Joint Comments of the American Bar Association’s
Section of Antitrust Law and
Section of International Law on the
COMESA Draft Guidelines on Public Interest and
Application of Articles 16 and 19 (Horizontal and Vertical Business Practices) and
18 (Abuse of Dominance)

August 20, 2013

I. Introduction

The Section of Antitrust Law and the Section of International Law of the American Bar Association (collectively, the “Sections”) appreciate the opportunity to submit these Comments on the Commission discussion paper on the COMESA Draft Guidelines on the application and enforcement of the COMESA Competition Regulations of 20041 (the “Competition Regulations”) relating to Public Interest (“Public Interest Guidelines”), the application of Articles 16 and 19 (Horizontal and Vertical Business Practices – “Horizontal/Vertical Guidelines”), and 18 (Abuse of Dominance – “Dominance Guidelines”) (collectively, the “Guidelines”). This is the Sections’ second set of comments, which address the non-merger aspects of the Guidelines, following the Sections’ comments on the Merger Guidelines submitted in June. The Sections again commend COMESA for developing a comprehensive set of guidelines, addressing mergers and acquisitions, vertical and horizontal business practices, abuse of a domination position, market definition, and the public interest test. The views expressed are those of both Sections. These comments have not been 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 policy of the American Bar Association.

The Sections’ membership includes more than twenty thousand lawyers. Most are based in the United States of America, but many have lived and worked outside the United States, and a significant number do so currently. Members of the Sections have substantial expertise in antitrust laws in the United States and in many other jurisdictions. In addition, many non-U.S. attorneys are associate members of the Sections and have contributed their expertise and perspectives to the Sections’ work.

II. Public Interest Guidelines

The Sections applaud the drafters for recognizing the very limited role that should be played by a vague “public interest” consideration untethered from market and competition factors. In particular, we applaud the drafters for acknowledging that public interest is an “amorphous concept” that can have various interpretations, that competition law is usually a very efficient way of addressing public interest, and that “diluting competition law in an attempt to satisfy a public interest often does not pay.” The Sections believe that non-competition-related public

policies (such as labor or environmental protection) should be dealt with by those organs of government that are directly charged with implementing such policies, not by competition authorities. Such a division of responsibility fosters subject-matter-specific accountability and prevents possible public confusion as to the appropriate role of competition policy in society. Nevertheless, we recognize that the drafters were constrained by the regulations, which include a public interest standard. We believe the draft does an admirable job of explaining how and why that standard needs to be carefully limited lest it undermine the basic goals of a competition law.

III. Guidelines on Horizontal and Vertical Business Practices

A. Introduction

The Sections support the goal of Article 16, as set out in paragraph 1.3: “to protect competition in the Common Market as a means to enhancing intra-regional trade, protecting consumer welfare and ensuring efficient allocation of resources in the Common Market.”

One basic change we would recommend for paragraph 6 of the Guidelines, however, is to clarify that Article 16(4) of the Regulations is an exception from the provisions of Article 16(1), not an exemption, as paragraph 6 currently states.

This distinction is not merely semantic. An exception is effectively a defense that applies by operation of law. Parties will themselves be required to consider whether or not the exception applies and to take the risk on the basis of this assessment. If a respondent to an Article 16(1) complaint is able to show that the requirements of Article 16(4) are met, the relevant conduct will automatically be excluded from the ambit of Article 16(1) and will be permissible. An exemption, on the other hand, must be granted by the regulator with jurisdiction before it applies. If Article 16(4) provides for an exemption, parties may have to approach the Commission before any conduct is exempt, which could lead to many applications to exempt benign conduct that the Commission need not be expending scarce resources to review.

On this basis, the Guidelines should make clear that conduct that meets the requirements of Article 16(4) automatically falls outside of Article 16(1) (and that, on this basis, it is a defense that does not require an affirmative application to the Commission for an exemption). This reading is supported by (i) the interpretation of Article 101(3) of the EC Treaty, on which the provisions of Article 16 of the Regulations are clearly based; and (ii) the fact that Article 20 specifically provides for an exemption.

In any event, the use of the exact wording of Article 101(3) means that the guidance available from European competition law, and in particular the vertical and horizontal guidelines issued by the European Commission² (collectively referred to as the “EC Guidelines”) can aid in the interpretation of the provisions of Article 16(4) of the Regulations.

B. Assessment of Trade Association Activity

Paragraph 5.1.8 of the Horizontal/Vertical Guidelines specifies that “recommendations adopted by trade associations” are included within the definition of “decisions by associations of undertakings” that may prevent, restrict, or distort competition. As drafted, the Horizontal/Vertical Guidelines may not provide enough guidance on how exceptions apply to the activities of trade associations, and, in particular, information exchanges. It is well recognized that, although certain trade association actions may be anticompetitive, much trade association behavior is procompetitive and efficient.3 Thus, the Sections believe the Guidelines should provide further details on what efficiencies qualify under Article 16(4) to activities of trade associations. As examples, the Horizontal/Vertical Guidelines may wish to provide practical advice on the exchange of competitively sensitive information, possibly mirroring Section 2 of the European Commission’s horizontal cooperation agreements Guidelines,4 Section 6 of the US Healthcare Policy Statements,5 or relevant parts of the US Antitrust Guidelines for Collaborations Among Competitors.6 Such practical advice would also be a useful adjunct to paragraph 8.7.1 of the Horizontal/Vertical Guidelines, which briefly notes that information exchanges may lead to efficiencies, but provides only limited information on how those efficiencies may be made manifest.

