

Stakeholder consultation on the review of the HBERs

Fields marked with * are mandatory.

1

Introduction

Article 101(1) of the Treaty on the Functioning of the European Union ('TFEU') prohibits agreements between undertakings that restrict competition unless they generate efficiencies in line with Article 101(3) of the Treaty. This happens 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 cooperation').

Horizontal cooperation relates, in most cases, to cooperation between actual or potential competitors in areas such as research and development ('R&D'), production, purchasing, commercialisation or standardisation. It can also involve information exchange, either as a self-standing agreement or in the context of another type of horizontal cooperation agreement. Horizontal cooperation agreements may cause a restriction of competition but also give rise to substantial efficiencies, in particular if the companies involved combine complementary activities, skills or assets.

The European Commission (the 'Commission') is empowered to adopt block exemption regulations, which define certain categories of agreements for which it can be presumed with sufficient certainty that they fulfil the conditions of exemption under Article 101(3) TFEU. The Commission has made use of this empowerment by adopting two block exemption regulations that declare Article 101(1) TFEU not applicable to certain categories of R&D agreements and certain categories of specialisation agreements. The [R&D Block Exemption Regulation](#) ('R&D BER') and [Specialisation Block Exemption Regulation](#) ('Specialisation BER') (together the

'Horizontal Block Exemption Regulations' or 'HBERs') entered into force on 1 January 2011 and will expire on 31 December 2022. The HBERs are accompanied by [Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal cooperation agreements](#) ('Horizontal Guidelines').

In May 2021, the Commission finalised its evaluation of the HBERs and the Horizontal Guidelines with the publication of a [Staff Working Document](#). The results of the evaluation showed that the HBERs and the Horizontal Guidelines are useful instruments and remain relevant for stakeholders. Nonetheless, the evaluation identified a number of potential issues. On the basis of these results, the Commission is now looking into policy options for a revision of certain areas of the HBERs with the aim to have revised rules in place by 31 December 2022, when the current rules will expire.

On 7 June 2021, the Commission published an [Inception Impact Assessment](#) ('IIA') setting out the areas for which the Commission proposed policy options and asked stakeholders to provide feedback by 5 July 2021. During the impact assessment phase, the Commission will collect views from stakeholders on these policy options and their ability to tackle the issues identified in the evaluation. The Commission will also collect feedback on other areas of the HBERs and the Horizontal Guidelines for which the results of the evaluation identified room for improvement or clarification. This questionnaire is one of the key instruments to collect stakeholders' views and the replies to the questionnaire will inform the drafting of the revised rules.

2 How to answer this consultation

You are invited to reply to this public consultation by filling out the EUSurvey questionnaire online.

The questionnaire is structured as follows:

1. The first part of the questionnaire (Sections 3 and 4) concerns **general information** on the respondent.
2. The second part focuses on **policy options** for a possible revision of the HBERs (Section 5). It aims at gathering information and views from stakeholders to assess the impact of the policy changes that the Commission is exploring.
3. The third part of the questionnaire addresses **other issues and elements** (e.g.

improvements, clarifications) to be considered during the impact assessment phase (Section 6).

Languages

The questionnaire is available in **English, French and German** but you may respond to the questionnaire in the EUSurvey tool in any official EU language.

Next steps

The Commission will summarise the results in a **report**, which will be made publicly available on the Commission's Better Regulation Portal.

Practical remarks:

1. To facilitate the analysis of your reply, we would kindly ask you to keep your answers concise and to the point.
2. You may include documents and URLs for relevant online content in your replies.
3. You are not required to answer every question. You may respond 'no opinion' to questions on topics where you do not have particular knowledge, experience or opinion. Where applicable, this is strongly encouraged in order to ensure that the evidence gathered by the Commission is solid.
4. You have the option of saving your questionnaire as a 'draft' and finalising your response later. In order to do this, 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* and continue replying to your questionnaire. Once you have submitted your response, you will be able to download a copy of your completed questionnaire.
5. Whenever there is a text field for a short description, the maximum number of characters will be indicated.
6. Questions marked with an asterisk (*) are mandatory.
7. To avoid any confusion about the numbering of the questions, please note that you will be asked some questions only if you choose a particular reply to the respective previous one(s).

No statements, definitions, or questions in this public consultation may be interpreted as an official position of the Commission. All definitions provided in this document are strictly for the purposes of this public consultation and are without prejudice to definitions the Commission may use under current or future EU law or in decisions.

You are invited to read the **privacy statement** attached to this consultation for information on how your personal data and contribution will be dealt with.

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

About you

1 Language of my contribution

English

2 I am giving my contribution as

Company/business organisation

3 First name

Philippe

4 Surname

Adriaenssens

5. Email (this won't be published)

philippe.adriaenssens@ert.eu

9 Organisation name

European Round Table for Industry (ERT)

10 Organisation size

Micro (1 to 9 employees)

11 Transparency register number

25487567824-45

12 Country of origin

Belgium

4 About your organisation

15) Please provide the main activity of your organisation (e.g. product(s) and/or service(s) provided)

The European Round Table for Industry (ERT) is a forum that brings together around 60 Chief Executives and Chairmen of major multinational companies of European parentage, covering a wide range of industrial and technological sectors. ERT strives for a strong, open and competitive Europe as a driver for inclusive growth and sustainable prosperity. Companies of ERT Members are situated throughout Europe, with combined revenues exceeding €2 trillion, providing around 5 million direct jobs worldwide - of which half are in Europe - and sustaining millions of indirect jobs. They invest more than €60 billion annually in R&D, largely in Europe.

16) Please describe the sectors in which your organisation or your clients or members conduct business:

Industrial and technology sectors, cross-horizontal.

17) Please indicate the 2 digit NACE Rev.2 code(s) referring to the level of 'division' that applies to your business (see part III, pages 61 – 90 of Eurostat's statistical classification of economic activities in the European Community, [available here](#)):

AISBL

18) Please mark the countries/geographic areas where your main activities are located:

- ☐ Austria
- ☒ Belgium
- ☐ Bulgaria
- ☐ Croatia
- ☐ Cyprus
- ☐ Czech Republic
- ☐ Denmark
- ☐ Estonia
- ☐ Finland
- ☐ France
- ☐ Germany
- ☐ Greece
- ☐ Hungary
- ☐ Ireland
- ☐
- ☐
- ☐
- ☐

- Italy
- Latvia
- Lithuania
- Luxembourg
- ☐ Malta
- ☐ Netherlands
- ☐ Poland
- ☐ Portugal
- ☐ Romania
- ☐ Slovak Republic
- ☐ Slovenia
- ☐ Spain
- ☐ Sweden
- ☐ United Kingdom
- ☐ Others in Europe
- ☐ The Americas
- ☐ Asia
- ☐ Africa
- ☐ Australia

19) Please describe the **relevance** of the **HBERs** and the **Horizontal Guidelines** for your activities and/or your organisation.

Regulations and Guidelines	Relevance
R&D BER	X
Specialisation BER	
Horizontal Guidelines	X – These are the most relevant Guidelines

20) Please indicate whether your organisation is or has been a party to any of the following **horizontal cooperation agreements**. Alternatively, please indicate whether you have experience with any of the following horizontal cooperation agreements:

Horizontal cooperation agreements	Yes	No
R&D agreements	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Production (or specialisation) agreements	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Information exchanges	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Joint purchasing agreements	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Commercialisation agreements	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Standardisation agreements	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Other (e.g. agreements pursuing sustainability goals, etc.)	<input checked="" type="checkbox"/>	<input type="checkbox"/>

21) If you have been **discouraged or dissuaded** in the last ten years from entering into a **pro-competitive horizontal cooperation agreement** (taking the form of any of the ones mentioned in the previous question), please

- indicate the type of horizontal cooperation agreement you are referring to
- explain the main reasons for the decision not to pursue the cooperation and
- describe any obstacles/deterrents arising from any provision in the HBERs and /or the Horizontal Guidelines.

5000 character(s) maximum

The assessment of horizontal cooperation agreements entails considerable costs for ERT's members, given the need to seek legal advice, create clean teams and monitor the agreement for competition law compliance. The review of the BERs and the HGL should therefore aim to provide greater legal certainty and guidance for companies undertaking self-assessment. Self-assessment under A101(1) is generally more straightforward than under A101(3), and ERT therefore encourages the EC to provide more guidance and examples of agreements which might fall under A101(3).

ERT would specifically welcome further guidance on the following arrangements, particularly insofar as they relate to cooperation in furtherance of sustainability objectives:

- **Information exchange:** As explained in our Position Paper on Horizontal Cooperation in February 2020, the assessment of the anti-competitive nature of information exchanges under the existing HGL has become too broad. The current approach places many legitimate information exchanges at risk of a "by object" infringement finding (even though the current HGL only attribute a "by object" infringement to exchanges of future price or quantity information). This has created significant legal uncertainty and caused companies to take an unduly restrictive approach, which in turn has limited the scope for legitimate collaboration. Rather than automatically being regarded as "by object" infringements, each

information exchange should be assessed on the facts of the case, considering the legal and economic context. (See also Q80-84.)

