

Public questionnaire for the 2019 Evaluation of the Research & Development and Specialisation Block Exemption Regulations

Fields marked with * are mandatory.

1

Introduction

Background and aim of the public questionnaire

Article 101(1) of the Treaty on the Functioning of the European Union ('the Treaty') prohibits agreements between undertakings that restrict competition unless they generate efficiencies in line with Article 101(3) of the Treaty. Agreements generate efficiencies in line with Article 101(3) of the Treaty 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 agreements').

Commission Regulations (EU) No 1217/2010 (Research & Development Block Exemption Regulation - 'R&D BER') and 1218/2010 (Specialisation Block Exemption Regulation - 'Specialisation BER'), together referred to as the 'Horizontal block exemption regulations' (or 'HBERs'), exempt from the prohibition contained in Article 101(1) of the Treaty those R&D and specialisation agreements for which it can be assumed with sufficient certainty that they satisfy the conditions of Article 101(3) of the Treaty. The Commission Guidelines on horizontal cooperation agreements ('HGL') provide binding guidance on the Commission for the interpretation of the HBERs and for the application of Article 101 of the Treaty to other horizontal agreements. The HBERs will expire on 31 December 2022.

This public questionnaire represents one of the methods of information gathering in the evaluation of the HBERs, together with the HGL, which was launched on 5 September 2019. The purpose of this questionnaire is to collect views and evidence from the public and stakeholders on how the current rules work for them. The Commission will evaluate the current HBERs, together with the HGL, based on the following criteria:

- Effectiveness (Have the objectives been met?),
- Efficiency (Were the costs involved proportionate to the benefits?),
- Relevance (Do the objectives still match current needs or problems?),
- Coherence (Does the policy complement other actions or are there contradictions?), and
- EU added value (Did EU action provide clear added value?).

The collected information will provide part of the evidence base for determining whether the Commission should let the HBERs lapse, prolong their duration without changing them or prolong them in a revised form, together with the accompanying HGL.

The responses to this public consultation will be analysed and the summary of the main points and conclusions will be made public on the Commission's central public consultations page. **Please note that your replies will also become public as a whole, see below under Section 'Privacy and Confidentiality'.**

Nothing in this questionnaire may be interpreted as stating an official position of the Commission.

Submission of your contribution

You are invited to reply to this public consultation by answering the questionnaire online. To facilitate the analysis of your replies, we would kindly ask you to keep your answers concise and to the point. You may include documents and URLs for relevant online content in your replies.

While the questionnaire contains several questions of a more general nature, notably Section 4 and 5 also contain questions that are aimed at respondents with more specialised knowledge of the HBERs and HGL. We invite all respondents to provide answers to the questionnaire. In case a question does not apply to you or you do not know the answer, please choose the field 'Do not know' or 'Not applicable'.

For your information, you have the option of saving your questionnaire as a 'draft' and finalising your response later. In order to do this you have to 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.

The questionnaire is available in English, French and German. You may however respond in any EU language.

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

In case of technical problem, please contact the Commission's [CENTRAL HELPDESK](#).

Duration of the consultation

The consultation on this questionnaire will be open for 14 weeks, from 6/11/2019 to 12/2/2020.

Privacy and confidentiality

*** 1.1 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 your type of respondent, country of origin and contribution will be published. All other personal details (name, organisation name and size, transparency register number) will not be published.

☒ **Public**

Your personal details (name, organisation name and size, transparency register number, country of origin) will be published with your contribution.

Please note that your replies and any attachments you may submit will be published in their entirety even if you chose 'Anonymous'. Therefore, please remove from your contribution any information that you will not want to be published.

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

2 About you

* 2.1 Language of my contribution

- ☐ Bulgarian
- ☐ Croatian
- ☐ Czech
- ☐ Danish
- ☐ Dutch
- ☒ English
- ☐ Estonian
- ☐ Finnish
- ☐ French
- ☐ Gaelic
- ☐ German
- ☐ Greek
- ☐ Hungarian
- ☐ Italian
- ☐ Latvian
- ☐ Lithuanian
- ☐ Maltese
- ☐ Polish
- ☐ Portuguese
- ☐ Romanian
- ☐ Slovak
- ☐ Slovenian
- ☐ Spanish
- ☐ Swedish

* 2.2 First name

Jorge

* 2.3 Surname

Conesa de Lara

* 2.4 Email (this won't be published)

* 2.5 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

2.6 Other - please specify

If you chose "Other", please specify whether you are contributing as lawyer/law firm, economic consultancy or something else:

* 2.7 Organisation name

255 character(s) maximum

Fair Trade Advocacy Office

If available, please provide your ID number of the [EU Transparency Register](#). If your organisation is not registered, we invite you to register, although it is not compulsory to be registered to reply to this consultation.

