

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

Fields marked with \* are mandatory.

### 1

## 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

\* 2.3 Surname

\* 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

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

Text of 1 to 250 characters will be accepted

\* 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](#):

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

\* 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                     |

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

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| <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

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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

\* 3.3 If Other, please specify

*Text of 1 to 500 characters will be accepted*

For example, infrastructure sharing 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?)

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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*

The current regime has been of limited help to unleash the full potential co-operation could bring to the European economy. Co-operation will be even more important for European industry in the changing geopolitical environment. With the digital evolution markets are becoming increasingly globalized dramatically changing the competitive landscape. While still operating on small fragmented markets European companies increasingly are in direct competition with global players, which in some instances even are benefiting of protective measures in their home countries.

Against this background, it is indispensable for companies to enter into horizontal co-operations to remain competitive. In order to achieve the necessary countervailing power to compete in the global markets the companies need to be able to reach the essential scale. To this end it is necessary that competition policy facilitates such cooperation and, in particular, fosters collaboration between European companies with regard to innovation technologies and digital infrastructure. Beyond that, cooperation is increasingly necessary for interoperability and standardization to achieve the goals of the digital single market and environmental targets. Therefore it is crucial that this review of the horizontal cooperation guidelines and BERs is taken as opportunity to make competition policy future-proof and fit for the changing global environment.

#### ***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*

The current HGL and BERs do provide sufficient legal certainty for self-assessment and there is very little case law for orientation.

\* 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*

It increases legal certainty compared with a situation where only the HGL would apply, but the legal certainty could be increased in a more comprehensive way.

\* 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 current HGL and BERs do provide sufficient legal certainty for self-assessment and there is very little case law for orientation.

\* 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

#### \* 4.10 Please explain your reply

*Text of 1 to 1500 characters will be accepted*

It increases legal certainty compared with a situation where only the HGL would apply, but the legal certainty could be increased in a more comprehensive way.

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 current HGL do provide sufficient legal certainty for self-assessment and there is very little case law for orientation. Beyond that, in the digital economy data is one of the key inputs in order to offer innovative digital services with regard to IoT, AI and other data-related initiatives. Against this background and given the fragmentation of the European market there will be a much greater need for data sharing in future. Facilitating horizontal cooperation with regard to the commercial exchange of data among European competitors, will allow stakeholders to compete within the current geopolitical ecosystem and to resolve current digital markets issues such as barriers to enter, bottlenecks, quasi-monopolies, conglomerate effects etc. The dated information exchange rules in the guidelines are not fit with regard to the role of data in the digital economy. In fact, they must be updated from scratch in order to meet the needs for data sharing /pooling in future.

#### \* 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*

The current HGL do provide sufficient legal certainty for self-assessment and there is very little case law for orientation.

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*

The current HGL do provide sufficient legal certainty for self-assessment and there is very little case law for orientation.

\* 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 current HGL do provide sufficient legal certainty for self-assessment and there is very little case law for orientation.

Currently the guidelines do not provide enough clarity and emphasis when analysing the pro-competitive against the anticompetitive effects of a standardization agreement. The existing guidelines should be adapted in order to have an updated and future-proof framework, which will facilitate the needs with regard to increased standard setting in the digital environment.

In particular, in fast-moving digital markets it is difficult to move forward with standardisation, if an unrestricted participation in the standard-setting process should be guaranteed. In practice, the process is too complex when trying to achieve a common denominator among all stakeholders at a very early stage. Such a process is also open to misuse with the aim to bring a standardization process to halt, because it was not aligned with their own interests, even when the standard was beneficial for the industry and consumers. Therefore, the guidelines should allow more flexibility in the standard-setting process by for instance introducing a mechanism to allow the participation of those interested, when the process is more advanced, while ensuring that the process is not blocked.

