

Public questionnaire for the 2019 Evaluation of the Research & Development and Specialisation Block Exemption Regulations

Fields marked with * are mandatory.

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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

Nicholas

* 2.3 Surname

Cunningham

* 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

InterDigital has conducted pure research and licensing since 1992. Its 300+ engineers develop mobile and video technologies for global standards. Its track record in R&D is matched by fair licensing practices. It partners with many other companies.

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

Text of 1 to 250 characters will be accepted

It contributes to standards development at ITU/ISO, ETSI, EUROCAE, GSMA, NGMN, and DVB among others. Such standards enable digital cellular and wireless communications and video technologies in many devices. It develops 5G for future IoT sectors.

*** 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](#)):**

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

Scientific research and development in digital cellular and wireless communications and video technologies; licensing of those technologies.

*** 2.15 Country of origin**

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

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

- Armenia
- Aruba
- Australia
- Austria
- Azerbaijan
- Bahamas
- Bahrain
- Bangladesh
- Barbados
- Belarus
- Belgium
- Belize
- Benin
- Bermuda
- Bhutan
- Bolivia
- Bonaire Saint Eustatius and Saba
- Bosnia and Herzegovina
- Botswana
- Bouvet Island
- Brazil
- British Indian Ocean Territory
- British Virgin Islands
- Brunei
- Bulgaria
- Burkina Faso
- Burundi
- Cambodia
- Cameroon
- Canada
- Cape Verde
- Falkland Islands
- Faroe Islands
- Fiji
- Finland
- France
- French Guiana
- French Polynesia
- French Southern and Antarctic Lands
- Gabon
- Georgia
- Germany
- Ghana
- Gibraltar
- Greece
- Greenland
- Grenada
- Guadeloupe
- Guam
- Guatemala
- Guernsey
- Guinea
- Guinea-Bissau
- Guyana
- Haiti
- Heard Island and McDonald Islands
- Honduras
- Hong Kong
- Hungary
- Iceland
- India
- Indonesia
- Marshall Islands
- Martinique
- Mauritania
- Mauritius
- Mayotte
- Mexico
- Micronesia
- Moldova
- Monaco
- Mongolia
- Montenegro
- Montserrat
- Morocco
- Mozambique
- Myanmar /Burma
- Namibia
- Nauru
- Nepal
- Netherlands
- New Caledonia
- New Zealand
- Nicaragua
- Niger
- Nigeria
- Niue
- Norfolk Island
- Northern Mariana Islands
- North Korea
- North Macedonia
- Norway
- Oman
- Singapore
- Sint Maarten
- Slovakia
- Slovenia
- Solomon Islands
- Somalia
- South Africa
- South Georgia and the South Sandwich Islands
- South Korea
- South Sudan
- Spain
- Sri Lanka
- Sudan
- Suriname
- Svalbard and Jan Mayen
- Sweden
- Switzerland
- Syria
- Taiwan
- Tajikistan
- Tanzania
- Thailand
- The Gambia
- Timor-Leste
- Togo
- Tokelau
- Tonga
- Trinidad and Tobago
- Tunisia
- Turkey
- Turkmenistan

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

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

at least 1 choice(s)

Multiple choice is possible

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

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

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

- Yes
- No
- Do not know

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

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

- Yes
- No
- Do not know
- Not applicable

* 3.2 Please specify the type of your horizontal cooperation agreements

at least 1 choice(s)

Multiple answers possible

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

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

- Yes
- No
- Do not know

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

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

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

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

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

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

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

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

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

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

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

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

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

Text of 1 to 1500 characters will be accepted

Some potential licensees argue that para 285 HGL mandates that a SEP holder provide FRAND licences to all parties. The global patent licensing community assumes that exhaustion will occur in a supply chain on grant of the first licence (see *Quanta v LG* (2008) and *Impression Products v Lexmark* (2017)).

Thus, inclusion of the word 'all' in para 285 arguably deprives SEP holders of the ability to choose the most efficient point in a supply chain at which to license, consistent with industry practice. If that view holds, it would impose costly and inefficient licensing practices that amount to a mandatory component licensing system. This issue was not foreseen during consultation, nor after draft publication in 2010, when "all" was first added.

The HGL require "effective access" (paras 264,268,280,283,284,286,287,294,298); para 285 offers one way this might be achieved. But the para 285 structure does not accord with established licensing practice, nor with SDO IPR policies.

