

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

Maria

* 2.3 Surname

Sendin Valle

* 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

GSMA

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.

30988577529-37

* 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

GSMA represents the interests of more than 750 mobile operators worldwide and nearly 400 companies in the broader mobile ecosystem and produces the industry-leading MWC events and other regional conferences

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

Text of 1 to 250 characters will be accepted

GSMA represents the interests of mobile operators and companies in the broader mobile ecosystem, including handset and device makers, software companies, equipment providers and internet companies, as well as organisations in adjacent industry sector

*** 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 |
| <input type="radio"/> Anguilla | <input type="radio"/> Eritrea | <input type="radio"/> Malaysia | <input type="radio"/> Senegal |
| <input type="radio"/> Antarctica | <input type="radio"/> Estonia | <input type="radio"/> Maldives | <input type="radio"/> Serbia |
| <input type="radio"/> Antigua and Barbuda | <input type="radio"/> Eswatini | <input type="radio"/> Mali | <input type="radio"/> Seychelles |
| <input type="radio"/> Argentina | <input type="radio"/> Ethiopia | <input type="radio"/> Malta | <input type="radio"/> Sierra Leone |
| <input type="radio"/> Armenia | <input type="radio"/> Falkland Islands | <input type="radio"/> Marshall Islands | <input type="radio"/> Singapore |
| <input type="radio"/> Aruba | <input type="radio"/> Faroe Islands | <input type="radio"/> Martinique | <input type="radio"/> Sint Maarten |
| <input type="radio"/> Australia | <input type="radio"/> Fiji | <input type="radio"/> Mauritania | <input type="radio"/> Slovakia |
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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 |

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

The HGL and BERs are based on self-assessment of relevant agreements. They do not include the possibility to receive a formal feedback from the Commission on compatibility of the agreements with EU antitrust rules. With the advent of the "digital revolution", this mechanism has become unfit to provide the necessary legal certainty as it is time consuming and does not protect operators from antitrust investigations. Operators, on the contrary, need to react more quickly to gain scale and avoid market tipping. This gap in legal certainty has often impeded the completion of initiatives allowing operators to join forces and thus to effectively compete. The review of the HGL and BERs should therefore introduce: (i) A quicker way to obtain guidance from the EC where self-assessment of the parties does not ensure timely compliance with Art.101, notably 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 will have major consequences. For such a guidance process to be effective, the process should be voluntary, limited in information provided and the time taken for the issuance of the guidance; (ii) A wider use of BERs i.e. extending them to other categories of cooperation agreements (see below) and stretching the scope and mechanisms for application of BERs (see below).

Legal certainty provided by the HBERs and the HGL

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

- ☐ Yes
- ☒ No
- ☐ Do not know

* 4.4 Please explain your reply

Text of 1 to 1500 characters will be accepted

The decision-making processes of undertakings and trade associations is affected by the uncertainty linked to the need to carry out a self-assessment of the antitrust risk. In this regard, the R&D BER and the HGL are only a partial response to the demand for legal certainty. This is particularly true as regards markets where dominant digital platforms are active. The ability of traditional operators to join forces in a reasonable time frame, can be decisive for their survival on these markets.

Moreover, finding a minimum common denominator between competitors is normally difficult and time consuming. Absence of legal certainty as regards compliance with antitrust rules will therefore be likely to delay (or impede) the achievement of the cooperation's objectives. Speed to scale is also decisive in digital, data driven markets. HGL are therefore not in line with the changes that the "digital revolution" has produced thus leaving operators with too much margin for interpretation. HGL should therefore be revisited in order to: (i) take into account the above mentioned important changes, and (ii) strongly reduce the margin of interpretation. The degree of legal certainty ensured is therefore not sufficient to allow operators to reach scale or streamline their offers also taking into account the strong regulatory pressure applied on some economic sectors which already considerably limits operators' ability to achieve the mentioned objectives.

