

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.

If you encounter **technical problems**, please contact the Commission's [CENTRAL HELPDESK](#).

3 About you

* 1 I am giving my contribution as

- Academic/research institution
- Business association
- Company/business organisation
- Consumer organisation
- EU citizen
- Environmental organisation
- Non-EU citizen
- Non-governmental organisation (NGO)
- Public authority
- Trade union
- Other

* 2 First name

Meeri Aurora

* 3 Surname

TOIVANEN

* 4 Email (this won't be published)

meeri.toivanen@outlook.com

* 6 Language of my contribution

- Bulgarian
- Croatian
- Czech
- Danish
- Dutch
- English
- Estonian
- Finnish
- French
- German

- Greek
- Hungarian
- Irish
- Italian
- Latvian
- Lithuanian
- Maltese
- Polish
- Portuguese
- Romanian
- Slovak
- Slovenian
- Spanish
- Swedish

*** 9 Organisation name**

255 character(s) maximum

The Finnish Innovation Fund Sitra

*** 10 Organisation size**

- Micro (1 to 9 employees)
- Small (10 to 49 employees)
- Medium (50 to 249 employees)
- Large (250 or more)

11 Transparency register number

255 character(s) maximum

Check if your organisation is on the [transparency register](#). It's a voluntary database for organisations seeking to influence EU decision-making.

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*** 12 Country of origin**

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

- | | | | |
|-------------------------------------|--------------------------------|-------------------------------------|---|
| <input type="radio"/> Afghanistan | <input type="radio"/> Djibouti | <input type="radio"/> Libya | <input type="radio"/> Saint Martin |
| <input type="radio"/> Åland Islands | <input type="radio"/> Dominica | <input type="radio"/> Liechtenstein | <input type="radio"/> Saint Pierre and Miquelon |

- Albania
- Algeria
- American Samoa
- Andorra
- Angola
- Anguilla
- Antarctica
- Antigua and Barbuda
- Argentina
- Armenia
- Aruba
- Australia
- Austria
- Azerbaijan
- Bahamas
- Bahrain
- Bangladesh
- Barbados
- Belarus
- Belgium
- Belize
- Benin
- Bermuda
- Bhutan
- Bolivia
- Dominican Republic
- Ecuador
- Egypt
- El Salvador
- Equatorial Guinea
- Eritrea
- Estonia
- Eswatini
- Ethiopia
- Falkland Islands
- Faroe Islands
- Fiji
- Finland
- France
- French Guiana
- French Polynesia
- French Southern and Antarctic Lands
- Gabon
- Georgia
- Germany
- Ghana
- Gibraltar
- Greece
- Greenland
- Grenada
- Lithuania
- Luxembourg
- Macau
- Madagascar
- Malawi
- Malaysia
- Maldives
- Mali
- Malta
- Marshall Islands
- Martinique
- Mauritania
- Mauritius
- Mayotte
- Mexico
- Micronesia
- Moldova
- Monaco
- Mongolia
- Montenegro
- Montserrat
- Morocco
- Mozambique
- Myanmar/Burma
- Namibia
- Saint Vincent and the Grenadines
- Samoa
- San Marino
- São Tomé and Príncipe
- Saudi Arabia
- Senegal
- Serbia
- Seychelles
- Sierra Leone
- Singapore
- Sint Maarten
- Slovakia
- Slovenia
- Solomon Islands
- Somalia
- South Africa
- South Georgia and the South Sandwich Islands
- South Korea
- South Sudan
- Spain
- Sri Lanka
- Sudan
- Suriname
- Svalbard and Jan Mayen
- Sweden

