

Stakeholder consultation on the review of the HBERs

Fields marked with * are mandatory.

1

Introduction

Article 101(1) of the Treaty on the Functioning of the European Union ('TFEU') prohibits agreements between undertakings that restrict competition unless they generate efficiencies in line with Article 101(3) of the Treaty. This happens if they contribute to improving the production or distribution of goods or services, or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefits; they only impose restrictions that are indispensable for the attainment of these objectives and do not eliminate competition in respect of a substantial part of the product in question. The prohibition contained in Article 101(1) of the Treaty covers, amongst others, agreements entered into between actual or potential competitors (so-called 'horizontal cooperation').

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

The European Commission (the 'Commission') is empowered to adopt block exemption regulations, which define certain categories of agreements for which it can be presumed with sufficient certainty that they fulfil the conditions of exemption under Article 101(3) TFEU. The Commission has made use of this empowerment by adopting two block exemption regulations that declare Article 101(1) TFEU not applicable to certain categories of R&D agreements and certain categories of specialisation agreements. The [R&D Block Exemption Regulation](#) ('R&D BER') and [Specialisation Block Exemption Regulation](#) ('Specialisation BER') (together the 'Horizontal Block Exemption Regulations' or 'HBERs') entered into force on 1 January 2011

and will expire on 31 December 2022. The HBERs are accompanied by [Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal cooperation agreements](#) ('Horizontal Guidelines').

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

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

2 How to answer this consultation

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

The questionnaire is structured as follows:

1. The first part of the questionnaire (Sections 3 and 4) concerns **general information** on the respondent.
2. The second part focuses on **policy options** for a possible revision of the HBERs (Section 5). It aims at gathering information and views from stakeholders to assess the impact of the policy changes that the Commission is exploring.
3. The third part of the questionnaire addresses **other issues and elements** (e.g. improvements, clarifications) to be considered during the impact assessment phase (Section 6).

Languages

The questionnaire is available in **English, French and German** but you may respond to the

questionnaire in the EUSurvey tool in any official EU language.

Next steps

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

Practical remarks:

1. To facilitate the analysis of your reply, we would kindly ask you to keep your answers concise and to the point.
2. You may include documents and URLs for relevant online content in your replies.
3. You are not required to answer every question. You may respond 'no opinion' to questions on topics where you do not have particular knowledge, experience or opinion. Where applicable, this is strongly encouraged in order to ensure that the evidence gathered by the Commission is solid.
4. You have the option of saving your questionnaire as a 'draft' and finalising your response later. In order to do this, click on 'Save as Draft' and save the new link that you will receive from the EUSurvey tool on your computer. Please note that *without this new link you will not be able to access the draft again* and continue replying to your questionnaire. Once you have submitted your response, you will be able to download a copy of your completed questionnaire.
5. Whenever there is a text field for a short description, the maximum number of characters will be indicated.
6. Questions marked with an asterisk (*) are mandatory.
7. To avoid any confusion about the numbering of the questions, please note that you will be asked some questions only if you choose a particular reply to the respective previous one(s).

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

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

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

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

3 About you

* 1 I am giving my contribution as

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

* 2 First name

Ief

* 3 Surname

Daems

* 4 Email (this won't be published)

ief.daems@inhousecompetitionlawyers.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

Association of Inhouse Competition Lawyers (ICLA)

* 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.

Identification number: 513747339430-11

* 12 Country of origin

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

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| <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 |