C. Treatment of Efficiencies

The manner in which paragraph 6.2 of the Horizontal/Vertical Guidelines has been framed could be interpreted to limit the efficiencies required in terms of Article 16(4) to those described in paragraph 6.2. It is submitted that Article 16(4) contains no limitation in this regard and, on this basis, paragraph 6.2 should confirm that efficiency gains for the purposes of Article 16(4) will be broadly construed to include all objective efficiencies.

More specifically, we also recommend that paragraph 6.2.3(a) of the Horizontal/Vertical Guidelines make it clear that the efficiency examples listed therein are not exhaustive and that “efficiencies” shall be broadly construed to include all objective efficiencies, so long as these are cognizable efficiencies.7

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7 Under the US Horizontal Merger Guidelines, “[c]ognizable efficiencies are merger-specific efficiencies that have been verified and do not arise from anticompetitive reductions in output or service. Cognizable efficiencies are assessed net of costs produced by the merger or incurred in achieving those efficiencies.” U.S. Dep’t
Paragraph 6.3.1 of the Horizontal/Vertical Guidelines does not account for possible consumer welfare benefits that may occur across national markets. However, if the Regulations are intended to consider the impact of anti-competitive conduct across the Common Market, we recommend that the Commission should at least retain discretion to consider consumer welfare benefits that may occur for the Common Market as a whole, in balancing those benefits against the potential for anti-competitive harm.

D. Relationship to European Commission Guidelines

Paragraph 6.5 provides an incomplete summary of the relevant EU guidelines applicable to the final leg of the exception, dealing with the possibility of eliminating competition. In particular, the EU Guidelines set out greater detail on the test for the elimination of competition (while paragraph 6.5.2 of the Horizontal/Vertical Guidelines provides that an assessment of the likelihood of elimination of competition should be established through the test outlined in the Dominance Guidelines). It is unclear which portion of the Dominance Guidelines was intended to apply here, as no section thereof would apply to the test required in terms of Article 16(4)(b) of the Regulations.

In any event, the Sections submit that the general outline of the analysis to be conducted (as set out in paragraph 6.5.3) contains insufficient detail to accomplish the intended guidance. In this regard, it is submitted that the Horizontal/Vertical Guidelines should incorporate similar detail to that contained in the comparable EU Guidelines.

Although the Horizontal/Vertical Guidelines are intended to provide guidance on the manner in which the Commission will consider particular issues, the Commission cannot yet rely on its own jurisprudence. To the extent that the Commission wishes to rely upon European Commission precedents, the Sections submit that it should do so in their entirety rather than selectively summarizing portions of applicable EU Guidelines. In our view, the Commission should refrain from publishing guidance on specific types of arrangements (in paragraphs 8.5 and 9.4) until it has greater jurisprudential experience and can set out its detailed views on each of the practices currently discussed. Furthermore, in revising the Horizontal/Vertical Guidelines, the Commission may wish to consider directly incorporating the analysis of horizontal and vertical business practices found in the EU Guidelines, rather than paraphrasing it.

IV. Abuse of Dominance

Since exclusionary practices are a central aspect of U.S. antitrust law enforcement, the Sections are grateful to the Commission for opening this important discussion on the enforcement of provisions on the abuse of a dominant position. It serves a very important role in seeking to provide clear guidance to the business community and private bar, and, thus, more effectively promoting transparency and predictability in the application of antitrust law. The Sections recognize that differences will exist between the U.S. and the COMESA Member States regarding jurisprudence and enforcement institutions. The Sections will point out these differences respectfully and candidly in the interest of promoting the full discussions the

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Commission desires. There is clear agreement on approach and outcome on many of these important issues, including the effects-based approach, the equation of dominance with substantial market power, and the focus on protection of competition, not competitors. The Sections’ comments and suggestions endeavor to take these factors into account.

A. Scope of the Dominance Guidelines and definition of Abuse of Dominance

The Sections welcome the Commission’s description of the scope of the Dominance Guidelines, especially as regards the goal to (i) provide clarity on the applicability of the abuse of dominance provisions (Section 2.1) and (ii) protect competition as a means of enhancing consumer welfare and ensuring the efficient allocation of resources (Section 1.3). Also, it is reassuring to notice that the analysis of the existence of dominance will be based on an analysis of market power.

In defining the scope of the Dominance Guidelines, item 2.3 states that “The application of the guideline will put emphasis on preventing dominant undertakings from excluding their rivals by means other than fair competition or exploiting consumers in case of exploitative conduct.” The Sections suggest that the reference to “fair competition” be replaced by “competition on the merits,” to eliminate the possible implication that efficient business conduct that harms individual rivals but benefits consumers is somehow “unfair,” and thus worthy of condemnation. We also suggest that the reference to “exploiting customers” be removed, as it does not give clear guidance on what types of conduct would be covered.

