S. antitrust agencies have stated that they are unlikely to challenge a production or specialization collaboration that is not subject to per se treatment (or "quick look" review) if the parties to the collaboration have a combined share of less than twenty percent of the affected relevant product market.[20]

IV. Suggested Options

In Section 5.1 of its consultation document, the Commission suggests several options to encourage the participation of SMEs, research institutes and academic bodies in R&D and specialization agreements.

The Sections welcome the Commission's initiative to stimulate research institutes to enter into collaborative R&D. However, they question whether this objective is best achieved by introducing a specific category of R&D and specialization agreements that may benefit from the block exemption regulations (Options 2 and 3) or by clarifying the definition of competing undertakings (Option 4).

As discussed below, the Sections support a widening of the R&D block exemption by removing the conditions in the R&D BER of full access to the results of the R&D and access to pre-existing know-how across the board. As these changes would also benefit SMEs, research institutes and academic institutes, the Sections believe that no specific rules for these entities are warranted.

In Section 5.2 of the consultation document, the Commission suggests two policy proposals aimed at loosening the conditions for exemption, i.e., removing (or allowing for limitations) to the conditions of (i) full access to the results of the R&D cooperation and (ii) access to pre-existing know-how that is indispensable for the purposes of exploitation of the R&D results. The Sections support both proposals.

In particular, the Sections note that the current conditions set out in Articles 3(2) and 3(3) may create a disincentive to enter into a pro-competitive R&D agreement.[21] 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 from one party that the other party be given "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 pro-competitive. In that 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."

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[19] 703 F.3d at 1011-13.

[20] Competitor Collaboration Guidelines, *supra* note 5, § 4.2 and Appendix Example 6.

[21] 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* 2009 Comments, *supra* n.5.

Similarly, 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 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."

The Sections submit 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. However, the Sections respectfully submit that the parties' incentives will generally be aligned to exploit the results of their collaboration and bring about the associated efficiencies.

The abovementioned concerns apply to R&D projects involving commercial parties and research institutes, SMEs, and other parties alike. As a result, the Sections do not believe that a relaxation of these two conditions should apply only to research institutes and similar entities.

Section 5.3 of the consultation document suggests four options regarding a revision of the Specialization BER. The proposed three potential changes relate to the expansion of the definition of unilateral specialization (Option 2); horizontal subcontracting (Option 3) and joint distribution for unilateral or reciprocal cooperation agreements (Option 4).

The Sections support Options 2, 3 and 4.

In relation to **Option 2** (expansion of unilateral specialization), the Sections observe that the proposed expansion of the definition of unilateral specialization of Article 1(1)(b) to include agreements concluded between more than two parties may strengthen the incentives of parties to consider pro-competitive unilateral specialization agreements between parties active on the same product market, where one party agrees to 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 believe 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.

Consider, for example, a contemplated investment in additional production capacity. It is conceivable that the additional demand necessary to justify the investment can be secured only if two or more companies agree to purchase the contract products from the producing party, which in turn agrees to carry out the investment. If the parties cumulatively fall below the market share threshold, the Sections do not believe that such a multi-party agreement would inherently pose greater risk to competition than a unilateral specialization agreement between two parties. The Sections believe that the extension to multi-party agreements does not, by itself, increase the risk of improper collusion and market allocation and that the existing safeguards are sufficient to mitigate these risks.

With regard to **Option 3** (horizontal subcontracting), the Sections believe that including horizontal subcontracting with a view to expanding production may have beneficial effects.

As the Sections have noted in their February 2020 comments, one of the areas in which the current framework could be clarified is in relation to subcontracting agreements. The interface between the Horizontal Guidelines 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) may not be entirely clear and there is likely opportunity for a more consistent approach.[22]

According to paragraphs 153 and 154 of the Horizontal Guidelines, (i) the Horizontal Guidelines apply to all forms of joint production agreements and horizontal subcontracting agreements while (ii) vertical subcontracting agreements are not covered by the Horizontal Guidelines but by the Vertical Cooperation Guidelines (VGL) (and Vertical Block Exemption Regulation (VBER)) and the Subcontracting Notice.

