

Factual summary of the contributions received during the public consultation on the evaluation of the two block exemption regulations and the guidelines on horizontal cooperation agreements

This document should be regarded solely as a summary of the contributions made by stakeholders during the public consultation on the antitrust rules. It cannot in any circumstances be regarded as the official position of the European Commission or its services and therefore does not bind the Commission.

This document only provides a factual summary. A later synopsis report as an annex to the Staff Working Document will provide a more detailed overview of the consultation activities. This summary does not prejudice the findings of the Staff Working Document to be published at the end of the evaluation phase. When views of stakeholders are mentioned, these simply represent examples and not the complete picture.

The European Commission ('Commission') ran a public consultation on the Commission's dedicated Better Regulation page on the evaluation of competition rules on horizontal agreements between 6 November 2019 and 12 February 2020. The competition rules on horizontal agreements that are covered by the evaluation are 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'); and the Commission Guidelines on horizontal cooperation agreements ('HGL'). The HBERs will expire on 31 December 2022.

The public consultation targeted both citizens and other stakeholders in order to gather views on the functioning of the current HBERs and HGL. The Commission published the survey in English, French and German. Participants could reply in any of the official languages of the European Union ('EU'). The Commission promoted the public consultation through various stakeholder meetings, a press release, and DG Competition's website.

The public consultation took the form of an online survey, with a mix of closed and open questions.

The Commission received 77 contributions to the public consultation submitted through the online survey. 8 other stakeholders also submitted documents in the context of the public consultation, but not through the Commission's Better Regulation page. These largely echoed the issues raised in the contributions to the public consultation. Due to the wide scope of the HBERs and the HGL, many parts of the survey were only relevant for some stakeholders.

The statistics computed in this summary are based only on contributions to the public consultation submitted through the online survey.

Due to a technical failure of the uploading option provided in the online survey tool, in several instances the Commission had to collect and upload manually the attachments that respondents intended to submit with their reply. This problem and other technical issues with the Better Regulation pages meant that there was a delay in publishing the contributions.

1. Profile of respondents to the online survey

General description

Among the 77 respondents, there are 3 academic and research institutions, 30 business associations, 25 companies/business organisations, 2 non-governmental organisations, 1 public authority, 1 EU citizen, 1 trade union, and 14 others (8 of which are law firms).¹ The majority of contributions were submitted in English, German and French. Figure 1 below illustrates the types of respondents.

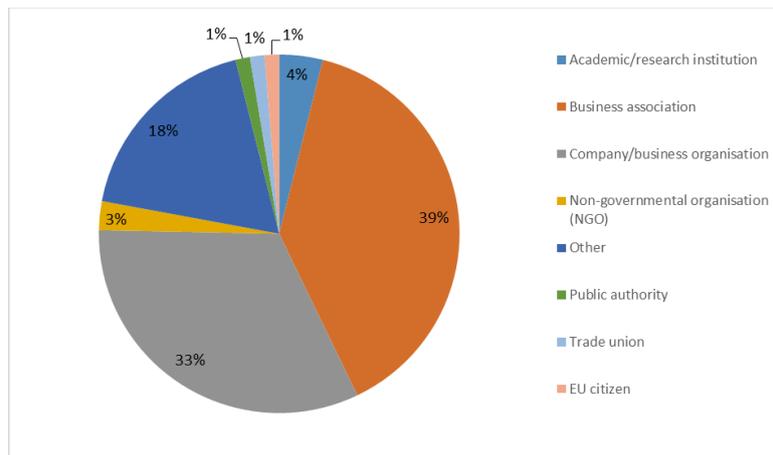


Figure 1. (Q2.5) Respondent type

The distribution of replies (76 respondents apart from the private citizen) across organisation size is tilted towards large organisations (see Figure 2 below), with 39 large (250 or more employees), 15 small (10 to 49 employees), 12 micro (1 to 9 employees) and 1 medium organisation(s) (50 to 249 employees) replying.

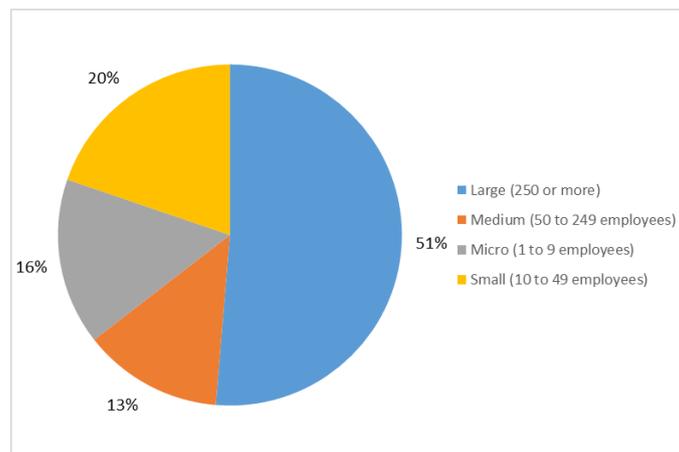


Figure 2. (Q2.10) Size of organisations

¹ Some respondents mistakenly classified themselves incorrectly (for instance, some law firms classified themselves as business associations, while in fact they classify as 'others'). The Commission corrected these mistakes for the purposes of this summary and established the statistics on the basis of the corrected dataset.

The distribution of replies (76 respondents apart from the private citizen) across organisation scope is tilted towards international organisations, with 52 international (68%) and 24 national (32%) organisations.

Business associations that responded either represent the interests of national members in specific industry sectors or focus their activities on a specific sector but have members in several Member States or the entire EU, for instance those active in the telecommunications sector.

The law firms represent the interests of several clients. These respondents have their headquarters in Belgium, France, the United Kingdom and the United States but tend to have clients in several Member States and beyond.

The academic and research institutes that responded to the consultation come from Belgium, Germany and Italy. All 3 share a specific interest in intellectual property licensing.

The trade union that responded is an umbrella organisation for trade unions, representing 90 national confederations and 10 sectoral federations from 38 countries.

The interests of the 2 non-governmental organisations lie mainly in the area of fair trade.

As far as companies/business organisations are concerned, 21 out of 25 were large, 2 were medium and 1-1 were micro and small in size (see Figure 3 below).

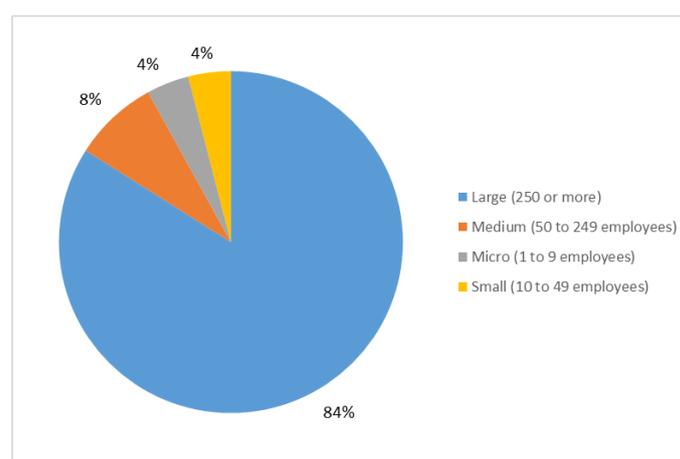


Figure 3. (Q2.10 with Q2.5) Size of companies

21 out of the 25 companies/business organisations were international (84%) and 4 were national (16%) in scope. The activities of the international companies typically cover several EU Member States, with each EU Member State having at least 5 respondent companies operating there. Of the national companies, 2 operate in Germany and 1-1 in Italy and Lithuania.

