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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

Paolo

* 2.3 Surname

Palmigiano

* 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:

Association of in-house competition lawyers

* 2.7 Organisation name

255 character(s) maximum

ICLA (in-house competition lawyers' association)

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

2.8 Transparency register number

255 character(s) maximum

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

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* 2.10 Organisation size

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

* 2.11 The main activities of your organisation:

Text of 1 to 250 characters will be accepted

Share knowledge between competition lawyers

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

Text of 1 to 250 characters will be accepted

All sectors of the economy

* 2.15 Country of origin

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

- Afghanistan
- Åland Islands
- Albania
- Algeria
- American Samoa
- Andorra
- Angola
- Anguilla
- Antarctica
- Antigua and Barbuda
- Argentina
- Armenia
- Aruba
- Australia
- Austria
- Azerbaijan
- Bahamas
- Bahrain
- Bangladesh
- Barbados
- Djibouti
- Dominica
- Dominican Republic
- Ecuador
- Egypt
- El Salvador
- Equatorial Guinea
- Eritrea
- Estonia
- Eswatini
- Ethiopia
- Falkland Islands
- Faroe Islands
- Fiji
- Finland
- France
- French Guiana
- French Polynesia
- French Southern and Antarctic Lands
- Gabon
- Libya
- Liechtenstein
- Lithuania
- Luxembourg
- Macau
- Madagascar
- Malawi
- Malaysia
- Maldives
- Mali
- Malta
- Marshall Islands
- Martinique
- Mauritania
- Mauritius
- Mayotte
- Mexico
- Micronesia
- Moldova
- Monaco
- Saint Martin
- Saint Pierre and Miquelon
- Saint Vincent and the Grenadines
- Samoa
- San Marino
- São Tomé and Príncipe
- Saudi Arabia
- Senegal
- Serbia
- Seychelles
- Sierra Leone
- Singapore
- Sint Maarten
- Slovakia
- Slovenia
- Solomon Islands
- Somalia
- South Africa
- South Georgia and the South Sandwich Islands
- 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

see attached paper

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

We have several comments in relation to R&D Block Exemption Regulation
- Need to clarify that joint R&D agreements are generally pro-competitive - simplification
- Overall, the R&D BER should be simplified. It is an extremely complex BER which makes it difficult to get the desired legal certainty.
- Mere paid for R&D should be treated under subcontracting notice
- increase of market share threshold
- removal of the requirement in article 3.2
- removal of the obligation to licence background IP
- introduction of the possibility to restrict passive sales in any type of specialisation
- review of R&D market definition
All these points are elaborated further in the attached paper.

* 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

Having a regulation increases legal certainty

* 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

33ICLA believes that there are other kind of horizontal agreements whose pro-competitive effects justify being included in the BER. We believe that the ongoing tendency to horizontal co-operations due to increasingly complex manufacturing processes and products, and due to globalisation effects is not reflected in the current legal framework. The scope of the Specialisation BER is too narrow and there are significant numbers of joint production or supply agreements between competitors that do not include a specialization and hence are not captured by a BER. Therefore, we would welcome a broader use for the Specialisation BER as the current, very restrictive threshold of 20% combined market share prevents larger companies to benefit from the efficiencies generated by a specialisation. Especially in times where European companies lack the scale of other players, specialisation could create a level playing field and increase the competitiveness of European players. We would welcome to increase the threshold to 30%. The Guidelines explicitly acknowledge these horizontal subcontracting agreements while not providing the same legal framework as a BER. A section on joint production and commercialization agreements could encompass, inter alia, the following agreements:

