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## AmCham EU's position on the new proposed rules for horizontal co-operation agreements in the EU

The American Chamber of Commerce to the European Union (**AmCham EU**) welcomes the European Commission's (**Commission**) initiative to consult on the functioning of Commission Regulations No 2658/2000 and 2659/2000 (the **Specialization Block Exemption** and the **R&D Block Exemption**, respectively, and the **Block Exemptions**, collectively) and the Guidelines on the applicability of Article 101 TFEU to horizontal cooperation agreements (**Guidelines**).

AmCham EU notes that the documents included in the current round of consultation factor in several recommendations made in the previous consultation round, for instance regarding guidance on information exchange. There are a number of important areas in which both the Block Exemptions and the Draft Guidelines could still be improved.

This summary briefly sets out AmCham EU's main comments. These comments are further detailed in the attached Information Paper.

### Analytical Framework

- **Harmonization.** AmCham EU believes there is value in harmonised frameworks of analysis for horizontal mergers and cooperation agreements. Analysis of similar situations should produce similar outcomes - for instance, joint ventures should produce similar outcomes under the Merger Regulation and Article 101 TFEU. There is further scope to harmonise the approach to foreclosure as well as with regard to the market share thresholds used in the Block Exemptions and the Guidelines. These should be uniformly set at 25% as there is no economic justification for the use of different thresholds in respect of different horizontal agreements.
- **Avoid Article 101 TFEU guidance to address potential Article 102 TFEU concerns.** The Commission should focus the final Guidelines on horizontal collaboration and remove provisions that are designed to limit possible abuses of dominant positions on the part of firms participating in horizontal collaboration, for example in respect of standardisation.

- **Coordination among joint ventures and their parents.** The new approach excluding the application of Article 101 TFEU is not firmly based on established law. Yet, it is problematic as it might be taken to establish a presumption of liability on the part of the parents of a joint venture company that they jointly control even though each parent company may individually lack the control rights to steer the joint venture’s commercial policy.

### Information Exchange

- **Strengthen the nexus between the economic analysis and legal requirements.** For purposes of Article 101 TFEU, it is important to establish a causal link between an agreement, decision or concerted practice and the requisite harmful coordinated effects. As currently drafted, the framework suggests a slippery slope by which information exchange could be taken to infringe Article 101(1) TFEU with only a very low evidentiary threshold.
- **Further guidance on borderline situations.** Most of the examples involve clearcut cases. Whilst the inclusion of examples is laudable, AmCham EU believes that the inclusion of additional “borderline” examples, perhaps linked to the leading cases, would provide more useful guidance to the business community and its legal advisers.

### R&D Agreements

- **Definitions and scope.** Several definitions are too restrictive, and exclude potentially pro-competitive arrangements. As in its previous submission, AmCham EU suggests to extend the definition of “research and development” to include clinical or laboratory research, studies and testing. The new definition of “specialisation in research and development” should not preclude arrangements whereby one party merely finances or exploits the results, or only contributes existing know-how or IP. The definition of “specialisation in exploitation” is unclear and disadvantages cooperation with non-EU companies in requiring each party to exploit the results of the R&D within the internal market.
- **Condition of equal access in R&D.** AmCham EU believes that the introduction of the condition that each party must have equal access to the results of the R&D raises a number of issues: it introduces doubt over the issue of compensation and excludes, without proper justification, schemes whereby parties agree on unequal compensation schemes reflecting differences in their respective contributions.

## Standardisation Agreements

- **Less prescriptive guidance on standard setting agreements.** The absence of EU case law necessitates a cautious approach to potentially overly prescriptive guidelines. This is especially important where Standard Development Organisations (SDOs) are developing rules that fit the industries affected by their activities. Under such circumstances, a “one size fits all” model is not appropriate. It is also important to include a description of standard setting focusing on what would amount to collusive behaviour rather than focusing on IPRs and licensing. Generally, AmCham EU would welcome a discussion of the pro-competitive aspects of IPRs and licensing.
- **Broader Safe Harbour, additional guidance for other situations.** The current review must be consistent with the Commission’s standardisation policy review and its objective of fostering R&D, innovation and investment and, therefore, competitiveness. In crafting a very restrictive safe harbour, AmCham EU sees a real risk that the Draft Guidelines may steer SDOs towards a particular business model whilst there is no case-law on the potential harm that the safe harbour is seeking to address. On the other hand, regardless of how the safe harbour is defined, additional guidance is needed in respect of situations that fail to meet the relevant requirements.
- **A framework adapted to an international setting.** The Guidelines will not only influence European standard development activities but also international standards bodies, whose standards are implemented in the EU. AmCham would urge the Commission to consider the wider impact of its policies on the international standards development community, especially given that standards are increasingly global in scope.

