

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

Fields marked with \* are mandatory.

### 1

## Introduction

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### 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](mailto: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

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\* 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

Katinka

\* 2.3 Surname

Worsoe

\* 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*

EuroCommerce

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.

84973761187-60

\* 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*

EuroCommerce is the principal European organisation representing the retail and wholesale sector. It embraces national associations in 31 countries and 5.4 million companies, both leading global players and many small businesses.

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

*Text of 1 to 250 characters will be accepted*

Retail and wholesale provide a link between producers and 500 million European consumers over a billion times a day. It generates 1 in 7 jobs, providing a varied career for 29 million Europeans, many of them young people.

**\* 2.13 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](#):**

retail and wholesale -NACE codes G46 & 47

**\* 2.14 The product(s) and/or service(s) provided by your company/business organisation:**

EuroCommerce represents food and non-food retailers and wholesalers

**\* 2.15 Country of origin**

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

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

- Aruba
- Australia
- Austria
- Azerbaijan
- Bahamas
- Bahrain
- Bangladesh
- 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
- Faroe Islands
- Fiji
- Finland
- France
- French Guiana
- French Polynesia
- French Southern and Antarctic Lands
- 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
- Martinique
- Mauritania
- Mauritius
- Mayotte
- Mexico
- Micronesia
- Moldova
- 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
- Sint Maarten
- Slovakia
- Slovenia
- Solomon Islands
- Somalia
- South Africa
- South Georgia and the South Sandwich Islands
- South Korea
- South Sudan
- Spain
- Sri Lanka
- Sudan
- Suriname
- Svalbard and Jan Mayen
- Sweden
- Switzerland
- Syria
- Taiwan
- Tajikistan
- Tanzania
- Thailand
- The Gambia
- Timor-Leste
- Togo
- Tokelau
- Tonga
- Trinidad and Tobago
- Tunisia
- Turkey
- Turkmenistan
- Turks and Caicos Islands

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|--|-----------------------------------|---|--|
| <input type="radio"/> Central African Republic         | <input type="radio"/> Iraq        | <input type="radio"/> Palau                                       | <input type="radio"/> Tuvalu                               |
| <input type="radio"/> Chad                             | <input type="radio"/> Ireland     | <input type="radio"/> Palestine                                   | <input type="radio"/> Uganda                               |
| <input type="radio"/> Chile                            | <input type="radio"/> Isle of Man | <input type="radio"/> Panama                                      | <input type="radio"/> Ukraine                              |
| <input type="radio"/> China                            | <input type="radio"/> Israel      | <input type="radio"/> Papua New Guinea                            | <input type="radio"/> United Arab Emirates                 |
| <input type="radio"/> Christmas Island                 | <input type="radio"/> Italy       | <input type="radio"/> Paraguay                                    | <input type="radio"/> United Kingdom                       |
| <input type="radio"/> Clipperton                       | <input type="radio"/> Jamaica     | <input type="radio"/> Peru  | <input type="radio"/> United States                        |
| <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                           |
| <input type="radio"/> Cook Islands                     | <input type="radio"/> Kenya       | <input type="radio"/> Puerto Rico                                 | <input type="radio"/> Vanuatu                              |
| <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                            |
| <input type="radio"/> Croatia                          | <input type="radio"/> Kuwait      | <input type="radio"/> Romania                                     | <input type="radio"/> Vietnam                              |
| <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                                 |  |

\* 2.16 Mark the countries/geographic areas where your main activities are located:

*at least 1 choice(s)*

Multiple choice is possible

- ☐ Austria
- ☒ Belgium
- ☐ Bulgaria
- ☐ Croatia
- ☐ Cyprus
- ☐ Czech Republic
- ☐ Denmark
- ☐ Estonia
- ☐ Finland
- ☐ France

