

## 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

Jonathan

\* 2.3 Surname

Matthysen

\* 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*

Oxfam-Wereldwinkels

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

2.8 Transparency register number

*255 character(s) maximum*

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

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\* 2.10 Organisation size

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

\* 2.11 The main activities of your organisation:

*Text of 1 to 250 characters will be accepted*

Advocacy, campaigning & development work (fair trade)

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

*Text of 1 to 250 characters will be accepted*

Food sector | Development sector | CSO sector

**\*2.15 Country of origin**

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

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| <input type="radio"/> Afghanistan         | <input type="radio"/> Djibouti                            | <input type="radio"/> Libya            | <input type="radio"/> Saint Martin                                 |
| <input type="radio"/> Åland Islands       | <input type="radio"/> Dominica                            | <input type="radio"/> Liechtenstein    | <input type="radio"/> Saint Pierre and Miquelon                    |
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| <input type="radio"/> Algeria             | <input type="radio"/> Ecuador                             | <input type="radio"/> Luxembourg       | <input type="radio"/> Samoa  |
| <input type="radio"/> American Samoa      | <input type="radio"/> Egypt                               | <input type="radio"/> Macau            | <input type="radio"/> San Marino                                   |
| <input type="radio"/> Andorra             | <input type="radio"/> El Salvador                         | <input type="radio"/> Madagascar       | <input type="radio"/> São Tomé and Príncipe                        |
| <input type="radio"/> Angola              | <input type="radio"/> Equatorial Guinea                   | <input type="radio"/> Malawi           | <input type="radio"/> Saudi Arabia                                 |
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| <input type="radio"/> 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                                 |
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| <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                                  |

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<input type="radio"/> Bermuda	<input type="radio"/> Greece	<input type="radio"/> Mozambique	<input type="radio"/> Suriname
<input type="radio"/> Bhutan	<input type="radio"/> Greenland	<input type="radio"/> Myanmar /Burma	<input type="radio"/> Svalbard and Jan Mayen
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<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
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<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

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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           |
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| <input type="radio"/> Curaçao                          | <input type="radio"/> Laos       | <input type="radio"/> Rwanda                                      | <input type="radio"/> Western Sahara    |
| <input type="radio"/> Cyprus                           | <input type="radio"/> Latvia     | <input type="radio"/> Saint Barthélemy                            | <input type="radio"/> Yemen             |
| <input type="radio"/> Czechia                          | <input type="radio"/> Lebanon    | <input type="radio"/> Saint Helena Ascension and Tristan da Cunha | <input type="radio"/> Zambia            |
| <input type="radio"/> Democratic Republic of the Congo | <input type="radio"/> Lesotho    | <input type="radio"/> Saint Kitts and Nevis                       | <input type="radio"/> Zimbabwe          |
| <input type="radio"/> Denmark                          | <input type="radio"/> Liberia    | <input type="radio"/> Saint Lucia                                 |   |

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

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- \* 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

***Legal certainty provided by the HBERs and the HGL***

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

- ☐ Yes
- ☐ No
- ☒ Do not know

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

- ☐ Yes
- ☐ No
- ☒ Do not know

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

- ☐ Yes
- ☐ No
- ☒ Do not know

\*



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

- ☐ Yes
- ☐ No
- ☒ Do not know

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

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

- ☐ Yes
- ☐ No
- ☒ Do not know

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

- ☐ Yes
- ☐ No
- ☒ Do not know

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

- ☐ Yes
- ☐ No
- ☒ Do not know

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

- ☐ Yes
- ☐ No
- ☒ Do not know

\* 4.19 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*

MSIs can play a role in achieving recognised policy goals at the EU and international level, such as sustainability, environmental protection, ensuring a living income for producers and workers or eradicating child labour from supply chains. These initiatives typically require industry-level cooperation, which can be

achieved by, for instance, pooling resources, exchanging best practices or the joint petitioning of authorities. This cooperation may however have an impact on procurement costs and/or sale prices.

The current HGL doesn't provide enough legal certainty for cooperative agreements and information exchanges aimed at achieving these policy objectives. In particular, it is not clear whether the benefits resulting from this cooperation can be considered as efficiency gains within the meaning of the HGL that would balance a potential price increase.

A recent study by the Fairtrade Foundation (<https://bit.ly/2SOY7th>) has collected evidence proving that the lack of certainty regarding whether a particular co-operation initiative is permissible, and how it can be structured, acts as a deterrent to retailers from collaborating on sustainability issues, particularly where those actors are associated with low incomes and wages in the supply chain.

