

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

Stefanie

* 2.3 Surname

Mielert

* 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:

* 2.7 Organisation name

255 character(s) maximum

Fraunhofer-Gesellschaft Institute for Integrated Circuits

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

Fraunhofer is a developer and holder of all types of intellectual property, working with industry and government. Fraunhofer participates in many licensing programs to implement global technology solutions, including for standard essential patents.

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

Text of 1 to 250 characters will be accepted

Fraunhofer is active in the fields of communications and ICT, health and environment, mobility and transport, security and protection, and production and services

*** 2.15 Country of origin**

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

- | | | | |
|---|--|--|--|
| <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 |
| <input type="radio"/> Anguilla | <input type="radio"/> Eritrea | <input type="radio"/> Malaysia | <input type="radio"/> Senegal |
| <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"/> Azerbaijan | <input type="radio"/> France | <input type="radio"/> Mayotte | <input type="radio"/> Solomon Islands |
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- Bangladesh
- Barbados
- Belarus
- Belgium
- Belize
- Benin
- Bermuda
- Bhutan
- Bolivia
- Bonaire Saint Eustatius and Saba
- Bosnia and Herzegovina
- Botswana
- Bouvet Island
- Brazil
- British Indian Ocean Territory
- British Virgin Islands
- Brunei
- Bulgaria
- Burkina Faso
- Burundi
- Cambodia
- Cameroon
- Canada
- Cape Verde
- Cayman Islands
- Central African Republic
- Chad
- Chile
- China
- Christmas Island
- French Southern and Antarctic Lands
- Gabon
- Georgia
- Germany
- Ghana
- Gibraltar
- Greece
- Greenland
- Grenada
- Guadeloupe
- Guam
- Guatemala
- Guernsey
- Guinea
- Guinea-Bissau
- Guyana
- Haiti
- Heard Island and McDonald Islands
- Honduras
- Hong Kong
- Hungary
- Iceland
- India
- Indonesia
- Iran
- Iraq
- Ireland
- Isle of Man
- Israel
- Italy
- Moldova
- Monaco
- Mongolia
- Montenegro
- Montserrat
- Morocco
- Mozambique
- Myanmar /Burma
- Namibia
- Nauru
- Nepal
- Netherlands
- New Caledonia
- New Zealand
- Nicaragua
- Niger
- Nigeria
- Niue
- Norfolk Island
- Northern Mariana Islands
- North Korea
- North Macedonia
- Norway
- Oman
- Pakistan
- Palau
- Palestine
- Panama
- Papua New Guinea
- Paraguay
- South Georgia and the South Sandwich Islands
- South Korea
- South Sudan
- Spain
- Sri Lanka
- Sudan
- Suriname
- Svalbard and Jan Mayen
- Sweden
- Switzerland
- Syria
- Taiwan
- Tajikistan
- Tanzania
- Thailand
- The Gambia
- Timor-Leste
- Togo
- Tokelau
- Tonga
- Trinidad and Tobago
- Tunisia
- Turkey
- Turkmenistan
- Turks and Caicos Islands
- Tuvalu
- Uganda
- Ukraine
- United Arab Emirates
- United Kingdom

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| <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 |
| <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 HBERs and the HGL acknowledge the economic efficiencies arising from R&D and standardisation agreements, as well as from other agreements, and preserve incentives to innovate, thus encouraging investment and enhancing dynamic competition for the market, to the ultimate benefit of consumers. It is humbly recommended the high standard of clarity in these documents be preserved in any future version of these documents.

A review of the R&D BER and the HGL appears timely to ensure that healthy competition for the market, and in the market, continues to lead to new technologies, products and processes. The Commission is respectfully invited to ensure that the evaluation of these documents preserves the current framework which enabled European standardisation to develop the best technical solutions for the market. Competition policy should support this objective.

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

* 4.4 Please explain your reply

Text of 1 to 1500 characters will be accepted

The R&D BER and Section 3 of the HGL on R&D agreements are easy to consult and provide clear guidance on the requirements to be met for an antitrust exemption to be enjoyed (i.e.: definitions, scope and conditions for exemption, market share threshold, duration, hardcore and excluded restrictions). In order to maintain a sustainable innovation ecosystem, we respectfully recommend that the clarity of the conditions for an antitrust exemption for R&D agreements be preserved in any future version of the R&D BER and the HGL.

