

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

* 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

*** 2.15 Country of origin**

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

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| <input type="radio"/> Albania | <input type="radio"/> Dominican Republic | <input type="radio"/> Lithuania | <input type="radio"/> Saint Vincent and the Grenadines |
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| <input type="radio"/> American Samoa | <input type="radio"/> Egypt | <input type="radio"/> Macau | <input type="radio"/> San Marino |
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| <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"/> Argentina | <input type="radio"/> Ethiopia | <input type="radio"/> Malta | <input type="radio"/> Sierra Leone |
| <input type="radio"/> Armenia | <input type="radio"/> Falkland Islands | <input type="radio"/> Marshall Islands | <input type="radio"/> Singapore |
| <input type="radio"/> Aruba | <input type="radio"/> Faroe Islands | <input type="radio"/> Martinique | <input type="radio"/> Sint Maarten |
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| <input type="radio"/> Azerbaijan | <input type="radio"/> France | <input type="radio"/> Mayotte | <input type="radio"/> Solomon Islands |

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| <input type="radio"/> Bahamas | <input type="radio"/> French Guiana | <input type="radio"/> Mexico | <input type="radio"/> Somalia |
| <input type="radio"/> Bahrain | <input type="radio"/> French Polynesia | <input type="radio"/> Micronesia | <input type="radio"/> South Africa |
| <input type="radio"/> Bangladesh | <input type="radio"/> French Southern and Antarctic Lands | <input type="radio"/> Moldova | <input type="radio"/> South Georgia and the South Sandwich Islands |
| <input type="radio"/> Barbados | <input type="radio"/> Gabon | <input type="radio"/> Monaco | <input type="radio"/> South Korea |
| <input type="radio"/> Belarus | <input type="radio"/> Georgia | <input type="radio"/> Mongolia | <input type="radio"/> South Sudan |
| <input checked="" type="radio"/> Belgium | <input type="radio"/> Germany | <input type="radio"/> Montenegro | <input type="radio"/> Spain |
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| <input type="radio"/> Bolivia | <input type="radio"/> Grenada | <input type="radio"/> Namibia | <input type="radio"/> Sweden |
| <input type="radio"/> Bonaire Saint Eustatius and Saba | <input type="radio"/> Guadeloupe | <input type="radio"/> Nauru | <input type="radio"/> Switzerland |
| <input type="radio"/> Bosnia and Herzegovina | <input type="radio"/> Guam | <input type="radio"/> Nepal | <input type="radio"/> Syria |
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| <input type="radio"/> British Indian Ocean Territory | <input type="radio"/> Guinea-Bissau | <input type="radio"/> Nicaragua | <input type="radio"/> Thailand |
| <input type="radio"/> British Virgin Islands | <input type="radio"/> Guyana | <input type="radio"/> Niger | <input type="radio"/> The Gambia |
| <input type="radio"/> Brunei | <input type="radio"/> Haiti | <input type="radio"/> Nigeria | <input type="radio"/> Timor-Leste |
| <input type="radio"/> Bulgaria | <input type="radio"/> Heard Island and McDonald Islands | <input type="radio"/> Niue | <input type="radio"/> Togo |
| <input type="radio"/> Burkina Faso | <input type="radio"/> Honduras | <input type="radio"/> Norfolk Island | <input type="radio"/> Tokelau |
| <input type="radio"/> Burundi | <input type="radio"/> Hong Kong | <input type="radio"/> Northern Mariana Islands | <input type="radio"/> Tonga |
| <input type="radio"/> Cambodia | <input type="radio"/> Hungary | <input type="radio"/> North Korea | <input type="radio"/> Trinidad and Tobago |
| <input type="radio"/> Cameroon | <input type="radio"/> Iceland | <input type="radio"/> North Macedonia | <input type="radio"/> Tunisia |
| <input type="radio"/> Canada | <input type="radio"/> India | <input type="radio"/> Norway | <input type="radio"/> Turkey |
| <input type="radio"/> Cape Verde | <input type="radio"/> Indonesia | <input type="radio"/> Oman | <input type="radio"/> Turkmenistan |
| <input type="radio"/> Cayman Islands | <input type="radio"/> Iran | <input type="radio"/> Pakistan | <input type="radio"/> Turks and Caicos Islands |
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| <input type="radio"/> Chad | <input type="radio"/> Ireland | <input type="radio"/> Palestine | <input type="radio"/> Uganda |
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| <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 | |

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

As a cross-sectoral industry association, the experience of ERT Member companies varies. Please see our position paper for more details.