Oxfam-Wereldwinkels calls upon the EC to assess the situations under which firms can cooperate in sustainability or social fairness related initiatives, with or without the intervention of public administrations.

\* 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*

The EC should reintroduce environmental agreements into the HGL, tailoring the model set out in the 2001 Guidelines (2001/C 3/02) to the current context including the European Green Deal and the Paris Agreement. In addition, the HGL should discuss and encourage other forms of cooperation on sustainability, such as agreements to improve working conditions and ensure a living income for producers and workers.

To that end, the EC should incorporate non-price efficiencies and other non-monetary benefits to EU consumers into its analysis under Article 101(3) TFEU, such as positive impacts on sustainable development and social conditions in the EU and third countries. The text of the Treaty permits the EC to take broader sustainability concerns into account when assessing an agreement's impact on consumer welfare. Indeed, Article 101(3) TFEU does not suggest that consumers must benefit from a lower price, but instead stipulates that the agreement must "allow consumers a fair share of the resulting benefit". This fair share may accrue to the companies' actual and potential consumers, but also to society as a whole, as the EC recognized in its CECED decision (2001, see para. 56).

Two cases reviewed by the Dutch ACM, the "Chicken of Tomorrow" and the "Energy Agreement for Sustainable Growth", illustrate how social costs can be included as part of a consumer welfare analysis. A criticism of these decisions goes beyond the scope of this submission. FTAO observes, however, that the ACM's analysis relied in large part on assumptions based on the Emissions Trading System (ETS) from a national perspective, with little regard to the long-term interests of future consumers and society as a whole. The outcome would likely be different today, in light of the latest ETS reform (2019) and the Dutch Supreme Court judgment in Urgenda (2019), which held that the Netherlands has an obligation to reduce "its part" of worldwide emissions because "every reduction counts".

Specific working principles should be included in the HGL to provide greater certainty for similar agreements

on the EU level, and would assist all actors involved in this type of agreement in its design in a manner that is compatible with competition law principles.

### ***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*

Horizontal agreements aimed at having positive impacts on society (e.g. emissions reductions, the provision of living wages and living incomes upstream) often require cooperation among competing actors in order to be effective and to enable them to allocate their benefits most effectively. The objectives of the agreement might not be attainable by any of the actors acting individually, and in some cases might not be attainable either by public authorities since they might require to take action out of the EU. If acting alone, there might be a significant first mover disadvantage involved for those firms who decide to take action in markets where customers are highly sensitive to price or where there is little scope for product differentiation.

Oxfam-Wereldwinkels considers that cooperation agreements and information exchanges aiming at providing equitable working conditions for producers should be eligible for an exemption, alongside those pursuing environmental objectives. Examples of such agreements include:

- Agreements among wholesalers and/or retailers regarding 'fair trade' certification and labelling programs may increase consumer welfare by (i) reducing transaction costs for consumers looking for sustainable products and (ii) fostering innovation by incentivising firms to develop products compliant with the standard. These agreements may accordingly satisfy the conditions of Art. 101(3) TFEU, as they contribute to 'improving the production or distribution of goods', 'promoting technical or economic progress', 'while allowing consumers a fair share of the resulting benefit'. This is however not clear from the sections of the HGL on standardisation agreements. An exemption should therefore be provided for standard-setting agreements, with a clear framework to assess those pursuing social fairness objectives.
- 'Collective bargaining' agreements among atypical or self-employed workers of the 'gig' economy. An exemption under Art. 101(3) TFEU should be provided for those agreements, to reflect the lessons from the ECJ judgments in Albany (1999), Wouters (2002) and FNV (2014). If collective bargaining agreements among employees and regulated professions may be excluded from the scope of Art. 101(1) TFEU on public interest ('improvement of conditions of work and employment') and pro-competitive justifications ('promotion of economic progress'), workers who are considered as 'undertakings' under EU law, as frequently happens in the 'gig' economy, should benefit from an exemption under Art. 101(3) TFEU.
- In general, the Commission should consider exemption of any agreement that leads to prices closer to the "true price" of a product or service, including the cost of pollution and of guaranteeing equitable working conditions and remuneration for producers.

Such agreements are covered by neither the R&D nor the Specialisation BER. Clear exemptions would thus increase the legal certainty for firms willing to enter into sustain

\* 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*

/

#### 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

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

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

### ***Benefits***

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

*Text of 1 to 1500 characters will be accepted*

The existence of the R&D and Specialisation BERs and the HGL is beneficial for firms, public administrations and civil society organizations. It helps these actors understand the types of initiatives, with or without the involvement or support of Member State administrations, which are likely to be deemed compliant with competition law rules. However, as set out in our reply to questions 4.20 and 4.22, the attainment of these objectives is hampered by the lack of specific guidance and concrete examples relating to environmental sustainability and the pursuit of living incomes. Therefore, the new HGL should signal a broader application of Article 101(3) TFEU with these considerations in mind.

