

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

Bernardo

* 2.3 Surname

MATOS

* 2.4 Email (this won't be published)

* 2.5 I am giving my contribution as

- Academic/research institution
- Business association
- Company/business organisation
- Consumer organisation
- EU citizen
- Environmental organisation
- Non-EU citizen
- Non-governmental organisation (NGO)
- Public authority
- Trade union
- Other

2.6 Other - please specify

If you chose "Other", please specify whether you are contributing as lawyer/law firm, economic consultancy or something else:

* 2.7 Organisation name

255 character(s) maximum

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

2.8 Transparency register number

255 character(s) maximum

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

* 2.10 Organisation size

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

* 2.11 The main activities of your organisation:

Text of 1 to 250 characters will be accepted

With more than 95,000 employees, of which over 35,000 are located in Europe, and a presence in more than 180 countries, Ericsson is one of the world's leading providers of information and communication technology.

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

Text of 1 to 250 characters will be accepted

Information and communication technology

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

- 61 Telecommunications
- 62 Computer programming, consultancy and related activities

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

Technology, software and services related to mobile telecommunications

*** 2.15 Country of origin**

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

- | | | | |
|---|--|--|--|
| <input type="radio"/> Afghanistan | <input type="radio"/> Djibouti | <input type="radio"/> Libya | <input type="radio"/> Saint Martin |
| <input type="radio"/> Åland Islands | <input type="radio"/> Dominica | <input type="radio"/> Liechtenstein | <input type="radio"/> Saint Pierre and Miquelon |
| <input type="radio"/> Albania | <input type="radio"/> Dominican Republic | <input type="radio"/> Lithuania | <input type="radio"/> Saint Vincent and the Grenadines |
| <input type="radio"/> Algeria | <input type="radio"/> Ecuador | <input type="radio"/> Luxembourg | <input type="radio"/> Samoa |
| <input type="radio"/> American Samoa | <input type="radio"/> Egypt | <input type="radio"/> Macau | <input type="radio"/> San Marino |
| <input type="radio"/> Andorra | <input type="radio"/> El Salvador | <input type="radio"/> Madagascar | <input type="radio"/> São Tomé and Príncipe |
| <input type="radio"/> Angola | <input type="radio"/> Equatorial Guinea | <input type="radio"/> Malawi | <input type="radio"/> Saudi Arabia |
| <input type="radio"/> Anguilla | <input type="radio"/> Eritrea | <input type="radio"/> Malaysia | <input type="radio"/> Senegal |
| <input type="radio"/> Antarctica | <input type="radio"/> Estonia | <input type="radio"/> Maldives | <input type="radio"/> Serbia |
| <input type="radio"/> Antigua and Barbuda | <input type="radio"/> Eswatini | <input type="radio"/> Mali | <input type="radio"/> Seychelles |
| <input type="radio"/> Argentina | <input type="radio"/> Ethiopia | <input type="radio"/> Malta | <input type="radio"/> Sierra Leone |
| <input type="radio"/> Armenia | <input type="radio"/> Falkland Islands | <input type="radio"/> Marshall Islands | <input type="radio"/> Singapore |

- Aruba
- Australia
- Austria
- Azerbaijan

- Bahamas
- Bahrain

- Bangladesh

- Barbados
- Belarus
- Belgium
- Belize
- Benin
- Bermuda
- Bhutan

- Bolivia
- Bonaire Saint Eustatius and Saba
- Bosnia and Herzegovina
- Botswana
- Bouvet Island
- Brazil
- British Indian Ocean Territory
- British Virgin Islands
- Brunei
- Bulgaria

- Burkina Faso
- Burundi

- Cambodia

- Cameroon

- Canada
- Cape Verde
- Cayman Islands

- Faroe Islands
- Fiji
- Finland
- France

- French Guiana
- French Polynesia
- French Southern and Antarctic Lands

- Gabon
- Georgia
- Germany
- Ghana
- Gibraltar
- Greece
- Greenland

- Grenada
- Guadeloupe

- Guam

- Guatemala
- Guernsey
- Guinea
- Guinea-Bissau

- Guyana

- Haiti
- Heard Island and McDonald Islands
- Honduras
- Hong Kong

- Hungary

- Iceland

- India
- Indonesia
- Iran

- Martinique
- Mauritania
- Mauritius
- Mayotte

- Mexico
- Micronesia

- Moldova

- Monaco
- Mongolia
- Montenegro
- Montserrat
- Morocco
- Mozambique
- Myanmar /Burma
- Namibia
- Nauru