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| <input type="radio"/> Albania | <input type="radio"/> Dominican Republic | <input type="radio"/> Lithuania | <input type="radio"/> Saint Vincent and the Grenadines |
| <input type="radio"/> Algeria | <input type="radio"/> Ecuador | <input type="radio"/> Luxembourg | <input type="radio"/> Samoa |
| <input type="radio"/> American Samoa | <input type="radio"/> Egypt | <input type="radio"/> Macau | <input type="radio"/> San Marino |
| <input type="radio"/> Andorra | <input type="radio"/> El Salvador | <input type="radio"/> Madagascar | <input type="radio"/> São Tomé and Príncipe |
| <input type="radio"/> Angola | <input type="radio"/> Equatorial Guinea | <input type="radio"/> Malawi | <input type="radio"/> Saudi Arabia |
| <input type="radio"/> Anguilla | <input type="radio"/> Eritrea | <input type="radio"/> Malaysia | <input type="radio"/> Senegal |
| <input type="radio"/> Antarctica | <input type="radio"/> Estonia | <input type="radio"/> Maldives | <input type="radio"/> Serbia |
| <input type="radio"/> Antigua and Barbuda | <input type="radio"/> Eswatini | <input type="radio"/> Mali | <input type="radio"/> Seychelles |
| <input type="radio"/> Argentina | <input type="radio"/> Ethiopia | <input type="radio"/> Malta | <input type="radio"/> Sierra Leone |
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| <input type="radio"/> Aruba | <input type="radio"/> Faroe Islands | <input type="radio"/> Martinique | <input type="radio"/> Sint Maarten |
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| <input type="radio"/> Bahamas | <input type="radio"/> French Guiana | <input type="radio"/> Mexico | <input type="radio"/> Somalia |
| <input type="radio"/> Bahrain | <input type="radio"/> French Polynesia | <input type="radio"/> Micronesia | <input type="radio"/> South Africa |
| <input type="radio"/> Bangladesh | <input type="radio"/> French Southern and Antarctic Lands | <input type="radio"/> Moldova | <input type="radio"/> South Georgia and the South Sandwich Islands |
| <input type="radio"/> Barbados | <input type="radio"/> Gabon | <input type="radio"/> Monaco | <input type="radio"/> South Korea |
| <input type="radio"/> Belarus | <input type="radio"/> Georgia | <input type="radio"/> Mongolia | <input type="radio"/> South Sudan |
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| <input type="radio"/> Bermuda | <input type="radio"/> Greece | <input type="radio"/> Mozambique | <input type="radio"/> Suriname |
| <input type="radio"/> Bhutan | <input type="radio"/> Greenland | <input type="radio"/> Myanmar/Burma | <input type="radio"/> Svalbard and Jan Mayen |
| <input type="radio"/> Bolivia | <input type="radio"/> Grenada | <input type="radio"/> Namibia | <input type="radio"/> Sweden |

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

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| <input type="radio"/> Cocos (Keeling) Islands | <input type="radio"/> Japan | <input type="radio"/> Philippines | <input type="radio"/> United States Minor Outlying Islands |
| <input type="radio"/> Colombia | <input type="radio"/> Jersey | <input type="radio"/> Pitcairn Islands | <input type="radio"/> Uruguay |
| <input type="radio"/> Comoros | <input type="radio"/> Jordan | <input type="radio"/> Poland | <input type="radio"/> US Virgin Islands |
| <input type="radio"/> Congo | <input type="radio"/> Kazakhstan | <input type="radio"/> Portugal | <input type="radio"/> Uzbekistan |
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| <input type="radio"/> Costa Rica | <input type="radio"/> Kiribati | <input type="radio"/> Qatar | <input type="radio"/> Vatican City |
| <input type="radio"/> Côte d'Ivoire | <input type="radio"/> Kosovo | <input type="radio"/> Réunion | <input type="radio"/> Venezuela |
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| <input type="radio"/> Curaçao | <input type="radio"/> Laos | <input type="radio"/> Rwanda | <input type="radio"/> Western Sahara |
| <input type="radio"/> Cyprus | <input type="radio"/> Latvia | <input type="radio"/> Saint Barthélemy | <input type="radio"/> Yemen |
| <input type="radio"/> Czechia | <input type="radio"/> Lebanon | <input type="radio"/> Saint Helena
Ascension and
Tristan da Cunha | <input type="radio"/> Zambia |
| <input type="radio"/> Democratic Republic of the Congo | <input type="radio"/> Lesotho | <input type="radio"/> Saint Kitts and Nevis | <input type="radio"/> Zimbabwe |
| <input type="radio"/> Denmark | <input type="radio"/> Liberia | <input type="radio"/> Saint Lucia | |

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

* 14 Contribution publication privacy settings

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

☐ **Anonymous**

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

☒ **Public**

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

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

4 About your organisation

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

500 character(s) maximum

ICLA is an informal association of in-house competition lawyers with currently nearly 500 members across the globe. The Association does not represent companies but is made up of individuals as experts in the area of competition law.

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

500 character(s) maximum

ICLA is not a business/economic operator. ICLA members work for companies which are active in a wide range of sectors. This submission represents the position of ICLA and does not necessarily represent the views of all of its individual members.

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

Not applicable

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

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	As inhouse competition counsel, we rely on the Horizontal BER and guidelines to provide clarity and legal certainty, so that we can advise our business partners to make sure they take decisions in a compliant manner.
Specialisation BER	As inhouse competition counsel, we rely on the Horizontal BER and guidelines to provide clarity and legal certainty, so that we can advise our business partners to make sure they take decisions in a compliant manner.
Horizontal Guidelines	As inhouse competition counsel, we rely on the Horizontal BER and guidelines to provide clarity and legal certainty, so that we can advise our business partners to make sure they take decisions in a compliant manner.

