

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

Fields marked with * are mandatory.

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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

Stephan

* 2.3 Surname

Purps

* 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

BASF SE

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

BASF is the world's leading chemical company

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

Text of 1 to 250 characters will be accepted

BASF has twelve divisions grouped into six segments as follows: Chemicals, Materials, Industrial Solutions, Surface Technologies, Nutrition & Care, Agricultural Solutions.

* 2.13 The 2 digit NACE Rev.2 code(s) referring to the level of "division" that applies to your business (see part III, pages 61 – 90 of Eurostat's statistical classification of economic activities in the European Community, [available here](#)):

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

BASF has twelve divisions grouped into six segments as follows: Chemicals, Materials, Industrial Solutions, Surface Technologies, Nutrition & Care, Agricultural Solutions.

* 2.15 Country of origin

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

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| <input type="radio"/> Afghanistan | <input type="radio"/> Djibouti | <input type="radio"/> Libya | <input type="radio"/> Saint Martin |
| <input type="radio"/> Åland Islands | <input type="radio"/> Dominica | <input type="radio"/> Liechtenstein | <input type="radio"/> Saint Pierre and Miquelon |
| <input type="radio"/> Albania | <input type="radio"/> Dominican Republic | <input type="radio"/> Lithuania | <input type="radio"/> Saint Vincent and the Grenadines |
| <input type="radio"/> Algeria | <input type="radio"/> Ecuador | <input type="radio"/> Luxembourg | <input type="radio"/> Samoa |
| <input type="radio"/> American Samoa | <input type="radio"/> Egypt | <input type="radio"/> Macau | <input type="radio"/> San Marino |
| <input type="radio"/> Andorra | <input type="radio"/> El Salvador | <input type="radio"/> Madagascar | <input type="radio"/> São Tomé and Príncipe |
| <input type="radio"/> Angola | <input type="radio"/> Equatorial Guinea | <input type="radio"/> Malawi | <input type="radio"/> Saudi Arabia |
| <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 |
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| ○ Australia | ○ Fiji | ○ Mauritania | ○ Slovakia |
| ○ Austria | ○ Finland | ○ Mauritius | ○ Slovenia |
| ○ Azerbaijan | ○ France | ○ Mayotte | ○ Solomon Islands |
| ○ Bahamas | ○ French Guiana | ○ Mexico | ○ Somalia |
| ○ Bahrain | ○ French Polynesia | ○ Micronesia | ○ South Africa |
| ○ Bangladesh | ○ French Southern and Antarctic Lands | ○ Moldova | ○ South Georgia and the South Sandwich Islands |
| ○ Barbados | ○ Gabon | ○ Monaco | ○ South Korea |
| ○ Belarus | ○ Georgia | ○ Mongolia | ○ South Sudan |
| ○ Belgium | ● Germany | ○ Montenegro | ○ Spain |
| ○ Belize | ○ Ghana | ○ Montserrat | ○ Sri Lanka |
| ○ Benin | ○ Gibraltar | ○ Morocco | ○ Sudan |
| ○ Bermuda | ○ Greece | ○ Mozambique | ○ Suriname |
| ○ Bhutan | ○ Greenland | ○ Myanmar /Burma | ○ Svalbard and Jan Mayen |
| ○ Bolivia | ○ Grenada | ○ Namibia | ○ Sweden |
| ○ Bonaire Saint Eustatius and Saba | ○ Guadeloupe | ○ Nauru | ○ Switzerland |
| ○ Bosnia and Herzegovina | ○ Guam | ○ Nepal | ○ Syria |
| ○ Botswana | ○ Guatemala | ○ Netherlands | ○ Taiwan |
| ○ Bouvet Island | ○ Guernsey | ○ New Caledonia | ○ Tajikistan |
| ○ Brazil | ○ Guinea | ○ New Zealand | ○ Tanzania |
| ○ British Indian Ocean Territory | ○ Guinea-Bissau | ○ Nicaragua | ○ Thailand |
| ○ British Virgin Islands | ○ Guyana | ○ Niger | ○ The Gambia |
| ○ Brunei | ○ Haiti | ○ Nigeria | ○ Timor-Leste |
| ○ Bulgaria | ○ Heard Island and McDonald Islands | ○ Niue | ○ Togo |
| ○ Burkina Faso | ○ Honduras | ○ Norfolk Island | ○ Tokelau |
| ○ Burundi | ○ Hong Kong | ○ Northern Mariana Islands | ○ Tonga |
| ○ Cambodia | ○ Hungary | ○ North Korea | ○ Trinidad and Tobago |
| ○ Cameroon | ○ Iceland | ○ North Macedonia | ○ Tunisia |
| ○ Canada | ○ India | ○ Norway | ○ Turkey |
| ○ Cape Verde | ○ Indonesia | ○ Oman | ○ Turkmenistan |
| ○ Cayman Islands | ○ Iran | ○ Pakistan | ○ Turks and Caicos Islands |