2.8 Transparency register number

255 character(s) maximum

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

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* 2.10 Organisation size

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

* 2.11 The main activities of your organisation:

Text of 1 to 250 characters will be accepted

The FTAO leads the Fair Trade movement political advocacy at European Union level and contributes to the strengthening of the political advocacy capacities of the global Fair Trade movement.

*** 2.12 Please describe the sectors where your organisation or your members are conducting business:**

Text of 1 to 250 characters will be accepted

Thought leadership, EU monitoring and advocacy, global advocacy and providing capacity building for the Fair Trade movement. From a sectoral approach, the FTAO focuses at the moment on textiles and deforestation-risk supply chains.

*** 2.15 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 |
| <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 |
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| <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 |
| <input type="radio"/> Armenia | <input type="radio"/> Falkland Islands | <input type="radio"/> Marshall Islands | <input type="radio"/> Singapore |
| <input type="radio"/> Aruba | <input type="radio"/> Faroe Islands | <input type="radio"/> Martinique | <input type="radio"/> Sint Maarten |
| <input type="radio"/> Australia | <input type="radio"/> Fiji | <input type="radio"/> Mauritania | <input type="radio"/> Slovakia |
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| <input type="radio"/> Bahamas | <input type="radio"/> French Guiana | <input type="radio"/> Mexico | <input type="radio"/> Somalia |
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| <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 |

- Barbados
- Belarus
- Belgium
- Belize
- Benin
- Bermuda
- Bhutan
- Bolivia
- Bonaire Saint Eustatius and Saba
- Bosnia and Herzegovina
- Botswana
- Bouvet Island
- Brazil
- British Indian Ocean Territory
- British Virgin Islands
- Brunei
- Bulgaria
- Burkina Faso
- Burundi
- Cambodia
- Cameroon
- Canada
- Cape Verde
- Cayman Islands
- Central African Republic
- Chad
- Chile
- China
- Christmas Island
- Clipperton
- Cocos (Keeling) Islands
- Gabon
- Georgia
- Germany
- Ghana
- Gibraltar
- Greece
- Greenland
- Grenada
- Guadeloupe
- Guam
- Guatemala
- Guernsey
- Guinea
- Guinea-Bissau
- Guyana
- Haiti
- Heard Island and McDonald Islands
- Honduras
- Hong Kong
- Hungary
- Iceland
- India
- Indonesia
- Iran
- Iraq
- Ireland
- Isle of Man
- Israel
- Italy
- Jamaica
- Japan
- Monaco
- Mongolia
- Montenegro
- Montserrat
- Morocco
- Mozambique
- Myanmar /Burma
- Namibia
- Nauru
- Nepal
- Netherlands
- New Caledonia
- New Zealand
- Nicaragua
- Niger
- Nigeria
- Niue
- Norfolk Island
- Northern Mariana Islands
- North Korea
- North Macedonia
- Norway
- Oman
- Pakistan
- Palau
- Palestine
- Panama
- Papua New Guinea
- Paraguay
- Peru
- Philippines
- South Korea
- South Sudan
- Spain
- Sri Lanka
- Sudan
- Suriname
- Svalbard and Jan Mayen
- Sweden
- Switzerland
- Syria
- Taiwan
- Tajikistan
- Tanzania
- Thailand
- The Gambia
- Timor-Leste
- Togo
- Tokelau
- Tonga
- Trinidad and Tobago
- Tunisia
- Turkey
- Turkmenistan
- Turks and Caicos Islands
- Tuvalu
- Uganda
- Ukraine
- United Arab Emirates
- United Kingdom
- United States
- United States Minor Outlying Islands

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| <input type="radio"/> Colombia | <input type="radio"/> Jersey | <input type="radio"/> Pitcairn Islands | <input type="radio"/> Uruguay |
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| <input type="radio"/> Cuba | <input type="radio"/> Kyrgyzstan | <input type="radio"/> Russia | <input type="radio"/> Wallis and Futuna |
| <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 | |

3 General Questions on the Horizontal Block Exemption Regulations and the Guidelines on horizontal cooperation agreements

* 3.6 How often do you consult the **R&D BER** for guidance on a horizontal cooperation agreement?

