

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

* 2.3 Surname

* 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

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.

* 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

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

Text of 1 to 250 characters will be accepted

- * 2.13 The 2 digit NACE Rev.2 code(s) referring to the level of "division" that applies to your business (see part III, pages 61 – 90 of Eurostat's statistical classification of economic activities in the European Community, [available here](#):

- * 2.14 The product(s) and/or service(s) provided by your company/business organisation:

- * 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 |

- Armenia
- Aruba
- Australia
- Austria
- Azerbaijan
- Bahamas
- Bahrain
- 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
- Falkland Islands
- Faroe Islands
- Fiji
- Finland
- France
- French Guiana
- French Polynesia
- 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
- Marshall Islands
- Martinique
- Mauritania
- Mauritius
- Mayotte
- Mexico
- Micronesia
- 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
- Singapore
- Sint Maarten
- Slovakia
- Slovenia
- Solomon Islands
- Somalia
- South Africa
- 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

- | | | | |
|--|-----------------------------------|---|--|
| <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 |
| <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 | |

* 2.16 Mark the countries/geographic areas where your main activities are located:

at least 1 choice(s)

Multiple choice is possible

☐ Austria
☐ Belgium
☐ Bulgaria
☐ Croatia
☐ Cyprus
☐ Czech Republic
☐ Denmark
☐ Estonia

Finland
France
Germany
Greece
Hungary
Ireland
Italy
Latvia
Lithuania
Luxembourg
Malta
Netherlands
Poland
Portugal
Romania
Slovak Republic
Slovenia
Spain
Sweden
United Kingdom
Others in Europe
The Americas
Asia
Africa
Australia

- * 2.17 Please specify whether your company/business organisation has been the addressee of a Commission decision under Article 7 or Article 9 of Regulation (EC) No 1/2003
- Yes
No
Do not know

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

- * 3.1 Has your company/business organisation been involved in horizontal cooperation agreements since the current HBERs and the HGL were introduced in 2010?
- ☒ Yes
☐ No
☐ Do not know
☐ Not applicable
- * 3.2 Please specify the type of your horizontal cooperation agreements
at least 1 choice(s)

Multiple answers possible

- ☐ R&D agreements in the sense of art.1(1)(a) of the R&D BER and Section 3 of the HGL
- ☐ Specialisation agreements in the sense of art. 1(1)(a) of the Specialisation BER and Section 4 of the HGL
- ☒ Agreements involving information exchange in the sense of Section 2 of the HGL
- ☒ Purchasing agreements in the sense of Section 5 of the HGL
- ☒ Commercialisation agreements in the sense of Section 6 of the HGL
- ☒ Standardisation agreements in the sense of Section 7 of the HGL
- ☐ Other horizontal cooperation agreements

* 3.4 Has your company/business organisation relied upon (an) exemption /exemptions under the R&D BER or Specialisation BER, or both?

- ☐ Yes
- ☒ No
- ☐ Do not know

* 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

We believe the current framework has worked to a certain extent but there is still room to update it in order to give response to the challenges emerged:

- A pro-competitive criteria based on European competitiveness: to be concreted as alternative of the current thresholds exemption with the aim to promote the competitiveness of the EU industry.
- In standardisation agreements: the current rules should be updated taking into account standardisation agreements are multi-sectorial and global. The counterfactual and the effects of a standardisation agreement should be considered in a case-by-case analysis due to their pro-competitive nature and depending on the market. Finally, we propose to restrict the standard-setting process whereby it could be managed only by a few operators, opening the negotiations for the rest of competitors when the process is more advanced.
- A New Block Exemption Regulation for Joint Production and Commercialization Agreements is needed due to their pro-competitive effects. Under this new BER, network sharing agreements and data pooling and data access agreements should be covered.
- On the procedure, the Guidelines should include a new instrument consisting on a voluntary notification of horizontal agreements. This should be a short procedure, ending up in a binding decision of the EC concluding the definitive approval of a horizontal agreement or the green light to continue to develop the basis for such cooperation.

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

* 4.6 Please explain your reply

Text of 1 to 1500 characters will be accepted

We believe the existence of the R&D BER provides full legal certainty and a legal harbour for European stakeholders when negotiating a horizontal agreement, while at the same time guarantee the horizontal agreement reached does not exert anti-competitive effects, ensured by the thresholds set out. We are of the view that self-assessment by companies provided much legal uncertainty, taking into account that the Guidelines are not sufficient clear in several chapters.