* 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

A safe harbour area for R&D agreements is an important added-value for legal certainty. Agreements falling in the safe harbour area can be quickly implemented so that parties can timely join forces (and/or reach scale) and produce the envisaged pro-competitive effects on the market. The Specialisation and R&D BERs contain safeguard clauses allowing the withdrawal of exemptions where market conditions make the agreements incompatible with Article 101 TFEU. The positive effects that a BER produces on legal certainty and on the competitive structure of the market would, therefore, make it advisable to widen as much as possible their scope of application. GSMA would therefore ask to: (i) extend the use of BERs to other categories of agreements (standardisation, network sharing, etc.); (ii) widen the scope of BERs by changing the exemption criteria. Exemptions should not be based on cumulative market shares but should be awarded by default in presence of a list of predefined conditions (i.e. elements justifying the presumption that the agreement has not an anti-competitive object and/or will produce anti-competitive effects) e.g: (i) "hard-core" clauses, (ii) non-hard-core clauses that can produce restrictions of competition not compensated by positive effects; (iii) a market structure likely to reduce or eliminate the positive effects of the agreement (e.g. dominant platforms are not present or likely to enter in the short term; high individual market share of the parties).

* 4.7 In your view, have the Specialisation BER and Section 4 of the HGL on production agreements provided sufficient legal certainty on production /specialisation agreements companies can conclude without the risk of infringing competition law?

- ☐ Yes
- ☒ No
- ☐ Do not know

* 4.8 Please explain your reply

Text of 1 to 1500 characters will be accepted

The same arguments used at 4.4 apply to this case. On top of that, both the Specialisation and R&D BER, consider relevant market shares in downstream markets when the cooperation regards a product used as input for that market. The same circumstances, are not taken into account to mitigate the impact of the cooperation where operators are joining forces exclusively to enter the downstream market. In such cases, a low market share of the participants in the downstream market indicates a lower impact and should influence the assessment of the impact upstream. Both the BERs and the HGL should therefore contain a rebuttable presumption that the mentioned cooperation agreements produce pro-competitive effects when they take place in markets which have been monopolised and/or where speed to scale is critical. It is important to specify that when cooperation is crucial to achieve scale and is exclusively aimed at providing an input downstream, the relevant market shares considered by the two BERs should be the downstream ones. GSMA finally considers that the HGL and the BER should pursue as main objective that of reducing to the least false positives (i.e. cases where a violation of 101.1 or failure to meet the criteria in 101.3 is wrongly assessed). On the contrary, the current structure of the mentioned documents is predominantly oriented at avoiding false negatives (i.e. cases where compliance with 101.1 or 101.3 is wrongly assessed). The same applies for Specialisation BER.

* 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

On top of the comments in 4.6, please note that:

(i) The HGL (and BERs) do not take into account the changes in the competitive landscape produced by the presence of dominant (quasi-monopolistic) digital platforms. A deep revision of the HGL as regards assessing competitive restrictions and market power is therefore needed.

(ii) For specialisation agreements regarding services that competitors provide at zero price, reference to market shares (based on turnover) leads to biased results. If market share thresholds are kept, they should therefore be modified. Thresholds should not refer to the cumulative market share of the parties but to the individual ones. If reference to the cumulative market share is maintained, thresholds should be significantly increased.

(iii) When cooperation is crucial to counterweight the market power of global players, the principle of

precaution suggests to prevent (probable) market tipping rather than the unlikely restrictive effects of the cooperation agreements. Market tipping is, in fact, difficult to reverse while, horizontal agreements' effects are easy to revert.

(iv) The HGL do not contain a detailed indications of clauses compatible with 101.1 and clauses needing an exemption under 101.3. As time to market and speed to scale are decisive, the margin for interpretation needs to be limited to the least necessary.

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

See above answers to questions 4.8 and 4.10

* 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

See above answers to questions 4.8 and 4.10

* 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*

See above answers to questions 4.8 and 4.10

* 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

GSMA's recent experience with a DOJ proceedings on its standardisation activities suggests that: (i) self-assessment does not guarantee the necessary level of legal certainty and, (ii) there is a margin for improving the content of the existing guidelines. On (i), GSMA considers it is important to adopt another BER regarding Standardisation agreements. Standardisation, in fact, requires a predictable and reasonably short timing for the adoption of standards. A BER would create the necessary legal certainty and make standardisation processes quicker and more predictable. On (ii), Section 7 of the HGL should introduce a general, rebuttable presumption that standardisation agreements comply with Article 101 TFEU. Such presumption should be applied based on the absence of specific, easy to detect, circumstances. This will make it easier to benefit from this safe harbour than with its current version (para. 280 to 286 of the HGL) which is based on a list of positive behaviours whose description has a relevant margin for interpretation. This change would give the necessary relevance to the procompetitive nature of these agreements which are the only alternative to global, proprietary solutions. It is finally important to change procedural rules so to ensure coordination among competition authorities in different jurisdictions. This is crucial to avoid that operators engage in forum shopping to distort the standardisation process.

