MEMORANDUM

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To DG Competition

From WilmerHale Antitrust and Competition Group

Re **DG COMP consultation regarding the Commission's review of the rules applicable to horizontal cooperation agreements**

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[1] WilmerHale welcomes this opportunity to comment on the Commission's draft Guidelines on the applicability of Article 101 TFEU to horizontal cooperation agreements (the "Draft Guidelines" or "Draft") and the proposed revised block exemption regulations on Research and Development and Specialisation. John Ratliff, Sven Völcker and Cormac O'Daly are the principal authors of these comments, but we acknowledge contributions from all our Brussels colleagues. The views expressed are personal and do not necessarily reflect the views of WilmerHale or its clients regarding any specific issue or proceeding.

[2] In general, we welcome the Draft Guidelines, which we think usefully expand and modernise the previous Horizontal Guidelines (EC OJ C3/2, 6 January 2001) ("the Current Guidelines"). In particular, we welcome the new section on information exchange and the revised section on standardisation.

[3] We do not aim to comment on all changes, but focus rather on the particular issues which appear to us important, based on our experience and discussion with clients. Our comments are mainly general ones on the Draft Guidelines and on information exchange, the R&D section, and standardisation (including environmental agreements). For ease of review, we generally discuss the sections in the order they appear in the Draft.

[4] Our main recommendations are as follows:

- The Guidelines should not contain any general presumption regarding parent company control of joint ventures.
- On information exchange, the Guidelines should clarify the distinction between unilateral publication to customers and reaching an agreement/concerted practice through publishing.
- The circumstances in which an information exchange constitutes a restriction of Article 101(1) by object should be narrowed.
- The section on information exchange should contain a safe harbour and rules of thumb which would apply absent unusual circumstances.
- The Guidelines should better define "genuinely public information"; as currently drafted, too many issues remain open and we question the relevance of the "costless" criterion.
- On R&D, we regret that proposed changes to the block exemption (including the relevant IP disclosure obligation) would narrow its scope when, if anything, we think it should be broadened.
- On standardisation, the Guidelines should explain the meaning of "good faith disclosure" and the "reasonable efforts" that a company must use to identify potentially essential IPR.
- The Guidelines should elaborate on the meaning of FRAND licensing including considering the availability of injunctive relief, the impact of innovation outside the standard, and the non-discriminatory aspect of FRAND.
- *Ex ante* joint negotiation or discussion of licensing terms should be examined under Article 101(1) and 101(3) and not be considered an infringement by object.
- Greater recognition should be given to the mandatory nature of environmental standards – more, not less, guidance is needed in this (highly topical) area.

I. The introductory section

[5] **Para. 5**: We note the way that the Commission has dropped the previous section on environmental agreements (see the Current Guidelines, paras 179-198), preferring now to treat such issues as "environmental standards", with one example on washing machines (as before). Given the importance of such agreements in practice, we query if that is enough or appropriate,

especially since such agreements are often government-engineered and de facto mandatory. This is discussed further below, but the key point is that more, rather than less guidance would be welcome on such highly topical agreements.

[6] **Para. 6:** We welcome the idea that the Draft Guidelines would apply "irrespective of the amount of integration they entail", since we think there is a bias in the Current Guidelines towards joint venture companies, when other commercial agreements may reflect much the same considerations (e.g. see para. 90 of the Current Guidelines; and para. 155 in the Draft Guidelines). We think it should not matter whether a joint venture is established through contract or corporate form.

[7] **Para. 7**: We also welcome the Commission's note on the need for flexibility in applying these guidelines. At times lawyers tend to argue too rigidly that a statement in the Current Guidelines is the law (e.g. in court or arbitration proceedings), when that may not be the case (e.g. because the Guidelines may simplify and, in defined circumstances, case-law and Commission practice may lead to other conclusions).

[8] **Para. 11**: In this paragraph the Commission states that Article 101 does not apply to agreements between each of the parents of a joint venture and a joint venture, where they jointly exercise decisive influence and have effective control over the joint venture (citing Avebe, Case T-314/01, ECR II 3085, paras 138-139).