- ☐ Frequently (several times per year)
- ☐ Occasionally (once or twice per year)
- ☒ Never

* 3.7 How often do you consult the **Specialisation BER** for guidance on a horizontal cooperation agreement?

- ☐ Frequently (several times per year)
- ☐ Occasionally (once or twice per year)
- ☒ Never

* 3.8 How often do you consult the **HGL** for guidance on a horizontal cooperation agreement?

- ☐ Frequently (several times per year)
- ☒ Occasionally (once or twice per year)
- ☐ Never

4 Effectiveness (Have the objectives of the current HBERs and HGL been met?)

In this section, we would like to have your opinion on the extent to which the HBERs and the HGL have met their objectives.

The **purpose of the EU competition rules** is to ensure that competition is not distorted to the detriment of the public interest, individual undertakings and consumers. In line with this objective, the Commission's policy is to leave companies maximum flexibility when concluding horizontal co-operation agreements in order to increase the competitiveness of the European economy while at the same time promoting competition for the benefit of European businesses and consumers.

The **purpose of the HBERs and the HGL** is to make it easier for undertakings to cooperate in ways which are economically desirable and without adverse effect from the point of view of competition policy. The specific objectives of the HBERs and HGL are to ensure effective protection of competition and providing adequate legal certainty for undertakings.

* 4.1 In your view, do you perceive that the HBERs and the HGL have contributed to promoting competition in the EU?

- ☐ Yes
- ☐ Yes, but they have contributed only to a certain extent or only in specific sectors
- ☐ They were neutral
- ☐ No, they have negatively affected competition in the EU
- ☒ Don't know

Legal certainty provided by the HBERs and the HGL

* 4.3 In your view, have the R&D BER and Section 3 of the HGL on research and development agreements provided sufficient legal certainty on R&D agreements companies can conclude without the risk of infringing competition law?

- ☐ Yes
- ☐ No
- ☒ Do not know

* 4.5 In your view, does the R&D BER increase legal certainty compared with a situation where the R&D BER would not exist but only the HGL applied?

- ☐ Yes
- ☐ No
- ☒ Do not know

* 4.7 In your view, have the Specialisation BER and Section 4 of the HGL on production agreements provided sufficient legal certainty on production /specialisation agreements companies can conclude without the risk of infringing competition law?

- ☐ Yes
- ☐ No
- ☒ Do not know

*

4.9 In your view, does the Specialisation BER increase legal certainty compared with a situation where the Specialisation BER would not exist but only the HGL applied?

- ☐ Yes
- ☐ No
- ☒ Do not know

In this section we would like to have your opinion on the extent to which the HGL have provided sufficient legal certainty on horizontal cooperation agreements companies can undertake without the risk of infringing competition law. Please specify your answer according to the different types of horizontal agreements.

* 4.11 In your view, have the HGL provided sufficient legal certainty on agreements involving **information exchange** in the sense of Section 2 of the HGL?

- ☐ Yes
- ☐ No
- ☒ Do not know

* 4.13 In your view, have the HGL provided sufficient legal certainty on **purchasing agreements** in the sense of Section 5 of the HGL?

- ☐ Yes
- ☐ No
- ☒ Do not know

* 4.15 In your view, have the HGL provided sufficient legal certainty on **commercialisation agreements** in the sense of Section 6 of the HGL?

- ☐ Yes
- ☐ No
- ☒ Do not know

* 4.17 In your view, have the HGL provided sufficient legal certainty on **standardisation agreements** in the sense of Section 7 of the HGL?

- ☒ Yes
- ☐ No
- ☐ Do not know

* 4.18 Please explain your reply

Text of 1 to 1500 characters will be accepted

The current HGL are a step in the right direction in particular regarding environmental standardisation agreements (SA). It is however regrettable that while the environmental performance of products is mentioned within the aims of SA (§ 257), it is not more developed later on. It is particularly striking that in the specific example of “environmental standards” (§ 329), the HGL mention the qualitative efficiencies of more environmentally friendly products only in terms of the increased functionality of the products and assess the lower use of water as a cost efficiency. The fact that the other examples with environmental aspects simply ignore these benefits, e.g. § 331 which specifically underlines the fact that the standard is implemented to meet environmental targets but only mentions quantitative efficiencies in terms of lower transportation and packaging costs, is also telling. It would provide stronger legal certainty if the HGL were to recognise that environmentally friendly products offer qualitative efficiencies because they have a lower impact on the environment and enable more sustainable consumption.

