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

Fields marked with * are mandatory.

1
Introduction

Background and aim of the public questionnaire

Article 101(1) of the Treaty on the Functioning of the European Union ('the Treaty') prohibits agreements between undertakings that restrict competition unless they generate efficiencies in line with Article 101(3) of the Treaty. Agreements generate efficiencies in line with Article 101(3) of the Treaty if they contribute to improving the production or distribution of goods or services, or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefits; they only impose restrictions that are indispensable for the attainment of these objectives and do not eliminate competition in respect of a substantial part of the product in question. The prohibition contained in Article 101(1) of the Treaty covers, amongst others, agreements entered into between actual or potential competitors (so-called 'horizontal agreements').

Commission Regulations (EU) No 1217/2010 (Research & Development Block Exemption Regulation - 'R&D BER') and 1218/2010 (Specialisation Block Exemption Regulation - 'Specialisation BER'), together referred to as the 'Horizontal block exemption regulations' (or 'HBERs'), exempt from the prohibition contained in Article 101(1) of the Treaty those R&D and specialisation agreements for which it can be assumed with sufficient certainty that they satisfy the conditions of Article 101(3) of the Treaty. The Commission Guidelines on horizontal cooperation agreements ('HGL') provide binding guidance on the Commission for the interpretation of the HBERs and for the application of Article 101 of the Treaty to other horizontal agreements. The HBERs will expire on 31 December 2022.

This public questionnaire represents one of the methods of information gathering in the evaluation of the HBERs, together with the HGL, which was launched on 5 September 2019. The purpose of this questionnaire is to collect views and evidence from the public and stakeholders on how the current rules work for them. The Commission will evaluate the current HBERs, together with the HGL, based on the following criteria:

- Effectiveness (Have the objectives been met?),
- Efficiency (Were the costs involved proportionate to the benefits?),
- Relevance (Do the objectives still match current needs or problems?),
- Coherence (Does the policy complement other actions or are there contradictions?), and
- EU added value (Did EU action provide clear added value?).

The collected information will provide part of the evidence base for determining whether the Commission should let the HBERs lapse, prolong their duration without changing them or prolong them in a revised form, together with the accompanying HGL.

The responses to this public consultation will be analysed and the summary of the main points and conclusions will be made public on the Commission's central public consultations page. **Please note that your replies will also become public as a whole, see below under Section 'Privacy and Confidentiality'.**
Nothing in this questionnaire may be interpreted as stating an official position of the Commission.

Submission of your contribution

You are invited to reply to this public consultation by answering the questionnaire online. To facilitate the analysis of your replies, we would kindly ask you to keep your answers concise and to the point. You may include documents and URLs for relevant online content in your replies.

While the questionnaire contains several questions of a more general nature, notably Section 4 and 5 also contain questions that are aimed at respondents with more specialised knowledge of the HBERs and HGL. We invite all respondents to provide answers to the questionnaire. In case a question does not apply to you or you do not know the answer, please choose the field 'Do not know' or 'Not applicable'.

For your information, you have the option of saving your questionnaire as a 'draft' and finalising your response later. In order to do this you have to click on 'Save as Draft' and save the new link that you will receive from the EUSurvey tool on your computer. Please note that without this new link you will not be able to access the draft again.

The questionnaire is available in English, French and German. You may however respond in any EU language.

In case of questions, you can contact us via the following functional mailbox: COMP-HBERS-REVIEW@ec.europa.eu .
In case of technical problem, please contact the Commission's CENTRAL HELPDESK.

Duration of the consultation

The consultation on this questionnaire will be open for 14 weeks, from 6/11/2019 to 12/2/2020.

Privacy and confidentiality

* 1.1 Publication privacy settings

The Commission will publish the responses to this public consultation. You can choose whether you would like your details to be made public or to remain anonymous.

- **Anonymous**
  Only your type of respondent, country of origin and contribution will be published. All other personal details (name, organisation name and size, transparency register number) will not be published.

