

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

Fields marked with * are mandatory.

1

Introduction

Background and aim of the public questionnaire

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

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

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

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

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

The responses to this public consultation will be analysed and the summary of the main points and conclusions will be made public on the Commission's central public consultations page. **Please note that your replies will also become public as a whole, see below under Section 'Privacy and Confidentiality'.**

Nothing in this questionnaire may be interpreted as stating an official position of the Commission.

Submission of your contribution

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

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

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

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

In case of questions, you can contact us via the following functional mailbox: COMP-HBERS-REVIEW@ec.europa.eu.

In case of technical problem, please contact the Commission's [CENTRAL HELPDESK](#).

Duration of the consultation

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

Privacy and confidentiality

*** 1.1 Publication privacy settings**

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

☒ **Anonymous**

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

☒ **Public**

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

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

☒ 1.2 I agree with the [personal data protection provisions](#)

2 About you

* 2.1 Language of my contribution

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

* 2.2 First name

Sara

* 2.3 Surname

GHAZANFARI

* 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

ETNO (European Telecommunications Network Operators' Association)

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.

08957111909-85

* 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

ETNO represents 40 members and observers from Europe and beyond. ETNO's responses in the consultation are given from an association viewpoint, and do not reflect members' businesses and specific individual cases.

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

Text of 1 to 250 characters will be accepted

ETNO brings together the main investors in innovative and high-quality e-communications platforms and services, representing 70.5% of the total sector investment.

*** 2.15 Country of origin**

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

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

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| <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 |
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| <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 | |

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

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

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

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

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

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

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

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

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

Text of 1 to 1500 characters will be accepted

In order for the HGL to maintain their relevance to the TLC sector, they need to be updated and cover new forms of cooperation and provide a legal certainty while taking into account the digital economy dynamics. The HGL must also be aligned with the European Electronic Communications Code and existing industry practices.

The HGL shall also provide more flexibility in regard to co-operation agreements between operators seeking to create standards and interoperability solutions.

ETNO would like to suggest "digital infrastructures" to be the object of a new block exemption regulation.

Two relevant examples of infrastructures sharing agreements would be: i) the network sharing agreements ii) data sharing and pooling agreements.

Further fast-track EC guidance

ETNO also believes a new quicker way to ask the European Commission for further guidance is needed in those cases in which the self-assessment of the parties does not provide sufficient legal security as to the compliance of the cooperation with Art. 101 conditions and if the cooperation is of a certain magnitude and complexity. These cases would require a rapid response from the EC, as any ex post review may have major consequences. For such a guidance process to be effective and manageable from a European Commission perspective, the process should be voluntary, limited in information provided and the time taken for the issuance of the guidance aimed at not to delay projects disproportionately.

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

Currently, both the HGL and the HBERs do not provide sufficient legal certainty for self-assessment and there is very little case law for orientation. Companies should have an increased legal certainty that also aims at reducing the costs associated with the legal uncertainties.

- * 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

ETNO believes that the presence of the R&D BER increases legal certainty compared with a situation where only the HGL would apply. However, the legal certainty for companies needs to 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

ETNO believes that the presence of the Specialisation BER and Section 4 of the HGL helps to increase legal certainty. However, sometimes companies face challenges to interpret or to apply those the rules and therefore cannot completely eliminate the risk of infringing competition law, despite their best efforts.

* 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

ETNO believes that the presence of the Specialisation BER increases legal certainty compared with a situation where only the HGL would apply. However, the legal certainty for companies needs to 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

Cooperation models require a certain degree of information exchange and data sharing between companies. However, companies are currently lacking clear guidance on the boundaries of allowed data/information exchange in such cooperations.

The current rules on information exchange bring more uncertainty in the Digital Economy and need to be adapted. The information exchange framework set out in the HGL needs to be clarified in order to provide more legal certainty and give response to the challenges emerged in the Digital Economy. In this sense, information exchange should be analysed in a case-by-case basis examining the competitive effects exerted in the market when competitors exchange information.

ETNO is of the view that the current framework obliges companies to adopt an extremely conservative approach, even when the impact of information exchange between competitors is neutral for competition or even pro-competitive (and not foresee to collude). For example, in the case of joint bidding, it could be clarified under which circumstances information exchange relating to buying-market could be considered as potentially anti-competitive.

* 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 HGL sometimes are difficult to interpret, to define markets or to know markets shares of upstream /downstream markets.

* 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

As for the other sections, they provide valuable indications but not full legal certainty.

* 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

ETNO considers that the HGL current framework does not guarantee enough flexibility to assess whether a standardization agreement falls under Article 101.1 TFEU or if it complies with the requirements of Article 101.3 TFEU.

The existing rules should be reviewed in order to have an updated and future-proof framework, which will respond to all the challenges of the increasing generation of standard setting activities.