More importantly, the HGL completely overlook certain types of SA: social and ethical SA. An industry wide standard to agree, for instance, on the use of raw materials that were not produced using child labour should in our view fits in this section of the guidelines. It is, after all, an agreement that aims to define the quality of the final product, i.e. ethical.

- * 4.19 In your view, have the HGL provided sufficient legal certainty on **other types of horizontal cooperation agreements** that are currently not specifically addressed in the HGL (for example sustainability agreements)

- ☐ Yes
☒ No
☐ Do not know

- * 4.20 Please explain your reply

Text of 1 to 1500 characters will be accepted

Sustainability and social equity are at the forefront of the political agenda (e.g. UN 2030 Agenda; EU Green Deal). Multi-stakeholders initiatives can play a role in achieving recognised policy goals, but such initiatives typically require cooperation, which can have an impact on costs and/or sale prices. Current HGL don't provide enough legal certainty for cooperative agreements aimed at achieving these policy objectives.

A study by Fairtrade established that the lack of certainty on (i) whether a cooperation initiative is permissible, and (ii) how it can be structured, acts as a deterrent to retailers collaborating, particularly on projects addressing low incomes and wages. Interviewees stated that "an unclear legal landscape around potential collaboration in relation to low farm-gate prices restricted progress towards working collectively to secure living wages and incomes in supply chains".

We call upon the EC to assess the situations under which private companies can cooperate in sustainability or social fairness related initiatives, with or without the intervention of public administrations. The starting point should be that such arrangements are inherently positive in character unless any appreciable negative impact on competition is demonstrated, which outweighs its benefits to promoting sustainability.

The HGL could also benefit from additional explanations on the notion of consumers (§ 49) to better explain that potential consumers can also include future ones

- * 4.21 In your view, are there other types of horizontal cooperation agreements outside those identified in the current HGL that should have been specifically addressed in order to increase legal certainty?

- ☒ Yes
☐ No
☐ Do not know

- * 4.22 If Yes, please list those types of agreements and explain your reasons

Text of 1 to 3000 characters will be accepted

We believe that reintroducing a section on environmental agreements following the model set forth in the 2001 Guidelines (2001/C 3/02), adapted to the current context (including consideration being given to the EU Green Deal and the Paris Agreement), could provide more certainty to public and private actors. However, this alone would not be sufficient to ensure a precise and coherent application of competition rules across the EU/EEA.

Ensuring fairness across the value chain and an appropriate level of living incomes upstream requires the HGL to include clear provisions on cooperation aimed at improving sustainability and other social goals.

The HGL would benefit from a new section dealing with the specific category of agreements falling within the traditional hard-core restrictions, i.e. agreement on price, cost, output, but which are entered into not to

restrict competition but to reach global social goals. For instance, an agreement between importers, representing a significant part of the market, to pay a premium on the purchase price of raw products may at first be assessed as an agreement on input price. It would provide legal certainty if the HGL were to explain that such an agreement is not a by-object restriction and may even be assessed as having no effect on competition if the raw product represent only a small part of the parties' variable costs, resulting in a very low commonality of costs.

Even if the agreement had the effect of restricting competition, it may benefit from Article 101(3), considering that it generates significant efficiencies in terms of e.g. quality of the final product (ethical but also potentially better health quality through reduce use of toxic pesticides) or security of long-term supply for the EU customers. The HGL should therefore take greater account of non-monetary values which can benefit EU consumers when assessing the efficiencies generated by the agreement. The EC should be in a position to outline its assessment framework for a range of non-price efficiencies which are capable of creating a broader range of benefits for consumers and citizens, for example, environmental quality, enjoyment of human rights, and positive impacts on sustainable development and social conditions in the EU and in third countries.

Cases dealt with at national level hinted that environmental and/or sustainability initiatives may fulfil the conditions of Article 101(3) under certain conditions, although the NCAs considered that it was not the case for the assessed initiatives (see for instance the so-called 'Chicken of Tomorrow' and 'Energy Deal for sustainable growth' Dutch cases). Including guidance on the specific conditions these initiatives would have to meet to fall within Article 101(3) in the HGL would help stakeholders design competition compliant sustainability initiatives. This would enable competition law to go from an obstacle to an enhancer of sustainability.

Identification of pro-competitive horizontal agreements

The R&D BER and the Specialisation BER set out a number of conditions that R&D and specialisation agreements need to meet in order to benefit from the block exemption. The HGL provide additional guidance on how to interpret these conditions. These conditions have been defined with the purpose to give exemption only to those agreements for which it can be assumed with sufficient certainty that they generate efficiencies that outweigh, in line with Article 101(3) of the Treaty, the harm caused by the restriction of competition.