- **Public**
  Your personal details (name, organisation name and size, transparency register number, country of origin) will be published with your contribution.

Please note that your replies and any attachments you may submit will be published in their entirety even if you chose 'Anonymous'. Therefore, please remove from your contribution any information that you will not want to be published.

☑ 1.2 I agree with the personal data protection provisions

2 About you

* 2.1 Language of my contribution

- Bulgarian
- Croatian
- Czech
- Danish
- Dutch
- English
- Estonian
- Finnish
- French
- Gaelic
- German
- Greek
- Hungarian
- Italian
- Latvian
- Lithuanian
- Maltese
- Polish
- Portuguese
- Romanian
- Slovak
- Slovenian
- Spanish
- Swedish

* 2.2 First name

Joakim

* 2.3 Surname

Smedman

* 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

European Trade Union Confederation - ETUC

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

2.8 Transparency register number

255 character(s) maximum

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

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* 2.10 Organisation size

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

* 2.11 The main activities of your organisation:

Text of 1 to 250 characters will be accepted

Representing the interests and rights of workers, national trade unions and 45 million members through social dialogue and advocacy in policy-making at European level. The ETUC is a recognised social partner to the EU under the Treaties.

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

Text of 1 to 250 characters will be accepted

As the European umbrella organisation for trade unions, the ETUC represents 90 national confederations from 38 countries with 45 million members, across all sectors of the labour market. We also gather 10 European sectorial trade union federations.

* 2.15 Country of origin

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

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

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

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

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

* 3.6 How often do you consult the **R&D BER** for guidance on a horizontal cooperation agreement?
  - Frequently (several times per year)
  - Occasionally (once or twice per year)
  - (•) Never

* 3.7 How often do you consult the **Specialisation BER** for guidance on a horizontal cooperation agreement?
  - Frequently (several times per year)
  - Occasionally (once or twice per year)
  - (•) Never

* 3.8 How often do you consult the **HGL** for guidance on a horizontal cooperation agreement?
  - Frequently (several times per year)
  - (•) Occasionally (once or twice per year)
  - Never

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

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

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

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

* 4.1 In your view, do you perceive that the HBERs and the HGL have contributed to promoting competition in the EU?
  - ○ Yes
  - ○ Yes, but they have contributed only to a certain extent or only in specific sectors
  - ○ They were neutral
  - ○ No, they have negatively affected competition in the EU
  - ◉ Don´t know

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

* 4.19 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

The ETUC calls on the Commission to clarify that the fundamental right to collective bargaining falls outside the scope of Art. 101 TFEU. Neither workers nor self-employed should be considered undertakings under competition law.
The HGL do not reflect the need for EU competition law to take into account social and sustainability objectives expressed by Art. 3 TEU and 9 TFEU, as well as policy initiatives such as the UN SDGs and the EU Social Pillar. The lack of guidance creates legal uncertainty for workers, self-employed and undertakings regarding the right to collective bargaining.
This contributes to a discrepancy between the definitions of 'worker' and 'self-employed' under labour law versus 'worker' and 'undertaking' under competition law. Whereas labour law recognises the need to afford rights and protection to self-employed, a similar recognition of economic dependency and lack of market power among self-employed is missing in competition law. To not create obstacles for self-employed persons to organise, competition law has to recognise that a shift of commercial risk from employers to self-employed providers of labour creates a de facto economic dependency comparable to that of workers.