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| <input type="radio"/> Central African Republic | <input type="radio"/> Iraq | <input type="radio"/> Palau | <input type="radio"/> Tuvalu |
| <input type="radio"/> Chad | <input type="radio"/> Ireland | <input type="radio"/> Palestine | <input type="radio"/> Uganda |
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| <input type="radio"/> Christmas Island | <input type="radio"/> Italy | <input type="radio"/> Paraguay | <input type="radio"/> United Kingdom |
| <input type="radio"/> Clipperton | <input type="radio"/> Jamaica | <input type="radio"/> Peru | <input type="radio"/> United States |
| <input type="radio"/> Cocos (Keeling) Islands | <input type="radio"/> Japan | <input type="radio"/> Philippines | <input type="radio"/> United States Minor Outlying Islands |
| <input type="radio"/> Colombia | <input type="radio"/> Jersey | <input type="radio"/> Pitcairn Islands | <input type="radio"/> Uruguay |
| <input type="radio"/> Comoros | <input type="radio"/> Jordan | <input type="radio"/> Poland | <input type="radio"/> US Virgin Islands |
| <input type="radio"/> Congo | <input type="radio"/> Kazakhstan | <input type="radio"/> Portugal | <input type="radio"/> Uzbekistan |
| <input type="radio"/> Cook Islands | <input type="radio"/> Kenya | <input type="radio"/> Puerto Rico | <input type="radio"/> Vanuatu |
| <input type="radio"/> Costa Rica | <input type="radio"/> Kiribati | <input type="radio"/> Qatar | <input type="radio"/> Vatican City |
| <input type="radio"/> Côte d'Ivoire | <input type="radio"/> Kosovo | <input type="radio"/> Réunion | <input type="radio"/> Venezuela |
| <input type="radio"/> Croatia | <input type="radio"/> Kuwait | <input type="radio"/> Romania | <input type="radio"/> Vietnam |
| <input type="radio"/> Cuba | <input type="radio"/> Kyrgyzstan | <input type="radio"/> Russia | <input type="radio"/> Wallis and Futuna |
| <input type="radio"/> Curaçao | <input type="radio"/> Laos | <input type="radio"/> Rwanda | <input type="radio"/> Western Sahara |
| <input type="radio"/> Cyprus | <input type="radio"/> Latvia | <input type="radio"/> Saint Barthélemy | <input type="radio"/> Yemen |
| <input type="radio"/> Czechia | <input type="radio"/> Lebanon | <input type="radio"/> Saint Helena Ascension and Tristan da Cunha | <input type="radio"/> Zambia |
| <input type="radio"/> Democratic Republic of the Congo | <input type="radio"/> Lesotho | <input type="radio"/> Saint Kitts and Nevis | <input type="radio"/> Zimbabwe |
| <input type="radio"/> Denmark | <input type="radio"/> Liberia | <input type="radio"/> Saint Lucia | |

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

at least 1 choice(s)

Multiple choice is possible

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

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

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

- ☒ Yes
- ☐ No
- ☐ Do not know

* 2.18 Please specify the type of decision

- ☒ Article 7 decision
- ☐ Article 9 decision

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

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

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

* 3.2 Please specify the type of your horizontal cooperation agreements

at least 1 choice(s)

Multiple answers possible

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

* 3.3 If Other, please specify

Text of 1 to 500 characters will be accepted

BASF is active in further types of cooperation agreements, including joint digital initiatives and sustainability initiatives.

