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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

Jérémie

* 2.3 Surname

Pélerin

* 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

AFEP - French Association of Large Companies / Association française des entreprises privées

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.

953933297-85

* 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

AFEP brings together large companies operating in France. The Association aims to foster a business-friendly environment and to present the company members' vision to French public authorities, European institutions and international organisations.

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

Text of 1 to 250 characters will be accepted

AFEP works on: economy, taxation, corporate governance, financial markets, competition, IP, consumer affairs, social affairs, environment, climate, energy, CSR and trade.
Its member companies operate in all sectors of the French 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
- 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
- Libya
- Liechtenstein
- Lithuania
- Luxembourg
- Macau
- Madagascar
- Malawi
- Malaysia
- Maldives
- Mali
- Malta
- Marshall Islands
- Martinique
- Mauritania
- Mauritius
- Mayotte
- Mexico
- Micronesia
- 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

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

- Clipperton
- Cocos (Keeling) Islands
- Colombia
- Comoros
- Congo
- Cook Islands
- Costa Rica
- Côte d'Ivoire
- Croatia
- Cuba
- Curaçao
- Cyprus
- Czechia
- Democratic Republic of the Congo
- Denmark
- Jamaica
- Japan
- Jersey
- Jordan
- Kazakhstan
- Kenya
- Kiribati
- Kosovo
- Kuwait
- Kyrgyzstan
- Laos
- Latvia
- Lebanon
- Lesotho
- Liberia
- Peru
- Philippines
- Pitcairn Islands
- Poland
- Portugal
- Puerto Rico
- Qatar
- Réunion
- Romania
- Russia
- Rwanda
- Saint Barthélemy
- Saint Helena Ascension and Tristan da Cunha
- Saint Kitts and Nevis
- Saint Lucia
- United States
- United States Minor Outlying Islands
- Uruguay
- 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

These texts (the HBERs and the HGL) are necessary for all sectors. They provide rather good legal certainty for undertakings (to see self-assessment framed and secured by the HGL). However:
- Business regulation should no longer focus solely on stability or the protection of consumers and investors, but must also become a tool for competitiveness;
- The deep evolutions of the economic, strategic and political context (competitors from the US and other third countries) must lead to adapt the framework for concluding horizontal cooperation agreements.

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

1. The issue of the sharing of know-how (K-H) and IPR

Requiring that IPR and K-H are shared with all parties as a general rule is not adapted anymore to the current context of hard competition between different geographic areas. Businesses must have an economic interest to share their IP; it cannot be a prerequisite.

Two clarifications are needed related to:
a) Further research and development and exploitation (art. 3.2): the BER should state that the exemption provided for in article 2 shall also apply to agreements which stipulate that part of joint results (and K-H and IPR) are confidential; thus partnering research bodies would not be allowed to share this K-H or IPR (pre-existing or resulting from joint research) with third parties (competitors or not) for the purposes of further research and development and exploitation in cooperation with them;
b) the conditions for exemption related to the access to pre-existing K-H (art 3.3): the BER should precise (i) if this access also applies to IPR (comparing the art 3.2 expressly applying to both IPR and K-H) and (ii) that the mentioned access applies only to the information of the other party that K-H (and/or IPR) exists.

Besides, hardcore restrictions listed in art. 5 of the R&D BER lack clarity.

2. The relationship between joint-ventures and parent companies - SEE ANSWER 4.43

* 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

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* 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

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* 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

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

* 4.11 In your view, have the HGL provided sufficient legal certainty on agreements involving **information exchange** in the sense of Section 2 of the HGL?
  - ( ) Yes
  - (●) No
  - ( ) Do not know

* 4.12 Please explain your reply

Text of 1 to 1500 characters will be accepted

The assessment of the anti-competitive nature of information exchanges under the existing guidelines has either become too broad or is unclear. The current approach leads to many information exchanges, sometimes in the context of clearly legitimate collaborations, being analysed as restrictions by object. This can act as a significant obstacle or brake to such legitimate collaborations. In particular, exchanges of individualised intentions concerning future prices or quantities are considered a restriction of competition by object because, according to the European Commission, they generally have the object of fixing prices or quantities.

However, the concept of restriction by object must be interpreted restrictively. Information exchanges should not be regarded as infringements per se: the analysis should be based on the merits of each case and a proper assessment of the legal and economic context in which the information exchange occurs. Information exchanges outside the framework of a cartel should not be qualified as restrictions by object but should systematically be assessed based on their actual effects on competition, in particular through the analysis of efficiencies. Indeed, an abstract assessment can lead to prohibiting information exchanges which are neutral for competition or even pro-competitive and makes risk assessment even more problematic for undertakings.