* 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

Not granting self-employed access to collective bargaining or terms and conditions under collective agreements opens up for social dumping and violates their freedom of association, recognised by the EU Charter, ECHR, European Social Charter and ILO.
Collective bargaining for workers falls outside the scope of Art. 101 TFEU. In Albany, the CJEU held that "restrictions of competition are inherent in collective agreements between organisations representing employers and workers" (§ 59). The "social policy objectives pursued by such agreements would be seriously undermined if management and labour were subject" to competition rules (§ 59). Exempted agreements need to "derive from social dialogue […] concluded in the form of a collective agreement and [be] the outcome of collective negotiations between organisations representing employers and workers" (§ 62) and contribute "directly to improving […] working conditions" (§ 63).
In FNV Kunsten the CJEU recognised collective bargaining for "'false self-employed' […] service providers in a situation comparable to that of employees" (§ 31). The "classification of a 'self-employed person' under national law does not prevent that person being classified as an employee [under] EU law if his independence is merely notional" (§ 35). In line with the Court's reasoning in Becu, professional relationships incorporated into an undertaking should be considered "economic units" within an undertaking rather than undertakings in themselves (§ 26). Still, EU competition law fails to recognise collective bargaining for genuine self-employed as falling outside Art. 101. As held by the European Committee of Social Rights, a ban on collective bargaining for self-employed is "excessive and […] not necessary in a democratic society".
Even where genuinely self-employed could be considered undertakings, competition law should allow for collective bargaining. As the CJEU held in Wouters, "not every agreement between undertakings […] which restricts the freedom of action of the parties or of one of them necessarily falls within the prohibition [in Art. 101(1) TFEU]" (§ 97). In Pavlov a pension scheme agreed by self-employed medical experts "acting as undertakings" (§ 82) did "not appreciably restrict competition" (§ 97).
This de minimis application of Art. 101 can be justified by Art. 3 TEU and 9 TFEU. As stated by the CJEU in Iraklis "in respect of the overriding reasons in the public interest […] the [EU] is not only to establish an internal market but is also to work for the sustainable development […] social market economy aiming at full employment and social progress". The objectives of fairness and level playing-field must apply also to competition rules. In the FNV Kunsten Opinion of AG Wahl, "preventing social dumping is an objective that can be legitimately pursued by a collective agreement containing rules affecting self-employed persons and […] may also constitute one of the core subjects of negotiation" (§ 79).

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

Collective bargaining should primarily be considered as falling outside the scope of Art. 101 TFEU, regardless of whether it covers workers, false or genuine self-employed, when these can be considered economic units within an undertaking rather than undertakings in themselves. Art. 101 should also not apply to situations where a ban on collective agreements for self-employed could obstruct the objective of collective bargaining for workers through social dumping or substitution. Therefore, the ETUC does not see any need for such a Block Exemption under 101(3) TFEU.
Should a self-employed nevertheless be considered an undertaking, this must not disproportionately restrict collective bargaining. Art. 101(3) TFEU has to be interpreted in the light of the fundamental values and policy objectives of the EU. It must provide for the possibility to grant exceptions for collective bargaining, justified based on the economic progress and collective benefits it brings.
In assessing horizontal agreements under Art. 101(3), greater account should be taken of non-monetary values and non-price efficiencies capable of creating a broader range of direct or indirect benefits for not only consumers, but also workers and citizens. Such societal benefits may be linked to social progress, sustainable development and the environment.
The consumer benefit criteria in Art. 101(3) must not be interpreted restrictively. Wage setting does not equal

price fixing, and the consumer interest represents more than just the price. As affirmed by the ILO Declaration of Philadelphia, “labour is not a commodity”. Furthermore, the European Committee of Social Rights “does not consider that permitting the self-employed workers […] to bargain collectively and conclude collective agreements, including in respect of remuneration, would have an impact on competition in trade that would be significantly different from the impact on such competition of collective agreements concluded solely in respect of dependent workers (employees)”.
The CJEU has considered social aspects in relation to Art. 101(3). In Remia it held that “the provision of employment comes within the framework of the objectives to which reference may be had pursuant to [Art. 101(3) TFEU] because it improves the general conditions of production” (§ 42). In Metro, the Court found that “the maintenance of workable competition may be reconciled with the safeguarding of objectives of a different nature and to this end certain restrictions of competition are permissible, provided they are essential to the attainment of those objectives and do not result in the elimination of competition” (§ 21).

