

Public questionnaire for the 2019 Evaluation of the Research & Development and Specialisation Block Exemption Regulations

Fields marked with * are mandatory.

1

Introduction

Background and aim of the public questionnaire

Article 101(1) of the Treaty on the Functioning of the European Union ('the Treaty') prohibits agreements between undertakings that restrict competition unless they generate efficiencies in line with Article 101(3) of the Treaty. Agreements generate efficiencies in line with Article 101(3) of the Treaty if they contribute to improving the production or distribution of goods or services, or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefits; they only impose restrictions that are indispensable for the attainment of these objectives and do not eliminate competition in respect of a substantial part of the product in question. The prohibition contained in Article 101(1) of the Treaty covers, amongst others, agreements entered into between actual or potential competitors (so-called 'horizontal agreements').

Commission Regulations (EU) No 1217/2010 (Research & Development Block Exemption Regulation - 'R&D BER') and 1218/2010 (Specialisation Block Exemption Regulation - 'Specialisation BER'), together referred to as the 'Horizontal block exemption regulations' (or 'HBERs'), exempt from the prohibition contained in Article 101(1) of the Treaty those R&D and specialisation agreements for which it can be assumed with sufficient certainty that they satisfy the conditions of Article 101(3) of the Treaty. The Commission Guidelines on horizontal cooperation agreements ('HGL') provide binding guidance on the Commission for the interpretation of the HBERs and for the application of Article 101 of the Treaty to other horizontal agreements. The HBERs will expire on 31 December 2022.

This public questionnaire represents one of the methods of information gathering in the evaluation of the HBERs, together with the HGL, which was launched on 5 September 2019. The purpose of this questionnaire is to collect views and evidence from the public and stakeholders on how the current rules work for them. The Commission will evaluate the current HBERs, together with the HGL, based on the following criteria:

- Effectiveness (Have the objectives been met?),
- Efficiency (Were the costs involved proportionate to the benefits?),
- Relevance (Do the objectives still match current needs or problems?),
- Coherence (Does the policy complement other actions or are there contradictions?), and
- EU added value (Did EU action provide clear added value?).

The collected information will provide part of the evidence base for determining whether the Commission should let the HBERs lapse, prolong their duration without changing them or prolong them in a revised form, together with the accompanying HGL.

The responses to this public consultation will be analysed and the summary of the main points and conclusions will be made public on the Commission's central public consultations page. **Please note that your replies will also become public as a whole, see below under Section 'Privacy and Confidentiality'.**

Nothing in this questionnaire may be interpreted as stating an official position of the Commission.

Submission of your contribution

You are invited to reply to this public consultation by answering the questionnaire online. To facilitate the analysis of your replies, we would kindly ask you to keep your answers concise and to the point. You may include documents and URLs for relevant online content in your replies.

While the questionnaire contains several questions of a more general nature, notably Section 4 and 5 also contain questions that are aimed at respondents with more specialised knowledge of the HBERs and HGL. We invite all respondents to provide answers to the questionnaire. In case a question does not apply to you or you do not know the answer, please choose the field 'Do not know' or 'Not applicable'.

For your information, you have the option of saving your questionnaire as a 'draft' and finalising your response later. In order to do this you have to click on 'Save as Draft' and save the new link that you will receive from the EUSurvey tool on your computer. Please note that without this new link you will not be able to access the draft again.

The questionnaire is available in English, French and German. You may however respond in any EU language.

In case of questions, you can contact us via the following functional mailbox: COMP-HBERS-REVIEW@ec.europa.eu.

In case of technical problem, please contact the Commission's [CENTRAL HELPDESK](#).

Duration of the consultation

The consultation on this questionnaire will be open for 14 weeks, from 6/11/2019 to 12/2/2020.

Privacy and confidentiality

*** 1.1 Publication privacy settings**

The Commission will publish the responses to this public consultation. You can choose whether you would like your details to be made public or to remain anonymous.

☒ **Anonymous**

Only your type of respondent, country of origin and contribution will be published. All other personal details (name, organisation name and size, transparency register number) will not be published.

☒ **Public**

Your personal details (name, organisation name and size, transparency register number, country of origin) will be published with your contribution.

Please note that your replies and any attachments you may submit will be published in their entirety even if you chose 'Anonymous'. Therefore, please remove from your contribution any information that you will not want to be published.

☒ 1.2 I agree with the [personal data protection provisions](#)

2 About you

* 2.1 Language of my contribution

- ☐ Bulgarian
- ☐ Croatian
- ☐ Czech
- ☐ Danish
- ☐ Dutch
- ☒ English
- ☐ Estonian
- ☐ Finnish
- ☐ French
- ☐ Gaelic
- ☐ German
- ☐ Greek
- ☐ Hungarian
- ☐ Italian
- ☐ Latvian
- ☐ Lithuanian
- ☐ Maltese
- ☐ Polish
- ☐ Portuguese
- ☐ Romanian
- ☐ Slovak
- ☐ Slovenian
- ☐ Spanish
- ☐ Swedish

* 2.2 First name

Francisco

* 2.3 Surname

MINGORANCE

* 2.4 Email (this won't be published)

* 2.5 I am giving my contribution as

- ☐ Academic/research institution
- ☐ Business association
- ☐ Company/business organisation
- ☐ Consumer organisation
- ☐ EU citizen
- ☐ Environmental organisation
- ☐ Non-EU citizen
- ☐ Non-governmental organisation (NGO)
- ☐ Public authority
- ☐ Trade union
- ☒ Other

2.6 Other - please specify

If you chose "Other", please specify whether you are contributing as lawyer/law firm, economic consultancy or something else:

Coalition of European Organisations on Innovation and Industrial Property (IP Europe)

* 2.7 Organisation name

255 character(s) maximum

IP Europe

If available, please provide your ID number of the [EU Transparency Register](#). If your organisation is not registered, we invite you to register, although it is not compulsory to be registered to reply to this consultation.