- **Industrial cooperation:** European companies need to cooperate to achieve the scale needed to develop innovative products/services and solutions and to invest in ESG projects. Such goals can no longer be achieved unilaterally. Currently, industry-wide co-operation involving several competitors is likely to raise suspicions of anti-competitive conduct, particularly as any “industry-wide” collaboration will (by definition) fall outside market share safe harbours. To ensure adequate competition law compliance, companies must therefore respect burdensome processes. This not only discourages cooperation, but also prevents companies from thinking boldly about how they might work with competitors where there is a clear justification to do so for the benefit of consumers/society at large. ERT submits that such industry-wide cooperation should be considered compatible with A101(1) be it in the form of commercialisation agreements, joint production, joint procurement, cooperative sourcing, joint funding or cooperative sponsorship, joint recycling, agreeing “sustainable” suppliers, or other (see also Q123).
- **R&D agreements:** ERT has a number of observations on R&D agreements, as previously set out in our Position Paper on Horizontal Cooperation of February 2020. In particular:
 - The HGL & the R&D BER should be reviewed in order to extend the current framework to cover other kinds of horizontal agreements that boost the creation of innovative technologies within all sectors including the digital economy. Cooperation on R&D is also indispensable for companies to meet ESG objectives.
 - The revised BER and HGL should emphasize the pro-competitive nature of joint R&D and provide clearer guidance to ensure that companies have sufficient comfort entering into a pro-competitive R&D cooperation even if not all requirements in Art. 3 of the R&D BER are met. In addition, the R&D BER should be simplified - its complex application detracts from legal certainty. In particular, the requirement under Article 3 that all parties have full access to the final results, including any resulting IPR and know-how, as well as to background know-how, has a negative impact on return on investment and disincentivizes investment in joint R&D. In particular, there is a real challenge in applying the current rules in respect of joint work on improving the existing IPR of other parties. Amongst other things, this requirement will have a direct impact on companies’ ability to fulfil the EC’s Green Deal objectives.
 - The reference to market shares on technology markets should be removed. The notion of technology market is not practical - it is unlikely that companies have a clear overview of all competing technologies or that they can calculate their share on that market. The market share threshold should also be increased - 25% is low and does not allow large companies to join forces. The same is true in relation to any cooperation which goes toward fulfilling the EC’s Green deal. Any step change will require the majority of industry to move.
 - Given the pro-competitive nature of R&D cooperation, the revised R&D BER should remove the restriction on limiting passive sales and allow the parties to impose strict restrictions on each other under any form of specialisation in the context of exploitation.
 - Paid for R&D should be treated under the subcontracting notice instead of the R&D BER. Vertical R&D cooperation should be exempted without further conditions.

5 Policy options for the HBERs

During the impact assessment phase, the Commission is exploring **policy options** aimed at improving the HBERs. The baseline scenario against which these policy options will be assessed is a renewal of the HBERs and the Horizontal Guidelines *without substantive change*.

5.1) Policy options relating to SMEs, research institutes and academic bodies

5.2) Policy options relating to the R&D BER: Conditions for exemption

The Commission is exploring options to encourage the conclusion of R&D agreements **by all types of market participants** which are unlikely to raise competition concerns. The Commission will assess the following policy options:

- **Option 1:** No change.
- **Option 2:** Allowing for **limitations** to the condition of **full access to the results** of the R&D cooperation; **and/or**
- **Option 3:** Allowing for **limitations** to the condition of **access to pre-existing know-how** indispensable for the purposes of exploitation of the R&D results.

Options that the Commission is exploring may include limiting (and/or potentially removing) the condition(s) for exemption in the R&D BER regarding full access to the results and/or to pre-existing know-how for R&D agreements. Limitations to the condition of full access to the final R&D results could for instance include limitations to the duration of full access, or the scope of the access, etc. Limitations to the condition of access to pre-existing know how could for instance include limitations to the duration of access, the exploitation activity the access is linked to, etc.

Options 2 and 3 could be applied cumulatively.

56) **Conditions for exemption.** Based on your experience, how do the conditions for exemption affect the conclusion of R&D cooperation agreements? Please consider agreements concluded by **all types of undertakings** (e.g. large, medium, small, etc.)

Conditions for exemption under the R&D BER	Very negative	Negative	Neutral	Positive	Very positive	No opinion
Condition of <u>full access to the final R&D results</u>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Condition of <u>access to any pre-existing know-how</u> of other parties if it is indispensable for the exploitation (e.g. production, distribution, application, assignment, licensing) of the R&D results	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

57) Please explain your reply and, if possible, provide concrete examples.

5000 character(s) maximum

ERT believes that R&D investments, which are characterised by high investment costs and effort in terms of time and staffing, should generate an adequate return and maintain adequate protections in respect of IPR and exclusivity. It is important to balance the protection of investors' returns on the one hand, with access to pre-existing and final R&D results by R&D partners on the other.

In our view the obligation in Art. 3.2 R&D BER is unnecessary and has a chilling effect on innovation by removing parties' incentives to invest in joint R&D and improve the other party's technology (see also Q59). We believe that limiting the condition of full access to final R&D results, or even removing this condition entirely, will increase R&D cooperation.

We also believe the requirement in Art.3.3 R&D BER has a significant chilling effect on the willingness of companies to undertake joint R&D (see also Q61). It should be for the parties to determine access rights to pre-existing know-how and exploitation of improvements even if

connected with the former.

Especially in vertical R&D agreements the obligations in Art. 3.2 and 3.3 R&D BER have little potential benefit for competition but have a significant chilling effect on innovation. In most practical scenarios, the partners in a vertical cooperation will have little incentive to actually make use of the rights granted under Art. 3.2 and 3.3 R&D BER themselves. At the same time, there is always the risk that a vertical partner will share these with a third party competitor, creating a significant risk for highly sensitive IP and know-how. At the very least, this creates high burdens in negotiations, especially with partners from jurisdictions with less strict rules on vertical restraints, e.g. the USA.

We therefore support the introduction of policy options 2 and 3 cumulatively. This change will be particularly important in achieving the EC's Green Deal objectives, which will require industry-wide cooperation. Without such changes, sustainability agendas will likely not move sufficiently quickly given businesses will choose to focus investment on the end-of-life aspects of the value chain (e.g. waste recycling, packaging recycling) rather than investing across the value chain where the real sustainability benefits would be felt (e.g. by virtue of the products and services themselves being made more sustainable through collaboration).

58) **Full access to the final R&D results.** Based on your experience, do you consider that a **limitation of the condition of full access to the final R&D results** would encourage the conclusion of R&D cooperation agreements that do not raise competition concerns? Please consider agreements concluded **by all types of undertakings** (e.g. large, medium, small, etc.).

- ☒ Yes
- ☐ No
- ☐ No opinion

59) Please explain your reply and, if possible, provide concrete examples of how the condition of full access to the final R&D results could be limited to encourage the conclusion of pro-competitive R&D cooperation agreements by all types of undertakings.

5000 character(s) maximum

Art. 3.2 R&D BER requires that any joint R&D agreements must explicitly stipulate full access rights to the results for the purposes of further research and development. As we explained in our Expert Paper on Horizontal Cooperation in February 2020, this requirement is unnecessary and has a chilling effect on the willingness of companies to engage in joint R&D. The pro-competitiveness of a joint R&D does not depend on future R&D efforts which are based on the results. Future competition on innovation is sufficiently safeguarded by the Art. 5 (a) prohibition on including a hardcore restriction that limits the parties' R&D activities in the same or a connected field after the completion of the joint R&D.

The revised R&D BER should therefore remove the strict, unnecessary and impractical requirements of Art. 3.2 and permit the parties to agree certain exploitation exclusivities. For example, if undertaking A improves the technology of undertaking B, it should be clear that undertaking A and B can agree that undertaking B will make those improvements available to competitors of undertaking A.

60) **Access to pre-existing know-how.** Based on your experience, do you consider that **limiting the condition to provide access to pre-existing know-how** would encourage the conclusion of R&D cooperation agreements that do not raise competition concerns? Please consider agreements concluded **by all types of undertakings** (e.g. large, medium, small, etc.).

- ☒ Yes
- ☐ No
- ☐ No opinion

61) Please explain your reply and, if possible, provide concrete examples of how the condition to provide access to pre-existing know-how could be

' limited to encourage the conclusion of pro-competitive R&D cooperation agreements by alltypes of undertakings.

Article 3.3 of the R&D BER states that companies must stipulate in their R&D agreement that each party must be granted access to any pre-existing know-how (i.e. background know-how) of the other party, if this is indispensable for the exploitation of the results.

As we explained in our Expert Paper on Horizontal Cooperation in February 2020, this requirement has a significant chilling effect on the willingness of companies to engage in joint R&D which is at odds with the spirit of the R&D BER.

In times where innovation is crucial, the revised R&D BER should remove this requirement and leave it to the parties to the joint R&D agreement to stipulate access rights to background IP and rights of exploitation.

62) **Impact (access to final R&D results).** Based on your experience, what would be the impact of **limiting the condition of full access to the final R&D results** on the following aspects?

Impact on:	Very negative	Negative	Neutral	Positive	Very positive	No opinion
Competition on the market	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
Prices	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
Quality of products /services	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
Innovation / Investment in R&D	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
Self-assessment of horizontal R&D agreements	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
Costs for business	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>

Legal certainty for businesses	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
Harmonised application of competition rules by national competition authorities and national courts	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>

62) Please explain your replies and, if possible, provide concrete examples of the impacts you indicated.

