

Stakeholder consultation on the review of the HBERs

Final version

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

...

3. About you

...

4. About your organisation

...

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	Little relevance
Specialisation BER	High relevance especially within the field of pools and other forms of co(re-)insurance.
Horizontal Guidelines	High relevance in various aspects, especially regarding information/data sharing.

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 type="checkbox"/>	<input checked="" type="checkbox"/>
Production (or specialisation) agreements	<input type="checkbox"/>	<input checked="" type="checkbox"/>
Information exchanges	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Joint purchasing agreements	<input type="checkbox"/>	<input checked="" type="checkbox"/>
Commercialisation agreements	<input type="checkbox"/>	<input checked="" 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

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

n/a

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

[no answers in this segment as this is not relevant in our opinion]

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

[no answers in this segment as this is not relevant in our opinion]

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.

We see no reason why the participation of more than two parties would justify a different assessment under competition law than the participation of only two parties. In our view, such an agreement would merit block exemption under the same conditions as unilateral specialisation agreements between only two parties. We consider that such an enlargement would allow the exemption of large numbers of pro-competitive agreements, thereby increasing legal certainty and reducing cost for the parties.

For instance, there is uncertainty whether co-insurance and co-reinsurance pools within the meaning of the former Insurance BER (almost all of which involve more than two parties) can be qualified as joint production agreements under the Specialisation BER. Even if they are not deemed to fulfil the conditions of joint production, they would arguably fall under the Specialisation BER as unilateral specialisation agreements that involve more than two parties.

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
- ☐ Neutral
- ☐ Unlikely
- ☐ Very unlikely

☐ No opinion

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

In our view, horizontal subcontracting agreements with a view to expanding production should be included in the exemption, as such agreements appear to be equivalent to own production from a competition point of view. The Horizontal Guidelines already state that regarding such subcontracting agreements it is in most cases unlikely that market power exists if the parties to the agreement have a combined market share not exceeding 20 %.

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					x	
Prices					x	
Quality of products/services					x	
Innovation					x	
Level of production					x	
Self-assessment of specialisation/production agreements				x		
Costs for business					x	
Legal certainty for businesses					x	
Harmonised application of competition rules by national competition authorities and national courts				x		

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

As stated above, we believe that unilateral specialisation between several parties should be subject to the same assessment under antitrust law as unilateral specialisation between two parties. Accordingly, we believe that this type of specialisation should also be subject to the block exemption. This would have a very positive impact on the legal certainty of such agreements. As a result, they could be concluded more frequently or at lower cost. The efficiency-enhancing effect of such agreements could thus be more frequent than is currently the case.

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				x		
Prices				x		
Quality of products/services				x		
Innovation				x		
Level of production				x		
Self-assessment of specialisation/production agreements			x			
Costs for business				x		
Legal certainty for businesses					x	
Harmonised application of competition rules by national competition authorities and national courts				x		

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

Such agreements are pro-competitive in our view and should thus benefit from the exemption. This would have a very positive impact on the legal certainty of such agreements. As a result, they could be concluded more frequently or at lower cost. The efficiency-enhancing effect of such agreements could thus be more frequent than is currently the case.

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).

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					x	
Level of market concentration					x	

Volume of products in the market					x	
Prices for consumers					x	
Innovation/Investment in R&D					x	
Investment in production					x	

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.

In our view, it would be very welcome to add to the definition of joint distribution the option to transfer the distribution of the contract products to one party. From the customer's point it is irrelevant for the competitive situation whether distribution is carried out by a joint venture or by one party - because in each of the two cases the result is that the customer is now faced with only one supplier where previously there were two competing suppliers. It would therefore be logical to extend the concept of "joint distribution" to the constellation in which one party handles distribution for both partners. In our view, this would also apply if the definition of unilateral specialization were to be extended to more than two parties, as is currently being considered.

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

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.