Section 3.2 of the Dominance Guidelines provides that a company has a dominant position if it is able to “operate in the market without effective constraints from its competitors or potential competitors.” The Sections believe it would make sense to address the possibility of constraints from customers and consumers, since this section as currently drafted could be interpreted as not addressing the possibility of countervailing market power, as is done in Section 4.2.

Section 3.6 of the Dominance Guidelines provides that the defendant has the burden of proving that a practice is not abusive upon a finding of dominance. The Sections recommend that all elements of an abuse be established in each case before finding (by presumption or otherwise) a violation that would expose a company to significant fines and related private damage actions. Second, in the instances in which the burden of proof for certain elements is shifted to the defendant, the required standard of proof appears almost impossible to meet. The Sections respectfully suggest that the plaintiff should have the burden of proof, and an indication of abusive conduct should be a condition for a complaint to be admissible.

B. Determination of Dominance

With respect to the level of competitive constraints, Section 4.1 of the Dominance Guidelines sets a 40% threshold above which an undertaking is presumed to hold a dominant position (4.1.2.1). Section 4.1 also states that an undertaking with a market share of less than 40% will be regarded as dominant if it has market power (4.1.2.2). Furthermore, Section 4.1 provides that “undertakings will be considered to be collectively dominant if three or fewer undertakings hold at least 50 percent share . . . or where five or fewer undertakings hold at least
65 percent share of the relevant market” (4.1.2.3). The Sections offer several observations on these points:

(i) A 40% threshold for the presumption of dominance is quite low. In United States jurisprudence, for example, “if the [market] share is lower than 70% courts become much more reluctant to find monopoly power.”

(ii) Especially considering that a finding of dominance gives companies a “special responsibility,” there should be a threshold below which companies can be presumed not to be dominant. As widely acknowledged, even in the Dominance Guidelines (Section 7), conduct that can be considered as exclusionary or abusive when performed by a dominant firm may have pro-competitive effects or efficiencies that offset the anticompetitive concerns. When performed by non-dominant firms, such conduct is most likely the result of effective and aggressive competition, which should not be hindered by competition law enforcement. According to the ICN, “Agencies can use market shares to establish a level under which an agency generally will not find dominance/substantial market power … Possession of a market share outside the safe harbor is generally necessary but insufficient for finding dominance/substantial market power.” In light of this guidance, we find it quite problematic that firms with shares below 40% may be deemed dominant based on some showing of mere market power. Notably, the ICN defines dominance not based on mere market power, but rather in terms of “substantial market power,” which is “a high degree of market power both with respect to the level to which price can be profitably raised and to the duration that price can be maintained at such a level.” Accordingly, we strongly recommend that the Commission delete its reference to the possibility of finding dominance in the case of shares under 40% in the presence of market power. Low market shares are inconsistent with substantial market power, the core meaning of dominance.

(iii) Consistent with the preceding observation, the Sections suggest that the Dominance Guidelines state more clearly that companies with market shares below a certain level, say 35% or 40%, will be not be presumed to have a dominant position absent special circumstances, and that, in such cases, the plaintiff should bear the burden of proof.

(iv) The concept of “collective dominance” runs the risk that individual firms with relatively small market shares may be constrained from engaging in aggressive competition on the merits, given the additional scrutiny given to “dominant” undertakings. Accordingly, the Sections strongly recommend that the Commission delete all references to collective dominance.

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10 Id., at 1.
C. Concept of Abuse of Dominance

The Sections commend the Commission for making it clear in the Dominance Guidelines that only abusive conduct, and not the existence of a dominant position in itself (Section 5.1), should be culpable. This is in line with widely accepted international understandings of sound competition enforcement policy. 11 Likewise, basing the assessment of the existence of abuse on objective factors, and not merely on subjective intent, as determined in Section 5.2.4, is a welcome principle.

The Dominance Guidelines establish categories of abuse in Section 6: exploitative abuse and exclusionary abuse. The concept of exclusionary abuse is directly related to anticompetitive foreclosure, which is the core of unilateral conduct enforcement. Exploitative conduct, on the other hand, seems to be related to excessive pricing. 12 The Sections note that, parting from the broad wording currently contained in the draft, the Guidelines could be interpreted to encompass legitimate conduct by companies that have market power. While consumer protection is a desirable goal, any direct control on prices or sales terms should not be an aspect of competition enforcement. The same comments apply to the provisions on excessive pricing in Section 8.6.

V. Conclusions

The Sections hope these comments are helpful and we would consider it a privilege to be able to offer any further assistance as the Commission drafts implementing regulations and considers any further amendments thereto.

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12 “Exploitative abuses by the dominant undertaking which directly and significantly exploits suppliers or customers by taking advantage of its market power,” Section 6.1.1 of the Dominance Guidelines.