The companies/business organisations that responded to the public consultation cover several sectors of the European economy. Table 1 provides an overview of the distribution of the companies/business organisations across the 2-digit NACE Rev.2 code.² Many companies indicated more than one sector

² See <https://ec.europa.eu/eurostat/documents/3859598/5902521/KS-RA-07-015-EN.PDF/dd5443f5-b88640e4-920d-9df03590ff91?version=1.0>.

where they are active, and some of them indicated that the list of sectors they specified is not exhaustive.

	NACE	Count
	06 Extraction of crude petroleum and natural gas	1
	19 Manufacture of coke and refined petroleum products	1
	20 Manufacture of chemicals and chemical products	2
	23 Manufacture of other non-metallic mineral products	1
	26 Manufacture of computer, electronic and optical products	7
	27 Manufacture of electrical equipment	1
	28 Manufacture of machinery and equipment n.e.c.	1
	29 Manufacture of motor vehicles, trailers and semi-trailers	2
	30 Manufacture of other transport equipment	1
	35 Electricity, gas, steam and air conditioning supply	3
	42 Civil engineering	1
	46 Wholesale trade, except of motor vehicles and motorcycles	1
	47 Retail trade, except of motor vehicles and motorcycles	5
	49 Land transport and transport via pipelines	2
	58 Publishing activities	2
	60 Programming and broadcasting activities	3
	61 Telecommunications	6
	62 Computer programming, consultancy and related activities	5
	63 Information service activities	1
	64 Financial service activities, except insurance and pension funding	1
	71 Architectural and engineering activities; technical testing and analysis	1
	72 Scientific research and development	2
	73 Advertising and market research	1

Table 1. (Q2.13) Companies/business organisations' activities across the 2-digit NACE Rev.2 code

Contributors and horizontal cooperation

Of the 25 companies that responded to the consultation, 13 participated in R&D cooperation, 7 were parties to cooperative production/specialisation agreements, 10 were involved in information sharing agreements, 10 participated in purchasing cooperation, 7 in commercialisation agreements, 11 in standardisation cooperation agreements. 8 companies indicated that they participated in other types of agreements, such as sustainability agreements, infrastructure sharing agreements, sharing of logistic facilities, etc.

Companies relied upon the exemptions provided by the R&D BER (8 companies) and by the Specialisation BER (3 companies).

Of all 77 respondents, the majority consult the HBERs and the HGL at least once a year while many of them indicated that they consulted the texts frequently (see Figure 4).

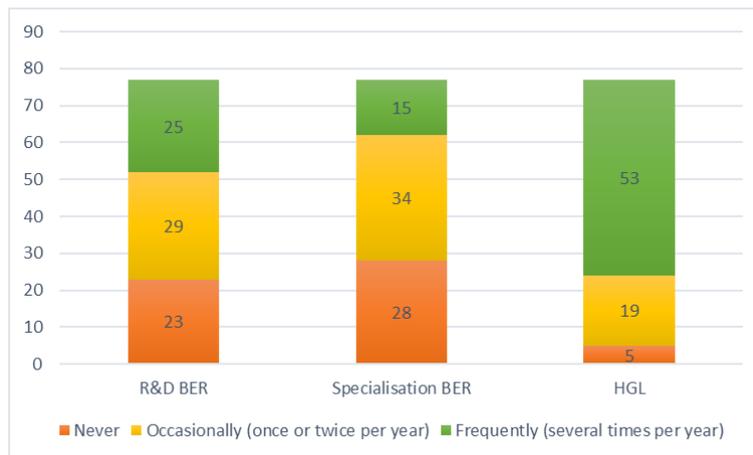


Figure 4. (Q3.6, Q3.7, Q3.8) How often respondents consult the different texts for guidance

2. Contributions to the online survey

The aim of the public consultation was to collect views and evidence from stakeholders on the following five evaluation criteria: effectiveness, efficiency, relevance, coherence and EU added value. The below summary of the contributions to the online survey is therefore structured around these five evaluation criteria.

Effectiveness (Have the objectives been met?)

In order to evaluate whether the HBERs, together with the HGL, have met their objectives, stakeholders were asked to answer three sets of questions.

The first set of questions inquired whether the respondents perceived the HBERs and the HGL to have contributed to the **promotion of competition in the EU**. 35% of the respondents noted an overall positive effect and 43% perceived this contribution to be only limited. 4% of the respondents thought that the rules are neutral regarding competition in the EU (see Figure 5). Respondents with a positive opinion supported their view by pointing out, for example, that the HBERs and HGL contribute to an increased level of legal certainty. They also mentioned that the rules acknowledge the pro-competitive nature of many horizontal cooperation agreements. Respondents also pointed to the contribution of the rules to the uniform application of Article 101 of the Treaty on the Functioning of the European Union ('TFEU') in all Member States.

The respondents that consider the positive effect to be limited mentioned as reasons for this, for example, the perceived lack of guidance regarding certain types of horizontal cooperation. Sustainability agreements were mentioned here in particular as an area where guidance was lacking. Contributors also mentioned that some details should be clarified or updated in order to provide more legal certainty. Respondents also believed that in order for the rules to be relevant, dynamics of the digital economy would need to be reflected in them. Other respondents also believed that the rules were too strict or inflexible.

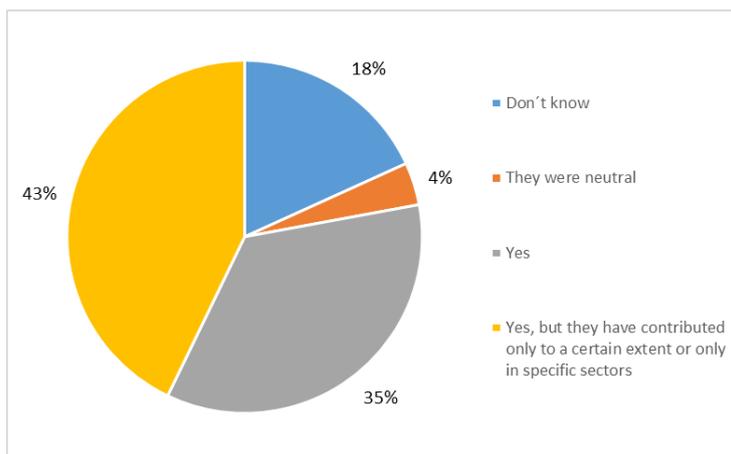


Figure 5. (Q4.1) Have the HBERs and the HGL contributed to promoting competition in the EU (all respondents)?

Note that companies/business organisations were more critical about the rules than other types of respondents (see Figure 6 below).