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

As a cross-sectoral industry association, it is challenging to reply with a straightforward yes or no. We refer to chapter IV. B. 4 (on research and development agreements) in our position paper:

Both the Guidelines and the block exemption regulation on R&D agreements should be reviewed in order to extend the current framework to cover other kinds of horizontal agreements that boost the creation of innovative technologies within the Digital Economy environment: platforms, cloud services, Big Data etc. Cooperation on R&D is also indispensable for companies to meet sustainability objectives.

See the following sub-chapters:

- a) Need to clarify that joint R&D agreements are generally pro-competitive and simplification
- b) Removal of the reference to market shares on technology markets
- c) Increase of market share thresholds for R&D cooperations
- d) Removal of the requirements in Article 3(2) R&D BER
- e) Removal of the obligation to license background IP
- f) Introduction of the possibility to restrict passive sales in any type of specialisation

[...]

* 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

We refer amongst others to chapter IV. B. 4 (on research and development agreements) in our position paper:

Both the Guidelines and the block exemption regulation on R&D agreements should be reviewed in order to extend the current framework to cover other kinds of horizontal agreements that boost the creation of innovative technologies within the Digital Economy environment: platforms, cloud services, Big Data etc. Cooperation on R&D is also indispensable for companies to meet sustainability objectives.

See the following sub-chapters:

- a) Need to clarify that joint R&D agreements are generally pro-competitive and simplification
- b) Removal of the reference to market shares on technology markets
- c) Increase of market share thresholds for R&D cooperations
- d) Removal of the requirements in Article 3(2) R&D BER
- e) Removal of the obligation to license background IP
- f) Introduction of the possibility to restrict passive sales in any type of specialisation

[...]

- * 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

As a cross-sectoral industry association, it is challenging to reply with a straightforward yes or no. We would like to have legal certainty in a wider area.

For more info please see our position paper, including (but not only) chapter II on the need for increased clarity and updated procedures, and chapter IV. B. 4 (on research and development agreements).

- * 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

Please see our paper for more info.

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

Please see our paper, chapter III. E. on information exchange:

The assessment of the anti-competitive nature of information exchanges under the existing guidelines has

become too broad. The current approach places many legitimate information exchanges at risk of a “by object” infringement finding (even though the current Horizontal Guidelines only attribute a “by object” infringement to exchanges of future price or quantity information). The broad interpretation of the current Guidelines has created significant legal uncertainty and caused companies to take an unduly restrictive approach, which in turn has limited the scope for legitimate collaborations.

Information exchanges should not automatically be regarded as “by object” infringements. Rather, the competitive assessment should be based on the facts of each case and consider the legal and economic context in which the information exchange occurs. Information exchanges outside the framework of a selling cartel should not be qualified as restrictions by object but should systematically be assessed based on their actual effects on competition, in particular through the analysis of intended efficiencies. Indeed, an abstract assessment can lead to prohibiting information exchanges which are neutral for competition or even pro-competitive and makes risk assessment even more problematic for undertakings.

Furthermore, best market practices for horizontal co-operation agreements where the exchange of competitively [...]

* 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

Please see our paper, chapter III. E. on joint purchasing.

The analytical framework for the assessment of joint purchasing agreements under the current HG draws a distinction based on whether or not the participants are competitors.

The HG focus on the possible restrictive effects of joint purchasing on the downstream (selling) market is not helpful when co-operating buyers do not compete downstream.

The HG provide little insight as to whether there is any need to analyse whether upstream (purchasing) cooperations can lead to potential anticompetitive behaviour (either by object or effect), where the companies are not “competitors” on the downstream selling market.

Guidance on this issue is welcome, not only in relation to joint buying, but also cooperations and exchanges of information falling short of joint buying, including:

- Buying alliances,
- Aggregating volumes to reach discount levels but purchasing separately,
- Approaching a supplier jointly to align on purchasing prices and terms & conditions,
- Non-aggregated benchmarking of supplier costs.