On its terms, the Subcontracting Notice covers all forms of subcontracting agreements, both horizontal and vertical. However, paragraph 153 of the Horizontal Guidelines may be read to give precedence to the Horizontal Guidelines alone, rendering Subcontracting Notice applicable only to vertical subcontracting agreements.

The Sections do not see any substantive reason for not including in the scope of the Specialisation BER horizontal sub-contracting agreements with a view to expanding production. Under paragraph 169 of the Horizontal Guidelines, these agreements are already assessed today in a manner similar to agreements falling within the scope of the Specialisation BER. Moreover, the Sections believe there are no substantive reasons to exclude sub-contracting agreements with a view to expanding production from the benefits of the Specialisation BER. In most situations, subcontracting agreements raise similar competitive risks as unilateral specialization agreements, which are covered by the Specialisation BER. It would therefore seem appropriate to treat both types of agreements in the same way.

In relation to **Option 4** (joint distribution), the Sections respectfully submit the following comments. According to the current text of the Specialisation BER, specialization agreements are only covered where they provide for supply and purchase obligations or joint distribution, i.e., the situation where the parties (i) carry out the distribution of the contract products by way of a joint team, organization or undertaking; or (ii) appoint a third-party distributor on an exclusive or non-exclusive basis, provided that the third party is not a competing undertaking. The Specialisation BER does not cover distribution of the contract products by only one party.

The Sections support expanding the scope of the Specialisation BER to otherwise eligible unilateral or reciprocal specialisation agreements under which the parties agree that only one of them will distribute the contract products in the future. These agreements currently fall outside the Specialisation BER because entrusting one of the parties with the distribution of the contract products does not qualify as "joint distribution" in the sense of Article 1(q) Specialisation BER. However, Article 1(q) covers scenarios where the parties cease their existing separate distribution

[22] 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. *See* ABA February 2020 Comments, *supra* note 4.

of the contract products while entrusting distribution to a joint venture or a third party that is not a competitor. Whether one of the parties distributes or a joint venture/third party distributes the contract products, the result for customers in both cases is identical: they will face a single supplier where two suppliers were active prior to the agreement. It is not clear why only the second category of agreements, where distribution is entrusted to a joint venture or a third party, is covered by the Specialisation BER. Accordingly, the Sections believe be adequate to expand the Specialisation BER to unilateral or reciprocal specialisation agreements that entrust distribution to one of the parties.[23]

V. Other Areas for Review

The Sections support the Commission's suggestion that the Horizontal Guidelines may be improved in relation to certain 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 Commissions interpretation of Articles 101(1) and (3) TFEU. Below, the Sections will briefly comment on information exchange, standardization agreements, and horizontal agreements with sustainability objectives.

A. Information Exchange

In their February 2020 comments, the Sections made two observations regarding a revision of the information exchange section in the Horizontal Guidelines (paragraphs 55-110). First, they recommended that the Commission defer revision of the Horizontal Guidelines until the new relevant market standards under the Commission's 1997 market definition notice are established. Second, with reference to the 2017 *Intel* judgment,[24] they observed that the judgment requires the Commission and national courts to assess in a more rigorous and granular way the economic effects on the market where the challenged anticompetitive conduct occurs. This also applies to the exchange of information.

The exchange of competitively sensitive information can result in anti-competitive effects. Nonetheless, the Sections also 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. Similarly, data pooling and sharing often allow companies to develop better products and services and to compete more effectively.

The Sections support a revision of Section 2 of the 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. The Sections do not recommend addressing situations where the absence of data sharing would potentially be objectionable under Article 102 TFEU.

The Sections suggest that the Commission (re-)consider the age of the data exchanged and its public/private nature as indicators for potentially problematic conduct. While exchange of

[23] This would also bring the Specialisation BER in line with the R&D BER which provides that a situation where only one party produces and distributes the contract products on the basis of an exclusive license granted by the other party as "joint production" within the meaning of Articles 1(1)(m)(iii), 1(1)(o) and 3(5) R&D BER.

