

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

Gabriel

* 2.3 Surname

Lluch

* 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

Orange is one of the world's leading telecommunications operators. Orange is also a leading provider of global IT and telecommunication services to multinational companies, under the brand Orange Business Services.

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

Text of 1 to 250 characters will be accepted

Orange is one of the world's leading telecommunications operators. Orange is also a leading provider of global IT and telecommunication services to multinational companies, under the brand Orange Business Services.

*** 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](#):**

60, 61, 62 and 64

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

Orange is one of the world's leading telecommunications operators. Orange is also a leading provider of global IT and telecommunication services to multinational companies, under the brand Orange Business Services.

*** 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 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

HBER and HGL have provided useful guidance to assess the legality of different types of horizontal cooperation agreements with regards to Article 101(1) TFEU but they are not adapted to the changes imposed by the digitalisation of the economy.

Electronic communication operators have a central role to play for achieving a stronger digital Europe by investing in high quality and innovative networks, technologies and services at the benefit of European consumers and businesses.

To seize the full potential of the digital era and to stay competitive in the context of a global digital market, a flexible and clearer legal framework with regards to certain horizontal cooperation agreements in electronic communications sector is indispensable (RAN sharing, industry-wide cooperation).

Such framework should provide a sufficient legal certainty and security for self-assessment and, when necessary, a possibility to request a guidance from the Commission within a reasonable timeline without imposing burdensome processes.

Furthermore, the European framework on horizontal cooperation has to be adapted to the dynamics of the digital economy to avoid any strong asymmetry with regards to the "rules of the game" between the European and global digital actors. We need the EU actors to be able to cooperate and develop innovation at the same pace as other parts of the world, for the benefit of European citizens and European digital economy.

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

* 4.8 Please explain your reply

Text of 1 to 1500 characters will be accepted

The scope of Specialisation BER is very limited and does not include projects of high importance for electronic communications sector and for European digital economy as a whole (such as RAN sharing in mobile networks) (see attached position paper).

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

- Yes
- No
- Do not know

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

Based on the section 2 of the HGL, best market practices have been developed by industry actors for horizontal cooperation agreements where the exchange of competitively sensitive information is indispensable. These market practices seem to be considered as waterproof from competition law standpoint (for examples exchanges in clean teams or through black boxes).

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

- Yes
- No
- Do not know

* 4.14 Please explain your reply

Text of 1 to 1500 characters will be accepted

Orange considers that section 5 of the HGL gives a clear framework to the companies to allow them to cooperate with a sufficient legal certainty.
For example, Orange and DT have set up a JV for procurement in 2011 and the design of this JV is largely based on the guidance provided in the HGL.

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

- Yes
- No
- Do not know

* 4.16 Please explain your reply

Text of 1 to 1500 characters will be accepted

Orange considers that the HGL shall provide more flexibility with regards to joint bidding between competitors. Indeed, joint bidding should be considered normally not likely to give rise to competition concerns not only if joint bidding is objectively necessary to allow one party to enter a market it could not have entered individually but also if it allows the bidding parties to achieve the necessary scale that they would not have had standalone.

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

- Yes
- No
- Do not know

* 4.18 Please explain your reply

Text of 1 to 1500 characters will be accepted

The provided rules are not fit to the specificities of the digital economy which is dynamic and fast moving while existing rules are sometimes burdensome and time-consuming.

As per paragraph 281 of the HGL, for the standardisation agreements to fall outside the scope of Article 101 (1) TFEU, the involvement of all parties affected by the standard in the process leading to definition of the standard is necessary.

In practice, guaranteeing an unrestricted participation may be complex, inefficient and time-consuming and may result in failure if all the parties do not have the same motivation or interest. Moreover, the experience shows that sometimes some participants benefit from the constraints imposed by the current legal framework to block certain initiatives that could compete with their own proprietary solutions.

It is true that the paragraph 295 of the HGL raises the possibility of departing from the principle of unrestricted participation. However, this possibility is not sufficiently clear and the burden of proof is heavy.