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:

An exchange of information is important for the insurance industry, e.g. for the purpose of reinsurance, industry-wide statistics or fraud prevention. Insurers depend on the industry-wide statistics, as they enable them to calculate premiums as accurately as possible. This is especially true of small and medium-sized companies with smaller pools of own data. Fraud prevention databases are used to detect accumulations of claims which would otherwise be distributed by the perpetrators among different companies and thus remain undetected. They constitute an important factor to avoid expenditures related to fraud.

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.

As far as the industry-wide statistics are concerned, information sharing occurs with the German insurance association as an intermediary. The fraud prevention database is run by a third party that is not active on the same market.

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

While the volume of the information exchanged will not necessarily grow, the way in which such information is being exchanged may well become more automated over time.

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.

As mentioned above, industry-wide statistics and databases for fraud prevention are important for the insurance sector.

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

- ☒ Yes, I was involved in data pooling/data sharing
- ☒ Yes, I am still involved in data pooling/data sharing
- ☒ Yes, I will take part in data pooling/data sharing in the future
- ☐ No

☐ Not applicable / no opinion

- ☐ 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

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.

1. GDV is compiling and distributing joint compilations, tables and studies within the meaning of the former Insurance BER. The basis for the offer of insurance products is the forecast of the future development of the risks covered by them. Small and medium-sized insurance companies in particular benefit from these statistics. They also facilitate market entry.
2. The insurance industry uses databases to prevent fraud. This is intended, for example, to detect accumulations of claims which would otherwise be distributed by the perpetrators among different companies and thus remain undetected. The German insurance industry uses such a system, which is known as the "Hinweis- und Informationssystem der Versicherungswirtschaft" (HIS). It supports insurers in clarifying claims with suspicion of manipulation. It is run by informa HIS GmbH, a subsidiary of Bertelsmann.

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?

- ☐ 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

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

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.

GDV is publishing model policy conditions and could therefore considered a standard setting organisation.

VdS, a subsidiary of GDV, is a standard-setting body for norms regarding safety measures, active among other things in fire protection, security, natural hazard prevention and cyber security (www.vds.de).

Furthermore, GDV is cooperating in efforts to set standards regarding the optimization of IT processes within the insurance industry (www.bipro.net).

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.

[none supplied]

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

[none supplied]

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

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

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
- ☐ No opinion/not applicable

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

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 by object or by effect	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					x
Degree of integration on the buyer side (e.g. separate joint purchasing entity)					x
Aggregated share of the buyers in total demand in the (upstream) purchasing market					x
Degree of concentration of sellers in the (upstream) purchasing market					x
Aggregated market share of the buyers in					x

the (downstream) selling markets					
The buyer cooperation is secret towards sellers					x
Other					x

17) 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						x
Prices for upstream suppliers						x
Prices for buyers, party to the purchasing agreement						x
Prices for buyers, not party to the purchasing agreement						x
Choice/quality of products for consumers						x
Choice/quality of products for upstream suppliers						x
Choice/quality of products for buyers, party to the purchasing agreement						x
Choice/quality of products for buyers, not party to the purchasing agreement						x
Innovation for consumers						x
Innovation for upstream suppliers						x
Innovation for buyers, party to the purchasing agreement						x
Innovation for buyers, not party to the purchasing agreement						x
Other						x

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						x
Prices for upstream suppliers						x
Prices for buyers, party to the purchasing agreement						x
Prices for buyers, not party to the purchasing agreement						x
Choice/quality of products for consumers						x
Choice/quality of products for upstream suppliers						x
Choice/quality of products for buyers, party to the purchasing agreement						x
Choice/quality of products for buyers, not party to the purchasing agreement						x
Innovation for consumers						x
Innovation for upstream suppliers						x
Innovation for buyers, party to the purchasing agreement						x
Innovation for buyers, not party to the purchasing agreement						x
Other						x

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.

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			x
Cross selling			x
Data pooling/access to data/data sharing	x		
Algorithms	x		
Online sales	x		

121) Please explain your reply.

The aspects mentioned have become more and more important since the inception of the current Horizontal Guidelines and will no doubt become even more important in the future. Therefore, further guidance on these aspects under competition law would be very useful.

