

# Stakeholder consultation on the review of the HBERs

Fields marked with \* are mandatory.

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## Introduction

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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

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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](mailto:COMP-HBERS-REVIEW@ec.europa.eu).

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

### 3 About you

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\* 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

Florian

\* 3 Surname

Feillet

\* 4 Email (this won't be published)

florian.feillet@gmail.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*

ETNO (European Telecommunications Network Operators' Association)

**\* 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

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

*500 character(s) maximum*

ETNO represents 40 members and observers from Europe and beyond. ETNO's responses in the consultation are given from an association viewpoint, and do not reflect members' businesses and specific individual cases.

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

*500 character(s) maximum*

ETNO brings together the main investors in innovative and high-quality e-communications platforms and services, representing 70.5% of the total sector investment.

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*

61.1 Wired telecommunications activities  
61.2 Wireless telecommunications activities

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	
Specialisation BER	
Horizontal Guidelines	

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

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

*5000 character(s) maximum*

Overall, horizontal cooperation agreements require a massive effort for companies to ensure that the given agreement complies with EU competition law. The legal assessment carried out internally relies alongside on external advice, the creation of clean teams and afterwards the monitoring of the reached agreement from competition law perspective, which implies high costs and efforts that companies must face if they want to cooperate without incurring in antitrust risks.

This is why the on-going review of the Horizontal Guidelines (HGLs) and the Block Exemptions Regulations

should aim at providing more legal certainty and easier way to make this self-assessment, as more than ever European companies need to cooperate to gain scale and ensure European sovereignty.

For ETNO members, network sharing agreements are probably the most important form of cooperation that needs to be covered in the HGLs in order to provide more legal certainty for telecom operators when undertaking this kind of agreements.

Network sharing agreements have become widespread in Europe as a means to decrease costs, increase coverage, reduce timing of network roll-out, deploy efficiently and rapidly new technologies and reduce the environmental impact. Usually; they do not imply competitive risks, as they do not affect the differentiation of technological features or service parameters, which nowadays are determined by the core network, service platform or cloud level. In addition, the regulatory pressure regarding roll-out timing and coverage will not be possible to achieve without network sharing agreements.

As far as efficiencies are concerned, 5G networks have two additional elements to support sharing initiatives: on one hand, they involve very high costs with important margins of optimization and, on the other hand, they allow further guarantees of differentiation and flexibility of the offers (e.g. through network virtualization). This has also been acknowledged by the European Parliament recommendation to "Promote infrastructure sharing for 5G: Policy for 5G networks". Also, a study made by BGC for ETNO (available here <https://etno.eu/component/attachments/attachments.html?task=download&id=8050> recently concluded that the EU is facing a €300Bn investment gap for fixed and mobile networks, i.e. a €150Bn gap to achieve a full 5G in EU.

Today, the regulatory authorities encourage or impose network agreements under regulatory framework, while the position of competition authorities is not always consistent.

On one hand, RAN sharing has been widely considered by the EC as a counterfactual to evaluate merger operations. It has often been used also to deny the efficiency gain attached to a merger considering that similar results could be achieved with less restrictive effect on competition (through RAN sharing). On the other hand, different antitrust cases (e.g. O2 CZ / CETIN and T-Mobile CZ, Italian RAN sharing between Vodafone and TIM ) have opened a debate on the competition assessment of RAN sharing agreements.

Hence, the current framework is not clear, and does not provide sufficient legal security for self-assessment of RAN sharing agreements. If no clear positions are taken on the European level (i.e. guidelines for self-assessment of RAN sharing agreements with a strong presumption as to their compatibility with Article 101 (1) TFEU), there is a risk to slow down investments and innovation in digital networks and digital transformation in Europe.