* 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

Cooperation agreements and those aimed at developing and/or acquiring inputs necessary to operate in traditional and new markets (e.g. algorithms, datasets, APIs, personal assistants, audio-visual content, etc.) are the main (and often the only) instrument for MNOs to achieve scale and scope. Some do not fall into the current HGL categories. Parties will therefore need to rely on the general part of Section 1 HGL that only contains a description of the main provisions in 101.1 and 101.3 and doesn't give specific, detailed guidance on how to carry out a self-assessment of agreements not falling in one of the subsequent categories. Agreements not addressed in HGL's sections 2-7, therefore, do not receive any specific guidance on how to ensure compliance. This can be improved by: (i) adding a detailed and prescriptive analysis based on the

minimum common elements contained in the most relevant sections in Section 1 (notably information sharing and specification, joint production and joint commercialisation); (ii) introducing a general rebuttable presumption that cooperation agreements “by object” pursue pro-competitive outcomes are compatible with 101; (iii) taking into account the new competitive dynamics inherent to the presence of dominant digital platforms; and (iv) acknowledging that MNO cooperation that do not otherwise have the necessary scale, scope or trans-national footprint might be helpful, and in some cases even be essential, to allow them to compete effectively

* 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

The HGL (and BERs) don't contain any reference to the impact that data as a new factor of production has on new and traditional product markets. Data on topics such as customer profiles and habits is necessary to design goods and services, and to deliver them in a targeted manner. Access to a large volume of high-quality data can be critical to the success of market entry and expansion, to the ultimate benefit of consumers. It is therefore likely to be beneficial to the development and maintenance of effective competition, to allow companies to pool data that is not commercially sensitive with their competitors (in a manner compliant with the GDPR and other relevant legislation). As Executive Vice-president Vestager has mentioned in a recent occasion “(...) combining companies' data into a single, big pool might give you insights that you couldn't get from each one on its own.” This has a few consequences: 1) The assessment of horizontal cooperation agreements in both the HGL and BERs should be revised so to take into account the impact of data on competitive dynamics in the relevant markets; 2) The HGL should also analyse new categories of cooperation agreements aimed at creating scale, scope or skills for the use of data that is not commercially sensitive; 3) The existing BERs should be amended and new BERs should be adopted that will capture the new market dynamics (e.g. data sharing and pooling agreements). Undertakings entering data-driven markets will normally be constrained by the limited amount and variety of data at their disposal. Merging their personal and non-personal data into pools is therefore one way to gain scale and scope for the data they can use so to bring the quality of data analytics to a sufficient level. This, in turn, can partially address the fact too few firms hold too much data. The pooling of data that is not competitively sensitive should therefore be generally allowed and, in presence of specific circumstances, encouraged. Data pooling (and data sharing) agreements should be addressed in the HGL and be the object of an additional BER. The same applies to agreements aimed at reducing the cost for the roll out on important infrastructures which are of high public interest and which will substantively contribute to EU economic and social development. This is the case of electronic communication networks. This part continues in our answer at 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

* 4.26 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

See answers to questions 4.1 to 4.22 above.

* 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

See answers to questions 4.1 to 4.22 above.

* 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

See answers to questions 4.1 to 4.22 above.

- * 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

See answers to questions 4.1 to 4.22 above.

- * 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

See answers to questions 4.1 to 4.22 above.

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

As mentioned in other parts of this document, the definitions are based on a price-centric approach to markets, which, with the advent of new data-centric markets and products, can fail to capture real market dynamics.

In some cases, in fact, joint production and/or specialisation agreements can be aimed at creating or distributing products and services which will not be sold at a price but will be provided in exchange for data created by users.

Article 1 of the Specialisation BER should therefore represent this new element in its definitions (e.g. points "n" and "r") of Article 1.

* 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

There seems to be a contradiction between Article 1.1(a) and 2.3 of the Specialisation BER. According to Article 1.1(a), "specialisation agreement" means a unilateral specialisation agreement, a reciprocal specialisation agreement or a joint production agreement". Article 2.3 on the contrary states that: "The exemption provided for in paragraph 1 shall apply to specialisation agreements whereby:

- a) the parties accept an exclusive purchase or exclusive supply obligation; or
- b) the parties do not independently sell the specialisation products but jointly distribute those products.