2.8 Transparency register number

255 character(s) maximum

Check if your organisation is on the [transparency register](#). It's a voluntary database for organisations seeking to influence EU decision-making.

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* 2.10 Organisation size

- ☐ Micro (1 to 9 employees)
- ☒ Small (10 to 49 employees)
- ☐ Medium (50 to 249 employees)
- ☐ Large (250 or more)

* 2.11 The main activities of your organisation:

Text of 1 to 250 characters will be accepted

IP Europe is a coalition of research and development-intensive organisations headquartered in Europe, whose inventions are protected by intellectual property rights.

*** 2.12 Please describe the sectors where your organisation or your members are conducting business:**

Text of 1 to 250 characters will be accepted

IP Europe's goal is to promote the vital importance of Intellectual Property Rights to the European digital and knowledge-based economy and to ensure that EU policies support a world-leading innovation ecosystem.

*** 2.15 Country of origin**

Please add your country of origin, or that of your organisation.

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| <input type="radio"/> Afghanistan | <input type="radio"/> Djibouti | <input type="radio"/> Libya | <input type="radio"/> Saint Martin |
| <input type="radio"/> Åland Islands | <input type="radio"/> Dominica | <input type="radio"/> Liechtenstein | <input type="radio"/> Saint Pierre and Miquelon |
| <input type="radio"/> Albania | <input type="radio"/> Dominican Republic | <input type="radio"/> Lithuania | <input type="radio"/> Saint Vincent and the Grenadines |
| <input type="radio"/> Algeria | <input type="radio"/> Ecuador | <input type="radio"/> Luxembourg | <input type="radio"/> Samoa |
| <input type="radio"/> American Samoa | <input type="radio"/> Egypt | <input type="radio"/> Macau | <input type="radio"/> San Marino |
| <input type="radio"/> Andorra | <input type="radio"/> El Salvador | <input type="radio"/> Madagascar | <input type="radio"/> São Tomé and Príncipe |
| <input type="radio"/> Angola | <input type="radio"/> Equatorial Guinea | <input type="radio"/> Malawi | <input type="radio"/> Saudi Arabia |
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| <input type="radio"/> Antarctica | <input type="radio"/> Estonia | <input type="radio"/> Maldives | <input type="radio"/> Serbia |
| <input type="radio"/> Antigua and Barbuda | <input type="radio"/> Eswatini | <input type="radio"/> Mali | <input type="radio"/> Seychelles |
| <input type="radio"/> Argentina | <input type="radio"/> Ethiopia | <input type="radio"/> Malta | <input type="radio"/> Sierra Leone |
| <input type="radio"/> Armenia | <input type="radio"/> Falkland Islands | <input type="radio"/> Marshall Islands | <input type="radio"/> Singapore |
| <input type="radio"/> Aruba | <input type="radio"/> Faroe Islands | <input type="radio"/> Martinique | <input type="radio"/> Sint Maarten |
| <input type="radio"/> Australia | <input type="radio"/> Fiji | <input type="radio"/> Mauritania | <input type="radio"/> Slovakia |
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| <input type="radio"/> Bahrain | <input type="radio"/> French Polynesia | <input type="radio"/> Micronesia | <input type="radio"/> South Africa |
| <input type="radio"/> Bangladesh | <input type="radio"/> French Southern and Antarctic Lands | <input type="radio"/> Moldova | <input type="radio"/> South Georgia and the South Sandwich Islands |