- Nepal

- Netherlands
- New Caledonia
- New Zealand
- Nicaragua

- Niger

- Nigeria
- Niue

- Norfolk Island
- Northern Mariana Islands
- North Korea

- North Macedonia
- Norway
- Oman
- Pakistan

- Sint Maarten
- Slovakia
- Slovenia
- Solomon Islands
- Somalia
- South Africa

- South Georgia and the South Sandwich Islands
- South Korea
- South Sudan
- Spain
- Sri Lanka
- Sudan
- Suriname
- Svalbard and Jan Mayen
- Sweden
- Switzerland

- Syria

- Taiwan
- Tajikistan
- Tanzania
- Thailand

- The Gambia

- Timor-Leste
- Togo

- Tokelau
- Tonga

- Trinidad and Tobago
- Tunisia

- Turkey
- Turkmenistan
- Turks and Caicos Islands

- | | | | |
|--|-----------------------------------|---|--|
| <input type="radio"/> Central African Republic | <input type="radio"/> Iraq | <input type="radio"/> Palau | <input type="radio"/> Tuvalu |
| <input type="radio"/> Chad | <input type="radio"/> Ireland | <input type="radio"/> Palestine | <input type="radio"/> Uganda |
| <input type="radio"/> Chile | <input type="radio"/> Isle of Man | <input type="radio"/> Panama | <input type="radio"/> Ukraine |
| <input type="radio"/> China | <input type="radio"/> Israel | <input type="radio"/> Papua New Guinea | <input type="radio"/> United Arab Emirates |
| <input type="radio"/> Christmas Island | <input type="radio"/> Italy | <input type="radio"/> Paraguay | <input type="radio"/> United Kingdom |
| <input type="radio"/> Clipperton | <input type="radio"/> Jamaica | <input type="radio"/> Peru | <input type="radio"/> United States |
| <input type="radio"/> Cocos (Keeling) Islands | <input type="radio"/> Japan | <input type="radio"/> Philippines | <input type="radio"/> United States Minor Outlying Islands |
| <input type="radio"/> Colombia | <input type="radio"/> Jersey | <input type="radio"/> Pitcairn Islands | <input type="radio"/> Uruguay |
| <input type="radio"/> Comoros | <input type="radio"/> Jordan | <input type="radio"/> Poland | <input type="radio"/> US Virgin Islands |
| <input type="radio"/> Congo | <input type="radio"/> Kazakhstan | <input type="radio"/> Portugal | <input type="radio"/> Uzbekistan |
| <input type="radio"/> Cook Islands | <input type="radio"/> Kenya | <input type="radio"/> Puerto Rico | <input type="radio"/> Vanuatu |
| <input type="radio"/> Costa Rica | <input type="radio"/> Kiribati | <input type="radio"/> Qatar | <input type="radio"/> Vatican City |
| <input type="radio"/> Côte d'Ivoire | <input type="radio"/> Kosovo | <input type="radio"/> Réunion | <input type="radio"/> Venezuela |
| <input type="radio"/> Croatia | <input type="radio"/> Kuwait | <input type="radio"/> Romania | <input type="radio"/> Vietnam |
| <input type="radio"/> Cuba | <input type="radio"/> Kyrgyzstan | <input type="radio"/> Russia | <input type="radio"/> Wallis and Futuna |
| <input type="radio"/> Curaçao | <input type="radio"/> Laos | <input type="radio"/> Rwanda | <input type="radio"/> Western Sahara |
| <input type="radio"/> Cyprus | <input type="radio"/> Latvia | <input type="radio"/> Saint Barthélemy | <input type="radio"/> Yemen |
| <input type="radio"/> Czechia | <input type="radio"/> Lebanon | <input type="radio"/> Saint Helena Ascension and Tristan da Cunha | <input type="radio"/> Zambia |
| <input type="radio"/> Democratic Republic of the Congo | <input type="radio"/> Lesotho | <input type="radio"/> Saint Kitts and Nevis | <input type="radio"/> Zimbabwe |
| <input type="radio"/> Denmark | <input type="radio"/> Liberia | <input type="radio"/> Saint Lucia | |