a. Network sharing agreements

b. data sharing and pooling arrangements

For more detailed explanation see attached paper

* 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

Having a regulation increases legal certainty

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

We have several comments in relation to the section on information exchanges. This is an area where in-house lawyers find themselves advising frequently their internal clients and where we believe some more clarity and a less restrictive approach would be welcomed. In our view the guidance overestimates the potential anti-competitive effect of information exchanges and underestimates the potential pro-competitive effects. Companies and their representatives have become so conscious of the potential issues around information exchanges that they sometimes take an overly restrictive approach. For example, it is not uncommon for companies to have stopped all their employees from attending trade meetings or trade associations. While a meeting with competitors (even for legitimate reasons) could result in an illegal coordination, the outcome of such total ban is to stop several initiatives that could be of wider benefit to society and to stop legitimate coordination between competitors. The risk in attending is deemed too high. For a lot more details on information exchanges, please look at the attached paper where we cover issues on the nature of the information, too many exceptions, restrictions of competition by object and effect, the characteristics of an information exchange, and clarifications needed in relation to joint ventures with competitors as well as info exchanges in the context of a vertical relationship, between a supplier and its distributors etc

* 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

a. Increase of “safe harbour” thresholds

Paragraph 208 of the Guidelines states that purchasing agreements between competitors are unlikely to give rise to restrictive effects on competition if the parties to the joint purchasing arrangement have a combined market share not exceeding 15% on both the purchasing and the selling markets. These thresholds are too low and should be increased significantly to at least 30%.

b. Distinction between purchasing agreements for “direct” and “indirect” material

The Guidelines currently do not distinguish between purchasing agreements in relation to so-called “direct” and “indirect” material. Direct material refers to products and services that are a direct input into the final product that a company sells on the selling market. Indirect material refers materials that are used in a production process and which are no direct input to the end products sold by a party on the selling market (e. g. office supplies, travel agency services for employees, etc.).

A purchasing agreement in relation to indirect material can have no impact on competition on the selling markets. Yet, the Guidelines foresee the same safe harbour threshold and guidance on individual assessment as for purchasing agreements for direct material. The Guidelines should explicitly clarify that purchasing agreements relating to “indirect” material both between competitors and non-competitors on the selling markets are unlikely to have potential restrictive effects

* 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

see attached paper

* 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

The rules on the creation of exploitation of standards are well developed. But some clarifications would benefit cooperation between companies for the setting up of standards.

a. Unrestricted participation in the standard-setting process

Paragraph 280 et seq. of the Guidelines stipulate, inter alia, that participation in standard setting should be unrestricted and that the procedure for adopting the standard in question shall be transparent. Having an unrestricted and transparent system for the creation of standards avoids competitors being excluded or the setting of standards without involvement of the relevant stakeholders. However, in our experience, this process is sometimes burdensome and unworkable when a standardisation process starts and there are too many companies involved. We have also seen these rules being misused by companies with the aim of blocking a standardization process (maybe because it was not aligned with their own commercial interests). For this reason, we propose that there should be instances in which a group of companies could be allowed to start a 'fast-track' process for setting a standard without the need for all potentially interested parties to be involved from the beginning. The outcome of course would be a faster development of standards. At the same time, we are fully conscious that there should not be unwanted effects on competition.

* 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

sustainability agreements, joint purchasing, information exchanges in the digital world. See the attached paper for more details

* 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

Transparency
The internet has allowed more transparency on markets and that is widely acknowledged as beneficial for consumers. Of course, more transparency could lead also to collusive outcomes. But in our view, transparency may have more positive than negative effects, and that should be acknowledged in the Guidance.
Joint ventures between competitors
Joint Ventures between competitors are in many instances necessary to benefit from the know-how and skills of the parents. However, these joint ventures could, sometimes not intentionally, became a vehicle for the exchange of information between the competing parents. In-house lawyers who advise on these issues find themselves advising directors on Chinese walls, limitation to what they can and cannot do and create complex structures that hamper business people from doing their job. It is accepted that information which does not relate to the business matters covered by the joint venture should not be exchanged, and any discussion within the joint venture about pricing / strategy should only be those that are necessary for the collaboration and limited to the specific scope of the joint venture.
The situation is more complex however in relation to what is passed to the parents in order to make the joint venture function. More specifically in the context of jointly controlled joint ventures we would like to see consistency with the approach in Paragraph 11 of the Guidelines that states that solely controlled subsidiaries are part of a single economic entity. We would like to see the reintroduction of the paragraph that was included in the draft 2010 Horizontal Guidelines that had an explicit confirmation that Article 101(1) TFEU would not apply to dealings between parents and their jointly controlled subsidiaries: "… as a joint venture forms part of one undertaking with each of the parent companies that jointly exercise decisive influence and effective control over it, Article 101 does not apply to agreements between the parents and such a joint venture, provided the creation of the joint venture did not infringe EU competition law".
Direct and indirect contacts
According to the Guidelines, "any direct or indirect contact between competitors (…)" (paragraph 61) might constitute a concerted practice under Art. 101 TFEU. In our view, this wording (which is even wider in the German version of the Guidelines "Fühlungnahme") and, in particular, the inclusion of any "indirect contact" creates considerable legal uncertainty and extends the very sense of a "concerted practice" as a two-sided kind of interaction. We believe that there is a need for more guidance on what kinds of "indirect contact" do and do not constitute a "concerted practice".