* 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

By not clarifying that the fundamental right to collective bargaining falls outside the scope of Art. 101 TFEU, the HGL contribute to legal uncertainty for workers, self-employed and undertakings regarding their right to freedom of association and the right to conclude collective agreements to improve working conditions.
Neither workers nor self-employed should be considered undertakings under EU competition law. However, the EU ban on cartels has in some cases been understood by National Competition Authorities as a ban on collective bargaining for self-employed persons.
The HGL need to be revised to guarantee legal certainty for workers and self-employed with respect to their right to collective bargaining. Collective agreements covering workers and self-employed primarily fall outside the scope of Art. 101 TFEU, as these economic entities should not be considered undertakings. In situations where Art. 101 nevertheless applies, the HGL should recognise that any agreement which restricts competition does not automatically fall under the prohibition of Art. 101, as such restrictions may be insignificant or justified based on overriding reasons of public interest with regard to the societal benefits collective agreements bring in terms of fairness, level playing-field and social progress.

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

No position.

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

The HGL may enhance legal certainty for collective bargaining under competition law by recognising it as a fundamental right for both workers and self-employed, and by providing specific guidance based on the case law of the CJEU regarding the relationship between collective agreements and Art. 101 TFEU. The HGL should recognise the autonomy of social partners in relation to collective bargaining.
For the appreciation of horizontal agreements, guidance could help to clarify the concept of undertaking to avoid overinclusion. Self-employed should not be considered undertakings under Art. 101, as this fails to recognise the lack of market power among self-employed. According to the European Committee of Social Rights, to identify undertakings under Art. 101 “it is not sufficient to rely on distinctions between worker and self-employed, the decisive criterion is rather whether there is an imbalance of power between the providers and engagers of labour. Where providers of labour have no substantial influence on the content of contractual conditions, they must be given the possibility of improving the power imbalance through collective bargaining”. Individual providers of labour who cannot be characterized as “genuine independent self-employed meeting all or most of criteria such as having several clients, having the authority to hire staff, and having the authority to make important strategic decisions about how to run the business” must enjoy the right to collective bargaining.

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	Lack of policy coherence between competition and labour law at EU and national level, resulting in incoherent interpretations of Art. 101 TFEU	HGL, Chapters 1-2, recitals 1-94, particularly regarding definitions, scope and assessment under Art. 101 TFEU	EU law should be applied with due regard to the fundamental values and policy objectives of the Union, as set out by Art. 3 TEU and 9 TFEU. Still, EU competition law fails to fully recognise the right to collective bargaining for self-employed. There is a discrepancy between the definitions of 'worker' and 'self-employed' under labour law versus 'worker' and 'undertaking' under competition law. As a result, Art. 101 TFEU is not coherently applied across the Member States when it comes to collective bargaining. See e.g. ETUC studies New trade union strategies for new forms of employment (2019) and Trade unions protecting self-employed workers (2018).
2	Collective bargaining recognised as a universal fundamental right for both workers and self-employed	HGL, Chapters 1-2, recitals 1-94, particularly regarding definitions, scope and assessment under Art. 101 TFEU	A ban on collective bargaining for self-employed under EU competition law violates every persons' fundamental right to freedom of association. The right to collective bargaining is recognised in particular in Art. 28 of the EU Charter of Fundamental Rights. According to the European Court of Human Rights in Vörður Ólafsson v. Iceland (20161/06) Art. 11 of the Convention also applies to self-employed. In ICTU v. Ireland (123/2016), the Council of Europe Committee of Social Rights affirmed that Art. 6§2 of the European Social Charter grants self-employed the right to