[See answers to Q57 and Q59.](#)

63) **Impact (access to pre-existing know-how).** Based on your experience, what would be the impact of **limiting the condition to provide access to pre-existing know-how if such know-how is indispensable for the exploitation of R&D results** on the following aspects:

Impact on:	Very negative	Negative	Neutral	Positive	Very positive	No opinion
Competition on the market	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
Prices	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
Quality of products /services	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
Innovation / Investment in R&D	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>

Self-assessment of horizontal R&D agreements	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
Costs for business	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
Legal certainty for businesses	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
Harmonised application of competition rules by national competition authorities and national courts	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>

64) Please explain your replies and, if possible, provide concrete examples of the impacts you indicated.

5000 character(s) maximum

[See answer to Q61.](#)

5.3) **Policy options regarding the Specialisation BER - Scope and conditions for exemption**

The Commission aims at clarifying the scope and the conditions for exemption under the Specialisation BER. Hence, the Commission is exploring the following separate options:

- [Option 1](#): No change.
- [Option 2](#): To widen the scope of the Specialisation BER by **expanding the definition of unilateral specialisation** to include agreements concluded between more than two parties; [and/or](#)

- Option 3: To verify whether **horizontal subcontracting agreements with a view to expanding production** in general would meet the requirements of Article 101(3) and hence should be included in the scope of the Specialisation BER; and/or
- Option 4: To review the conditions for exemption as regards **joint distribution** for unilateral or reciprocal cooperation agreements.

Options 2 to 4 could be applied cumulatively.

66 Unilateral specialisation. Based on your experience, do you consider that **expanding the definition of unilateral specialisation agreements to include agreements concluded between more than two parties** would allow to exempt pro-competitive agreements among competitors (actual or potential)?

*[The Specialisation BER defines 'Unilateral specialisation agreement' as an **agreement between two parties** which are active on the same product market by virtue of which one party agrees to fully or partly refrain/cease production of certain products and to purchase them from the other party, who agrees to produce and supply those products to it]*

- ☐ Very likely
- ☒ Likely
- ☐ Neutral
- ☐ Unlikely
- ☐ Very unlikely
- ☐ No opinion

67) Please explain your reply and, if possible, provide concrete examples of unilateral specialisation agreements that involve more than two parties.

5000 character(s) maximum

ERT considers that expanding the definition of unilateral specialisation agreements to include agreements concluded between more than two parties would allow multiple parties to create efficiencies from which consumers will ultimately benefit. It would also strengthen European companies' competitiveness on a global scale. However, as explained in our Expert Paper on Horizontal Cooperation in February 2020, we consider that such a change will only work if the market share thresholds are increased significantly (e.g. to 30 %), or removed altogether when the aim is to meet Green Deal commitments.

68) **Horizontal subcontracting with a view to expanding production.** Based on your experience, do you consider that widening the exemption in the Specialisation BER to **include subcontracting agreements with a view to expanding production** would allow to exempt pro-competitive agreements?

[Under the Horizontal Guidelines, subcontracting agreements with a view to expanding production are agreements whereby the contractor entrusts the subcontractor with the production of a good, while the contractor does not at the same time cease or limit its own production of the good].

- ☒ Very likely
- ☐ Likely
- ☐ Unlikely
- ☐ Very unlikely
- ☐ No opinion
- ☐

69) Please explain your answers and, if possible, provide concrete examples.

5000 character(s) maximum

ERT would highly welcome expanding the Specialisation BER to include subcontracting agreements with a view to expanding production, but this should be combined with raising the market share threshold in order to have practical relevance.

In addition, we would request that the HGL be clarified so as to make clear that horizontal subcontracting with a view to expanding production - generally and independent from market shares and a possible block exemption - does not raise any competitive concern if:

- It concerns less than 50% of the purchasing company's total volume of the product, or
- The costs of a component account for less than 50% of the total cost of a downstream product for the inclusion in which it is being purchased, or
- A customer is requiring a company to purchase a component from a competitor for inclusion in a downstream product.

Finally the HGL should clarify that any information related to the main aspects of the contractual relationship can be freely shared between the undertakings concerned, as long as no information beyond what is necessary for the subcontracting is shared as between competitors regarding current or future conditions of production, costs or market conduct. This is especially important to allow for strategic "make-or-buy" decisions.

70) Impact (unilateral specialisation). Based on your experience, what would be the impact of expanding the scope of the Specialisation BER by allowing **unilateral specialisation agreements between more than two parties** on the following aspects:

Impact on:	Very negative	Negative	Neutral	Positive	Very positive	No opinion
Competition on the market	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
Prices	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
Quality of products /services	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
Innovation	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
Level of production	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
Self-assessment of specialisation /production agreements	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
Costs for business	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>

Legal certainty for businesses	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
Harmonised application of competition rules by national competition authorities and national courts	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>





































71) Please explain your replies and, if possible, provide concrete examples of the impacts you indicated.

5000 character(s) maximum

[See answer to Q67.](#)

72) Impact (expand production). Based on your experience, what would be the impact of expanding the scope of the Specialisation BER by **exempting horizontal sub-contracting agreements with a view to expanding production** on the following aspects:

Impact on:	Very negative	Negative	Neutral	Positive	Very positive	No opinion
Competition on the market	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>

Prices						
Quality of products /services						
Innovation						
Level of production						
Self-assessment of specialisation /production agreements						
Costs for business						

Legal certainty for businesses	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
Harmonised application of competition rules by national competition authorities and national courts	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>

73) Please explain your reply and, if possible, provide concrete examples of the impacts you indicated.

66 character(s) maximum

[See answer to Q69.](#)

5.3.1) **Joint distribution**

- According to the [Specialisation BER](#), unilateral and reciprocal specialisation agreements should only be covered by the regulation where they provide for supply and purchase obligations or joint distribution. Under this regulation, **joint distribution** means that the parties: (i) carry out the distribution of the products by way of a joint team, organisation or undertaking; or (ii) appoint a third party distributor on an exclusive or non-exclusive basis, provided that the third party is not a competing undertaking (recital 9 and Article 1 (1)(q) Specialisation BER).
- Under the [R&D BER](#), **'joint' distribution** includes a scenario where only one party produces and distributes the contract products on the basis of an exclusive licence granted by the other parties (Articles 1(1)(m)(iii), 1(1)(o) and 3(5) R&D BER).

6.1) General questions

74) Based on your experience, what would be the impact of allowing under the Specialisation BER that **only one party distributes the contract products** on the following aspects:

Impact on:	Very negative	Negative	Neutral	Positive	Very positive	No opinion
Competition on the market	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
Level of market concentration	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
Volume of products in the market	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
Prices for consumers	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
Innovation /Investment in R&D	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
Investment in production	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>

75) Please explain your reply and, if possible, provide concrete examples of production agreements in which only one of the parties of the specialisation/production agreement is in charge of distribution.

5000 character(s) maximum

ERT considers that allowing only one party to distribute the contract products would allow for efficiencies in the sales setup/distribution and in certain cases prevent ruptures of supply chain/stock. This could increase geographical and customer category reach which in turn increases inter-brand competition and wider choice for customers.

6 Other areas for review

The evaluation has identified **further areas** where the HBERs and Horizontal Guidelines may be improved. The following questions relate to such possible improvements.

6.1) **General questions**

77 Based on your experience, please indicate what would be the best way to determine which chapter of the Horizontal Guidelines takes priority in the assessment of a horizontal agreement that combines different types of cooperation and for which there may be different chapters that apply (e.g. an agreement combining R&D and commercialisation, or information exchange and joint purchasing):

- ☐ The 'centre of gravity' that prevails for the entire cooperation [two factors are relevant to determine the centre of gravity: (i) the starting point of the cooperation and (ii) the degree of integration of the different functions which are combined]
- ☐ The nature of the activity that constitutes the starting point of the cooperation (e.g. R&D, production, etc.)
- ☐ The degree of integration of the different functions which are combined
- ☐ The nature of the activity that constitutes the end point of the cooperation (e.g. distribution, commercialization, etc.)
- ☐ The rules of the most stringent chapter of the Horizontal Guidelines
- ☐ Other criteria
- ☐ I do not know
- ☐ No opinion

78 Please explain your choice.

It is important that companies have a clear framework for the self-assessment of horizontal cooperation agreements. The application of multiple different rules to one and the same agreement makes self-assessment complicated and burdensome, with the potential for conflicting outcomes and companies having to apply the most restrictive rules. The likely result is substantially reduced cooperation and a resulting loss of the benefits that such cooperation can bring to consumers, including loss of geographic and customer reach.

To this end, determining which chapter takes priority based on the “center of gravity” of the cooperation seems appropriate. In particular, the relevant factors for determining the center of gravity are clear and easy to determine at the outset of an agreement. Conversely, trying to look at the endpoint might be challenging, given it may not always be clear what the endpoint is at the time of self-assessment.

It is also important that agreements which have their centre of gravity as “vertical” are not treated under horizontal rules simply because a customer and supplier may act down-stream at the same level of the distribution chain (either at consumer level or wholesale retail level). Overall, it is important that the revised HGL recognise the pro-competitive and consumer benefits achieved via cooperation and exclude agreements which are mainly “vertical”.