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

* 4.26 If No, please explain what aspect of these conditions fails to correctly identify R&D agreements that are compliant with Article 101 of the Treaty

Text of 1 to 1500 characters will be accepted

d Removal of the requirements in Article 3.2 R&D BER
Article 3.2 R&D BER requires that any joint R&D agreements must explicitly stipulate full access rights to the results for the purposes of further research and development. This requirement is unnecessary and has a chilling effect on innovation. The pro-competitiveness of a joint R&D does not depend on future R&D efforts which are based on the results. Future competition on innovation is sufficiently safeguarded by the prohibition of Article 5 (a) to include a hard-core restriction that limits the parties R&D activities in the same or a connected field after the completion of the joint R&D. The revised R&D BER should therefore remove the strict and unnecessary and unpractical requirements in Article 3.2.
e. Removal of the obligation to license background IP
Article 3.3 of the R&D BER states that companies must stipulate in their R&D agreement that each party must be granted access to any pre-existing know-how (i.e. background know-how) of the other party, if this is indispensable for the exploitation of the results.
This requirement has a significant cooling-off effect on the willingness of companies to engage in joint R&D which would eventually be contravening the spirit of the R&D BER. In times where innovation is crucial, the revised R&D BER should remove this requirement and leave it to the parties to the joint R

* 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

* 4.28 If No, please explain what aspect of these provisions fails to correctly identify R&D agreements that are compliant with Article 101 of the Treaty

Text of 1 to 1500 characters will be accepted

Many traditional companies are developing new technologies that can be applied to their traditional products. Networked cars are just an example. In our view, Section 3 of the Guidelines as currently drafted does not take into account the developments that are taking place. In the Guidelines, a differentiation is made there

between existing products and/ or technology markets on the one hand (Paragraphs 113-118 of the Horizontal Guidelines) and competition in innovation (R&D efforts) in Paragraphs 119 etc. Seq. That differentiation limits the ability of traditional industry players to cooperate amongst themselves while companies in the digital word are able to get together to develop these innovative services.
The market share threshold of 25% according to Article 4 para. 2 of the R&D Block Exemption Regulation only allow this type of cooperation between small traditional companies. However, these small competitors often lack the financial resources and/or impact to compete with new suppliers in the digital world, which sometimes plan to extend their market power to technological innovation to existing product markets. An illustrative example is the R&D activities of big, data-driven companies in the field of autonomous driving.
40. We would appreciate some clarification in the Horizontal Guidelines that the scenario of competition in innovation/ R&D efforts may also apply in the context of traditional product markets which are in transformation towards digitalization.

* 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

* 4.40 If No, please explain what aspect of these provisions fails to correctly identify Specialisation agreements that are compliant with Article 101 of the Treaty

Text of 1 to 1500 characters will be accepted

It is too Therefore, we would welcome a broader use for the Specialisation BER as the current, very restrictive threshold of 20% combined market share prevents larger companies to benefit from the efficiencies generated by a specialisation. Especially in times where European companies lack the scale of other players, specialisation could create a level playing field and increase the competitiveness of European players. We would welcome to increase the threshold to 30%.

