

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

Maurits

* 2.3 Surname

Dolmans

* 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

Law firm

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

Text of 1 to 250 characters will be accepted

Legal advice and representation

***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 |
| <input type="radio"/> Austria | <input type="radio"/> Finland | <input type="radio"/> Mauritius | <input type="radio"/> Slovenia |
| <input type="radio"/> Azerbaijan | <input type="radio"/> France | <input type="radio"/> Mayotte | <input type="radio"/> Solomon Islands |
| <input type="radio"/> Bahamas | <input type="radio"/> French Guiana | <input type="radio"/> Mexico | <input type="radio"/> Somalia |
| <input type="radio"/> Bahrain | <input type="radio"/> French Polynesia | <input type="radio"/> Micronesia | <input type="radio"/> South Africa |
| <input type="radio"/> Bangladesh | <input type="radio"/> French Southern and Antarctic Lands | <input type="radio"/> Moldova | <input type="radio"/> South Georgia and the South Sandwich Islands |
| <input type="radio"/> Barbados | <input type="radio"/> Gabon | <input type="radio"/> Monaco | <input type="radio"/> South Korea |

- 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
- Clipperton
- Cocos (Keeling) Islands
- Colombia
- 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
- Jamaica
- Japan
- Jersey
- 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
- Peru
- Philippines
- Pitcairn Islands
- 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
- United States
- United States Minor Outlying Islands
- Uruguay

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

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

Rules on Sustainability Agreements are lacking. This hampers cooperation to promote sustainability. For instance, in assessing Art 101(3), the requirement of "benefit to consumers" should not be limited to the market in which the restriction is felt. See further detail below.

Rules on standard setting should be maintained and not weakened, as certain SEP owners want. Rules on standard setting are in fact inadequate. Processes and procedures to determine FRAND rates are too time-consuming, and the combination of (a) standard setting and (b) near-automatic issuance of injunctions without appropriate proportionality review creates risk of hold-up. See further detail below.

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

no further comment at this stage

* 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

no further comment at this stage

* 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

no further comment at this stage

* 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

no further comment at this stage

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

no further comment at this stage

* 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

no further comment at this stage

* 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

no further comment at this stage

* 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

Patentees who use SEP injunctions to extract supra-FRAND royalties and terms are seeking changes in the HGL sections on standard setting. Several held balanced views when they were both SEP owners and implementers, but radically changed views when their mobile device business shut down and they became NPEs. But the EC should not weaken rules on standard setting.

(1) The availability of near-automatic injunctions without adequate proportionality review creates risk of hold-up. Competition law is necessary to maintain an adequate balance between the need to encourage contribution to standards, and the need to encourage open access to standards and efficient implementation.

(2) The HGL should maintain the "license to all willing licensees at all levels" principle. See also Rosenbrock, <https://bit.ly/31qjEL2> and https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3064894.

(3) HGL should make clear that cross-licenses in SEP license agreements should themselves be FRAND and reciprocal (same terms and royalty principles as the main license).

(4) SEP royalties should reflect incremental value added to a standardized product compared to the next best alternative technology, but not tax value added by implementers or complementary tech owners. The principle should be a royalty on the SSPPU, and exceptions to that should be justified.

(5) Privateering agreements involving portfolio disaggregation within the same field of use restrict competition in breach of 101.

* 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

Rules on Sustainability Agreements are lacking. This hampers necessary cooperation to promote sustainability and fight climate change.

Environmental agreements were cut out from the Guidelines in 2010. They should be put back in. Not doing so in the current climate crisis would be a negative political signal to the engaged public, and inconsistent with the EU's focus on the environment. They should also discuss other forms of environmental agreements, where individual producers are willing to invest in greening production, but may be held back by the fear that they will be undercut by those who don't invest, or by cheaper imports.

For instance, HGL should confirm that

(1) the "consumer welfare standard" also includes "environmental impact", accounting for the social cost and price externalities of pollution and greenhouse gases.

(2) Analysis under Art 101(3) should not be limited to improvements or benefits with local or EU-wide impact

(3) in assessing Art 101(3), the requirement of "fair share to consumers" should not be limited to the market in which the restriction is felt, but should include all benefits that accrue to society as a whole (as in the CECED case).

See further detail in article "Sustainable Antitrust", Maurits Dolmans, CLPD Competition Law and Policy Debate, Claeys & Casteels, 2019 (forthcoming)

* 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

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

- Yes
- No
- Do not know

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

- Yes
- No
- Do not know

* 4.47 If Yes, please explain your answer

Text of 1 to 3000 characters will be accepted

The HGL have hampered sustainability agreements. See article on "Sustainable antitrust" linked above.

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

Legal advice

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

Text of 1 to 1000 characters will be accepted

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

Text of 1 to 500 characters will be accepted

5.4 Please explain how you calculate these costs

Text of 1 to 1500 characters will be accepted

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

- Costs increased
- Costs decreased
- Do not know

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

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

- Would increase
- Would decrease
- Do not know

* 5.9 Please explain your reply

Text of 1 to 1500 characters will be accepted

Legal certainty would decrease, which would increase costs for obtaining legal advice, and increase opportunity costs for companies who decline to enter into agreements in the absence of sufficient legal certainty.