Another important form of cooperation that needs more guidance under HGL are industry wide initiatives, that are targeted to drive or support innovation in the European digital market. Under the current framework, for any project of horizontal cooperation with the involvement of several operators there is a strong presumption of restriction of competition under Article 101(1) TFEU. The process to respect in order establish various safeguards to limit the exposure to legal risk is very burdensome, time-consuming and does not give sufficient legal comfort. Thus, the operators refrain from cooperation and many common initiatives which could result in the creation of new innovative and competitive products and interoperable solutions are, unfortunately, abandoned half way or never initiated in the European Union (e.g E5 initiative). The current framework will need to be more flexible to allow the creation of the necessary scale for development of innovative and competitive products and services in Europe. Beyond that, there needs to be more emphasis on the recognition of procompetitive effects of such cooperation.

For more detailed views on network sharing please see also question Q143.

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## 5 Policy options for the HBERs

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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

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

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 type="radio"/>
Prices	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Quality of products /services	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

Innovation / Investment in R&D	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Self-assessment of horizontal R&D agreements	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Cooperation by SMEs in R&D	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Costs for your organisation	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Legal certainty for your organisation	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Harmonised application of competition rules by national competition authorities and national courts	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input 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 type="radio"/>
Prices	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Quality of products/services	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Innovation	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input 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 type="radio"/>
Cooperation by SMEs in specialisation/production	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Level of production	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Costs for your organisation	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Legal certainty for your organisation	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Harmonised application of competition rules by national competition authorities and national courts	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input 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)?

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Options	Yes	No	No opinion
<b>Limiting</b> the condition of <b>full access to the final R&amp;D results</b> (for example, by limiting the duration of full access or the scope thereof, etc.)	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
<b>Limiting</b> the condition of <b>access to pre-existing know-how</b> 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 type="radio"/>
<b>Removing</b> the condition of <b>full access to the final R&amp;D results</b>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
<b>Removing</b> the condition of <b>access to pre-existing know-how</b> 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 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*

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*

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
<b>Limiting</b> the condition of <b>full access to the final R&amp;D results</b> (for example, by limiting the duration of full access or the scope thereof, etc.)	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
<b>Limiting</b> the condition of <b>access to pre-existing know-how</b> 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 type="radio"/>
<b>Removing</b> the condition of <b>full access to the final R&amp;D results</b>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
<b>Removing</b> the condition of <b>access to pre-existing know-how</b> 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 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*

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*

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 type="radio"/>
Prices	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Quality of products/services	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Innovation / Investment in R&D	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Self-assessment of horizontal R&D agreements	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Cooperation with SMEs in R&D	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input 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 type="radio"/>
Costs for your organisation	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Legal certainty for your organisation	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Harmonised application of competition rules by national competition authorities and national courts	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input 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 type="radio"/>
Prices	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Quality of products /services	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Innovation / Investment in R&D	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Self-assessment of horizontal R&D agreements	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Cooperation with SMEs in R&D	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input 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"/>
Costs for your organisation	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Legal certainty for your organisation	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Harmonised application of competition rules by national competition authorities and national courts	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input 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*

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 type="radio"/>
Prices	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Quality of products/services	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Innovation / Investment in R&D	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Self-assessment of horizontal R&D agreements	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input 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 type="radio"/>
Costs for your organisation	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Legal certainty for your organisation	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Harmonised application of competition rules by national competition authorities and national courts	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input 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*

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&amp;D results</u>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Condition of <u>access to any pre-existing know-how</u> of other parties if it is indispensable for the exploitation (e.g. production, distribution, application, assignment, licensing) of the R&D results	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

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

*5000 character(s) maximum*

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



Yes

No

No opinion

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

*5000 character(s) maximum*

In the Commission inception impact assessment document it is stated that the revision aims to remove conditions that stakeholders perceive as potentially preventing agreements that may not raise competition concerns. This is one of the examples of such a condition that is actually preventing cooperation.

In fact, the 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, as the high investment costs and efforts incurred by the parties shall be granted in an adequate return. We believe that this requirement, as currently set out in Art.3.3 R&D BER, has a significant chilling effect on the willingness of companies to undertake a joint R&D agreement. There must be a correlation between the investment carried out and its associated returns.