Inclusion of 'all' in para 285 has enabled an argument used by potential licensees to delay taking licences or to force royalties below FRAND levels, hampering SEP holders' efforts to conclude FRAND licences that provide a fair return. These arguments, with their delay and hold-out goals, impede SEP holders' ability to fund new innovation, thereby undermining dynamic competition, contrary to the intention of the HGL (para. 269: "IPR promote dynamic competition by encouraging undertakings to invest..")

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

We welcome that paragraph 269 HGL properly recognises that "there is no presumption that holding or exercising IPR essential to a standard equates to the possession or exercise of market power" and that "[t]he question of market power can only be assessed on a case by case basis."

Similarly, paragraph 279 affords adequate flexibility to evaluate the actual competitive effects of the holding or exercise of IPR essential to a standard: "The non-fulfilment of any or all of the principles set out in this section will not lead to any presumption of a restriction of competition within Article 101(1)". SDO policies evolve and generally require self-assessment but have long been held to be consistent with the HGL.

However, and as outlined above, the insertion of the word 'all' in para 285 HGL has inadvertently created legal uncertainty by furthering the argument that there is, in effect, a mandatory component licensing system for SEP holders contributing in SDOs. This is contrary to the settled custom and practice whereby SEP holders offer end-manufacturer licences on FRAND terms which include "have made" provisions for the benefit of all upstream suppliers of the licensed manufacturer, thereby providing them with effective access to the standard.

This legal uncertainty impedes the licence negotiation process, with the result that a SEP holder may be deprived of an appropriate reward for their innovation, and be reticent to contribute new technologies to the standard.

* 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

Identification of pro-competitive horizontal agreements

The R&D BER and the Specialisation BER set out a number of conditions that R&D and specialisation agreements need to meet in order to benefit from the block exemption. The HGL provide additional guidance on how to interpret these conditions. These conditions have been defined with the purpose to give exemption only to those agreements for which it can be assumed with sufficient certainty that they generate efficiencies that outweigh, in line with Article 101(3) of the Treaty, the harm caused by the restriction of competition.

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

* 4.23 The list of definitions that apply for R&D agreements that can benefit from exemption in Article 1 of the R&D BER

- Yes
- No
- Do not know

* 4.25 The conditions for exemption listed in Article 3 of the R&D BER, regarding, for instance, access to the final results of the R&D, access to pre-existing know-how and joint exploitation.

- Yes
- No
- Do not know

* 4.27 The absence of a market share threshold for non-competing undertakings, the market share threshold of 25% for competing undertakings and the application thereof provided for in Articles 4 and 7 of the R&D BER

- Yes
- No
- Do not know

* 4.29 The limits regarding the duration of the exemption provided for in Article 4

- Yes
- No
- Do not know

* 4.31 The list identified in Article 5 of the R&D BER which make the exemption not available for agreements that have as their object certain restrictions or limitations ('hardcore restrictions')

- Yes
- No
- Do not know

* 4.33 The list of obligations included in agreements to which the exemption does not apply ('excluded restrictions'), identified in Article 6 of the R&D BER

- Yes
- No
- Do not know

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

* 4.35 The definitions that apply for the purposes of the Specialisation BER, in Article 1

- Yes
- No
- Do not know

* 4.37 The explanations on the type of specialisation agreements to which the exemption applies, provided by Article 2 of the Specialisation BER

- Yes

- No
- Do not know

* 4.39 The market share threshold of 20% and its application, provided for in Articles 3 and 5 of the Specialisation BER

- Yes
- No
- Do not know

* 4.41 The list identified in Article 4 of the Specialisation BER which make the exemption not available for agreements that have as their object price fixing, certain limitations of output or sales or market or customer allocation ('hardcore restrictions')

- Yes
- No
- Do not know

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

Text of 1 to 3000 characters will be accepted

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

- Yes
- No
- Do not know

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

- Yes
- No
- Do not know

* 4.47 If Yes, please explain your answer

Text of 1 to 3000 characters will be accepted

The statement that an SDO's IPR policy may require participants to issue: "an irrevocable commitment in writing to offer to license their essential IPR to all third parties" on FRAND terms (para 285 HGL) has caused unexpected effects as described below.

These were not intended; see the lack of comment as to the effects of including the word 'all', before and after issuance of the draft HGL; the fact that it is at odds with the custom and practice of SDOs in the mobile sector (possibly save IEEE, where recent changes are controversial); and understanding of the patent exhaustion principle following US judgments in *Quanta v LG* (2008) and *Impression Products v Lexmark* (2017).

