

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

joanna

* 2.3 Surname

goyder

* 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

Provision of 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

All sectors

*** 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 |

- | | | | |
|--|----------------------------------|---|---|
| <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

The legal certainty for business provided by block exemption Regulations helps companies when they are making investments and engaging in new projects. In addition, the Block Exemptions and Guidelines have made a considerable contribution to the consistent application of Article 101 throughout the EU, whether by companies themselves or by national courts and national competition authorities, which is also helpful to those companies.

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

In practice, while the HGL are widely consulted, the R&D BER much less so in our experience as it is difficult to reconcile its wording with the requirements and aims of different R&D projects.

* 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

In principle, a block exemption provides legal certainty both because it is binding legislation, and its terms are relatively clearcut. However, as said, the limited use of this R&D BER shows that it can be improved in order to render it applicable to a wider number of circumstances without depriving it of the required legal certainty. The HGL provide fewer "bright lines", and also may be disregarded by national courts and national competition authorities, and by the European Courts.

* 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

Same reasons as for the R&D BER.

* 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

In principle a block exemption provides legal certainty both because it is binding legislation, and its terms are relatively clearcut. However, as said, the limited use of this R&D BER shows that it can be improved in order to render it applicable to a wider number of circumstances without depriving it of the required legal certainty. The HGL provide fewer "bright lines", and also may be disregarded by national courts and national competition authorities, and by the European Courts.

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

While the current HGL have increased legal certainty by comparison with no HGL at all, there is ample room for improvement. In this respect, the HGL do not provide:

- "safe harbours" (beyond the 15% market share for purchasing Agreements and the usual 10 % market share "de minimis" rule);
- indication of the number of market participants needed for "aggregated" information;
- guidance on the traditional information gathering and sharing activities of trade associations;
- guidance on issues raised by vertical information exchange in the context of dual distribution (where the parties are also competing at retail level);
- guidance on application of the rules to very fast-moving industries such as fashion in which some information exchange may enable companies to be more reactive and compete more effectively. In marketplace partnerships it may be that a large marketplace (also a direct seller) which owns a lot of data shares some data on competing sales with the various smaller webshops/merchants on its platform; or
- indication of the circumstances in which cross shareholdings which create a conduit for information exchange fall outside the scope of Article 101.

* 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

Yes, it provides a clear framework for analysis.

* 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

Yes, it provides a clear framework for analysis.

* 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

Given the importance of standardisation agreements to innovation and technology, the current HGL provide only very "high level" guidance that does not actually deal with the most commonly encountered situations in practice, such as the sharing of technology on FRAND terms and how those issues should be addressed in practice. That the guidelines have not succeeded in providing practical guidance is demonstrated in the amount of litigation on these issues in national courts.

* 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

Environmental/sustainability agreements:

- a separate section on environmental agreements (currently subsumed under the topic of standardisation) could usefully be introduced, given the rapidly increasing importance of such standard-setting, eco-labelling and other agreements;
- the current framework does not provide sufficient certainty to entities who seek to promote sustainability while maintaining their compliance with antitrust regulations. In some sustainability developments, individual action is not feasible, and to better understand and plan what can be achieved, companies need more guidance, including safe harbours, and also decisional practice, on when cooperation will fall within the scope of Article 101;
- there is case law and, to some extent, guidance from some national competition authorities, and some regulators are increasingly open to discussing these issues. Clear and detailed guidance at EU level would therefore contribute significantly to a more harmonised approach, in particular on the application of the conditions of Article 101(3) when engaging in cooperation for sustainable development.

* 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

Industrial alliances, which combine a mixture of R&D, joint purchasing, joint production and specialization arrangement, including information exchanges, should be covered in a combined way.

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
- * 4.36 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

Sometimes is difficult to distinguish a unilateral specialization agreement from a supply agreement. Further, tolling agreements are not considered as a form of specialization agreement when they may well be.

* 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

Generally speaking, the use of the Horizontal BERs is much less frequent than the use of the vertical BER. In our view, the Horizontal BERs should be simplified in terms of scope of application. This would not detract from legal certainty as as currently drafted either one follows them "Verbatim" or the degree of legal certainty remains very low. It would be good to have a broader substantive logic (in addition to the market share thresholds, that are helpful) which would allow undertakings to apply them or their rationale to the complex transaction that real life business require to assess.

* 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

Joint production agreements as well as joint purchasing agreements are normally driven by efficiencies gains from scale and scope. They should be included in the Horizontal BERs.

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

- ☐ Yes
- ☒ No
- ☐ Do not know

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

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

Costs

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

Text of 1 to 1500 characters will be accepted

Naturally the HBERs and the HGL provide helpful guidance in any self-assessment and thus reduce the associated legal and management costs. Therefore, the HBERs and HGL clearly reduce costs compared with no HBERs or HGLs at all. The question though is not whether they contribute to reducing cost but whether this cost reduction, and consequential benefits, could be increased along with more legal certainty.

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

Text of 1 to 1000 characters will be accepted

We do not consider that the HBERs and HGL impose a cost compared to not having any HBERs or HGL at all. The legal costs (and potentially the additional cost of expert economic consultants) associated with self-assessment advice in the absence of the HBERs and HGL would be very considerably greater.