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			x
Data commercialisation agreements	x		
Platforms	x		

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.

The aspects mentioned have become more and more important since the inception of the current Horizontal Guidelines and will no doubt become even more important in the future. Therefore, further guidance on these aspects under competition law would be very useful.

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.

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?

Several sustainability initiatives exist to which German insurance companies are members, e.g.

- Sustainability Commitment of the GDV (<https://www.en.gdv.de/en/issues/our-news/climate-neutral-investment-portfolios-by-2050---insurers-commit-to-sustainability-goals-65924>)

- Klima-Selbstverpflichtung des deutschen Finanzsektors (Climate protection voluntary commitment of the German financial sector, <https://www.klima-selbstverpflichtung-finanzen.de/>)

Taskforce on Nature-related Financial Disclosures

UN Net Zero Asset Owner Alliance (<https://www.unepfi.org/net-zero-alliance/>)

UN Net-Zero Insurance Alliance (<https://www.unepfi.org/net-zero-insurance/>)

Principles for Sustainable Insurance (PSI) (<https://www.unepfi.org/psi/>)

Principles for Responsible Investment (PRI) (<https://www.unpri.org/>)

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

[no Q 129]

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

[no Q 131]

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.

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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.

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 type="radio"/>	<input type="radio"/>	<input type="radio"/>
Negative impact	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

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.

A few years ago the insurance industry developed a code of responsible investment. Insurers wanted to commit to no longer invest in companies involved in the production of certain internationally outlawed weapon systems such as anti-personnel landmines and cluster munitions. This code was however not put into practice after the Federal Cartel Office had raised objections from a competition law perspective. We consider this a good example on why more legal certainty is important in this area.

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.

We believe that many if not most sustainability agreements have specific features that do not fit squarely into the current categories of the Horizontal Guidelines. We therefore believe that - instead of additions or revisions to existing sections of the Guidelines - it would be preferable to devote an additional chapter to sustainability objectives.

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.

As noted above, we consider an additional chapter as better suited. That being said, the chapters which would benefit the most from specific guidance on the assessment of agreements pursuing sustainability objectives would be in our view:

- the chapter on standardisation agreements, which could include specific guidance on Codes of conduct promoting environmental or climate-conscious practices, including joint standards and certification labels.
- information exchange: carrying through sustainability agreements may require an exchange of commercially sensitive information, so the question arises under what circumstances such an exchange might be allowed if it concerns sustainability agreements.

- commercialisation agreements: regarding rules on joint quality labels with respect to sustainability, for ex. production following ecological standards
- purchasing agreements: regarding rules on purchase of ecological / sustainably produced raw materials.

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

On a fundamental level, facilitating cooperation agreements pursuing sustainability goals would require widening the understanding of the criteria of contribute to improving the production or distribution of products or contribute to promoting technical or economic progress in Art. 101 (3) TFEU. This currently rather narrow understanding underpins all efficiency-related guidance in the Horizontal Guidelines. Tackling this issue would probably also require changes in the Guidelines on the application of Article 81(3) of the Treaty as well.

With respect to the assessment of sustainability initiatives the following two changes are in our view needed:

The requirement that environmental benefits can only be taken into account as efficiency gains when applying article 101 (3) TFEU if these benefits are quantified should in our view be dropped. Consistently, a qualitative (as opposed to a quantitative) assessment of whether these benefits outweigh the restrictive effects of a sustainability initiative should be sufficient and adequate.

The requirement that an exemption based on article 101 (3) TFEU can only exist where the specific group of customers that bears the restrictive effects of an agreement or concerted practice is (over-)compensated by the benefits generated by such agreement or concerted practice should in our view again be waived in case of sustainability initiatives. By consequence, efficiency gains / benefits for the society (and humanity) as a whole should be fully admitted and taken into account in the assessment of whether the beneficial effects of a sustainability initiative outweigh its restrictive effects.

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.

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

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

Yes



No