

## INCEPTION IMPACT ASSESSMENT

Inception Impact Assessments aim to inform citizens and stakeholders about the Commission’s plans in order to allow them to provide feedback on the intended initiative and to participate effectively in future consultation activities. Citizens and stakeholders are in particular invited to provide views on the Commission’s understanding of the problem and possible solutions and to make available any relevant information that they may have, including on possible impacts of the different options.

<b>TITLE OF THE INITIATIVE</b>	Revision of the two Block Exemption Regulations for horizontal cooperation agreements and the Horizontal Guidelines
<b>LEAD DG (RESPONSIBLE UNIT)</b>	DG COMP – A1 – HT.5454
<b>LIKELY TYPE OF INITIATIVE</b>	Legislative initiative – Commission Regulation
<b>INDICATIVE PLANNING</b>	Q4 2022
<b>ADDITIONAL INFORMATION</b>	<a href="https://ec.europa.eu/competition/consultations/2019_hbers/index_en.html">https://ec.europa.eu/competition/consultations/2019_hbers/index_en.html</a>

The Inception Impact Assessment is provided for information purposes only. It does not prejudice the final decision of the Commission on whether this initiative will be pursued or on its final content. All elements of the initiative described by the Inception impact assessment, including its timing, are subject to change.

### A. Context, problem definition and subsidiarity check

#### Context

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. The latter 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 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 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 research and development (‘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](#). In October 2020, the Commission also launched a [call for contributions](#) to gather ideas and proposals on how competition policy can contribute to the Green Deal. Insofar as the responses to this call for contributions are relevant for horizontal cooperation agreements, they have been taken on board.

#### Problems the initiative aims to tackle

The results of the evaluation of the HBERs and Horizontal Guidelines showed that the HBERs and the Horizontal Guidelines are useful instruments and remain relevant for stakeholders. Nonetheless, the evaluation has identified a number of potential issues.

The evaluation found that the scope of the **R&D BER** might not allow to identify all categories of agreements for which it can be assumed with sufficient certainty that they fulfil the conditions of exemption under Article 101(3) TFEU. Notably, small and medium sized enterprises (‘SMEs’) have difficulty in self-assessing their R&D

agreements in order to establish whether they qualify for exemption and may therefore refrain from engaging in such agreements. The evaluation further revealed that the requirements of the R&D BER may also deter companies to conclude R&D agreements with research institutes and/or academic bodies, as it is not always clear whether these should be regarded as competing undertakings according to the definitions of the Regulation. Finally, it flowed from the evaluation that companies might be deterred from concluding R&D agreements because of the conditions for exemption, notably the conditions requiring full access to the final results, such as intellectual property rights, and access to pre-existing know-how.

The evaluation also identified potential issues regarding the scope and conditions for exemption of the **Specialisation BER**. With regard to the scope, the evidence gathered in the evaluation indicated that the definition of unilateral specialisation agreements (limited to agreements between two parties) may stand in the way of concluding pro-competitive agreements. The evaluation also identified questions regarding horizontal subcontracting agreements with the aim of expanding production, which are currently not explicitly exempted. Paragraph 169 of the Horizontal Guidelines appears to argue that these would not raise competition concerns if the combined market share does not exceed 20%. In addition, in the case of unilateral and reciprocal specialisation agreements, the requirement for either supply and purchase obligations or joint distribution raised concerns. Finally, also here the evaluation identified that SMEs have difficulty self-assessing their specialisation agreements in order to establish whether they qualify for exemption.

Outside of these policy issues, the evaluation has also identified some **additional potential problems** that could be tackled through a revision of the texts.

The evaluation suggested that the rules in the HBERs and Horizontal Guidelines might not be sufficiently adapted to recent (market) developments. This applies in particular to developments relating to digitisation and the pursuit of sustainability goals. The HBERs and Horizontal Guidelines may not offer sufficient legal certainty for types of horizontal cooperation linked to these new developments. Many responses to the call for contributions on competition law and the Green Deal arrived at the same conclusion.

The evaluation further found that some of the provisions in the HBERs and Horizontal Guidelines are considered unclear and/or difficult to interpret by stakeholders. The evaluation also identified areas of the rules that are not always perceived as coherent with enforcement decisions and case law issued since their adoption.

Finally, the evaluation has emphasized that the Horizontal Guidelines lack a section on the withdrawal of the benefit of the block exemption.

#### **Basis for EU intervention (legal basis and subsidiarity check)**

The Commission adopted the HBERs on the basis of Council Regulation (EEC) No 2821/71 of 20 December 1971 on application of Article 85 (3) of the Treaty (now Article 101(3) TFEU) to categories of agreements, decisions and concerted practices (“Empowerment Regulation of 1971”).