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

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

- Would increase
- Would decrease
- Do not know

* 5.12 Please explain your reply

Text of 1 to 1500 characters will be accepted

Legal certainty would decrease, which would increase costs for obtaining legal advice, and increase opportunity costs for companies who decline to enter into agreements in the absence of sufficient legal certainty.

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

Text of 1 to 1500 characters will be accepted

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

Legal certainty, and framework for analysis.

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

Legal certainty would decrease, which would increase costs for obtaining legal advice, and increase opportunity costs for companies who decline to enter into agreements in the absence of sufficient legal certainty.

* 5.17 Regarding the **Specialisation BER**

- Costs are proportionate to benefits
- Costs are not proportionate to benefits
- Do not know

* 5.18 Please explain your reply

Text of 1 to 1500 characters will be accepted

Legal certainty would decrease, which would increase costs for obtaining legal advice, and increase opportunity costs for companies who decline to enter into agreements in the absence of sufficient legal certainty.

* 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

Legal certainty would decrease, which would increase costs for obtaining legal advice, and increase opportunity costs for companies who decline to enter into agreements in the absence of sufficient legal certainty.

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			
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

Legal certainty would decrease, which would increase costs for obtaining legal advice, and increase opportunity costs for companies who decline to enter into agreements in the absence of sufficient legal certainty.

* 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

Legal certainty would decrease, which would increase costs for obtaining legal advice, and increase opportunity costs for companies who decline to enter into agreements in the absence of sufficient legal certainty.

* 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

Legal certainty would decrease, which would increase costs for obtaining legal advice, and increase opportunity costs for companies who decline to enter into agreements in the absence of sufficient legal certainty.

* 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

Legal certainty would decrease, which would increase costs for obtaining legal advice, and increase opportunity costs for companies who decline to enter into agreements in the absence of sufficient legal certainty.

* 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

Legal certainty would decrease, which would increase costs for obtaining legal advice, and increase opportunity costs for companies who decline to enter into agreements in the absence of sufficient legal certainty.

* 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

See comments above. It is important for the EC not to fall into the trap of changing the rules in favour of SEP owners, in spite of the heavy pressure and lobby. Many European SEP owners are declining in position and are reducing R&D (compared to 10-15 years ago), because they no longer have an implementation business. A number of EU implementers (like automated care manufacturers) have little standards R&D and rely on open access to standards for their component suppliers. Non-EU firms are increasing standards R&D. A proper balance should therefore be struck between interests of SEP owners and implementers, and the rules should not be changed to favour the former.

That means maintaining:

(a) the obligation to "license to all" , including upstream licensing to willing upstream implementers,

(b) the SSPPU as a royalty base,

(c) the requirement that cross-licenses be FRAND with royalties set on the same basis as the basic license, and

(d) the ban on injunctions to licensees who declare themselves willing and able to pay a FRAND royalty even if the royalty has not yet been set (in which case monetary damages should be adequate).

Also: (e) Privateering agreements involving portfolio disaggregation within the same field of use tend to restrict competition. See http://awa2015.concurrences.com/IMG/pdf/m._dolmans_-_privateers_and_trolls.pdf

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

Only area of potential difficulty is mixed horizontal/vertical agreement, where a vertically integrated supplier competes with a downstream customer.

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

- Yes
- No
- Do not know

* 7.4 Please explain

Text of 1 to 3000 characters will be accepted

The European Parliament has given a clear environmental mandate to the Commission, when it declared a climate crisis. President Von der Leyen and Executive Vice-President Vestager have made the climate crisis the key policy issue for the coming term. If the European Commission is really serious in its plan to give priority to fighting climate change, it should recognize that every reduction of a risk of climate change is meaningful, in light of the precautionary principle, and that it should use every available tool. Antitrust should be a part of an integrated climate policy, and the social cost of carbon emissions should be taken into account when assessing an agreement or conduct's impact on consumer welfare. In theory, antitrust is not the only or even a primary tool to fight the crisis. Economists tell us the right tools are regulation; carbon taxation; an effective emission trading scheme resulting in a price at least equivalent to the damage to society; reform of the CAP to improve land use; State aid for innovation in carbon offsets, carbon capture, and clean production; etc. Governments should have done these things properly a decade ago, yet we are no further ahead. At this late stage, it's all hands on deck. We cannot let the perfect be the enemy of the good. In a crisis, we have to use all means available, including private sustainability initiatives. Antitrust policy should support and encourage those.

See further detail in article "Sustainable Antitrust", Maurits Dolmans, CLPD Competition Law and Policy Debate, Claeys & Casteels, 2019 (forthcoming)

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

Without it, legal certainty would decrease, which would increase costs for obtaining legal advice, and increase opportunity costs for companies who decline to enter into agreements in the absence of sufficient legal certainty

* 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

Without it, legal certainty would decrease, which would increase costs for obtaining legal advice, and increase opportunity costs for companies who decline to enter into agreements in the absence of sufficient legal certainty

* 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

Without it, legal certainty would decrease, which would increase costs for obtaining legal advice, and increase opportunity costs for companies who decline to enter into agreements in the absence of sufficient legal certainty

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

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

COMP-HBERS-REVIEW@ec.europa.eu