Indeed, given the low threshold of a combined market share (25%) and the hardcore restrictions, both set out in the BER (art. 4 and 5), it can in general be presumed, for the application of Article 101(3) of the Treaty, that the positive effects of research and development agreements will outweigh any negative effects on competition.

In fact the abovementioned condition seems so strict that they exclude almost all the R&D agreements from the scope of the block exemption.

The condition is not in line with the Commission's policy to leave companies maximum flexibility when concluding horizontal co-operation agreements in order to increase the competitiveness of the European economy.

The purpose of providing adequate legal certainty for undertakings and leave them more flexibility would be pursued by introducing:

1) A clear definition of "access" and a clearer distinction between, on one hand, access for the purpose of further research & development, and, on the other hand, access for the purpose of exploitation: which need different assessments (both under IP rights and competition legislation), especially if they are free of charge or not.

2) Limitation of the condition of "full access to results" only to access for the purpose of further research & development, eliminating any condition on exploitation activities (the definition of "results" in the BER is wide and includes know how and secrets, so that a provision like this still gives more access than what is already given by the research exception in IP law).

And, in any case,

3) Limitations on the duration of the full access to results (e.g., to the duration of the research and development).

4) Limitations on the scope of the access (e.g., to the activities linked to the research or the contract).

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

- Yes
- No
- No opinion

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

*5000 character(s) maximum*

ETNO members are of the view that it should be left to companies within the R&D agreement to decide access rights to the pre-existing know-how indispensable for the cooperation and the rights of exploitation. We believe this requirement, as currently set out in Art.3.3 R&D BER, has a significant chilling effect on the willingness of companies to undertake a joint R&D agreement.

In addition, this condition is not in line with the Commission's policy to leave companies maximum flexibility when concluding horizontal co-operation agreements in order to increase the competitiveness of the European economy.

Overall, the purpose of providing adequate legal certainty for undertakings and leave them more flexibility would be pursued by:

1) eliminating any condition to provide access to pre-existing know-how except for a (free of charge) access limited to the fulfilment of the research activities related to the contract and until the research & development is ended.

Or, in any case, introducing:

1) a clear definition of "access" and a clearer distinction between, on one hand, access for the purpose of further research & development, and, on the other hand, access for the purpose of exploitation: which need different assessments (both under IP rights and competition legislation), especially if they are free of charge or not.

2) limitations on the duration of the full access together with the limitation on the scope of the access.

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

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

*5000 character(s) maximum*

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

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

*5000 character(s) maximum*

R&D agreements are very important for undertakings operating in the telecommunications and digital sectors, where progressive innovation is essential and continuous.

Moreover, R&D agreements need to be encouraged because they are fundamental to promote technical and scientific progress for the benefit of the entire community.

As also stated already in our 2020 ETNO response to the public consultation (available here <https://etno.eu/library/positionpapers/405:public-questionnaire-for-the-2019-evaluation-of-the-research-development-and-specialisation-block-exemption-regulations.html>), we believe that R&D BER and Section 3 of the HGL are still relevant. However, the approach based on market share is no longer appropriate. In fact, especially in the telecommunications industry, such agreements need scale to be significant at the global level.

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

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

- Option 1: No change.
- Option 2: To widen the scope of the Specialisation BER by **expanding the definition of unilateral specialisation** to include agreements concluded between more than two parties; *and/or*
- Option 3: To verify whether **horizontal subcontracting agreements with a view to expanding production** in general would meet the requirements of Article 101(3) and hence should be included in the scope of the Specialisation BER; *and/or*
- Option 4: To review the conditions for exemption as regards **joint distribution** for unilateral or reciprocal cooperation agreements.

*Options 2 to 4 could be applied cumulatively.*

66 ) **Unilateral specialisation**. Based on your experience, do you consider that **expanding the definition of unilateral specialisation agreements to include agreements concluded between more than two parties** would allow to exempt

pro-competitive agreements among competitors (actual or potential)?