- ☐ Germany
- ☐ Greece
- ☐ Hungary
- ☐ Ireland
- ☐ Italy
- ☐ Latvia
- ☐ Lithuania
- ☐ Luxembourg
- ☐ Malta
- ☐ Netherlands
- ☐ Poland
- ☐ Portugal
- ☐ Romania
- ☐ Slovak Republic
- ☐ Slovenia
- ☐ Spain
- ☐ Sweden
- ☐ United Kingdom
- ☐ Others in Europe
- ☐ The Americas
- ☐ Asia
- ☐ Africa
- ☐ Australia

\* 2.17 Please specify whether your company/business organisation has been the addressee of a Commission decision under Article 7 or Article 9 of Regulation (EC) No 1/2003

- ☐ Yes
- ☒ No
- ☐ Do not know

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

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\* 3.1 Has your company/business organisation been involved in horizontal cooperation agreements since the current HBERs and the HGL were introduced in 2010?

- ☒ Yes
- ☐ No
- ☐ Do not know
- ☐ Not applicable

\* 3.2 Please specify the type of your horizontal cooperation agreements

*at least 1 choice(s)*

Multiple answers possible



- ☐ R&D agreements in the sense of art.1(1)(a) of the R&D BER and Section 3 of the HGL
- ☐ Specialisation agreements in the sense of art. 1(1)(a) of the Specialisation BER and Section 4 of the HGL
- ☒ Agreements involving information exchange in the sense of Section 2 of the HGL
- ☒ Purchasing agreements in the sense of Section 5 of the HGL
- ☐ Commercialisation agreements in the sense of Section 6 of the HGL
- ☒ Standardisation agreements in the sense of Section 7 of the HGL
- ☐ Other horizontal cooperation agreements

\* 3.4 Has your company/business organisation relied upon (an) exemption /exemptions under the R&D BER or Specialisation BER, or both?

- ☐ Yes
- ☒ No
- ☐ Do not know

\* 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?)

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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

\* 4.2 Please explain your reply, distinguishing between sectors where relevant: (1500 characters max).

*Text of 1 to 1500 characters will be accepted*

The Guidelines recognise that joint purchasing agreements have pro-competitive effects. European retail and wholesale alliances are such joint purchasing agreements. They use straightforward, universally applicable criteria and are based on long-standing economic policy to help us ensure the competition compliance of these agreements. European retail and wholesale Alliances (ERAs) lead to lower prices for customers, create efficiencies and contribute to creating a single market for sourcing. SME retailers compete with larger retailers and play a key role in the livelihood of communities. The Guidelines provide the needed flexibility and legal certainty for these alliances to operate both effectively and compliantly. ERAs support retailers and wholesalers negotiating with strong, often international suppliers with high profit margins. By providing clear rules on the conditions for purchasing agreements, the Guidelines safeguard that retailers and wholesalers can increase their buying power towards these suppliers. In doing so, they also support retailers' and wholesalers' efforts to develop a truly single market for sourcing. To improve the Guidelines, we ask that the Commission considers increasing the safe harbour threshold for the relevant buying market to 30%. Furthermore, the possibility of voluntary ex-ante consultations with the EU Commission and/or the national competition authorities should be introduced in order to increase legal certainty.

#### ***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

\* 4.4 Please explain your reply

*Text of 1 to 1500 characters will be accepted*

It provides legal certainty

\* 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

\* 4.6 Please explain your reply

*Text of 1 to 1500 characters will be accepted*

The R&D BER gives more legal certainty than the HGL, since the latter are not binding for NCAs.

\* 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

\* 4.8 Please explain your reply

*Text of 1 to 1500 characters will be accepted*

Section 4 of the horizontal guidelines addresses subcontracting agreements in the context of joint production agreements. Example 5 contains helpful guidance on assessing the competition effects of non-compete and non-poaching clauses during the contract duration. It would however be beneficial to update the guidelines to reflect the case law (BGH, KZR 18/97 and KZR 54/08) on such clauses also after the termination of the contract. Legal clarity on non-compete clauses is fundamental for the agile functioning and inclusion of SMEs in supply chains in retail and wholesale and many other sectors of the economy.