\* 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*

One particular example for a cooperation for an infrastructure layer that is critical for the Digital Single market are network sharing agreements. Network sharing is a widespread form of cooperation between telecommunications operators that benefits both consumers and the European economy as a whole, including swifter and enhanced deployment of innovative technologies, broader coverage, improved service quality and lower environmental impact. It leads to significant cost savings for network deployment by freeing up resources for other investments in innovation which ultimately translates into lower tariffs, increased quality, and improved product propositions. Therefore, the new guidelines should acknowledge the positive effects of network sharing and should give clearer guidance on the permissibility of such co-operation. Given the general pro-competitive nature of such co-operations they should be regarded as permissible when the commonality of costs among the participants keeps a relative low level, the capacity to differentiate offers is guaranteed (for example by unilateral deployments), information sharing is kept to what is necessary and there are no likely foreclosure effects.

\* 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*

Competition law should facilitate cooperation efforts in Europe by reducing barriers that EU companies faced in the past, such as opposition against horizontal cooperation in innovation technologies. As mentioned above, network sharing agreements are critical for the Digital Single market that benefits both consumers and the European economy as a whole, including swifter and enhanced deployment of innovative technologies, broader coverage, improved service quality and lower environmental impact. It leads to significant cost savings for network deployment by freeing up resources for other investments in innovation which ultimately translates into lower tariffs, increased quality, and improved product propositions. Therefore, the new guidelines should acknowledge the positive effects of network sharing and should give clearer guidance on the permissibility of such co-operation.

The same applies to data sharing agreements. The guidelines need to be updated in order to provide more legal certainty and in particular to respond to the challenges of data sharing of the digital economy. This means on the one hand, the critical information exchange should not be determined by the nature of the data, but should be analysed in a case-by-case basis examining the competitive effects exerted in the market when competitors exchange information. On the other hand, facilitate more commercial data sharing to unlock the full value of the data by creating a BER for certain data types.

### ***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

\* 4.26 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*

The current complexity of the R&D BER create great uncertainty for companies as to whether or not their joint R&D agreement is compliant with EU competition rules or not.

\* 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*

Procompetitive data sharing and pooling agreements should be also covered by a BER. Beyond that cooperations covering the development and roll-out of critical and/or innovative digital infrastructure should benefit from a safe harbour.

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

- ☒ Yes
- ☐ No
- ☐ Do not know

\* 4.47 If Yes, please explain your answer

*Text of 1 to 3000 characters will be accepted*

The current restrictive HGL and BER regime and the procedural handling of it has been of limited help to unleash the full potential co-operation could bring to the European economy. Unfortunately, the current guidelines and practice have provided neither the necessary flexibility nor the legal certainty, but rather stifled incentives for horizontal cooperation in our industry, as following two examples demonstrate:

"E5" standardization cooperation from 2010:

- o 5 largest European Operators (DT, Orange, TIM, VF, TEF) for the development of standards for RCS, mobile payment, mobile advertising and secure IT transport.
- o The aim was to establish a secure and attractive counterweight to the proprietary services of Google and Apple, by allowing the cooperation to achieve sufficient scale.
- o DG Competition had launched investigations which ultimately failed in 2013, but the lack of transparency, lengthiness and legal uncertainty of the procedure have decisively discouraged the cooperation in the industry. As a consequence, the development of these digital services was set back for years or completely prevented, which has caused lasting damage to the competitive situation of European Telcos.

The ongoing investigations of the GSMA's eSIM standardization:

- o Led by the DoJ and as a direct result of excessive complaints from a few players (particularly Apple and Google), the ongoing investigations have slowed the eSIM standardization by more than 1 year. Due to the lack of transparency by DoJ and DG COMP, the GSMA is still not clear which exact damage theories are based on the investigations, so that effective and efficient addressing and clearing up of worries is made extremely difficult.

## 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*

The legal uncertainty and the restrictive approach to cooperation cause substantial costs for the business. For one you have the costs associated to with the self assessemnt and external legal opinions. On the oher hand you have substantial finacial effects on the buisness side by creating "overly" cautious safeguards leading to negative effects on investments plans or opportunity costs of overly limited or even forgone cooperations.

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*

Even if not sufficient, there is more legal certainty with the HGL and BERs than there would be without them.

### ***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	Changing geopolitical environment	Overall HGL and BERs	Increased need for cooperation for EU competitiveness
2	Digitalisation	Overall given the scale of some digital players	Increased need for coopartion to scale up
3	Data economy	Information Exchange and new BER	Increased need for data sharing & pooling
4	Infrastructure Sharing	Extended HGL	Increased need to share costs for investment heavy infrastructure
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*

While it remains relevant adaptations need to be made in order to update it with regard to market developments, in particular in the context of digitalistaion.