[9] Whilst we agree that, in principle, a parent may be expected not to compete with a joint venture which it jointly controls, we would stress that issues of control such as those examined in Avebe need careful review on the facts (as occurred in Avebe itself, see paras 136-137 of the judgment). We do not favour the development of any general presumption on this in the Draft Guidelines for that reason. We also note that some restrictions in favour of the parent may be ancillary to the joint venture in any event.

[10] **Para. 13**: We note the change to the "most upstream indispensable building block of [the] integrated cooperation" rather than the agreement's "centre of gravity". Whilst a somewhat

cumbersome sounding criterion, it may be that this will help, since some find the "centre of gravity" test too vague. In any event, we think that any agreement which bridges several types of activity (as noted in the Draft Guidelines) will still need a multi-layered assessment.

[11] **Paras 23-24**: We note the new structure with "restriction by object" and "restriction by effect" in each section. Whilst it may be simpler than in the Current Guidelines (where the Commission referred to agreements "falling" or "almost always falling" under Article 101), we have further comments below on narrowing what should be a "restriction by object" in some cases.

II. General principles on competitive assessment of information exchange

[12] We welcome the creation of a new section on information exchange, because this is an important area for advice, especially after the T-Mobile judgement (Case C-8/08, judgment of 4 June 2009) which some interpret as setting a very wide rule for when such exchanges are caught by Article 101. We read the Commission's approach as more specific and economic. However, we also note that, in some ways, the proposed section is more complex to apply and broader than the previous focus on historic data and aggregating inputs.

[13] **Para. 55**: **Unilateral declarations.** In this paragraph, the Commission states that "Information exchange can only be addressed under Article 101 if it establishes or is part of an agreement, a concerted practice or a decision of an association of undertakings" (see also para. 60). We note, however, the statement in para. 54 and footnote 40 that "publishing" can be a means by which information is exchanged, which may lead to some ambiguity.

[14] This is a sensitive issue in practice. We suggest that the Commission emphasise further that what it appears to have in mind here is not ordinary unilateral publication to customers (which is lawful but which competitors may see and to which they may choose to react) but rather the interactive development of a common understanding through (e.g. web) publishing.

[15] **Paras 62-64**: **Main competition concerns.** We note that the Commission's approach here is somewhat wider than many previously thought. In other words, it focuses not only on

exchanges to achieve coordination, but also exchanges which may facilitate monitoring of deviations from (as we understand it, express or tactic) collusive outcomes.

[16] While, we understand that monitoring has been an issue in the case-law, e.g. in the UK Tractor Exchange case (Case T-35/92, John Deere, [1994] ECR II 957 at para. 96), notably as regards parallel imports, we would stress that this was in an oligopolistic setting. We urge that this consideration not be applied widely because it may undermine lawful and pro-competitive market statistics in aggregated form in other contexts.

[17] **Para. 68: Restriction by object.** In line with what we have just noted, we are concerned about the breadth of what is considered to be a restriction by object. We think that such a finding should only apply to patently unlawful conduct and we are concerned that this phrasing may catch more innocent exchanges, or even aggregated data exchanges, where the restrictive effect was neither intended (as in a cartel) or is not clear. In particular, we are concerned about "cases where the combination of different types of data enables the direct deduction of intended future prices or quantities" and would delete that phrase here.

[18] We think that if the Commission wants to retain this sort of consideration, it should be dealt with separately as a restriction by effect, unless as suggested in the third sentence here, the exchange of data is part of a cartel (which we regard as a separate situation in any event). It may be that sometimes experienced business people will be able to guess what may be happening from various combinations of data, but that is a difficult standard for a restriction by object. Restrictions by object should rely on clear and readily identifiable concepts. This is unlikely to be the case as regards aggregated data relevant to monitoring deviations from collusive outcomes. We also think that this should only be a concern in oligopolistic markets, or where related to cartels, or perhaps in exceptional markets where there is already a great deal of transparency and the exchange of even aggregated data may be a step too far.