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*AmCham EU speaks for American companies committed to Europe on trade, investment and competitiveness issues. It aims to ensure a growth-orientated business and investment climate in Europe. AmCham EU facilitates the resolution of transatlantic issues that impact business and plays a role in creating better understanding of EU and US positions on business matters. Aggregate US investment in Europe totalled \$1.2 trillion (€1.24 trillion) in 2008 and currently supports 4.8 million direct jobs in Europe.*

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# Explaining AmCham EU's Position on the New Proposed Rules for Horizontal Co-operation Agreements in the EU

INFORMATION PAPER

25 June 2010

This information paper explains in more detail the recommendations made in the American Chamber of Commerce to the European Union's (**AmCham EU**) position statement on the European Commission's (**Commission**) consultation on the functioning of Commission Regulations No 2658/2000 and 2659/2000 (the **Specialization Block Exemption** and the **R&D Block Exemption**, respectively, and the **Block Exemptions**, collectively) and the Guidelines on the applicability of Article 101 TFEU to horizontal cooperation agreements (**Guidelines**).

## INTRODUCTION

AmCham EU welcomes the Commission's initiative to consult on the functioning of the Block Exemptions and the Guidelines.

AmCham EU believes that one of the main goals of effective competition policy should be to better align competition law enforcement with the objectives of the Europe 2020 Agenda, in particular the stimulation of competitiveness, innovation and growth. It should also provide a lean and simple regulatory framework in the spirit of President Barroso's Political Guidelines for the new Commission and its "*Smart Regulation*" agenda which primarily focuses on cutting red tape to ease the administrative burden on companies. This is all the more important in the current difficult economic situation following the crisis in international financial markets affecting businesses worldwide. In line with the Commission's Communication "*From financial crisis to recovery: A European framework for action*" of October 29th 2008, one of the priorities of the EU must be to use national and EU competition policy to make markets work better, thereby affording consumers with broader product choices and more effective competition taking full advantage of the Single Market. Thus, the EC should support innovation and efficiency-enhancing investments.

AmCham EU notes that the documents included in the current round of consultation factor in several recommendations made in the previous consultation round (e.g. AmCham EU's submission dated 13 February 2009), such as to introduce guidance on information exchange. There are a number of important areas in which both the Block Exemptions and the Guidelines could be further improved to encourage innovation and efficiency while ensuring uniform application of Article 101 TFEU by national courts and competition authorities. This Information Paper proposes improvements in four areas: the Analytical Framework, Information Exchange, Research and Development Agreements and Standardisation Agreements.

## ANALYTICAL FRAMEWORK

**The role of the Block Exemptions and Guidelines.** Horizontal cooperation guidelines gained increased significance with the introduction of the direct application of Article 101(3) under Regulation No 1/2003. Member State judges are increasingly being called upon to undertake analyses that were previously reserved to the Commission. Few of these judges have experience in applying economic-based competition law rules. They are therefore likely to depend heavily on guidance from the Commission, in particular on horizontal guidelines. It is thus imperative that the Guidelines set out a clear analytical framework to ensure consistent application of EU competition law throughout the European Union.

In this regard, AmCham EU welcomes a clear analytical framework for the Guidelines per type of horizontal cooperation agreement, including the analysis of restrictions by object and by effect, although AmCham EU expresses concern about the lack of clarity and certainty in certain sections of the draft, as discussed below. For example, it would be useful to develop the discussion in the Draft Guidelines on classes of cooperation that amount to restrictions of competition by object. In this respect, the only guidance as to research & development (R&D) agreements is that these will be considered as restrictions by object if they are “*a tool to engage in disguised cartel*” (¶ 122). As regards commercialisation agreements, the Commission identifies price fixing as a major competition concern leading to a restriction by object, but when discussing restrictive effects on competition, it states that price fixing can be justified when it is indispensable for the integration of marketing functions (¶¶ 229 and 241).