- Bonaire Saint Eustatius and Saba
- Bosnia and Herzegovina
- Botswana
- Bouvet Island
- Brazil
- British Indian Ocean Territory
- British Virgin Islands
- Brunei
- Bulgaria
- Burkina Faso
- Burundi
- Cambodia
- Cameroon
- Canada
- Cape Verde
- Cayman Islands
- Central African Republic
- Chad
- Chile
- China
- Christmas Island
- Clipperton
- Guadeloupe
- Guam
- Guatemala
- Guernsey
- Guinea
- Guinea-Bissau
- Guyana
- Haiti
- Heard Island and McDonald Islands
- Honduras
- Hong Kong
- Hungary
- Iceland
- India
- Indonesia
- Iran
- Iraq
- Ireland
- Isle of Man
- Israel
- Italy
- Jamaica
- Nauru
- Nepal
- Netherlands
- New Caledonia
- New Zealand
- Nicaragua
- Niger
- Nigeria
- Niue
- Norfolk Island
- Northern Mariana Islands
- North Korea
- North Macedonia
- Norway
- Oman
- Pakistan
- Palau
- Palestine
- Panama
- Papua New Guinea
- Paraguay
- Peru
- Switzerland
- Syria
- Taiwan
- Tajikistan
- Tanzania
- Thailand
- The Gambia
- Timor-Leste
- Togo
- Tokelau
- Tonga
- Trinidad and Tobago
- Tunisia
- Turkey
- Turkmenistan
- Turks and Caicos Islands
- Tuvalu
- Uganda
- Ukraine
- United Arab Emirates
- United Kingdom
- United States

- Cocos (Keeling) Islands
- Colombia
- Comoros
- Congo
- Cook Islands
- Costa Rica
- Côte d'Ivoire
- Croatia
- Cuba
- Curaçao
- Cyprus
- Czechia
- Democratic Republic of the Congo
- Denmark
- Japan
- Jersey
- Jordan
- Kazakhstan
- Kenya
- Kiribati
- Kosovo
- Kuwait
- Kyrgyzstan
- Laos
- Latvia
- Lebanon
- Lesotho
- Liberia
- Philippines
- Pitcairn Islands
- Poland
- Portugal
- Puerto Rico
- Qatar
- Réunion
- Romania
- Russia
- Rwanda
- Saint Barthélemy
- Saint Helena
Ascension and
Tristan da Cunha
- Saint Kitts and
Nevis
- Saint Lucia
- United States
Minor Outlying
Islands
- Uruguay
- US Virgin Islands
- Uzbekistan
- Vanuatu
- Vatican City
- Venezuela
- Vietnam
- Wallis and
Futuna
- Western Sahara
- Yemen
- Zambia
- Zimbabwe

The Commission will publish all contributions to this public consultation. You can choose whether you would prefer to have your details published or to remain anonymous when your contribution is published. **For the purpose of transparency, the type of respondent (for example, 'business association, 'consumer association', 'EU citizen') country of origin, organisation name and size, and its transparency register number, are always published. Your e-mail address will never be published.** Opt in to select the privacy option that best suits you. Privacy options default based on the type of respondent selected

* 14 Contribution publication privacy settings

The Commission will publish the responses to this public consultation. You can choose whether you would like your details to be made public or to remain anonymous.

● **Anonymous**

Only organisation details are published: The type of respondent that you responded to this consultation as, the name of the organisation on whose behalf you reply as well as its transparency number, its size, its country of origin and your contribution will be published as received. Your name will not be published. Please do not include any personal data in the contribution itself if you want to remain anonymous.

● **Public**

Organisation details and respondent details are published: The type of respondent that you responded to this consultation as, the name of the organisation on whose behalf you reply as well as its transparency number, its size, its country of origin and your contribution will be published. Your name will also be published.

I agree with the [personal data protection provisions](#)

4 About your organisation

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

500 character(s) maximum

Sitra is an independent public foundation which operates directly under the supervision of the Finnish Parliament. It functions both as a think tank and as an investment company with the objective to promote stable and balanced development in Finland, qualitative and quantitative economic growth and international competitiveness and cooperation by supporting projects that increase the efficiency of the economy, improve the level of education or research, or study future development scenarios.