\* 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

\* 4.10 Please explain your reply

*Text of 1 to 1500 characters will be accepted*

The BER gives more legal certainty than if we only had the guidelines, especially in term of ensuring consistent interpretation in the member states.

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

\* 4.12 Please explain your reply

*Text of 1 to 1500 characters will be accepted*

Further guidance could help retailers and wholesalers engage in new, efficiency enhancing cooperations made possible by digitalisation. Digitalisation is fueling the development of ecosystems, where data sharing between competitors could be essential. We do however reject a general "data sharing obligation" of non-personal data.

Information exchange in relationships with suppliers that sell to customers directly online or via their own retail outlets should be addressed. Vertical information exchange between a distributor and a supplier usually benefits from a safe harbour in VBER. In case of a horizontal relationship, that exemption should continue, as long as the vertical information exchange does not affect the horizontal competition.

Recent case law on signaling has given rise to uncertainties. This case law requires that undertakings receiving competitively sensitive information from a competitor must distance themselves or risk engaging in an illegal concerted practice. The HGL could specify how undertakings should distance themselves from such unilateral information exchange, and clarify the requirements that companies participating in online platforms have to meet.

The HGL could give guidance on whether suggestions and recommendations on pricing are enough of a signal to give rise to competition concerns. Finally, guidance on the exchange of information between competitors having entered into agency agreements and on hub-and-spoke situations is needed.

\* 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

\* 4.14 Please explain your reply

*Text of 1 to 1500 characters will be accepted*

The HGL recognise that joint purchasing agreements have pro-competitive effects. European retail and wholesale alliances are such joint purchasing agreements. We appreciate that the HGL use straightforward, universally applicable criteria and are based on long-standing economic policy to help us ensure the competition compliance of these agreements.

Purchasing agreements exist in many sectors and their role in supporting competitiveness is well-established. There is no economic justification for a differing, sector-specific approach to purchasing agreements in retail and wholesale.

We ask the Commission to maintain the HGL's current well-balanced approach. The HGL are properly enforced in a consistent manner throughout the EU with regards to purchasing agreements. National competition authorities have used the HGL when analysing retail and wholesale alliances not only under Article 101 TFEU but also when applying the equivalent national law provisions.

The HGL require that purchasing cooperations are assessed both on the relevant buying and selling markets and they set a conservative safe harbour threshold of 15% combined market share both upstream and downstream. We believe it is reasonable to raise at least the upstream safe harbor threshold to 30%. Furthermore, the possibility of voluntary ex-ante consultations with the EU Commission and/or the national competition authorities should be introduced in order to increase legal certainty.

\* 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

\* 4.16 Please explain your reply

*Text of 1 to 1500 characters will be accepted*

It is necessary to clarify this sections relation to the VBER and vertical guidelines. As a general principle, the exemption granted under art. 2 of the VBER should explicitly apply to aspects covered by the horizontal guidelines such as disclosure of sensitive information, as long as they are necessary for the distribution relationship, and has no impact on the horizontal competition between the parties.

\* 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*

This section should be amended to reflect the Commissions' assessment of sustainability standards – see further details in point 4.20

- \* 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*

Retailers and wholesalers support the commitment to tackle sustainability challenges and are doing a lot already. They often rely on cooperation to make an effective contribution; this is due to the large investments or because national governments require retailers and wholesalers to take joint action. In each case, lack of legal certainty on how to cooperate compliantly can quickly become an obstacle. Ensuring legal clarity regarding sustainability cooperation can help companies overcome the “first mover disadvantage” which slows down the needed investments.

In the HGL, sustainability is currently covered explicitly only in the context of standardization agreements. Sustainability cooperation between competitors can and should however go beyond this and retail and wholesale would benefit from further guidance.

Sustainability benefits should be explicitly included as potential efficiency gains, a parameter of competition equal to lower prices, higher quality or better service. It would be helpful if the Commission clarified how to consider future consumer benefits and sustainability burdens in competitive assessments. Where a sustainability agreement restricts competition, it should be considered whether the residual competition criteria can be fulfilled through competition on other factors.