79) Based on your experience, should the Horizontal Guidelines clarify whether and in which circumstances Article 101 TFEU applies to horizontal agreements between a joint venture and its parent(s) provided that the creation of the joint venture did not infringe competition law? Please also consider in your answer the scenario of horizontal cooperation agreements between the parents of a joint venture outside the scope of the joint venture.

5000 character(s) maximum

The HGL are expressly consistent with the “single economic entity doctrine”, insofar as they set out how the single economic entity principle applies to cooperation among solely controlled subsidiaries and their parent companies. Namely, that A101(1) does not apply to such arrangements. By contrast, the HGL are silent with regard to the precise circumstances in which A101(1) applies to arrangements between parents and their jointly controlled subsidiaries, including where there may be a horizontal or vertical relationship.

As we explained in our Expert Paper on Horizontal Cooperation in February 2020, this creates considerable uncertainty for companies with large-scale global operations managed through both jointly- and solely-controlled subsidiaries. The consequence of this uncertainty is that companies often feel compelled to take a conservative approach and assume that the single economic entity doctrine may not apply when engaging with their jointly controlled subsidiaries. This means they are then unable to fully realise the synergies of operating as an integrated group, potentially causing harm to their customers and the economy as a whole. This unfortunate outcome is generally considered an artificial interpretation of EU competition law.

As operations through joint venture companies are an increasingly important and relevant form of doing business globally, we believe that it is important to revisit this issue.

The prevailing uncertainty seems particularly artificial where the establishment of a joint venture/acquisition of joint control has been subject to merger control (and approved).

We understand that in the draft 2010 Horizontal Guidelines the Commission intended to include an explicit confirmation that A101(1) would not apply to dealings between parents and their jointly controlled subsidiaries: "... as a joint venture forms part of one undertaking with each of the parent companies that jointly exercise decisive influence and effective control over it, Article 101 does not apply to agreements between the parents and such a joint venture, provided the creation of the joint venture did not infringe EU competition law."

We are of the strong view that reinstating this wording in the revised HGL, together with an explicit acknowledgement that "decisive influence" for this purpose is based on the EUMR definition, would provide companies with the certainty that they require.

This request is without prejudice to the exchanges of information made by competitors through the jointly controlled company, which should still be banned under A101(1).

We also respectfully submit that this change would not represent a material shift in policy for the EC, but rather is supported by the commercial/economic reality of joint ventures and legal considerations, as further explained in Appendix A to our Expert Paper on Horizontal Cooperation.

6.2) **Information exchange**

The Horizontal Guidelines contain a chapter on information exchange. Paragraphs 55 and 56 explain that information exchange can take many different forms and can take place in different contexts. Information exchange is a common feature in many competitive markets and may generate various types of efficiency gains. Companies can for instance save costs as information sharing may allow them to calculate possible risks better.

Information exchange can also be necessary for the efficient distribution of goods and services. Information concerns data that is processed into a form that has meaning and is useful. The next questions concern the exchange of information.

80) Is information exchange relevant in your industry or sector? Please explain how it is relevant:

1000 character(s) maximum

Information exchange is crucial for successful cooperation in most sectors and will become more so – with digitalization the role of data/information will increase. It is key that the HGL are fit for the digital age and consistent with EC policy goals. In particular:

- Beyond cartels, information exchange should not be a "by object" infringement – the analysis should look at the merits of the case and legal and economic context (see Q21).
- The HGL should clarify the boundary between "information" (covered in the information exchange chapter) and data (which should be covered in a data pooling chapter).
- Criteria e.g. the age of data / frequency of exchange should be updated to reflect the realities of the digital age.

- The HGL should recognise that information exchange in the context of dual distribution is generally pro-competitive and necessary to generate efficiencies and boost inter-brand competition (see Q84 and Q92).
- The HGL should recognize cooperation in the digital field and on ESG issues are pro-competitive and a certain degree of information exchange/data sharing is inevitable. Companies need clear guidance on the boundaries of permitted information exchange in such areas, including when individual exemption may be appropriate.

81) Have you shared information with your (potential) competitors, or do you intend to do so in the future?

at most 3 choice(s)

- ☐ Yes: I shared information in the past
- ☐ Yes: I am currently sharing information
- ☐ Yes: I intend to share information in the future
- ☐ No
- ☐ Not applicable/no opinion

82) How did or do you share information?

at most 5 choice(s)

- ☐ Directly with one or more (potential) competitor(s)
- ☐ Through a common agency, such as business or industry association
- ☐ Through a third party that is not active on the same market
- ☐ Through my suppliers or retailers
- ☐ In another manner

83) Please explain your reply and include details on the level of aggregation of the information, the age of the information and the frequency of the information exchange.

In light of the current requirements under EU competition rules, any information exchange listed in Q82 is limited to the sharing of historic, aggregated and anonymized data. What amounts to an adequate level of aggregation and anonymization is assessed on a case by case basis. However, restricting information exchange to purely historical data is not suitable for generating efficiency-enhancing effects. Real-time data exchange is needed for most data driven business models and depending on the case even future-related data needs to be exchanged (e.g. for shared networks/infrastructure).

As explained in response to Q21 the current HGL overestimate the potentially anti-competitive effects of information exchange and underestimate its potentially pro-competitive effects. The exchange of sensitive information between competitors outside the scope of a lawful cooperation agreement is in many cases classified as a restriction of competition by object.

This is too broad and has led to considerable uncertainty. Many companies have therefore adopted a highly restrictive approach to information exchange. The actual effects of the exchange on competition should always have to be examined in the individual case.

84) Do you expect that information exchange in your industry or sector will change in the next 10 years, and if so, how?

5000 character(s) maximum

ERT considers that in the digital economy and in respect of meeting Green Deal goals and ESG, data sharing and information exchange will be of paramount importance. Unless they are updated, the current EU competition rules on information exchange will act as a “roadblock”, and will in particular disadvantage European companies vis a vis large global competitors and impede sustainability and CSV advances.

As noted in response to Q80, with the digitalisation of most industries and pressing need to meet ESG objectives, the role of data and information will increase exponentially. Consequently, the need for information (data) exchange will also increase.

In respect of dual distribution specifically, the proposed changes to the VBER regarding dual distribution will have a negative impact on the exchange of information between suppliers and distributors unless the updated HGL clarify that the exchange of information in a dual distribution context is pro-competitive with a view to a strengthening of inter-brand competition by allowing companies to choose the most efficient distribution set-up. If a supplier decides to go for a dual distribution model it is absolutely required that it can exchange information with its distributors as it could do in a purely vertical relationship.

Data pooling and data sharing

Technological advances have made it possible for companies to collect, store, and use large amounts of data. Timely access to relevant data has become important to compete in certain industries and sectors. Data pooling and data sharing allows companies to develop better products or services. However, data pooling and sharing arrangements may also become anti-competitive in certain scenarios. As with other types of information exchange, they may facilitate collusion when they enable undertakings to be aware of the market strategies of their competitors. In addition, (potential) competitors who do not have access to important data may be foreclosed from the market.

The next questions concern data pooling and data sharing.

85) Is **data pooling** and **data sharing** important in your industry or sector?

- ☒ Yes
- ☐
- ☐

No

I do not know

86) Please explain your reply.

1000 character(s) maximum

ERT considers that data is one of the key inputs in the digital economy in order to be able to offer innovative products and services – including in respect of the internet of things and artificial intelligence, which will play an increasing role in traditional industries going forward.

Against this backdrop, there will be a much greater need for data sharing in future to maximise the benefits of Big Data for industries and consumers. Facilitating the commercial exchange of data among competitors will allow stakeholders to be more competitive within the current geopolitical ecosystem. It will also contribute to resolving current digital markets issues such as barriers to entry, gatekeepers and their conglomerate effects.

As explained above, data sharing is also critical to meet Green deal commitments and ESG goals.

It is therefore crucial that the HGL are updated to provide more legal certainty and in particular to respond to the challenges of data sharing in the digital economy.

87) Have you been or are you involved in data pooling or data sharing or do you intend to do so in the future?

at most 3 choice(s)

- ☐ Yes, I was involved in data pooling/data sharing
- ☐ Yes, I am still involved in data pooling/datasharing
- ☐ Yes, I will take part in data pooling/data sharing in the future
- ☐ No
- ☐ Not applicable / no opinion

88) What type of data pooling or data sharing? In your reply, please explain through which intermediary you share your data, who owns and manages the database and who has access to the data and on what conditions.

Information exchange in dual distribution scenarios

The Horizontal Guidelines mainly cover agreements between (potential) competitors. The growth of e-commerce has led to many suppliers now selling their goods or services directly to end customers, thereby competing with their distributors at the retail level (dual distribution). While information exchange in a vertical relationship will often not raise competition concerns, the situation may be different if the supplier is competing with its distributors at the retail level.

The next questions concern information exchange in mixed horizontal and vertical

relationships.

89) Are you or your supplier engaged in dual distribution?

at most 2 choice(s)

- ☒ X Yes, I am a supplier and I am also selling directly at retail level
- ☐ Yes, I am a distributor and my supplier also sells directly at retail level
- ☐ No
- ☐ Not applicable / no opinion

90) In the context of the relationship between a supplier, a distributor and own retail outlet: are you involved in information exchange?

at most 4 choice(s)

- ☒ Yes, I am a supplier and I exchange information with my distributors
- ☒ Yes, I am a supplier and I exchange information with my own retail outlets
- ☐ Yes, I am a distributor and I exchange information with my supplier
- ☐ Yes, I share information in another manner
- ☐ No
- ☐ Not applicable / no opinion

91) Is the information shared between suppliers and distributors at retail level different from the information shared between suppliers and their own retail outlets?