* 4.13 In your view, have the HGL provided sufficient legal certainty on **purchasing agreements** in the sense of Section 5 of the HGL?
  - ○ Yes
  - ○ No
  - ◉ Do not know

* 4.15 In your view, have the HGL provided sufficient legal certainty on **commercialisation agreements** in the sense of Section 6 of the HGL
  - ○ Yes
  - ○ No
  - ◉ Do not know

* 4.17 In your view, have the HGL provided sufficient legal certainty on **standardisation agreements** in the sense of Section 7 of the HGL
  - ○ Yes
  - ◉ No
  - ○ Do not know

* 4.18 Please explain your reply

Text of 1 to 1500 characters will be accepted

In order to allow for fair and balanced negotiations on FRAND terms, it is desirable to amend the HGL as follows:

1. Specify that all implementers can rely on the FRAND commitment (FC) of the patent owners (POs) (§ 285 of the HGL): need to clarify that level discrimination is critical to competition and that the FC must relate to all third parties which are interested to implement the technology.
Some POs, despite having issued FCs, disregard some implementers' willingness to take licenses under standard essential patents (SEP) and reject their initiatives to enter into good-faith negotiations on the (FRAND) terms of a license. Rather, those POs take the position that they would have the choice to select on which level of the value chain FRAND licenses are granted.
This situation is problematic due to the fact that customers generally require their suppliers to accept the full legal responsibility for any infringement of third party rights in line with applicable law.
Such level discrimination is in conflict with the clear wording of § 285 of the HGL and also harms competition.

2. Specify that the rates for licenses under SEP should be determined in view of the specific product for which a FRAND license is sought. It is not adequate that the PO leverages its monopoly by third party's efforts and achievements – namely by the added value created in the value chain.

* 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

To maintain their competitiveness, undertakings must increase cooperation whilst complying with the legal framework. Economic sectors need to reconcile the prohibition of cartels with the necessity to quickly and deeply transform in a concerted way to face challenges (Climate change, EU green deal…).

Whereas the Commission considers that sustainability agreements must not be used as a cover for a cartel, it is unfortunately not so easy to ensure that these agreements are not used to make it hard for some businesses to compete. The existing rules on standardisation do not provide enough clarity on all aspects.

Under a strict interpretation of existing guidelines, it could be argued that a mere discussion between competing businesses on their anticipations of future "greener" playing field is an exchange of forward-looking sensitive information, reducing strategic uncertainty. This creates a significant risk under art. 101.1, which risk can deter business from entering into discussions that could contribute to a more sustainable future.

Several governments push companies to agree between themselves on self-binding and ambitious targets addressing climate concerns (e.g. "green deals" in the Netherlands or "engagements pour la croissance verte" in France). In such cases, although there is unequivocal public support, there can be some risks under competition law.

The new HGL could make it clear that such "official projects" would be compatible with competition law.

* 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

In relation to joint bidding, there is also a lack of clear guidance about the types of consortia / bidding agreements which are allowed, and about the conditions under which companies that have considered bidding jointly may eventually bid separately, which leads to some cooperation being abandoned.

"Private" publications such as Cyril Ritter's "Joint tendering under EU competition law" are seen as overly restrictive and far from practical realities by the industry.

Companies would welcome the Commission opening the debate on this subject, so that the industry and the Commission be able to exchange views but not necessarily with a view to publishing guidelines (or supplementing the current Horizontal Guidelines), which could be overly restrictive and more harmful than the current legal uncertainty.

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

Requiring that IPR and know-how (K-H) are shared with all parties as a general rule is not adapted anymore to the current context of hard competition between different geographic areas. Businesses must have an economic interest to share their IP; it cannot be a prerequisite.

Two clarifications are needed related to:
a) Further research and development and exploitation (art. 3.2): the BER should state that the exemption provided for in article 2 shall also apply to agreements which stipulate that part of joint results (and K-H and IPR) are confidential; thus partnering research bodies would not be allowed to share this K-H or IPR (pre-existing or resulting from joint research) with third parties (competitors or not) for the purposes of further research and development and exploitation in cooperation with them;
b) the conditions for exemption related to the access to pre-existing K-H (art 3.3): the BER should precise (i) if this access also applies to IPR (comparing the art 3.2 expressly applying to both IPR and K-H) and (ii) that the mentioned access applies only to the information of the other party that K-H (and/or IPR) exists.