The Commission could make it possible for cooperating companies to get a waiver for sustainability cooperation from DG COMP.

- \* 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*

Further guidance on sustainability cooperation is needed. Please refer to the answer in question 4.20.

### ***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*



\* 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*

Sustainability agreements. Please refer to the answer to question 4.20

\* 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?)

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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*

We cannot quantify these costs.

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

*Text of 1 to 1000 characters will be accepted*

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*

5.4 Please explain how you calculate these costs

*Text of 1 to 1500 characters will be accepted*

\* 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

\* 5.9 Please explain your reply

*Text of 1 to 1500 characters will be accepted*

It gives more legal certainty with the regulations rather than only guidelines in place and hence compliance costs would increase, if the regulation was removed.

5.10 Please provide an estimate of the possible change in costs and explain your estimation

*Text of 1 to 1500 characters will be accepted*

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

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

\* 5.12 Please explain your reply

*Text of 1 to 1500 characters will be accepted*

It gives more legal certainty with the regulations rather than only guidelines in place and hence compliance costs would increase, if the regulation was removed.

5.13 Please provide an estimate of the possible change in costs and explain your estimation

*Text of 1 to 1500 characters will be accepted*

### **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 HBER and the Horizontal Guidelines work well and provide an overall balanced and flexible framework for horizontal cooperation. The European Commission's current evaluation is an opportunity to update this framework and provide further legal certainty, especially by reflecting more recent market developments such as digitalisation, globalisation and sustainability.

Purchasing alliances lead to lower prices for customers, they create efficiencies and contribute to creating a single market for sourcing. The Guidelines provide the needed flexibility and legal certainty for these alliances to operate both effectively and compliantly.

The Guidelines spell out the criteria for lawful information exchange between competing companies. These provisions are essential for legal certainty and are strictly and consistently enforced by the EU Commission and national authorities. They provide effective guidance to make sure that information exchange among companies – including among members of European retail and wholesale alliances – is structured to effectively safeguard compliance with competition laws. In general, these provisions have worked well and provided sufficient guidance for operators. We ask the Commission to ensure that any change in these provisions are necessary and backed up by strong evidence.

### ***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

#### **\* 5.16 Please explain your reply**

*Text of 1 to 1500 characters will be accepted*

The BER provides legal certainty

#### **\* 5.17 Regarding the **Specialisation BER****

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

#### **\* 5.18 Please explain your reply**

*Text of 1 to 1500 characters will be accepted*

The BER provides legal certainty

\* 5.19 Regarding the **HGL**

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

\* 5.20 Please explain your reply

*Text of 1 to 1500 characters will be accepted*

See response to question 5.14

These benefits are proportionate to the cost of compliance.

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

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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 competitive pressure on retailers and wholesalers. (Digitalisation, globalization, consolidation of suppliers, changing consumer behavior, etc.)	Section 5 of HGL on purchasing agreements	<p>Purchasing alliances lead to lower prices for customers, create efficiencies and contribute to creating a single market for sourcing. The HGL provide flexibility and legal certainty for alliances to operate effectively and compliantly. We ask the Commission to consider increasing the safe harbor threshold for the relevant buying market to 30%. The possibility of voluntary ex-ante consultations with EU and/or national competition authorities should be introduced.</p> <p>The HGL should allow for consideration of market power imbalance between suppliers and retailers and wholesalers as joint purchasers. Alliances bring together resellers who typically deal with international suppliers with high market shares or “must-have” products, with low substitutability due to customer loyalty. Suppliers have various routes to market and are increasingly selling direct to consumers. Retailers and wholesalers are faced with fragmented sourcing markets, which is further aggravated by the use of territorial supplier constraints by some suppliers.</p>