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

- ☒ Yes
- ☐ No
- ☐ Do not know

* 3.5 If Yes, please specify

at most 3 choice(s)

Optional question, multiple answers possible

- ☒ Exemption(s) under R&D BER
- ☐ Exemption(s) under Specialisation BER
- ☐ Exemption(s) under both

* 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

Compared to other world regions, competition law rules and enforcement are significantly stricter in Europe, with the threat of exorbitant fines. This has led undertakings to take an extremely cautious approach to cooperations in the EU, even if these may be efficiency-enhancing and pro-competitive. When working internationally, one notices much greater freedom in projects outside the EU (and, if a project with foreign partners has effects in the EU, a lack of understanding by those partners for the requirements of EU competition law).

Within the strict European setup, the HBERs provide safe harbours and the HGL some orientation points to guide undertakings through these “troubled waters”. However, with very narrow prerequisites for their application, the safe harbour created by the HBERs is small and the vagueness of the HGL limits their usefulness for undertakings, especially against the very strict rules of evidence applied by some national courts regarding Art. 101 (3). In practice, therefore, most undertakings will not go beyond the safe harbour created by the HBERs and some do not enter cooperations due to the overly restrictive conditions and difficult interpretation of the HBERs. Anything outside this safe harbour is in practice not seen as subject to a case-by-case assessment but rather as likely infringing Art. 101.

Therefore, the HBERs and the HGL only manage to neutralize the restrictions placed on cooperations through the overly strict enforcement of Art. 101.

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

As stated above, the high risk associated with infringements of European competition law has in practice led undertakings to be overly cautious and abandon efficiency-enhancing and pro-competitive cooperation agreements.

This is especially true for the R&D-BER which – although developed as a horizontal BER – is also applicable to R&D cooperations between non-competitors, be it in vertical scenarios (joint R&D between a raw material producer and a customer using the raw material as an input in its products) or in outsourcing cases where specialised research institutes are paid for research and hand over their results to their customer. The HGL (para 130/131) rightfully state that these cases usually do not restrict competition. Some restraints of competition in these scenarios are clearly characterised as ancillary in the HGL. However, in practice, to be on the safe side and avoid complicated individual assessments, undertakings very often jump directly to the BER without assessing whether there is a restriction of competition in the first place. In the best case this leads to more burdensome and costly negotiations; in the worst case beneficial agreements will not materialise.

As further described in the answers below, the R&D-BER is a clear misfit for non-horizontal R&D cooperations and should be amended to exempt these without any further restrictions.

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

- ☒ Yes

- ☐ No
- ☐ Do not know

* 4.6 Please explain your reply

Text of 1 to 1500 characters will be accepted

The R&D BER is binding on national authorities and courts and therefore increases legal certainty compared to a situation where only the HGL applied, which only is binding on the European Commission. The BER can therefore play an important role in aligning the application of EU competition law throughout Europe and thus strengthening the internal market.

* 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

Due to the very low market share thresholds in the Specialisation BER, most relevant scenarios do not qualify for the exemption.

Outside of the safe harbour of the BER, undertakings are extremely cautious to agree to cooperation agreements, given the threat of exorbitant fines for an infringement of competition law. The HGL provide only limited relief, as they do not bind national authorities or courts and are in any event vague regarding their assessment of cooperation agreements. Furthermore, national authorities and courts often take a very strict stance on the rules of evidence regarding the conditions of Art. 101 (3) TFEU. It is nearly impossible for undertakings to evaluate and prove the efficiencies gained through the cooperation and how these are shared with consumers. Even with the costly use of specialised economic advisors it is usually not possible to gain a sufficient degree of legal certainty to go ahead with cooperation projects outside the safe harbour of the Specialisation 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

The Specialisation BER is binding on national authorities and courts and therefore increases legal certainty compared to a situation where only the HGL applied, which only is binding on the European Commission. The BER can therefore play an important role in aligning the application of EU competition law throughout Europe and thus strengthening the internal market.