			engage in collective bargaining. Similarly, the ILO Committee on Freedom of Association has extended the right to collective bargaining to self-employed (ILO (2018): Compilation of decisions of the Committee on Freedom of Association, § 387).
3	CJEU competition case law developments recognising collective bargaining for workers and self-employed under Art. 101(1) TFEU	HGL, Chapters 1-2, recitals 1-94, particularly regarding definitions, scope and assessment under Art. 101 TFEU	According to the CJEU in Albany (C-67/96), collective bargaining for workers falls outside the scope of Art. 101 TFEU. In FNV Kunsten (C-413/13), it recognised collective bargaining for false self-employed comparable to workers. Such self-employed are not considered undertakings so Art. 101 does not apply. Also collective bargaining for genuine self-employed can be allowed under Art. 101. As held by the CJEU in Wouters (C-309/99) not every agreement restricting competition falls within the prohibition of Art. 101(1). In Pavlov (C-180/98 - C-184/98) an agreement between self-employed was allowed as it did not appreciably restrict competition. As recalled by the CJEU in Iraklis (C-201/15) the objective of the internal market is also sustainable development, social market economy, full employment and social progress. In his Opinion to FNV Kunsten (C-413/13), AG Wahl suggested preventing social dumping is a legitimate objective justifying collective agreements also for self-employed.
			Collective bargaining should primarily be considered to fall outside Art. 101 TFEU, regardless of whether it covers workers, false or genuine self-employed. The CJEU in Becu (C-22/98) saw incorporated persons as “economic units” within an undertaking rather than undertakings on their own. Should a self-employed nevertheless be considered an undertaking, this must not disproportionately restrict collective bargaining. Art.

4	Need for broader appreciation of non-monetary direct and indirect societal benefits for consumers, workers and citizens under Art. 101(3) TFEU	HGL, Chapters 1.1.2 and 2.3, recitals 48-53 and 95-110.	101(3) has to be read in the light of Art. 3 TEU and 9 TFEU. Exceptions should be justified by economic progress and collective benefits such agreements bring. In ICTU v. Ireland (123/2016), the European Committee of Social Rights did not consider that collective bargaining on remuneration for self-employed had any significant impact on competition. In Metro (C-26/76) and Remia (C- 42/84), the CJEU made social considerations when applying Art. 101(3) TFEU and found competition may be reconciled with such objectives, thus allowing restrictions of competition.
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

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

A ban on collective bargaining for self-employed under EU competition law violates every persons' fundamental right to freedom of association. The right to collective bargaining is recognised in particular in Art. 28 of the EU Charter of Fundamental Rights. According to the European Court of Human Rights in Vörður Ólafsson v. Iceland (20161/06) Art. 11 of the Convention also applies to self-employed. In ICTU v. Ireland (123/2016), the Council of Europe Committee of Social Rights affirmed that Art. 6§2 of the European Social Charter grants self-employed the right to engage in collective bargaining. Similarly, the ILO Committee on Freedom of Association has extended the right to collective bargaining to self-employed (ILO (2018): Compilation of decisions of the Committee on Freedom of Association, § 387).
According to the CJEU in Albany (C-67/96), collective bargaining for workers falls outside the scope of Art. 101 TFEU. In FNV Kunsten (C-413/13), it recognised collective bargaining for false self-employed comparable to workers. Such self-employed are not considered undertakings so Art. 101 does not apply. Also collective bargaining for genuine self-employed can be allowed under Art. 101. As held by the CJEU in Wouters (C-309/99) not every agreement restricting competition falls within the prohibition of Art. 101(1). In Pavlov (C-180/98 - C-184/98) an agreement between self-employed was allowed as it did not appreciably restrict competition. As recalled by the CJEU in Iraklis (C-201/15) the objective of the internal market is also sustainable development, social market economy, full employment and social progress. In his Opinion to FNV Kunsten (C-413/13), AG Wahl suggested preventing social dumping is a legitimate objective justifying collective agreements also for self-employed.
Collective bargaining should primarily be considered to fall outside Art. 101 TFEU, regardless of whether it covers workers, false or genuine self-employed. The CJEU in Becu (C-22/98) saw incorporated persons as "economic units" within an undertaking rather than undertakings on their own. Should a self-employed nevertheless be considered an undertaking, this must not disproportionately restrict collective bargaining. Art. 101(3) has to be read in the light of Art. 3 TEU and 9 TFEU. Exceptions should be justified by economic progress and collective benefits such agreements bring. In ICTU v. Ireland (123/2016), the European Committee of Social Rights did not consider that collective bargaining on remuneration for self-employed had any significant impact on competition. In Metro (C-26/76) and Remia (C- 42/84), the CJEU made social considerations when applying Art. 101(3) TFEU and found competition may be reconciled with such objectives, thus allowing restrictions of competition.