**Harmonised frameworks of analysis for horizontal mergers and cooperation.** AmCham EU welcomes the Commission’s willingness to adopt a more economic approach to horizontal cooperation agreements, in line with the assessment of horizontal mergers (there are many conceptual parallels in the analysis of the effects that follow from the elimination of competitive constraints whether by way of mergers or agreements). In this regard, it would be useful for the final Guidelines to clarify that analyses of similar situations (e.g. joint ventures) should produce similar outcomes under the Merger Regulation and Article 101 TFEU, so as to avoid arbitrary differences in outcome that are mainly derived from the form of the transaction at issue.

**Harmonisation of market share thresholds in Block Exemptions.** AmCham EU has previously (see submission dated 13 February 2009) suggested that the safe harbour thresholds under the Block Exemptions and in the Horizontal Cooperation Guidelines be set uniformly at 25%. The rationale underpinning this recommendation still holds true: there is no explanation, nor does there appear to be any economic justification for the use of different thresholds in respect of different horizontal agreements. To the extent that market shares are used as proxies for market power, market power is assumed to derive from the parties’ combined market position, not from the category of agreement. Notwithstanding the fact that market shares can by no means on

their own be evidence of market power, there is a strong consensus among economists and competition regulators that market power is extremely unlikely to arise at market shares below 25%.

**Harmonised approach to foreclosure.** First, AmCham EU believes that the circumstances under which foreclosure is likely should be clarified. AmCham EU suggests that the Commission could use the same analytical framework as used in the *Guidelines on the assessment of non-horizontal mergers*, which requires an evaluation of both the ability and the incentives of the parties to foreclose competition. Second, the Guidelines should be revised in line with both the Commission’s *Enforcement priorities in applying Article 102 TFEU to abusive exclusionary conduct by dominant undertakings* and the *Non-Horizontal Merger Guidelines* to make clear that foreclosure as such does not restrict competition unless the foreclosure puts the foreclosing undertakings “*in a position to profitably increase prices to the detriment of consumers*”. In assessing foreclosure, it is important to consider whether the conduct will lead to efficiencies that could increase downstream competition.

**Avoid Article 101 TFEU guidance designed to address potential Article 102 TFEU concerns.** Article 101 and 102 TFEU serve the same over-arching objective of combating anti-competitive conduct, but do so by different means: preventing anticompetitive coordination and anticompetitive unilateral conduct by dominant firms, respectively. Accordingly, meaningful guidance as to the applicability of the prohibitions must take this into account. AmCham EU recommends that the Commission focus the final Guidelines on horizontal collaboration and remove from the draft Guidelines provisions that are designed to address possible abuses of dominant positions on the part of firms participating in horizontal collaboration, especially given the lack of case-law. To the extent that concerns that arise from potentially abusive unilateral conduct, Article 102 TFEU would be the most appropriate tool to address those concerns, but that framework is distinct from the subject matter of the Guidelines.

The section on standard setting agreements in the Guidelines stand out in this respect (¶¶ 277 *et seq*): in an effort to guard against abuses of dominant position, the Guidelines define, having regard to highly specific requirements (these are addressed specifically in the final section of this Information Paper), a safe harbour under Article 101 TFEU for the development of standards in standard development organisations (SDOs). However, given that the apparent objective underpinning this portion of the Guidelines is to limit the scope for possible abuses of a dominant position, rather than the potential liability of SDOs, the safe harbour is necessarily narrowly construed and the guidance offered by the Guidelines may result in SDO rules that do not properly balance the interests of SDO members and their business models. For this reason, AmCham EU recommends that the Draft Guidelines be revised so as to address potential concerns arising from horizontal collaboration only.

**Coordination among joint ventures and their parents.** The Guidelines state that Article 101 TFEU does not apply to agreements between the parents and a joint venture over which the parents jointly exercise decisive influence and

effective control (¶ 11). In support of this proposition, the Guidelines refer to the *Avebe*-case, which concerned the question whether parties collaborating in a joint venture, which did not have legal personality, could be held liable for an infringement of Article 101 TFEU committed by the joint venture. The case involved highly specific facts and the Court did not have reason to consider whether parent-joint venture coordination was outside the scope of Article 101 TFEU. Although the statement in the Guidelines (¶ 11) could be helpful in many situations, *Avebe* does not apply specifically to the facts discussed in this paragraph. The new approach might be taken to establish a presumption of liability on the part of the parent companies of a joint venture that they jointly control even though each parent company may individually lack the control rights to steer the joint venture’s commercial policy. Given that the topic of parent-joint venture coordination has not been viewed as a source of significant legal uncertainty to date, AmCham EU recommends that the relevant paragraph be removed.