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| <input type="radio"/> Barbados | <input type="radio"/> Gabon | <input type="radio"/> Monaco | <input type="radio"/> South Korea |
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| <input type="radio"/> Benin | <input type="radio"/> Gibraltar | <input type="radio"/> Morocco | <input type="radio"/> Sudan |
| <input type="radio"/> Bermuda | <input type="radio"/> Greece | <input type="radio"/> Mozambique | <input type="radio"/> Suriname |
| <input type="radio"/> Bhutan | <input type="radio"/> Greenland | <input type="radio"/> Myanmar /Burma | <input type="radio"/> Svalbard and Jan Mayen |
| <input type="radio"/> Bolivia | <input type="radio"/> Grenada | <input type="radio"/> Namibia | <input type="radio"/> Sweden |
| <input type="radio"/> Bonaire Saint Eustatius and Saba | <input type="radio"/> Guadeloupe | <input type="radio"/> Nauru | <input type="radio"/> Switzerland |
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| <input type="radio"/> Brazil | <input type="radio"/> Guinea | <input type="radio"/> New Zealand | <input type="radio"/> Tanzania |
| <input type="radio"/> British Indian Ocean Territory | <input type="radio"/> Guinea-Bissau | <input type="radio"/> Nicaragua | <input type="radio"/> Thailand |
| <input type="radio"/> British Virgin Islands | <input type="radio"/> Guyana | <input type="radio"/> Niger | <input type="radio"/> The Gambia |
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| <input type="radio"/> Bulgaria | <input type="radio"/> Heard Island and McDonald Islands | <input type="radio"/> Niue | <input type="radio"/> Togo |
| <input type="radio"/> Burkina Faso | <input type="radio"/> Honduras | <input type="radio"/> Norfolk Island | <input type="radio"/> Tokelau |
| <input type="radio"/> Burundi | <input type="radio"/> Hong Kong | <input type="radio"/> Northern Mariana Islands | <input type="radio"/> Tonga |
| <input type="radio"/> Cambodia | <input type="radio"/> Hungary | <input type="radio"/> North Korea | <input type="radio"/> Trinidad and Tobago |
| <input type="radio"/> Cameroon | <input type="radio"/> Iceland | <input type="radio"/> North Macedonia | <input type="radio"/> Tunisia |
| <input type="radio"/> Canada | <input type="radio"/> India | <input type="radio"/> Norway | <input type="radio"/> Turkey |
| <input type="radio"/> Cape Verde | <input type="radio"/> Indonesia | <input type="radio"/> Oman | <input type="radio"/> Turkmenistan |
| <input type="radio"/> Cayman Islands | <input type="radio"/> Iran | <input type="radio"/> Pakistan | <input type="radio"/> Turks and Caicos Islands |
| <input type="radio"/> Central African Republic | <input type="radio"/> Iraq | <input type="radio"/> Palau | <input type="radio"/> Tuvalu |
| <input type="radio"/> Chad | <input type="radio"/> Ireland | <input type="radio"/> Palestine | <input type="radio"/> Uganda |
| <input type="radio"/> Chile | <input type="radio"/> Isle of Man | <input type="radio"/> Panama | <input type="radio"/> Ukraine |
| <input type="radio"/> China | <input type="radio"/> Israel | <input type="radio"/> Papua New Guinea | <input type="radio"/> United Arab Emirates |
| <input type="radio"/> Christmas Island | <input type="radio"/> Italy | <input type="radio"/> Paraguay | <input type="radio"/> United Kingdom |
| <input type="radio"/> Clipperton | <input type="radio"/> Jamaica | <input type="radio"/> Peru | <input type="radio"/> United States |
| <input type="radio"/> Cocos (Keeling) Islands | <input type="radio"/> Japan | <input type="radio"/> Philippines | <input type="radio"/> United States Minor Outlying Islands |

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| <input type="radio"/> Colombia | <input type="radio"/> Jersey | <input type="radio"/> Pitcairn Islands | <input type="radio"/> Uruguay |
| <input type="radio"/> Comoros | <input type="radio"/> Jordan | <input type="radio"/> Poland | <input type="radio"/> US Virgin Islands |
| <input type="radio"/> Congo | <input type="radio"/> Kazakhstan | <input type="radio"/> Portugal | <input type="radio"/> Uzbekistan |
| <input type="radio"/> Cook Islands | <input type="radio"/> Kenya | <input type="radio"/> Puerto Rico | <input type="radio"/> Vanuatu |
| <input type="radio"/> Costa Rica | <input type="radio"/> Kiribati | <input type="radio"/> Qatar | <input type="radio"/> Vatican City |
| <input type="radio"/> Côte d'Ivoire | <input type="radio"/> Kosovo | <input type="radio"/> Réunion | <input type="radio"/> Venezuela |
| <input type="radio"/> Croatia | <input type="radio"/> Kuwait | <input type="radio"/> Romania | <input type="radio"/> Vietnam |
| <input type="radio"/> Cuba | <input type="radio"/> Kyrgyzstan | <input type="radio"/> Russia | <input type="radio"/> Wallis and Futuna |
| <input type="radio"/> Curaçao | <input type="radio"/> Laos | <input type="radio"/> Rwanda | <input type="radio"/> Western Sahara |
| <input type="radio"/> Cyprus | <input type="radio"/> Latvia | <input type="radio"/> Saint Barthélemy | <input type="radio"/> Yemen |
| <input type="radio"/> Czechia | <input type="radio"/> Lebanon | <input type="radio"/> Saint Helena Ascension and Tristan da Cunha | <input type="radio"/> Zambia |
| <input type="radio"/> Democratic Republic of the Congo | <input type="radio"/> Lesotho | <input type="radio"/> Saint Kitts and Nevis | <input type="radio"/> Zimbabwe |
| <input type="radio"/> Denmark | <input type="radio"/> Liberia | <input type="radio"/> Saint Lucia | |

3 General Questions on the Horizontal Block Exemption Regulations and the Guidelines on horizontal cooperation agreements

* 3.6 How often do you consult the **R&D BER** for guidance on a horizontal cooperation agreement?