* 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

* 4.32 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

Hardcore restrictions listed in art. 5 of the R&D BER lack clarity.

* 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

The relationship between joint-ventures and parent companies

Clarifications are required with regard to the relationships between a joint venture and a parent company. The following potential contradictions on the treatment of full-function joint-ventures (JV) and parent companies need to either be resolved or rationally explained:

- Under the Merger Regulation, for the purposes of considering jurisdiction when applying the turnover thresholds, JV's turnover is attributed to the relevant notifying Parties.
- When notifying full-function JVs, the turnover of each notifying Party is considered.
- When considering cartel liability of full function JVs, there is a presumption of parent company liability.
- However, for the purposes of certain information exchanges and coordination of business, there is the risk of the parent company/ies and JV being treated as independent companies. There is an uneasy feeling that the crucial notion of "economic unit" may not be unified, and that there could be a bit too much room for discretional appreciation from the Commission.

It should be made clear that arrangements between a JV and its parent company should be treated as intra-Group, in order for the industry not to back out of possibly pro-competitive cooperation or agreements generating significant intra-group synergies. In this respect, we understand that in the draft 2010 Horizontal Guidelines the Commission intended to include an explicit confirmation that Article 101(1) 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."

We ask for its inclusion in the next 2022 version.

* 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

To maintain their competitiveness, undertakings are more and more forced to cooperate whilst complying with the legal framework (art. 101.3 of the Treaty). Several entire economic sectors need to reconcile the prohibition of cartels with the absolute necessity to quickly and deeply transform, in a concerted way, to face new challenges (Climate change, EU green deal…).

Whereas the Commission considers that sustainability agreements must not be used as a cover for a cartel, it is unfortunately not easy to control and ensure that sustainability agreements are not used to make it hard for some businesses to compete. The existing rules on standardisation do not provide enough clarity on all aspects.

Under a strict interpretation of existing guidelines, it could be argued that a mere discussion between competing businesses on their anticipations of future “greener” playing field is an exchange of forward-looking sensitive information, reducing strategic uncertainty. This creates a significant risk under art. 101.1. This risk can deter business from entering into discussions that could vitally contribute to a more sustainable future for everyone.

Several governments push companies to agree between themselves on self-binding and ambitious targets addressing climate concerns (see for example the “green deals” in the Netherlands or the “engagements pour la croissance verte” in France). In such cases, although there is unequivocal public support, there can be some risks under competition law (because there is no mandatory regulation).

The new Horizontal Guidelines could typically make it clear that such “official projects” would be compatible with competition law (except for hidden hardcore violations, obviously).

* 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 R&D BER has had unexpected impacts. The mandatory sharing of intellectual property and know-how (resulting from the R&D and/or pre-existing) puts a brake on the cooperation between competing businesses. Thus, it has a negative impact on the strategy of research in the European Union.

The same problem is encountered with IPCEI when applying state aid rules. Common European interests include specific criteria for (i) R&D&I projects which must be of major innovative nature or constitute an important value added in terms of R&D&I in the light of the state of the art in the sector concerned and for (ii) Projects comprising of industrial deployment which must allow for the development of a new product or service with high research and innovation content and/or the deployment of a fundamentally innovative production process.

These negative impacts must be corrected, including in relation to new issues that have arisen as a result of digitalisation, changing business models and political concerns about the sharing of profits across value chains between European and non-European competitors. Sharing IPR and know-how cannot remain a pre-condition for R&D agreements.

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

Information not available

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

Text of 1 to 1000 characters will be accepted

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

Text of 1 to 500 characters will be accepted

5.4 Please explain how you calculate these costs

Text of 1 to 1500 characters will be accepted

*

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

- ○ Costs increased
- ○ Costs decreased
- ◉ Do not know

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

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

- ○ Would increase
- ○ Would decrease
- ◉ Do not know

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

- ○ Would increase
- ○ Would decrease
- ◉ Do not know

Benefits

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

Text of 1 to 1500 characters will be accepted

Information not available

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	Increased market globalisation and international competition		Increased competition from third countries must trigger a reaction from the EU to make its companies more competitive. This goes through more agreements on R&D. For this purpose, the Commission assessment should take into account this external competition and acknowledge efficiency gains.
2	Climate change		The EU should favour agreements with a positive impact on sustainability.
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

See section 4

* 6.4 The Specialisation BER and Section 4 of the HGL are
  - ○ Still relevant
  - ○ No longer relevant
  - ◉ Do not know

* 6.6 Section 2 of the HGL on agreements involving information exchange is
  - ○ Still relevant
  - ◉ No longer relevant
  - ○ Do not know

* 6.7 Please explain your reply

Text of 1 to 1500 characters will be accepted

The assessment of the anti-competitive nature of information exchanges under the existing guidelines has either become too broad or is unclear. The current approach leads to many information exchanges, sometimes in the context of clearly legitimate collaborations, being analysed as restrictions by object. This can act as a significant obstacle or brake to such legitimate collaborations. In particular, exchanges of individualised intentions concerning future prices or quantities are considered a restriction of competition by object because, according to the European Commission, they generally have the object of fixing prices or quantities.