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

500 character(s) maximum

Sitra operates directly and indirectly with its clients/partners in inter alia:

- Fair data economy and digitalisation (e.g., health data, data spaces, Gaia-X, data ecosystems)
- Sustainability (e.g., climate solutions, circular economy)
- Democratic societies
- Training and life-long learning
- Future scenarios

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](#)):

250 character(s) maximum

74.90 Other professional, scientific and technical activities n.e.c.

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 | Our activities and projects in collaboration with our clients/partners in the field of data ecosystems and data spaces. |
| Specialisation BER | Ibid. |
| Horizontal Guidelines | Ibid. |

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 type="checkbox"/> | <input checked="" type="checkbox"/> |
| Joint purchasing agreements | <input type="checkbox"/> | <input checked="" type="checkbox"/> |
| Commercialisation agreements | <input type="checkbox"/> | <input checked="" type="checkbox"/> |
| Standardisation agreements | <input type="checkbox"/> | <input checked="" type="checkbox"/> |
| Other (e.g. agreements pursuing sustainability goals, etc.) | <input type="checkbox"/> | <input checked="" 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.

5000 character(s) maximum

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

The Commission is exploring options to encourage the participation of SMEs, research institutes and/or academic bodies in R&D and production/specialisation agreements that do not raise competition concerns. The policy options currently identified include:

SMEs – R&D and specialisation

- Option 1: No change
- Option 2: The potential **introduction of a specific category of R&D agreements** exempted by the R&D BER, subject to conditions to be defined, in case such agreements are ***concluded by SMEs, and/or***
- Option 3: The potential **introduction of a specific category of specialisation /production agreements** exempted by the Specialisation BER, subject to conditions to be defined, in case such agreements are ***concluded by SMEs, and/or***

Research institutes /academic bodies – R&D

- Option 4: Clarifying the **definition of competing undertakings** in case **research institutes and/or academic bodies** are involved in R&D agreements; ***and/or***

SMEs and research institutes /academic bodies – R&D

- **Option 5: Limiting (and/or potentially removing) the condition(s) in the R&D BER of full access to the results and/or access to pre-existing know-how** in case R&D agreements are concluded with SMEs, academic bodies and/or research institutes.

Options 2 to 5 could be applied cumulatively.

22) **Type of R&D agreements.** Please indicate which type of R&D agreement(s) you are currently a party to, or have been a party to in the last ten years.

- Joint R&D of products/technologies
- Joint R&D of products/technologies and joint exploitation of R&D results (e.g. production, distribution, application, assignment and/or licensing)
- Paid-for R&D of products/technologies (i.e. one party finances the R&D activity, that is carried out by the other party)
- Paid-for R&D of products/technologies and joint exploitation of R&D results (e.g. production, distribution, application, assignment and/or licensing)
- Joint exploitation of R&D results jointly carried out pursuant to a prior agreement between the same parties
- Joint exploitation of the results of paid-for R&D pursuant to a prior agreement between the same parties
- Other type(s) of R&D cooperation agreement(s)
- None

24) **Type of specialisation/production cooperation agreements.** Please indicate which type of specialisation/production agreement(s) you are currently a party to, or have been a party to in the last ten years.

- '*Unilateral specialisation agreement*' (i.e. an agreement between two parties which are active on the same product market by 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)
- '*Reciprocal specialisation agreement*' (i.e. an agreement between two or more parties which are active on the same product market, by which two or more

parties on a reciprocal basis agree to fully or partly cease or refrain from producing certain but different products and to purchase these products from the other parties, who agree to produce and supply them)

- ' *Joint production agreement* (i.e. an agreement by which two or more parties agree to produce certain products jointly)
- ' *Horizontal subcontracting agreements with a view to expanding production*' (i.e. an agreement by which 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)
- Other type(s) of specialisation/production agreement(s)
- None

5.1.1 / **New categories of exempted agreements.**

The Commission is exploring options to encourage the participation of SMEs in R&D and specialisation/production agreements.

26) Based on your experience, would the introduction of a specific exemption for **R &D agreements concluded by SMEs** achieve such an objective (i.e. encourage the participation of SMEs)?

- Yes
- No
- No opinion

27) Please explain your reply. If you replied 'yes', please give concrete examples of **R&D agreements involving SMEs** that should be exempted.

5000 character(s) maximum

Cf. our response to question 143.