Based on your experience, have the following provisions in the **R&D BER** allowed to correctly identify the horizontal cooperation agreements that are compliant with Article 101 of the Treaty?

* 4.23 The list of definitions that apply for R&D agreements that can benefit from exemption in Article 1 of the R&D BER

- ☐ Yes
- ☐ No
- ☒ Do not know

* 4.25 The conditions for exemption listed in Article 3 of the R&D BER, regarding, for instance, access to the final results of the R&D, access to pre-existing know-how and joint exploitation.

- ☐ Yes
- ☐ No
- ☒ Do not know

4.27 The absence of a market share threshold for non-competing undertakings, the market share threshold of 25% for competing undertakings and the application thereof provided for in Articles 4 and 7 of the R&D BER

- ☐ Yes
- ☐ No
- ☒ Do not know

* 4.29 The limits regarding the duration of the exemption provided for in Article 4

- ☐ Yes
- ☐ No
- ☒ Do not know

* 4.31 The list identified in Article 5 of the R&D BER which make the exemption not available for agreements that have as their object certain restrictions or limitations ('hardcore restrictions')

- ☐ Yes
- ☐ No
- ☒ Do not know

* 4.33 The list of obligations included in agreements to which the exemption does not apply ('excluded restrictions'), identified in Article 6 of the R&D BER

- ☐ Yes
- ☐ No
- ☒ Do not know

Based on your experience, have the following provisions in the **Specialisation BER** allowed to correctly identify the horizontal cooperation agreements that are compliant with Article 101 of the Treaty?

* 4.35 The definitions that apply for the purposes of the Specialisation BER, in Article 1

- ☐ Yes
- ☐ No
- ☒ Do not know

* 4.37 The explanations on the type of specialisation agreements to which the exemption applies, provided by Article 2 of the Specialisation BER

- ☐ Yes
- ☐ No
- ☒ Do not know

* 4.39 The market share threshold of 20% and its application, provided for in Articles 3 and 5 of the Specialisation BER

- ☐ Yes
- ☐ No
- ☒ Do not know

* 4.41 The list identified in Article 4 of the Specialisation BER which make the exemption not available for agreements that have as their object price fixing,

certain limitations of output or sales or market or customer allocation ('hardcore restrictions')

- ☐ Yes
- ☐ No
- ☒ Do not know

4.43 Based on your experience, are there other elements, besides those listed in the previous questions that should have been clarified, added, or removed to improve the guidance given by the BERs?

Text of 1 to 3000 characters will be accepted

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* 4.44 Based on your experience, are there other types of horizontal cooperation agreements outside those identified in the R&D and Specialisation BERs which would satisfy the conditions of Article 101(3) of the Treaty?

- ☒ Yes
- ☐ No
- ☐ Do not know

* 4.45 If Yes, please list those types of agreements and explain your reasons

Text of 1 to 3000 characters will be accepted

Horizontal agreements aimed at having positive impacts on society (e.g., waste reduction, the reduction of emissions, the provision of living wages and living incomes upstream, etc.) often require cooperation among competing actors in order to be effective and to be able to allocate their benefits most effectively. The objectives of the agreement may not be attainable by any of the actors acting unilaterally, nor in some cases by public authorities, since they might require taking action outside of the EU. By the same token, if acting alone, there might be a significant "first mover disadvantage" involved for those business actors who decide to take action in markets where customers are highly sensitive to price or where there is little scope for product differentiation.

These agreements may satisfy the conditions of Article 101 (3) TFEU, but they are not covered by the R&D, nor the Specialisation BER.

Additionally, we call upon the Commission clarify if Article 101(3)'s scope includes market efficiencies, in particular when the benefits of a particular agreement fall under non-EU citizens (e.g. workers in a producing non-EU country).

* 4.46 Based on your experience, have the BERs and the HGL had any impacts that were not expected or not intended?

- ☐ Yes
- ☐ No
- ☒ Do not know

5 Efficiency (were the costs involved proportionate to the benefits?)

In this section, we would like to have your view concerning the efficiency of the HBERs and the HGL. In your view, do you consider that the costs (for example, legal fees, delays in implementation) of analysing the conditions and applying these instruments is proportionate to the benefits (for example, faster self assessment) of having the rules in place?