**Clarification on counterfactual.** As to the counterfactual, the Guidelines indicate that there will normally be no restrictive effects on competition if the competitors would “*not be able to independently carry out the project or activity*” (¶ 28). However, further guidance would be useful as to how parties should assess whether they are unable to independently carry out any activity, for example in view of access to finance or the requirement or ability to do individual research.

## INFORMATION EXCHANGE

AmCham EU welcomes the inclusion in the Guidelines of a new section on information exchange. This section offers potentially valuable guidance, especially since it forms the only general guidance available on the analysis of information exchange in a horizontal context. AmCham EU recommends that certain clarifications be made before the Guidelines are adopted as final.

**Strengthen the nexus between the economic analysis and legal requirements.** Information exchange does not constitute, and has never constituted, a hard-core “object” restriction. Beyond the rather narrow circumstances in which the EU Courts have held that information exchange involves a restriction by object, the effects of information exchange determine whether the practice is unlawful under Article 101 TFEU.

AmCham EU welcomes the effects-based framework of analysis in the Guidelines. It is natural that this should resemble the framework of analysis for coordinated effects under the Commission’s *Horizontal Merger Guidelines*, although no explicit cross reference is made to those guidelines or the case-law on which they are based. For purposes of Article 101 TFEU, it is however important to establish a causal link between an agreement, decision or concerted practice and the requisite harmful coordinated effects. While the Guidelines do recognise this need by way of introduction (¶ 295), the discussion of effects does not recognise this as clearly as would be required in order to distinguish the framework provided by the Guidelines and the Commission’s *Horizontal*

*Merger Guidelines.* As currently drafted, the framework thus suggests a slippery slope by which information exchange could be taken to infringe Article 101(1) TFEU with only a very low evidentiary threshold to show that the legal elements of that provision have actually been satisfied. This can presumably be avoided by improvements to the drafting of the section on framework of analysis and the examples.

**Clarification of certain key concepts.** Apart from the framework, the Guidelines’ discussion of the criteria to determine whether Article 101(1) TFEU has been infringed and whether the criteria of Article 101(3) TFEU are satisfied is broadly descriptive, but declines to reach conclusions.

- For example, in the Guidelines’ discussion of market coverage, the criterion of “sufficiently large part of the market” is considered to be important in determining whether the information exchange could appreciably restrict competition (¶ 71). Yet the very next paragraph states that this term “cannot be defined in the abstract” (¶ 72).
- Moreover, the discussion on market characteristics (¶ 74 and 75) would need to be drafted so as to more clearly distinguish potentially problematic from unproblematic situations. The current wording does not explain clearly how the Commission intends to assess transparency in markets with many or few participants, but rather gives rise to questions about the risks and benefits associated with increased transparency in markets with many participants and oligopolistic markets.
- Another example where greater clarity would be welcome is the discussion of the age of data (¶ 86). This paragraph suggests that the frequency of contract renewals is only relevant to assess the age of data “*when they are indicative of the frequency of price re-negotiation*”. However, the next sentence and Example 5 go on to only refer to average length of contract in the industry – which can bear no relation to the frequency of price re-negotiation.

AmCham EU recognises that the final Guidelines cannot make definitive statements that will apply to each case, but believes that the Guidelines can be enhanced by offering greater specificity. An example of such guidance can be seen in the April 1996 joint Statements of Antitrust Enforcement Policy in Health Care, issued by the US Department of Justice and Federal Trade Commission, which is frequently referred to by practitioners in Europe in the absence of an alternative. That guidance offers antitrust “safe harbours” in which information exchanges (such as survey creation) can take place. Equally, the Commission’s Liner Conference Guidelines offer greater specificity as to how specific factors should be analysed, with links to existing case-law.

**Further guidance on borderline situations.** The inclusion of specific examples of information exchange is to be welcomed. Whilst the examples are generally very useful, they (¶ 98-104) essentially cover clearly permissible information exchanges or clearly impermissible ones.