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

The wide field of information exchange is very difficult to assess. Many different scenarios may arise and the HGL list many different aspects which play a role in their assessment. Naturally, the wide scope of scenarios covered leads to vagueness and ambiguity in the description of the relevant factors by the HGL.

At the same time, information exchange is in many cases classified as a by object infringement of Art. 101 TFEU, leaving little room for defences by undertakings concerned. This, together with the ambiguity of the HGL, in many cases leads to undertakings being extremely cautious regarding information exchange, thereby foregoing potential benefits of a cooperation.

The Commission investigation into the German automotive industry has raised many questions in this regard, given the many touchpoints and wide degree of exchange which apparently took place. It would be beneficial for undertakings if the Commission could give more practical examples in the HGL, based on this case and other cases, including cases decided by national authorities.

A further issue which could be clarified in this regard is the information exchange between a supplier and its distributor in cases of dual distribution. While Art. 2 (4) (a) Vertical BER already exempts any exchange between the two as it qualifies their relationship as first and foremost vertical, in practice this is often put in doubt.

* 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

The expectations of European politics and consumers towards European industry with regard to corporate social responsibility have grown significantly over the last decade. With the new Commission announcing a Green Deal for Europe, especially environmental sustainability has come to the focus of many large market players. To aid cooperations pursuing those overriding societal benefits, the Commission should consider providing guidelines on how to balance restrictions of competition against advances towards such societal benefits outside the narrow scope of economic efficiencies.

* 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

Cooperations in the digital space often fall somewhere between the “classical” cooperations discussed in the current HGL. Also, the limits between customers and competitors in many cases become less clear in digital cooperation models (“frenemies”), leading to some ambiguity as to which regime (horizontal/vertical) is applicable. At the same time, most public activity of competition enforcers is focused on the major American tech players (GAFA) and there is little guidance on digital cooperations between other actors by competition authorities. An expansion of the HGL to cover digital cooperation scenarios by other market players could be helpful. This expansion should recognise that joint approaches by industry players can be more beneficial to societal welfare than the monopolistic structures which have developed in some areas (most often based outside Europe) and against which European players must compete.

Identification of pro-competitive horizontal agreements

The R&D BER and the Specialisation BER set out a number of conditions that R&D and specialisation agreements need to meet in order to benefit from the block exemption. The HGL provide additional guidance on how to interpret these conditions. These conditions have been defined with the purpose to give exemption only to those agreements for which it can be assumed with sufficient certainty that they

generate efficiencies that outweigh, in line with Article 101(3) of the Treaty, the harm caused by the restriction of competition.

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

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

- ☐ Yes
- ☒ No
- ☐ Do not know

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

Text of 1 to 1500 characters will be accepted

The definition of paid-for R&D in Art. 1(a)(iv/vi) is overly broad and should be limited to horizontal cases to cover the (rather theoretical) example in Recital 17 why paid-for R&D should be put under the restrictive conditions of the BER rather than being per-se exempt.

The overwhelming majority of paid-for R&D takes place in non-horizontal cases, between industry players and private or public research institutes. The industry player paying for the R&D should be entitled to have full and unlimited ownership of the results. This is a normal commercial scenario and no restriction of competition, as correctly identified in para 131 HGL. However, Art. 3 in its current form applies to these scenarios. Having to grant access to the joint final results and access to the pre-existing know-how for an unlimited period of time creates a major risk of leakage of know-how and trade secrets. This significantly limits the willingness of undertakings to engage in such cooperations.

The limitation in Art. 3 (2) 2nd sentence – “without normally being active in the exploitation of results” – fails to address this issue. Research institutes do regularly exploit results, exactly by handing them over to their customer or by licensing out results of own R&D to third parties. Accordingly, Art. 3 should not apply to any non-horizontal R&D cooperation. As a minimum, the cited part of Art. 3 (2) 2nd sentence should be removed and Art. 3 (3) should not apply to joint R&D between non-competitors.