- ☐ Frequently (several times per year)
- ☒ Occasionally (once or twice per year)
- ☐ Never

* 3.7 How often do you consult the **Specialisation BER** for guidance on a horizontal cooperation agreement?

- ☐ Frequently (several times per year)
- ☒ Occasionally (once or twice per year)
- ☐ Never

* 3.8 How often do you consult the **HGL** for guidance on a horizontal cooperation agreement?

- ☐ Frequently (several times per year)
- ☒ Occasionally (once or twice per year)
- ☐ Never

4 Effectiveness (Have the objectives of the current HBERs and HGL been met?)

In this section, we would like to have your opinion on the extent to which the HBERs and the HGL have met their objectives.

The **purpose of the EU competition rules** is to ensure that competition is not distorted to the detriment of the public interest, individual undertakings and consumers. In line with this objective, the Commission's policy is to leave companies maximum flexibility when concluding horizontal co-operation agreements in order to increase the competitiveness of the European economy while at the same time promoting competition for the benefit of European businesses and consumers.

The **purpose of the HBERs and the HGL** is to make it easier for undertakings to cooperate in ways which are economically desirable and without adverse effect from the point of view of competition policy. The specific objectives of the HBERs and HGL are to ensure effective protection of competition and providing adequate legal certainty for undertakings.

* 4.1 In your view, do you perceive that the HBERs and the HGL have contributed to promoting competition in the EU?

- ☒ Yes
- ☐ Yes, but they have contributed only to a certain extent or only in specific sectors
- ☐ They were neutral
- ☐ No, they have negatively affected competition in the EU
- ☐ Don't know

* 4.2 Please explain your reply, distinguishing between sectors where relevant: (1500 characters max).

Text of 1 to 1500 characters will be accepted

The anomalous inclusion of the phrase 'to all third parties' in para 285 HGL is fallaciously used to argue that a licence must be granted to any third party requesting one, depriving the IPR holder of the option of where in the supply chain to issue a licence. If construed as obligatory, this can amount to a compulsory upstream licensing system. This was not foreseen during either the initial public consultation evaluating the impact of the HGL; nor following publication of the draft HGL, May 2010, where the word 'all' was added for the first time. Its inclusion was not necessary; the touchstone of the HGL is "effective access" (see paras 264, 268, 280, 283, 284, 286, 287, 294 and 298).

The effect of this inclusion was not foreseen and has exacerbated since the US Supreme Court decisions in *Quanta v LG* in 2008 and *Impression Products v Lexmark* in 2017, whereby the global patent licensing community now works on the basis that exhaustion will occur (at least in the US) on grant of the first licence. This makes a nonsense of the phrase 'to all third parties' and has harmed the nature of competition that would otherwise have occurred. IP holders are deprived of a proper monetisation of their inventions. This harms further innovation; contrary to the intention of the HGL (see para 269: "IPR promote dynamic competition by encouraging undertakings to invest in developing new or improved products and processes. IPR are therefore in general pro-competitive.")

Legal certainty provided by the HBERs and the HGL

* 4.3 In your view, have the R&D BER and Section 3 of the HGL on research and development agreements provided sufficient legal certainty on R&D agreements companies can conclude without the risk of infringing competition law?

- ☐ Yes

- ☐ No
- ☒ Do not know

* 4.5 In your view, does the R&D BER increase legal certainty compared with a situation where the R&D BER would not exist but only the HGL applied?

- ☐ Yes
- ☐ No
- ☒ Do not know

* 4.7 In your view, have the Specialisation BER and Section 4 of the HGL on production agreements provided sufficient legal certainty on production /specialisation agreements companies can conclude without the risk of infringing competition law?

- ☐ Yes
- ☐ No
- ☒ Do not know

* 4.9 In your view, does the Specialisation BER increase legal certainty compared with a situation where the Specialisation BER would not exist but only the HGL applied?

- ☐ Yes
- ☐ No
- ☒ Do not know

In this section we would like to have your opinion on the extent to which the HGL have provided sufficient legal certainty on horizontal cooperation agreements companies can undertake without the risk of infringing competition law. Please specify your answer according to the different types of horizontal agreements.

* 4.11 In your view, have the HGL provided sufficient legal certainty on agreements involving **information exchange** in the sense of Section 2 of the HGL?

- ☐ Yes
- ☐ No
- ☒ Do not know

* 4.13 In your view, have the HGL provided sufficient legal certainty on **purchasing agreements** in the sense of Section 5 of the HGL?