Technical standards and specifications are increasingly required in a digitalised world.

The clear procompetitive nature of standardization agreements should also be considered. In this sense, it would be relevant to take into account in the analysis that in some cases the counterfactual of the considered standardization is not a different standardization, but proprietary systems imposed by global companies. In those cases, there must be a presumption of pro-competitiveness, ideally in the form of a new block exemption, for those standardization cooperations. If not considered,

ETNO proposes to include at least such strong presumption in points 7.3 and 7.4 of the Guidelines when a case-by-case analysis is made.

Finally, there is the need to find mechanisms in order to have workable processes, such as restricting temporarily the participation whereby it could be managed only by a few operators, opening the negotiations for the rest of competitors when the process is more advanced (Paragraphs 280 and 281).

- * 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

Considering the key role of data in the digital economy, the HGL need to be updated in order to address new kinds of collaboration such as the use of artificial intelligence and platforms.

- * 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

ETNO believes the current HGL need to be updated in order to match the current market developments and provide a legal certainty to the telecommunications industry while taking into account the dynamics of the digital economy.

As data is key in the digital economy, the guidelines need to be updated to facilitate horizontal agreements in areas where interoperability is needed such as AI, IoT or data-related projects. Particularly, guidance on data pooling and data sharing agreements would be welcome in order to provide legal certainty for European companies to do the self-assessment.

Generally, the HGL on production agreements might be used in order to assess digital infrastructure sharing initiatives. However, ETNO believes that more specific insights would be necessary as such cooperation agreements have many specificities.

More specifically, digital infrastructures should be the object of a new block exemption regulation provided they respect predefined conditions.

Digital infrastructure should be considered in the broader sense of all assets required to create a European digital market, being for instance networks (i.e. deployment of Very High Capacity Networks, including 5G) and data sharing platforms.

Two relevant examples of digital infrastructures agreements would be: i) the network sharing agreements, which have become a usual and effective way for telecom operators to deploy networks across Europe, and that will be particularly relevant in the deployment of 5G going forward; and ii) data sharing and pooling agreements: data being the basis of the digital economy, it will become a very common type of cooperation, facilitating innovative digital services in Europe.

(see also question 4.45)

Identification of pro-competitive horizontal agreements

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

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

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

- ☐ Yes
- ☐ No
- ☒ Do not know

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

- ☐ Yes

- ☐ No
- ☒ Do not know

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

- ☐ Yes
- ☐ No
- ☒ Do not know

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

- ☐ Yes
- ☐ No
- ☒ Do not know

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

- ☐ Yes
- ☐ No
- ☒ Do not know

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

- ☐ Yes
- ☐ No
- ☒ Do not know

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

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

- ☐ Yes
- ☐ No
- ☒ Do not know

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

- ☐ Yes
- ☐ No
- ☒ Do not know

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

- ☐ Yes
- ☐ No
- ☒ Do not know

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

- ☐ Yes
☐ No
☒ Do not know

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

Text of 1 to 3000 characters will be accepted

N/A

* 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

ETNO would like to suggest “digital infrastructures” to be the object of a new block exemption regulation. “Digital infrastructures” should include, in a broad sense, all the assets needed to build the European Digital market.

Two relevant examples of infrastructures sharing agreements would be: i) the network sharing agreements, which have become a usual and effective way of telecom operators to deploy networks across Europe, and that will be particularly relevant in the deployment of 5G going forward; and ii) data sharing and pooling agreements: being data the infrastructure of the digital economy, it will become a very common type of cooperation, facilitating innovative digital services in Europe.

For ETNO members, network sharing agreements are probably the most important form of cooperation that should be covered in the HGL or under the new proposed block exemption regulation. Network sharing agreements have become widespread in Europe as a mean to decrease costs, increase coverage, reduce timing of network roll-out, deploy efficiently and rapidly new technologies and reduce the perception of environmental impact of antennas.

Already in 2011, in a report on infrastructure and spectrum sharing in mobile networks, the Body of European Regulators for Electronic Communications (BEREC) found passive sharing agreements to be spread in all European Member States. Those kinds of agreements are today commonplace and don't raise competition concerns.

As far as efficiencies are concerned, 5G networks have two additional elements to support sharing initiatives: on the one hand, they involve very high costs with important margins of optimization and, on the other hand, they allow further guarantees of differentiation and flexibility of the offers (e.g. through network virtualization).

One of the important issues coming up in connection to data and the competitiveness of the telecoms industry will be the possibilities to share data amongst competitors. Such sharing will enable the European telecoms operators to reach higher scale in data, which is a key input in digital markets. It is important that operators have the flexibility to enter into commercial sharing agreements without legal uncertainty.