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

- ☐ Yes
- ☒ No
- ☐ Do not know

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

Text of 1 to 1500 characters will be accepted

The conditions for exemption in Art. 3 are overly strict. This is especially true for non-horizontal R&D cooperations (see above).

The required granting of rights to results and pre-existing know-how creates a major risk of leakage of know-how which significantly limits the willingness of undertakings to cooperate. Especially when engaging with players from outside the EU, these requirements are usually extremely contentious and it often requires significant work, including by outside counsel, to convince them that these are legal requirements in Europe and not just business tactics.

At the same time, in non-horizontal R&D scenarios, the granting of rights does not lead to the benefits which they are intended to lead to in horizontal scenarios – namely to ensure competition between the players after the end of the joint R&D. The partners in non-horizontal scenarios will usually not have the possibility or the interest to make use of these rights and compete against each other, since they are active up- or downstream of each other. The same is true for research institutes.

The BER should therefore be amended to exempt non-horizontal R&D without further requirements. This would be more in line with para. 130/131 of the HGL and recital 18 BER which state that these types of cooperation are regularly not restrictive of competition. The rules on hard-core restrictions would still provide sufficient limits in the extremely rare cases where restrictions of competition may arise.

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

- ☐ Yes
☒ No
☐ Do not know

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

Text of 1 to 1500 characters will be accepted

Non-horizontal R&D agreements should be per se exempted. Currently, the 25%-threshold will apply even to non-competing undertakings after seven years. This means the safe harbour for vertical R&D cooperations is smaller than for other vertical agreements, as the market share threshold in the Vertical BER is 30%. At the very least, it should be expressly clarified that the 25%-threshold is to be applied to non-competing undertakings by assessing each of the markets where they are active individually.

Further, having to assess market shares can unduly limit pro-competitive cooperations. The delineation of markets is burdensome and complicated and often does not produce a clear black and white result. At the same time, as an example, whether a market is EEA-wide (with some competitive restraints from outside the EEA) or worldwide, can in many cases lead to seismic shifts in market shares. While this is difficult enough for “normal” product and geographic markets, regarding technology markets this becomes neigh impossible. When a product or service is offered on a market there is at least some publicity on this offering. For technologies, this is usually not the case; and information on income from royalties (suggested as a measurement in para. 125 HGL) is usually not accessible to market players. In practice, falling under the market share thresholds is a “do-or-die” question, as undertakings are extremely hesitant to cooperate outside the safe harbour of the BER.

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

- ☐ Yes
☒ No
☐ Do not know

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

Text of 1 to 1500 characters will be accepted

Regarding the duration of the exemption, the HGL should clarify that for determining the point in time in which the contract products are first put on the market, the sale of products from pilot plants, pre-series models, or in ramp-up phases for test and market preparation purposes are not relevant; but only the fully-fledged sale from ramped-up serial production.

Another point which is currently unclear, is how restrictions are to be treated and which consequences arise regarding the granting of rights pursuant to Art. 3 R&D-BER in cases where the parties have agreed on joint exploitation but later fail to come to a commercial agreement on such joint exploitation.

* 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

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

Text of 1 to 1500 characters will be accepted

Having to assess market shares can unduly limit pro-competitive cooperations. The delineation of markets is burdensome and complicated and often does not produce a clear black and white result. At the same time, as an example, whether a market is EEA-wide (with some competitive restraints from outside the EEA) or worldwide, can in many cases lead to seismic shifts in market shares.

In practice, falling under the very low market share thresholds of the Specialisation BER is a “do-or-die” question, as undertakings are extremely hesitant to cooperate outside the safe harbour of the BER.

- * 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

As described above, the R&D-BER is a clear misfit for non-horizontal R&D cooperations and should be amended to exempt these without any further restrictions.