Therefore, the HGL with regards to standardisation agreements should be reviewed and more flexible solutions should be introduced. For example, should be better explained when and to what extent restricted participation is allowed as well as to enlarge the scope of the cases which could fall under this "exception". The criteria for the "exception" to apply should be clear and not imply a heavy burden of proof.

See attached position paper.

* 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

No, sufficient legal certainty is not provided for RAN sharing agreements and for industry-wide initiatives to develop innovative products and services.

See the response to the question 4.22.

* 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

RAN sharing agreements

To optimize network deployment (cost, environment impact, speed of deployment, etc.) while providing high quality services and improved coverage, mobile network sharing agreements between mobile operators have become widespread in Europe. New technologies, such as 5G, require heavy investments and an accelerated deployment plan that remain challenging for all operators. RAN sharing agreements will be an important tool to allow a rapid deployment of 5G networks.

The guidance provided in the HGL regarding production agreements can be helpful for the self-assessment of RAN sharing agreement, but they are not adapted to the specificities of these forms of cooperation and thus cannot provide a sufficient legal security to the parties entering into RAN sharing agreements.

Taking into consideration all pro-competitive effects of RAN sharing agreements, Orange considers that such agreements should be block exempted (if predefined conditions are fulfilled) as they can be regarded as normally satisfying the conditions laid down in Article 101(3) TFEU.

Industry-wide initiatives

In the context of digitalisation and global competitive dynamics, it is important for operators to have more flexibility and security when working together on industry-wide initiatives seeking to develop innovative products and services.

Encouraging such initiatives could accelerate the creation of interoperable products and services in Europe, help European operators not to be held back compared to global digital actors and allow Europe to stay competitive in the digital era.

For such discussions, operators should have the flexibility to work in small committees between peers having a common interest for the project as well as the necessary innovation capacity. This would allow working efficiently and in a timely manner on digital projects requiring a scale and reactivity.

Under the current framework, for any project of horizontal cooperation with the involvement of several operators there is a strong presumption of restriction of competition under Article 101(1) TFEU. The process to respect in order not to be exposed to legal risk is very burdensome, time-consuming and does not give sufficient legal comfort.

To support EU competitiveness globally, deliver a digital single market and eliminate asymmetry between European operators and global digital actors, the reviewed HGL should establish a secure framework for self-assessment of such industry-wide cooperation agreements. There should not be a presumption of restriction of competition, but, on the contrary, such initiatives should be considered complying with Article 101 TFEU (either because they do not infringe Article 101 (1) TFEU or because they fulfil the criteria for exemption under Article 101 (3)).

See paper attached.

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

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

Text of 1 to 3000 characters will be accepted

Yes, RAN sharing agreements

With the explosion of data use and in the context of a never-ending demand for a better connectivity, there are high expectations from consumers and public authorities regarding the roll-out of state-of-the-art networks, the improvement of the mobile coverage, both indoor and in the rural and non-profitable areas, while at the same time taking into account the growing reluctance regarding the implementation of new sites.

Meanwhile, with each new technology generation, the innovation cycles are getting shorter and the operators have less and less time not only for network roll-out but also for return on investments.

New technologies, such as 5G, require heavy investments and an accelerated deployment plan that remain challenging for all operators. RAN sharing agreements will be an important tool to allow a rapid deployment of 5G networks.

Today, there is a gap between competition and regulatory authority positions in regards to network sharing agreements. While the regulatory authorities encourage and, in certain cases, even impose network sharing, the positions of competition authorities are not always consistent throughout EU.

RAN sharing agreements are generally a source of substantial efficiencies and benefits for operators and consumers (cost reduction, faster deployment of new technologies, more extended coverage, less environmental impact, etc.), and, if implemented in compliance with certain principles, they do not give rise to restrictive effects on competition. Therefore, Orange considers that RAN sharing agreements should be block exempted as they can be regarded as normally satisfying the conditions laid down in Article 101(3) TFEU.