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

21) If you have been **discouraged or dissuaded** in the last ten years from entering into a **pro-competitive horizontal cooperation agreement** (taking the

form of any of the ones mentioned in the previous question), please

(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

In our experience, horizontal cooperation agreements require a significant legal effort to ensure compliance with EU competition laws, including the need of external advice, the creation of clean teams or investments to monitor compliance. Providing more legal certainty and guidance that will facilitate the review of horizontal agreements is therefore highly appreciated.

Over the past few years, markets have significantly changed and have become fast-moving due to increasing digitalization. This requires companies to be more agile and cooperate more often to create innovative digital solutions, ensure interoperability and create new technological standards to the benefit of customers.

In addition, there is a strong need on developing sustainable solutions to reduce the environmental impact. The BER and HGL should take these new dynamics into account and recognize that cooperation that seek to address these goals are generally pro-competitive.

The BER and HGL should be revised in order to provide a higher degree of legal certainty to participants of such cooperation initiatives:

- Information exchange, particularly with regard to digital cooperation and cooperation to develop sustainable solutions: Information exchange outside the scope of a cartel agreement should not be a “by object” restriction but the actual effects of the exchange on competition should be assessed. Any abstract assessment of information exchange can lead to prohibiting information exchange which is neutral for competition or even pro-competitive.

Uncertainty in terms of what kind of information can be exchanged becomes even greater when dealing with these new cooperation models in the digital field and cooperations to develop sustainable solutions.

These cooperation models require a certain degree of information exchange and data sharing. However, companies are currently lacking clear guidance with regard to the boundaries of permitted information exchange in such cooperations. The BER and HGL should include guidance on these types of information exchanges taking into account the general pro-competitive nature of the vast majority of these cooperations.

- Joint bidding: The HGL should clarify that joint bidding between competitors can only create potential restrictive effects on competition if a cooperation between competitors effectively leads to a reduction of the number of bids (i.e. competitive pressure) that a customer receives.

- R&D agreements: Both the HGL & the BER on R&D agreements should be reviewed in order to extend the current framework to cover other kind of horizontal agreements that boost the creation of innovative technologies within the Digital Economy environment: platforms, cloud services, Big Data etc. Cooperation on R&D is also indispensable for companies to meet sustainability objectives.

Second, the BER and HGL should clarify that joint R&D agreements are generally pro-competitive. The current tools should emphasize more strongly the pro-competitive nature of joint R&D co-operations and provide clearer guidance to ensure that companies have sufficient comfort entering into a pro-competitive R&D cooperation even if not all requirements in Art. 3 of the R&D BER are strictly included. In addition, the R&D BER should be simplified, as its complex application makes it difficult to get the desired legal certainty. Third, there is a need to remove the reference to market shares on technology markets and limit the market share threshold to relevant product markets, as this notion is not practical and does not add any value for the assessment. In practice, it is highly unlikely that companies have a clear overview of all competing

technologies. It is even more unlikely that companies can calculate their market share on such a market. Fourth, in view of the overall pro-competitive nature of R&D co-operations, the revised R&D BER should remove the restriction on limiting passive sales and should allow the parties of an R&D cooperation to impose strict restrictions on each other under any form of specialization in the context of exploitation. Finally, “paid for” R&D should be treated under the subcontracting notice instead the R&D BER. Outsourcing R&D is usually similar to subcontracting, whereby the subcontractor produces the products and supplies them exclusively to the principal.

- Network sharing agreements: even though the analysis will always need to look at case and country specific circumstances, the HGL should provide some general points to facilitate self-assessment and encourage investments in high quality networks. The HGL on joint production do currently not provide sufficient guidance. The relevant Section 4 of the HGL should include a set of criteria based on which an adequate self-assessment can be made. Network sharing could also be introduced under the Examples under Section 4.5 to provide more legal certainty and enable consistency amongst different competition authorities.

5 Policy options for the HBERs

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

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

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

SMEs – R&D and specialisation

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

Research institutes /academic bodies – R&D

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

SMEs and research institutes /academic bodies – R&D

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

Options 2 to 5 could be applied cumulatively.

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

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

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

- ☐ ' *Unilateral specialisation agreement* (i.e. an agreement between two parties which are active on the same product market by which one party agrees to fully or partly refrain/cease production of certain products and to purchase them from the other party, who agrees to produce and supply those products to it)
- ☐ ' *Reciprocal specialisation agreement* (i.e. an agreement between two or more parties which are active on the same product market, by which two or more parties on a reciprocal basis agree to fully or partly cease or refrain from producing certain but different products and to purchase these products from the other parties, who agree to produce and supply them)
- ☐ ' *Joint production agreement* (i.e. an agreement by which two or more parties agree to produce certain products jointly)
- ☐ ' *Horizontal subcontracting agreements with a view to expanding production*' (i.e. an agreement by which the contractor entrusts the subcontractor with the production of a good, while the contractor does not at the same time cease or limit its own production of the good)
- ☐ Other type(s) of specialisation/production agreement(s)
- ☐ None

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

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

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







- ☐ Yes
- ☐ No
- ☐ No opinion

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						
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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)?