Neither the agreements in a) nor those in b) seem to capture the characteristics of joint production agreements. On the contrary, point b) clearly refers to joint commercialisation agreements which are the object of a different Section of the HGL than the one dealing with Specialisation and joint production. It would therefore be necessary to clarify the underlying rationale of this apparent inconsistency (if any) and to clarify it.

* 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

Market shares are not anymore an adequate indicator of market power and/or potential competitive restraints because: (i) An ecosystem where digital services are provided for free or at prices not connected to real costs, market shares based on turnover are unlikely to reproduce the real market dynamics. In such cases, other factors than turnover are taken into account (e.g. control of relevant datasets and data sources; (ii) Where dominant digital platforms are present and the main objective of the cooperation agreement is to create an alternative to incumbents' services and products, a rebuttable presumption that those agreements do not infringe Article 101 should be introduced. The presumption should not be based on a market share threshold but: (i) on specific market dynamics (e.g. absence of dominant digital platforms) or, (ii) on the presence of specific restrictive clauses in the agreement (e.g. exclusivity clauses, clause introducing unnecessary restrictions, etc.); (iii) If market share thresholds are maintained, they should be substantively increased. According to the BER on Specialisation Agreements: "The benefit of the exemption established by this Regulation should be limited to those agreements for which it can be assumed with sufficient certainty that they satisfy the conditions of Article 101(3)." In the spirit of the above-mentioned need to avoid false positives, the 20% market share would need to be substantively increased or eliminated.

- * 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

Article 4 should be modified so to make restrictions listed in this Article the only element preventing the application of the exemption in Article 1 to agreement between parties exceeding the market share threshold. The list should therefore be complemented with other restrictions to competition (not necessarily hard-core) considered incompatible with the exemption. Accordingly also Article 1 should be modified so that the 20% threshold will be eliminated or transformed in a complementary criterion for exemption.

- 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

As mentioned in several replies above, BERs should change the approach applied so far, especially in markets affected by the presence of digital dominant platforms. BERs should therefore apply a rebuttable presumption that horizontal cooperation agreements aimed at creating or stimulating additional competition to those platforms deserve exemption (or are not even in breach of 101.1). This should result in the elimination of the exemption threshold based on parties' cumulative market share and its substitution with qualitative criteria related to the absence of incompatible restrictions and/or the presence of specific market characteristics.

If the legislator would decide to keep the market share based thresholds, the following changes should be applied:

- (i) Reference to market shares in the downstream market as a decisive element also to exempt agreements where cooperation upstream is aimed at producing/creating an input for the downstream market;
- (ii) In data driven markets and/or in markets characterised by the presence of products and services provided at zero price, market shares should also be calculated based on the control/access to relevant datasets or data sources;
- (iii) More in general, market shares based on turnover should be maintained as a fall back criterion applicable as an exception for those markets not affected (or affected to a limited extent) by the presence and activity of digital platforms and/or by the provision of products and services at zero price.

* 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

Both BERs and HGL need to be updated as they fail to capture the impact of data as a new factor of production. As a consequence:

- 1) The analysis of the different categories of horizontal cooperation agreements should be revised so to take into account this new element;
- 2) A new section of the HGL and new BERs should be introduced that cover cooperation agreements aimed at creating scale, scope or skills for the use of data;
- 3) Agreements aimed at reducing the cost for the roll out on important infrastructures which are of high public interest should also be exempted.