Block exemption shall be provided if the RAN sharing agreement fulfils the following cumulative conditions:

Guarantees in terms of capacity for commercial differentiation:

- o No spectrum sharing except for a transitional period of time or in limited areas, or because of regulatory constraints (obligations or limitation of spectrum),
- o All participants have their own independent core network (possibly based on backhaul/fibre sharing).

The exchange of competitively sensitive information between competitors is restricted and controlled as per applicable competition rules (black box, clean teams, etc.). This could be achieved through a JV but not necessarily.

Geographical perimeter (takes into account that geographical obligations are largely addressed by the regulatory framework which imposes national coverage obligation for almost the entire territory (licenses, white zone coverage, etc.)):

- o In urban zones, all network operators have already a network (based on coverage obligations) (in this case any mutualisation in urban zones will not have a foreclosure effect),
- o The operator(s) not being part of the cooperation has (have) a sufficient coverage over the territory.

See the response to the question 4.22 and attached position paper.

* 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

HGL and BER are not adapted to the digital era and to new forms of cooperation which seek to respond to the challenges of the digitalisation.

For such cooperation agreements, the current framework either does not provide a sufficient legal certainty (for example RAN Sharing agreements) or is not flexible enough (for example industry-wide initiatives and standardisation agreements).

Interoperability is essential for the delivery of a European digital single market. Today, only global digital actors can offer this approach on the European soil. Yet, their solutions are often proprietary and potentially create vertical lock-in for the clients.

In the context of digitalisation, European operators should have the possibility to evolve towards services that are interoperable with the latest technologies. By doing so, Europe would give itself a leading role on digital issues and allow European citizens and industry to be more independent from non-European global actors.

For this, the operators need to have more flexibility and security when working together on industry-wide initiatives seeking to develop innovative and interoperable solutions.

Due to the absence of a flexibility and security for the operators to work in small committees between peers having a common interest for the project as well as the necessary innovation capacity, the operators censor themselves when it comes to cooperation. Thus, many common initiatives which could result in the creation of innovative and competitive solutions are abandoned half way or never initiated.

For example, the E5 initiative (2011) had the purpose of discussing topics such as RCS within a small group but was eventually moved under the umbrella of normalisation organisations because of antitrust risks (even though all necessary precautions were taken under applicable rules). It is still, in 2020, under discussion within GSMA while other competing solutions have already been launched.

In addition, in the context of a global digital economy, a restrictive approach regarding standardisation process (unrestricted participation principle) is problematic. Operators should have more flexibility to work in small committees in the beginning of the standardisation process in order to progress quickly. Due to the current framework and past experiences, operators are reluctant to embark into such discussions - which can lead to delays.

In a digital world where innovation cycles are short, the success of the standardisation process largely depends on its timely definition and implementation. If the process is lengthy and resource consuming and does not produce required results in due time, the "momentum" is missed. Meanwhile, other actors having a global scale will indeed propose an alternative proprietary solution developed outside of the defined standard-setting organisation which will eventually be imposed to all other industry actors.

See paper attached.

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

The cost of applying the current R&D and Specialisation BER as well as the HGL are related to the following :

- costs necessary for self-assessment, such as legal expenses, costs borne for different economic analyses of the effects produced by the envisaged cooperation, resources mobilisation costs,
- costs due to implementation delays related, on one side, to the legal uncertainty existing for certain type of cooperation agreements under the current framework and, on the other side, to time and resource consuming processes that need to be put in place in order to respect the applicable antitrust framework,
- lost business opportunities due to the abandon of the project half way or its late launch in the market because of constraints imposed by the current framework (legal uncertainty, non-flexibility, non-efficient and resource consuming processes),
- loss related to the decrease of competitiveness in comparison with those actors that do not have the same antitrust risks,
- loss related to market lock-in due to late launch in the market.

See the response to the question 5.20.