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

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

- ☐ Yes
- ☐ No
- ☐ No opinion

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

- ☐ Yes
- ☐ No
- ☐ No opinion

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

Impact on:	Very negative	Negative	Neutral	Positive	Very positive	No opinion
Competition on the market	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input 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"/>
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 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"/>
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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 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"/>
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 type="radio"/>	<input type="radio"/>
Harmonised application of competition rules by national	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

competition authorities and national courts						
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5.3) Policy options regarding the Specialisation BER - Scope and conditions for exemption

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

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

Options 2 to 4 could be applied cumulatively.

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

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

☒ Very likely

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

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

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

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

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

Impact on:	Very negative	Negative	Neutral	Positive	Very positive	No opinion
Competition on the market	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input 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"/>
Level of production	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Self-assessment of specialisation/production agreements	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input 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 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"/>

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 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"/>
Level of production	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Self-assessment of specialisation/production agreements	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input 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 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"/>

5.3.1) *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"/>

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6 Other areas for review

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

6.1) General questions

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

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

78 Please explain your choice.

It is important to have a clear reference point for an efficient self assessment of a horizontal cooperation. Potentially having multiple different sets of categories/rules apply to one and the same cooperation would make a self assessment too complicated and burdensome. Furthermore, in case different sections or rules apply, companies will need to implement the most stringent ones. This may result in substantially reduced forms of cooperation, sacrificing some of the benefits such cooperation could bring to consumers. Overall, it is important that a revised guidance on horizontal cooperation recognizes the pro-competitive and consumer benefits that may be achieved via cooperation.

To this end the "center of gravity" criteria seems the most appropriate, since the relevant factors to determine the center of gravity are clear and easy to determine at the outset of a cooperation. Trying to look at the endpoint might be difficult, because it may not always be clear what that point is at the time of the self assessment.

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

A clarification on the circumstances under which Art. 101 TFEU applies to joint ventures and its parents would help creating more legal certainty for the self assessment.

Joint Ventures between competitors are in many instances necessary to benefit from the know-how and skills of the parents. However, these joint ventures could, sometimes not intentionally, become a vehicle for the exchange of information between the competing parents. In-house lawyers who advise on these issues find themselves advising directors on Chinese walls, limitation to what they can and can't do and create complex structures that hamper business people from doing their job. It is accepted that information which does not relate to the business matters covered by the joint venture should not be exchanged, and any discussion within the joint venture about pricing / strategy should only be those that are necessary for the collaboration and limited to the specific scope of the joint venture.

The situation is more complex however in relation to what is passed to the parents in order to make the joint venture function. More specifically in the context of jointly controlled joint ventures we would like to see consistency with the approach in Paragraph 11 of the 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 Article 101(1) TFEU would not apply to dealings between parents and their jointly controlled subsidiaries: "... as a joint venture forms part of one undertaking with each of the parent companies that jointly exercise decisive influence and effective control over it, Article 101 does not apply to agreements between the parents and such a joint venture, provided the creation of the joint venture did not infringe EU competition law".

6.2) Information exchange

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

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

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

1000 character(s) maximum

Information exchange is an important base for a successful cooperation in most industries, in particular with digitalization, where the role of data and information will increase exponentially.

It is important that the relevant chapters are carefully revised to be fit for the digital age and not conflicting with other EC policy goals. It should be clear what the distinction is between “information” (under the restrictive chapter of information exchange) and “data” (under the probably more flexible chapter of data pooling). Criteria such as age of data or frequency of exchange need to be updated for the digital age. The HGL should recognize that new forms of cooperation in the digital field / to develop sustainable solutions are generally pro-competitive, and that they require a certain degree of information exchange and data sharing to achieve their goals. Companies are lacking clear guidance with regard to the boundaries of permitted information exchange in such cooperations.

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

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

See our response to Question 21 above. With digitalisation of most industries and the increased focus on sustainability, the role of data and information will increase exponentially. Consequently, the need for information (data) exchange will continue to grow significantly.

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

In the digital economy data is one of the key inputs in order to be able to offer innovative IoT and AI solutions, which will also play an increasing role in the traditional industries. Against this background and given the fragmentation of the European market, there will be a much greater need for data sharing in the future to maximize the benefits of big data for industries and consumers. Facilitating horizontal cooperation with regard to the commercial exchange of data among competitors will allow stakeholders to compete better within the current geopolitical ecosystem and to resolve any barriers to entry that may exist in current digital markets.