In addition, the HG should reconsider relevant market share thresholds. The current threshold of a 15 % market share threshold on the upstream market is far too conservative where there is no competition on the downstream markets, and the Commission should consider increasing this to 30%.

Where companies do compete on the downstream selling market, the HG should clarify in which circumstances [...]

* 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

Please see our paper, chapter VI. 5.

A new block exemption regulation for joint production and commercialisation agreements is needed. The procompetitive effects of this kind of horizontal cooperations justify their exemption which would provide stakeholders the necessary legal certainty to ensure such kind of horizontal agreements comply with Article 101(3) under certain requirements. The following kind of agreements should be covered either in this new BER or in a specific BER for each one:

- Infrastructure sharing agreements: Such agreements have become a usual and effective way for companies (mainly telecom operators) to deploy infrastructure (such as networks) across Europe due to their procompetitive effects: substantial efficiencies, costs-savings, reduction of environmental impact, co-investments; as well as the benefits for consumers: increase coverage, innovation, high quality and speedier networks.

Moreover, network sharing agreements are even more key with the upcoming deployment of 5G technology. The huge investment required for the roll out of 5G with ambitious expectations from public authorities and consumers regarding roll-out timing and coverage will not be possible to achieve without infrastructure sharing agreements among operators in order to ensure business sustainability, reduce environmental impact and satisfy high quality connectivity demand in accordance with regulatory obligations.

- Data sharing and pooling agreements: As data provide [...]

* 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

Please see our paper, chapter III, J (standardisation agreements), chapter IV. 2 (standardisation and sustainability agreements) and chapter VI. B. 5. (new block exemption regulation for joint production and commercialisation agreements)

Standardisation agreements, i.e. standards development, takes place globally across sectors and industries. This has two key implications:

- Participants in standardisation agreements are not necessarily competitors, as they are often active in different markets. It would therefore be useful for the Horizontal Guidelines to acknowledge this by adding the following sentence to paragraph 264 (bold text is new):

[see paper]

- The Guidelines need to be applied in an open-ended manner in order to accommodate different sectors and different standards development language, without imposing regulatory burdens on EU standardisation that do not apply elsewhere in the world. The ability to comply with different [...]

* 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

Please see our paper, amongst others, chapter IV. B. 2 on standardisation and sustainability agreements.

In addition to changes in the Guidelines suggested above, and given the growing importance of sustainability and standardisation to everyday life we believe that both standardisation and sustainability agreements should be considered as topics for new block exemption regulations where they exert clearly net procompetitive effects [for instance, standardisation agreements in markets where the only alternative are proprietary solutions of dominant companies or where companies need to agree on certain standards to meet environment objectives]. Besides their procompetitive effects, both kind of agreements are key in the process of digitalisation and the fight against climate change, key objectives of the new Commission.

* 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

Please see our paper, the entire chapter under IV. B. "where to expand"

ERT believes the current framework is still workable for companies to analyse whether horizontal agreements comply with the requirements needed to fall under Article 101(3) or are anticompetitive.

However, the current rules do not give sufficient flexibility [to European companies to facilitate procompetitive cooperations that are nowadays key to compete in a world characterised by globalisation and digitalisation. The following proposals try to achieve that outcome.

Introducing tailored BERs using realistic market share thresholds (and when more pertinent, other adapted conditions) to provide guidance to undertakings wishing to cooperate, including: standardisation and sustainability agreements; joint production and commercialization agreements: data pooling/data access and infrastructure sharing agreements and updated BER for research & development, would reflect the new competitive dynamics within existing markets and foster innovation,

For example, in the context of container liner shipping, the Consortia BER (which is an industry specific specialization block exemption) has recently been recommended by the Commission for renewal. It is an instrument that has greatly assisted the container liner shipping industry to conclude operational cooperation and respond in an agile manner to fluctuations in supply and demand, thereby creating efficiencies to the benefit of customers, more so than any other document, and is internationally accepted as the standard for agreements in the container liner shipping sector.

...

Identification of pro-competitive horizontal agreements

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

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

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

☐ Yes
☒ No
☐ Do not know

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

Text of 1 to 1500 characters will be accepted

It is challenging to provide a straightforward yes or no answer. Our paper contains our perspective.

- * 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

It is challenging to provide a straightforward yes or no answer. Our paper contains our perspective.