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

Text of 1 to 1000 characters will be accepted

Mentioned costs cannot always be quantifiable. Furthermore, they differ from one project to another. They depend on the scope and scale of the project and required investments. If the project is abandoned half way or is launched too late, the costs will be even higher, including loss of competitiveness in comparison with those actors that do not have the same antitrust risks. In certain cases, because of the failure of the project or late launch, there may also be a risk of eviction from the concerned market.

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

See the response to the question 5.2

5.4 Please explain how you calculate these costs

Text of 1 to 1500 characters will be accepted

See the response to the question 5.2

* 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

So far, the BER and HGL have provided useful guidance to assess the legality of different types of horizontal cooperation agreements with regards to Article 101(1) TFEU (for example for exchange of competitively sensitive information, joint purchasing) but they need to evolve to be adapted to the changes imposed by the digitalisation of the economy (network sharing, industry-wide initiatives for innovative products and services and standardisation processes).

To seize the full potential of the digital era and to stay competitive in the context of a global digital market, a fluid, legally secured, and efficient cooperation between operators will be crucial for upcoming years which will allow to:

- (i) deploy rapidly new technologies and infrastructures,
- (ii) gain the necessary scale to contribute to the emergence of European digital innovative products and services and to reduce the dependence on global digital actors (often non-European), and

(iii) promote wide interoperability.

See attached position paper and answers to the questions above.

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

When analysing costs vs. benefits, should not only be taken into consideration the direct costs but also the missed business opportunities due to the abandon of the project half way or its late launch in the market because of constraints imposed by the current framework (legal uncertainty, non-flexibility, non-efficient and resource consuming processes, etc.).

For example, the E5 initiative (2011) had the purpose of discussing topics such as RCS but was moved under the umbrella of multiple normalisation organisations because of antitrust risks. It is still, in 2020, under discussion within GSMA while one of its initial aims was to compete against services such as WhatsApp or other solutions which have been launched meanwhile.

See the response to the question 5.1.

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	Ambitious expectations from public authorities and consumers in terms of timing and coverage regarding the roll-out of new technology networks (5G, FttH).	Section 4 of the HGL	<p>The guidance provided in the HGL regarding production agreements can be helpful for the self-assessment of RAN sharing agreement, but they are not adapted to their specificities and thus cannot provide a sufficient legal security to the parties entering into such cooperation agreements.</p> <p>The positions of competition authorities regarding RAN sharing agreements are not always consistent throughout EU.</p> <p>As RAN sharing agreements are generally a source of substantial benefits for operators and consumers (cost reduction, faster deployment, extended coverage, less environmental impact, etc.), and, if implemented in compliance with certain principles, they do not give rise to restrictive effects on competition, Orange considers that RAN sharing agreements should be block exempted.</p> <p>See also attached position paper.</p>
			HGL are not adapted to the digital era and to new forms of cooperation.

2	<p>Development of digital markets with specificities such as short innovation cycles, “lock-in” effects, winner-takes-all, etc.</p> <p>The legal uncertainty making it difficult to develop interoperable European solutions based on cooperation agreements.</p>	Section 1 of the HGL	<p>Due to the absence of a legal security under the current framework regarding industry-wide initiatives undertaken in small committees between peers having a common interest and as well as the necessary innovation capacity, the operators censor themselves and many common initiatives which could result in creation of innovative solutions are abandoned half way.</p> <p>Due to restrictive approach regarding standardisation, important initiatives which are key for interoperability stay blocked in inefficient and time consuming processes and miss time to market while in parallel digital global actors develop and then impose to the whole industry proprietary solutions.</p>
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

It provides more legal certainty to have the guidance of the R&D BER than only rely on self-assessment.

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

- Still relevant
- No longer relevant
- Do not know

* 6.5 Please explain your reply

Text of 1 to 1500 characters will be accepted

Would be relevant with an enlarged scope to include RAN sharing agreements. See attached position paper and the responses to the above questions.

* 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

Information exchange forms an important part of most horizontal cooperation agreements and a clear, secure and flexible framework regarding information exchange is key for a successful implementation of a horizontal cooperation agreement.