* 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

* 4.6 Please explain your reply

Text of 1 to 1500 characters will be accepted

These two documents have different levels of binding application, and complement each other. A BER amounts to primary legislation with which all companies must comply. On the other hand, the HGL amounts to secondary law and provides the Commission's interpretation of the primary legislation. While the HGL has significant more detail than the BER, the BER might be interpreted differently by Courts than as set out in the HGL.

* 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

We commend the Commission for recognising standards as solutions that are mutually beneficial for all actors in the market, and society. Consumers and producers alike benefit from efficiently obtained standard solutions that are interoperable and have backward compatibility.

In general, it is considered that the HGL provides good guidance on how to comply with EU competition law to entities active in standardisation.

At the same time, in order to provide further certainty, it is respectfully recommended that the Commission refrain from using expressions such as “patent hold-up” and “hold out”, neither of which reflect a ‘state of being’. In addition, use of these vague terms in the HGL could disincentivise activity and investment in R&D, causing harm to innovation and dynamic competition for the market.

For the sake of consistency between EU competition policy and wider EU policy and practice, it is suggested that general principles relating to FRAND licensing in the HGL be updated based on the principles determined by the Commission in the 29 November 2017 “Communication on Setting out the EU approach to Standard Essential Patents”.

Some clarifications are also considered required on the role of SDOs.

Please find attached to these answers Fraunhofer’s detailed comments on each of the above issues.

* 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?

- * 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

* 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

No

* 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

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

The main types of costs for complying with the BERs and the HGL consists of legal fees for external specialist counsels and in the time allocated by in-house counsels to consult these documents. In some occasions, market surveys may need to be purchased to get insights on market shares and other information of an economic nature.

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

Text of 1 to 1000 characters will be accepted

No comment

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

It is not possible to provide an estimate of our quantifiable costs. The clarity of the BERs and the HGL mean these can be consulted and applied by inhouse counsel with some knowledge of competition law, without the need for constant support from specialist external counsel. The HGL as a compliance tool helps reduce

compliance costs for companies, and aids in minimising the risk of breaching EU competition law. For more complex transactions and assessments, expert legal counsel is necessary.

5.4 Please explain how you calculate these costs

Text of 1 to 1500 characters will be accepted

No comment

- * 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

- * 5.9 Please explain your reply

Text of 1 to 1500 characters will be accepted

Were the R&D BER not in place, the cost of ensuring compliance is expected to significantly increase. Indeed, there would be a need to ask for external legal advice for almost each transaction, or for hiring specialised competition inhouse counsel.

5.10 Please provide an estimate of the possible change in costs and explain your estimation

Text of 1 to 1500 characters will be accepted

No comment

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

While Fraunhofer does not engage in production and commercialisation of goods and does not rely on the competition law exemptions provided under Regulation No 1218/2010 (Specialisation BER), Fraunhofer has many research and development (R&D) agreements in place and participates in SDOs, thus benefitting from the antitrust exemption granted by Regulation No 1217/2010 (R&D BER) and the Guidelines on the applicability of Article 101 TFEU to horizontal co-operation agreements (HGL).

In general, Fraunhofer's experience with the R&D BER and the HGL is highly positive. These documents provide entities active in R&D and standardisation with good guidance on how to comply with EU competition law and reduce the risk of unintended violations.

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

* 5.16 Please explain your reply

Text of 1 to 1500 characters will be accepted

Aside from the reduced costs of compliance enabled by the R&D BER, R&D agreements (i) bring about significant efficiency gains, (ii) may lead to a wider dissemination of knowledge, thus triggering further innovation, and (iii) may give rise to cost reductions, in terms of reduced duplication of resources and facilities. Having a framework which enables an assessment as to whether R&D agreements comply with EU competition law appears to strike a good balance between costs and benefits arising from the R&D BER.

* 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

* 5.20 Please explain your reply

Text of 1 to 1500 characters will be accepted

It is believed that costs arising from the HGL are proportionate to benefits. In particular, as far as it concerns standardisation agreements, standards by definition are intended to reduce transaction costs for sellers and buyers. The framework provided by the HGL ensures that stakeholders are aware of the competition law risks arising from standardisation, and that they can manage these risks in a timely and cost-effective manner.

