

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

Fields marked with \* are mandatory.

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### Introduction

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#### 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](mailto: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

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\* 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

Leo

\* 2.3 Surname

BAUMANN

\* 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*

Nokia creates the technology to connect the world. We serve communications service providers, governments, large enterprises and consumers with the industry's most complete, end-to-end portfolio of connectivity products, services and licensing.

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

*Text of 1 to 250 characters will be accepted*

Telecommunication infrastructure market. Main customers are telecommunication operators. We deliver connectivity technology also to any other sector of the economy.

**\* 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](#)):**

2630, 2640, 6190

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

Telecom/connectivity equipment, services, software and brand/technology licensing.

**\* 2.15 Country of origin**

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

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

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

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|--|-----------------------------------|---|--|
| <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

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\* 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

\* 3.5 If Yes, please specify

*at most 3 choice(s)*

Optional question, multiple answers possible

- Exemption(s) under R&D BER
- Exemption(s) under Specialisation BER
- Exemption(s) under both

\* 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?)

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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*

HBERs and the HGL are extremely useful in many areas. However, they should be updated based on business realities of today, especially in terms of digital and technologically advanced markets. The case examples of the HGL should be revisited and further guidance provided especially in novel areas.

#### ***Legal certainty provided by the HBERs and the HGL***

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

- Yes
- No
- Do not know

\* 4.4 Please explain your reply

*Text of 1 to 1500 characters will be accepted*

R&D BER and Section 3 of the HGL do not necessarily correspond with business realities of today and they could provide better legal certainty for companies in order to further foster R&D and innovation. The "safe harbours" contained in the R&D BER and Section 3 of the HGL could therefore be expanded and their scope further clarified with useful case examples, including innovative technology markets.

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

- Yes
- No
- Do not know

\* 4.6 Please explain your reply

*Text of 1 to 1500 characters will be accepted*

R&D BER and the HGL complement each other and R&D BER would be more difficult to understand without the HGL. The guidelines put the regulation in the right context, although both the R&D BER and the HGL should be updated in terms of content and case examples.

\* 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*

Para. 194 of the HGL contains ambiguous and vague language, especially where “even looser forms of co-operation” are mentioned. It should be clarified whether the intent of this definition is, for instance, to address groups of companies without external stakeholders (other than shareholders) that structure purchasing to the effect of sustaining a principal contracting entity and entitling all group companies to purchase under the agreement. The current definition is not conclusive, and the references to “stakes” in companies does not seem sufficiently clear either. Reference could be made to specific group structures, as embedded in member states’ laws as a more reliable means of definition.

\* 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*

The HGL sets good basic principles for evaluating simple situations but does not necessarily provide sufficient guidance for more complex scenarios e.g. addressing practical difficulties of identifying potential competitive relationships or collaborations within wider ecosystems comprising of both vertical and horizontal elements. More guidance could also be provided for companies regarding information exchange through an intermediary.

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

- Yes  
 No  
 Do not know

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

- Yes  
 No  
 Do not know

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

- Yes  
 No  
 Do not know

\* 4.18 Please explain your reply

*Text of 1 to 1500 characters will be accepted*

The HGL are generally clear, but some argue para 285 requires SEP holders to license anyone who asks. This is at odds with the rest of the HGL which is premised on access to standards, as also enshrined in the access-based IPR policies of SSOs like ETSI.

Some implementers invoke this anomaly in para 285 to deflect responsibility for taking a licence from themselves to their suppliers.

Compelling legal, economic, policy and logistic arguments support single-point licensing at the end-user product level. This is customary in mobile devices and has rapidly become the established model in automotive licensing as evidenced by more than a dozen brands (i.e. around a fifth of connected cars sold today) licensed by Avanci over two years.

Single point licensing means only one, readily identifiable entity in the supply chain needs a licence. Suppliers get access without a separate licence. By contrast, licensing anyone who asks means the entire supply chain are potential licensees, exposing suppliers to complex licensing needs, making licensing more arduous, inefficient and costly for everyone.

Experience shows single-point licensing does not distort competition, disrupt the market or harm consumers, but does allow access to standards. However, obliging SEP holders to license to all would discourage participation in open standards and dramatically increase the complexities and cost of licensing.

The anomaly in para 285 can be resolved simply by deleting "all third parties".