- ☐ Yes
- ☐ No
- ☒ Do not know

* 4.15 In your view, have the HGL provided sufficient legal certainty on **commercialisation agreements** in the sense of Section 6 of the HGL

- ☐ Yes
- ☐ No
- ☒ Do not know

* 4.17 In your view, have the HGL provided sufficient legal certainty on **standardisation agreements** in the sense of Section 7 of the HGL

- ☐ Yes
- ☒ No
- ☐ Do not know

* 4.18 Please explain your reply

Text of 1 to 1500 characters will be accepted

IP Europe welcomes that the HGL maintain sufficient elasticity to enable the evolution of SDO governance and emphasise self-assessment: "The non-fulfilment of any or all of the principles set out in this section will not lead to any presumption of a restriction of competition within Article 101(1)" (para 279). This flexibility is not at the cost of legal certainty and is appropriate. IP Europe welcomes the recognition that "there is no presumption that holding or exercising IPR essential to a standard equates to the possession or exercise of market power" and that "...[t]he question of market power can only be assessed on a case by case basis." (para 269). However, the HGL have inadvertently created legal uncertainty by insertion of the phrase 'to all third parties' in para 285, as there is argument that it has in effect created a compulsory upstream licensing system for SEP holders contributing in SDOs. This is contrary to settled custom and practice that SEP holders commit to offer end manufacturers licences on FRAND terms with "have made" provisions benefiting upstream suppliers, to provide them with effective access to the standard. This change was not envisaged at the time of adoption of the HGL, and legal uncertainty has arisen over whether para 285 may mean that any manufacturer at any point in a supply chain can demand a licence, with the result that a SEP holder may be deprived of an appropriate reward for their innovation, and be reticent to contribute to a standard.

* 4.19 In your view, have the HGL provided sufficient legal certainty on **other types of horizontal cooperation agreements** that are currently not specifically addressed in the HGL (for example sustainability agreements)

- ☐ Yes
- ☐ No
- ☒ Do not know

* 4.21 In your view, are there other types of horizontal cooperation agreements outside those identified in the current HGL that should have been specifically addressed in order to increase legal certainty?

- ☐ Yes
- ☐ No
- ☒ Do not know

Identification of pro-competitive horizontal agreements

The R&D BER and the Specialisation BER set out a number of conditions that R&D and specialisation agreements need to meet in order to benefit from the block exemption. The HGL provide additional guidance on how to interpret these conditions. These conditions have been defined with the purpose to give exemption only to those agreements for which it can be assumed with sufficient certainty that they generate efficiencies that outweigh, in line with Article 101(3) of the Treaty, the harm caused by the restriction of competition.

Based on your experience, have the following provisions in the **R&D BER** allowed to correctly identify the horizontal cooperation agreements that are compliant with Article 101 of the Treaty?

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4.23 The list of definitions that apply for R&D agreements that can benefit from exemption in Article 1 of the R&D BER

- ☐ Yes
- ☐ No
- ☒ Do not know

* 4.25 The conditions for exemption listed in Article 3 of the R&D BER, regarding, for instance, access to the final results of the R&D, access to pre-existing know-how and joint exploitation.

- ☐ Yes
- ☐ No
- ☒ Do not know

* 4.27 The absence of a market share threshold for non-competing undertakings, the market share threshold of 25% for competing undertakings and the application thereof provided for in Articles 4 and 7 of the R&D BER

- ☐ Yes
- ☐ No
- ☒ Do not know

* 4.29 The limits regarding the duration of the exemption provided for in Article 4

- ☐ Yes
- ☐ No
- ☒ Do not know

* 4.31 The list identified in Article 5 of the R&D BER which make the exemption not available for agreements that have as their object certain restrictions or limitations ('hardcore restrictions')

- ☐ Yes
- ☐ No
- ☒ Do not know

* 4.33 The list of obligations included in agreements to which the exemption does not apply ('excluded restrictions'), identified in Article 6 of the R&D BER

- ☐ Yes
- ☐ No
- ☒ Do not know

Based on your experience, have the following provisions in the **Specialisation BER** allowed to correctly identify the horizontal cooperation agreements that are compliant with Article 101 of the Treaty?

* 4.35 The definitions that apply for the purposes of the Specialisation BER, in Article 1

- ☐ Yes
- ☐ No
- ☒ Do not know

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4.37 The explanations on the type of specialisation agreements to which the exemption applies, provided by Article 2 of the Specialisation BER

- ☐ Yes
- ☐ No
- ☒ Do not know

* 4.39 The market share threshold of 20% and its application, provided for in Articles 3 and 5 of the Specialisation BER

- ☐ Yes
- ☐ No
- ☒ Do not know

* 4.41 The list identified in Article 4 of the Specialisation BER which make the exemption not available for agreements that have as their object price fixing, certain limitations of output or sales or market or customer allocation ('hardcore restrictions')

- ☐ Yes
- ☐ No
- ☒ Do not know

4.43 Based on your experience, are there other elements, besides those listed in the previous questions that should have been clarified, added, or removed to improve the guidance given by the BERs?

Text of 1 to 3000 characters will be accepted

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* 4.44 Based on your experience, are there other types of horizontal cooperation agreements outside those identified in the R&D and Specialisation BERs which would satisfy the conditions of Article 101(3) of the Treaty?

- ☐ Yes
- ☐ No
- ☒ Do not know

* 4.46 Based on your experience, have the BERs and the HGL had any impacts that were not expected or not intended?

- ☒ Yes
- ☐ No
- ☐ Do not know

* 4.47 If Yes, please explain your answer

Text of 1 to 3000 characters will be accepted

The statement that an SDO's IPR policy should require its participants to commit: "... in writing to offer to license their essential IPR to all third parties" on FRAND terms (para 285 HGL) has given rise to unintended

consequences.