In particular, most of the information exchange examples seem to involve cases which would infringe Article 101(1) TFEU and not satisfy Article 101(3) TFEU. Yet even the examples that do not involve an infringement by object do not fully explain why Article 101(3) TFEU is not satisfied. Equally, of the examples that are likely to satisfy Article 101(3) TFEU, there is little discussion of precisely why that is the case. The examples could offer more explanation to show how the Commission would consider the facts in light of the law. AmCham EU recommends that the examples be improved in these respects.

It would also be useful to add examples on classes of information exchange that occur in between the two extremes of clearly permissible and clearly unlawful conduct. Indeed, whilst the inclusion of examples is laudable, AmCham EU believes that the inclusion of additional “borderline” examples, perhaps linked to the leading cases, would provide more useful guidance for the business community and its legal advisors. Even if the number of examples is not expanded, the existing examples could be improved by introducing a more thorough treatment of the likely analysis under Article 101(1) TFEU and Article 101(3) TFEU. Notably, AmCham EU notes that there have been recent cases at national level (for instance the RBS/Barclays case) which are of concern to the business community. Whilst all details of this case are not known, it appears to have involved enforcement related to information exchange of a unilateral nature. It would therefore be important for the Commission to clarify that the legal requirements of Article 101 TFEU must always be satisfied.

## R&D AGREEMENTS

The proposed amendments to the R&D Block Exemption and the draft Guidelines’ section on R&D agreements do not dramatically change the current rules. Most amendments, and in particular those to the Block Exemption are to be welcomed, because they eliminate certain inconsistencies and unclear issues that rendered the assessment of R&D agreements under the current rules difficult. AmCham EU considers that there is still scope for further improvement of the Block Exemption and the Guidelines in relation to issues of definition, scope and application of the Block Exemption.

**The definition of “research and development”.** In a previous submission (13 February 2009), AmCham EU suggested that the definition of “research and development” in Article 1(4) of the Block Exemption be extended to include “*clinical or laboratory research, studies or testing necessary to bring products to market*”. This remains an important point, but is not reflected in the current consultation package. AmCham EU invites the Commission to make this adjustment in the final Block Exemption.

**The benefits of R&D collaborations.** The Guidelines should recognise expressly that the benefits of R&D collaboration are not limited to the sharing of complementary skills and knowledge, but also include the sharing of risks, including the risk that the R&D will prove unsuccessful.

**The definition of “specialisation in research and development”.** Article 1(12) of the draft Block Exemption introduces a new definition of “specialisation in research and development”. This definition is critical, because agreements that do not meet the requirements of the definition would fall outside the Block Exemption (except when covered by Article 1(11) a) or b) of the draft Block Exemption). The proposed definition raises a number of issues:

- Requirement for each party to “focus on a distinct area” of the R&D: the notion of “area” should allow sufficient flexibility to split the R&D work in whatever way appears most appropriate to the parties, for example by subject matter or task. It would be useful to clarify this in the Guidelines.
- Exclusion of mere “financing or exploitation”: the current definition excludes from the scope of the block exemption situations “*where one party carries out all the research and development and the other party merely finances these activities or exploits the results*”. There seems to be no convincing policy justification for this, and AmCham EU invites the Commission to maintain the benefit of the Block Exemption to such situations. AmCham EU expresses its concern that the exclusion of paid-for research could affect the way companies fund research with universities, research institutes and academic bodies. The definition or the Guidelines should also clarify the meaning of the word “or”, that is, whether agreements under which one company does both, providing financing and exploiting the results, would be excluded from the definition.
- Contribution of know-how or IP rights: the Guidelines should also specify that situations where one party provides financing and also contributes IP rights or know how constitute specialisation in R&D, even if that party does not also actively carry out R&D.

**The definition of “specialisation in exploitation”.** Article 1(13) of the draft Block Exemption introduces a new definition of “*specialisation in exploitation*” of the results of the joint R&D. It requires that “*each of the parties must carry out some of the exploitation of the results in the internal market*”.