* 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

* 4.8 Please explain your reply

Text of 1 to 1500 characters will be accepted

We believe the combination of the Specialisation BER together with the guidance related to Specialisation agreements provided by the HGL ensure a good legal harbour for companies to analyse whether the horizontal agreements reached do not infringe competition law. This is without prejudice that several changes are needed in order to adapt the current rules to digitalisation and globalisation.

* 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

* 4.10 Please explain your reply

Text of 1 to 1500 characters will be accepted

We are of the view that the existence of Specialisation BER provides full legal certainty for European stakeholders when negotiating a horizontal agreement while at the same time guarantee the horizontal agreement reached does not exert anti-competitive effects, ensured by the thresholds set out. We believe the self-assessment done by companies provides more legal uncertainty than having a Block Exemption, taking into account that the Guidelines are not sufficient clear in several chapters.

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

* 4.12 Please explain your reply

Text of 1 to 1500 characters will be accepted

The current rules on Information Exchange are still workable but some changes are needed in order to provide more legal certainty and give response to the new challenges emerged in the field of Digital Economy.

On the one hand, we believe Information Exchange should not be considered “per se” a violation but it should be analysed in a case-by-case basis taking into account the competitive effects exerted in the market when the companies exchange information. We are of the view that considering Information Exchange as object obliges companies to adopt an extremely restrictive approach, even when information exchange between competitors is neutral for competition or even pro-competitive (and for sure, not foresee to a cartel agreement).

On the other hand, Information Exchange is even more uncertain in the Digital Economy, particularly when companies are not confident in terms of what kind of information they can exchange when dealing with these new cooperation models in the digital field such as data pooling and data sharing agreements. Therefore clear guidance with regard to the boundaries of permitted information exchange in such kind of cooperations would be welcome.

* 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

* 4.14 Please explain your reply

Text of 1 to 1500 characters will be accepted

Further guidance on the current rules are need in order to provide more legal certainty for companies when doing the self-assessment of a joint purchasing agreement. We find difficult to interpret the rules, to define the markets subject to this kind of horizontal agreement. We also believe it is tricky to know markets shares of upstream/downstream markets.

* 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

* 4.16 Please explain your reply

Text of 1 to 1500 characters will be accepted

Future legal framework should consider the ongoing tendency to horizontal cooperations that involve other components which are not solely a commercialisation agreement but entail other kind of horizontal agreements. Further guidelines on how to treat those mixed cooperations would be highly useful.

* 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

Several changes are needed taking into account that standardisation agreements are becoming key nowadays in the Data Economy:

Competitors in multi-sectorial processes and global nature of standardisation agreements: Digitalisation makes cross-sectorial standardisation agreements key for European stakeholders, especially in areas where interoperability is needed such as AI, IoT and data-related projects. Therefore, multi-sectorial projects should have a smoother scrutiny to the extent players involved in the standard-setting come from different sectors and are not competitors.

Unrestricted participation: the procedure applied in Paragraph 281 is unworkable when trying to go through a standard-setting process in which many competitors participate from the beginning, becoming a failure due to the difficulty to achieve a consensus. We propose that standard-setting process could be managed only by a few operators, opening the negotiations when the process is more advanced and provided that key decisions are not taken only by those few operators.

Analysis of the market effects: the effects considered when analysing case-by-case of standardisation agreements are different and would depend on the market. Clear rules on how to balance the effects affecting the different markets would be needed in the Guidelines.

Counterfactual: The procompetitive nature of standardization agreements should also be considered when analysing the effects of such kind of agreements.

* 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

* 4.20 Please explain your reply

Text of 1 to 1500 characters will be accepted

Taking into account the revolution of the Digital Economy, with data as the oil of this new economy, the HGL should be adapted in order to address and facilitate this new kind of cooperation in areas where interoperability is needed such as AI, IoT, data-related projects and audiovisual content. In particular, guidance on data pooling and data sharing agreements would be welcome to facilitate cooperation agreements, especially for traditional European operators as Telefonica when trying to compete in these new data-related markets cuasi-dominated by a few non-European operators. Therefore, guidance on horizontal agreements in the Digital Economy would be welcome to facilitate the self-assessment of European companies, apart from new Block Exemption Regulation for data pooling and data sharing agreements.