However, the concept of restriction by object must be interpreted restrictively. Information exchanges should not be regarded as infringements per se: the analysis should be based on the merits of each case and a proper assessment of the legal and economic context in which the information exchange occurs. Information exchanges outside the framework of a cartel should not be qualified as restrictions by object but should systematically be assessed based on their actual effects on competition, in particular through the analysis of efficiencies. Indeed, an abstract assessment can lead to prohibiting information exchanges which are neutral for competition or even pro-competitive and makes risk assessment even more problematic for undertakings.

* 6.8 Section 5 of the HGL on purchasing agreements is
  - ○ Still relevant
  - ○

No longer relevant
- (•) Do not know

* 6.10 Section 6 of the HGL on commercialisation agreements is
- ( ) Still relevant
- ( ) No longer relevant
- (•) Do not know

* 6.12 Section 7 of the HGL on standardisation agreements is
- ( ) Still relevant
- (•) No longer relevant
- ( ) Do not know

* 6.13 Please explain your reply

Text of 1 to 1500 characters will be accepted

In order to allow for fair and balanced negotiations on FRAND terms, it is desirable to amend the HGL as follows:

1. Specify that all implementers can rely on the FRAND commitment (FC) of the patent owners (POs) (§ 285 of the HGL): need to clarify that level discrimination is critical to competition and that the FC must relate to all third parties which are interested to implement the technology.
Some POs, despite having issued FCs, disregard some implementers' willingness to take licenses under standard essential patents (SEP) and reject their initiatives to enter into good-faith negotiations on the (FRAND) terms of a license. Rather, those POs take the position that they would have the choice to select on which level of the value chain FRAND licenses are granted.
This situation is problematic due to the fact that customers generally require their suppliers to accept the full legal responsibility for any infringement of third party rights in line with applicable law.
Such level discrimination is in conflict with the clear wording of § 285 of the HGL and also harms competition.

2. Specify that the rates for licenses under SEP should be determined in view of the specific product for which a FRAND license is sought. It is not adequate that the PO leverages its monopoly by third party's efforts and achievements – namely by the added value created in the value chain

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

Business regulation should not focus solely on stability or the protection of consumers and investors, but must also become a tool for competitiveness. The deep evolutions of the economic, strategic and political context (competitors from the US and other third countries) must lead to adapt the framework for concluding horizontal cooperation agreements.

Therefore, competition rules on horizontal agreements should be better articulated with other competition rules (in particular state aid rules), but also other EU policies, in particular trade and industrial policies.

Because the competition context has changed, businesses stress the importance of the need for a new interpretation of the texts

- the concept of restriction by object must be interpreted restrictively,
- the assessment based on the actual effects on competition, in particular through the analysis of efficiencies, has to be preferred,
- efficiency gains generated by horizontal agreements must absolutely be taken into account.

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

The R&D BER has given a real legal security (see above). It contributes to effective consistency for all the concerned parties.

Nevertheless, businesses stress their difficulties being confronted with different interpretations by national competition authorities. That is why they consider as extremely necessary the efforts of transparency made by the Commission related to this text.

*

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

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* 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

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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

Without going back to the formal exemption procedure in force before 2004 (on the basis of Regulation (EC) No 3385/94), which allowed companies (and associations of companies) to ask the Commission for a negative certificate / exemption in favour of an agreement or a practice likely to be covered by the former Articles 85(1) and 86 of the Treaty, it would be very useful to offer a possibility for businesses to request from the European Commission an informal opinion on certain agreements or agreement clauses.
This procedure would not lead to a formal decision on the basis of Regulation (EC) No 3385/94, but only to a letter from the Commission in the same way it can issue letters when requested to do so in the field of merger control (anonymously or not) to check the notifiability of an operation. The informal nature of this procedure would allow the Commission to reduce the resources to be mobilised (compared to the publication

of a formal decision) and would constitute a simple non-binding opinion (and not an official decision).
This possibility would increase legal certainty for businesses while committing reasonable resources to the Commission.

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