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	See attached letter		
2			
3			
4			
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

* 6.3 Please explain your reply

Text of 1 to 1500 characters will be accepted

These two documents have different levels of application and complement each other. The R&D BER amounts to high-level primary legislation with which all the stakeholders must comply. Section 3 of the HGL amounts to secondary law and provides the Commission's interpretation of the primary legislation. This document is much more detailed. Section 3 of the HGL might be interpreted otherwise by Courts.

* 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

It is considered that Section 7 of the HGL on standardisation agreements is even more relevant than having Section 3 of the HGL on R&D agreements. This is because standardisation agreements are not addressed in any HBER, but they are central to innovation in some key areas for modern society, including 5G, WiFi,

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

Significant changes to this framework may severely harm incentives for European-based companies to invest in R&D and innovation, thus resulting in a loss of international competitiveness for the European economy. In this regard, there appears to be attempts by some groups to have the scope of the HGL extended to licensing negotiations involving standard essential patents (see by way of example ACT – The App Association, contribution submitted during the first phase of this consultation, available at https://ec.europa.eu/info/law/better-regulation/initiatives/ares-2019-4715393/feedback/F473574_en?p_id=5763121). Standard essential patents are patents, and there is no reason to distinguish these as a separate class of IP. IP licensing agreements are already addressed in a very clear manner under the Technology Transfer Block Exemption Regulation No 316/2014 (TTBER) and the Guidelines on the application of Article 101 TFEU to Technology Transfer Agreements. Including principles governing IP licensing negotiations in the HGL would give rise to confusion and possible conflicts, thus frustrating the interpreting function of these documents. The decision of the Court of Justice of the European Union in Huawei v. ZTE (16 July 2015, C-170/13) is considered to already confirm applicable principles for licensing negotiations.

- * 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

It is considered that retaining consistency between EU competition policy and wider EU policy and practice should be a key objective for the European Commission. Ambitious goals such as achieving a Digital Single Market and the adoption of 5G can only be achieved by encouraging investment in R&D and standardisation and safeguarding intellectual property. Ultimately these elements are important for the sustainable, dynamic and international competitiveness of Europe, along with improvement in quality of life.

In order to further enhance the existing consistency, it is respectfully suggested that the general principles relating to FRAND licensing in the HGL be updated based on the principles determined by the Commission in the November 2017 "Communication on Setting out the EU approach to Standard Essential Patents".

Any introduction of commercial terms within standard development organisations gives rise to a real risk of a

consequential distortion of trade, whereby dominating interests create unfair disadvantage for asset holders – thus undermining Europe’s economic efficiency based on standardised technology and perhaps encouraging a system based on proprietary technology. Naturally any proposed change to the HGL would need to clearly identify an issue supported by verified empirical data, clearly suggest a proposal to address this, and undertake an impact assessment.

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

* 8.2 Please explain your reply

Text of 1 to 1500 characters will be accepted

There is little case law available on the application of EU competition law to R&D agreements. There also appears to have been little enforcement activity by the European Commission and national authorities in this area, and thus little guidance available outside of the R&D BER. For these reasons, it is considered that the R&D BER has brought significant added value in terms of clarity by unifying in a single document all the relevant provisions applicable to R&D agreements from a EU competition law perspective.

* 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

* 8.6 Please explain your reply

Text of 1 to 1500 characters will be accepted

The HGL is considered to have brought significant added value in the assessment of compatibility of horizontal cooperation agreements with Article 101 TFEU. In the HGL, the European Commission aims to provide its interpretation of the HBERs and deliver further guidance on types of agreements which are not mentioned in the HBERs, such as standardisation agreements. The HGL is considered an important document when it comes to compliance with EU competition law for standardisation agreements.

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

Please refer to the attached document for Fraunhofer's further comments.

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

21cb375a-7afd-424e-9cbb-2154829d494e

/200212_EC_Consultation_Horizontal_Agreements_Fraunhofer_Submission_Final_Signed_BW.pdf

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

- ☒ Yes
☐ No

Contact

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