[19] We may add that the concept of information exchange concerning "current conduct which reveals intentions on future behaviour" is also difficult in practice. This may be viewed as liberal because it suggests that recent, even current data which does not that have this effect may

be exchanged. However, given difficulties of defining such information, in practice, if this is to be treated as a "restriction by object", companies must be expected to counsel against exchanging any such recent data, save in exceptional cases.

[20] **Paras 71 and 72: Market coverage.** We think it would be useful to add a "safe harbour" for information exchanges not otherwise benefitting from one applicable to another section of the Draft Guidelines. We appreciate that the question whether competition is reduced is one of fact but, absent unusual circumstances, we think it should be possible to specify a threshold below which Article 101 would not normally be infringed. We would recommend that this threshold be set at 15-20% (although we would defer to economists as to what should be the "safe" figure).

[21] **Para. 82: "Genuinely public" information.** The Commission states that "in general, exchanges of genuinely public information are unlikely to constitute an infringement of Article 101" (referring to TACA, Joined cases T-191/98 and others, [2003] ECR II-3275 at para.1154) and defines "genuinely public information" as "information that is equally easy (i.e., costless) to access for everyone". Thus not all information in the "public domain" is "genuinely public" information if "the costs involved in collecting the data discourage to a sufficient degree other companies and buyers from doing so".

[22] In general we are uncomfortable with the "genuinely public" notion, since it does not appear clear. How should companies assess whether the costs of collecting data are enough to discourage others from doing so "to a sufficient degree"? We also think that a reasonable cost for accessing such information should not be a bar to it being "genuinely public". The key point appears to be that the data should be (reasonably) available on equal terms to all market participants. One could otherwise maintain that information published in a fee-bearing trade journal would not be a public exchange. We also think that publication on a publicly accessible website should mean that the exchange is public and the Guidelines should expressly recognise this. We note that publication on a freely accessible website appears to be a big factor in Example 2, but we would welcome a clearer statement on this.

[23] Otherwise, we recommend that the Guidelines specify that availability of information to customers and other market participants beyond the companies contributing information to the exchange system is an indication that there is not an anti-competitive aim behind the collecting and publishing of the information.

[24] **Para. 85: "Genuinely aggregated data".** We think some further assistance could be given by way of an example here. While it runs counter to the effects-based approach that the Draft laudably advocates, companies and "aggregators", such as trade associations, need rules of thumb (regarding, for example, the number of companies contributing data, their respective shares of the aggregated data) to enable them to determine when it might be dangerous to contribute to or aggregate information.

[25] **Para. 86, footnote 57: "age of data".** Here the Commission notes that it has considered that data over a year old is historic data and its exchange does not infringe Article 101. Para. 86, however, indicates that for data to be historic it should be "several times older" than the industry's average contract length. While we think we understand the Commission's objective, (i.e. to say that it all depends on the length of contracts in a market), again we note this is a concern to "aggregators", who seek clear rules of thumb. Example 5 discusses exchange of three year old data when prices are renegotiated every three months, which is hardly a controversial case! It would be useful to have a more realistic, borderline example, with more "recent" data.

[26] **Paras 88 et seq.** Finally we welcome the inclusion of material on Article 101(3) as regards information exchanges, as noted and emphasised in Asnef–Equifax (Case C-238/05[2006] ECR-I-11125 at paras 64-71). This is an important area.

III. Research and development

[27] **General.** While we think that the R&D section of the Draft Guidelines is a very good framework for review, essentially similar to the Current Guidelines, we note that this is a complex area and companies often struggle with it, in particular in the smaller cases. It would be better if, as in the Guidelines on Vertical Restraints and the Technology Transfer Guidelines, there was also detailed commentary on the R&D block exemption in the Guidelines.

[28] However, we are concerned to see a number of proposed amendments to the R&D block exemption, which appear to limit its scope further. As matters stand, a great many cases already end up in self-assessment, which is burdensome and often does not provide the desired legal certainty.

[29] We would also stress that "research as a business" comes up frequently, where work is carried out by universities, or now very often small pharmaceutical or biotech companies which may well be pre-financed by larger ones with the resources to bring products to market. These companies then (quite logically) seek and need long exclusive licences in return. In our view this should be encouraged as much as "joint research", allowing many different variations, including financing of such activity by large companies, as well as flexible positions on "joint access to results" and "joint exploitation". We think it wrong to exclude these from the block exemption, even if a flexible approach in self-assessment is offered.