- * 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

Digital Initiatives

In the digital economy many different forms of cooperation are possible and business models evolve constantly and rapidly. At the same time, the limits between customers and competitors in many cases are less clear in digital cooperation models ("frenemies"), leading to difficulties in the assessment under the current legal regime.

Comparing the ease of entering into digital cooperations in other jurisdictions to doing so in Europe, the burden of European competition law is clearly discernible. This may be one of the reasons for the perceived gap between the European digital economy and the digital economies of the US and China. We believe that joint approaches by industry players can be more beneficial to societal welfare than the monopolistic structures which have developed in some areas (most often based outside Europe) and against which European players must compete.

Given European industry players do not have a level playing field, the European Commission should consider whether providing an experimentation field for digital initiatives could aid the development of the digital industry in Europe, thus giving European consumers more choice in a field currently dominated by large foreign tech players and state-owned and -directed enterprises. For a limited period of time certain restrictions of competition law could be lifted or the market share thresholds of the BERs could be abolished or at least significantly raised for digital cooperations and initiatives.

Sustainability Initiatives

The expectations of European politics and consumers towards European industry with regard to corporate social responsibility have grown significantly over the last decade. With the new Commission announcing a

Green Deal for Europe, especially environmental sustainability has come to the focus of many large market players.

The more legal certainty the European Commission can provide to undertakings wishing to cooperate in these fields, the more likely it becomes that Europe can achieve the ambitious goals it has set itself.

Currently, there is no clear guidance on how to balance under Art. 101 (3) TFEU restrictions of competition against advances towards valuable societal benefits outside the narrow scope of economic efficiencies.

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

- ☒ Yes
☐ No
☐ Do not know

* 4.47 If Yes, please explain your answer

Text of 1 to 3000 characters will be accepted

Given the clear statements both in the HGL and the recitals of the R&D BER as to the pro-competitiveness of non-horizontal R&D cooperations, we believe the restrictive effect the application of the R&D BER has on such non-horizontal cooperations was not intended.

This may partially be due to overly cautious approaches by undertakings concerned which treat anything outside the BER as forbidden rather than open to individual assessment and often jump directly to the BER instead of assessing whether a certain clause is a restriction of competition in the first place or rather ancillary to the form of cooperation. At the same time, given the high risk associated with infringements of EU competition law, the undertakings can hardly be put at a fault in taking a cautious approach.

Rather, we believe the complicated way in which the R&D BER is drafted and the inclusion of non-horizontal scenarios in a horizontal BER makes the application of the R&D BER unnecessarily difficult. When assessing non-horizontal R&D cooperations under the R&D BER, it often feels like one is trying to fit a square peg into a round hole. The R&D BER is not easy to use especially in this scenario, creating an additional burden on generally pro-competitive non-horizontal R&D cooperations.

We would therefore strongly advocate clarifying that non-horizontal R&D cooperations are exempted per se, without the further requirements of the R&D BER, or at the very least exclude the application of Art. 3 to such cooperations.

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

Generally, the HBERs provide a safe harbour and therefore raise the efficiency of the review of cases which clearly fall under the market share thresholds. Also, the HGL provide a useful overview of EU case law in one place.

At the same time, in certain scenarios, especially regarding the assessment of non-horizontal R&D cooperations, the strict rules of the R&D BER lead to significantly higher costs of coming to an agreement compared to a scenario of self-assessment under the vertical rules.

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

Text of 1 to 1000 characters will be accepted

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

Text of 1 to 500 characters will be accepted

5.4 Please explain how you calculate these costs

Text of 1 to 1500 characters will be accepted

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

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

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

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

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

* 5.9 Please explain your reply

Text of 1 to 1500 characters will be accepted

The R&D BER is binding on national authorities and courts and therefore increases legal certainty compared to a situation where only the HGL applied, which only is binding on the European Commission. The BER can thus play an important role in aligning the application of EU competition law throughout Europe and thereby strengthen the internal market. This allows for an easier pan-European assessment and facilitates cross-border R&D cooperation. For cases which clearly qualify under the market share thresholds, this given set of rules lowers the cost of legal assessment, even if these costs could be further reduced by increasing the user-friendliness of the legislation. For cases outside the requirements of the R&D BER, the existence of the R&D BER makes their assessment more complicated, since in practice many undertakings consider scenarios outside the BER to be off-limits rather than open to individual assessment, also against the background of very high requirements regarding the rules of evidence applied by national courts. Clear HGL with practical examples may facilitate these assessments.