Costs

*** 5.1 Please describe the different types of costs of applying the current R&D and Specialisation BERs; and the HGL**

Text of 1 to 1500 characters will be accepted

Under the current framework, companies wishing to engage in sustainability initiatives need to carry out a self-assessment in the dark; they have little to no case law on which they can rely and the HGL fall short of providing the required guidance. The result is that in order to merely set up a competition compliant sustainability initiative, companies require extensive professional support, which can very quickly add up to significant sums in legal fees.

The requirement to quantify in economic terms the efficiencies also usually requires extensive economic studies and reliance on (expensive) economic consultants.

But more importantly, the bigger cost of the lack of clarity of the current HGL regarding sustainability initiatives generates is the deterrence it has on industry players. Many initiatives are abandoned as soon as they are subject to a preliminary competition law assessment and being deprived of many cooperation projects which would have benefited society as a whole is a very significant cost charged to EU citizens.

5.2 Please explain whether you can express the above costs in money terms

Text of 1 to 1000 characters will be accepted

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5.3 Please provide an estimate of your quantifiable costs both in terms of value (in EUR) and as a percentage of your annual turnover (or, in the case of a business association, of the annual turnover of the members you are representing)

Text of 1 to 500 characters will be accepted

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5.4 Please explain how you calculate these costs

Text of 1 to 1500 characters will be accepted

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- * 5.5 In your view, how have the costs generated by the application of the R&D or the Specialisation BER or the HGL evolved **compared with the previous legislative framework** (Reg. 2659/2000 on R&D, Reg. 2658/2000 on Specialisation agreements and the accompanying horizontal guidelines)?

- ☐ Costs increased
- ☐ Costs decreased
- ☒ Do not know

In your view, would the costs of ensuring compliance of your horizontal cooperation agreements (or the agreements of your members) with Article 101 of the Treaty would be different **if the current HBERs were not in place but only the HGL applied?**

- * 5.8 Were the **R&D BER** not in place, the cost of ensuring compliance

- ☐ Would increase
- ☐ Would decrease
- ☒ Do not know

5.11 Were the **Specialisation BER** not in place, the cost of ensuring compliance

- ☐ Would increase
- ☐ Would decrease
- ☒ Do not know

Benefits

- * 5.14 Please describe the benefits, if any, of having the R&D and Specialisation BERs; and the HGL

Text of 1 to 1500 characters will be accepted

The existence of the R&D and Specialisation BERs and the Horizontal Guidelines is beneficial for public administrations and civil society organizations. It helps these actors understand better the types of initiatives which are likely to be compliant with competition rules, whether or not such initiatives have the support of the Member State administrations. However, the lack of specific guidance and concrete examples relating to environmental sustainability and the pursuit of living incomes hampers the attainment of these objectives, as is explained in our reply to questions 4.20 and 4.22.

Benefits vs. costs

In your view, does the application of the R&D and Specialisation BERs and the HGL generate costs that are proportionate to the benefits they bring (or, in the case of a business association, the benefits for the members you are representing)?

- * 5.15 Regarding the **R&D BER**

- ☐ Costs are proportionate to benefits
- ☐ Costs are not proportionate to benefits
- ☒ Do not know

- * 5.17 Regarding the **Specialisation BER**

- ☐ Costs are proportionate to benefits
- ☐ Costs are not proportionate to benefits
- ☒ Do not know

* 5.19 Regarding the **HGL**

- ☐ Costs are proportionate to benefits
- ☐ Costs are not proportionate to benefits
- ☒ Do not know

6 Relevance (do the objectives still match the needs or problems?)

In this section, we would like to understand if the objectives of the HBERs and the HGL are still up-to-date considering the developments that have taken place since their publication.

6.1 Please identify major trends and developments (for example legal, economic, political) that, based on your experience, have affected the application of the BERs and HGL. Please provide a short explanation with concrete examples in case you consider that (parts of) the HBERs or HGL do not sufficiently allow to address them

1000 characters max. for each row

	Major trends/changes	Articles of the HBERs and/or recitals of the HGL	Short explanation/concrete examples
1	Increased climate change risks and awareness of these risks	Recital 329 for instance.	See answer to question 4.18 above for instance with regards to the way environmental efficiencies are addressed.
2	Increased Corporate Social Responsibility requirements across Member States and at EU level	Recital 22.	The HGL fail to address the increasing burden placed on companies by national legislation, e.g. the UK requires companies to report on CSR goals, and EU regulation, as well as the existence of numerous policies to improve sustainability at a global level. The reluctance of companies to engage into sustainability initiatives for fear of competition law whereas many sustainability initiatives require cooperation to have an actual impact runs counter to the aim of such policy.
3			
4			
5			
6			
7			

Do you think that it is still relevant to have the current HBERs and HGL in light of major trends or developments listed above?