[30] To some extent this is recognised already in the Draft Guidelines (see paras 124 and 125, 134 and Example 2. This is very welcome. To some extent this is also reflected in the R&D block exemption (Recital 11 and Article 3(3)).

[31] **Narrowing of the block exemption**. Otherwise the approach in the block exemption appears now narrower, with emphasis on: (i) the need for each party to carry out some of the research (Article 1(11) and (12)), excluding the financing scenario just noted; (ii) the need for each party to carry out some exploitation in the internal market, excluding the (not infrequent) situation where a small company will be happy to allow its R&D partner to be the exclusive licensee and distributor of the developed technology and products (Article 1(11) and (13)) and earning its rewards through licensing; and (iii) the emphasis on "equal" access to results" (Article 3(3)).

[32] Although it is useful to see clarification, we see such narrowing of the block exemption as a step in the wrong direction. We stress that this is an area where much may be at stake, especially for small companies. They often prefer to see the core agreements for their activities block exempt, rather than rely on self-assessment.

[33] **Disclosure obligations**. Otherwise, we note that under Recitals 12 and 13 and the proposed Article 3(2) of the block exemption, before starting the R&D, the parties must agree to disclose all existing and pending intellectual property rights that may be "relevant" to other parties' exploitation of the R&D's results. We assume that this new condition is driven by patent "hold-up" /ambush issues.

[34] However, we think that (unlike in standardisation) this is something which should be left to the parties to resolve as appropriate, the concept here being that only small market shares (combined less than 25%) are in question. We also think that this test is not clear or easy to apply. How is "relevant" to be assessed and how wide should this obligation be? Two companies may have different exploitation in view from joint R&D. We do not see that each has to disclose all their "related" IP, rather than that which is indispensable to (i.e. therefore very likely already contributed to) the joint research and/or exploitation.

IV. Standardisation

[35] Standardisation is a complex area and we welcome the Draft's thoughtful analysis. While there is need to ensure that competition law (i) does not deter IPR holders from participating in standard setting, (ii) preserves their incentives to innovate, and (iii) allows them sufficiently to monetize their IPR, the Draft – building on the Commission's experience in investigations such as Rambus and Qualcomm – correctly highlights the patent hold-up issue and encourages the use of prior disclosure of IPR and commitments to license on fair reasonable and non-discriminatory ("FRAND") terms.

[36] **Para. 267**: **Restrictions by object.** We would suggest clarifying the last sentence, which reads "Prior to the adoption of the standard, agreements by IPR holders on the licensing terms they will disclose will also constitute restrictions of competition by object within the meaning of Article 101(1)". Does this mean the same as the phrase in para. 287, which we comment on below at paragraphs 58 to 60, that IPR rules should "not allow for the joint negotiation or discussion of licensing terms in particular royalty rates"?

[37] **Para. 277: The safe harbour.** While we support the inclusion of a safe harbour, it would appear that many standard setting organisations ("SSOs") will not be able to avail of it. In particular, many standards are mandatory (see below at paragraphs 62 and 63 on environmental standards) and in the absence of more detailed guidance on the meaning of FRAND licensing, SSOs will be unsure if their IPR rules put them in the safe harbour.

[38] This said, as para. 276 notes, a safe harbour is only a safe harbour, and even if a standard setting agreement does not benefit from the safe harbour, it may not necessarily fall under Article 101(1) or it may fall under the exception in Article 101(3). In this context we feel that the Draft does not provide sufficient guidance on the factors used to analyse whether either the standardisation falls under Article 101(1) or whether Article 101(3) is applicable. In particular, the existence of competition (i) between products implementing different standards and (ii) between products implementing standards and those that do not implement any standards should be emphasised.

[39] We would also suggest adding an additional sentence to para. 277. The safe harbour is envisaged to assist SSOs establish rules that will not fall under Article 101(1). But more often it is the behaviour of certain participants in SSOs that restricts competition. We advise therefore that a further sentence should specify that even if the SSO's rules benefit from the safe harbour, the compatibility of agreements among the participants with Article 101 may still need to be analysed separately.