* 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

There is a greater need for policy coherence at national and EU level within competition law as well as between competition and labour law regarding the interpretation of Art. 101 TFEU. Despite the full harmonisation of EU competition law, the study 'Trade unions protecting self-employed workers' (2018) conducted by the ETUC found that in 2017 only 11 EU Member States (AT, BE, DE, DK, ES, FR, IE, IT, NL, SE, UK) guaranteed some form of access to collective bargaining for self-employed. EU competition policy must not in any way limit such national rules, but rather clarify that Member States are not prevented from taking such measures, in order to enhance legal certainty for self-employed in the internal market with regard to competition rules.
EU competition law still fails to fully recognise the right to collective bargaining for workers and self-employed. However, at policy level there is an increasing understanding of the need to enhance protection and rights for self-employed and non-standard workers, including their right to organise and bargain collectively. The European Commission Work Programme for 2020 identifies the need to improve labour

conditions for platform workers, mentioning e.g. access to collective bargaining. However, Art. 19-20 of the Copyright Directive 2019/790 already recognise the possibility of collective bargaining mechanisms for authors and performers or their representatives for the purpose of assuring appropriate and fair remuneration. Similarly, Regulation 2019/1150 on Fairness and Transparency of Online Intermediation Services in Recitals 2 and 32 identifies the “increased dependency” and “imbalances in bargaining power” of business users in relation to the “superior bargaining power” of providers of online intermediation services.

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 line with the Albany case law of the CJEU, collective agreements should be exempt from Art. 101 TFEU on the condition that they (1) contribute to directly improving working conditions and (2) derive from a genuine social dialogue between organisations representing employers and workers. In this respect, social dialogue should be understood as negotiations between organised, representative and recognised social

partners of management and labour in accordance with national law and traditions.
Collective bargaining is a fundamental right for both workers and self-employed. A ban on collective bargaining for self-employed under EU competition law violates their freedom of association. The EU Charter of Fundamental Rights recognises the right to collective bargaining. Art. 28 states that “Workers and employers, or their respective organisations, have, in accordance with Union law and national laws and practices, the right to negotiate and conclude collective agreements at the appropriate levels”. The Charter applies when implementing and applying EU law and guarantees at least the same level of protection as the European Convention for Human Rights. According to the European Court of Human Rights, the freedom of association under Art. 11 of the Convention also applies to self-employed.
More recently also the European Committee of Social Rights has clearly affirmed that Art. 6§2 of the European Social Charter grants self-employed the right to engage in collective bargaining, observing that “an outright ban on collective bargaining of all self-employed workers would be excessive as it would run counter to the object and purpose of this provision”. Similarly the ILO Committee on Freedom of Association has extended the right to collective bargaining to self-employed. The Committee has held that access to freedom of association is “not based on the existence of an employment relationship, which is often non-existent, for example in the case of agricultural workers, self-employed workers in general or those who practise liberal professions, who should nevertheless enjoy the right to organize.” As for any human right, restrictions should be motivated by the protection of human rights and be interpreted restrictively.
In conclusion, the HGL need to be revised to guarantee legal certainty for workers and self-employed with respect to their right to collective bargaining. Collective agreements covering workers and self-employed primarily fall outside the scope of Art. 101 TFEU, as these economic entities should not be considered undertakings. In situations where Art. 101 nevertheless applies, the HGL should recognise that any agreement which restricts competition does not automatically fall under the prohibition of Art. 101, as such restrictions may be insignificant or justified based on overriding reasons of public interest with regard to the societal benefits collective agreements bring in terms of fairness, level playing-field and social progress.

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

The maximum file size is 1 MB
Only files of the type pdf,txt,doc,docx,odt,rtf are allowed

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

- (●) Yes
- ( ) No

Contact

COMP-HBERS-REVIEW@ec.europa.eu