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

at least 1 choice(s)

Multiple choice is possible

- Austria
- Belgium
- Bulgaria
- Croatia
- Cyprus
- Czech Republic
- Denmark
- Estonia
- Finland
- France

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

* 2.17 Please specify whether your company/business organisation has been the addressee of a Commission decision under Article 7 or Article 9 of Regulation (EC) No 1/2003

- Yes
- No
- Do not know

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

* 3.1 Has your company/business organisation been involved in horizontal cooperation agreements since the current HBERs and the HGL were introduced in 2010?

- Yes
- No
- Do not know
- Not applicable

* 3.2 Please specify the type of your horizontal cooperation agreements

at least 1 choice(s)

Multiple answers possible

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

* 3.3 If Other, please specify

Text of 1 to 500 characters will be accepted

Note: the part of this questionnaire which pertains to standardisation agreements (currently covered by Section 7 of the HGL) is most relevant to Ericsson's business activities. Many other parts of this questionnaire involve issues that are less relevant to Ericsson's activities, and on which Ericsson does not necessarily have a specific view. Therefore, Ericsson's responses to this questionnaire primarily focus on issues related to standardisation agreements and do not cover other aspects.

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

- Yes
- No
- Do not know

* 3.6 How often do you consult the **R&D BER** for guidance on a horizontal cooperation agreement?

- Frequently (several times per year)
- Occasionally (once or twice per year)
- Never

* 3.7 How often do you consult the **Specialisation BER** for guidance on a horizontal cooperation agreement?

- Frequently (several times per year)
- Occasionally (once or twice per year)
- Never

* 3.8 How often do you consult the **HGL** for guidance on a horizontal cooperation agreement?

- Frequently (several times per year)
- Occasionally (once or twice per year)
- Never

4 Effectiveness (Have the objectives of the current HBERs and HGL been met?)

In this section, we would like to have your opinion on the extent to which the HBERs and the HGL have met their objectives.

The **purpose of the EU competition rules** is to ensure that competition is not distorted to the detriment of the public interest, individual undertakings and consumers. In line with this objective, the Commission's policy is to leave companies maximum flexibility when concluding horizontal co-operation agreements in order to increase the competitiveness of the European economy while at the same time promoting competition for the benefit of European businesses and consumers.

The **purpose of the HBERs and the HGL** is to make it easier for undertakings to cooperate in ways which are economically desirable and without adverse effect from the point of view of competition policy. The specific objectives of the HBERs and HGL are to ensure effective protection of competition and providing adequate legal certainty for undertakings.

* 4.1 In your view, do you perceive that the HBERs and the HGL have contributed to promoting competition in the EU?

- Yes
- Yes, but they have contributed only to a certain extent or only in specific sectors
- They were neutral
- No, they have negatively affected competition in the EU
- Don't know

* 4.2 Please explain your reply, distinguishing between sectors where relevant: (1500 characters max.)

Text of 1 to 1500 characters will be accepted

Section 7 of the HGL sets out certain general principles emphasising the generally pro-competitive nature of standardisation agreements, for example: standardisation agreements usually produce significant positive economic effects; holding standard essential patents does not lead to a presumption of market power; there exist different models of standard-setting organizations; high royalties do not in themselves give rise to EU competition concerns; it can be presumed that, where participation in standard-setting is unrestricted and certain other conditions are met, standardisation agreements will normally not restrict competition. These principles remain valid and should be maintained.

On the other hand, certain aspects of Section 7 of the HGL may have negatively affected competition in the EU and should be improved: there is a significant gap in the HGL in that they do not cover the development of open source software; the HGL suggest specific methodologies for assessing whether royalty rates are FRAND, which should be left to the competent courts; the HGL have been misleadingly interpreted by some as supporting the existence of a requirement for holders of standard essential patents to license all interested parties, irrespective of their level in the supply chain, and the future HGL should make clear that there is no such obligation.

For additional details, Ericsson refers to the annex provided in response to 9.2.

Legal certainty provided by the HBERs and the HGL

* 4.3 In your view, have the R&D BER and Section 3 of the HGL on research and development agreements provided sufficient legal certainty on R&D agreements companies can conclude without the risk of infringing competition law?