* 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

We have identified a number of specific issues we would like to address

a. Nature of the information

The Guidelines acknowledges that the exchange of "genuinely public information" normally should not be a problem although it leaves open the possibility, as it does in relation to other issues in the Guidance, that even genuinely public exchanges of information may facilitate a collusive outcome in the market .

An information is defined as ‘”genuinely public if it makes the exchanged data equally accessible (in terms of cost of access) to all competitors and customers”. Such a definition is quite restrictive as plenty of public information might entail costs for some competitors or customers. Nobody would disagree that the information on prices of petrol shown on motorways is public information. But if somebody were to collate that information on a national basis, it would be easy to argue that it is not ‘genuinely public’ as it is not equally accessible in terms of cost of access to all competitors and customers.

Such restrictive definition makes advising business unnecessarily complicated and an alignment with the normal concept of ‘publicly available information’ would be welcomed.

b. Too many exceptions

In many instances, the Guidance, having expressed a statement that would give comfort to business, states that there could be exceptions. While we understand that the Commission would like to have flexibility in its enforcement to capture situations that were not foreseen at the time the Guidance was drafted, that decreases its value and creates legal uncertainty, in particular when it is unclear what such exceptions are supposed to entail. If exceptions are deemed to be needed, describing the type of information or behaviour that the Commission aims to capture would be helpful.

c. Restrictions of competition by object

The Guidance states that ‘information exchanges between competitors of individualised data regarding intended future prices or quantities should be considered a restriction of competition by object’ . However,

the Guidance leaves open several other situations which could be characterised as an infringement by object (see Paragraph 72) and therefore it becomes clear that Paragraph 74 is just an example.
This has created significant uncertainty within companies. Many companies have adopted an extremely restrictive approach to information exchange out of fear of ending up in the “restriction by object box”. In our view, we believe that, in enforcing the rules on information exchanges, there is a tendency by competition authorities to jump quickly to the object box (as there is no need to prove effects) in cases that go far beyond information exchanges on future prices or quantities. The object box should become again the exception; in all others the assessment of the effects should be taken into account.

* 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

Text of 1 to 3000 characters will be accepted

a. Network sharing agreements
Network sharing agreements have become an effective and efficient way for telecom operators to deploy networks across Europe due to their procompetitive effects: costs-savings, reduction of environmental impact, sharing of costs. And one should not forget the benefits for consumers: increased coverage, innovation, higher quality and faster networks. Network sharing agreements are even more important 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.
b. Data sharing and pooling agreements
Data being the infrastructure of the Digital Economy, there is an increasing need for data sharing and data pooling agreement between competitors with the aim to offer innovative digital services. Data pooling provides companies with a larger data base for analytical purposes and allows them to improve solutions and to develop innovative ways of operating to the benefit of customers. Facilitating such types of horizontal cooperation agreements under certain requirements will allow stakeholders to compete in the digital world, and resolve current issues that one may see arise in digital markets: barriers to entry, bottlenecks, quasi-monopolies, conglomerate effects etc.

* 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

stopping pro-competitive conduct. Sometimes the rules are too strict.

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

Opportunity costs - losses for stopping legitimate conduct as well as the cost of using external assistance (law firms) to get comfortable about the rules to be interpreted

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

Again the corresponding uncertainty would increase opportunity costs and legal fees

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

Again the corresponding uncertainty would increase opportunity costs and legal fees

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 which could be increased. Horizontal cooperation is key to ensure the competitiveness in the current geopolitical environment. The Guidelines and BERs in their current status, while helpful, do not always give enough guidance. In order to make use of the full opportunities that cooperation might bring, in particular in digital Markets and reduce the associated costs, legal certainty for companies needs to be increased.
In addition to providing clearer guidance in the Guidelines and the BERs the European Commission should also look into how to best provide some informal and formal guidance on a case by case basis. Therefore, we suggest following tools should be used or introduced:
a. Informal meetings with the European Commission in order to discuss the interpretation of concrete questions in connection with a certain horizontal cooperation project;
b. Guidance letters in accordance with the Commission Notice on informal guidance relating to novel questions concerning Articles 81 and 82 of the EC Treaty that arise in individual cases (2004/C 101/06), where it may be necessary to reassess the interpretation for the criteria for application of this tool, given the limited use of this tool so far;
c. A mechanism to ask for specific guidance / approval for cooperation that has certain magnitude and involves high stakes, which would be at risk for the participating companies. For such (very exceptional) cases a specific system could be envisaged.