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

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

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

*5000 character(s) maximum*

If the parties, two or more, have a low combined market share, as per the thresholds provided in art. 3 of the Specialisation BER (max 20% on any relevant market), the horizontal co-operation agreement should not give rise to restrictive effects on competition within the meaning of Article 101.1 (see parr. 44-45 and 169-170 of HGL). Even horizontal specialization cooperations with a higher joint market share should be able to benefit of an exemption, as the cooperation at the production level does not necessarily determine the competitive outcome.

As also stated already in our 2020 ETNO response to the public consultation, we believe that Specialisation BER and Section 4 of the HGL are still relevant. However, the approach focused on market share is no longer appropriate. The emphasis should shift towards a more holistic view on maintaining differentiation and innovation.

In fact, especially in the telecommunications industry, such agreements need sufficient scale to be significant at the global level, which is difficult to reconcile with the above-mentioned market shares.

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.

*5000 character(s) maximum*

“Production agreements” in general may allow the relevant parties to achieve economies of scale or scope that they could not achieve individually, with clear positive effects for consumers.

“Subcontracting agreements with a view to expanding production” do not jeopardise the competition in the same way as (or even more than) the other options provided for in the Specialisation BER; they provide clear positive effects and benefits for consumers. For instance, efficiency gains passed on to consumers in the form of greater quantity and greater variety of products, better product quality, less expensive products and related services (see parr. 169-170 HGL).

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 type="radio"/>
Prices	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
Quality of products/services	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
Innovation	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
Level of production	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
Self-assessment of specialisation/production agreements	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
Costs for business	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
Legal certainty for businesses	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
Harmonised application of competition rules by national competition authorities and national courts	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>

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

*5000 character(s) maximum*

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 type="radio"/>
Prices	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
Quality of products/services	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
Innovation	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
Level of production	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
Self-assessment of specialisation/production agreements	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
Costs for business	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
Legal certainty for businesses	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
Harmonised application of competition rules by national competition authorities and national courts	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>

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

*5000 character(s) maximum*

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

## 6 Other areas for review

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

### 6.1 ) General questions

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

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

78 Please explain your choice.

As stated through the questionnaire, the lack of guidance in the different chapters of the Horizontal Guidelines sometimes makes it difficult for companies to carry out a proper analysis of a given horizontal cooperation. In particular, we find it difficult to understand which rules or chapters might apply to horizontal cooperation agreements that contain multiple characteristics covered by the Guidelines and the HBERs, this is why further guidance would be very welcomed.

The rule of the "centre of gravity" that "prevails" for the entire cooperation is the most adequate and reasonable criteria to determine which chapter of the Horizontal Guidelines takes priority in the assessment of an horizontal agreement that combines different types of cooperation (i.e. the rule of the prevalent contract, applicable in mixed contracts). This would avoid overburdening the parties with having to deal with multiple sets of rules, which may even be difficult to combine.

That being said, it should also be clearly defined how the Commission will determine that “centre of gravity”.

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*

For the sake of clarity and certainty, it would be appropriate to specify whether and under which circumstances the provisions apply to cooperation agreements between joint ventures and their parents.

The Guidelines need further clarification to explicitly state that Art. 101 (1) prohibition does not apply to agreements between the parent companies and their jointly controlled subsidiaries. Although the Guidelines are consistent in the concept of “single economic entity doctrine”, we believe that the Guidelines create legal uncertainty for companies at global scale when managing operations through both the jointly and the solely controlled subsidiaries. This has a counterproductive effect, as companies tend to take a conservative approach to avoid the risk of falling under Art. 101 (1) prohibition.

We therefore believe that consistency is needed with the approach in paragraph 11 of the Horizontal Guidelines that states that solely controlled subsidiaries are part of a single economic entity. We would like to see the reintroduction of the paragraph that was included in the draft 2010 Horizontal Guidelines that had an explicit confirmation that Art. 101 (1) TFEU would not apply to dealings between parent companies and their jointly controlled subsidiaries: “... as a joint venture forms part of a one undertaking with each of the parent companies that jointly exercise decisive influence and effective control over it, Article 101 does not apply to agreements between the parents and such a joint venture, provided the creation of the joint venture did not infringe EU competition law”.