- Cooperation with non-EU companies is disadvantaged: by requiring each party to exploit the results of the R&D in the internal market, the proposed definition excludes agreements under which an EU company and a non-EU company jointly carry out R&D and agree that the EU company will exclusively market the results in the EU and that the non-EU company will only market the results elsewhere. AmCham EU believes that there is no convincing policy reason for excluding such agreements.
- “Some” of the exploitation of the results: on the wording of the definition, it would appear to include a situation where (in the example above) the non-EU company will distribute the products in a single small EU Member State while the EU company distributes in the rest of

the EU. It is questionable whether it is a convincing policy result to exclude situations of no distribution but to include situations of distribution in a single small Member State. This strengthens the argument to delete the requirement that all parties must exploit in the EU.

**Requirement to disclose IP rights.** Article 3(2) of the draft Block Exemption requires that each party “*disclose all their existing and pending intellectual property rights in as far as they are relevant for the exploitation of the results by the other parties*”. Under introductory clause 12 of the draft R&D Block Exemption, such disclosure must be “*open and transparent*”. The objective of this condition seems to be to avoid situations where one R&D partner is precluded from exploiting the R&D results because of pre-existing IP rights of one of the other parties, similar to a scenario discussed in the Guidelines’ section on agreements on standards. It seems disproportionate to introduce a vague disclosure requirement as a pre-condition for the Block Exemption to apply, especially since collaborating parties may not be in a position to assess what, if any, IP rights might be “relevant” for the exploitation of the results of the R&D. In any event, any requirement about disclosure of IP rights should be limited to that which is not merely “relevant” but technically essential to the exploitation of the R&D results by the party concerned.

**Market share threshold.** As regards the methodology to assess the relevant market share of the parties in the Draft Guidelines (¶ 119), the Commission itself notes that calculating market shares on the basis of licensing income from royalties may not always be very practical. For example in the context of cross-licensing, royalty income (which may be nil) may significantly underestimate the market position of the parties. AmCham EU invites the Commission to reconsider the requirement to calculate market shares in technology markets in that way before adopting the final text of the Guidelines.

**Equal access.** Article 3(3) of the draft Block Exemption modifies the existing condition requiring that all parties must have access to the R&D results by stating that the access must be “equal”. In this regard, AmCham EU invites the Commission to clarify in the Guidelines that equal access does not mean that access has to be granted without compensation and that the parties are free to provide for differentiated compensation schemes, for example, to reflect differences in the value of the parties’ contributions to the joint R&D.

**“Hardcore” restrictions.** Article 5(d) of the draft Block Exemption states that it constitutes a hardcore restriction if the parties restrict the territory into which, or the customers to whom, the parties may passively sell the contract products or license the contract processes. AmCham EU suggests amending the Guidelines to allow for a ban of passive sales for two years, at least between non-competitors. This would reflect the approach the Commission has taken in its Vertical Guidelines (¶ 61) for situations where the distributor introduces a new product. As R&D will often lead to new products, the same policy rationale applies here.

**Assessment under Article 101(3) TFEU.** R&D cooperation will often lead to new or improved products and the availability of such new or improved products (or their earlier introduction on the market) by itself constitutes a “pass-on” of relevant benefits to consumers. Accordingly, pass-on of benefits are more likely with regard to R&D agreements than with regard to some other agreements and AmCham EU suggests amending the discussion of the “pass-on” condition (¶ 137) to reflect that fact.

## STANDARDISATION AGREEMENTS

A new section of the Guidelines concerns standardisation agreements and agreements on standard terms. AmCham EU welcomes additional guidance in the area of standard terms which it expects to be well received, on the whole. However, AmCham EU recommends the Commission to reconsider several aspects of the Guidelines on standardisation agreements and adopt final Guidelines based only on established case-law in the field of horizontal coordination.

**Consistent concepts for agreements on standard terms.** The Guidelines state that adoption of standard terms which “influence” (¶ 268) prices charged to customers constitutes a restriction of Article 101(1) TFEU by object. It is submitted that the notion of mere “influence” is too broad to be an appropriate standard under Article 101(1) TFEU. Indeed, the discussion of restriction by effect (¶ 295) is based on a different notion according to which terms have “a likely negative effect on competition” would give rise to restrictive effects within the meaning of Article 101(1) TFEU. AmCham EU recommends that the latter notion be used also for the purposes of determining whether there is restriction by object.