2	Market definitions/relevant market	All sections of the HGL, art.1 and art.3 of the specialisation BER and art.1 and art.4 of the R&D BER	Digitalisation has brought about huge transformational changes in supply chains, increasing transparency and competitive pressure. Retailers and wholesalers are now facing competition from global eco-systems established outside the EU. Manufacturers increasingly address consumers direct on-line and thus are becoming direct competitors. Digital has also expanded the selling market for a number of products which are offered in stores and on-line. Retailers and wholesalers are facing suppliers that are increasingly consolidated, hold significant profits and market shares by selling unique brands and in many cases fragment the single market. We ask the Commission to take these factors into account when conducting their competition assessments.
3	Information exchange	Section 2 of HGL on information exchange	In light of the further digitalisation of retail and wholesale, we recommend adapting the Guidelines in relation to information exchange. Specifically, the Guidelines should provide more clarification on signaling and help better assess data and information exchange between competitors, particularly regarding agency agreements as well as hubs-and-spoke situations. See point 4.11 for more details.
4	Sustainability		The Guidelines should provide more guidance on sustainability cooperation, especially on how to consider future benefits and future burdens in the competitive assessment. This would help retailers and wholesalers make required investments in sustainability projects. See point 4.20 for further details.
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*

The BER provide legal certainty

\* 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*

The BER provide legal certainty

\* 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*

In light of the further digitalisation of commerce, we recommend adapting the Guidelines in relation to information exchange. Specifically, the Guidelines should provide more clarification on signaling and help better assess data and information exchange between competitors, particularly regarding agency agreements as well as hubs-and-spoke situations.

\* 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*

Purchasing alliances lead to lower prices for customers, they create efficiencies and contribute to creating a single market for sourcing. The Guidelines provide the needed flexibility and legal certainty for these alliances to operate both effectively and compliantly.

\* 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*

The section provides legal certainty

\* 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*

Retailers and wholesalers rely on standards for the efficient running of their distribution activities. Legal certainty and clarity provided by the provisions on standardization agreements are still relevant.

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

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\* 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*

In the Guidelines, the Commission should also address information exchange in (increasingly horizontal) relationships with suppliers that sell to customers directly online or via their own retail outlets or with the help of agency relationships. When doing so, the Commission should keep in mind that vertical information exchange between a retailer/wholesaler and a supplier (e.g. communication of recommended retail prices or joint campaign planning) usually benefits from a safe harbour under the Vertical Block Exemption Regulation. In case of a horizontal relationship with the supplier, that exemption should continue, as long as the vertical information exchange does not affect the horizontal competition between the parties.

\* 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 entry into force of the Geo-Blocking Regulation has added further pressure on the market by making it possible for consumers to buy products from wherever they want, while retailers and wholesaler are still prevented from choosing the countries they can source from, restricting the choice of products they can offer and resulting in further pressure on their already narrow margins. This re-enforces the need for retail alliances to mitigate territorial supply constraints. We ask the Commission to take these new developments into account when conducting their assessment of markets.

Furthermore, we ask the Commission to ensure consistency with on-going initiatives in the field of digital and data sharing. Digitalisation is fueling the development of ecosystems, where data sharing between competitors could be essential. Current provisions on information exchange work well and further guidance could help retailers and wholesalers engage in new, efficiency enhancing cooperations made possible by digitalisation. We do however reject a general "data sharing obligation" of non-personal data.

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

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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 Horizontal Block Exemption Regulations (HBER) and the Horizontal Guidelines work well and provide an overall balanced framework for horizontal cooperation. The European Commission's current evaluation is an opportunity to update this framework and provide further legal certainty, especially by reflecting more recent market developments such as digitalisation, globalisation and sustainability.

We ask the Commission to maintain the Guideline's current overall well-balanced approach. The Guidelines are properly enforced in a consistent manner throughout the EU with regards to purchasing agreements. National competition authorities have used the HGL when analysing retail and wholesale alliances not only under Article 101 TFEU but also when applying the equivalent national law provisions.

## 9 Specific questions

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### 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*

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

**fb5d01c7-4d4a-4d6c-ac63-bd1ddcf58629/EuroCommerce\_HBER\_position-Final\_shrunked.pdf**

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

☒ Yes

☐ No

## Contact

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