[40] **Para. 278: Open participation.** We agree with the general point that participation in standard setting should be open and that rules should not discriminate against or in favour of a particular group of IPR holders including against or in favour of royalty-free standards. However, it is important that the Guidelines specify that the Commission is not discouraging the continued existence of SSOs that use default or mandatory royalty-free models. These include prominent SSOs like the Worldwide Web Consortium (W3C). We would also advocate that the Commission expressly recognise somewhere in the Guidelines that royalty-free licensing is the norm in some sectors and that this should be encouraged. Royalty-free licensing obviates the need to discuss whether a royalty is FRAND and reduces products' overall price, which benefits

consumers.

[41] **Para. 281: Disclosure of essential IPR.** We believe the Draft is correct to favour *ex ante* disclosure of potentially essential IPR and would even recommend that SSO rules contain appropriate sanctions for situations where it can be shown that a company deliberately disregarded an SSO's requirement for *ex ante* disclosure.

[42] We would, nonetheless, welcome guidance on the meaning of "good faith disclosure" and the "reasonable efforts" that a company must use to identify potentially essential IPR including patent applications. There are several possibilities here and failure to specify what the Commission would normally expect risks lessening the safe harbour's utility and the ability to carry out Article 101(1) and 101(3) analysis.

[43] We would suggest that the Guidelines expressly state that full patent searches for all potentially essential IPR are not necessary for SSO rules to benefit from the safe harbour. A good faith statement by the company representative involved in the standard setting as to their knowledge of existing and pending IPR would appear to be an appropriate requirement. Alternatively, we would suggest including a definition of the steps that a company must take to investigate its IPR portfolio. A good example of this is provided in the Institute for Electrical and Electronics Engineers (IEEE)'s definition of "reasonable and good faith inquiry".[1]

[44] We would also suggest that para. 281 encourage SSOs to adopt IPR policies that oblige participants to withdraw disclosures previously made if the participant no longer believes that the disclosed IPR is essential to the standard. Over inclusive disclosure of what sometimes are trivial patents has been a problem in standard setting and complicates the determination of FRAND royalties.

[45] **Paras 284 and 285: FRAND.** Ideally the Commission would already have given some guidance on the meaning of exploitative abuse and unfair prices under Article 102. If the Draft's paras 284 and 285 remain, they would be the only formal Commission guidance on excessive

[1] See http://standards.ieee.org/guides/bylaws/sect6-7.html.

pricing, which seems odd. Nevertheless, we commend the Draft's inclusion of a discussion on FRAND and in fact believe that the discussion should be more detailed. The Draft's premise is that SSO rules must provide basic safeguards against patent hold-up to benefit from the safe-harbour. In addition to disclosure requirements, FRAND commitments are such a basic safeguard, and if there is no explanation of the FRAND concept in the Guidelines the safe-harbour concept becomes meaningless.

[46] We suggest clarifying the language in paras 262 and 284 lest it be interpreted as suggesting that any party that holds IPR essential to a standard automatically has obtained a dominant position under Article 102. The Commission should have to establish market power based on a proper market analysis. Standardised technology often competes with other standardised and non-standardised technology and it cannot therefore be presumed that a holder of essential IPR has a dominant position.

[47] The Draft refers to the case-law under Article 102 – namely that an excessive price is one that bears no reasonable relationship to the economic value provided – and effectively considers that an excessive royalty under that case-law would not be FRAND. This should not be controversial. We would, however, recommend adding that "reference to the case-law on excessive pricing does not exclude that a FRAND royalty could be substantially less that the rate that would be considered excessive under Article 102".

[48] We endorse the Draft's recognition that the cost-based models used in Article 102 case-law are normally not suitable for determining FRAND, and that a proposed royalty's reasonableness be measured by comparing it to fees charged in a competitive market before the IPR became part of the adopted standard. Generally this is the best and easiest way to determine if a royalty is FRAND. We would, however, suggest that the final Guidelines add that what was reasonable before adoption of a standard may not continue to be reasonable many years later. The price of a product implementing a standard may decrease over the years and certain, for example per unit, royalties may become unreasonable over time.