### ***Benefits vs. costs***

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

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

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

\* 5.17 Regarding the **Specialisation BER**

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

\* 5.19 Regarding the **HGL**

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

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

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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			
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

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

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

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

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

\* 6.8 Section 5 of the HGL on purchasing agreements is

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

\* 6.10 Section 6 of the HGL on commercialisation agreements is

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

\* 6.12 Section 7 of the HGL on standardisation agreements is

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

## 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

\* 7.3 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*

Sustainability, environmental protection and social equity have come to the forefront of the political agenda as shown by the UN's 2030 Sustainable Development Agenda, the European Green Deal or the EU-Mercosur trade agreement. The lack of specific HBERs and provisions in the HGL regarding environmental sustainability and the achievement of living incomes in producer countries reflects the current absence in alignment between competition policy and other key EU policies, such as social and environmental policies.

For example, HBERs and HGL are instruments which are not currently sufficiently aligned with the European Commission's Communication on the European Green Deal. The ambitious goals set by this Communication require that all available policy and regulatory tools be brought together in a holistic manner in order to fulfil the objectives set out in that policy document. Competition policy plays an important role in shaping the EU's economy and the decisions taken by our businesses. As such, it should be sensitive to the fact that collaboration, alongside competition, is important to foster sustainability.

The EU-Mercosur trade agreement also contains strong commitments regarding responsible supply chains and the protection of labour rights. Considering the globalisation of supply chains, EU competition policy must reflect the increased need for firms engaged in international trade to integrate these factors into their actions, which often requires them to cooperate.

Nor are the HBERs and HGL sufficiently aligned with the 2014 Communication of the EC on 'A Stronger Role of the Private Sector in Achieving Inclusive and Sustainable Growth in Developing Countries'. Many of the achievements that the private sector can generate in terms of fostering inclusive development do have costs for companies, which often means that a price is necessarily incurred by consumers.

There are sufficient experiences proving that there is a heavy first mover disadvantage for those companies who decide to move forward unilaterally to adopt sustainability standards, while their competitors continue to offer less sustainable (and often cheaper) products, since consumers do not always buy the most sustainable products.

The case of Lidl, which backed away from its decision in September 2018 to sell only Fairtrade bananas in Germany and Switzerland, offers a classic example of vulnerability to entrenched consumer behaviour (<https://bit.ly/2SfS2oF>). This is precisely the reason why collaboration among competitors is often required to achieve a positive result in social policy terms. While some initiatives might universally be considered to fall under the exception of Article 101(3) TFEU, achieving greater certainty throughout the HBERs and the HGL would facilitate competitor-driven initiatives, and hence would add to the private sector's contribution to sustainable growth worldwide, including in developing countries where it is most necessary.

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

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

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

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

- ☐ Yes
- ☐ No
- ☒ Do not know

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

- ☐ Yes
- ☐ No
- ☒ Do not know

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

- ☐ Yes
- ☐ No
- ☒ Do not know

## 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*

We call upon the EC to clarify the role of NGOs and civil society with regard to competition law, in particular in the context of horizontal agreements, where civil society would benefit from clear guidelines on the possibility of engaging with firms and other stakeholders.

Separately, the EC should clarify whether Art. 101(3) TFEU also covers efficiencies accruing to non-EU stakeholders, achieved outside the product market where the restriction is felt, or benefiting consumers other than the ones affected by the agreement. This is excluded by the current HGL but would be consistent with the approach taken in CGM (2002) and GSK (2009) cases, where the GC found that efficiencies do not necessarily need to arise in the relevant market, and with the CECED decision (2001), where the EC considered the benefits for society, on top of individual purchasers, of a sustainability agreement.

To conclude, the aim of EU competition law is to protect competition on the market. It is one of many European policy tools in pursuit of the goals enshrined in the Treaties. Indeed, the EC has a legal obligation to take into account all the Treaty provisions when applying competition law, including free and fair trade and the eradication of poverty (Article 3(5) TEU), the protection of human health (Article 9 TFEU) and the integration of environmental protection and sustainable development into EU policies (Article 11 TFEU). With that in mind, EU competition law can – and should – play a crucial role as part of an integrated European climate and sustainability policy.

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

The maximum file size is 1 MB

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

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

☒ Yes

☐ No

## Contact

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