- ☒ Yes
- ☐ No
- ☐ I do not know

92) Please explain your reply.

1000 character(s) maximum

Information exchange in vertical relationships generally has pro-competitive effects e.g. assisting resellers with product launches/promotions, setting sales objectives, sharing market research, assessing RRP, expanding distribution, addressing customer needs, sharing feedback on products/services, managing supply chains etc. An isolated horizontal assessment of an information exchange in certain dual distribution situations (beyond the market share threshold of Art. 2 (4) draft VBER) would not be appropriate.

Absent safe harbours addressing this issue there will be severe consequences for the companies involved and for global supply chains and consumers. In particular, restrictions on information connected with geographic location and customer identity will have a negative impact on the potential distribution and customer reach for manufacturers' products/services. This means it is crucial that businesses have clarity on the types of information sharing that create competition concerns in the dual distribution of goods and services.

Other information exchange, data sharing and data pooling

The following question concerns both information exchange and data sharing and data pooling, through any means and in any scenario.

93) Do you feel disadvantaged by other companies who are sharing information or data?

- ☐ Yes
- ☐ No
- ☒ I do not know
- ☐ No opinion/not applicable

94) Please explain what type of disadvantages you encounter:

5000 character(s) maximum

ERT notes that EU companies are increasingly encouraged to join European initiatives, particularly those which aim to enhance EU digital sovereignty. At the same time, these companies are aware that such cooperation might fall foul of applicable antitrust laws. We consider that EU companies lack clear guidance as to the boundaries of these rules, particularly with regard to information exchange and data pooling. This results in a considerable disadvantage for European companies compared with their global competitors.

6.3) Standardisation agreements

The Guidelines on Horizontal Cooperation include a chapter on standardisation agreements and standard terms. The questions in this section cover these types of agreements.

For the purposes of the following questions, standard-setting organisations cover both the formal, open standardisation bodies and the private independent bodies, alliances, partnerships or initiatives whose purpose is to develop and adopt industry standards.

95) Have you engaged in standardisation efforts / the development of standards in standard setting organisations or in the development of standard terms in the past ten years?

- ☒ Yes
- ☐ No
- ☐ No opinion/not applicable

96) Please list here the names of the standard setting organisations that you engaged in or the framework for the development of standard terms.

5000 character(s) maximum

N/A

97) Please provide the governance rules/working methods of the standard setting organisations that you have experience with.

- For those standard setting organisations where the governance rules/working methods are available online, please only include a list with the hyperlinks.
- For those which are not publicly available (including for standard terms), please upload the governance rules/working methods as a separate document in reply to this question

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

98 Does any of the standard setting organisations that you have experience with also provide guidance on the meaning or interpretation of "FRAND"?

- ☒ Yes
- ☐ No
- ☐ No opinion/not applicable

99 Please upload here any guidance on the interpretation or meaning of "FRAND".

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

The ETSI Intellectual Property Rights Policy is available here:

<https://www.etsi.org/images/files/IPR/etsi-ipr-policy.pdf>

The CEN-CENELEC Guidelines for Implementation of the Common Policy on Patents is available here:

<https://www.cencenelec.eu/media/Guides/CEN-CLC/cencclguide8.pdf>

100) Do you have experience with standard setting organisations which require (for example in their Intellectual Property Rights ('IPR') policy) that participants disclose their IPR that might be essential for the implementation of the standard under development for instance by identifying specific IPR, specific IPR claims, applications to patent offices for IPR protection etc.?

- ☒ Yes
- ☐
- ☐

No

No opinion / not applicable

101 Please describe here what level of disclosure is requested and when such disclosure should be made.

Certain of ERT's members have experience in this area. The disclosure and declaration requirements are specific to the different SDOs. In some cases, the process begins with the declaration for potentially essential IPRs. A general declaration (blanket declaration) is also possible.

Normally, the patent publication reference suffices, and no specific reference to the patent claims is needed. These declarations include the preferred mode of licensing IPRs. In most cases, if not all, the default licensing mode is FRAND.

102) If you have experience with standard setting organisations that require participants to identify specific IPR, IPR claims or applications to patent offices for IPR protection (for instance in their IPR declarations to those standard setting organisations), which impact did such requirement have on:

Impact on:	Very negative	Negative	Neutral	Positive	Very positive	No opinion
Access to the standard	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>		<input type="radio"/>
The licensing of the essential IPR	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>		<input type="radio"/>
Any costs /burden for your organisation	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>		<input type="radio"/>
Benefits for your organisation	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>		<input type="radio"/>
The standard development /setting process in general	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>		<input type="radio"/>

Commented [BG(CC1): I have aligned with Martin Karlsson and we agreed that it should be neutral because it always depends on the case and is not per se positive.

Your respective industry /market(s)	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
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103) Please explain your choices. If possible, provide concrete information on costs/benefits to your organisation.

5000 character(s) maximum

The requirement to identify in advance specific IPR, IPR claims or applications to patent offices that would be incorporated in the development of an industry standard can help provide some clarity in respect of which IPR may potentially be essential for the standard in question. Depending on the case this can facilitate the standardisation process but on the other hand it can slow down the process at the beginning. In many other instances participants are not required to identify this information in advance, for example IEC, Din norms etc.

104) Have you negotiated the licensing of standards essential patents (SEPs) with potential licensees that were part of a group (for example a licensing negotiation group)?

- ☒ Yes, as owner of a SEP
- ☒ Yes, as potential licensee of a SEP
- ☐ No
- ☐

105) If you have experience with negotiations with potential licensees as part of a group (for example a licensing negotiation group), please provide information about your experience: whether the licensing negotiation group was a formal/informal structure, which standards/SEPs this concerned, who was a party to the licensing negotiation group, the degree of integration between the licensees within the licensing negotiation group, the scope of negotiations, your own position in the negotiation (for example if as a SEPs owner you negotiated individually or also as part of a group), etc.

Some ERT members have experience in this area but it is hard to give an answer as a group as this all depends on the specific circumstances of the case and the respective role in such process.

5000 character(s) maximum

6.4) Joint purchasing agreements

The Guidelines on Horizontal Cooperation contain a chapter on joint purchasing agreements. Such agreements concerning the joint purchase of products by several buyers may take different forms and be used in different economic sectors. Such joint purchasing agreements usually aim at creating buying power vis-à-vis suppliers which often can lead to lower prices or better quality or services for consumers. Buying power may, under certain circumstances, also give rise to competition concerns.

The following questions concern such joint purchasing agreements, their qualification as either a restriction by object or a restriction by effect and the potential benefits and negative effects associated with the creation of buying power.

106) Have you negotiated the purchase of products / services together with other buyers?

- ☒ Yes
- ☐ No
- ☐ Not applicable

107) If yes, which sector(s) did this concern?

5000 character(s) maximum

This related to both direct material (i.e. material incorporated into the good to be sold by the manufacturer) and indirect material (i.e. other purchasing needs).

108) If yes, were the buyers, competitors or potential competitors?

- ☒ Yes
- ☐ Yes, but only some of them
- ☐ No
- ☐ I do not know

109) Please explain in which markets they were (potential) competitors.

5000 character(s) maximum

110) Was there a separate (joint) entity (so-called '*central buying organisation*' in the form of a joint venture, a company in which the buyers hold shares, a contractual arrangement, or other looser forms of cooperation) in charge of the negotiation for the buyers?

- ☐ Yes
- ☐
- ☐

No

Not applicable

111) If yes, please explain the features of the separate purchasing entity and the degree of integration of the buyers.

5000 character(s) maximum

112) If no, please explain the nature and degree of integration between the buyers.

5000 character(s) maximum

In the experience of ERT's members, more often than not there will be no separate legal entity. Instead, one of the parties will organise and negotiate with suppliers on behalf of all the members of the purchasing alliance.

In other cases, an independent third party can negotiate and purchase products or services on behalf of the buyers. Finally, suppliers may also agree to apply the same terms and conditions, including rebate levels to the aggregated volume purchased by the buyers.

113) Which aspects of the joint purchasing were negotiated jointly with the group and which ones separately?

	Jointly	Separately	Not applicable
Price	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
Certain element(s) of the price	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Definition/Assortment of products/services	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
Quantity	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
Timing	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Delivery	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
Other	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

114) Please explain your reply. In particular, if you chose 'other', please specify which aspects were negotiated jointly and which ones were negotiated separately.

5000 character(s) maximum

It depends on the ERT company in question.

115) Based on your experience or knowledge, which of the following elements should play a role in qualifying joint purchasing either as a **restriction of**

competition by object or as a restriction of competition by effect (several choices are possible)?