\* 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*

While it remains relevant it should be broadend in order to meet the geopolitical challenges of Eu buisnesses.

\* 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*

While it remains relevant it must be updated from scratch in order to meet the needs for data sharing/pooling in future. Criteria such as frequency or age of data can not be considered a viable criterion in the digital economy where the permanent exchange of real-time data is what makes the sharing produce the optimum benefit for the industry and the consumers.

\* 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*

While it remains relevant the current guidelines fail to provide sufficient clarity regarding joint purchasing and /or selection of vendors for self-assessment which led to chilling effect to the detriment of competition and innovation.

\* 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*

While it remains relevant more flexibility and clarity needs around joint commercialisation needs to be provided.

\* 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*

While it remains relevant the guidelines do not provide enough clarity and emphasis when analysing the pro-competitive against the anticompetitive effects of a standardization agreement. The existing guidelines should be adapted in order to have an updated and future-proof framework, which will facilitate the needs with regard to increased standard setting in the digital environment.

## 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

\* 7.2 Please explain

*Text of 1 to 3000 characters will be accepted*

N.A.

\* 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*

N.A.

## 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*

The EU guidelines and regulations with regard to horizontal cooperation help to prevent further fragmentation of competition law in the markets.



\* 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

\* 8.4 Please explain your reply

*Text of 1 to 1500 characters will be accepted*

The EU guidelines and regulations with regard to horizontal cooperation help to prevent further fragmentation of competition law in the markets.

\* 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 EU guidelines and regulations with regard to horizontal cooperation help to prevent further fragmentation of competition law in the markets.

## 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*

Procedural aspects

- Increase in Legal Certainty

In order to foster horizontal cooperation, which is very much needed for European competitiveness in the changing geopolitical environment, the legal certainty for companies needs to be increased to reduce the cost associated with the legal uncertainties. Currently, as described above, neither the HGL nor BERs provide sufficient guidance for self-assessment and there is very little case law for orientation.

Besides giving clearer guidance in the HGL and the BERs, the EC should also examine how to best provide some informal guidance on a case-by-case basis. The set-up of recurring meetings with the EC, aimed at

discussing the interpretation of concrete questions in connection with a specific horizontal cooperation project, is one example of a possible tool in this context.

- Informal Guidance Letters

Additionally, the EC should be able to give inputs and feedback at an earlier stage. Another potentially helpful tool in this context are guidance letters in accordance with the EC Notice on informal guidance relating to novel questions concerning Articles 81 and 82 of the EC Treaty that arise in individual cases (2004 /C 101/06). Given the limited use of this tool so far, it may be necessary to reassess the interpretation for the criteria which should be enlarged to include more cases for application of this tool.

- Voluntary Fast-track Notification Procedure

Voluntary fast-track notification procedure for cooperation that have certain magnitude and involves high stakes, that would be at risk for the participating companies. For such (exceptional) cases a voluntary notification procedure should be introduced, similar to the voluntary procedure that has been suggested by the German Commission 'Competition Law 4.0' with regard to innovation cooperation: "recommends the introduction of a voluntary notification procedure at the European level for novel forms of cooperation in the digital economy with a right to receive a decision within a short period of time. It also recommends that the Directorate-General for Competition hire additional personnel for this purpose."

In order for such a voluntary notification procedure to be effective and make it manageable from a European Commission perspective the procedure should be limited in information provided and time. It is not desirable to create a burdensome lengthy procedure, especially in fast-moving markets. Therefore, it would be necessary to define a minimum amount of information that needs to be provided for a decision and have a limited period of time for the decision, eg. 3 months.

Both the higher use of informal guidance letters as well as a voluntary fast-track notification procedure will also contribute to creating more case law which will facilitate the self-assessment of the companies.

## 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

**a476f436-3908-4c1e-ad1a-a04e3caa2729/Consultation\_HG\_\_\_BERs\_Deutsche\_Telekom\_Feb2020.pdf**

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

- ☒ Yes  
☐ No

## Contact

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