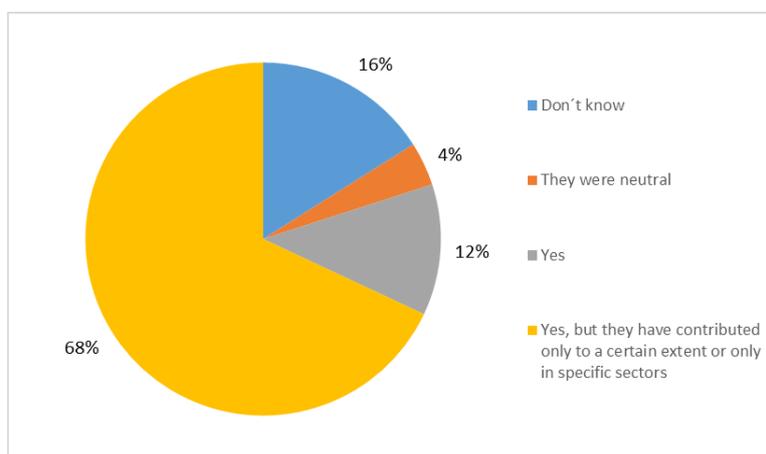


Figure 6. (Q4.1 with Q2.5) Have the HBERs and the HGL contributed to promoting competition in the EU (companies only)?

The second set of questions aimed at assessing the **level of legal certainty** provided by the current legal framework. In this set, a first group of questions aimed at identifying whether the HBERs and the specific sections in the HGL have provided sufficient legal certainty to conclude R&D and production/specialisation agreements without the risk of infringing competition law. A subsequent number of questions aimed at gauging whether the HBERs in themselves increased legal certainty, in comparison to a situation where only the HGL were available. Finally, a number of questions measured whether the remaining individual chapters of the HGL, dealing with information exchange, purchasing, commercialisation, and standardisation agreements have provided legal certainty. The Commission also asked this question in relation to other types of cooperation agreements, not specifically covered by the HGL.

In their replies, respondents explained that while the current rules are useful as guidance, recent market developments and business realities³ have diminished the legal certainty provided. They

³ The respondents provided more detailed information about these market developments in reply to the question asking them to list specific areas where the current texts no longer met their objectives due to major trends and developments (see below, in the section on relevance).

argued that the Commission needed to update and clarify the rules in relation to certain aspects in order to provide or increase legal certainty. Respondents pointed at developments in the case law of the European Court of Justice in this respect. Respondents also argued that the safe harbours provided by the rules would need to be expanded in order to allow for more instances of horizontal cooperation. Respondents felt that the amount of legal certainty provided is diminished by the lack of market share thresholds and other safe harbours outside the field of application of the two HBERs. The rules are also viewed by respondents as too complex and technical and therefore difficult to interpret, which again diminishes legal certainty.

Given these shortcomings, respondents did not consider that the current rules (in both HBERs and HGL combined) provide sufficient legal certainty for any type of cooperation agreements. The responses are most balanced (i.e. the number of ‘no’ and ‘yes’ replies are nearly equal) for production/specialisation agreements (noted as ‘Production agreements’ in Figure 7 below) and standardisation agreements. The opinion regarding legal certainty was least favourable on information exchange and for agreements not specifically addressed in the HGL (see Figure 7).

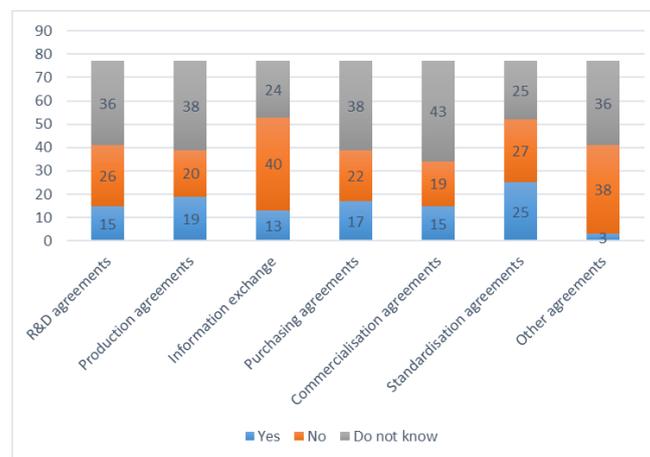


Figure 7. (Q4.3, Q4.7, Q4.11, Q4.13, Q4.15, Q4.17, Q4.19) Do the current rules provide sufficient legal certainty?

Respondents also expressed their opinion on whether the **HBERs increase legal certainty** compared with a situation where only the HGL applied. Though nearly half of the respondents could not answer these questions, among those who answered, for both block exemption regulations, the reply was a strong ‘yes’ (see Figures 8 and 9 below). In their clarification, respondents argued in favour of ‘yes’ notably because the HBERs are binding on Member State courts and authorities and the HGL are not. Other respondents replied that the safe harbours provided by both HBERs offer more legal certainty than is offered by self-assessment under Article 101 TFEU. Two respondents were of the opinion that the Specialisation BER did not increase legal certainty compared with a situation where only the HGL applied but did not provide an explanation.

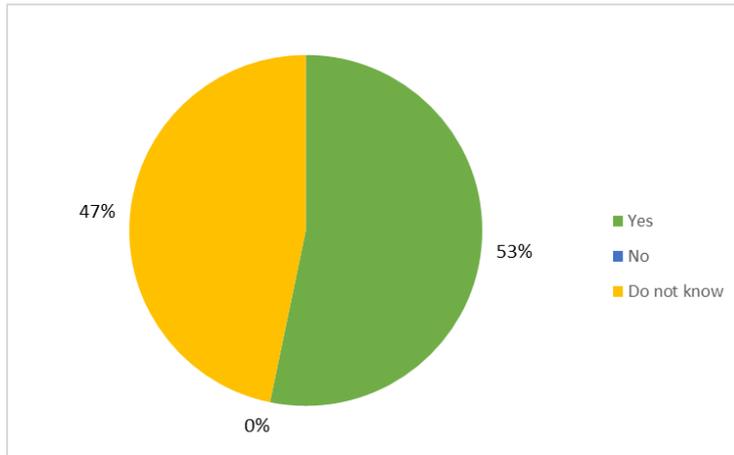


Figure 8. (Q4.5) Does the R&D BER increase legal certainty in addition to the HGL?

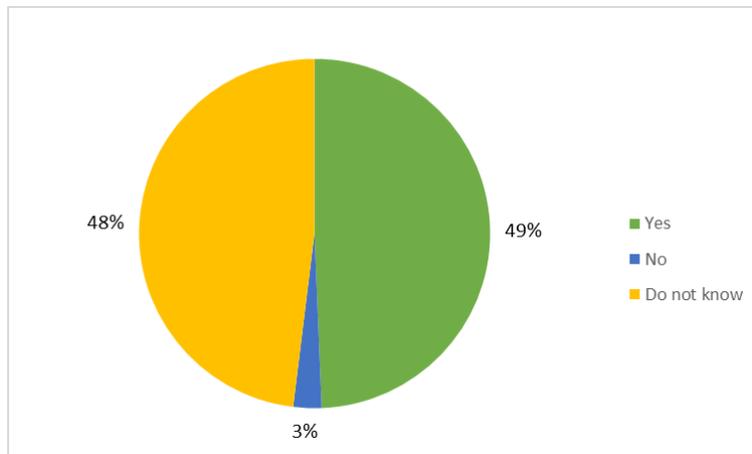


Figure 9. (Q4.9) Does the Specialisation BER increase legal certainty in addition to the HGL?