[49] As for the Draft's recognition that there may be limits to *ex ante* comparisons and its

suggested use of two other methods to assess FRAND, we welcome the possibility of using independent expert assessment to value the IPR portfolio's objective quality and centrality to the relevant standard. We would recommend that the Draft specify that an IPR portfolio's value cannot be ascertained purely, or principally, by counting its number of co-called essential patents. As the Draft suggests, a portfolio can only be valued qualitatively consistent with the patents' objective contribution to the standard; we think this should be more explicit in the final Guidelines as this would help counter the problem of over inclusive declarations of essentiality.

[50] We also believe it is sensible and workable to refer to a company's *ex ante* disclosure of its most restrictive licensing terms, including maximum royalties. We address this below in paragraphs 58 to 60.

[51] In addition to these two subsidiary methods, we would recommend that the Draft be amended to provide that (i) the royalty rates charged for the same IPR in other standards and (ii) the royalty rates charged by other IPR holders for similar IPR, both for that same standard and for other standards, can be used as benchmarks for FRAND.

[52] **Further guidance on the meaning of FRAND.** We would strongly advocate that the final Guidelines contain additional material on the interpretation of FRAND. We believe that elaborating on the subjects discussed in the next paragraphs would help avoid future uncertainty and controversy.

[53] The Draft does not address the availability of injunctive relief, which in a number of legal systems allows a patent holder to obtain injunctions against a potential infringer. We believe that if a company has committed to license on FRAND terms, it would generally be inconsistent if they were then allowed to obtain an injunction preventing an implementer's use of the patent. The only circumstance in which injunctive relief should be available is when an objective third party has ruled that the terms on which the patent holder has offered to license are FRAND, and the implementer is not satisfying those terms. If this issue is not considered in the Guidelines, IPR holders will have substantial bargaining power against implementers who often may have incurred sunk costs. In these circumstances it is virtually certain that the ensuing licensing

conditions will not be FRAND.

[54] The Guidelines should state that a FRAND royalty should not be influenced by the extent of innovation outside of the standard; if the product implementing the standard derives most of its value from other features not covered by the standard, this cannot justify charging a higher royalty such as one dependent on the product's average selling price. The Commission accepted this in Rambus, when it insisted that the royalty caps be based on sales of DRAM-chips themselves, not on the sales of devices incorporating DRAM-chips, or sales of multi-function chips incorporating DRAM functionality.

[55] Holders of essential IPR should generally not be allowed to demand cross-licenses of non-essential IPR, which is irrelevant to the standard at issue.

[56] The Draft should consider the non-discriminatory aspects of FRAND. For lawyers non-discrimination is often a more understandable concept than fair and reasonable; focussing on the ND part of FRAND may alleviate some of the difficulties inherent in the somewhat elusive FR part. In particular, the Guidelines should require that royalties not discriminate against licensees who may not have participated in the standard setting. These "outsiders" should not be penalised for not having essential IPR that could be contributed to the standard nor indeed should they be penalised if they chose not to have their IPR be part of the standard. In this context, the Guidelines should state that the value that companies that participated in the standard setting ascribe to their IPR in cross-licenses with the other "insiders" should be taken into account as a relevant benchmark when determining what is FRAND when licensing to outsiders.

[57] Pervasive use of non-disclosure agreements ("NDAs") can render a commitment to non-discriminatory licensing nugatory since it prevents a potential licensee from comparing the royalty rate offered with that offered to other licensees. The Guidelines should specify that systematic and broad use of extensive NDAs has the potential to undermine FRAND commitments and may itself be evidence of a breach of such a commitment.

[58] **Para. 287: Ex ante disclosure of most restrictive licensing terms and discussion of**

licensing terms. We welcome the statement in para. 287 that disclosure of most restrictive licensing terms, including individual disclosure of maximum royalty rates, will not infringe Article 101(1). But we are concerned by the possible interpretation of the caveat "as long as the rules do not allow for the joint negotiation or discussion of licensing terms in particular royalty rates". This could be interpreted as meaning that any joint consideration of licensing terms would automatically be viewed unfavourably.