We have explained at question 4.22 why data pooling and data sharing agreements should be specifically addressed in the HGL and should also be the object of an additional BER. The same applies to agreements aimed at reducing the cost for the roll out on important infrastructures. This is the case of electronic communication networks (notably 5G mobile networks). Joint efforts to roll out new 5G networks have several efficiencies (quicker and cheaper roll out, broader and faster coverage, lower environmental impact, etc.) most of which are automatically passed on to consumers. Such agreements are also pro-competitive as they intensify competition at the retail level thus introducing retail innovation in terms of speed, capacity, new services, etc. Impact on competition is lower when network sharing regards 4G and, particularly, 5G roll out. Thanks to the advent of full IP-based networks and the related infrastructure innovations service differentiation does not come anymore from the performance of the RAN networks but from the characteristics of the specific network slices. Network virtualisation and slicing facilitate sharing of active access infrastructure without compromising differentiation. What is more, tailoring flexibly to different parties sharing an active infrastructure is at the core of network sharing standardisation efforts in 3GPP. RAN sharing should therefore be normally permitted (except in presence of special circumstances). Spectrum sharing and core network sharing, however need to be considered on a case by case basis at this stage of technological development, as they still play a role for quality and service functionalities in 4G. This will shift with the full advent of 5G technology and networks. In any case, the case-by-case analysis will need to take into account the important efficiencies that a faster and more complete roll out of 5G networks implies. The mentioned agreements, therefore, should be considered in principle pro-competitive and should be both covered by a BER and addressed specifically in the HGL.

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

From GSMA point of view, any instrument that increases legal certainty in assessing horizontal cooperation agreements is an important improvement and a source of substantive savings. In particular, we are quite surprised to read that legal fees or delays in implementation are considered as an example of costs connected to the application of HGL or BERs.

We think that the reality is quite different. Absence of legal tools such as the HGL or BERs will normally trigger much higher legal fees and much longer delays in implementation.

As an example, absent the HGL in-house or external lawyers will need to make a much more complex assessment of the horizontal cooperation agreement in question as they will need to base it on all the relevant EU case law. In most cases this will imply: (i) many more billable hours; (ii) need to involve more senior lawyers; (iii) a final assessment providing a lower degree of legal certainty.

All these elements imply higher costs and longer delays.

In light of the above, GSMA considers that the right benchmark to evaluate efficiency of HGL and BERs is not a situation where these instruments are absent. On the contrary, the most appropriate benchmark is a different version of those documents where: (i) the scope of agreements falling in the safe harbour(s) has been extended; (ii) a presumption of compatibility has been introduced and the burden of proof inverted; (iii) the margin for interpretation has been very much reduced.

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

Text of 1 to 1000 characters will be accepted

Non-exhaustive list of monetary elements:

- Legal fees of external lawyers' to assess the antitrust compliance risk linked to the negotiation, conclusion and implementation of agreements;
- Salary of the parties' staff involved in negotiations and discussions that would have been avoided with more legal clarity;
- Additional capex and/or opex linked to the need to prevent hypothetical antitrust risk (e.g. the service /product will have some features introduced exclusively for compliance reasons)
- Missed business opportunities linked to a slower time-to-market of products/services

- Slower entrance of an important competitor e.g. telcos try to develop a product or service (messaging, IoT, cloud, personal assistant, AR/VR, etc.) competing with incumbent platforms' services but they market it too late (e.g. once the market has already tipped)
- Loss of consumers' welfare for absence of an important alternative possibly applying stricter data protection standards

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

It is not possible to give such an estimate. It is possible, however, to give a practical example of how insufficient legal certainty can affect (also economically) a trade association and its members

5.4 Please explain how you calculate these costs

Text of 1 to 1500 characters will be accepted

GSMA has been active in developing specifications in the last few years. Notwithstanding these activities are monitored by internal and external antitrust lawyers, it is not possible to adequately address the relevant antitrust risks and prevent the opening of antitrust proceedings by relevant competition authorities. This costs a lot to the organisation in terms of (preventive and reactive) legal fees as well as in terms of significant delay in the adoption of the relevant standards and/or specifications.

It is important to highlight that, in the present situation, most of the mentioned costs are an inherent part of the process due to the insufficient degree of legal certainty available or achievable.

This situation could be substantively improved by offering to the parties to standardisation agreements: (i) a wider and easier to apply safe harbour or, (ii) the possibility to ask a formal preliminary assessment of the relevant agreement(s) to the European Commission. Last but not least, in some cases, the lack of certainty caused by the self-assessment regime not only involve significant costs for companies in terms of their business risk profile, but the absence of formal comfort from the European Commission can leave them more exposed to regulatory action in other jurisdictions than might otherwise be the case.

* 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

See answer to 5.1, 5.2 and 5.3 above

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

See answer to 5.3 above.

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

See answer to 5.1, 5.2 and 5.3 above.

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

See answer to 5.3 above.