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

- Yes
- No
- Do not know

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

- Yes
- No
- Do not know

#### ***Identification of pro-competitive horizontal agreements***

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

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

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

- Yes
- No
- Do not know

\* 4.24 If No, please explain what aspect of this provision fails to correctly identify R&D agreements that are compliant with Article 101 of the Treaty

*Text of 1 to 1500 characters will be accepted*

The concept of “relevant technology market” and “potential competitor” under Article 1 of the R&D BER is not always straightforward in complex markets and would benefit from further guidance.

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

- Yes
- No
- Do not know

- \* 4.26 If No, please explain what aspect of these conditions fails to correctly identify R&D agreements that are compliant with Article 101 of the Treaty

*Text of 1 to 1500 characters will be accepted*

"Full access" in terms of duration under Article 3.2 of the R&D BER would benefit from clarification.

- \* 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

- \* 4.28 If No, please explain what aspect of these provisions fails to correctly identify R&D agreements that are compliant with Article 101 of the Treaty

*Text of 1 to 1500 characters will be accepted*

For competing undertakings, the market share threshold can in practice be difficult to apply, especially in industries where information on market shares or volumes is not available.

- \* 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*

Regulation should be updated to meet the demands of today's business realities and take into account of complex market environments where traditional mechanical market share/competitor vs. non-competitor rules are not necessarily practical or useful in all cases. Regulation should strive to better meet the demands of highly dynamic and innovative markets related to technological and digital industries in order to boost growth and competition.

- \* 4.44 Based on your experience, are there other types of horizontal cooperation agreements outside those identified in the R&D and Specialisation BERs which would satisfy the conditions of Article 101(3) of the Treaty?
- Yes
  - No
  - Do not know
- \* 4.46 Based on your experience, have the BERs and the HGL had any impacts that were not expected or not intended?
- Yes
  - No

- Do not know

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

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

### **Costs**

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

*Text of 1 to 1500 characters will be accepted*

Legal fees, compliance costs, delays in implementation and contract negotiations.

#### 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*

They provide good guidance of the basic principles and “safe harbours” for straightforward situations.

### ***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?)

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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			
2			
3			
4			
5			
6			
7			

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

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

- Still relevant
- No longer relevant
- Do not know

\* 6.3 Please explain your reply

*Text of 1 to 1500 characters will be accepted*

R&D BER and Section 3 of the HGL provide guidance of the basic principles and “safe harbours” for straightforward situations.

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

- Still relevant
- No longer relevant
- Do not know

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

- Still relevant
- No longer relevant
- Do not know

\* 6.7 Please explain your reply

*Text of 1 to 1500 characters will be accepted*

Section 2 of the HGL provides good guidance of the basic principles and for straightforward situations.

\* 6.8 Section 5 of the HGL on purchasing agreements is

- Still relevant
- No longer relevant
- Do not know

\* 6.10 Section 6 of the HGL on commercialisation agreements is

- Still relevant
- No longer relevant
- Do not know

\* 6.12 Section 7 of the HGL on standardisation agreements is

- Still relevant

- No longer relevant
- Do not know

### \* 6.13 Please explain your reply

*Text of 1 to 1500 characters will be accepted*

Section 7 of the HGL has provided and continues to provide a useful benchmark for collaborative industry standardisation activities where IPR is involved. We can expect that new standardisation entities will be created in the future that will find section 7 of the HGL useful in establishing their IPR policies. Aside from an anomaly in para 285 (as explained in our answer to 4.18 above), the HGL encourage clear, transparent and balanced IPR policies, recognising the important and delicate balance between (1) ensuring access for those wanting to use standardised technology covered by essential IPR (see e.g. paras 283-287 of the HGL) and (2) providing FRAND compensation for holders of essential IPR. In our answer to Question 4.18 above we propose a simple amendment to resolve the anomaly in paragraph 285.

Para 274 HGL (see footnote) together with the Technology Transfer Guidelines make it clear that patent pools are neither prevented nor mandated, contrary to what some suggest. Pools can produce pro-competitive effects (para 245 TTGL) but may also be restrictive of competition (para 246 TTGL).

The HGL recognise that “nothing in these Guidelines prejudices the possibility for parties to resolve their disputes about the level of FRAND royalty rates by having recourse to the competent civil or commercial courts” (para 290 HGL). This remains important and relevant guidance in case disputes cannot be resolved amicably by the parties directly or through other channels.

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

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### \* 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?)

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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 has provided guidance of the basic principles and “safe harbours” for straightforward situations.

\* 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*

HGL has generally provided good guidance of the basic principles and for straightforward situations.

## 9 Specific questions

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### 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*

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