Qualification as a restriction <u>by object</u> or <u>by effect</u>	Relevant for qualification as by object restriction	Not relevant for qualification as by object restriction	Relevant for qualification as restriction by effect	Not relevant for qualification as restriction by effect	No opinion
Buyers are competing downstream	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Degree of integration on the buyer side (e.g. separate joint purchasing entity)	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Aggregated share of the buyers in total demand in the (upstream) purchasing market	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Degree of concentration of sellers in the (upstream) purchasing market	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

Aggregated market share of the buyers in the (downstream) selling markets	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
The buyer cooperation is secret towards sellers	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Other	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

116) Please explain your choices for the elements that would play a role in qualifying such agreements as a restriction of competition by object or by effect.

5000 character(s) maximum

In ERT's opinion joint purchasing should not be qualified as a restriction by object because it generates pro-competitive efficiencies and economies of scale. In addition, suppliers usually have no objection to joint buyer arrangements, when done in a transparent manner. ERT also does not consider joint purchasing should be considered a restriction by effect, unless the pooled volume exceeds a critical threshold.

117) Based on your experience or knowledge, what would be **potential pro-competitive benefits** of joint purchasing agreements between buyers on the following elements (several options are possible)?

Potential pro-competitive benefits	No pro-competitive benefits	Insignificant pro-competitive benefits	Some pro-competitive benefits	Significant pro-competitive benefits	Do not know	No experience /knowledge
Prices for consumers	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Prices for upstream suppliers	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Prices for buyers, party to the purchasing agreement	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Prices for buyers, not party to the purchasing agreement	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Choice/quality of products for consumers	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Choice/quality of products for upstream suppliers	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

Choice/quality of products for buyers, party to the purchasing agreement	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Choice/quality of products for buyers, not party to the purchasing agreement	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Innovation for consumers	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Innovation for upstream suppliers	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Innovation for buyers, party to the purchasing agreement	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Innovation for buyers, not party to the purchasing agreement	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Other	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

118) Based on your experience or knowledge, what would be **potential anti-competitive effects** of joint purchasing agreements between buyers on the following elements (several options are possible)?

Potential anti-competitive effects	No anti-competitive effects	Insignificant anti-competitive effects	Some anti-competitive effects	Significant anti-competitive effects	Do not know	No experience /knowledge
Prices for consumers	<input checked="" type="checkbox"/> <input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Prices for upstream suppliers	<input checked="" type="checkbox"/> <input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Prices for buyers, party to the purchasing agreement	<input type="checkbox"/> <input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Prices for buyers, not party to the purchasing agreement	<input checked="" type="checkbox"/> <input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Choice/quality of products for consumers	<input checked="" type="checkbox"/> <input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Choice/quality of products for upstream suppliers	<input checked="" type="checkbox"/> <input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

Choice/quality of products for buyers, party to the purchasing agreement	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Choice/quality of products for buyers, not party to the purchasing agreement	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Innovation for consumers	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Innovation for upstream suppliers	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Innovation for buyers, party to the purchasing agreement	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Innovation for buyers, not party to the purchasing agreement	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Other	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

119) Please explain your choices for both the pro-competitive benefits and the anti-competitive effects. If you chose "other" please explain which elements you mean.

In our view, joint purchasing arrangements bring significant pro-competitive benefits. They enable companies to join efforts for purchases where scale plays an important role, resulting not only in reduced costs (for example product prices and also transaction, transportation and/or storage costs) but also in better quality and higher standards.

For example, the negotiating power of the buyer is relevant to achieving better prices, better sustainability performance, better minimum standards (including with respect to child labour, living income and other ethical criteria), better quality standards and quicker delivery times. This is particularly the case for markets characterised by few suppliers and high bargaining power, who are not always willing to adjust sourcing practices to meet ESG goals. Acting unilaterally, an individual company (even a large multi-national), may not be able to force ESG changes upon the supplier.

In addition, joint purchasing arrangements may enable companies to sponsor third party innovation and entry that might otherwise not be achievable without a minimum volume group purchasing commitment. Incumbent supply chains are often protected by significant scale efficiencies and network effects. By pooling buying power, companies may incentivize disruptive innovation at scale.

The efficiencies of joint purchasing have a cascade effect in the quality of products, increased supply, incentives for further innovation and overall service to consumers. In general, these pro-competitive benefits should satisfy the criteria of A101(3) TFEU, as they generally improve the production and distribution of goods whilst allowing consumers a fair share. In any event, given the different forms that joint purchasing agreements can have, they should be analysed on a case-by-case basis.

Against this background, the "safe harbour" thresholds are too low and should be increased to 30% (in line with the VBER). The HGL should also distinguish between purchasing agreements in relation to "direct" material (i.e. material incorporated into the good to be sold by the manufacturer) and "indirect" material (i.e. other purchasing needs). They should explicitly clarify that purchasing agreements relating to "indirect" material both between competitors and non-competitors on the selling markets are unlikely to have potential restrictive effects on competition in the absence of a dominant position by the purchasing alliance on the purchasing markets.

Purchasing arrangements are very distinct from so-called "retail alliances". Such retail alliances do not involve any genuine integration of retailers' purchase function. Retail alliances are not a joint purchasing agreement where members buy together, they are a mechanism for collectively exercising market power. Their sole purpose is to require additional payments from their suppliers in exchange for the right to sell to the individual suppliers who are part of the retail alliance ("pay to play").

6.5) **Horizontal commercialisation agreements**

Commercialisation agreements involve co-operation between competitors in the selling, distribution or promotion of their substitute products. This type of agreement can have widely varying scope, depending on the commercialisation functions which are covered by the co-operation. At one end of the spectrum, joint selling agreements may lead to a joint

determination of all commercial aspects related to the sale of the product, including price. At the other end, there are more limited agreements that only address one specific commercialisation function, such as distribution, after-sales service, or advertising.

120) Please explain for which of the following clauses/subjects of commercialisation agreements you consider that further guidance would be necessary in the Horizontal guidelines:

Clauses / Subjects			Yes	No	No opinion
Pricing			<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
Cross selling			<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Data pooling/access to data/data sharing			<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
Algorithms			<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
Online sales			<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

121) Please explain your reply.

5000 character(s) maximum

ERT considers that commercialization agreements give rise to market, quality and cost efficiencies which are passed on to consumers. Given this, greater legal certainty on clauses/arrangements relating to prices, data and algorithms is necessary to prevent detriment to the economy and innovation.

In relation to digital markets specifically, ERT considers that further guidance on such clauses/arrangements would assist companies and enhance pro-competitive agreements between companies. For example, when undertaking commercialisation agreements, companies are currently subject to high compliance costs (e.g. law firm advice and internal resources devoted to legal analysis). This can reduce pro-competitive collaboration and delay innovation in digital markets which are generally global and fast-paced. The provision of clear rules and guidance in the HGL would speed up and encourage joint initiatives by operators in the digital world.

In addition, commercialization agreements very often involve the exchange of price-related information between the parties, together with access to data (or even data pooling) to improve commercialization services, reduce costs/prices, and achieve other business efficiencies. Facilitating horizontal commercialisation agreements dealing with data, in a proportionate and harmonized way will allow the EU to reach digital sovereignty. In addition, it will contribute to solving the current issues in digital markets - namely, barriers to entry, bottlenecks, quasi-monopolies, conglomerate effects etc. Therefore, more guidance on this issue is key for operators in the digital economy.

122) Based on your experience/knowledge, should the **scope of the chapter on commercialisation agreements** of the Horizontal Guidelines be extended in order to include the following categories of agreements?

	Yes	No	No opinion
Industrial Alliances	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
Data commercialisation agreements	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
Platforms	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>

123) Please explain your reply and in particular explain whether, for each category, you consider that the inclusion of specific examples in the Horizontal Guidelines would be sufficient to bring clarity and legal certainty to the assessment of these agreements.

5000 character(s) maximum

ERT's members welcome more guidance on horizontal commercialisation agreements, especially regarding industrial alliances, data pooling and ESG, as we consider these are areas which will become even more relevant in the coming years.

Such guidance should not be limited to providing examples but should also set out a clear approach for the assessment of such arrangements, and provide guidance as to the permitted scope of the horizontal cooperation, the type of information which can be exchanged, and the possible anti-competitive effects. This will allow companies to compete swiftly in markets characterized by high investment costs and entry barriers such as digital and technology markets and will allow companies to address critical ESG issues.

In particular, ERT would welcome more guidance on "industrial alliances". Indeed, in the context of digitalisation, global competitive dynamics and the growing need for collaboration, European companies need to cooperate in a flexible way to achieve the scale necessary to develop innovative products and services. These goals can no longer be achieved unilaterally. Currently, any industry-wide cooperation which involves several competitors is likely to raise suspicions of anti-competitive conduct. For companies to ensure adequate competition law compliance, they need to respect burdensome and time-consuming processes which tend to discourage cooperation.

When analysing industry-wide forms of horizontal co-operation, the EC may ask companies to demonstrate why cooperation between several industry actors is necessary. However, the analysis should go beyond whether individual companies can or cannot undertake a project unilaterally, and look at whether the cooperation will:

- achieve minimum viable scale in order to compete at global level and create new digital propositions for consumers and industry.
- allow the emergence of alternatives to the ecosystems created by global digital actors and enhance competition and innovation in digital markets,
- drive improvements in consumer welfare, environmental protection, delivering a single market.

ERT submits that industry-wide horizontal cooperation which leads to any of the positive outcomes outlined above should be considered as pro-competitive and compatible with A101 (1) TFEU be it in the form of commercialisation agreements, joint production or other.