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

The current HBERs and the HGL are more consistent amongst themselves and better drafted with respect to their predecessors.

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

It is often relatively straightforward to assess whether given arrangements fulfil the requirements of a block exemption. In contrast, application of guidelines often involves complex economic and other assessments.

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

It is often relatively straightforward to assess whether given arrangements fulfil the requirements of a block exemption. In contrast, application of guidelines often involves complex economic and other assessments.

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

If given arrangements fulfil the requirements of a block exemption this gives a high degree of legal certainty. In contrast, application of guidelines results in less legal certainty, especially where this involves complex economic and other assessments.

At the same time the rigidity of the BERs and thus their reduced scope limits their application. The HGL on the other hand are a flexible tool that permits a wider application and provides comfort in a much higher number of cases without the strait-jacket effects that the BERs inevitably lead to.

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

It is quite obvious that both the BERs and the HGL do generate benefits and no real advantage would instead descend from their elimination. The issue is how to improve and modernise them and increase the benefits they bring about already today.

*** 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

It is quite obvious that both the BERs and the HGL do generate benefits and no real advantage would instead descend from their elimination. The issue is how to improve them and increase the benefits they bring about already today.

*** 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

It is quite obvious that both the BERs and the HGL do generate benefits and no real advantage would instead descend from their elimination. The issue is how to improve and modernise them and increase the benefits they bring about already today.

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	Digitisation of the economy and the emergence of two-sided technology platforms	HGL 55-110, and more generally the examples given in the various sections	
2	Increased reliance on communications standards such as 5G	HGL 257-335	
3	Climate change and the imperative for greater cooperation to combat it	HGL 55-110 and 257-335	
4	Internet of things	HGL 55-110 and 257-335	
5	Emergence of FinTech and cryptocurrencies	HGL 55-110 and 257-335	
6	Blockchain	HGL 55-110 and 257-335	
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

While relevant in providing a general framework for analysis, the guidelines in particular could be expanded to better explain current policy and thinking on matters such as how competition in innovation is assessed in practice and how cooperation R&D regarding emerging technologies and products is assessed. The examples in section 3.5 of the guidelines could be usefully updated to be more relevant to the modern digitised economy.

* 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

As above, the examples in section 4.5 of the guidelines could be updated to include examples that are more relevant to the modern digitised economy.

* 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

Both the range of situations in which companies may need to legitimately share information (such as in developing environmental cooperation) and the Commission's enforcement practice have changed since the guidelines were written. This section of the guidelines is in particular need of updating.

* 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

While relevant in providing a general framework for analysis the guidelines could be expanded to better explain current policy and thinking and make the examples more relevant to the modern digitised economy.

* 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

While relevant in providing a general framework for analysis the guidelines could be expanded to better explain current policy and thinking and make the examples more relevant to the modern digitised economy.

* 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

Standardisation is particularly important in the context of communications and the internet of things. The current guidelines do not deal adequately with the issues most commonly encountered in practice, such as the sharing of technology on FRAND terms.

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

An area of further focus and consistency is the approach to the application of article 101(3) in practice. All of the current guidelines suggest an overly narrow role for article 101(3), in particular as regards the nature and quantification of the efficiencies that will be taken into account. This is likely to be inhibiting the development of cooperation that is in the public interest, such as measures to combat climate change and other environmental damage.

* 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

While it is difficult to be precise on this issue in circumstances where the Commission has not yet announced its proposals (if any) to reform Regulation 1/2003 and/or the EU Merger Regulation in the light of challenges in the digital economy, the current HBERs and HGL have an "old fashioned" flavour which should be updated to take account of the Commission's current economic and legal thinking, enforcement priorities and emerging policy proposals for antitrust and merger law reform generally.

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

Yes. It is clearly the case that the R&D BER has created greater legal certainty than if it had not been enacted at all.

* 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

Yes. It is clearly the case that the Specialisation BER has created greater legal certainty than if it had not been enacted at all.

* 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

Yes. It is clearly the case that the HGLs have created greater legal certainty than if they had not been published at all.

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

(1) More “safe harbours” or “bright line” guidance would be welcome. The Guidelines make frequent reference to concepts such as parties which “have market power” (e.g. paras. 165, 168, 169, 204) or have a “low” (para. 44) or “high” (paras. 44, 173) market share. Nowhere are these expressions defined, despite the fact that in many situations they represent a crucial element of the analysis;

(2) the Guidelines should state clearly that Article 101 does not apply as between parents and joint venture when the parents “control” the joint venture within the meaning of the EU Merger Regulation;

(3) additional worked examples, and in particular some more focusing on ordinary situations, such as a standard sort of joint production arrangement, would be useful. Some of the existing examples do not reflect typical situations. For example one at para. 190 envisages specialisation with no provision for cross-supply, and one at para. 192 seems to be a price-fixing cartel, but appears as an example in the joint production agreement. Others such as those at paras. 252 and 253 have negligible cross-border relevance. And the example at para. 106 appears to extend the scope of Article 101(1) unjustifiably, by suggesting exemption under Article 101(3) for what appears to be a pro-competitive agreement.

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

The maximum file size is 1 MB

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

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

- ☒ Yes
- ☐ No

Contact

COMP-HBERS-REVIEW@ec.europa.eu