## 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*



The chapter on information exchange needs to be adapted to the digital era. First, clarity on the difference between information and data is needed, in particular with regard to concepts like data sharing/ pooling. Then, in the fast-paced era of digitalization, some of the concepts of the information exchange framework may be outdated, such as references to age of data or frequencies of exchange. ETNO believes that the current framework requires companies to adopt a conservative approach, even when the impact of information exchange between competitors is neutral for competition or even pro-competitive (and not foresee to collude). Overall, the rational and the procompetitive outcome of a cooperation should gain more weight in the analysis of the information exchanges.

ETNO members also have a concern related to a provision of the Art. 22 EEECC, combined with Art. 20, requiring operators to provide detailed information on network deployments, including forecasts on the reach of networks

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.

*5000 character(s) maximum*

Information exchange is often key for the successful outcome of a cooperation in the telecommunications sector, where agreements such as those dealing with interoperability, network sharing, interconnection agreements, ensure the functioning of the market as well as the provision of effective services to consumers.

In addition, as a regulated market, there are usually exchanges of regulatory information between telecom operators and NRAs/Commission.

Information exchange can take place directly, or in many occasions, through external parties such as industry associations (e.g. ETNO's members through ETNO); economists or law firms that ensure compliance with competition laws when information relates to specific projects.

Finally, regulated industries such as the telecoms sector, also entail common support to lobbying projects regarding future legislation and initiatives by the Commission and NRAs that affect the industry as a whole. Hence, operators exchange information in the framework of industry associations for undertaking lobbying actions. However, such information is usually not sensitive from a competition law perspective.

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*

### **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*

Such type of cooperation will become essential to offer innovative digital services in data-related initiatives. Creating a clear framework/safe harbor will allow European competitors to remain globally competitive. Therefore, ETNO believes the EC needs to revise the outdated framework. When analyzing the sharing of data, procompetitive aspects should be weighed against the potential anticompetitive effect. The new framework should recognize the value of data and data sharing in the digital economy and create more flexibility for companies to do so. ETNO believes that a new block exemption for data sharing/data pooling agreements is needed. In case the EC decides that this is not possible due to the limits imposed by the Empowerment Regulation of 1971, these agreements should meanwhile be covered by a revision of the HGL. Finally, it is crucial that clear definitions and criteria of distinction are provided for “data sharing-pooling” to draw a line with information exchange.

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

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

*5000 character(s) maximum*

ETNO follows the activities on standardisation of bodies such as the EC Multistakeholder Platform on ICT Standardisation, ITU, CEPT and ETSI, and our members are engaged in the work of over multiple Standards Developing Organisations (SDOs), including, but not limited to ITU, ETSI, CEN/CENELEC, IETF, IEEE, CEPT, 3GPP project, O-RAN, etc. Such engagement gives the opportunity to define and influence standards by bringing industrial and technical expertise to the work of the SDO with the aim of achieving standardised solutions allowing a large interoperability for the benefit of the European Single Market and the related industrial ecosystem. ETNO considers that the current framework set out in the HGL does not provide enough flexibility when analysing whether a standardization agreement falls under Article 101.1 TFEU or if it complies with the requirements of Article 101.3 TFEU. These are the changes ETNO would like to propose: Unrestricted participation.

The current regime is very complex and difficult to follow. In practice, the process applied is unworkable when trying to go through a standardisation process in which many competitors participate from the beginning. Telecom operators' experience has shown that many times initiatives fail due to difficulties to achieve a common understanding among all stakeholders at a very early stage. Telecom operators have also suffered from the misuse of such antitrust rules by third companies with the aim to bring a standardization process to halt, because it was not aligned with their own interests, even when the standard was beneficial for the industry and consumers.

For this reason, ETNO would like to propose to allow more flexibility in the standard-setting process. While paragraph 295 accepts that some restrictions could be adopted when it is necessary and only "ensuring that stakeholders are kept informed and consulted on the work in progress", this exception is not sufficiently clear. This rule should be further developed in order to better explain when and to what extent restricted participation is allowed and to provide more flexibility for such restricted participation.