Respondents also answered the question whether there are other types of horizontal cooperation agreements outside those identified in specific sections of the HGL that should have been specifically addressed in order to increase legal certainty. While 33 respondents did not know how to answer this question, 42 of the remaining respondents replied with a 'yes' and 2 respondents thought that no other types of cooperation agreements would have had to be addressed (see Figure 10 below). Respondents replying with 'yes' considered that sustainability agreements (or 'environmental agreements' or 'social equity arrangements') deserved a specific section outside the examples given in the standardisation chapter. Respondents also mentioned that the information exchange section did not cover sufficiently new developments regarding benchmarking, data pooling and data sharing and other new types of collaboration regarding artificial intelligence, ecosystems, network sharing and platforms. Respondents made similar comments regarding the joint purchasing section that currently does not sufficiently cover new types of retail alliances or buyer arrangements.

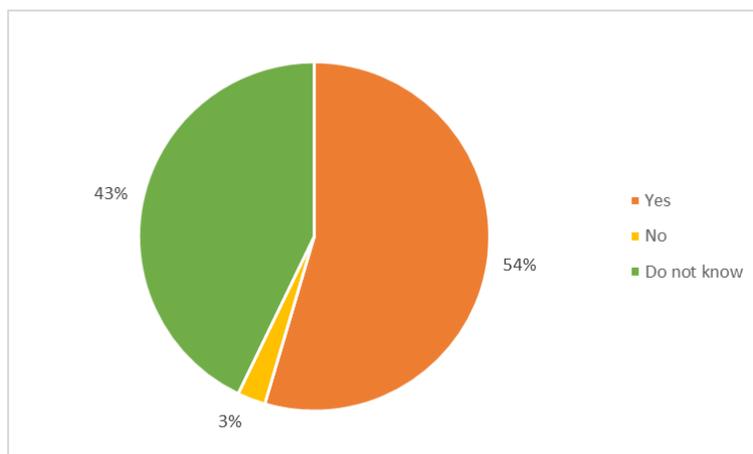


Figure 10. (Q4.21) Are there other types of agreements that should have been addressed in the HGL to increase legal certainty?

The third set of questions focussed on **whether the two HBERs correctly identify those horizontal cooperation agreements that are compliant with Article 101 TFEU**. As these questions require an in-depth knowledge of the applicable rules and experience with R&D and specialisation agreements, only a minority of respondents provided replies here (see Figures 11 and 12).

Regarding the R&D BER, the consultation asked stakeholders for their opinion whether the following elements correctly identify cooperation agreements that do not violate Article 101 TFEU (see Figure 11):

- The list of **definitions** that apply for R&D agreements that can benefit from exemption in Article 1 of the R&D BER;
- The **conditions for exemption** listed in Article 3 of the R&D BER;
- 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;
- The limits regarding the **duration of the exemption** provided for in Article 4;
- The list of '**hardcore restrictions**' 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; and
- The list of '**excluded restrictions**', i.e. obligations included in agreements to which the exemption does not apply, identified in Article 6 of the R&D BER.

As regards the list of definitions, respondents that provided explanations to their reply commented on the fact that certain definitions require further clarification. Regarding the conditions for exemption, they mentioned that the current rules are difficult to apply and no longer match business realities. Regarding the market share thresholds for competing undertakings respondents mentioned that they were too low or that it was difficult to define markets and establish the market shares with certainty. Concerning the duration of the exemption, 7 respondents mentioned that this provision would require clarification or that the limited duration should be abolished entirely. Similarly, 7 respondents commented that there should be no list of hardcore restrictions or that some of the items on the list needed clarification or deletion. One respondent also mentioned that the list of excluded restrictions was unduly strict.

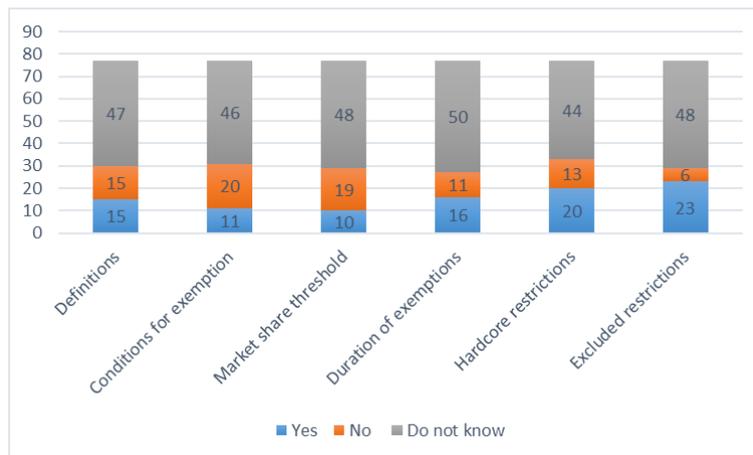


Figure 11. (Q4.23, Q4.25, Q4.27, Q4.29, Q4.31, Q4.33) Have the following provisions in the R&D BER correctly identified pro-competitive cooperation?

Regarding the Specialisation BER, the consultation asked stakeholders their opinion whether the following elements correctly identify cooperation agreements that do not violate Article 101 TFEU (see Figure 12):

- The **definitions** that apply for the purposes of the Specialisation BER, in Article 1
- The explanations on the **type of specialisation agreements** to which the exemption applies, provided by Article 2 of the Specialisation BER
- The **market share threshold** of 20% and its application, provided for in Articles 3 and 5 of the Specialisation BER
- The list of '**hardcore restrictions**' 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

Respondents commented on the complexity of applying the definitions to different types of specialisation agreements. One respondents pointed at incoherence between the definitions and the explanations of the specialisation agreements. As regards the market share threshold, some respondents found the 20% barrier too low and considered it inconsistent with the guidance provided in merger control. Regarding the list of hardcore restrictions, one respondent mentioned that the list should have been complemented with other excluded restrictions, as is the case for the R&D BER.

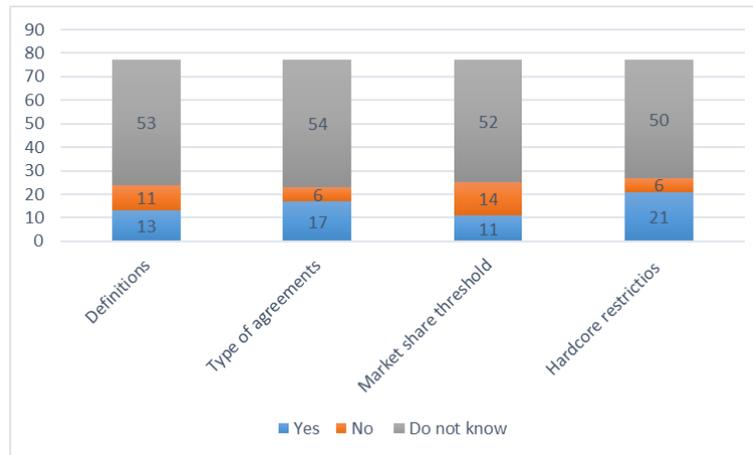


Figure 12. (Q4.35, Q4.37, Q4.39, Q4.41) Have the following provisions in the Specialisation BER correctly identified pro-competitive cooperation?

The next question was whether there were other elements, besides those listed in the previous questions that should have been clarified, added, or removed to improve the guidance given by the HBERs. Respondents raised a variety of potential improvements to the HBERs, ranging from the inclusion of provisions rewarding sustainability goals to an adaptation of the texts to mirror today’s technological and digital developments. As regards these developments, some respondents mentioned that there is a need for a much broader horizontal cooperation block exemption, with an application scope wider than R&D and specialisation agreements.

