

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

Nikolaos

* 2.3 Surname

Peristerakis

* 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

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.

* 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

Legal services

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

Text of 1 to 250 characters will be accepted

Automotive, Banks, Chemicals, Consumer, Energy & Utilities, Fintech, Healthcare, Industrials, Infrastructure & Transport, Insurance, Investment Managers, Mining, Private Equity and Financial Sponsors, Real Estate and Leisure, Sports, Technology.

***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 |
| <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 |
| <input type="radio"/> Austria | <input type="radio"/> Finland | <input type="radio"/> Mauritius | <input type="radio"/> Slovenia |
| <input type="radio"/> Azerbaijan | <input type="radio"/> France | <input type="radio"/> Mayotte | <input type="radio"/> Solomon Islands |
| <input type="radio"/> Bahamas | <input type="radio"/> French Guiana | <input type="radio"/> Mexico | <input type="radio"/> Somalia |
| <input type="radio"/> Bahrain | <input type="radio"/> French Polynesia | <input type="radio"/> Micronesia | <input type="radio"/> South Africa |
| <input type="radio"/> Bangladesh | <input type="radio"/> French Southern and Antarctic Lands | <input type="radio"/> Moldova | <input type="radio"/> South Georgia and the South Sandwich Islands |
| <input type="radio"/> Barbados | <input type="radio"/> Gabon | <input type="radio"/> Monaco | <input type="radio"/> South Korea |

<input type="radio"/> Belarus	<input type="radio"/> Georgia	<input type="radio"/> Mongolia	<input type="radio"/> South Sudan
<input type="radio"/> Belgium	<input type="radio"/> Germany	<input type="radio"/> Montenegro	<input type="radio"/> Spain
<input type="radio"/> Belize	<input type="radio"/> Ghana	<input type="radio"/> Montserrat	<input type="radio"/> Sri Lanka
<input type="radio"/> Benin	<input type="radio"/> Gibraltar	<input type="radio"/> Morocco	<input type="radio"/> Sudan
<input type="radio"/> Bermuda	<input type="radio"/> Greece	<input type="radio"/> Mozambique	<input type="radio"/> Suriname
<input type="radio"/> Bhutan	<input type="radio"/> Greenland	<input type="radio"/> Myanmar /Burma	<input type="radio"/> Svalbard and Jan Mayen
<input type="radio"/> Bolivia	<input type="radio"/> Grenada	<input type="radio"/> Namibia	<input type="radio"/> Sweden
<input type="radio"/> Bonaire Saint Eustatius and Saba	<input type="radio"/> Guadeloupe	<input type="radio"/> Nauru	<input type="radio"/> Switzerland
<input type="radio"/> Bosnia and Herzegovina	<input type="radio"/> Guam	<input type="radio"/> Nepal	<input type="radio"/> Syria
<input type="radio"/> Botswana	<input type="radio"/> Guatemala	<input type="radio"/> Netherlands	<input type="radio"/> Taiwan
<input type="radio"/> Bouvet Island	<input type="radio"/> Guernsey	<input type="radio"/> New Caledonia	<input type="radio"/> Tajikistan
<input type="radio"/> Brazil	<input type="radio"/> Guinea	<input type="radio"/> New Zealand	<input type="radio"/> Tanzania
<input type="radio"/> British Indian Ocean Territory	<input type="radio"/> Guinea-Bissau	<input type="radio"/> Nicaragua	<input type="radio"/> Thailand
<input type="radio"/> British Virgin Islands	<input type="radio"/> Guyana	<input type="radio"/> Niger	<input type="radio"/> The Gambia
<input type="radio"/> Brunei	<input type="radio"/> Haiti	<input type="radio"/> Nigeria	<input type="radio"/> Timor-Leste
<input type="radio"/> Bulgaria	<input type="radio"/> Heard Island and McDonald Islands	<input type="radio"/> Niue	<input type="radio"/> Togo
<input type="radio"/> Burkina Faso	<input type="radio"/> Honduras	<input type="radio"/> Norfolk Island	<input type="radio"/> Tokelau
<input type="radio"/> Burundi	<input type="radio"/> Hong Kong	<input type="radio"/> Northern Mariana Islands	<input type="radio"/> Tonga
<input type="radio"/> Cambodia	<input type="radio"/> Hungary	<input type="radio"/> North Korea	<input type="radio"/> Trinidad and Tobago
<input type="radio"/> Cameroon	<input type="radio"/> Iceland	<input type="radio"/> North Macedonia	<input type="radio"/> Tunisia
<input type="radio"/> Canada	<input type="radio"/> India	<input type="radio"/> Norway	<input type="radio"/> Turkey
<input type="radio"/> Cape Verde	<input type="radio"/> Indonesia	<input type="radio"/> Oman	<input type="radio"/> Turkmenistan
<input type="radio"/> Cayman Islands	<input type="radio"/> Iran	<input type="radio"/> Pakistan	<input type="radio"/> Turks and Caicos Islands
<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 checked="" 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