Therefore, it is crucial that the guidelines are updated in order to provide more legal certainty and respond to the challenges of data sharing in the digital economy, acknowledging the generally pro-competitive effects of such data pooling.

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

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

at most 4 choice(s)

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

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

- ☒ Yes
- ☐ No
- ☐ I do not know

92) Please explain your reply.

1000 character(s) maximum

It is widely accepted that an exchange of commercial information between operators at different levels of a vertical supply chain is part of a normal business dialogue. Such a business dialogue is generally a source of efficiency. Through its direct sales channel, a supplier will not receive the same level of detail and type of information. For example, a multinational may decide to only sell to certain, large customer or only into some territories where it makes economically sense to set up an own distribution network, while distributing its products to smaller customers or into smaller territories via distributors. If such a manufacturer is not able to receive information from its distributors on general pricing requirements, customer needs or similar commercially important information, it will not be able to react to such customer needs appropriately. Ultimately, this will be to the detriment of end users, businesses and consumers.

Other information exchange, data sharing and data pooling

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

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

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

94) Please explain what type of disadvantages you encounter:

5000 character(s) maximum

Companies active in the EU are more and more encouraged from a political level to join European initiatives, particularly in the digital field to enhance EU digital sovereignty. At the same time, they are being informed that the same cooperation may be problematic under the applicable EU (and national) competition laws, while lacking clear guidance or boundaries particularly with regard to information exchange or data pooling.

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

ICLA members have engaged or advised business teams in relation to a variety of different standard setting organizations (SSOs).

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

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

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

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

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

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

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

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:

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

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

5000 character(s) maximum

Due to its broad membership, ICLA does not have a specific position as to the advantages or disadvantages of specific (vs. general) disclosure obligations. However, it is important to note that there is no one-size-fits-all solution when it comes to disclosure rules for SSOs. Different rules will apply to different SSOs, for different reasons.

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

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

5000 character(s) maximum

Our members conclude joint purchasing agreements on a regular basis, especially when dealing with suppliers of indirect materials or costs like traveling, hotels, office suppliers, etc. Also in the

telecommunications sector, joint purchasing agreements have been concluded within the framework of broader partnership programs between operators and industry players, the scope of which has usually been limited to very specific products (e.g. the joint purchase of SIM cards). These arrangements enable companies to get better commercial offers and economic conditions in their purchases against upstream suppliers that may have strong bargaining power.

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

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

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

- ☐ Yes
- ☒ No
- ☐ Not applicable

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

5000 character(s) maximum

See our response to Question 107 above. The agreements referred to did not necessarily include separate purchasing entities. In some instances, one company took the lead and negotiated on behalf of others the key terms, following which other parties could place their own orders. Companies that part of the joint purchasing agreement are typically only bound by the contractual terms and conditions laid down in the joint purchasing agreements.

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

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

Other



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

5000 character(s) maximum

See our response to Question 107 above. Different elements may be discussed, depending on the type of arrangement.

115) Based on your experience or knowledge, which of the following elements should play a role in qualifying joint purchasing either as a **restriction of competition by object** or as a **restriction of competition by effect** (several choices are possible)?

Qualification as a restriction <u>by</u> <u>object</u> or <u>by</u> <u>effect</u>	Relevant for qualification as by object restriction	Not relevant for qualification as by object restriction	Relevant for qualification as restriction by effect	Not relevant for qualification as restriction by effect	No opinion
Buyers are competing downstream	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" 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 checked="" 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 checked="" 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 checked="" 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 checked="" 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 checked="" type="checkbox"/>
Other	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

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

5000 character(s) maximum

Joint purchasing can take many different forms and the effects can vary significantly based on the setup of the joint purchasing and the prevailing market conditions. ICLA therefore believes that joint purchasing should be assessed based on its effect in the relevant markets and should not be considered as relevant for "by object" restriction.

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

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



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

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

The potential benefits and negative effects of joint purchasing agreement will depend on the concrete setup of the joint purchasing as well as the market conditions.

In general, joint purchasing agreements bring significant pro-competitive benefits. They enable companies to join purchasing efforts in particular in industries where scale plays an important role. Furthermore, lower costs resulting from joint purchases may also be relevant, not only in terms of product prices but also in terms of transaction, transportation and storage costs.

Joint purchasing may also create efficiencies in terms of the quality of the products, increased supply, incentives for further innovation and overall service to consumers. This also holds true for suppliers, as higher-volume contracts may support innovation incentives and translate in better products, wider choice and lower prices for consumers.

However, if the joint purchasing is covering a substantial part of the market, it can also have anti-competitive effects.

Joint purchasing agreements should therefore be analyzed on a case-by-case basis. However, it should also be recognized that they generally create pro-competitive efficiencies, that outweigh any competition law concerns pursuant to the assessment under Article 101(3) TFEU unless the combined market share on the purchasing market is too high.