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	Data economy		
2	Sustainability		
3	Geopolitical issues		
4	More transparency and information exchanges		
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

Still relevant but updates are needed as per our attached document

* 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 updates are needed as per our attached document

* 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 updates are needed as per our attached document. For example for joint ventures, Joint Ventures between competitors are in many instances necessary to benefit from the know-how and skills of the parents. However, these joint ventures could, sometimes not intentionally, became a vehicle for the exchange of information between the competing parents. In-house lawyers who advise on these issues find themselves advising directors on Chinese walls, limitation to what they can and cannot do and create complex structures that hamper business people from doing their job. It is accepted that information which does not relate to the business matters covered by the joint venture should not be exchanged, and any discussion within the joint venture about pricing / strategy should only be those that are necessary for the collaboration and limited to the specific scope of the joint venture. The situation is more complex however in relation to what is passed to the parents in order to make the joint venture function. More specifically in the

context of jointly controlled joint ventures we would like to see consistency with the approach in Paragraph 11 of the Guidelines that states that solely controlled subsidiaries are part of a single economic entity. We would like to see the reintroduction of the paragraph that was included in the draft 2010 Horizontal Guidelines that had an explicit confirmation that Article 101(1) TFEU would not apply

* 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

Joint purchasing. The safe harbour threshold should be increased to at least 30% and the Guidelines should make a distinction between purchasing agreement for direct and indirect material. See attached paper

* 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 updates are needed as per our attached document

* 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

Still relevant but updates are needed as per our attached document.
The clear procompetitive nature of standardization agreements should also be considered. It would therefore be relevant when assessing compliance of the proposed standardization agreement with competition rules to take into account the counterfactual of the considered standardization to be (various) proprietary systems. In those cases, there must be a presumption of legality, ideally included in the block exemption, for that standardization cooperation. If not, we propose to include at least such presumption in point 7.4 of the Guidelines when a case-by-case analysis is made as a positive factor showing the relevant efficiencies under Article 101(3) TFEU.

Setting versus implementation in Standardization Agreements
The Guidelines only provide guidance on how standard setting should be applied but not how standards should be implemented. For this reason, a clear distinction in the Guidelines between the setting of the standards and its implementation is needed.
Effects in various markets
In the case-by case assessment of a standardization agreement, the effects on the products and services markets, the technology and the standards markets are considered. It could be that the outcome of such analysis is different depending on the market. The guidelines should aim to include clear rules on how to balance the effects on the different markets

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

Need to ensure consistent application of the rules at the national level. Finally, we could not finish the paper without mentioning cooperation between competitors in order to achieve sustainable objectives. The current rules sometimes do not permit competitors to work together to impact and foster the 'Green' agenda of the new Commission. It would be useful if certain specific types of cooperation would be allowed in particular in cases where the outcome is a reduction on the environmental impact of products. At least, such effects should be taken into consideration more prominently in any assessment.
The Commission now has a unique chance to address these concerns during the current review. Certain manageable modifications of the current Horizontal Cooperation Guidelines may include:
a. Introduction of a separate chapter on environmental agreements as it was the case in the earlier 2001 Guidelines
b. A reintroduced chapter on environmental agreements should not simply repeat the language and contents of the 2001 Guidelines as in the meanwhile (EU and global) priorities have shifted.
For other points please see attached paper

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

More legal certainty and assistance in self-assessment but improvements are needed as suggested in the attached paper.

* 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

More legal certainty and assistance in self-assessment but improvements are needed as suggested in the attached paper.

* 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

More legal certainty and assistance in self-assessment but improvements are needed as suggested in the attached paper.

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

4a497545-b3f0-4f08-86c7-76ba8a2a74d5/ICLA_horizontal_submission.pdf

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

- (●) Yes
- ( ) No

Contact

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