* 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

* 4.22 If Yes, please list those types of agreements and explain your reasons

Text of 1 to 3000 characters will be accepted

The HGL should be adapted to the Digital Economy, taking into account data is the new currency for innovative digital services and new traditional product markets based on data. Thus, revision of the HGL should go through the already covered horizontal agreements to analyse how data impacts on the competitive dynamics of the relevant markets subject to scrutiny. Furthermore, a new section focused on new categories related to data such as data sharing and data pooling cooperation agreements are needed, aimed at creating scale and scope for the use of such data. Facilitating data cooperation agreements among European competitors will allow stakeholders to compete with non-European ones within the digital world, as well as to resolve current issues arisen in digital markets: barriers to enter, bottlenecks, cuasi-monopolies, conglomeral effects etc.

Secondly, sustainability cooperations should also be considered to those aimed at reducing the ecological footprint (carbon emissions, recyclability and recycling, reduction of plastics and composting projects); to gain efficiencies and to share infrastructure, saving costs and reduce (as network sharing agreements to roll out 5G); as well as agree certain standards to reduce the environmental impact and to increase the commercial viability of environmental projects, should be considered procompetitive. Accordingly, we propose to include the sustainability criteria as accumulative criteria in point 1.2.2. of the HGL when a case-by-case analysis is made when evaluating horizontal cooperations under Art. 101(.3) TFUE.

Finally, joint production and distribution of audiovisual content agreements should also be covered in the HGL: the audiovisual content industry is increasingly concentrated in the markets for distribution and production due to the vertical integration exerted by the biggest audiovisual companies: the so-called Majors, HBO, Disney, Netflix... On the other hand, the big efforts of the European Institutions to fulfil a real European single market (with the treatment to territorial exclusivities by competition law, the Geo-blocking Regulation or the Regulation on cross-border portability of online content services in the internal market), have end up in further advantages to those biggest players as they are the only ones able to compete for pan-European licences. In such concentrated markets, small European producers and broadcasters cannot compete on the merits. For this reason, we ask for a new block exemption for joint production and distribution of audiovisual content agreements to promote the European audiovisual industry.

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

* 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

* 4.45 If Yes, please list those types of agreements and explain your reasons

New Block Exemption Regulation for Joint Production and Commercialization Agreements: The procompetitive goals of this kind of horizontal cooperations justify its exemption and provide stakeholders the enough legal certainty to ensure such kind of horizontal agreements comply with Art. 101.3 TFUE under certain requirements. Under this new HBER, we consider the following agreements should be covered:

o Network Sharing agreements: they have become a usual and effective way for telecom operators to deploy networks across Europe due to their procompetitive effects: substantial efficiencies, costs-savings, reduction of environmental impact, co-investments; as well as the benefits for consumers: increase coverage, innovation, high quality and speedier networks.

Moreover, network-sharing agreements are even more key with the upcoming deployment of 5G technology. The huge investment required for the roll out of 5G will require infrastructure-sharing agreements among operators in order to ensure the business sustainability according to the regulatory obligations.

o Data sharing and pooling agreements: being data the infrastructure of the Digital Economy, it will become a very common type of cooperation among competitors with the aim to offer innovative digital services. Facilitating such kind of horizontal agreements among European competitors under certain requirements, will allow stakeholders to compete with non-European ones within the digital world, as well as to resolve current issues arisen in digital markets: barriers to enter, bottlenecks, cuasi-monopolies, conglomeral effects etc.

Joint production and distribution of audiovisual content agreements: the audiovisual content industry is increasingly concentrated in the markets for distribution and production due to the vertical integration exerted by the biggest audiovisual companies: the so-called Majors, HBO, Disney, Netflix... On the other hand, the big efforts of the European Institutions to fulfil a real European single market (with the treatment to territorial exclusivities by competition law, the Geo-blocking Regulation or the Regulation on cross-border portability of online content services in the internal market), have end up in further advantages to those biggest players as they are the only ones able to compete for pan-European licences. In such concentrated markets, small European producers and broadcasters cannot compete on the merits. For this reason, we ask for a new block exemption for joint production and distribution of audiovisual content agreements to promote the European audiovisual industry.

Standardisation and sustainability agreements should be considered under a new Block Exemption Regulation when they exert clearly net procompetitive effects (for instance, standardization agreements in markets where the only alternative are proprietary solutions of dominant companies).