The information exchange framework set out in the HGL needs to be clarified in order to provide more legal certainty and give response to the challenges emerged in the Digital Economy.

* 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?)

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

Companies face substantial costs associated to legal uncertainty.

For example, among the others, ETNO would like to identify the following costs:

- costs associated to external legal opinions
- opportunity costs
- costs caused by the (negative) effects on investments plans
- costs caused by wrong investments plans that were biased by legal uncertainty

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

Text of 1 to 1000 characters will be accepted

N/A

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

N/A

5.4 Please explain how you calculate these costs

Text of 1 to 1500 characters will be accepted

N/A

* 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

* 5.9 Please explain your reply

Text of 1 to 1500 characters will be accepted

ETNO believes that the presence of the R&D BER increases to a certain extent legal certainty compared with a situation where they would not be in place.

5.10 Please provide an estimate of the possible change in costs and explain your estimation

Text of 1 to 1500 characters will be accepted

N/A

5.11 Were the **Specialisation BER** not in place, the cost of ensuring compliance

- ☒ Would increase
- ☐ Would decrease
- ☐ Do not know

* 5.12 Please explain your reply

Text of 1 to 1500 characters will be accepted

ETNO believes that the presence of the Specialisation BER increases to a certain extent legal certainty compared with a situation where they would not be in place.

5.13 Please provide an estimate of the possible change in costs and explain your estimation

Text of 1 to 1500 characters will be accepted

N/A

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

ETNO believes that the presence of the R&D and the Specialisation BERs increases to a certain extent legal certainty compared with a situation where they would not be in place.

Benefits vs. costs

In your view, does the application of the R&D and Specialisation BERs and the HGL generate costs that are proportionate to the benefits they bring (or, in the case of a business association, the benefits for the members you are representing)?

*** 5.15 Regarding the **R&D BER****

- ☐ Costs are proportionate to benefits
- ☐ Costs are not proportionate to benefits
- ☒ Do not know

*** 5.17 Regarding the **Specialisation BER****

- ☐ Costs are proportionate to benefits
- ☐ Costs are not proportionate to benefits
- ☒ Do not know

*** 5.19 Regarding the **HGL****

- ☐ Costs are proportionate to benefits
- ☐ Costs are not proportionate to benefits
- ☒ Do not know

6 Relevance (do the objectives still match the needs or problems?)

In this section, we would like to understand if the objectives of the HBERs and the HGL are still up-to-date considering the developments that have taken place since their publication.

6.1 Please identify major trends and developments (for example legal, economic, political) that, based on your experience, have affected the application of the BERs and HGL. Please provide a short explanation with concrete examples in case you consider that (parts of) the HBERs or HGL do not sufficiently allow to address them

1000 characters max. for each row

	Major trends/changes	Articles of the HBERs and/or recitals of the HGL	Short explanation/concrete examples
1	Recent market developments and the global competition on dynamics digital markets		
2	Increased legal certainty is essential to boost the level of the sector investments and to reduce the costs associated with such uncertainty		The European Commission should examine how to best provide some informal guidance on a case-by-case basis
3	Alignment with the EU Electronic Communications Code		
4	Industry EU pro-competitive and pro-innovation wide projects that cannot be achieved by a single actor		
5	The current HGL do not address the specific role of data and its role in the digital economy		
6	Increasing adoption of standardization agreements		
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

ETNO believes the R&D BER and Section 3 of the HGL are still relevant. However, the approach based on market share is not anymore appropriate.

* 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

ETNO believes the R&D BER and Section 4 of the HGL are still relevant. However, the approach based on market share is not anymore appropriate.

* 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

The current rules on information exchange bring more uncertainty in the Digital Economy and need to be adapted. That is particularly relevant when companies are not sure on which kind of information they would be able to exchange when dealing with these new cooperation models.

The information exchange framework set out in the HGL needs to be clarified in order to provide more legal certainty and give response to the challenges emerged in the Digital Economy. In this sense, information exchange should be analysed in a case-by-case basis examining the competitive effects exerted in the market when competitors exchange information.

* 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

ETNO believes section 5 of the HGL on purchasing agreements is still relevant. However, it needs to be updated in order to take account the evolution of the markets and their dynamics.

Additionally, it is sometimes difficult to interpret the rules and to define the markets subject to this kind of horizontal agreement. ETNO considers challenging to know markets shares of upstream/downstream markets.

* 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

ETNO believes section 6 of the HGL on commercialisation agreements is still relevant. However, it needs to be updated in order to take account the evolution of the markets and their dynamics.

Additionally, it is sometimes difficult to interpret the rules and to define the markets subject to this kind of horizontal agreement. ETNO considers challenging to know markets shares of upstream/downstream markets.