The consultation also asked stakeholders whether there are other types of horizontal cooperation agreements outside those identified in the R&D and Specialisation BERs that would satisfy the conditions of Article 101(3) TFEU. Among those who replied to the question, the majority agreed that there were such agreements (33 ‘yes’ and 4 ‘no’ replies, see in Figure 13 below). Horizontal cooperation agreements that were mentioned are, for instance, data sharing agreements, collective bargaining, sustainability agreements, joint purchasing agreements, joint bidding agreements, co(re)insurance agreements within the meaning of the former Insurance BER and joint commercialisation agreements. One respondent saw the need for a general horizontal block exemption regulation and referred to the example of the BER on vertical agreements. Another respondent pointed out that many other horizontal cooperation agreements may satisfy the conditions of Article 101(3) TFEU without expressing a need for another BER.

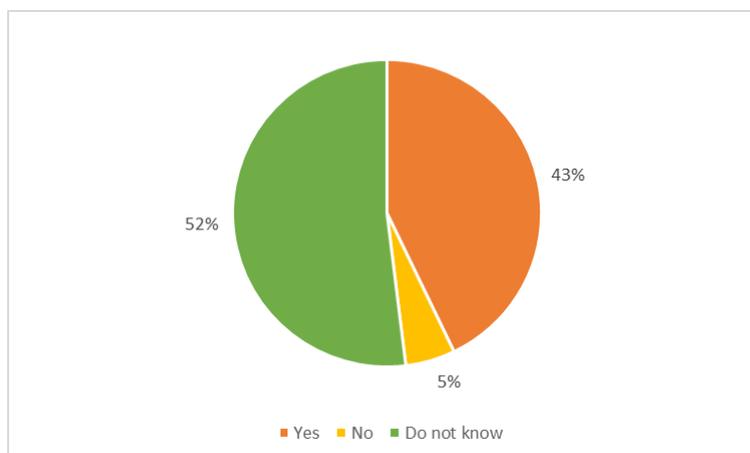


Figure 13. (Q4.44) Are there other types of horizontal cooperation agreements that would satisfy the conditions of Article 101(3)?

At the end of the section on effectiveness, the Commission asked respondents whether the HBERs and the HGL had any impacts that were not expected or not intended. The majority of those who replied to this question believe that indeed there were such unintended consequences (Figure 14 below). Respondents commented that the complexity of the current rules, notably as regards market definitions and calculation of market shares, has hampered the conclusion of horizontal cooperation agreements. Respondents also mentioned that they have applied a restrictive approach to the rules to ensure maximum legal certainty, thereby foregoing opportunities that would require self-assessment. Respondents also mentioned unintended effects as regards the joint purchasing rules in Section 5 of the HGL (2 respondents) and the rules on standardisation in Section 7 of the HGL (8 respondents).

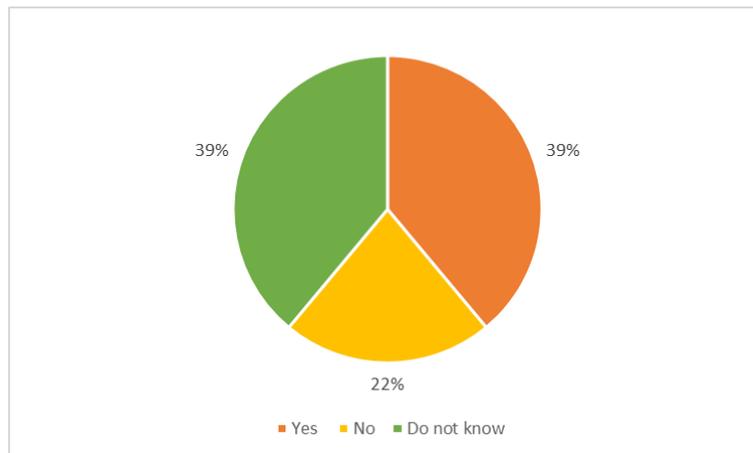


Figure 14. (Q4.46) Are there any unintended impacts of the HBERs and HGL?

Efficiency (Were the costs involved proportionate to the benefits?)

In this section of the survey, the Commission asked stakeholders about the costs and benefits associated with the competition rules on horizontal agreements and whether the costs were proportionate with the benefits.

The Commission first asked stakeholders about the different types of costs associated with applying the current R&D and Specialisation BERs and the HGL. Around 30 respondents stated that they did not know the costs, that they did not have an opinion on the costs or thought that the HBERs and HGL were not applicable to them; or that they could not quantify the costs; or that they had not incurred any costs related to the application of the legislation.

The remaining contributors mentioned, for example, legal costs in their answer. These legal costs relate to both internal and external legal advice. Respondents also mentioned costs of hiring economic consultants. One respondent also pointed to extra training costs.

Some respondents also replied that the legislation has caused market players to abandon or delay (the implementation of) business plans, and that this opportunity cost was caused by the legal uncertainty created by the rules or the excessive stringency of the rules.

Some respondents also stated that transaction and implementation costs were incurred due to ambiguities regarding, in particular, section 7 of the HGL that deals with standardisation. They also pointed out that SMEs tend to feel these costs the most.

Respondents pointed out that it was very difficult to impossible to estimate the costs of applying the HBERs and the HGL. One respondent tried to estimate them as the minimal legal costs to respond to standard essential patent ('SEP') licence demands (€5 000-10 000); another respondent as the conception (€10 000), set up and putting into place costs (€3 000) of compliance guidelines and procedures. One respondent presented a non-exhaustive list of monetary elements, including legal fees, salary of the parties' staff involved in negotiations, additional capex and opex linked to the need to prevent hypothetical antitrust risk, missed business opportunities, slower entrance of an important competitor and loss of consumers' welfare. Respondents also mentioned, referring to SEPs disputes, that the costs incurred were often so high that SMEs were forced to accept anticompetitive settlement terms under a non-disclosure agreement, or abandon their business ventures altogether.

The next question asked stakeholders for their views on how the costs generated by the application of the R&D or the Specialisation BERs or the HGL have evolved compared with the previous legislative framework (Reg. 2659/2000 on R&D, Reg. 2658/2000 on Specialisation agreements and the accompanying horizontal guidelines). 7 respondents believed that costs have increased and 3 were of the opinion that costs have decreased, while 67 could not reply to the question.

Among the 7 respondents that believed that costs have increased, one respondent from the insurance sector pointed out that relevant previous legislation for the German insurance industry was Insurance BER 358/2003 for standard policy conditions and safety devices (until 2010) and Insurance BER 267/2010 for joint statistics and for co(re)insurance agreements (until 2017). This respondent was of the opinion that these two pieces of legislation offered clearer requirements specifically for the insurance industry, which was why their costs increased. Another respondent answered that, in relation to section 7 of the guidelines, they have incurred additional training-related expenses. Two respondents pointed out that due to the excessive complexity of the rules and their lack of flexibility costs have remained high.

Another respondent noted that, independently of the rules in place, due to increased efforts by companies to find out whether they meet the exemption requirements, legal fees have increased. Another respondent echoed this view, as it believed that antitrust compliance costs in general have increased because enforcement policy has become stricter and the risks are much greater today.