The lack of any comment as to the adverse effects of the inclusion of the phrase 'to all third parties', both before and after the issue of the draft HGL; the fact that it is at odds with the custom and practice of SDOs in the telecommunications sector; and a strict reading of the patent exhaustion principles from the US SC Quanta judgment in 2008 and Impression Products judgment in 2017 all indicate that these effects were not expected, let alone intended.

The 2000 Draft HGL were the first promulgation of guidelines in relation to horizontal cooperation. For agreements on standards, at para 166 they provided that:

"To avoid elimination of competition in the relevant market(s), access to the standard must be possible for third parties on fair, reasonable and non-discriminatory terms."

The final version of the 2001 HGL contained identical wording to that of para 166 of the Draft HGL (see para 174).

On 4 December 2008, the Commission ran a public consultation on the horizontal cooperation agreements (see European Commission, IP/08/1887, 4 December 2008). Most contributions submitted to the Commission did not address access to standards under para 174 of the 2001 HGL.

On 4 May 2010, the Commission adopted draft guidelines on the application of Article 101 of the Treaty on the Functioning of the European Union to Horizontal co-operation agreements (SEC(2010) 528/2). A new requirement at para 282, the 2010 Draft HGL provided that:

"The IPR policy should also require that all holders of essential IPR in technology which may be adopted as part of a standard provide an irrevocable commitment in writing to license their IPR to all third parties on fair, reasonable and non-discriminatory terms ("FRAND commitment"). (emphasis added)

At the same time, the Commission announced a public consultation on the 2010 Draft HGL (see European Commission, IP/10.489, 4 May 2010). Although the addition of para 282 was widely commented on by contributors, the requirement for holders of essential IPRs to license their IPR "to all third parties" was not addressed, save for one comment in relation to export controls [CBI, 25 June 2010, p.3].

In the circumstances, IP Europe considers the inclusion of the phrase 'to all third parties' was 'the dog that didn't bark'. No theory of harm was identified to justify the inclusion; let alone any decisional practice or judicial oversight. Nor was it identified as having the reading that it is now being wrongly given in some quarters.

The unexpected consequence of this drafting is that it is argued as reversing a long-established practice, consistent with the IPR policies of most SDOs of licensing at a single level in a supply chain; disrupting the efficiencies of such licensing.

5 Efficiency (were the costs involved proportionate to the benefits?)

In this section, we would like to have your view concerning the efficiency of the HBERs and the HGL. In your view, do you consider that the costs (for example, legal fees, delays in implementation) of analysing the conditions and applying these instruments is proportionate to the benefits (for example, faster self assessment) of having the rules in place?

Costs

* 5.1 Please describe the different types of costs of applying the current R&D and Specialisation BERs; and the HGL

Text of 1 to 1500 characters will be accepted

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5.2 Please explain whether you can express the above costs in money terms

Text of 1 to 1000 characters will be accepted

-

5.3 Please provide an estimate of your quantifiable costs both in terms of value (in EUR) and as a percentage of your annual turnover (or, in the case of a business association, of the annual turnover of the members you are representing)

Text of 1 to 500 characters will be accepted

-

5.4 Please explain how you calculate these costs

Text of 1 to 1500 characters will be accepted

-

* 5.5 In your view, how have the costs generated by the application of the R&D or the Specialisation BER or the HGL evolved **compared with the previous legislative framework** (Reg. 2659/2000 on R&D, Reg. 2658/2000 on Specialisation agreements and the accompanying horizontal guidelines)?

- ☐ Costs increased
- ☐ Costs decreased
- ☒ Do not know

In your view, would the costs of ensuring compliance of your horizontal cooperation agreements (or the agreements of your members) with Article 101 of the Treaty would be different **if the current HBERs were not in place but only the HGL applied?**

* 5.8 Were the **R&D BER** not in place, the cost of ensuring compliance

- ☐ Would increase
- ☐ Would decrease
- ☒ Do not know

5.11 Were the **Specialisation BER** not in place, the cost of ensuring compliance

- ☐ Would increase
- ☐ Would decrease
- ☒ Do not know

Benefits

- * 5.14 Please describe the benefits, if any, of having the R&D and Specialisation BERs; and the HGL

Text of 1 to 1500 characters will be accepted

Benefits vs. costs

In your view, does the application of the R&D and Specialisation BERs and the HGL generate costs that are proportionate to the benefits they bring (or, in the case of a business association, the benefits for the members you are representing)?

- * 5.15 Regarding the **R&D BER**
 - ☐ Costs are proportionate to benefits
 - ☐ Costs are not proportionate to benefits
 - ☒ Do not know
- * 5.17 Regarding the **Specialisation BER**
 - ☐ Costs are proportionate to benefits
 - ☐ Costs are not proportionate to benefits
 - ☒ Do not know
- * 5.19 Regarding the **HGL**
 - ☐ Costs are proportionate to benefits
 - ☐ Costs are not proportionate to benefits
 - ☒ Do not know

6 Relevance (do the objectives still match the needs or problems?)

In this section, we would like to understand if the objectives of the HBERs and the HGL are still up-to-date considering the developments that have taken place since their publication.