* 6.2 The R&D BER and Section 3 of the HGL are

- ☒ Still relevant
- ☐ No longer relevant
- ☐ Do not know

* 6.3 Please explain your reply

Text of 1 to 1500 characters will be accepted

Section 3 of the HGL is still relevant but as explained throughout our answers, it would need to be updated to better take into account sustainability and social fairness initiatives.

* 6.4 The Specialisation BER and Section 4 of the HGL are

- ☒ Still relevant
- ☐ No longer relevant
- ☐ Do not know

* 6.5 Please explain your reply

Text of 1 to 1500 characters will be accepted

Section 4 of the HGL is still relevant but as explained throughout our answers, it would need to be updated to better take into account sustainability and social fairness initiatives.

* 6.6 Section 2 of the HGL on agreements involving information exchange is

- ☒ Still relevant
- ☐ No longer relevant
- ☐ Do not know

* 6.7 Please explain your reply

Text of 1 to 1500 characters will be accepted

Section 2 of the HGL is still relevant but as explained throughout our answers, it would need to be updated to better take into account sustainability and social fairness initiatives.

* 6.8 Section 5 of the HGL on purchasing agreements is

- ☒ Still relevant
- ☐ No longer relevant

☐ Do not know

* 6.9 Please explain your reply

Text of 1 to 1500 characters will be accepted

Section 5 of the HGL is still relevant but as explained throughout our answers, it would need to be updated to better take into account sustainability and social fairness initiatives.

* 6.10 Section 6 of the HGL on commercialisation agreements is

- ☒ Still relevant
- ☐ No longer relevant
- ☐ Do not know

* 6.11 Please explain your reply

Text of 1 to 1500 characters will be accepted

Section 6 of the HGL is still relevant but as explained throughout our answers, it would need to be updated to better take into account sustainability and social fairness initiatives.

* 6.12 Section 7 of the HGL on standardisation agreements is

- ☒ Still relevant
- ☐ No longer relevant
- ☐ Do not know

* 6.13 Please explain your reply

Text of 1 to 1500 characters will be accepted

Section 7 of the HGL is still relevant but as explained throughout our answers, it would need to be updated to better take into account environmental and ethical standardisation agreements.

7 Coherence (Does the policy complement other actions or are there contradictions?)

* 7.1 In your view, are the HBERs and the HGL coherent with other instruments and /or case law that provide(s) guidance on the interpretation of Article 101 of the Treaty (e.g., other Block Exemption Regulations, the Vertical Guidelines and the Article 101(3) Guidelines)?

- ☐ Yes
- ☒ No

☐ Do not know

* 7.2 Please explain

Text of 1 to 3000 characters will be accepted

The current HGL may be considered as partially incoherent with Regulation 1184/2006 applying certain rules of competition to the production or/and trade in certain agricultural products. This regulation states that article 101(1) does not apply to agreements that are necessary for the attainment of the objectives set out in Article 39 TFEU (ex-33 TEC) which includes “ensur[ing] a fair standard of living for the agricultural community, in particular by increasing the individual earnings of persons engaged in agriculture”.

Although Article 39 TFEU benefits primarily EU farmers, the impact on third-countries is more and more taken into account which warrant a wider read of these provisions. For instance, the impact assessment of the common agricultural policy for 2014-2020 included for the first time an evaluation of the effects of the common agricultural policy on third countries, based on the idea that it should seek coherence with other policies, including development policies.

* 7.3 In your view, are the HBERs and the HGL coherent with other existing or upcoming legislation or policies at EU or national level?

☐ Yes

☒ No

☐ Do not know

* 7.4 Please explain

Text of 1 to 3000 characters will be accepted

The lack of specific guidance in the HGL regarding sustainability initiatives is incoherent with certain overarching goals of the EU, e.g. Article 3(5) TEU setting the goals of the EU, including the sustainable development of the Earth and the development of free and fair trade with the wider world.