* 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 negative impact we have found with the current tools is the lack of legal certainty faced when applying them to analyse whether a horizontal agreement exerts anti-competitive effects. It is difficult to interpret the rules, to define the markets subject to a horizontal agreement and to know markets shares of upstream /downstream markets. At the end of the day, European stakeholders prefer to adopt an extremely restrictive approach because of the fear falling into an anticompetitive conduct, even when such horizontal agreements exert pro-competitive effects.

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 lack of legal certainty generated by both the HGL and the BERs have created costs for Telefonica in terms of external legal assistance, opportunity costs, as well as the costs caused by the negative effects on investment plans.

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

Text of 1 to 1000 characters will be accepted

Not able to provide.

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

The monetary cost is associated to the strategic cost when negotiating a horizontal agreement, as well as the cost assumed by the Industry in the long term. The lack of legal certainty faced in the application of the outdated rules obliges companies to take a conservative approach. The lack of legal certainty faced by European companies beneficiate in ultimate stance to global and non-European companies that have no competitors in the digital markets where they enjoy a cuasi-dominance.

5.4 Please explain how you calculate these costs

Text of 1 to 1500 characters will be accepted

N.A.

- * 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

We are of the view that the existence of BERs provides full legal certainty and a legal harbour for European stakeholders compared to the HGL when negotiating a horizontal agreement while at the same time guarantee the horizontal agreement reached does not exert anti-competitive effects, ensured by the thresholds set out. We are of the view the HGL provides more legal uncertainty than having a Block Exemption, taking into account that the Guidelines are not sufficient clear in several chapters. The legal uncertainty generated by the HGL is clear: It is difficult to interpret the rules, to define the markets subject to a horizontal agreement and to know markets shares of upstream/downstream markets.

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 | Challenges emerged by the Digital Economy and the role of data in AI, IoT and data-related projects | The current HGL do not address the specific role of data and its role in the digital economy. We also suggest a new block exemption for data sharing and data pooling agreements | <ul style="list-style-type: none"> - Further guidance on data-related process - New BERs on data sharing/data pooling agreements to boost European competitiveness |
| 2 | Green deal and fight against climate change | <ul style="list-style-type: none"> -New accumulative criteria in the HGL based on suistaintability cooperations. Point 1.2.2 of the Guidelines -BER on network sharing agreements | <ul style="list-style-type: none"> - A pro-competitive criteria to be considered when reaching horizontal agreements aimed at reducing the ecological footprint (carbon emissions, recyclability and recycling, reduction of plastics and composting projects), to gain efficiencies and to share infrastructure and costs, as well as agree certain standards to reduce the environmental impact and to increase the commercial viability of environmental projects. - BER on network sharing agreements due to their pro-competitive effects: substantial efficiencies, costs-savings, reduction of environmental impact, co-investments; as well as the benefits for consumers: increase coverage, innovation, high quality and speeder networks. |

| | | | |
|---|--|---|--|
| 3 | Cross-sectorial and global nature of standardization agreements | <p>-Further guidance on the HGL is needed.</p> <p>-New BER on Standardisation agreements when they exert clearly net procompetitive effects (for instance, standardization agreements in markets where the only alternative are proprietary solutions of dominant companies).</p> | <p>- Guidance is needed when standardisation agreements are cross-sectorial and global nature, reached by competitors and no competitors along the value chain.</p> <p>-New BER on Standardisation agreements when they exert clearly net procompetitive effects (for instance, standardization agreements in markets where the only alternative are proprietary solutions of dominant companies).</p> |
| 4 | Increased legal certainty is essential to boost the level of the sector investments and to reduce the costs associated with such uncertainty | Adaptation to the HGL and BERs to the current realities. | Need for more BER |
| 5 | Cross-sectorial and global nature of certain horizontal agreements | Adaptation to the HGL and BERs to the current realities. | Further guidance in the HGL and new BERs. Cooperation among authorities around the world is needed for cross-sectorial and global nature of horizontal agreements. |
| 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

Still relevant, but they need to be updated according to the new challenges emerged by digitalisation and globalisation.

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

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

* 6.5 Please explain your reply

Text of 1 to 1500 characters will be accepted

Still relevant, but they need to be updated according to the new challenges emerged by digitalisation and globalisation.