### **B. Objectives and policy options**

The general objective of the HBERs and Horizontal Guidelines is to make it easier for companies to cooperate in ways which are economically desirable and without adverse effects from the point of view of competition law. The intervention also has specific objectives, which are to ensure an effective protection of competition and to provide adequate legal certainty for companies. Finally, the intervention aims at simplifying administrative supervision by providing a framework for the Commission, National Competition Authorities (‘NCAs’) and national courts for the assessment of horizontal cooperation agreements. The revision aims to ensure that the HBERs and Horizontal Guidelines continue to meet these objectives.

In the areas in which the evaluation showed that a more substantive revision of the HBERs and the Horizontal Guidelines might be warranted, the initiative will explore **policy options** aimed at improving the rules, while ensuring the compliance of horizontal cooperation agreements with Article 101 TFEU. Such policy options must remain within the limits imposed by the Empowerment Regulation of 1971 that defines the powers of the Commission to adopt block exemption regulations for horizontal cooperation agreements to those that have as their object the application of standards and types, R&D and specialisation.

The baseline scenario against which the proposed options will be assessed is a renewal of the HBERs and the Horizontal Guidelines without substantive change. Against this baseline scenario, the following policy options are proposed:

The Commission will explore options to ensure that the current rules do not discourage the participation of SMEs, research institutes and/or academic bodies in R&D and specialisation agreements that do not raise competition concerns. The policy options currently identified include:

1. The potential introduction of a specific category of R&D agreements covered by the R&D block exemption, subject to conditions to be defined, in case such agreements are concluded by SMEs; and/or
2. The potential introduction of a specific category of specialisation agreements covered by the Specialisation Block Exemption Regulation, subject to conditions to be defined, in case such agreements are concluded by SMEs; and/or
3. The addition of further clarifications of the definition of competing undertakings in case research institutes

and/or academic bodies are involved in R&D agreements; and/or

4. The exploration of whether the conclusion of R&D agreements that are unlikely to raise anti-competitive concerns and have beneficial effects on consumers can be allowed by modifying (and potentially removing) the requirement(s) in the R&D BER of full access to the results and/or access to pre-existing know-how in case such agreements are concluded with SMEs, academic bodies and/or research institutes.

To avoid discouraging the conclusion of R&D agreements which are unlikely to raise competition concerns and can be pro-competitive in general, the Commission will assess:

5. Whether the conclusion of such R&D agreements by all types of market participants can be encouraged by allowing for limitations to the requirement(s) of full access to the results and/or access to pre-existing know-how.

To clarify the uncertainty relating to the scope of the Specialisation BER, the Commission will reflect on the following separate options:

6. To widen the scope of the Specialisation BER by expanding the definition of unilateral specialisation to include more parties;
7. 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
8. To verify the conditions for exemption under the Specialisation BER as to the requirement of joint distribution for unilateral or reciprocal cooperation.

The different policy options address different issues and therefore are not mutually exclusive and the impact assessment could also assess alternative and more nuanced sub-options. These policy options will be further refined following the stakeholder consultations and in the course of the impact assessment work.

The policy options are also complemented by revisions aimed at tackling other problems that the evaluation identified, as set out in Section A above.

The revision of the Horizontal Guidelines will, in particular aim at providing specific guidance on horizontal cooperation resulting from new market developments such as digitisation and the pursuit of sustainability goals. In this regard, the Commission intends to include in the Horizontal Guidelines guidance that would assist stakeholders in the self-assessment of, for instance, data pooling and data sharing arrangements and horizontal cooperation agreements that pursue sustainability goals. This guidance would further clarify and develop the policy lines currently set out in the Horizontal Guidelines and will take into account the findings and analysis conducted during the impact assessment phase and of other relevant policy initiatives, for instance in the area of data, sustainability and intellectual property rights.

In the revision of the HBERs and the Horizontal Guidelines, the Commission will pay particular attention to the clarification of definitions and terms that are considered unclear or difficult to interpret. The Commission will further aim at improving the coherence between the HBERs, the Horizontal Guidelines and other Commission's initiatives that interpret Article 101 TFEU.

The Commission also aims at clarifying and simplifying the rules of the HBERs and the Horizontal Guidelines where necessary, including incorporating recent case law of the Court of Justice of the European Union and enforcement practice of the Commission and, where relevant, of the NCAs.

In addition, the Commission considers including guidance on how to apply the withdrawal of the block exemption in the Horizontal Guidelines.

## C. Preliminary Assessment of Expected Impacts

### Likely economic impacts

A revision of the R&D and Specialisation BERs and of the Horizontal Guidelines is likely to have an impact on the general objective of ensuring effective competition, on compliance costs borne by companies, on consumers and on innovation and research.

Certain options, notably on the scope of the R&D BER and the Specialisation BER, as well as the modification of the safe harbours in the Regulations, explore changes that may extend the block exemptions to agreements currently not covered by them. In addition to increasing legal certainty, these policy options could give businesses more flexibility to conclude horizontal cooperation agreements, which may not raise competition concerns and may contribute to increasing innovation, research and competitiveness in the EU. In addition, these policy options could reduce compliance costs for businesses (notably SMEs) by making it easier to self-assess the compliance of their horizontal cooperation agreements with Article 101 TFEU.