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

All these instruments increase legal certainty, reduce the above mentioned costs and missed opportunities. Giving companies more certainty will certainly allow them to create more and better products and services that will ultimately benefit consumers.

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

* 5.16 Please explain your reply

Text of 1 to 1500 characters will be accepted

See answer to 5.1, 5.2 and 5.3 above.

* 5.17 Regarding the **Specialisation BER**

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

* 5.18 Please explain your reply

Text of 1 to 1500 characters will be accepted

See answer to 5.1, 5.2 and 5.3 above.

* 5.19 Regarding the **HGL**

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

* 5.20 Please explain your reply

Text of 1 to 1500 characters will be accepted

See answer to 5.1, 5.2 and 5.3 above.

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	Digital transformation	Article 3 and 4 of the Specialisation BER and Articles 4 and 5 of R&D BER	The exemption based on market share thresholds should be changed as well as the role of hard-core restrictions and the list included in the BERs. A presumption of compatibility with Article 101 should also be included
2	The emergence of dominant digital platforms	Article 3 and 4 of the Specialisation BER and Articles 4 and 5 of R&D BER	
3	The impact of data on competition in both innovative and traditional markets	Article 3 and 4 of the Specialisation BER and Articles 4 and 5 of R&D BER	
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

As mentioned in the answers to questions in section 4 above, GSMA considers both the HGL and BERs extremely relevant but widely insufficient in the present scenario. As a consequence both the HGL and the existing BERs are no longer sufficiently relevant as they should be modified so to: (i) enlarge their scope of application; (ii) extend them to new categories of agreements and; (iii) reverse the approach on the basis of which exemptions are awarded or (more in general) article 101.1 is applied to horizontal cooperation agreements.

See also answers to questions in Section 4 above.

* 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

See answers to question 6.3 above and answers to questions in Section 4 above.

* 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

See answer to question 6.3 and to questions in Section 4 above.

* 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

See answer to question 6.3 and to questions in Section 4 above.

* 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

See answer to question 6.3 and to questions in Section 4 above.

* 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

See answer to question 6.3 and to questions in Section 4 above.

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

The issues, mentioned in previous answers, that justify a profound revision of both the HGL and BERs (thus introducing a wider and easier to apply safe harbour) are also mentioned in important policy documents produced by the European Commission.

The first and most important document is the letter from President Von der Leyen to Vice-president Vestager.

Another important document with which HGL and BERs should be coherent is the report: "Competition policy for the digital era" commissioned by the European Commission.

* 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

In its letter to vice-president Vestager the President explains that: "The digital transition will have an impact on every aspect of our economy and society. Your task will be to ensure that Europe fully grasps the potential of the digital age and strengthens its industry and innovation capacity."

Subsequently, in explaining that competition law enforcement should be strengthened the letter states that:

"Your task over the next five years will be to ensure our competition policy and rules are fit for the modern economy, vigorously enforced and contribute to a strong European industry at home and in the world."

Last but not least, the letter also clarifies that:

"Competition will have an important role in our industrial strategy. The competitiveness of our industry depends on a level playing field that provides business with the incentive to invest, innovate and grow."

As regards the report: "Competition policy for the digital era" commissioned by the European Commission, it clearly identifies the main characteristics of the digital economy i.e.: Network externalities, the role of data, extreme return to scale and economies of scope. The report also confirms that "large incumbent digital players are very difficult to dislodge". It thus confirms the assumption that creating additional competitive constraints for these operators has important pro-competitive consequences, normally outweighing the (possible) negative ones.

In light of the above, in situations where horizontal cooperation agreements contribute to creating and/or strengthening the competitive appeal of alternative products or services, a proportionate and vigorous enforcement of competition law rules implies focusing on the prevention of an unlevelled playing field and/or

market tipping. Potential restrictions of competition deriving from horizontal cooperation agreements (not included in the list of major restrictions preventing the exemption) have a much lower impact on the market and, normally, do not produce irreversible effects on the market.

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

See above answers to questions in Sections 4 and 5

* 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

See above answers to questions in Sections 4 and 5

* 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

See above answers to questions in Sections 4 and 5

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

Please see further comments on the accompanying document attached in section 9.2

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

8060c078-773e-4699-806c-6f60c0cf2aac

/Accompanying_paper_to_GSMA_response_to_Horizontal_Guidelines_consultation.pdf

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

- ☒ Yes
☐ No

Contact

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