Last, the revised HGL should include the conclusions of the most recent judgments of EU Courts as well as acknowledge market developments and new forms of cooperating in the digital economy, including interoperability agreements and contracts regarding IoT or artificial intelligence.

124) **Consortia arrangements.** *According to paragraph 237 of the Horizontal Guidelines, consortia arrangements that allow the companies involved to participate in projects that they would not be able to undertake individually normally are not likely to give rise to competition concerns, as the parties to the consortia arrangement are not potential competitors for implementing the project. However, the Horizontal Guidelines do not provide any guidance on consortia arrangements among competitors (i.e. where the parties can compete on their own or are able on their own to meet the tender requirements).* Based on your experience, do you consider that introducing a specific example regarding a consortium among competitors would provide sufficient guidance?

- ☒ Yes
- ☐ No
- ☐ No opinion

125) Please explain your reply and, in particular, explain which specific aspects should be expressly assessed in the example.

5000 character(s) maximum

ERT values and welcomes the introduction of an example on consortia agreements among competitors, in particular setting out the potential justifications for a consortium between competitors.

However, while examples are helpful, we believe it is essential that the HGL clarify that joint bidding between competitors can only create potential restrictive effects on competition if a cooperation between competitors effectively leads to a reduction of the number of bids (i.e. competitive pressure) that a customer could receive. This should be the relevant test for assessing potential effects on competition of joint bidding between competitors.

In that respect, the HGL should clarify that it is sufficient if e.g. only one of two competitors cannot submit an offer independently. In such a case, a cooperation between those competitors will not reduce the number of bids (i.e., competitive pressure) on the market as one of the two competitors would not have the ability to bid alone at all. On the contrary, the consortia might be able to submit a lower or technically better or more complete bid as a result of the cooperation between competitors to the benefit of the customer.

The HGL should also clarify that for the question whether one party can bid alone the decisive criteria is whether an independent bid would be economically feasible or reasonable. Often, a company could theoretically bid independently but will in practice not be able to do so as an independent bid would be economically not feasible or reasonable. For example, the independent bid might be too high in price or absorb the entire capacity/resources of the bidder, which would reduce competition for future bids and also not be economically reasonable from a risk allocation perspective.

6.6) Sustainability

The evaluation of the current Horizontal Guidelines suggested that there is need for more guidance on the assessment of horizontal cooperation agreements that pursue sustainability objectives. The term sustainability objective for the purpose of this survey pertains to economic, social and environmental goals set out in Article 3(3) of the Treaty on European Union.

126) Have you been a party to cooperation agreements that pursue sustainability objectives or do you intend to conclude such agreements in the near future?

- ☒ Yes
- ☐ No
- ☐ Not applicable

127) Could you please briefly describe the cooperation agreement(s) that you have concluded, or you want to conclude, and what sustainability objectives they pursued/would pursue?

5000 character(s) maximum

Various of ERT's members have been party to cooperation agreements that pursue ESG objectives. For example:

- In the telecoms sector, the [ECORATING](#) initiative brings together various mobile operators to promote an environmental standard for mobile phones. Eco Rating evaluates the environmental impact of the entire process of production, transportation, use and disposal of mobile phones. This allows consumers to make decisions based on environmental criteria and enables manufacturers to incorporate them into their manufacturing and design processes. In addition, infrastructure sharing agreements are a usual and effective way for companies to co-invest and deploy infrastructure (such as telecommunications networks) across Europe. In many cases, they generate substantial efficiencies, cost-savings, and reduce environmental impact.
- In the shipping industry, the incumbent supply chain is based on a vast, scaled network of fossil fuel delivery and consumption. It is likely that no single carrier will be able to offer the volume commitments necessary to sponsor alternative fuels, alternative engines, or alternative ships at a minimum viable scale necessary to compete with traditional supply. Cooperation agreements among container ship operators could lead to substantial acceleration in green transformation, leading to new scaled infrastructure around alternative fuels and ships.
- In the FMCG sector, collaborations with competitors to accelerate the collection and recycling of coffee capsules, thereby (i) minimizing the impact of packaging on the environment and playing an active role in the development of well-functioning collection, sorting and recycling schemes across territories, and (ii) responding to increased regulatory pressure/legislation and potential outright bans on capsules, due to current recycling difficulties.
- In sectors such as energy generation, transmission, e-charging, cloud services, cooperation via joint R&D and standardisation are key to achieving sustainability goals,

especially given the fact that the investments required are considerable and customers are often not willing to pay higher prices for more sustainable products/solutions. Examples include initiatives which help companies to create transparency on the carbon footprint of their entire supply chain or create an e-charging ecosystem.

- Data sharing and data pooling agreements could also help pursue sustainability goals. For instance, telecom, shipping and energy operators alike are increasingly using Big Data and AI applications to optimise system performance to make networks as sustainable and cost-efficient as possible. The data transmitted by smart meters are used for the targeted implementation of energy efficiency solutions, such as the application of standby mode to limit energy consumption when traffic is slow. There are many examples of efficient data sharing between operators in different sectors of the economy in relation to collaborations on green projects (e.g. finding new zero- carbon fuels for air or sea transport for example).

128) Could you please specify the type of agreement(s) that you have concluded or intend to conclude? Please choose one or more of the following:

- ☐ Joint Research & Development
- ☐ Standard Setting
- ☐ Standard terms
- ☐ Joint Production
- ☐ Joint Purchasing
- ☐ Joint Commercialisation
- ☐ Information exchange
- ☐ Other
- ☐ Not applicable

129) If you replied 'Other', please specify.

5000 character(s) maximum

130) Could you please explain your motivation/incentives/purpose to conclude such cooperation agreements? Please choose one or more of the following:

- ☐ Contributing to sustainability objectives
- ☐ Improving reputation
- ☐ Profit making
- ☐ Contribution to sustainability objectives and profit making
- ☐ Contributing to sustainability objectives and improving reputation
- ☐
- ☐

Profit making and improving reputation

Required by law/regulation

- ☐ Other
- ☐ Not applicable

a)

131) If you replied 'Other', please specify.

5000 character(s) maximum

132) Are you required by law/regulation to comply with certain sustainability targets? Please explain what law/regulation and what sustainability targets you are bound by.

Certain of the examples given in response to Q127 above were prompted by legal requirements as to sustainability targets. For example, the collaboration in respect of coffee capsules discussed in response to Q127 was prompted by the fact that, in Spain, several regional laws require companies to comply with sustainability standards or targets.

133) Please indicate whether your company has tried to pursue the stated sustainability objective on its own before considering cooperating with competitors?

- ☒ Yes
- ☐ No
- ☐ Not applicable

134) Please explain what prompted you to consider cooperation with your competitors instead of pursuing the stated sustainability objective on your own and why the agreement was necessary to reach that objective.

As explained in response to Q127 above, in order to drive ESG change across an industry, it is indispensable that a large part of that industry be on board and committed to the change, particularly given the scale of investments required and – in some cases - the need for industry-wide standards. For many ESG initiatives, unilateral changes either will not work, will not have a significant impact or will not deliver change sufficiently quickly.

5000 character(s) maximum

135) Do you have the means and methods to measure or assess the **positive and /or negative impact** of your agreements on sustainability?

Impact of your agreement on sustainability	Yes	No	Not applicable
Positive impact	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
Negative impact	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

136) If your reply was 'yes', please could you give concrete examples?

5000 character(s) maximum

ERT considers there are various ways by which to measure the positive impact of agreements on ESG objectives.

For example, the collaboration in respect of coffee capsules discussed in response to Q127 brought real and measurable efficiencies for consumers by:

- Increasing total capsules recycling rates;
- Making available more capsule collection points for consumers; and
- Potential reduction of recycling costs.

It is often also possible to measure the positive impact of agreements on, for example, carbon footprint or energy consumption. That said, other factors such as social standards are also taken into account before deciding on a concrete measure.

137) If your reply was 'no', please explain how you would assess whether the objective of your agreement is attained/will be attained.

5000 character(s) maximum

138) Have you abstained from concluding an actual cooperation agreement that pursued sustainability objectives for fear that you may breach competition rules (e.g. Article 101 TFEU that prohibits anti-competitive agreements)?

- ☒ Yes
- ☐ No
- ☐ Not applicable

139) If your reply was 'yes', please explain what concerns you have had and what specific aspect(s) of the rules you have been afraid you might breach.

5000 character(s) maximum

In ERT's view, companies and their staff undergo intensive antitrust training and as a result are very aware of the competition rules, as well as recent collaborations which were found to fall foul of those rules (e.g. the laundry detergent and car emissions cartels). As a consequence, staff often do not even dare to contemplate projects which might require exemption under A101(3). For this reason, we consider it critical that the HBER and HGL provide concrete guidance as to when "by object" competitor collaborations may merit exemptions, such as:

- Agreements to roll-out innovation in specified markets within the EU, e.g. where there is capacity, sourcing, demand or recycling challenges, without being vulnerable to a charge of market sharing or market allocation;
- Otherwise-exemptible agreements which entail achieving compliance with new product-related legal requirements, given the Commission's new theory of "over-fulfilment competition" as applied in the recent emissions cartel case (companies may face the accusation of restricting competition even though striving for the best technical solution implies considering numerous trade-offs, in particular when it comes to complex products, e.g., effects on performance, weight, maintenance effort and energy consumption);
- Agreements to allocate volumes for input, e.g. when competitors are supporting and purchasing from the same sustainable source, without being vulnerable to a charge of forming a buying cartel;
- Agreements to align on pricing elements in order to e.g. introduce sustainable and easily recyclable but more expensive packaging (to deal with the first mover disadvantage) OR agreements on minimum prices/volumes to sustainable suppliers, without being vulnerable to a charge of forming a pricing cartel;
- Agreements to purchase from sustainable suppliers (e.g. who do not use child labour, who guarantee a minimum wage or who use regenerative farming methods), without being vulnerable to a charge of a collective boycott;
- Agreements on standards (and not just minimum or maximum standards) when it is necessary to e.g. adhere to the same standards when communicating to customers (e.g. nutritional content) or the same sector or cross-sectorial standard to promote ESG objectives (e.g. for recycling). By their nature, standards can only work in practice if all market players implement the same standard.