Para 166 of the 2000 Draft HGL provided that:

"To avoid elimination of competition in the relevant market(s), access to the standard must be possible for third parties on fair, reasonable and non-discriminatory terms."

The final version of the 2001 HGL included this wording (at para 174).

On 4 December 2008, the Commission announced a public consultation on the functioning of the existing regime for the assessment of horizontal cooperation agreements under EU antitrust rules (see European Commission, IP/08/1887, 4 December 2008). The majority of contributions submitted to the Commission did not address the issue of access to standards under paragraph 174 of the 2001 HGL.

On 4 May 2010, the Commission published a communication containing its draft guidelines on the application of Article 101 of the Treaty on the Functioning of the European Union to Horizontal Co-operation Agreements (SEC(2010) 528/2). The 2010 Draft HGL included a requirement at paragraph 282 that:

"The IPR policy should also require that all holders of essential IPR in technology which may be adopted as part of a standard provide an irrevocable commitment in writing to license their IPR to all third parties on fair, reasonable and non-discriminatory terms ("FRAND commitment")."

At the same time, the Commission announced a public consultation on the 2010 Draft HGLs (see European Commission, IP/10.489, 4 May 2010). Although the addition of paragraph 282 was widely commented on by contributors, the requirement for holders of essential IPRs to license their IPR to all third parties was not addressed, save for one comment in relation to export controls.

We consider that inclusion of the word 'all' before 'third parties' was not supported. No theory of harm to competition was identified to justify the inclusion, nor any decisional practice or judicial statement. Nor was it identified as having the reading it is now being given in some quarters.

The unexpected consequence is that para 285 is argued as reversing a long established practice whereby one stop access is afforded to all users of a patented technology along the supply chain. This has the potential to deprive both the SEP holder and putative licensees of the efficiencies that arise from licensing the last manufacturer in a supply chain.

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

N/A

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

N/A

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	Quanta Computer, Inc. v. LG Electronics, Inc., 553 U.S. 617 (2008).	Para 285 HGL: 'an irrevocable commitment in writing to offer to license their essential IPR to all third parties' on FRAND terms.	Patent exhaustion arises on the authorised sale of a component. Requiring a licence to be granted to all undermines the settled system of single end-point licensing combined with 'have made' protections for intermediate producers.
2	Impression Products, Inc. v Lexmark International, Inc., 137 S.Ct. 1523 (2017)	Para 285 HGL: 'an irrevocable commitment in writing to offer to license their essential IPR to all third parties' on FRAND terms.	US patent exhaustion arises on the authorised sale of a component whether in the US or overseas. Requiring a licence to be granted to all undermines the settled system of single end-point licensing combined with 'have made' protections for intermediate producers.
3	Case C-170/13 Huawei v ZTE	Para 285 HGL: 'an irrevocable commitment in writing to offer to license their essential IPR to all third parties' on FRAND terms.	ECJ gave guidance as to the negotiation of SEP licences and availability of injunctive relief in relation to standard essential patents (SEPs) and for the licensing and enforcement of SEPs that are subject to a FRAND licensing commitment.
4	Unwired Planet v. Huawei (UK), [2018] EWCA Civ 2344 and judgment of Supreme Court expected [TBA – hearing was in October 2019]	Para 285 HGL: 'an irrevocable commitment in writing to offer to license their essential IPR to all third parties' on FRAND terms.	Settled licence annexed to remedies judgment was limited to end user devices and infrastructure equipment. Intermediate products were explicitly excluded from the licence scope. A "have made" provision was included.
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

Section 7 remains relevant. We believe the HGL have safe-guarded a positive, fair and rewarding environment for collective standard development by innovators within SDOs. The continuing need for such fair and stable structures forms a key part of the EU's ambitions for a Digital Europe where markets function well for all stakeholders and industry is supported to embrace global challenges.

As recognised in President von der Leyen's mission letter to Commissioner Vestager, entrusting her with both the Digital and Competition portfolios, competition and innovation will have an important role in the EU's industrial strategy, where 'Europe must focus on maintaining [our] digital leadership' and should be 'moving first on new-generation technologies'. Further, "[T]he competitiveness of our industry depends on a level playing field that provides business with the incentive to invest, innovate and grow".

Section 7 plays an important role in settling policy in this critical area, reassuring innovators that there is a stable eco-structure in which participants can collectively innovate and develop standardised technology recognising that they will obtain a fair reward for their innovation and contribution. This will benefit all users of technology, including consumers and small businesses of all kinds.