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

☐ Yes

- ☒ No
- ☐ Do not know

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

Text of 1 to 1500 characters will be accepted

It is challenging to provide a straightforward yes or no answer. Our paper contains our perspective.

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

- ☐ Yes
- ☒ No
- ☐ Do not know

* 4.30 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

It is challenging to provide a straightforward yes or no answer. Our paper contains our perspective.

* 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

* 4.32 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

It is challenging to provide a straightforward yes or no answer. Our paper contains our perspective.

* 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

- * 4.34 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

It is challenging to provide a straightforward yes or no answer. Our paper contains our perspective.

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

- * 4.36 If No, please explain what aspect of these definitions fails to correctly identify specialisation agreements that are compliant with Article 101 of the Treaty

Text of 1 to 1500 characters will be accepted

It is challenging to provide a straightforward yes or no answer. Our paper contains our perspective.

- * 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

- * 4.38 If No, please explain what aspect of this provision fails to correctly identify specialisation agreements that are compliant with Article 101 of the Treaty

Text of 1 to 1500 characters will be accepted

It is challenging to provide a straightforward yes or no answer. Our paper contains our perspective.

- * 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

* 4.40 If No, please explain what aspect of these provisions fails to correctly identify Specialisation agreements that are compliant with Article 101 of the Treaty

Text of 1 to 1500 characters will be accepted

It is challenging to provide a straightforward yes or no answer. Our paper contains our perspective.

* 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

* 4.42 If No, please explain what aspect of these conditions fails to correctly identify Specialisation agreements that are compliant with Article 101 of the Treaty

Text of 1 to 1500 characters will be accepted

It is challenging to provide a straightforward yes or no answer. Our paper contains our perspective.

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

Please see our paper for a comprehensive analysis on this issue.

* 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

Please see our paper, chapter IV. B. "Where to expand" including the sub-chapters:

1. Industry wide cooperation agreements
2. Standardisation and sustainability agreements
3. Specialisation BER
4. Research and development agreements
5. New block exemption regulation for joint production and commercialisation agreements: data pooling /data access and infrastructure sharing agreements

ERT believes the current framework is still workable for companies to analyse whether horizontal agreements comply with the requirements needed to fall under Article 101(3) or are anticompetitive.

However, the current rules do not give sufficient flexibility [to European companies to facilitate procompetitive cooperations that are nowadays key to compete in a world characterised by globalisation and digitalisation. The following proposals try to achieve that outcome.

Introducing tailored BERs using realistic market share thresholds (and when more pertinent, other adapted conditions) to provide guidance to undertakings wishing to cooperate, including: standardisation and sustainability agreements; joint production and commercialization agreements: data pooling/data access and infrastructure sharing agreements and updated BER for research & development, would reflect the new competitive dynamics within existing markets and foster innovation,

For example, in the context of container liner shipping, the Consortia BER (which is an industry specific specialization block exemption) has recently been recommended by the Commission for renewal. It is an instrument that has greatly assisted the container liner shipping industry to conclude operational cooperation and respond in an agile manner to fluctuations in supply and demand, thereby creating efficiencies to the benefit of customers, more so than any other document, and is internationally accepted as the standard for agreements in the container liner shipping sector...

* 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

Please see our paper, the entire chapter III on Horizontal Guidelines and the chapter IV on Block Exemption Regulation

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

N/A

- 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

5.11 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

Please see our paper, amongst others the chapters IV.B.3 on specialisation BER and IV.B.4 on R&D agreements.

3. Specialisation BER

While we appreciate the current Specialisation BER and the underlying rationale of efficiencies which are the result of specialisation, we would propose to raise the combined market share threshold from 20% to 30% to allow larger companies to benefit from the efficiencies generated by specialisation. As of today, none of the ERT Member companies has experience in practice with the Specialisation BER. More guidance as to the application of joint production/specialisation in the context of services would be welcomed. Particularly, where European companies lack the scale of non-European players, specialisation could pave the way for increased competitiveness of European players.

4. Research and development agreements

Both the Guidelines and the block exemption regulation on R&D agreements should be reviewed in order to extend the current framework to cover other kinds of horizontal agreements that boost the creation of innovative technologies within the Digital Economy environment: platforms, cloud services, Big Data etc. Cooperation on R&D is also indispensable for companies to meet sustainability objectives.