Conversely, other policy options, notably on the conditions for exemption under the R&D BER explore the elimination or limitation of certain conditions for exemption (e.g. full access to the R&D results, access to pre-existing know-how) and aim to remove conditions that some stakeholders perceived as potentially preventing agreements that may not raise competition concerns. The Commission seeks to ensure that such conditions do not have a chilling effect on the conclusion of horizontal cooperation agreements, which could be beneficial to

<p>consumers. These policy options may require a revision of the terms under which horizontal cooperation agreements are set up which could increase costs for some businesses that will have to re-assess the compliance of their agreements with Article 101 TFEU. However, these effects may be countered by the beneficial impact of the changes.</p> <p>The initiative also seeks to clarify areas where the rules are perceived as unclear or complex, fill gaps and contribute to a more harmonised interpretation and enforcement across the EU. Combined with the policy options, these improvements would provide businesses with more legal certainty, enabling them to more effectively self-assess the compliance of their horizontal cooperation agreements with Article 101 TFEU and reduce their legal costs and other related financial and administrative burdens. At the same time, the improvements should provide benefits to consumers, as they would encourage the conclusion of horizontal cooperation agreements that meet the requirements of Article 101(3) TFEU and reduce the risk of enforcement errors.</p> <p>The initiative would also facilitate and reduce the cost of the enforcement of the Commission and NCAs.</p> <p>Furthermore, by capturing those horizontal cooperation agreements that comply with the conditions of Article 101(3) TFEU to be block exempted, the initiative will increase consumer welfare in the internal market. Benefits passed on to consumers may be related to price reduction, product quality increase, as well as increased choice and the emergence of new or more efficient and greener technologies.</p>
<p><b>Likely social impacts</b></p>
<p>The initiative is not expected to have a direct social impact.</p>
<p><b>Likely environmental impacts</b></p>
<p>The initiative aims at promoting effective protection of competition and increasing legal certainty for companies with regard to different types of horizontal cooperation agreements, including agreements pursuing sustainability goals. It is therefore expected to have a positive environmental impact.</p>
<p><b>Likely impacts on fundamental rights</b></p>
<p>The initiative is not expected to have an impact on fundamental rights.</p>
<p><b>Likely impacts on simplification and/or administrative burden</b></p>
<p>This initiative aims at simplifying the current rules to the extent possible, while ensuring compliance with Article 101 TFEU. By improving areas where the evaluation identified high complexity or a lack of clarity resulting in difficulties with applying the rules in practice, the initiative would ensure that the HBERs and the Horizontal Guidelines make it easier for companies to cooperate in ways which are economically desirable and without adverse effects from the point of view of competition law. Finally, the intervention aims at simplifying administrative supervision by providing a framework for the Commission, NCAs and national courts for the assessment of horizontal cooperation agreements.</p>
<p><b>D. Evidence Base, Data collection and Better Regulation Instruments</b></p>
<p><b>Impact assessment</b></p>
<p>The Commission's decision will be informed by an Impact Assessment, analysing in detail the different policy options considered.</p>
<p><b>Evidence base and data collection</b></p>
<p>The Impact Assessment will be supported by the evidence gathered during the evaluation of the HBERs and Horizontal Guidelines and the <a href="#">call for contributions</a> on competition and the Green Deal. The Commission intends to further obtain evidence from various other sources, including an open public consultation, a consultation of the NCAs, discussions with expert groups, such as the Commission's Economic Advisory Group on Competition Policy, or expert advice commissioned for specific issues. The outcome of the ongoing evaluation of the <a href="#">Vertical Block Exemption Regulation and Vertical Guidelines</a> and the <a href="#">Notice on Market Definition</a>, as well as other past and ongoing initiatives of the Commission, such as the <a href="#">IP Action Plan</a> and the <a href="#">Data Act</a> will also be taken into account.</p>
<p><b>Consultation of citizens and stakeholders</b></p>
<p>The Commission will conduct an open public consultation as well as targeted stakeholder workshops and bilateral meetings to gather feedback on the policy options proposed and their ability to tackle the issues identified in the evaluation. Stakeholders will be invited to provide input in the consultation process notably by providing practical examples of horizontal cooperation agreements that in their view would benefit consumers in the sense of Article 101 TFEU but that they were refrained from concluding after self-assessment with the help of the block exemption regulations and Horizontal Guidelines. The Commission will also publish a draft of the revised HBERs and the Horizontal Guidelines for stakeholders' comments.</p>
<p><b>Will an Implementation plan be established?</b></p>

An implementation plan is not needed, given that the Impact Assessment concerns the review of an existing set of rules that serves as a basis for the enforcement practice of the Commission and NCAs.