- Yes
- No
- Do not know

* 4.5 In your view, does the R&D BER increase legal certainty compared with a situation where the R&D BER would not exist but only the HGL applied?

- Yes
- No
- Do not know

* 4.7 In your view, have the Specialisation BER and Section 4 of the HGL on production agreements provided sufficient legal certainty on production /specialisation agreements companies can conclude without the risk of infringing competition law?

- Yes
- No
- Do not know

* 4.9 In your view, does the Specialisation BER increase legal certainty compared with a situation where the Specialisation BER would not exist but only the HGL applied?

- Yes
- No
- Do not know

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

* 4.11 In your view, have the HGL provided sufficient legal certainty on agreements involving **information exchange** in the sense of Section 2 of the HGL?

- Yes
- No
- Do not know

* 4.13 In your view, have the HGL provided sufficient legal certainty on **purchasing agreements** in the sense of Section 5 of the HGL?

- Yes
- No
- Do not know

* 4.15 In your view, have the HGL provided sufficient legal certainty on **commercialisation agreements** in the sense of Section 6 of the HGL

- Yes
- No
- Do not know

*

4.17 In your view, have the HGL provided sufficient legal certainty on **standardisation agreements** in the sense of Section 7 of the HGL

- Yes
- No
- Do not know

* 4.18 Please explain your reply

Text of 1 to 1500 characters will be accepted

Section 7 of the HGL, in particular paragraphs 285 and 294, is being relied upon by some market participants as supporting the existence of a requirement for holders of standard essential patents to license all interested parties, irrespective of their level in the supply chain. Although it is clear that Section 7 of the HGL does not provide for such a requirement, it remains the case that this interpretation has been facilitated by a certain lack of clarity of the HGL. This situation has negatively affected legal certainty surrounding licensing of standard essential patents and seriously threatens well-established licensing models which have made enormous contributions to innovation in Europe. A license to all requirement would effectively dictate that holders of standard essential patents adopt a particular licensing model which, for numerous reasons, would be highly inefficient and impracticable, resulting in significant welfare losses. Accordingly, it is vital that the future HGL clarify that there is no such obligation.

For additional details, Ericsson refers to the annex provided in response to 9.2.

* 4.19 In your view, have the HGL provided sufficient legal certainty on **other types of horizontal cooperation agreements** that are currently not specifically addressed in the HGL (for example sustainability agreements)

- Yes
- No
- Do not know

* 4.21 In your view, are there other types of horizontal cooperation agreements outside those identified in the current HGL that should have been specifically addressed in order to increase legal certainty?

- Yes
- No
- Do not know

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

Text of 1 to 3000 characters will be accepted

There is a significant gap in the HGL in that they do not cover the development of open source software. For additional details, Ericsson refers to the annex provided in response to 9.2.

Identification of pro-competitive horizontal agreements

The R&D BER and the Specialisation BER set out a number of conditions that R&D and specialisation agreements need to meet in order to benefit from the block exemption. The HGL provide additional

guidance on how to interpret these conditions. These conditions have been defined with the purpose to give exemption only to those agreements for which it can be assumed with sufficient certainty that they generate efficiencies that outweigh, in line with Article 101(3) of the Treaty, the harm caused by the restriction of competition.

Based on your experience, have the following provisions in the **R&D BER** allowed to correctly identify the horizontal cooperation agreements that are compliant with Article 101 of the Treaty?

- * 4.23 The list of definitions that apply for R&D agreements that can benefit from exemption in Article 1 of the R&D BER
 - Yes
 - No
 - Do not know

- * 4.25 The conditions for exemption listed in Article 3 of the R&D BER, regarding, for instance, access to the final results of the R&D, access to pre-existing know-how and joint exploitation.
 - Yes
 - No
 - Do not know

- * 4.27 The absence of a market share threshold for non-competing undertakings, the market share threshold of 25% for competing undertakings and the application thereof provided for in Articles 4 and 7 of the R&D BER
 - Yes
 - No
 - Do not know

- * 4.29 The limits regarding the duration of the exemption provided for in Article 4
 - Yes
 - No
 - Do not know

- * 4.31 The list identified in Article 5 of the R&D BER which make the exemption not available for agreements that have as their object certain restrictions or limitations ('hardcore restrictions')
 - Yes
 - No
 - Do not know

- * 4.33 The list of obligations included in agreements to which the exemption does not apply ('excluded restrictions'), identified in Article 6 of the R&D BER
 - Yes
 - No
 - Do not know

Based on your experience, have the following provisions in the **Specialisation BER** allowed to correctly identify the horizontal cooperation agreements that are compliant with Article 101 of the Treaty?