* 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

ETNO considers that the HGL current framework does not guarantee enough flexibility to assess whether a standardization agreement falls under Article 101.1 TFEU or if it complies with the requirements of Article 101.3 TFEU.

The existing rules should be reviewed in order to have an updated and future-proof framework, which will respond to all the challenges of the increasing generation of standard setting activities.

Technical standards and specifications are increasingly required in a digitalised world.

The clear procompetitive nature of standardization agreements should also be considered. In this sense, it would be relevant to take into account in the analysis that in some cases the counterfactual of the considered standardization is not a different standardization, but proprietary systems imposed by global companies. In those cases, there must be a presumption of pro-competitiveness, ideally in the form of a new block exemption, for those standardization cooperations. If not considered,

ETNO proposes to include at least such strong presumption in points 7.3 and 7.4 of the Guidelines when a case-by-case analysis is made.

Finally, there is the need to find mechanisms in order to have workable processes, such as restricting temporarily the participation whereby it could be managed only by a few operators, opening the negotiations for the rest of competitors when the process is more advanced (Paragraphs 280 and 281).

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

* 7.1 In your view, are the HBERs and the HGL coherent with other instruments and /or case law that provide(s) guidance on the interpretation of Article 101 of the Treaty (e.g., other Block Exemption Regulations, the Vertical Guidelines and the Article 101(3) Guidelines)?

- ☐ Yes
- ☐ No
- ☒ Do not know

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

- ☐ Yes
- ☒ No
- ☐ Do not know

* 7.4 Please explain

Text of 1 to 3000 characters will be accepted

The HGL must also be aligned with the EU Electronic Communications Code ("EECC") so that the different forms of co-operation promoted under the EECC, like co-investment and various forms of sharing of assets will be supported by a clear analytical competition law framework.

8 EU added value (Did EU action provide clear added value?)

In this section, we would like to understand if the HBERs and the HGL have had added value. In the absence of the HBERs and the HGL, undertakings would have had to self-assess their horizontal cooperation agreement with the help of the remaining legal framework. This would include for instance the case law of the EU and national courts, the Article 101(3) Guidelines, the enforcement practice of the Commission and national competition authorities, as well as other guidance at EU and national level.

Please indicate whether, in your view, the HBERs and the HGL have had added value in the assessment of the compatibility of horizontal cooperation agreements with Article 101 of the Treaty

* 8.1 Has the R&D BER had added value in the assessment of the compatibility of horizontal cooperation agreements with Article 101 of the Treaty?

- ☒ Yes
- ☐ No
- ☐ Do not know

* 8.2 Please explain your reply

Text of 1 to 1500 characters will be accepted

ETNO believes the R&D BER helped to reduce the fragmentation among EU members states, and to ensure a consistent application of competition law.

* 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

ETNO believes the Specialisation BER helped to reduce the fragmentation among EU members states, and to ensure a consistent application of competition law.

* 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

ETNO believes the HGL helped to reduce the fragmentation among EU members states, and to ensure a consistent application of competition law.

9 Specific questions

Final comments and document upload

9.1 Is there anything else with regard to the R&D and Specialisation BERs and the HGL that you would like to add?

Text of 1 to 3000 characters will be accepted

ETNO would like to add further thoughts on the procedural aspects.

In order to foster more horizontal cooperation, which is very much needed for European competitiveness in the changing geopolitical environment, the legal certainty for companies needs to be increased, also to reduce the cost associated with the legal uncertainties.

Currently, as already stated, the HGL and BERs do not 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 European Commission should also look into how to best provide some informal guidance on a case-by-case basis. The set up of recurring meetings with the European Commission, aimed at discussing the interpretation of concrete questions in connection with a certain horizontal cooperation project, is an example of a possible tool in this sense.

Additionally, the European Commission should be able to give inputs and feedbacks at an earlier stage. Another tool that you could be helpful in this context are guidance letters in accordance with the Commission 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).

Further fast-track EC guidance

ETNO also believes a new quicker way to ask the EC for further guidance is needed in those cases in which the self-assessment of the parties does not provide sufficient legal security as to the compliance of the cooperation with Art. 101 conditions and if the cooperation is of a certain magnitude and complexity. These cases would require a rapid response from the EC, as any ex post review may have major consequences.

In order for such a guidance process to be effective and make it manageable from a European Commission perspective, the process should be voluntary, limited in information provided and the time taken for the issuance of the guidance aimed at not to delay projects disproportionately. It is not desirable to create a burdensome lengthy process, 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.

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

The maximum file size is 1 MB

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

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/12022020_Response_of_ETNO_to_the_consultation_on_horizontal_regulations_and_guidelines_FINAL_(pdf

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

☒ Yes

☐ No

Contact

COMP-HBERS-REVIEW@ec.europa.eu