6.1 Please identify major trends and developments (for example legal, economic, political) that, based on your experience, have affected the application of the BERs and HGL. Please provide a short explanation with concrete examples in case you consider that (parts of) the HBERs or HGL do not sufficiently allow to address them

1000 characters max. for each row

	Major trends/changes	Articles of the HBERs and/or recitals of the HGL	Short explanation/concrete examples
1	Quanta Computer, Inc. v. LG Electronics, Inc., 553 U. S. 617 (2008).	Para 285 HGL: 'an irrevocable commitment in writing to offer to license their essential IPR to all third parties' on FRAND terms.	US patent exhaustion arises on the authorised sale of a component. Requiring a licence to be granted to all undermines the settled system of single end point licensing combined with 'have made' protections for intermediate producers.
2	Impression Products, Inc. v Lexmark International, Inc., 137 S.Ct. 1523 (2017)	Para 285 HGL: 'an irrevocable commitment in writing to offer to license their essential IPR to all third parties' on FRAND terms.	US patent exhaustion arises on the first sale of a component, irrespective of contractual restrictions or location. Requiring a licence to be granted to all undermines the settled system of single end point licensing combined with 'have made' protections for intermediate producers.
3	Case C-170/13 Huawei v ZTE	Para 285 HGL: 'an irrevocable commitment in writing to offer to license their essential IPR to all third parties' on FRAND terms.	ECJ gave guidance as to the negotiation of SEP licenses and availability of injunctive relief in relation to standard essential patents (SEPs) and for the licensing and enforcement of SEPs that are subject to a FRAND licensing commitment.
4	Unwired Planet v. Huawei (UK), [2018] EWCA Civ 2344 and judgment of Supreme Court expected [TBA – hearing was in October of last year]	Para 285 HGL: 'an irrevocable commitment in writing to offer to license their essential IPR to all third parties' on FRAND terms.	Settled licence annexed to judgment was limited to end user devices and infrastructure equipment. Intermediate products were explicitly excluded from the licence scope. A "have made" provision was included.
5			

6			
7			

Do you think that it is still relevant to have the current HBERs and HGL in light of major trends or developments listed above?

* 6.2 The R&D BER and Section 3 of the HGL are

- ☐ Still relevant
- ☐ No longer relevant
- ☒ Do not know

* 6.4 The Specialisation BER and Section 4 of the HGL are

- ☐ Still relevant
- ☐ No longer relevant
- ☒ Do not know

* 6.6 Section 2 of the HGL on agreements involving information exchange is

- ☐ Still relevant
- ☐ No longer relevant
- ☒ Do not know

* 6.8 Section 5 of the HGL on purchasing agreements is

- ☐ Still relevant
- ☐ No longer relevant
- ☒ Do not know

* 6.10 Section 6 of the HGL on commercialisation agreements is

- ☐ Still relevant
- ☐ No longer relevant
- ☒ Do not know

* 6.12 Section 7 of the HGL on standardisation agreements is

- ☒ Still relevant
- ☐ No longer relevant
- ☐ Do not know

* 6.13 Please explain your reply

Text of 1 to 1500 characters will be accepted

Section 7 remains relevant and IP Europe considers that, by and large, the HGL have safe-guarded a positive, fair and rewarding environment for collective standard development by innovators within SDOs.

7 Coherence (Does the policy complement other actions or are there contradictions?)

*

7.1 In your view, are the HBERs and the HGL coherent with other instruments and /or case law that provide(s) guidance on the interpretation of Article 101 of the Treaty (e.g., other Block Exemption Regulations, the Vertical Guidelines and the Article 101(3) Guidelines)?

- ☐ Yes
- ☒ No
- ☐ Do not know

* 7.2 Please explain

Text of 1 to 3000 characters will be accepted

The anomalous nature and effect of a mistaken interpretation of the proviso that a licence be offered 'to all third parties' by a SEP holder making a FRAND undertaking is highlighted by the carrying over of similar language to the Technology Transfer Guidelines ("TTG"). Here, in relation to patent pools, the TTG states that:

The creation and operation of the pool, including the licensing out, generally falls outside Article 101(1) of the Treaty, irrespective of the market position of the parties, if all the following conditions are fulfilled:....

(e) the pooled technologies are licensed out to all potential licensees on FRAND (97) [Footnote 97 TTG, p. 46] terms;" (emphasis added)

Nevertheless, and by contrast to the situation concerning exploitation of SEP IPRs, the Commission envisages that a patent owner exploiting their IPRs within a patent pool may maximise their royalties by reference to the place in the supply chain occupied by the prospective licensee:

"Where the pool has a dominant position on the market, royalties and other licensing terms should be non-excessive and non-discriminatory and licences should be non-exclusive (98).

These requirements are necessary to ensure that the pool is open and does not lead to foreclosure and other anti-competitive effects on down-stream markets. These requirements, however, do not preclude different royalty rates for different uses. It is in general not considered restrictive of competition to apply different royalty rates to different product markets, whereas there should be no discrimination within product markets." (emphasis added).

* 7.3 In your view, are the HBERs and the HGL coherent with other existing or upcoming legislation or policies at EU or national level?