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	Geopolitical challenges and global competitiveness	-	See our paper, chapter I.
2			
3			
4			
5			
6			
7			

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

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

- ☒ Still relevant
- ☐ No longer relevant
- ☐ Do not know

* 6.3 Please explain your reply

Text of 1 to 1500 characters will be accepted

It's still relevant but it depends on what is covered. Please see our paper, chapter IV. B. 4 on R&D agreements.

Both the Guidelines and the block exemption regulation on R&D agreements should be reviewed in order to extend the current framework to cover other kinds of horizontal agreements that boost the creation of innovative technologies within the Digital Economy environment: platforms, cloud services, Big Data etc. Cooperation on R&D is also indispensable for companies to meet sustainability objectives ...

* 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

It's still relevant but it depends on what is covered. Please see our paper, chapter IV. B. 3 on specialisation BER.

While we appreciate the current Specialisation BER and the underlying rationale of efficiencies which are the result of specialisation, we would propose to raise the combined market share threshold from 20% to 30% to allow larger companies to benefit from the efficiencies generated by specialisation. As of today, none of the ERT Member companies has experience in practice with the Specialisation BER. More guidance as to the application of joint production/specialisation in the context of services would be welcomed. Particularly, where European companies lack the scale of non-European players, specialisation could pave the way for increased competitiveness of European players.

* 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

It's still relevant but it depends on what is covered. Please see our paper, for more info.

* 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

It's still relevant but it depends on what is covered. Please see our paper, for more info.

* 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

It's still relevant but it depends on what is covered. Please see our paper, for more info.

* 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

It's still relevant but it depends on what is covered. Please see our paper, for more info.

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

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

- ☐ Yes
☒ No
☐ Do not know

* 7.2 Please explain

Text of 1 to 3000 characters will be accepted

Please see our paper, chapter III. C on arrangements between parent companies as well as the Appendix.

The Horizontal Guidelines are expressly consistent with the “single economic entity doctrine”, insofar as they set out how the doctrine applies to cooperation among solely controlled subsidiaries and their parent companies, i.e. Article 101(1) does not apply to such arrangements. By contrast, the Guidelines are silent with regard to the circumstances in which Article 101(1) applies to arrangements among parent companies and their jointly controlled subsidiaries.

This creates considerable uncertainty for companies with large-scale global operations managed through jointly- and solely-controlled subsidiaries – which seems particularly perverse where the establishment of a joint venture (or the acquisition of joint control) has been subject to merger control (and approved). The consequence is that companies will often assume (conservatively) that the single economic entity doctrine does not apply when engaging with their jointly-controlled subsidiaries. These companies may then be unable to realise fully the synergies of operating as an integrated group, potentially causing harm to their customers and even the wider economy. This unfortunate outcome is generally considered an artificial interpretation of EU competition law.

We submit that it would provide companies with the certainty that they require, if similar wording – as in the draft 2010 Horizontal Guidelines – is included in the revised Horizontal Guidelines, together with an explicit acknowledgement that “decisive influence” for this purpose is based on the EU Merger Regulation (EUMR) definition. We also submit that this change would not represent a material shift in policy for the Commission, but rather is supported by the commercial and economic reality of joint ventures and legal considerations as further explained in Appendix A: “Note on the application of Article 101(1) to arrangements between parents and their jointly-controlled subsidiaries.

...

* 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

Please see our paper, chapter I on geopolitical challenges and global competitiveness, including the references to the ERT Industrial Strategy paper and ERT Benchmarking Report.

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

We would like to ask for increased clarity and more guidance. Please see our entire paper, in particular chapter II on the need for increased clarity and updated procedures.

* 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

We would like to ask for increased clarity and more guidance. Please see our entire paper, in particular chapter II on the need for increased clarity and updated procedures.

* 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

We would like to ask for increased clarity and more guidance. Please see our entire paper, in particular chapter II on the need for increased clarity and updated procedures.

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

Thanks for opening this consultation and enabling us to contribute. We would mainly like to refer to our position paper and hope you find it of interest.
The ERT Working Group on Competition Policy is definitely open for an exchange to discuss the various points in greater detail.

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

7d4dc866-cdc2-4ef5-adcf-3a25ba062063/ERT_position_paper_on_horizontal_cooperation_-_12022020.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