- * 4.35 The definitions that apply for the purposes of the Specialisation BER, in Article 1
 - Yes
 - No
 - Do not know

- * 4.37 The explanations on the type of specialisation agreements to which the exemption applies, provided by Article 2 of the Specialisation BER
 - Yes
 - No
 - Do not know

- * 4.39 The market share threshold of 20% and its application, provided for in Articles 3 and 5 of the Specialisation BER
 - Yes
 - No
 - Do not know

- * 4.41 The list identified in Article 4 of the Specialisation BER which make the exemption not available for agreements that have as their object price fixing, certain limitations of output or sales or market or customer allocation ('hardcore restrictions')
 - Yes
 - No
 - Do not know

4.43 Based on your experience, are there other elements, besides those listed in the previous questions that should have been clarified, added, or removed to improve the guidance given by the BERs?

Text of 1 to 3000 characters will be accepted

- * 4.44 Based on your experience, are there other types of horizontal cooperation agreements outside those identified in the R&D and Specialisation BERs which would satisfy the conditions of Article 101(3) of the Treaty?
 - Yes
 - No
 - Do not know

- * 4.46 Based on your experience, have the BERs and the HGL had any impacts that were not expected or not intended?
 - Yes
 - No

Do not know

* 4.47 If Yes, please explain your answer

Text of 1 to 3000 characters will be accepted

As noted in the response to 4.18, a certain lack of clarity of Section 7 of the HGL has facilitated misleading interpretations and claims according to which holders of standard essential patents would be subject, pursuant, in particular, to paragraphs 285 and 294 of the HGL, to a requirement to license all interested parties, irrespective of their level in the supply chain. This situation has negatively affected legal certainty surrounding licensing of standard essential patents and seriously threatens well-established licensing models which have made enormous contributions to innovation in Europe. The fact that (i) a license to all requirement would be at odds with long-standing, well-established industry practice and (ii) the wording at issue that is today misleadingly relied upon did not give rise to any significant public debate at the time of the adoption of the HGL both indicate that this negative impact of Section 7 of the HGL was neither expected nor intended. Accordingly, it is vital that the future HGL clarify that there is no such obligation.

For additional details, Ericsson refers to the annex provided in response to 9.2.

5 Efficiency (were the costs involved proportionate to the benefits?)

In this section, we would like to have your view concerning the efficiency of the HBERs and the HGL. In your view, do you consider that the costs (for example, legal fees, delays in implementation) of analysing the conditions and applying these instruments is proportionate to the benefits (for example, faster self assessment) of having the rules in place?

Costs

* 5.1 Please describe the different types of costs of applying the current R&D and Specialisation BERs; and the HGL

Text of 1 to 1500 characters will be accepted

Legal fees, delays in implementation.

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

As noted in response to 6.13, overall, Section 7 of the HGL sets out a framework for standardisation agreements that is potentially beneficial to competition and innovation.

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

* 5.20 Please explain your reply

Text of 1 to 1500 characters will be accepted

As noted in response to 6.13, overall, Section 7 of the HGL sets out a framework for standardisation agreements that is potentially beneficial to competition and innovation. The costs generated by the HGL are proportionate to these benefits.

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 claims by some stakeholders according to which holders of standard essential patents would be subject, pursuant, in particular, to the HGL, to a requirement to license all interested parties, irrespective of their level in the supply chain.	Section 7 of the HGL (in particular, paragraphs 285 and 294).	For additional details, Ericsson refers to 4.18 and 4.46, as well as the annex provided in response to 9.2.
2	Development of open source software.	Section 7 of the HGL.	For additional details, Ericsson refers to 4.2, as well as the annex provided in response to 9.2.
3			
4			
5			
6			
7			

Do you think that it is still relevant to have the current HBERs and HGL in light of major trends or developments listed above?