The EU also has to ensure coherence between its internal policies and its external actions. It would be untenable to, on the one hand work to “foster the sustainable economic, social and environmental development of developing countries, with the primary aim of eradicating poverty” (article 21 TEU), while on the other, deterring companies from working towards the same goal through inappropriate guidance. The EU Charter of fundamental rights also guarantees the right to fair and just working conditions, which is exactly the goal of some sustainability initiatives that are left on the table for fear of competition law infringement. The lack of specific provisions in the HGL regarding environmental sustainability and the achievement of living incomes in producer countries reflects the current absence in alignment between competition policy and other key EU policies, such as social and environmental policies, in particular:

- The EC’s Communication on the EU Green Deal: the ambitious goals set by this Communication require that all available policy and regulatory tools be brought together in a holistic manner to fulfill the objectives set out. Competition policy plays an important role in shaping the EU’s economy and the decisions taken by our businesses. As such, it should be sensitive to the fact that it is not only competition, but also necessary collaboration that fosters sustainability and enable to address global challenges.

- The 2014 Communication on ‘A Stronger Role of the Private Sector in Achieving Inclusive and Sustainable Growth in Developing Countries’.

Many achievements that the private sector can generate in terms of fostering inclusive development do have costs for companies, which often means an increased price for consumers. There are sufficient experiences proving that there is a heavy “first mover disadvantage” for a company who decides to move forward unilaterally to adopt sustainability standards, while its competitors continue to offer less sustainable (and often cheaper) products. The case of Lidl, which backed away from its decision in September 2018 to sell only Fairtrade bananas, offers a classic example of vulnerability to entrenched consumer behaviour

(<https://www.bananalink.org.uk/news/lidl-backs-away-from-fairtrade-bananas/>). This is precisely the reason why collaboration among competitors is often required to achieve a positive result in social policy terms. Achieving greater certainty throughout the HGL would facilitate competitor-driven initiatives, hence adding to the private sector's contribution to sustainable growth worldwide, including in developing countries, where it is most necessary.

8 EU added value (Did EU action provide clear added value?)

In this section, we would like to understand if the HBERs and the HGL have had added value. In the absence of the HBERs and the HGL, undertakings would have had to self-assess their horizontal cooperation agreement with the help of the remaining legal framework. This would include for instance the case law of the EU and national courts, the Article 101(3) Guidelines, the enforcement practice of the Commission and national competition authorities, as well as other guidance at EU and national level.

Please indicate whether, in your view, the HBERs and the HGL have had added value in the assessment of the compatibility of horizontal cooperation agreements with Article 101 of the Treaty

* 8.1 Has the R&D BER had added value in the assessment of the compatibility of horizontal cooperation agreements with Article 101 of the Treaty?

- ☐ Yes
- ☐ No
- ☒ Do not know

* 8.3 Has the Specialisation BER had added value in the assessment of the compatibility of horizontal cooperation agreements with Article 101 of the Treaty?

- ☐ Yes
- ☐ No
- ☒ Do not know

* 8.5 Have the HGL had added value in the assessment of the compatibility of horizontal cooperation agreements with Article 101 of the Treaty?

- ☒ Yes
- ☐ No
- ☐ Do not know

* 8.6 Please explain your reply

Text of 1 to 1500 characters will be accepted

The HGL have added value in the assessment of the compatibility of horizontal agreements compared to a world without them. However, from the point of view of competitor-driven sustainability initiatives, the HGL provide less value than they did in their previous version, which included more extensive explanations on at least environmental agreements.

Moreover, we are reaching a point where the HGL will end up below the level of guidance provided by National Competition Agencies. If left unchanged, the HGL will have less added-value than the upcoming revised Dutch guidance which, according to statements by the Dutch Competition Authority's members, will include guidance to companies on what sort of co-operation could be considered legitimate to achieve

sustainability goals. If other NCAs were to follow, this may create risk of diverging application of competition law throughout the Member States.

9 Specific questions

Final comments and document upload

9.1 Is there anything else with regard to the R&D and Specialisation BERs and the HGL that you would like to add?

Text of 1 to 3000 characters will be accepted

We call upon the Commission to clarify the role of NGOs and civil society with regard to competition law. In particular, in the context of multi-stakeholders' initiatives, in which civil society shall have clear guidelines allowing it to engage with business actors and other stakeholders.

We would additionally like to stress the legal requirement to take into account all the Treaty provisions when applying competition law (e.g. Article 3(5) TEU, Article 9 TFEU, or Article 11 TFEU).

9.2 You may upload a file that further explains your position in more detail or further details the answers you have given

The maximum file size is 1 MB

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

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

- ☒ Yes
☐ No

Contact

COMP-HBERS-REVIEW@ec.europa.eu