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

6.5) **Horizontal commercialisation agreements**

Commercialisation agreements involve co-operation between competitors in the selling, distribution or promotion of their substitute products. This type of agreement can have widely varying scope, depending on the commercialisation functions which are covered by the co-operation. At one end of the spectrum, joint selling agreements may lead to a joint determination of all commercial aspects related to the sale of the product, including price. At the other end, there are more limited agreements that only address one specific commercialisation function, such as distribution, after-sales service, or advertising.

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

Clauses / Subjects	Yes	No	No opinion
Pricing	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
Cross selling	<input checked="" 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

Further guidance on the aspects of pricing, data, and algorithms within commercialization agreements will be useful for digital and technology markets. In any event, as in the case of JVs and parent companies, a case-by-case analysis by the Commission would be welcomed to ensure that the Commission will also recognize the pro-competitive effects of commercialization agreements between companies. For example, when concluding commercialization agreements, companies are currently subject to high compliance costs (e.g. law firm advice and internal resources devoted to the legal and compliance analysis). Combined with the legal uncertainty around these type of agreements, these costs (in terms of money and time it takes to advise businesses) may be prohibitive and prevent companies from engaging in pro-competitive innovation in particular in technology and digital markets, which are generally global and fast-paced. Hence, a swift case-by-case analysis by the Commission would fasten joint initiatives whilst ensuring legal certainty.

In particular, companies have used commercialization agreements to be able to compete more effectively in the field of digital services. Facilitating such kind of horizontal agreements in a proportionate and harmonized way will create pro-competitive efficiencies and encourage digital innovation in the EU.

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

We welcome more guidance for these types of horizontal cooperation, especially regarding industrial alliances and data, as they are likely to become even more relevant in the coming years.

However, guidance should not be limited to examples, but should also provide specific steps to be followed by market players, to ensure legal certainty when entering into horizontal agreements in fast-paced markets such as technology and digital markets. In addition, guidance in terms of the scope of the horizontal cooperation, type of information to be exchanged, and possible pro- and anti-competitive effects is needed. This will allow companies to compete more efficiently in particular in markets that may be characterized by high investment costs and entry barriers.

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

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

- ☒ Yes
- ☐ No
- ☐ No opinion

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

5000 character(s) maximum

We would welcome the introduction of examples and further guidance on consortia agreements (e.g. in cases of joint bidding), in particular in terms of scope of cooperation, possible pro- and anti-competitive effects, and the type of information to be exchanged.

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

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

To tackle climate change, water pollution, loss in biodiversity and other sustainability challenges, businesses need to do their part. Reliance on European and European State initiatives will not be sufficient. As indicated in our initial submission on the EC consultation process on the review of the two Horizontal Block Exemption Regulations for horizontal cooperation agreements, the EC has a unique opportunity to be “part of the solution”. It shall encourage companies to cooperate by providing guidance on the circumstances in which joint efforts comply with EU competition law.

ICLA is of the view that the current Horizontal Guidelines must be reviewed to provide more detailed guidance, as well as more flexibility, when it comes to competitors working together to contribute to the EC “Green” agenda. In-house competition lawyers have a clear interest in a competition law regime that prioritises certainty, minimises costs and does not represent a disproportionate demand on businesses’ time and resources.

The five scenarios below are examples of possible cooperation among competitors which could help companies furthering their sustainability objectives and bring significant benefits from a sustainability perspective. These examples are provided for illustrative purposes and do not necessarily reflect actual agreements.

Scenario 1:

Faced with stringent new emissions targets to be complied with in five years time as part of the European Green deal climate package, a number of competitors in the chemicals sector consider collaborating in order to more quickly be able to achieve such targets. All companies individually will be able to comply with the targets by the deadline, but they believe that a collaboration could lead to complying with the targets in three years time, generating both sustainability and customer benefits. Lowering emissions even further would require very significant investments, both collectively and (to an even greater extent) individually. The competitors do not propose to address what activities, if any, can or should be taken after the collaboration.

Scenario 2:

Aircraft engines present different levels of fuel efficiency. New technologies, aerodynamic designs and

materials have the potential to decrease greenhouse gas emissions significantly. Aircraft engine manufacturers would like to consider the following joint initiatives:

- Cooperate on R&D and the market deployment of new engines and other environmentally friendly technologies; and concomitantly
- Cease producing certain types of engines to achieve 20 percent lower fuel consumption and CO2 emissions by 2050 through their renewed range of engines.

These joint initiatives could ultimately lead to increased efficiency, less emissions and improved durability.