Furthermore, when it comes to agreements initiated or funded by a government entity rather than companies themselves, situations should not arise in which companies acting in cooperation with a state authority in order to comply with standards are challenged by a competition authority for this very arrangement. Instances like this have already occurred in other jurisdictions, such as the proceedings of the U.S. Department of Justice in 2019 and 2020 against four car manufacturers that had previously agreed with the California Air Resources Board (CARB) to further reduce the emission levels of their vehicles.

140) Based on your experience, please indicate any concrete provisions in the current [Horizontal Guidelines](#) that in your view need to be revised to facilitate cooperation agreements pursuing sustainability objectives. Please explain your reply.

See please ERT's [Response on Competition Policy contributing to the Green Deal and the response to Question 139 above](#).

ERT supports the provision of additional guidance and clarity to encourage and enable European businesses, including competitors where relevant, to work together to achieve bold ESG goals which either cannot be achieved unilaterally, or can be more effectively pursued through joint efforts. Without greater legal certainty, companies face increased time and costs (e.g. self-assessment) and horizontal cooperation is likely to be avoided (for fear of breaching an unclear set of rules). Moreover, with collaboration on emission reductions being inherently global in nature, ERT is calling for globally coherent rules that will enable European business to achieve their sustainability goals in a timely manner.

In addition to greater legal certainty, we consider that industry collaboration and government support are required to achieve ESG goals in the time available. Ultimately, European businesses need a collaborative partnership with the EC which focuses less on enforcement and more on the provision of carefully-considered safe harbours. A strong message that collaboration on ESG objectives is actively encouraged is necessary to change the perception that competition authorities view such collaboration with suspicion.

In this context, ERT calls on the EC to indicate the circumstances in which ESG projects will likely fall outside the scope of A101(1), rather than defaulting to a detailed A101(3) effects analysis. Guidance is also welcomed on the quantification of ESG benefits – we consider that only once sustainability is “credited” with a value can our industries feel confident that their efforts are on balance pro-competitive. Concrete, dedicated guidance would stimulate private investment and business involvement in achieving the EU Green Deal objectives. Conversely, an overly conservative approach or continued lack of specific guidance would severely hamper the achievement of rapid decarbonisation that is needed to meet European and international environmental goals.

ERT encourages the EC to clearly signal its willingness to engage with business in a timely and effective manner to enable prompt progress on the myriad of complex investments and collaborations required, without placing an undue administrative burden on business in the process. Agility and flexibility will be key.

We invite the EC in the short-term to consider, and provide a clear statement on, the likelihood of the following sorts of horizontal agreements being pro-competitive (subject to the basic principles of good faith, transparency, openness, information sharing and proportionality, etc.):

- a) Projects to reduce ecological footprint (e.g. by reducing carbon emissions, energy consumption and the use of plastics, improving agricultural methods to reduce emissions,

and by encouraging composting projects),

- b) Projects to increase the commercial viability of implementing circular economies, driving re-use, recyclability, and recycling, such as harmonised approaches to packaging or the fixing of levies to support more widespread and efficient recycling activities,
- c) Infrastructure sharing to meet Green Deal goals,
- d) Minimum mandatory standards to reduce environmental impact,
- e) Collaborations to create new alternative fuel pathways and other high -risk transformation projects that require significant investments and scale,
- f) Initiatives between companies to agree on common standards and reporting obligations with, and conduct joint audits on, their common suppliers to assess their sustainability Green Deal credentials,
- g) Agreements between competitors where they commit to respect environmental laws and commit to only using compliant suppliers and other business partners,
- h) Agreements between competitors to source from suppliers who go beyond minimum legal requirements, e.g. sourcing from farms who meets regenerative farming criteria.
- i) Agreements between competitors where they commit to only source from “ethical” suppliers, e.g. who do not engage in child labour, guarantee human rights or provide a minimum living income.
- j) Agreements between competitors to adopt standardised “green” taxonomy or classification in relation to sustainability claims, and eco-labelling of products, and
- k) Projects which are endorsed or supported by national and/or EU public authorities and agencies as contributing to achieving the objectives of the energy transition.

In addition, it would be helpful to have clearer guidelines in relation to the competition law risk of exchanges of information between competitors for sustainability/ESG projects.

Finally, ERT urges the EC to provide guidance on cases eligible for A101(3) exemption, as outlined in response to Q139 above.

141) Please indicate in which chapter(s) of the current [Horizontal Guidelines](#) it would be helpful to have more specific guidance on the assessment of agreements pursuing sustainability objectives? Please explain your reply.

See please ERT's [Response on Competition Policy contributing to the Green Deal](#)

142) Do you have any additional comments that you want to make in relation to the assessment of cooperation agreements pursuing sustainability objectives?

7 Additional remarks

143) Please feel free to **upload a concise document**, such as a position paper, explaining your views in more detail or including additional information and data.

Please note that the uploaded document will be published alongside your response to the questionnaire that is the essential input to this open public consultation. The document is an optional complement and serves as additional background reading to better understand your position.

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

144) Do you have any **further comments** on this initiative on aspects not covered by the previous questions?

5000 character(s) maximum

Increase in legal certainty

As we explained in our Expert Paper on Horizontal Cooperation in February 2020, horizontal cooperation can improve European competitiveness in a changing geopolitical environment by delivering projects that increase consumer welfare. However, without greater legal certainty, companies face increased time and costs (e.g. self-assessment) and horizontal cooperation is likely to be avoided (for fear of breaching an unclear set of rules and being subject to significant sanctions). Currently, as described above, the HGL and BERs do not provide sufficient guidance for self-assessment (and there is little in the way of useful precedents from EU or Member States courts and Competition Authorities).

Therefore, as a first step, ERT submits that clearer guidance is required in the HGL and the BERs through a substantial review of the current framework to adapt it to new challenges.

As part of this, ERT considers that the updated HGL should better reflect the EC's experience in cases in which it, for example, conducted dawn raids or opened formal investigations, but in which the case team ultimately did not issue a Statement of Objections. Otherwise, it is almost impossible to understand the factual and legal background behind the initial suspicions and final administrative closure of these cases. It is understandable that the EC may not wish to make public its reasoning in each case, but the new version of the HGL could reflect better these useful precedents.

Increased market share thresholds

A key issue with the current BERs is the application of the market share thresholds.

In many cases, a lack of reliable precedents on market definition leads to considerable uncertainty for companies in their self-assessment. A particular challenge exists in newly developing markets e.g. in the digital sector or in the development of new, sustainable products - it is often unclear whether a newly developed product can be regarded as a substitute for existing products or whether it establishes an independent market.

Moreover, reliable market share data is often not available either within the companies themselves or for purchase from independent third parties, with the result that companies have to rely on a subjective assessment of market shares by their employees. Even where reliable data does exist, residual uncertainties remain given the unclear rules on market definition e.g. as to whether geographic markets are European- or worldwide – with sometimes considerable consequences for market shares.

In practice, this means that undertakings often apply a considerable 'margin of error' in their self-assessment, in order to be comfortable that they fall within the BERs - the safe harbour created

by the BERs is therefore much smaller in practice than the wording suggests.

Against this backdrop, we consider the market share thresholds should be increased significantly. At the same time, it should be clarified that for the development of new products that potentially create a “sustainable” market, the exemption applies for a certain period of time, irrespective of market shares, e.g. 10 years.

Guidance

The EC should look into how best to provide informal guidance on a case-by-case basis. The EC could encourage companies to make more use of informal (confidential) meetings to examine specific questions relating to horizontal cooperation projects. In this respect, the EC should commit that it will not use the information provided for any purpose other than offering informal guidance. ERT would also encourage greater use of the Commission’s Notice on informal guidance relating to novel questions concerning Articles 81 and 82 of the EC Treaty that arise in individual cases. On the procedural front, we believe that a quick way to ask the EC for further guidance is needed in cases where the self-assessment of the parties does not provide sufficient legal certainty as to the compliance of the co-operation with A101 and the cooperation is of a certain magnitude and complexity. These cases would require a rapid response from the EC, as any ex post review may have major consequences for the company concerned.

In order for such a guidance process to be effective and manageable from the EC’s perspective, the process should be voluntary, and limited in terms of both the information provided and the time taken for issuance of the guidance – in order to not to delay projects disproportionately. It is not desirable to create a burdensome, lengthy process, especially in fast-moving markets.

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

- ☒ Yes
- ☐ No