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

future strategic information (e.g., prices) should be considered problematic, the Sections believe the Horizontal Guidelines' current "bright line" for when data becomes "historic" (and, thus, presumably exchangeable) should be reconsidered.[25]

With respect to information exchange in dual distribution settings, the Sections suggest that the exchange of information required for a proper distribution of the contract products should remain lawful and permissible. The future Horizontal Guidelines should clarify that such information exchanges are a priori non-problematic. In light of the efficiencies associated with distribution and other vertical agreements, coupled with the fact that the Commission intends to broaden the VBER regime to include wholesalers and independent importers who are not also active in the downstream market, any new rules should make clear that the primary concern associated with information exchange is the potential for collusion on the downstream (retail) market. In the context of exchange of information in dual distribution settings, such a concern may be related to the supplier's sales to end customers.

B. Standardization Agreements

The Horizontal Guidelines 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 Horizontal Guidelines concentrate specifically on standardization agreements involving IPRs that give rise to collaborative industry standards.

The 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.[26] 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.[27] An effects-based assessment is required before such a violation can be established to determine whether the agreement restricts competition and constitutes a violation of Article 101 TFEU.[28]

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.[29] 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.[30] In addition, the Horizontal Guidelines explicitly acknowledge that different types of companies with different business models, incentives and interests in standardization and standard-setting organizations exist.[31] 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

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[25] The current Horizontal Guidelines seem too restrictive, stating that "data can be considered as historic if it is several times older than the average length of contracts in the industry." 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, ¶ 90 [hereinafter 2011 Horizontal Guidelines].

[26] *Id*. ¶ 269.

[27] *Id*. ¶¶ 263-266, 268.

[28] *Id*. ¶¶ 292-299.

[29] *Id*. ¶ 263.

[30] *Id*. ¶ 269.

[31] *Id*. ¶ 267.

to the economic value of the IPR[32] 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.[33]

The Sections consider that these statements of principle provide valuable and helpful guidance that should be maintained in any revised version of the Horizontal Guidelines.

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

First, in the context of paragraphs 285 and 294 of the Horizontal Guidelines, the Sections are aware of the current debate about where in the supply chain licensing should or should not take place. The Sections recommend that the Commission clarify that standard development organizations (SDOs) may address this issue, as needed, in their respective IPR policies, subject to a by effect-review under Article 101.

Second, the Sections respectfully believe that the Horizontal Guidelines are appropriately concerned with the application of Art. 101 TFEU, including guidance regarding how to structure and interpret clear and balanced IPR policies of SDOs, and not generally with potential abuse of dominance. Some of the current debates surrounding the licensing of SEPs similarly implicate the interpretation and application of Article 102 TFEU. Although there are diverging substantive views on these questions, the Sections encourage the Commission to weigh carefully whether, and if so how, the Horizontal Guidelines address this issue.

Third, the current Horizontal Guidelines, in particular paragraphs 280-281, suggest that participation in standard setting should be unrestricted. However, the Sections note that the requirement of "unrestricted participation" may give rise to uncertainty and may make it difficult to set meaningful and reasonable conditions for participation. The Sections take the view that criteria for participating in standards development activities can—while remaining objective and non-discriminatory—legitimately be based on substantive merits of potential participants that are reasonably related to the development of the standards at issue and note that the Commission itself has already acknowledged that principle, in particular in its *Ship Classification* decision[34] and the *X/Open Group* case.[35] The Sections therefore suggest that the Horizontal Guidelines be clarified in this respect. The Sections also recommend that the Guidelines make clear that parties to private standard setting, for example on the basis of prior joint R&D projects, would not normally be subject to any requirement of "unrestricted participation."

Finally, the Sections observe that additional guidance would be appropriate in relation to "Special Interest Groups" (SIGs) composed of SDO members that operate with restricted membership to manipulate consensus-based standards-development activities in ways that may harm competition, similar to how abuse of the standard-setting process has been found to harm

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32 *Id*. ¶ 289

33 *Id*. ¶ 269 & n2, 287, 290

34 *See* Case 39.416—Ship Classification, Comm'n Decision, ¶ 36 (Oct. 14, 2009) (summary at 2010 O.J. (C 2) 5), *available at* https://ec.europa.eu/competition/antitrust/cases/dec_docs/39416/39416_2325_1.pdf.