Those 3 respondents that believed that costs, on the contrary, have decreased stated that the current legislative framework is easier to apply and clearer than the previous one. They also mentioned that the current HBERs and the HGL are more consistent amongst themselves and better drafted than their predecessors were. One respondent noted that a small cost decrease was due to the introduction of a number of clarifications in the current R&D BER in terms of hardcore restrictions and the grey list. Cost were further reduced due to R&D funding agreements now being covered and exclusive licensing to one of the parties being permitted.

A subsequent set of questions asked stakeholders what would have happened to the costs of applying the rules had the HBERs not been in place but only the HGL. The respondents that replied agreed in their reply (see below Figures 15-16) that costs would have increased, due to the loss of legal certainty and the loss of consistency the HBERs bring across the EU.

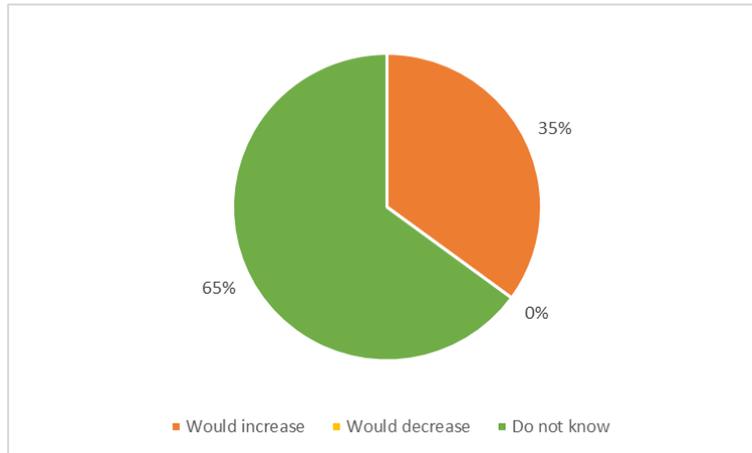


Figure 15. (Q5.8) Were the R&D BER not in place, what would happen to the cost of applying the rules?

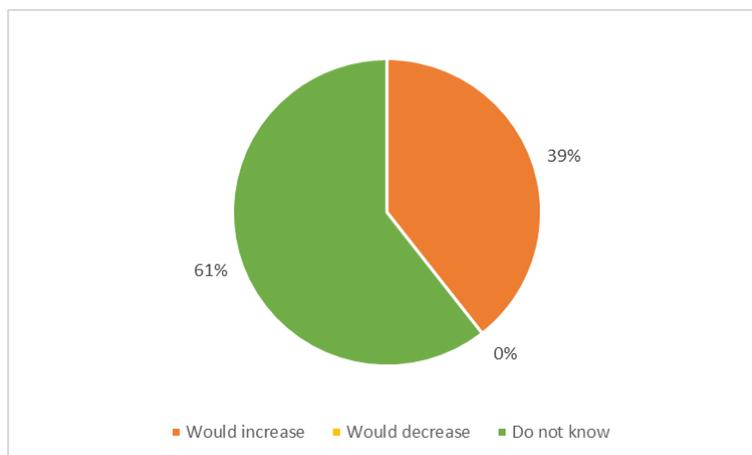


Figure 16. (Q5.11) Were the Specialisation BER not in place, what would happen to the cost of applying the rules?

When asked about the benefits of having the R&D and Specialisation BERs and the HGL, respondents mentioned, for example, increased legal certainty, decrease in legal and compliance costs and saving management time. They also mentioned that the reduction of costs is due to increased uniformity and the homogeneous application of the exemption requirements of Article 101(3) TFEU throughout the EU.

At the end of the section on efficiency, the consultation asked stakeholders to weigh the costs and benefits of applying the competition rules on horizontal agreements. They did this separately for the two HBERs and the HGL. Most of those respondents that could answer these questions were of the opinion that costs are proportionate to benefits (see Figure 17).

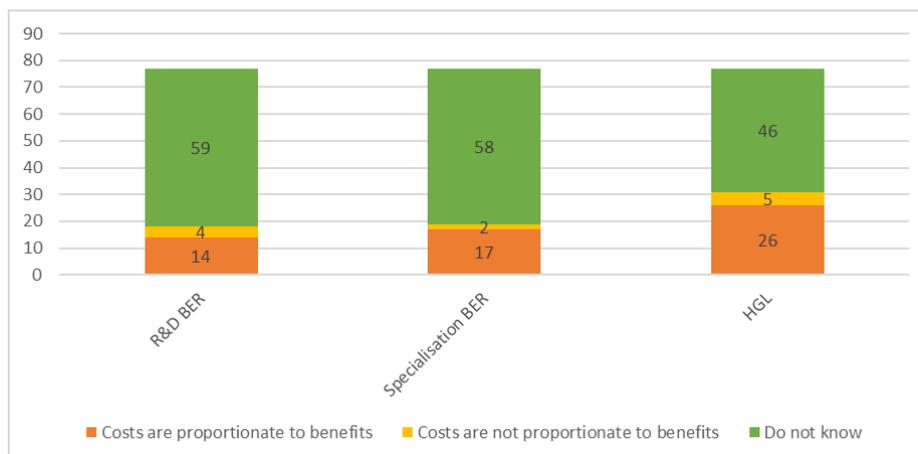


Figure 17. (Q5.15, Q5.17, Q5.19) Are the costs of applying the horizontal rules proportionate to their benefits?

Regarding the R&D BER, some respondents stated that an abolition of the R&D BER would lead to a material and significant increase in costs and a decrease in legal certainty because they would need to ensure compliance on a case-by-case basis. Nevertheless, they also mentioned that costs could be reduced and benefits increased if certain provisions of the R&D BER were further clarified to allow for more efficient internal assessment, if they were simplified or if they were improved and modernized to reflect business realities. One respondent pointed out that a massive revision of the R&D BER would entail additional costs, as it would require recalibration of existing horizontal agreements in order to ensure continued compliance.

Regarding the Specialisation BER, some respondents pointed out that the costs were proportionate to the benefits because the block exemption regulation creates legal certainty and decreases costs of legal compliance. Nevertheless, they also noted that the Specialisation BER could be further improved. Finally, one respondent replied that the block exemption regulation did not generate benefits to them.

Regarding the HGL, some respondents mentioned that costs of legal compliance would increase and legal certainty would decrease without the guidelines (and in particular without the safe harbours). Nevertheless, they noted that costs are sometimes disproportionate when it came to small projects and new markets or new developments (in the digital area) due to the costs of legal clarifications (e.g. market analysis to determine the relevant product markets). One respondent mentioned that due to some ambiguities with respect to Section 7 of the HGL, EU SMEs feel the costs of applying the HGL more acutely because they very often do not have expansive legal budgets to withstand years of SEP litigation. Further, one respondent noted that, for agreements outside the safe harbours, which required an assessment under Article 101(3) TFEU, the very high evidentiary standard set in Commission infringement decisions meant that the costs and legal risks were usually prohibitive. This could result in proposed cooperation agreements not taking place even if the parties were confident of significant efficiencies.

Relevance (Is EU action still necessary?)