Scenario 3:

Several airlines are considering “zero waste” options. To multiply the benefits of their initiatives, they consider agreeing on big goals and in particular the two following initiatives:

- Reduce their reliance on single use plastics by 70% by 2030; and
- Charge passengers for the use of certain disposable items such as in-ear headphones, which are often left behind by passengers and not reusable by airlines.

The airlines would not discuss the types of single use plastic items they will remove or the price they intend to charge the passengers for the disposable items.

Scenario 4:

Two major aircraft engine manufacturers agree to pool their R&D efforts into more fuel-efficient engines by setting up a joint venture to complete the R&D and produce a new generation of engines. Their agreement prevents them from developing engines which would be more fuel-efficient than the ones developed by the joint venture, even if they are capable to do so.

Scenario 5:

Several airlines agree at a trade association meeting to (i) reduce their use of single use plastics by 70% by 2030 and (ii) charge passengers for the use of certain items, which are often left behind by passengers and not reusable by airlines (e.g., headphones). The first agreement will result in increased costs for the airlines and will indirectly impact the airline catering companies. The second agreement will result in passengers being charged for some services.

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

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

5000 character(s) maximum

Besides contributing to sustainability objectives and improving reputation, some contemplated collaborations are also aimed at:

- Pooling knowledge and expertise, raising the funds available, and sharing the risks, especially when the initiatives and investments are associated with uncertain results; or
- Building standards which will apply across the industry or the supply chain, allowing the relevant stakeholders to monitor and evaluate the impact of their initiatives on the environment.

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

An increasing number of governments and regulators around the world (consider) implement(ing) sustainability commitments with legally binding targets.

For instance, the EU is developing legislation to mandate the use of sustainable fuels in the aviation sector (ReFuelEU initiative).

Furthermore, companies that employ some of ICLA's members do not belong to sectors subject to binding targets, but have nevertheless established internal sustainability commitments to meet environmental and investment objectives.

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

Through product, service, price or image differentiation, a business will be able to provide superior value to customers and differentiate itself from its competitors, thus gaining a competitive advantage. Businesses increasingly incorporate sustainability in their differentiation strategies, i.e., they seek to provide customers with something unique in terms of sustainability and different from their competitors' products and services. Thus, whenever possible, businesses will prefer to approach sustainability initiatives on a unilaterally basis. In some instances, however, if there is a risk that (i) a unilateral move results in only negligible effects on, e.g., carbon emissions and/or (ii) the company's initiative translates into a competitive disadvantage because it is the only one pursuing a certain sustainability objective (e.g., because of the significant costs associated with it), there is a possibility that the company will not pursue that objective. In such circumstances, a company may be interested in exploring opportunities for collaboration with its competitors as a way to achieve scale and/or overcome this first mover disadvantage.

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

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

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

5000 character(s) maximum

In order to track their achievements vis-à-vis their sustainability goals, some businesses have developed key metrics and collect data to measure the impact of their activities on sustainability. Governments and regulators have also come up with methodologies and calculators.

For example, methodologies have been developed to calculate the carbon dioxide emissions from air travel, based on the aircraft load factor, the aircraft fuel burn, etc. The impact of an agreement among airlines to fly more slowly could potentially be measured using these methodologies.

In the telecommunications sector, companies follow standards of the Scope 3 emissions, according to the GHG Protocol. Similarly, under the Eco-Rating initiative, which seeks to provide information on the environmental impact of producing, using, transporting, and disposing of smartphones, operators measure environmental impacts according to the improvements of mobile handset rating over time.

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

☒ Yes

☐

No

☒ Not applicable

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

5000 character(s) maximum

On a number of occasions, companies that employ ICLA members have abstained from concluding (or even discussing) cooperation agreements that pursued sustainability objectives for fear that they could breach competition rules.

The main hurdle to sustainability cooperation is probably the lack of legal certainty. ICLA members call for the EC to provide guidance on the assessment of agreements that serve sustainability objectives. Today, many initiatives are abandoned at inception phase because of fear of competition law implications. Companies (and in particular their in-house counsels) need detailed guidance setting out the main criteria that the EC will follow in assessing sustainability cooperation projects under Article 101 TFEU (including Article 101(3) TFEU).

Another major concern is the EC's approach to the criteria set out in Article 101(3) TFEU. For instance, paragraph 49 of the current Horizontal Guidelines provide that the concept of "consumers" encompasses the customers, potential and/or actual, of the parties to the agreement (see also paragraph 219 of the current Horizontal Guidelines). That narrow interpretation seems difficult to reconcile with the EC's ambitions and the climate urgency we are facing. ICLA calls for the definition of consumer in the current paragraph 49 to include the future generation(s) of consumers in line with the 2030 and 2050 milestones of the EU Green Deal. We note in this regard the recent publication by the EC of the Competition Policy Brief No 1/2021, which is confusing in some aspects. It is for instance indicated that benefits achieved on separate markets could be taken into account "provided that the group of consumers affected by the restriction and the group of benefiting consumers are substantially the same", while stressing that these are sound principles which "allows [sic] sustainability benefits that accrue for the benefit of society as a whole, to be taken into account."