35 *See* Case IV/31.458—X/Open Group, Comm'n Decision, 1987 O.J. (L 35) 36, ¶ 46.

competition in other contexts.[36] The Sections suggest that where members of such SIGs collectively can and do exercise effective control or influence ("dominance") over the standards-development process, such collusive conduct may give rise to concerns under Article 101 TFEU.

C. Joint Purchasing Agreements

The Horizontal Guidelines provide guidance on evaluating the competitive effects of joint purchasing agreements. The Horizontal Guidelines 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 fifteen percent in these markets.

As noted in the Sections' February 2020 comments, 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 twenty percent or less of the relevant market(s).[37] 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."[38]

The Sections respectfully recommend that the Commission increase its safe harbor for joint purchasing agreements to at least twenty percent combined market share in the selling or purchasing markets because a purchasing arrangement whose members remain below this threshold is unlikely to have a substantial adverse effect on competition.[39]

The Sections also urge the Commission to consider incorporating additional guidance on how to distinguish between legitimate joint purchasing agreements and buyer cartels. According to the Horizontal Guidelines, 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."[40] 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 Horizontal Guidelines are unclear about how the

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[36] *See, e.g.*, Letter from Makan Delrahim, Ass't Att'y Gen., U.S. Dep't of Justice to Timothy Cornell, Esq. Re: GSMA Business Review Letter Request (Nov. 27, 2019), *available at* https://www.justice.gov/opa/press-release/file/1221181/download; Allied Tube & Conduit Corp. v. Indian Head, 486 U.S. 492, 500 (1988).

[37] Competitor Collaboration Guidelines, *supra* note 5, § 4.2. 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*.

[38] 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/atr/page/file/1197731/download.

[39] *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).

[40] 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)).

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

Finally, the Sections are skeptical that cooperation between users of standard essential technology in Collective Licensing Negotiations Groups (LNGs) would readily give rise to lower transaction cost and other efficiencies. At minimum, such initiatives require careful assessment.[41]

D. Agreements That Pursue Sustainability Objectives

The Sections support the 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 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 others, which consumers must be shown to benefit, how to weigh future cost decreases against current cost increases, and how to quantify sustainable benefits. Given this uncertainty, businesses may forego sustainability collaborations out of fear of antitrust scrutiny. Accordingly, the Sections recommend that the Commission adopt 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.

In its recent August 11, 2021 report *Sustainability and Competition Law*, ABA Antitrust Law Section's International Developments and Comments Task Force set out detailed views and suggestions on sustainability agreements and other business transactions.[42] The Commission is kindly referred to this report.

Finally, the Sections welcome recent statements made in relation to sustainability initiatives, in particular the notion that "sustainability benefits can be assessed as qualitative efficiencies," and that "sustainability benefits do not necessarily need to take the form of direct or immediately noticeable product quality improvement or cost savings."[43] However, they recommend that the Commission provide guidance on the methodology that businesses should

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[41] 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" (E03600), Contribution to the Debate on SEPs 168 (Jan. 2021), *available at* https://ec.europa.eu/docsroom/documents/45217. However, as SEP licenses must comply with FRAND principles, the joint purchase of SEP licenses may not be readily comparable to the purchase of other inputs.

[42] Am. Bar Ass'n, Sustainability and Competition Law, Report of the International Developments and Comments Task Force (Aug. 11, 2021), *available at* https://www.americanbar.org/content/dam/aba/administrative/antitrust_law/comments/august-2021/comments-82621-greece.pdf.

[43] *Competition Policy in Support of Europe's Green Ambition*, COMPETITION POLICY BRIEF NO. 2021-01 (Eur. Comm'n), Sept. 2021, at 5-6 *available at* https://ec.europa.eu/competition-policy/system/files/2021-09/Competition%20Policy%20Brief%20-%20Green%20Deal%201-2021_0.pdf.

apply to ascertain whether qualitative sustainability efficiencies outweigh potential negative effects, in particular if the products at issue are offered at a higher price.

The Sections support the notion that "the consumer welfare standard . . . remains at the heart of competition policy."[44]

VI. Conclusion

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

[44] *Id*. at 6.