28) Based on your experience, would the introduction of a specific exemption for **production/specialisation agreements concluded by SMEs** achieve such an objective (i.e. encourage the participation of SMEs)?

- Yes
- No
- No opinion

29) Please explain your reply. If you replied 'yes', please give concrete examples of **specialisation/production agreements involving SMEs** that should be exempted.

5000 character(s) maximum

Cf. our response to question 143.

30) **Impact (R&D - SMEs)**. Based on your experience, what would be the impact of **exempting a specific category of R&D cooperation agreements concluded by SMEs** 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 type="radio"/> | <input checked="" type="radio"/> |
| Prices | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input checked="" type="radio"/> |
| Quality of products /services | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input checked="" type="radio"/> |
| Innovation / Investment in R&D | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input checked="" type="radio"/> |
| Self-assessment of horizontal R&D agreements | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input checked="" type="radio"/> |
| Cooperation by SMEs in R&D | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input checked="" type="radio"/> |
| Costs for your organisation | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input checked="" type="radio"/> |
| Legal certainty for your organisation | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input checked="" 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 type="radio"/> | <input checked="" type="radio"/> |
|---|-----------------------|-----------------------|-----------------------|-----------------------|-----------------------|----------------------------------|

32) **Impact (Specialisation/Production - SMEs)**. Based on your experience, what would be the impact of **exempting a specific category of specialisation (production) cooperation agreements concluded by SMEs** 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 type="radio"/> | <input checked="" type="radio"/> |
| Prices | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input checked="" type="radio"/> |
| Quality of products/services | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input checked="" type="radio"/> |
| Innovation | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input checked="" type="radio"/> |
| Self-assessment of horizontal specialisation/production agreements | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input checked="" type="radio"/> |
| Cooperation by SMEs in specialisation/production | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input checked="" type="radio"/> |
| Level of production | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input checked="" type="radio"/> |
| Costs for your organisation | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input checked="" type="radio"/> |
| Legal certainty for your organisation | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input checked="" 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 type="radio"/> | <input checked="" type="radio"/> |

5.1.2) Potential conditions for exempting horizontal cooperation agreements by SMEs.

34) **R&D agreements.** Based on your experience, please consider the potential conditions under which an R&D agreement by SMEs could be exempted and indicate which of the possible conditions listed below would be the easiest to apply?

- Conditions based on market shares of the parties to the agreement
- Conditions based on revenues of the parties to the agreement
- Conditions linked to the duration of the agreement
- Other
- No opinion

36) **Specialisation/production agreements.** Based on your experience, please consider the potential conditions under which a specialisation/production agreements by SMEs could be exempted and indicate which of the possible conditions would be the easiest to apply?

- Conditions based on market shares of the parties to the agreement
- Conditions based on revenues of the parties to the agreement
- Conditions linked to the duration of the agreement
- Other
- No opinion

5.1.3) Conditions for exemption under the R&D BER.

The Commission is exploring options to ensure that the rules encourage the participation of (i) SMEs and (ii) research institutes/academic bodies in R&D agreements, when these agreements do not raise competition concerns. 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 in case R&D agreements are concluded with SMEs, academic bodies and/or research institutes. 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.

38) Based on your experience, would the following options concerning **R&D agreements concluded by SMEs** achieve such objective (i.e. ensure that the rules encourage the participation of SMEs in R&D agreements)?

| | | | |
|--|--|--|--|
| | | | |
|--|--|--|--|

| Options | Yes | No | No opinion |
|---|-----------------------|-----------------------|----------------------------------|
| Limiting the condition of full access to the final R&D results (for example, by limiting the duration of full access or the scope thereof, etc.) | <input type="radio"/> | <input type="radio"/> | <input checked="" type="radio"/> |
| Limiting the condition of access to pre-existing know-how if this know-how is <i>indispensable</i> for the <u>purposes of exploitation</u> of the R&D results (for example by limiting the duration of access or the exploitation activity it is linked to, etc.) | <input type="radio"/> | <input type="radio"/> | <input checked="" type="radio"/> |
| Removing the condition of full access to the final R&D results | <input type="radio"/> | <input type="radio"/> | <input checked="" type="radio"/> |
| Removing the condition of access to pre-existing know-how if this know-how is <i>indispensable</i> for the <u>purposes of exploitation</u> of the R&D results | <input type="radio"/> | <input type="radio"/> | <input checked="" type="radio"/> |