In order to evaluate whether the objectives of the HBERs and the HGL are still up to date in light of major trends and developments, the consultation asked stakeholders several questions. First, they were asked to specify any major trends or developments that affected the application of the HBERs and the HGL. 52 respondents referred to such developments in their reply and their replies covered a wide range of topics.

The most important development according to respondents (25 responses) is climate change and the corresponding challenging environmental and sustainability goals. Respondents believe that this results in increased demand from consumers and businesses for sustainable, ethical and environmentally friendly business practices.

The second most important development for respondents was digitalisation (18 responses). This covered a wide range of issues such as increasing reliance on digital technologies, the impact of data on competition in both innovative and traditional markets, data pooling, data sharing and algorithms. Further issues that were mentioned in this regard were the digitalisation of the audiovisual business, more complex product and IT landscape, tendencies to more data and platform driven business models, emergence of two-sided technology platforms, artificial intelligence, Internet of Things, and the emergence of FinTech and cryptocurrencies.

Another important development was globalisation and increased international competition (13 responses). Respondents also specifically mentioned competition with companies from other jurisdictions where competition rules are less strict and that often EU companies have difficulties to compete alone, therefore they need to cooperate.

9 respondents also referred to the need to update the HBERs and the HGL in order to reflect recent developments in the case law of the European Court of Justice, for example, the case law on single economic entity.

Another development mentioned by respondents was the changing standardisation landscape (8 responses). They referred to, for example, the increased use of standard essential patents, the cross-sectorial and global nature of standardisation agreements, and that technology developments have caused wireless communication technologies as well as other standardised technologies to be implemented in new industry sectors. This has resulted in a variety of new market players, in particular in the Internet of Things and related sectors.

Some respondents also pointed at the emergence of purchasing alliances that are formed mainly by retailers.

Platforms were mentioned not only in the context of digitalisation but also regarding their increased importance in e-commerce and the gig economy.

Some respondents also believed that increased enforcement activity by competition authorities and the strengthening of private enforcement increases the need for more legal certainty relating to horizontal cooperation agreements.

Some respondents also mentioned that recent EU initiatives are not necessarily reflected in competition rules, for example in the area of sustainability and green technologies.

Other issues that were brought up by some respondents were, for example, the need for infrastructure sharing to roll out new technologies, the dissolution of traditional competitive structures and the blurring of lines between horizontal and vertical structures, the emergence of dual distribution, etc.

Figure 18 gives a visual representation of the developments mentioned.



Figure 18. (Q6.1) Major trends and developments that affect the application of competition rules on horizontal agreements

Nevertheless, in spite of the above major trends affecting the application of competition rules on horizontal agreements, most respondents considered that the rules are still relevant. The responses are summarised in Figure 19 below, for the R&D BER and corresponding section in the HGL, the Specialisation BER and corresponding section in the HGL (noted as ‘Production agreements’ in Figure 19 below) and for the remaining individual sections of the HGL.

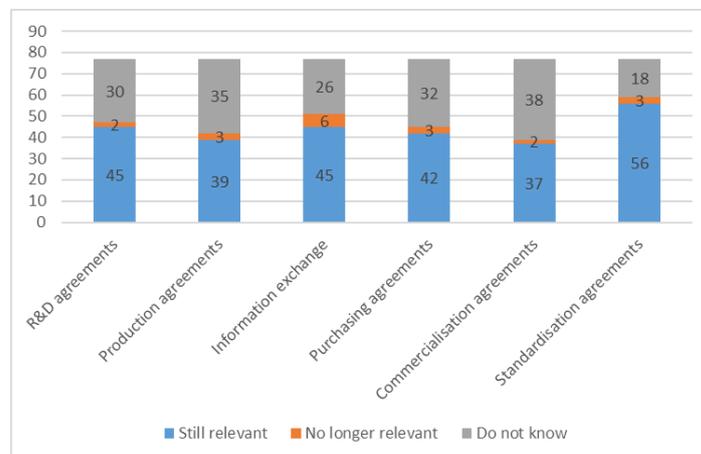


Figure 19. (Q6.2, Q6.4, Q6.6, Q6.8, Q6.10, Q4.12) Are the current rules still relevant?

Respondents’ replies regarding the relevance of the objectives of the competition rules on horizontal agreements very closely reflect responses regarding the effectiveness of the rules. While respondents believed that the objectives are still relevant, they were also of the view that the range of situations in which companies now cooperate requires an update to the rules. Some respondents would like to ensure that the rules reflect the Commission’s recent enforcement practice and that the examples are made more relevant to the modern digitalised economy. Similarly, some respondents believed that the rules should reflect the Commission’s wider policies and the needs of today’s society. The

Commission's Green Deal was mentioned in this regard. Some respondents also recommended, where applicable, to reflect recent case law of the European Court of Justice in the texts.

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

This section of the survey asked stakeholders whether the HBERs and the HGL are coherent with other legal instruments and policies.

The first question focussed on coherence with other Commission instruments that provide guidance on the interpretation of Article 101 TFEU (e.g., other Block Exemption Regulations, the Vertical Guidelines and the Article 101(3) Guidelines). 43% of the respondents believed that the rules are coherent with other such instruments (see Figure 20), 21% believed that they are not.

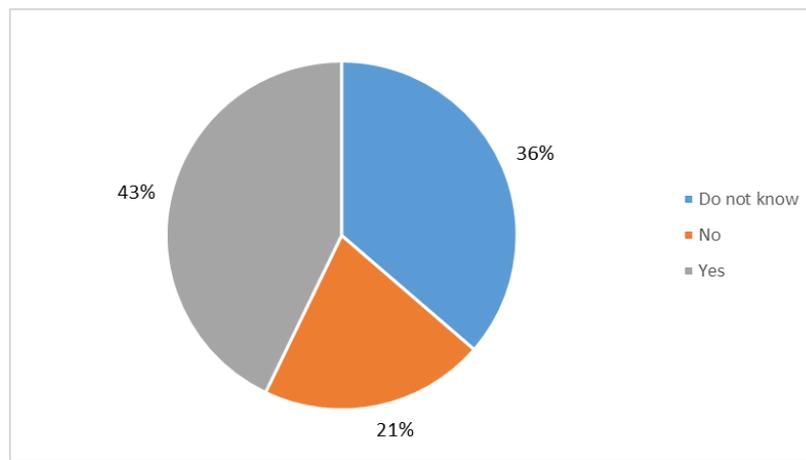


Figure 20. (Q7.1) Are the HBERs and the HGL coherent with other Article 101 instruments?

Those that believed that different instruments interpreting Article 101 TFEU are incoherent mentioned several areas. One respondent noted that it is sometimes uncertain whether **Article 101 TFEU applies** in certain situations at all. For example, it is unclear if a parent that exercises decisive influence over a joint venture could coordinate its competitive conduct with the JV, on the basis that they form part of the same undertaking.

One respondent believed that **coherence with the Technology Transfer Block Exemption Regulation** could be improved by, for example, moving all conditions relating to licensing terms to the latter text. One respondent pointed to some further minor discrepancies, for example, differences in the definitions of 'technology markets' and 'potential competitor'.