**Less prescriptive guidance on standard setting agreements.** The jurisprudence of the EU Courts and the decisional practice of the Commission is not developed in the area of standard setting: no case-law is cited in support of the Draft Guidelines’ propositions. In AmCham EU’s view, the absence of case law necessitates a cautious approach to the adoption of guidelines: overly prescriptive guidance on the basis of untested and contentious theories may introduce legal uncertainty to well-established, pro-competitive and innovation-stimulating collaboration. It is especially important to observe this, for instance, in circumstances where a variety of SDOs, are active and seek to develop rules on, for instance, disclosure, assertion of rights and, in some cases, licensing that are suitable to the industries affected by their activities as well as competition law. This is an area where a “one size fits all” model is not appropriate.

It is also important to include, as part of any final guidance in this area, a description of standard setting focusing on what would amount to collusive behaviour among standards participants. AmCham EU would also welcome confirmation of the pro-competitive aspects of IP rights and licensing including (i) the importance of IP rights in terms of incentivising investment in risky research and development for technology that might contribute to standardisation efforts; (ii) the importance of IP rights in enabling the sharing of

technology, e.g. through collaborative standards setting; (iii) the downstream economic and welfare benefits that selection of high performance technologies typically bring; and (iv) the acknowledgement that, under European law, it is only in exceptional circumstances that competition rules can restrict the enjoyment of IP rights.

Indeed, as the then Competition Commissioner Neelie Kroes stated in 2008, *“The patent system is a tremendously effective mechanism to create incentives to innovate, and reward successful innovation .... Intellectual property protection for technology will always be necessary to give just rewards for investment in R&D”*. This was echoed by the US Government, which stated at the WIPO Standards and Patents Committee in 2009 that *“Without the commercial return there is no incentive for investors to fund research and development into new technology. Therefore, the incentive to develop and use patented technologies in standards should not be undermined”*. To achieve this, competition law rules must be used judiciously when balancing divergent stakeholder interests present in standardisation and should focus upon conduct that has an objectively demonstrable exclusionary anticompetitive effect and remedies that do not undermine incentives for innovative investment.

**Less prescriptive “safe harbour” provisions.** As AmCham EU has mentioned previously (see submission of 13 February 2009), the current review must be consistent with the Commission’s standardisation policy review, and its objective of fostering R&D, innovation and investment and, therefore, competitiveness. In its White Paper *“Modernising ICT Standardisation in the EU - The Way Forward”* (COM(2009) 324 final), the Commission stressed the need to *“implement clear, transparent and balanced IP rights policies which do not discriminate and allow competition among different business models”* (emphasis added). In line with this objective, the final Guidelines must not unduly restrict the evolution of SDO policies, discourage innovative contributions to standards, nor prejudge legitimate and pro-competitive commercial activity.

Indeed, the Commission’s *Guidelines on the application of Article 81 of the EC Treaty to technology transfer agreements* (2004, C101/02) indicates that licensing creates pro-competitive efficiencies: *“the existing analytical framework is sufficiently flexible to take due account of the dynamic aspects of technology licensing. There is no presumption that intellectual property rights and licence agreements as such give rise to competition concerns. Most licence agreements do not restrict competition and create pro-competitive efficiencies. Indeed, licensing as such is pro-competitive as it leads to dissemination of technology and promotes innovation”* (¶ 9). An equivalent clarification would be useful in the standard setting portion of the Guidelines.

The Guidelines contain detailed provisions on the policies to be adopted by SDOs in order that they satisfy the safe harbour requirements. For instance, they state (¶ 275) that IP rights holders are (if found to hold a dominant position) able to abuse their position due to so-called “lock in” (however, that concept is not sufficiently defined). On this basis, the safe harbour concept is applied to SDOs (¶ 276). With this approach, AmCham EU sees a real risk that the Draft

Guidelines may steer SDOs towards a particular model although there is no case-law on the potential harm that the safe harbour seeks to address.