40) Based on your experience, do you consider that the limitations that are identified in the table above (i.e limiting the duration of full access to the final R&D results or the scope thereof or limiting the duration of access to pre-existing know-how or the exploitation activity it is linked to, etc.) would be most appropriate to achieve the objective (i.e. ensure that the rules encourage the participation of SMEs in R&D agreements)?

5000 character(s) maximum

N/A

41) If, based on your experience, you consider that other types of limitations to the conditions of full access to the final R&D results or to pre-existing know-how than the ones listed in the table above would be more appropriate to achieve the objective (i.e. ensure that the rules encourage the participation of SMEs in R&D agreements), please list them and explain the reasons.

5000 character(s) maximum

N/A

42) Based on your experience, would the following options concerning **R&D agreements concluded with research institutes/academic bodies** achieve such objective?

| | | | |
|--|--|--|--|
| | | | |
|--|--|--|--|

| Options | Yes | No | No opinion |
|---|-----------------------|-----------------------|----------------------------------|
| Limiting the condition of full access to the final R&D results (for example, by limiting the duration of full access or the scope thereof, etc.) | <input type="radio"/> | <input type="radio"/> | <input checked="" type="radio"/> |
| Limiting the condition of access to pre-existing know-how if this know-how is <i>indispensable</i> for the <u>purposes of exploitation</u> of the R&D results (for example by limiting the duration of access or the exploitation activity it is linked to, etc.) | <input type="radio"/> | <input type="radio"/> | <input checked="" type="radio"/> |
| Removing the condition of full access to the final R&D results | <input type="radio"/> | <input type="radio"/> | <input checked="" type="radio"/> |
| Removing the condition of access to pre-existing know-how if this know-how is <i>indispensable</i> for the <u>purposes of exploitation</u> of the R&D results | <input type="radio"/> | <input type="radio"/> | <input checked="" type="radio"/> |

44) Based on your experience, do you consider that the limitations that are identified in the table above (i.e limiting the duration of full access to the final R&D results or the scope thereof or limiting the duration of access to pre-existing know-how or the exploitation activity it is linked to, etc.) would be most appropriate to achieve the objective (i.e. ensure that the rules encourage the participation of research institutes/academic bodies in R&D agreements)?

5000 character(s) maximum

N/A

45) If, based on your experience, you consider that other types of limitations to the conditions of full access to the final R&D results or to pre-existing know-how than the ones listed in the table above would be more appropriate to achieve the objective (i.e. ensure that the rules encourage the participation of research institutes /academic bodies in R&D agreements), please list them and explain the reasons.

5000 character(s) maximum

N/A

46) **Impact (R&D full access to results)**. Based on your experience, what would be the impact of **limiting (and potentially removing) the condition of full access to the final results** from R&D cooperation agreements concluded with SMEs, research institutes and/or academic bodies 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 type="radio"/> | <input checked="" type="radio"/> |
| Prices | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input checked="" type="radio"/> |
| Quality of products/services | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input checked="" type="radio"/> |
| Innovation / Investment in R&D | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input checked="" type="radio"/> |
| Self-assessment of horizontal R&D agreements | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input checked="" type="radio"/> |
| Cooperation with SMEs in R&D | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input checked="" type="radio"/> |
| Cooperation with research institutes/academic bodies in R&D | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input checked="" type="radio"/> |
| Costs for your organisation | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input checked="" type="radio"/> |
| Legal certainty for your organisation | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input checked="" 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 type="radio"/> | <input checked="" type="radio"/> |