[59] As noted above in paragraph 40, some SSOs mandate specific, or default, forms of FRAND licenses. The Guidelines should state that the caveat is "without prejudice" to such a possibility and that, at the very least, joint discussion will not always be considered an infringement of Article 101 by object. In particular, we think the Commission should clarify that SSOs that prescribe mandatory, or default, royalty-free licenses are not caught by the caveat. Otherwise one might seek to argue that subsequent royalty-free licensing was the result of an agreement to set zero royalty rates.

[60] Unless the meaning of the caveat is clarified, we believe that meaningful *ex ante* disclosure of individual most restrictive licensing terms will not occur. SSOs and participants will fear that such disclosure inevitably risks leading to joint discussion of licensing terms. We would therefore recommend that the Draft specify that joint negotiation or discussion of licensing terms will be examined under both Articles 101(1) and 101(3). We note that the U.S. Department of Justice and Federal Trade Commission generally analyse such discussions under the rule of reason.[2]

[61] Lastly, royalties ought to be FRAND both individually and in the aggregate. *Ex ante* discussion of an aggregate cap would help achieve this.

[62] **Applicability of standardisation section to environmental agreements.** The deletion of the separate section on environmental agreements, and the view expressed in para. 252 of the Draft that environmental standards can be analysed under the general standardisation rules is

[2] U.S. Department of Justice and Federal Trade Commission, *Antitrust Enforcement and Intellectual Property Rights: Promoting Innovation and Competition*, at paragraph 54 available at http://www.usdoj.gov/atr/public/hearings/ip/222655.pdf.

problematic. Environmental standards are normally mandatory and therefore would automatically fall outside the proposed safe harbour. Draft para. 309 provides, moreover, that making a standard obligatory is "in principle not indispensable" and therefore would not benefit from Article 101(3). Neither Example 5 nor 6, which are otherwise helpful, seem to concern a truly mandatory standard and we would put forward at the very least that an additional example be developed.

[63] Overall we believe that more, not less, guidance on environmental standards would be beneficial especially because some Member States actively promote industry self-regulation, sometimes with the threat of imposing stricter legislative standards if such self-regulation fails. At the very least, the Guidelines should expressly state whether the Current Guidelines' separate section on environmental agreements continues to be of any ongoing relevance (we believe that many of its principles are still embodied in Examples 5 and 6).

V. Other

[64] We have two points on production agreements.

[65] **Para. 155:** First, we note the changed wording in para. 155 of the Draft Guidelines, referring to a "production agreement" rather than "production joint venture" (as in para. 90 of the Current Guidelines) and welcome it since, as noted above, joint ventures may often be formed by contract and not necessarily have corporate form.

[66] **Paras 155 and 161**: Second, we also agree with the approach reflected there and in para. 161, that related commercialisation, which is part of a joint production agreement has to be assessed in terms of overall effects, in order to see whether Article 101(1) applies.

[67] **Commonality of costs.** Finally, we have a general point on the concept of commonality of costs, which appears in the sections on production agreements, purchasing agreements and commercialisation agreements.

[68] These sections suggest that an agreement may restrict competition if it increases

commonality of variable costs "to a level which is likely to lead to a collusive outcome" (para. 237). At least for production and commercialisation agreements, this can apparently occur in two ways. First, if before the agreement the parties already have a high proportion of variable costs in common, the increment could "tip the balance towards a collusive outcome". Second, if the increment is high, the risk of collusion may also be high even if the initial level of common costs is low. For commercialisation agreements, para. 238 adds that commonality of costs only increases the risk of a collusive outcome if the parties have market power and if the commercialisation costs are a large proportion of the products' variable costs.

[69] We agree with the Commission's general reasoning but would welcome rules of thumb on various aspects, such as: What level of common costs is generally likely to give rise to concerns? While we accept this may vary in practice, we think that general presumptions should exist. Is there a *de minimis* percentage increment that generally will not lead to a collusive outcome? Is there a safe harbour here?