- The Guidelines state (¶ 276) that standard-setting agreements that do not benefit from the safe harbour will require individual assessment. However, several of the subsequent paragraphs, which define the parameters of the safe harbour, risk leaving the impression that practices that do not comply with a parameter of the safe harbour would infringe Article 101(1) and would unlikely be exempted under Article 101(3). For example, the analysis at ¶ 316 suggests that SDOs that fail to mandate detailed IP rights disclosure *as well as* licensing on fair, reasonable and non-discriminatory (“FRAND”) terms (these concepts are also discussed below) are “*likely to give rise to restrictive effects on competition within the meaning of Article 101(1) and are unlikely to meet the criteria of Article 101(3).*” It would be helpful if the Guidelines clarified that no presumption of illegality follows for practices/agreements outside the safe harbour.
- The aim of ensuring open participation in SDOs, which should apply objective and non-discriminatory procedures for the allocation of voting rights (¶ 278), is uncontroversial; as is the transparency requirement (¶ 279). It is important, however, that the application of these concepts takes account of how standard setting works in practice. For instance, during the early formation stage of standards, the ideas for any standard often emanates from a group of companies with a like minded vision, which develops specifications to a certain level of completeness and then transfer the draft work into a SDO open to all interested participants from around the world. In addition, industry specifications are often developed and introduced to the market by groups of limited likeminded companies.
- The disclosure requirement in respect of “*intellectual property rights that might be essential for the implementation of a standard*” (¶ 281) should be clarified. Determining upfront whether IP rights are actually essential can be difficult and uncertain, particularly for complex subjects and standards, and for firms owning many patents. Therefore, to minimise the burdens of a disclosure requirement, most SDOs permit the disclosure of patents that “may” be essential. The Guidelines should not deny the benefit of a safe harbour to an SDO that permits but does not require the disclosure of patents that are not actually essential. From these difficulties also stem issues of costs and burdens. It would be more appropriate to incorporate terms that conform to corresponding concepts used by established SDOs (e.g. ETSI refers to members making “reasonable endeavours” to inform ETSI of essential IP rights and, in particular, to draw the attention to IP rights which might be essential, if a proposed standard is adopted; and ITU/ISO/IEC and ANSI encourage early disclosure of essential IP rights).
- The requirement that holders of essential IP rights license “*their IPR*” to third parties on FRAND terms (¶ 282) should be clarified. First, the

Commission should clarify that the FRAND licensing requirement properly extends only to “actually essential” IP rights. Second, other methods (e.g. non-assertion or of refusal to grant such a commitment as per the ETSI IPR rules) may be more appropriate in many circumstances and there is no principled basis why the application of such (well-established) options should bring an SDO outside the safe harbour. Thus, SDOs should be permitted to benefit from the safe harbour if their IP rights regimes are open and non-discriminatory.

- The disclosure and FRAND requirements are examples of ways in which the Guidelines, if finalised in their current form, might make SDOs responsible for their members’ commercial arrangements which might damage SDOs’ ability to maintain a balanced and neutral environment and process for standards setting.

**Guidance for situations that fall outside the “safe harbour”.** Regardless of how the “safe harbour” is defined, additional guidance would be welcome in respect of situations that, for one reason or another, fail to meet one of the cumulative requirements of the safe harbour, especially if construed in the manner described in the Guidelines. The Guidelines offer little guidance in this regard, particularly not (and, as noted above, surprisingly) as regards collaboration or collusion in the context of standard setting.

**A framework adapted to an international setting.** Business needs clear and simple rules in order to flourish. This is especially true for globally active companies that must adapt their business models to differing regulatory frameworks. The final Guidelines must strike the right balance between providing sufficient guidance, on the one hand, and avoiding the possibility for over-regulation, on the other. The Guidelines will not only influence European standard development activities but also international standards bodies, whose standards are implemented in the EU. As noted above, the draft Guidelines promote one particular model that may not be optimal in an international setting.

It is worth noting that the US Government stated before WIPO that “*The United States is not in favor of a mandatory single set of uniform guidelines which will deprive the U.S., its diverse standard setting community and its innovative industries of its current flexibility in developing standards according to different processes and policies. These are driven by the objective of the particular standards project and the related market factors.*” AmCham EU would therefore urge the Commission to consider the wider impact of its policies on the international standards development community, especially given that standards are increasingly global in scope.

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*AmCham EU speaks for American companies committed to Europe on trade, investment and competitiveness issues. It aims to ensure a growth-orientated business and investment climate in Europe. AmCham EU facilitates the resolution of transatlantic issues that impact business and plays a role in creating better understanding of EU and US positions on business matters. Aggregate US investment in Europe totaled €1.2 trillion in 2008 and currently supports 4.8 million direct jobs in Europe.*

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