* 6.2 The R&D BER and Section 3 of the HGL are

- Still relevant
- No longer relevant
- Do not know

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

- Still relevant
- No longer relevant
- Do not know

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

- Still relevant
- No longer relevant
- Do not know

* 6.8 Section 5 of the HGL on purchasing agreements is

- Still relevant
- No longer relevant
- Do not know

* 6.10 Section 6 of the HGL on commercialisation agreements is

- Still relevant
- No longer relevant
- Do not know

* 6.12 Section 7 of the HGL on standardisation agreements is

- Still relevant
- No longer relevant
- Do not know

* 6.13 Please explain your reply

Text of 1 to 1500 characters will be accepted

As noted in response to 4.2, Section 7 of the HGL sets out a number of general principles which emphasise the generally pro-competitive nature of standardisation agreements. On the other hand, certain aspects of Section 7 of the HGL may have negatively affected competition in the EU and should be improved. In any event, Section 7 of the HGL remains relevant and, overall, sets out a framework for standardisation agreements that is potentially beneficial to competition and innovation. For additional details, Ericsson refers to 4.2 and the annex provided in response to 9.2.

7 Coherence (Does the policy complement other actions or are there contradictions?)

* 7.1 In your view, are the HBERs and the HGL coherent with other instruments and /or case law that provide(s) guidance on the interpretation of Article 101 of the Treaty (e.g., other Block Exemption Regulations, the Vertical Guidelines and the Article 101(3) Guidelines)?

- Yes
- No
- Do not know

* 7.2 Please explain

Text of 1 to 3000 characters will be accepted

Section 7 of the HGL, in particular paragraphs 289-290, set out a number of specific methodologies for assessing whether royalty rates are FRAND. This is somewhat remarkable: the question of whether a license is offered at FRAND terms does not typically arise in the context of horizontal cooperation, but rather is in most cases a “vertical” topic. In fact, the intellectual property rights policies of standard-developing organizations typically do not mandate specific licensing modalities or rates; they generally merely provide that licenses for standard essential patents should be granted on FRAND terms and specifically provide that licensing terms of standard essential patents are to be negotiated on an individual basis between the holder of the standard essential patents and the prospective licensee. From that perspective, it would be more logical to address the notion of FRAND in the Technology Transfer Guidelines. For additional details, Ericsson refers to the annex provided in response to 9.2.

* 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

As noted in response to 4.18 and 4.47, a certain lack of clarity of Section 7 of the HGL has facilitated misleading and incorrect claims according to which holders of standard essential patents would be subject to a requirement to license all interested parties, irrespective of their level in the supply chain. These interpretations and claims are not only erroneous, because it is clear that Section 7 of the HGL does not provide for such a requirement, but they are also irreconcilable with EU competition law more generally. There is no provision of EU competition law, nor any precedent which would support the existence of a license to all requirement. No plausible theory of harm supports claims that licensing standard essential patents at one particular level of the supply chain (e.g. the end-product level) would infringe Articles 101 or 102 TFEU. In particular: licensing of standard essential patents confined to one particular industry level does not qualify as anticompetitive refusal to license; licensing at the end-product level does not amount to anticompetitive discrimination; licensing at the end-product level does not constitute excessive pricing; Huawei v ZTE does not prescribe a license to all requirement; a number of important national court decisions confirm, explicitly or implicitly, the freedom of holders of standard essential patents to choose at which level they wish to license within a complex multi-level production chain. For additional details, Ericsson refers to the annex provided in response to 9.2.

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

* 8.3 Has the Specialisation BER had added value in the assessment of the compatibility of horizontal cooperation agreements with Article 101 of the Treaty?

- Yes
- No
- Do not know

* 8.5 Have the HGL had added value in the assessment of the compatibility of horizontal cooperation agreements with Article 101 of the Treaty?

- Yes
- No
- Do not know

* 8.6 Please explain your reply

Text of 1 to 1500 characters will be accepted

Ericsson refers to its response to 4.2, 6.13 and the annex provided in response to 9.2.

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

Ericsson refers to the annex provided in response to 9.2.

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

dbad86d1-af77-4f30-beed-37b9ebdea8fc/Ericsson_-_Annex_HBER_consultation.pdf

* 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