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

In addition to the provisions identified above, ICLA calls for the following changes:

- The current paragraph 149 on R&D co-operation on dynamic product and technology markets and the environment should drop the reference to the refrained "ability of the parties to profitably raise prices" as a factor of measurement and add a long-term perspective to assessment of the benefits (for examples that "future generations of consumers will benefit from a lower consumption of fuel by 2030").
- The current paragraph 329 on environmental standards could drop the wording "the group of consumers affected by the restriction and the efficiency gains is substantially the same", to (i) allow for a long term assessment, and (ii) focus on environment protection as a necessity when that can be measured against the EU green taxonomy (rather than a net balancing where restraint of current competition and environment are considered in the current context).
- By the same token, the current paragraph 331 on open standardisation of product packaging for reduced

packaging waste and recycling costs of producers could drop the language “quantitative efficiencies through lower transport and packaging costs” and “the prevailing conditions of competition on the market are such that these costs reductions are likely to be passed on to consumers” for the above reasons.

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

ICLA calls for the EC to introduce a separate chapter on environmental agreements as it was the case in the 2001 Guidelines.

The content of this new chapter could come from both the standardisation chapter of the current Guidelines (with some amendments) as well as from some best practices at national level or examples shared by companies in response to the EC’s consultations. It should also clarify the conditions as to when cooperations will likely fall outside the scope of Article 101(1) TFEU, rather than defaulting to a detailed Article 101(3) effects analysis. ICLA would also welcome a strong message that sustainability collaboration is actively encouraged as no one can achieve the goal alone.

The new chapter could also refer to the current EU Green Deal and its 2030 and 2050 milestones so that the principles of long-term sustainability and objective necessity can be included and that collaborations that contribute to these goals can more easily be exempted.

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

ICLA members are of the view that climate change, water pollution, loss in biodiversity and other sustainability challenges call for the possibility to exceptionally and voluntarily ask and get comfort letters in order to have legal certainty for these often massive investments and cooperations with competitors to tackle these emergencies and effectively contribute to the Green Deal. Those reassurances should be provided in a timely manner without the need for extensive investigations, to make sure that companies maintain the incentives to promote the Commission’s and their own sustainability objectives. It should be clear relatively early whether the objectives that are being promoted are genuine, and do not seek to hide a series of anti-competitive outcomes.

In the above-mentioned Competition Policy Brief, EC officials indicated that “the Commission remains ready to consider requests for individual guidance letters in relation to sustainability initiatives that raise novel issues.” ICLA welcomes this announcement and would like the Commission to consider the publication of those guidance letters if the parties agree to it, or at least publish aggregated and anonymized decision practice that could benefit a broader group of market players – without revealing factual details about the envisaged cooperation in case those are confidential. Over time, the boundaries of permissible sustainability cooperation will become clearer and the need for, e.g., comfort letters will likely decrease. Yet, as things currently stand, any additional guidance provided by the EC would certainly be a welcome development for in-house lawyers.

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

Legal certainty and procedural issues

Horizontal cooperation is key to ensure the competitiveness in the current geopolitical environment. The Guidelines and BERs in their current status, while helpful, do not always give enough guidance. In order to make use of the full opportunities that cooperation might bring, in particular in digital markets and reduce the associated costs, legal certainty for companies needs to be increased.

In addition to providing clearer guidance in the Guidelines and the BERs, the European Commission should also look into how to best provide some informal and formal guidance on a case-by-case basis. Therefore, we suggest the following tools should be used or introduced, to be available to companies in addition to self-assessments:

- a. Informal meetings with the European Commission in order to discuss the interpretation of concrete questions in connection with a certain horizontal cooperation project;
- b. Guidance letters in accordance with the Commission Notice on informal guidance relating to novel questions concerning Articles 81 and 82 of the EC Treaty that arise in individual cases (2004/C 101/06), where it may be necessary to reassess the interpretation for the criteria for application of this tool, given the limited use of this tool so far;
- c. A mechanism to ask for specific guidance / approval for cooperation that has certain magnitude and involves high stakes, which would be at risk for the participating companies. For such (very exceptional) cases a specific system could be envisaged.

Applying these procedures would also create more decisional practice which could be made available to third parties subject to confidentiality concerns, and will facilitate the self-assessment of companies.

When introducing these tools, it is of utmost importance that any guidance by the Commission will be provided within a reasonably short time in view of the fast-moving pace of some markets.

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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