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

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

* 6.7 Please explain your reply

Text of 1 to 1500 characters will be accepted

Still relevant but need the following improvements:

On the one hand, we believe Information Exchange should not be considered “per se” a violation but it should be analysed in a case-by-case basis taking into account the competitive effects exerted in the market when the companies exchange information. We are of the view that considering Information Exchange as object obliges companies to adopt an extremely restrictive approach, even when information exchange between competitors is neutral for competition or even pro-competitive (and for sure, not foresee to a cartel agreement).

On the other hand, Information Exchange is even more uncertain in the Digital Economy, particularly when companies are not confident in terms of what kind of information they can exchange when dealing with these new cooperation models in the digital field. Cooperation models require a certain degree of information exchange and data sharing between companies. However, companies are currently lacking clear guidance with regard to the boundaries of permitted information exchange in such cooperations.

* 6.8 Section 5 of the HGL on purchasing agreements is

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

* 6.9 Please explain your reply

Text of 1 to 1500 characters will be accepted

Still relevant but further guidance on the current rules are need in order to provide more legal certainty for companies when doing the self-assessment of a joint purchasing agreement. We find difficult to interpret the rules, to define the markets subject to this kind of horizontal agreement. We also believe it is tricky to know markets shares of upstream/downstream markets.

* 6.10 Section 6 of the HGL on commercialisation agreements is

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

* 6.11 Please explain your reply

Text of 1 to 1500 characters will be accepted

Still relevant but further guidance on the current rules are need in order to provide more legal certainty for companies when doing the self-assessment of a commercialisation agreement. I find difficult to interpret the rules, to define the markets subject to this kind of horizontal agreement. We also believe it is tricky to know markets shares of upstream/downstream markets.

* 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

Several changes are needed taking into account that standardisation agreements are becoming key nowadays in the Data Economy:

- Competitors in multi-sectorial processes and global nature of standardisation agreements: Digitalisation makes cross-sectorial standardisation agreements key for European stakeholders, especially in areas where interoperability is needed such as AI, IoT and data-related projects. Therefore, multi-sectorial projects should have a smoother scrutiny to the extent players involved in the standard-setting come from different sectors and are not competitors.
- Unrestricted participation: the procedure applied in Paragraph 281 is unworkable when trying to go through a standard-setting process in which many competitors participate from the beginning, becoming a failure due to the difficult to achieve a consensus. We propose that standard-setting process could be managed only by a few operators, opening the negotiations when the process is more advanced and provided that key decisions are not taken only by those few operators.
- Analysis of the market effects: the effects considered when analysing case-by-case of standardisation agreements are different and would depend on the market. Clear rules on how to balance the effects affecting the different markets would be needed in the Guidelines.
- Counterfactual: The procompetitive nature of standardization agreements should also be considered when analysing the effects of such kind of agreements.

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

* 7.3 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

We are of the view the current framework on horizontal cooperation should be adapted to facilitate data sharing and data pooling agreements according to the goal of the Commission on the EU Data Space. Facilitating such kind of agreements among European Stakeholders will promote new and better services, boost innovation and investments, and maximise the benefits of the European data-driven markets.

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

We believe the existence of R&D BER provides full legal certainty for European stakeholders when negotiating a horizontal agreement while at the same time guarantee the horizontal agreement reached does not exert anti-competitive effects, ensured by the thresholds set out. We are of the view that self-assessment by companies provided much legal uncertainty, taking into account that the Guidelines are not sufficient clear in several chapters.

* 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

* 8.4 Please explain your reply

Text of 1 to 1500 characters will be accepted

We believe the existence of Specialisation BER provides full legal certainty for European stakeholders when negotiating a horizontal agreement while at the same time guarantee the horizontal agreement reached does not exert anti-competitive effects, ensured by the thresholds set out. We are of the view that self-assessment by companies provided much legal uncertainty, taking into account that the Guidelines are not sufficient clear in several chapters.

* 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

We believe the Guidelines provides legal certainty at certain extent for European stakeholders when negotiating a horizontal agreement. However, there is still room for improvement in the current rules, and the HGL need to be updated to give response to the challenges emerged by digitalisation and globalisation. Furthermore, we consider specific new BERs are needed in order to ensure full legal certainty for companies under certain requirements and for those kind of agreements that have a pro-competitive nature. In particular, joint production and commercialisation agreements covering data pooling/data access agreements and network sharing agreements are key.

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 go through our paper position.

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

* 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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