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

InterDigital considers that the requirement that a licence be offered to 'all' third parties by a SEP holder making a FRAND undertaking, per para 285 HGL, is at odds with long established principles of Community law both substantively and procedurally. Combined with the doctrine of exhaustion on first sale, the inclusion of the word 'all' gives rise to an argument that the SEP holder is deprived of the ability to choose the manner and means whereby they wish to obtain value for the fruits of their research. This is effectively introducing a mandatory licensing system.

This is at odds with the European Commission's espoused policy of 'Better Regulation'. During the 2008 initial public consultation regarding the then HGL, no comment or request was made that the nature of access to technology to be afforded by a SPE holder should be qualified by stating "all"; nor upon addition of the word "all" in the draft 2010 HGL were the consequences of that addition understood. In the respectful submission of InterDigital, it is contrary to the Commission's commitment to Better Regulation, its commitment for transparent and open consultation, and its commitment to the setting of policy only following extensive planning and action, for such a fundamental change to be effected as it was.

It is not evident that the Commission may rely upon the application of Articles 101 or 102 TFEU to justify in a set of guidelines a duty to license. The Commission does not appear to have carried out any balancing exercise of the rights of a SEP holder to obtain a proper return for their commitment to the standard development process, their innovation and investment, with that of any theory of harm.

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

- Yes
- No
- Do not know

* 7.4 Please explain

Text of 1 to 3000 characters will be accepted

The mistaken interpretation of para 285 HGL to mean that SDOs must require participants to issue "an irrevocable commitment in writing to offer to license their essential IPR to all third parties" on FRAND terms has arguably given rise to the possibility that the HGL have introduced compulsory component licensing regardless of the efficiency and competitive effects of such a rule, and regardless of industry practice. If this argument gains traction, and in light of the application of the exhaustion doctrine as it is now construed by the licensing community post-Quanta and Impression Products, it will deprive a SEP owner of its fundamental entitlement to receive a fair rent from its proprietary interest.

This is in contrast with the statement in the same paragraph that IPR holders have the option of excluding specified technology. This option was included following on from considerable consternation and adverse comment during the consultation process that the Commission was effectively requiring the introduction of a compulsory licensing system. If IPR holders elect to exclude specified technology the quality and pro-competitive nature of the resulting standards may suffer.

Compulsory licensing of this nature is also contrary to the case law of the Community courts, which have established that a 'duty to deal' exists in 'exceptional circumstances' of abuse of a dominant position (See Magill and Microsoft). Such exceptional circumstances do not exist in this situation in view at least of the FRAND commitment made by SEP holders.

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

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

In considering the appropriateness or otherwise of requiring SDOs to ensure their participants offer a licence to all manufacturers in a supply chain, and hence curtail the fair and proper reward for their innovation, it is worth noting that the Commission has long guarded against the notion of compulsory licensing within the ETSI system. The first iteration of the IPR Policy in 1982 contained a compulsory licensing obligation whereby the proprietor of an 'essential' IPR would be required to license on reasonable terms. This approach was considered to favour the incumbent Public Network Operators, who had limited R&D budgets, yet also had a large appetite for IPRs.

At that time, the Commission was alive to the consequences of such a shift in rents: "Although it could be argued that consumers would benefit in the short term if IPRs were compulsively licensed to serve as the basis of standards, in the long term, investment in R&D would dry up within the Community" [CEC COM (92) 445 final].

Despite this controversy, an interim policy was adopted by ETSI's General Assembly on 18 March 1993 which was subject to some opposition, plus a complaint to the Commission to the effect that the IPR Policy would effectively be a system of compulsory licensing and amount to an infringement of (the then) Articles 81 and 82 EC. Before awaiting the outcome of that complaint, ETSI abandoned the policy.

Likewise, in relation to the then para 282 of the 2010 Draft HGL, during the public consultation, there was considerable representation that a mandatory requirement for holders of essential IPR to license on FRAND terms was contrary to the common policy of standards organisations which allowed for SEP holders to declare that they will not license their SEPs. (See American Intellectual Property Law Association, Re: Draft Guidelines on the Applicability of Article 101 of the Treaty on the Functioning of the European Union to Horizontal Co-operation Agreements, SEC (2010) 528/2, 24 June 2010, page 5.) These concerns were addressed by the Commission in the final version of the Guidelines and para 285 left open the option to SEP holders not to contribute their technology to the standard development of an SSO.

9.2 You may upload a file that further explains your position in more detail or further details the answers you have given

The maximum file size is 1 MB

Only files of the type pdf,txt,doc,docx,odt,rtf are allowed

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

- Yes
 No

Contact

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