48) **Impact (R&D access to pre-existing know-how).** Based on your experience, what would be the impact of **limiting (and potentially removing) the condition of access to pre-existing know-how** from R&D cooperation agreements concluded with SMEs, research institutes and/or academic bodies on the following aspects:

| Impact on: | 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"/> |
| Prices | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input checked="" type="radio"/> |
| Quality of products /services | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input checked="" type="radio"/> |
| Innovation / Investment in R&D | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input checked="" 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"/> |
| Cooperation with SMEs in R&D | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input checked="" type="radio"/> |
| Cooperation with research institutes/academic bodies in R&D | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input checked="" type="radio"/> |
| Costs for your organisation | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input checked="" type="radio"/> |
| Legal certainty for your organisation | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input checked="" 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"/> |

5.1.4) **Research institutes and academic bodies.**

The R&D BER currently defines academic bodies and research institutes as undertakings which supply R&D as a commercial service without normally being active in the exploitation of results (e.g. production, distribution, etc.).

50) Based on your experience, under which circumstances would you consider **research institutes and/or academic bodies** to be *actual or potential competitors* to another organisation in R&D? Please be as detailed as possible indicating the relevant R&D areas (e.g. development/improvement of new/existing products and /or technologies)?

5000 character(s) maximum

N/A

51) The Commission is exploring options to ensure that the rules encourage the participation of research institutes/academic bodies in R&D agreements. Based on your experience, would a clarification of the definition of competing undertakings applicable to **research institutes and/or academic bodies** involved in R&D agreements achieve such objective?

- Yes
- No
- No opinion

53) **Impact (R&D - research institutes/academic bodies)**. Based on your experience, what would be the impact of **adding further clarifications to the definition of competing undertakings** for R&D cooperation agreements concluded with **research institutes and/or academic bodies** 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 type="radio"/> | <input checked="" type="radio"/> |
| Prices | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input checked="" type="radio"/> |
| Quality of products/services | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input checked="" type="radio"/> |
| Innovation / Investment in R&D | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input checked="" type="radio"/> |
| Self-assessment of horizontal R&D agreements | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input checked="" type="radio"/> |
| Cooperation with research institutes/academic bodies in R&D | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input checked="" type="radio"/> |
| Costs for your organisation | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input checked="" type="radio"/> |
| Legal certainty for your organisation | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input checked="" 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 type="radio"/> | <input checked="" type="radio"/> |

5.1.5) Additional remarks on policy options regarding SMEs, research institutes and academic bodies

55) Based on your experience, please explain whether there are any other measures that could encourage the participation of SMEs, research institutes and /or academic bodies in horizontal R&D and production/specialisation agreements, when these agreements do not raise competition concerns.

5000 character(s) maximum

Cf. our response to question 143.

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 type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input checked="" 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 type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input checked="" type="radio"/> |

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

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

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 type="radio"/> | <input type="radio"/> | <input checked="" type="radio"/> |
| Prices | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input checked="" type="radio"/> |
| Quality of products /services | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input checked="" type="radio"/> |
| Innovation / Investment in R&D | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input checked="" type="radio"/> |
| Self-assessment of horizontal R&D agreements | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input checked="" type="radio"/> |
| Costs for business | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input checked="" type="radio"/> |
| Legal certainty for businesses | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input checked="" 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 type="radio"/> | <input checked="" type="radio"/> |
|---|-----------------------|-----------------------|-----------------------|-----------------------|-----------------------|----------------------------------|

64) **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 type="radio"/> | <input checked="" type="radio"/> |
| Prices | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input checked="" type="radio"/> |
| Quality of products /services | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input checked="" type="radio"/> |
| Innovation / Investment in R&D | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input checked="" type="radio"/> |
| Self-assessment of horizontal R&D agreements | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input checked="" type="radio"/> |
| Costs for business | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input checked="" type="radio"/> |
| Legal certainty for businesses | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input checked="" type="radio"/> |
| Harmonised application of competition rules by national | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input checked="" type="radio"/> |

| | | | | | | |
|--|--|--|--|--|--|--|
| competition authorities and national courts | | | | | | |
|--|--|--|--|--|--|--|