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| <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 | |

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

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

Text of 1 to 1500 characters will be accepted

See attachment in Q9.2 where we make specific proposals for the interpretation of key concepts including potential competition, object restrictions, and concept of agreement, as well as specific types of agreements, including information exchange, sustainability agreements, purchasing agreements, productions /commercialisation agreements, and standardisation agreements.

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

See answer to Q4.24

* 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

A binding Block Exemption Regulation by definition offers more legal certainty (see Expedia judgment, C-226/11).

* 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

The title "Specialisation BER" appears unduly narrow since the BER also covers joint production, and joint production does not always involve specialisation in a narrow sense. We would therefore suggest that the BER is renamed to "joint production and/or joint specialisation BER". Any concern that such a title might suggest that the Commission has exceeded its powers under Regulation (EEC) 2821/71 would be unfounded.

* 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

See answer to Q4.6

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

See our comments contained in the attachment provided in Q9.2., and specifically the chapter on "information exchange". In this regard, we also want to draw the Commission's attention to situations of restructuring of companies in distress. In this type of situations, a strict application of the horizontal guidelines, and in particular the rules on information exchange between actual/potential competitors, could prevent the effective restructuring of companies in distress. We therefore consider that the rules of information exchange should contain some additional guidance that deal in particular with restructuring situations.

* 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

See attachment in Q9.2. and specifically the chapter on "joint purchasing"

* 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

See attachment in Q9.2. and specifically the chapter on “production and commercialisation agreements (bid consortia)”

* 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

See attachment in Q9.2. and specifically the chapters on “standardisation agreements” and “sustainability agreements”

* 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

See attachment in Q9.2 and specifically the chapter on “sustainability agreements.”

* 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

See answer to Q4.20

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

- * 4.24 If No, please explain what aspect of this provision fails to correctly identify R&D agreements that are compliant with Article 101 of the Treaty

Text of 1 to 1500 characters will be accepted

The R&D BER provides valuable guidance, but it would be helpful if the EC could further clarify the concept of "joint exploitation of the results of R&D of contract products or contract technologies" as this is crucial for the scope of the exception contained in 5(c) of the R&D block exemption regulation. Article 5(c) of the R&D BER allows the fixing of prices charged to immediate customers or the fixing of license fees charged to immediate licenses, where the joint exploitation of the results includes the joint distribution of the contract products or the joint licensing of the contract technologies. It would be very helpful if the R&D BE clarifies more that there can be "joint exploitation by way of specialisation" when one of the parties entrust the other with production and/or distribution of the jointly developed contract goods. This would give more flexibility to the parties to the R&D agreement to set minimum prices, particularly in situations where both parties are not in a position to market the newly developed products, and one party must rely on the other for the exploitation of the newly developed products. This type of flexibility can be crucial to preserve incentives for joint R&D particularly when one or more of the companies involved do not have their own marketing/sales /distribution capabilities. It would also be helpful to clarify the concept of "competing undertaking", which is linked to the concept of potential competition (See attachment in Q9.2).

- * 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

- * 4.26 If No, please explain what aspect of these conditions fails to correctly identify R&D agreements that are compliant with Article 101 of the Treaty

Text of 1 to 1500 characters will be accepted

The requirement in Article 3(2) that compensation for access to the results of the R&D for the purposes of further R&D “must not be so high as to effectively impede such access” might discourage companies from teaming up with smaller R&D partners as they might be able to claim access to R&D below the actual market value of R&D.

- * 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

- * 4.28 If No, please explain what aspect of these provisions fails to correctly identify R&D agreements that are compliant with Article 101 of the Treaty

Text of 1 to 1500 characters will be accepted

We agree on the absence of a market share threshold for non-competing undertakings, but we would invite more clear guidance on the calculation of the 25% threshold for undertakings that are actual or potential competitors. Article 2(b) of the R&D BER refers to the relevant “product and technology markets” but more guidance on how the EC would actually calculate shares in these markets would be very valuable. We would also request the increase of the market share threshold to 30%, to incentive further R&D in the EU.