A mechanism to allow the participation of those interested, when the process is more advanced, should be put in place while ensuring that the process is not blocked.

Competitors in multi-sectorial processes.

Digitalisation makes cross-sectorial standardisation agreements crucial for European stakeholders to compete in the digital economy, especially in areas where interoperability is needed, such as digital services

and data-related cooperation projects. APIs for data sharing and algorithmic models will require standardization processes going forward. In all those projects, where multiple sectors and industries are involved, a smoother scrutiny could be set up considering that players from different sectors are not competitors (more flexibility on unrestricted participation for example).

Counterfactual for standardization.

It would be relevant to take into account in the analysis that in some cases the counterfactual of the considered standardization is not a different standardization, but proprietary systems imposed by global companies. In those cases, there must be a presumption of pro-competitiveness, ideally in the form of a new block exemption, for those standardization cooperation initiatives.

If not considered, ETNO proposes to include at least such strong presumption in points 7.3 and 7.4 of the HGL when a case-by-case analysis is made.

Setting vs implementation.

A clear distinction in the HGL between the setting of the standards and its implementation is needed, with the aim to clarify that the HGL related to standardization agreements should only be applied to the standards setting but not to its implementation.

Effects in various markets.

In the case-by-case analysis of a standardization agreement, the effects over the products and services markets, the technology and the standards markets should be considered when analysing the procompetitive effects of the agreement, or it risks being banned under Article 101.1 TFUE.

In this sense, there could be the case that the outcome of such analysis is different depending on the market. Therefore, clear rules on how to balance the effects affecting the different markets would be needed in the HGL. Global context should also be taken into consideration, including competition constraint exercised by global actors.

Beyond standardization.

Often, standardization projects entail other components which are not purely related to standardization.

Further guidance in the HGL on how to treat those mixed cooperations would be highly useful.

Global nature.

Cooperation among competition authorities at an international level is absolutely needed given that standards are usually set at a global level and by global organizations. A uniform application of competition law to this kind of cooperation would be welcome.

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

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

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

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

- Yes
- No
- No opinion/not applicable

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

- Yes
- No
- No opinion / not applicable

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

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

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

103 ) Please explain your choices. If possible, provide concrete information on costs/benefits to your organisation.

*5000 character(s) maximum*

Based on the experiences highlighted by members, ETNO believes that awareness of individual IPRs that are incorporated in the development of any standard provide certainty and help in clarifying the FRAND conditions, before incurring in live implementations that could become liabilities.

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

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

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)?

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



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

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



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

*5000 character(s) maximum*

Pro-competitive benefits. Joint purchasing arrangements can give rise to significant efficiency gains such as cost reduction (lower purchase prices or reduced transaction, transportation and storage costs, allowed by the higher quantities) and qualitative efficiency gains, by allowing the placing on the market of innovative, improved or new products.

These efficiency gains can be passed on to consumers to an extent that outweighs the possible restrictive effects of competition caused by the joint purchasing arrangement and meets the criteria of Article 101(3): for instance through lower prices for products and related services on the selling markets.

This situation tends to stimulate competition on prices and, as a result, to price reductions.

The "other" pro-competitive benefit is the increase of the quantity of products on the market. This efficiency gain is passed on to consumers also through reduction of prices due to the increase of the supply of products on the market.

## 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:

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

121 ) Please explain your reply.

5000 character(s) maximum

Commercialization agreements involve very often some sorts of price-related information exchange between the parties, together with access to data (or even data pooling) to improve commercialization services, reduce costs/prices and achieve other business efficiencies.

This kind of agreements gives rise to positive gains also for the market, with quality and cost efficiencies to be passed on to consumers. In the light of the importance of such agreements (also for the economy in general), a higher level of legal certainty on the subjects selected (in Q. n. 120) is needed to prevent competition rules from being detrimental to the economy and the innovation.