* 6.8 Section 5 of the HGL on purchasing agreements is

- Still relevant
- No longer relevant

Do not know

* 6.9 Please explain your reply

Text of 1 to 1500 characters will be accepted

See the response to the question 4.14.

* 6.10 Section 6 of the HGL on commercialisation agreements is

- Still relevant
- No longer relevant
- Do not know

* 6.11 Please explain your reply

Text of 1 to 1500 characters will be accepted

For electronic communications sector commercialisation agreements are notably important for joint biddings. The HGL shall remain with more flexible rules.

See the response to the question 4.16.

* 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 the context of digitalisation, standardisation is key to achieve interoperability. The HGL on standardisation is thus still relevant but should be reviewed and more flexible solutions should be introduced.

Namely, the paragraph 295 of the HGL needs to be further developed in order to better explain when and to what extent restricted participation is allowed as well as to enlarge the scope of the cases which could fall under this “exception”.

The “exception” to the unrestricted participation principle could be applied in regards to global and sophisticated projects for which the timing is key. The existence of alternative proprietary solutions should be taken into account for the application of the “exception”.

In such cases, the industry actors having a common interest and the necessary scale should be allowed in the beginning of the standardisation process to work in a small committee in order to progress quickly. The participation should be opened to industry actors not initially involved in the standardisation process once the project is more advanced.

This also calls for reviewing the rules regarding industry consultation and transparency defined in the HGL in

order to protect the interests of non-participating industry actors without harming the progress and success of the process. In this respect, participation should be understood as active participation with real and valuable contributions to achieve the common goal.

See attached position paper.

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

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

It provides more legal certainty to have the guidance of the R&D BER than only rely on self-assessment.

* 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

The BER and HGL have provided useful guidance to assess the legality of different types of horizontal cooperation agreements with regards to Article 101(1) TFEU (for example for exchange of competitively sensitive information, joint purchasing) but they need to evolve to be adapted to the changes imposed by the digitalisation of the economy (network sharing, industry-wide initiatives for innovative products and services and standardisation processes).

See also the answers to the questions above.

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

We propose to review the Commission notice on informal guidance by providing the parties the possibility to solicit the European Commission when they need a legal certainty with regards to the assessment of their horizontal cooperation agreement and existing tools do not provide sufficient legal security. Current conditions imposed for the guidance letter to be issued by the Commission are very restrictive and, in practice, this tool has never been used.

Several factors prove the importance of putting in place a less restrictive and more efficient guidance process:

- the complexity of certain projects and the major consequences that any ex post assessment by the European Commission could have on the parties and on the market,
- in a fast moving digital markets, it is difficult to provide a legal framework which covers all possible cases and cooperation,
- increased cost associated with the legal uncertainty.

For the process to be efficient, the guidance letters should be issued within a reasonable timeline, there should not be any burdensome processes in terms of information requests. The issued guidance should be taken into account if a formal antitrust investigation is opened with regards to the concerned project at a later stage.

Furthermore, in the rapidly evolving environment of digital markets, traditional definitions of markets and market power are not always adapted as the analysis is static and is based on isolated product markets and parties' turnover. To fit to the challenges of the digital era, a more dynamic and forward-looking approach is necessary taking into consideration the interdependence of different markets and the specificities of digital markets.

A broader assessment of horizontal cooperation agreements related to digital markets is necessary with less emphasis on market definitions and market power and more on potential effects on competition in dynamic markets. The possible competition constraint exercised by global digital actors on the parties to the horizontal cooperation agreement should as well be integrated in the assessment.

Moreover, greater account should be taken of pro-competitive effects produced by the envisaged cooperation (reaching a necessary scale to invest in new technologies and innovation or achieving a level playing field with global actors of digital economy) and sufficient importance should be given to the overall impact that the cooperation may have on the competitiveness of the EU digital economy and on delivering a digital single market.

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

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/2020_02_12_EC_Consultation_Horizontal_cooperation_Reponse_Orange.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