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

☐ Yes
☒ No
☐ Do not know

- * 4.30 If No, please explain what aspect of these conditions fails to correctly identify R&D agreements that are compliant with Article 101 of the Treaty

Text of 1 to 1500 characters will be accepted

The 7 year limitation appears arbitrary, as the necessary duration to recoup the R&D investment may vary depending on the industry sector. We would suggest the abolition of the 7 year time limitation, and replacement by the market share threshold. In other words, for as long as the market share remains below the safe-harbours, the R&D BER should continue to apply. This would increase the incentives for joint R&D.

- * 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

- * 4.32 If No, please explain what aspect of these conditions fails to correctly identify R&D agreements that are compliant with Article 101 of the Treaty

Text of 1 to 1500 characters will be accepted

It would be helpful to clarify that Article 5(b)(iii), which allows limitation of output of sales to the extent that they are the result of “practices constituting specialisation in the context of exploitation” also covers situations where one party exclusively licenses the results of the joint R&D to the other party. It would also be helpful to further clarify and expand the concept of “joint exploitation” in Article 5(d), and eliminate the requirement of “joint distribution” given that there may be situations where one party entrusts the other with the exploitation of the results. The additional requirement of “joint distribution” would discourage smaller parties with no distribution capabilities from entering into joint R&D arrangements. See also response to 4.24 above.

- * 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

- * 4.36 If No, please explain what aspect of these definitions fails to correctly identify specialisation agreements that are compliant with Article 101 of the Treaty

Text of 1 to 1500 characters will be accepted

It is submitted that the definitions are unnecessarily complex and could be simplified to facilitate application of the BER. For example, the distinction between the terms “preparation of services” and “joint distribution” of services often artificial and may create confusion about the scope of the BER when applied to services. The BER also employs the concepts “intermediary” services. Is the “preparation” of a service an “intermediary service”?

- * 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

* 4.40 If No, please explain what aspect of these provisions fails to correctly identify Specialisation agreements that are compliant with Article 101 of the Treaty

Text of 1 to 1500 characters will be accepted

We think that the 25% safe-harbour in Regulation 139/2004 (recital 32) could be applied pursuant to the Specialisation BER. Indeed, the analysis of a production joint venture will be similar to the analysis in merger control. If competition concerns were to arise under this threshold, which is unlikely, it should be recalled that it is always possible to remove the protection of the BER (Article 29 of Regulation 1/2003).

* 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

See attachment in Q9.2

* 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

The question could be understood as meaning that only agreements identified by the BERs are compliant with Article 101(3) TFEU. This is clearly not the case. There will be numerous types of agreements, apart from those identified by the BERs, which will nevertheless meet the conditions for an exemption under Article 101(3) TFEU.

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

* 4.47 If Yes, please explain your answer

Text of 1 to 3000 characters will be accepted

See attachment in Q9.2 as regards information exchanges. The HGL has, in our experience, inadvertently led to an overly strict application of Article 101 TFEU in certain Member States in relation to information exchanges.

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

The net effect of the BERs is to reduce costs as compared to a self-assessment under the HGL.

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

Text of 1 to 1000 characters will be accepted

N/A

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

N/A

5.4 Please explain how you calculate these costs

Text of 1 to 1500 characters will be accepted

N/A

- * 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

- * 5.6 Please explain your reply

Text of 1 to 1500 characters will be accepted

Antitrust compliance costs in general has increased since enforcement policy has become stricter and the risks are much greater today.

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

Text of 1 to 1500 characters will be accepted

N/A

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

See answer to Q5.1

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

N/A

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

See answer to Q5.1

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

N/A

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

See answers to Q5.1 and Q4.6

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

See answer to Q 5.1. However, streamlining the BER could reduce compliance costs further.

*** 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

See answer to Q5.16.

*** 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

Despite not offering the same legal certainty, the HGL still provides helpful guidance, and compliance and transaction costs would be higher in its absence. It also helps, albeit imperfectly, to reduce the risk for divergent application of Article 101 TFEU.

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			
2			
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

They play an important role, but need to be updated.

* 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

See attachment in Q9.2

* 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

See attachment in Q9.2

* 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

See attachment in Q9.2

* 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

See attachment in Q9.2

* 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

See attachment in Q9.2

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 answer is generally "yes", but we think that the Commission's Article 81(3) guidelines also would benefit from an update. See also attachment in Q9.2

* 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

See attachment in Q9.2 as regards sustainability agreements and information pooling.

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

* 8.2 Please explain your reply

Text of 1 to 1500 characters will be accepted

See answers to Q4.6 and Q5.1.

* 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

* 8.4 Please explain your reply

Text of 1 to 1500 characters will be accepted

See answers to Q4.6 and Q5.1.

* 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

See answer to Q5.20

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

N/A

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

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/200212_EC_Horizontals_Consultation_LINKLATERS_CONTRIBUTION.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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