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

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

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 type="radio"/> | <input checked="" type="radio"/> |
| Prices | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input checked="" type="radio"/> |
| Quality of products/services | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input checked="" type="radio"/> |
| Innovation | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input checked="" type="radio"/> |
| Level of production | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input checked="" type="radio"/> |
| Self-assessment of specialisation/production agreements | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input checked="" type="radio"/> |
| Costs for business | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input checked="" type="radio"/> |
| Legal certainty for businesses | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input checked="" 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 type="radio"/> | <input checked="" type="radio"/> |

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 type="radio"/> | <input checked="" type="radio"/> |
| Prices | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input checked="" type="radio"/> |
| Quality of products/services | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input checked="" type="radio"/> |
| Innovation | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input checked="" type="radio"/> |
| Level of production | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input checked="" type="radio"/> |
| Self-assessment of specialisation/production agreements | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input checked="" type="radio"/> |
| Costs for business | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input checked="" type="radio"/> |
| Legal certainty for businesses | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input checked="" 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 type="radio"/> | <input checked="" type="radio"/> |

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 | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input checked="" type="radio"/> |
| Level of market concentration | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input checked="" type="radio"/> |
| Volume of products in the market | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input checked="" type="radio"/> |
| Prices for consumers | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input checked="" type="radio"/> |
| Innovation/Investment in R&D | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input checked="" type="radio"/> |
| Investment in production | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input type="radio"/> | <input checked="" type="radio"/> |

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.

5000 character(s) maximum

Cf. our response to question 143.

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

N/A

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

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

N/A

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

Our activities/projects are directly and indirectly related to data pooling/sharing activities between undertakings across sectors, e.g., the joint action Towards the European Health Data Space TEHDAS (<https://tehdas.eu/>), Fair Data Economy operations (<https://www.sitra.fi/en/topics/fair-data-economy/>) and other initiatives promoting the formation of data ecosystems.

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/data sharing
- Yes, I will take part in data pooling/data sharing in the future
- No
- Not applicable / no opinion

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)

- 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

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 <u>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 type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input checked="" type="checkbox"/> |
| Degree of integration on the buyer side (e.g. separate joint purchasing entity) | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input checked="" type="checkbox"/> |
| Aggregated share of the buyers in total demand in the (upstream) purchasing market | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input checked="" type="checkbox"/> |
| Degree of concentration of sellers in the (upstream) purchasing market | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input checked="" type="checkbox"/> |
| Aggregated market share of the buyers in the (downstream) selling markets | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input checked="" type="checkbox"/> |

| | | | | | |
|---|--------------------------|--------------------------|--------------------------|--------------------------|-------------------------------------|
| The buyer cooperation is secret towards sellers | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input checked="" type="checkbox"/> |
| Other | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input checked="" type="checkbox"/> |

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

5000 character(s) maximum

| |
|-----|
| N/A |
|-----|

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 type="radio"/> | <input type="radio"/> | <input checked="" type="radio"/> |
| Cross selling | <input type="radio"/> | <input type="radio"/> | <input checked="" type="radio"/> |
| Data pooling/access to data/data sharing | <input type="radio"/> | <input type="radio"/> | <input checked="" type="radio"/> |
| Algorithms | <input type="radio"/> | <input type="radio"/> | <input checked="" type="radio"/> |
| Online sales | <input type="radio"/> | <input type="radio"/> | <input checked="" type="radio"/> |

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 type="radio"/> | <input type="radio"/> | <input checked="" type="radio"/> |
| Data commercialisation agreements | <input type="radio"/> | <input type="radio"/> | <input checked="" type="radio"/> |
| Platforms | <input type="radio"/> | <input type="radio"/> | <input checked="" type="radio"/> |

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

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

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.

5000 character(s) maximum

N/A

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.

5000 character(s) maximum

N/A

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

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.

5000 character(s) maximum

N/A

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.

5000 character(s) maximum

N/A

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

5000 character(s) maximum

N/A

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

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

5000 character(s) maximum

Cf. our response to question 143.

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

- Yes
- No

THANK YOU FOR YOUR COOPERATION

Contact

COMP-HBERs-REVIEW@ec.europa.eu