- ☐ Yes
- ☒ No
- ☐ Do not know

* 7.4 Please explain

Text of 1 to 3000 characters will be accepted

The mistaken interpretation of para 285 HGL allegedly as meaning that any manufacturer at any position within a supply chain is entitled to demand a licence has arguably given rise to the possibility that the HGL have introduced compulsory upstream licensing. In light of the application of the exhaustion doctrine as it is now construed by the licensing community post-Quanta and Impression Products, such an interpretation would deprive an IPR owner of its fundamental entitlement to extract a proper rent from its proprietary interest.

This is in contrast with the statement in the same paragraph that IPR holders have the option of excluding specified technology. This option was included following on from considerable consternation and adverse comment during the consultation process that the Commission was effectively requiring the introduction of a compulsory licensing system. If IPR holders elect to exclude specified technology the quality and pro-competitive nature of the resulting standards may suffer.

Compulsory licensing of this nature is also contrary to the case law of the Community courts, which have established that a 'duty to deal' exists only in 'exceptional circumstances' of abuse of a dominant position (See Magill and Microsoft). Such exceptional circumstances do not exist in this situation in view of not least the FRAND commitment made by SEP holders.

8 EU added value (Did EU action provide clear added value?)

In this section, we would like to understand if the HBERs and the HGL have had added value. In the absence of the HBERs and the HGL, undertakings would have had to self-assess their horizontal cooperation agreement with the help of the remaining legal framework. This would include for instance the case law of the EU and national courts, the Article 101(3) Guidelines, the enforcement practice of the Commission and national competition authorities, as well as other guidance at EU and national level.

Please indicate whether, in your view, the HBERs and the HGL have had added value in the assessment of the compatibility of horizontal cooperation agreements with Article 101 of the Treaty

* 8.1 Has the R&D BER had added value in the assessment of the compatibility of horizontal cooperation agreements with Article 101 of the Treaty?

- ☐ Yes
- ☐ No
- ☒ Do not know

* 8.3 Has the Specialisation BER had added value in the assessment of the compatibility of horizontal cooperation agreements with Article 101 of the Treaty?

- ☐ Yes
- ☐ No
- ☒ Do not know

* 8.5 Have the HGL had added value in the assessment of the compatibility of horizontal cooperation agreements with Article 101 of the Treaty?

- ☐ Yes
- ☐ No
- ☒ Do not know

9 Specific questions

Final comments and document upload

9.1 Is there anything else with regard to the R&D and Specialisation BERs and the HGL that you would like to add?

Text of 1 to 3000 characters will be accepted

In considering the appropriateness of interpreting para 285 as meaning that SDOs must ensure their participants offer a licence to all manufacturers in a supply chain, and hence curtail the fair and proper reward for their innovation, it is worth noting that the Commission has long guarded against the notion of compulsory licensing within the ETSI system. The first iteration of ETSI's IPR Policy in 1982 contained a compulsory licensing obligation whereby the proprietor of an 'essential' IPR would be required to license on reasonable terms. This approach was considered to favour the incumbent Public Network Operators, who

had limited R&D budgets, yet also had a large appetite for IPRs.

At that time, the Commission was alive to the consequences of such a shift in rents: "Although it could be argued that consumers would benefit in the short term if IPRs were compulsively licensed to serve as the basis of standards, in the long term, investment in R&D would dry up within the Community" [CEC COM (92) 445 final].

Despite this controversy, an interim policy was adopted by ETSI's General Assembly on 18 March 1993 which was subject to some opposition, plus a complaint to the Commission to the effect that the IPR Policy would effectively be a system of compulsory licensing and amount to an infringement of (the then) Articles 81 and 82 EC. Before awaiting the outcome of that complaint, ETSI abandoned the policy.

Likewise, in relation to the then para 282 of the 2010 Draft HGL, during the public consultation, there was considerable representation that a mandatory requirement for holders of essential IPR to license on FRAND terms was contrary to the common policy of standards organisations which allowed for SEP holders to declare that they will not license their SEPs. (See American Intellectual Property Law Association, Re: Draft Guidelines on the Applicability of Article 101 of the Treaty on the Functioning of the European Union to Horizontal Co-operation Agreements, SEC (2010) 528/2, 24 June 2010, page 5.) These concerns were addressed by the Commission in the final version of the Guidelines and para 285 left open the option to SEP holders not to contribute their technology to the standard development of an SSO.

In addition, we direct your attention to the attached Comments to this response, which explain in greater detail our analysis of other issues pertaining to the HGL. In particular, it explains that the HGL, which discuss so-called patent hold-up, should also reflect for balance the significant problem of patent hold out from negotiating, in good faith towards concluding a FRAND licence. We also note that the HGL's should make clearer their coverage of the governance rules and policies of SDOs and recognise actual or potential exercise of collusive buyer power.

9.2 You may upload a file that further explains your position in more detail or further details the answers you have given

The maximum file size is 1 MB

Only files of the type pdf,txt,doc,docx,odt,rtf are allowed

de6a1449-f388-419b-ad04-e30b978b1a4a/20200212_IP_Europe_-_Horizontal_Guidelines_Annex_Final_version.pdf

* 9.3 Please indicate whether the Commission services may contact you for further details on the information submitted, if required

- ☒ Yes
☐ No

Contact

COMP-HBERS-REVIEW@ec.europa.eu