Besides giving clearer guidance in the HGL and the BERs, the EC should also examine how to best provide some informal guidance on a case-by-case basis: recurring meetings, inputs and feedbacks at an earlier stage, guidance letters (a fast-track EC guidance, as per ETNO's position paper available here <https://etno.eu/downloads/positionpapers/response%20of%20etno%20to%20the%20consultation%20on%20horizontal%20regulations%20and%20guidelines.pdf> ).

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

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

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

5000 character(s) maximum

Given the key role of data, platforms and artificial intelligence in today's economy, "digital commercialization agreements" need to receive a more specific guidance to increase clarity and legal certainty in assessing these agreements, for the benefit of the parties thereto and all other economic operators.

Guidance on digital horizontal cooperation agreements involving platforms, artificial intelligence, IoT or data-related projects would be very important to facilitate agreements in areas where interoperability is needed (inside but also outside of the commercialization agreements category) [see also point 4.22 of ETNO response to questionnaire 2020].

Industrial alliances are an important type of cooperation to be covered under HGL. Horizontal agreements within the industry need to be assessed in their economic context. Digital markets are developing fast and are global. Telecommunications companies compete on these markets and need to have the adequate conditions to increasingly work together on industry-wide initiatives with a proper scale.

These forms of cooperation are in general pro-competitive as they allow to achieve the necessary scale to be competitive in the context of global actors, and to create new digital solutions for consumers and industry



(applications, algorithms, ecosystems, platforms, etc.). They may also result in emergence of alternatives to the ecosystems created by global digital actors and reduce the dependence of the market actors on such ecosystems (often non-European) thus bringing more competition to the digital markets.

Moreover, the telecommunications industry is part of the digital economy ecosystem and it is increasingly facing competition from large global digital players (mainly outside the European Union). Therefore, the competition constraint exercised by these actors needs to be taken into account when assessing industry-wide horizontal agreements, also with regards to their impact on competition. Under the current framework, the processes to respect in order not to be exposed to legal risk are very burdensome, time-consuming and at the end do not provide the necessary legal certainty. Therefore, many common industry-wide initiatives that would result in creation of new products and solutions have been unfortunately abandoned.

ETNO thus believes an update of the HGL is needed. The update should consider, under certain conditions, those initiatives seeking to create innovative and interoperable products and services to support EU competitiveness globally being pro-competitive and not restricting competition. These agreements can be included in already identified types of horizontal co-operation agreements or they can be newly defined. The counterfactual of the envisaged cooperation should also be considered in the analysis. For instance, when the counterfactual of an industry-wide cooperation agreement is the coexistence of proprietary systems controlled by super-dominant players, the cooperation should be considered pro-competitive unless very serious competitive concerns arise.

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

- Yes
- No
- No opinion

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

*5000 character(s) maximum*

Guidance on consortia arrangements among competitors for the implementation of common projects between two or more undertakings would be very useful particularly in the telecommunications sector, in which such agreements are very important and are playing an ever increasing role in the context of digitalization and globalization.

On the one hand, companies operating in the fragmented EU markets need to join forces to compete at

scale against global players. On the other hand, a single competitors may not have all the resources needed for certain innovation projects or be able to bear the risk alone and therefore will need a consortia to cooperate to ensure a successful project.

However, we are of the view that consortia agreements in public bidding instances should be analysed on a case-by-case basis. In public bidding, the analysis should take into consideration the conditions of the bid and the features of the bidder companies. Setting out strict and sectoral rules for consortia agreements could hinder the opportunities for companies to present the bid.

## 6.6 ) **Sustainability**

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

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

- Yes
- No
- Not applicable

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

*5000 character(s) maximum*

For ETNO members, network sharing agreements are probably the most important form of cooperation that pursue also sustainability objectives.

Network sharing agreements, which have become a usual and effective way for telecom operators to deploy networks across Europe, will be particularly relevant in the deployment of 5G going forward. They have become widespread in Europe as a means to decreasing costs, increasing coverage, reducing timing of network roll-out, deploying efficiently and rapidly new technologies and reducing the environmental impact.

In particular, RAN sharing agreements – also – pursue sustainability goals as they allow to reduce the number of mobile sites, and thus their environmental impact because of radio emissions. At the same time this reduces the amount of radio equipment, i.e. lower production and less waste. They also contribute to reduce energy consumption.