With regard to **coherence with competition rules on vertical agreements** (i.e. the BER on vertical agreements and the accompanying guidelines), some respondents pointed out that often it is difficult to determine which set of rules is applicable for a specific agreement. They referred to the fact that the boundary between horizontal and vertical cooperation has become blurred in the last decade. Furthermore, they mentioned, for example, that the treatment is different for information exchange between competitors in accordance with the horizontal guidelines and information exchange between competitors in a vertical context. In their opinion, pure horizontal relationships are treated in a stricter manner than with mixed cooperation (horizontal and vertical) when information is exchanged between manufacturers on the one hand and manufacturers and dealers (own brands) on the other. Another respondent believed that non-horizontal R&D cooperation is an area of

incoherence between the horizontal and vertical instruments and that such cooperation should be exempted in the R&D BER without any further conditions. This respondent argued that pure vertical relations benefited from the exemption in the BER on vertical agreements, without further requirements. An additional respondent pointed out that while the competition rules on vertical agreements consider one year a ‘short period of time’ in relation to potential market entry, the R&D BER applied a three-year period.

One respondent also pointed to possible incoherence with the **Horizontal Merger Guidelines** regarding the definition of ‘potential competitor’.

One respondent considered that the HGL is partially incoherent with **Regulation 1184/2006 applying certain rules of competition to the production and trade in certain agricultural products**. The respondent pointed out that the latter regulation states that Article 101(1) TFEU does not apply to agreements that are necessary for the attainment of the objectives set out in Article 39 TFEU, which included ‘ensur[ing] a fair standard of living for the agricultural community, in particular by increasing the individual earnings of persons engaged in agriculture’. The respondent believed that this should be reflected in the HGL.

A further question asked stakeholders about their views on the coherence between competition rules on horizontal agreements and existing/upcoming legislation/policies at EU or national level. 27% of respondents believed that they are coherent, while 46% believed that there is a lack of coherence between these instruments and policies (see Figure 21).

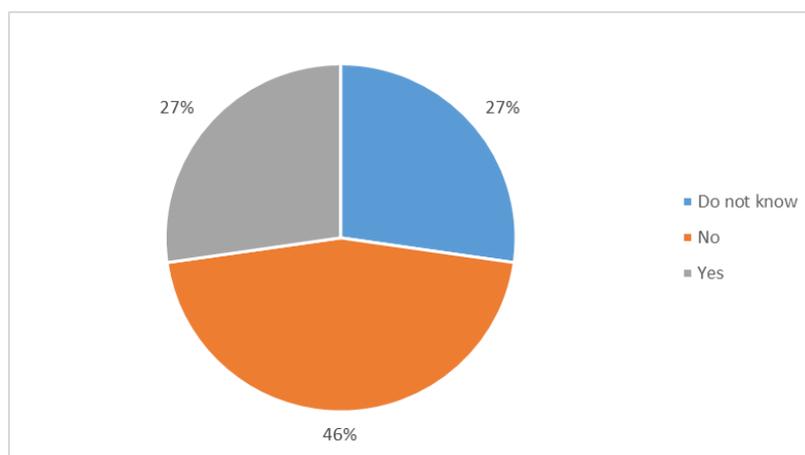


Figure 21. (Q7.1) Are the HBERs and the HGL coherent with other EU or national legislation or policies?

11 respondents believed that the antitrust policy as laid down in the HBERs and HGL is not sufficiently aligned with the Commission’s climate policy. Further, one respondent noted that there is lack of coherence between the EU’s internal policies and its external actions, in particular fulfilling the obligation to ‘foster the sustainable economic, social and environmental development of developing countries, with the primary aim of eradicating poverty’. To remedy this further guidance would be necessary on sustainability initiatives.

7 respondents mentioned potential inconsistencies with on-going initiatives in the field of digitalisation and data sharing and that the HGL should facilitate data sharing and data pooling agreements according to the goal of the Commission on the EU Data Space. Another respondent

believed that the horizontal guidelines needed to become more flexible in order to execute the EU's strategy in digital media cooperation.

One respondent felt that the HGL should be aligned with the EU Electronic Communications Code ('EECC') in order for the different forms of co-operation promoted under the EECC (like co-investment and various forms of sharing of assets) to be supported by the competition law framework.

5 respondents indicated that the HBERs and HGL need to be aligned with the EU's renewed industrial policy and that the rules should be sufficiently flexible to allow collaboration to ensure competitiveness of the European industry.

4 respondents stated that various courts in the EU struggle to apply competition law in SEP licensing-related decisions. 2 respondents also suggested updating the HGL based on the principles determined by the Commission in the November 2017 'Communication on Setting out the EU approach to Standard Essential Patents'. Further, one respondent found that it is important for the Commission to ensure that any proposed changes to the HBERs and HGL were aligned with broader IP regulation and industrial policy.

Further, another respondent suggested that the HGL is not coherent with the recently adopted Directive (EU) 2019/1023 on preventive restructuring frameworks et. al., which could be resolved if the HGL clarified that an exchange of information in the context of restructuring could promote competition.

One respondent thought that there is a greater need for policy coherence between competition and labour law regarding the interpretation of Article 101 TFEU. This respondent believed that EU competition law still fails to recognise the right to collective bargaining for workers and self-employed.

One respondent mentioned that the Austrian Supreme Court's permission to exchange detailed information on investment plans and budgets between competitors did not appear to be in line with the current HGL according to which this would reveal a cost factor to a competitor.

One respondent proposed that safe harbours based on market shares should be made consistent with comparable safe harbours used in other instruments, notably the Horizontal Merger Guidelines.

EU Added Value (Did EU action provide clear added value?)

In the final section of the survey respondents expressed their opinion whether the EU competition rules on horizontal agreements have provided a clear added value in the assessment of the compatibility of horizontal cooperation agreements with Article 101 TFEU. Those respondents that could answer this question gave an almost unanimous reply that they do (see Figure 22).

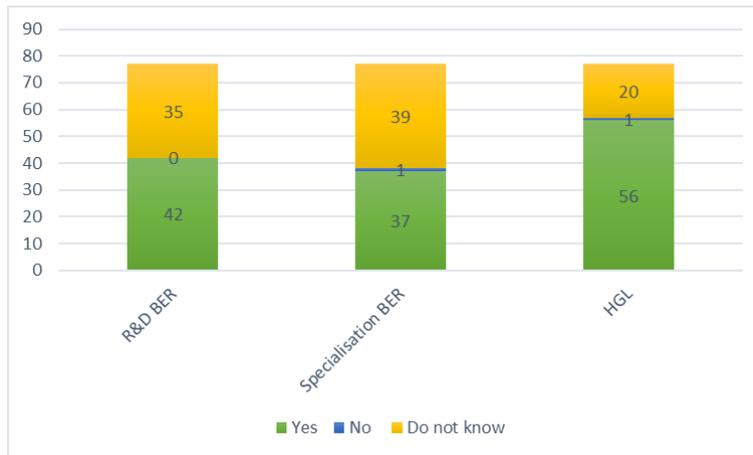


Figure 22. (Q7.1) Do the HBERs and the HGL provide added value?

Respondents explained that the rules have contributed to the uniform application of rules across the EU. Further, respondents pointed out that the HBERs provide a uniform exemption across all Member States. Nevertheless, one respondent suggested that the Commission and EU national competition authorities should develop a consistent approach also for situations outside the HBERs. One respondent also noted that, as there is little case law available on the application of EU competition law on horizontal agreements, as well as little enforcement activity by the EC and national authorities in this area, the HBERs and the HGL provide a clear benefit.