As regards in particular investments in 5G, it should be noted that the mobile access network in 5G has greater physical needs in the sense that antennas are larger and there is a greater need for densification and thus the deployment of individual antennas for the various operators would have a greater environmental impact.

Therefore, RAN sharing agreements are sustainability projects because they (also) pursue sustainability objectives: the economic, social and environmental goals set out in Article 3(3) of the Treaty on European Union. They participate to the sustainable development of Europe, protect price stability for a highly competitive social market economy and for scientific and technological advance, and pursue the economic,

social, territorial and environmental EU goals.

ETNO would like to reinstate that this kind of agreements should be covered by the HGL.

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

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

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*

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.

*5000 character(s) maximum*

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

Impact of your agreement on sustainability	Yes	No	Not applicable
Positive impact	<input 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

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*

A specific section in the Guidelines for horizontal cooperation agreements aimed at pursuing sustainability goals would be welcomed, as such agreements could take the form of any of the cooperation agreements that are already on the HGL.

Introducing a new section would increase legal certainty and help companies in the self-assessment of sustainability agreements or agreements that pursue significant sustainability efficiencies, such as network sharing agreements or data sharing/pooling.

In particular, the Guidelines could include the following section: "considering efficiency of horizontal cooperation vs unilateral approach from sustainability perspective".

European companies need to co-operate in a flexible way to achieve the scale necessary to develop innovative products and services as well as to invest in sustainability projects. Nowadays these goals are rarely achieved unilaterally, which makes it even more important now than ever the need for companies to cooperate.

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

- reduce the ecological footprint by creating infrastructure efficiencies and lessening energy consumption. The main sources of energy consumption in the telco sector are the overlapping of networks and technologies, rather than the total amount of traffic carried. Indeed, for a given network architecture, the high demand of traffic (that increases double every two years) has not been reflected in an increase of the energy consumption. Consequently, agreements among competitors to carry the same amount of traffic over a reduced number of networks or technologies would greatly reduce energy consumption.
- achieve minimum viable scale in order to compete at global level and create new digital or environmental propositions for consumers and industry.
- allow the emergence of alternatives to the ecosystems created by global digital actors and enhance competition and innovation to digital markets,
- drive improvements in consumer welfare, environmental protection, delivering a single market.

Therefore, any of the positive outcomes outlined above should be considered as pro-competitive and compatible with Article 101 (1) TFEU/not restricting competition under Article 101 (1) TFEU.

- Sustainability co-operations should be considered pro-competitive: Horizontal cooperation agreements aimed at reducing the ecological footprint (e.g. carbon emissions, energy consumption, recyclability and recycling, reduction of plastics and composting projects), gaining efficiencies and sharing infrastructure and costs, should be considered procompetitive.
- To include the sustainability criteria as a accumulative pro-competitive criterion in point 1.2.2 of the Guidelines when evaluating horizontal cooperation agreements under Art. 101(3) basis.

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*

Please see question 140.

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*

In general, we welcome the explicit objective of the EC's revision aimed at also including sustainability as one of the key trends to be addressed. In this regard, we concur that for example infrastructure sharing, data pooling and data sharing arrangements and horizontal cooperation agreements that pursue sustainability goals should deserve guidance included in the HGL (see please response to Q. 140)

Last, we are of the view that the unarguable positive objective of sustainability agreements makes them worth to be exempted by a Block Exemption Regulation. The market share thresholds are often inapplicable. Therefore, the Commission could block exempt agreements that do not contain hard-core clauses rather than focusing on a combined market share threshold.

## 7 Additional remarks

143 ) Please feel free to **upload a concise document**, such as a position paper, explaining your views in more detail or including additional information and data. Please note that the uploaded document will be published alongside your response to the questionnaire that is the essential input to this open public consultation. The document is an optional complement and serves as additional background reading to better understand your position.

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

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

*5000 character(s) maximum*

please cfr the document uploaded in Q 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

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