For the chilling effect of the R&D BER on non-horizontal R&D cooperations, please refer to our other responses.

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

Text of 1 to 1500 characters will be accepted

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

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

* 5.12 Please explain your reply

Text of 1 to 1500 characters will be accepted

The Specialisation BER is binding on national authorities and courts and therefore increases legal certainty compared to a situation where only the HGL applied, which only is binding on the European Commission. The BER can thus play an important role in aligning the application of EU competition law throughout Europe and thereby strengthen the internal market. This allows for an easier pan-European assessment and facilitates cross-border cooperation. For cases which clearly qualify under the market share thresholds, this given set of rules lowers the cost of legal assessment, even if these costs could be further reduced by increasing the user-friendliness of the legislation. For cases outside the requirements of the BER, the existence of the BER makes their assessment more complicated, since in practice many undertakings consider scenarios outside the BER to be off-limits rather than open to individual assessment, also against the background of very high requirements regarding the rules of evidence applied by national courts. Clear HGL with practical examples may facilitate these 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

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 HBERs are binding on national authorities and courts and therefore increase legal certainty. The HBERs can thus play an important role in aligning the application of EU competition law throughout Europe and thereby strengthen the internal market. This allows for an easier pan-European assessment and facilitates cross-border cooperation.

The HGL, as opaque and ambiguous as they are, bind the European Commission and therefore increase legal certainty. Furthermore, the central overview of EU case law on horizontal cooperation is useful. Adding clarity to the HGL, especially with practical examples, may increase their usefulness.

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

Overall, costs are proportionate to benefits, with the exception of the application of the R&D BER to non-horizontal R&D cooperations, where costs clearly outweigh benefits.

* 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

Overall, costs are proportionate to benefits.

* 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

Overall, costs are proportionate to benefits.

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

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

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

1000 characters max. for each row

	Major trends/changes	Articles of the HBERs and/or recitals of the HGL	Short explanation/concrete examples
1			
2			
3			
4			
5			
6			
7			

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

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

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

* 6.3 Please explain your reply

Text of 1 to 1500 characters will be accepted

Even against the forms of cooperation having evolved (esp. in the digital space, industry 4.0 etc.), societal demands towards undertakings being different today and the competitive threat from state-sponsored players from outside the EU having become more concrete, their relevance is still given. Updating them to better reflect these challenges would help.

* 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

Even against the forms of cooperation having evolved (esp. in the digital space, industry 4.0 etc.), societal demands towards undertakings being different today and the competitive threat from state-sponsored players from outside the EU having become more concrete, their relevance is still given. Updating them to better reflect these challenges would help.

* 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

Even against the forms of cooperation having evolved (esp. in the digital space, industry 4.0 etc.), societal demands towards undertakings being different today and the competitive threat from state-sponsored players from outside the EU having become more concrete, their relevance is still given. Updating them to better reflect these challenges would help.

* 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

Even against the forms of cooperation having evolved (esp. in the digital space, industry 4.0 etc.), societal demands towards undertakings being different today and the competitive threat from state-sponsored players from outside the EU having become more concrete, their relevance is still given. Updating them to better reflect these challenges would help.

* 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

Even against the forms of cooperation having evolved (esp. in the digital space, industry 4.0 etc.), societal demands towards undertakings being different today and the competitive threat from state-sponsored players from outside the EU having become more concrete, their relevance is still given. Updating them to better reflect these challenges would help.

* 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

Even against the forms of cooperation having evolved (esp. in the digital space, industry 4.0 etc.), societal demands towards undertakings being different today and the competitive threat from state-sponsored players from outside the EU having become more concrete, their relevance is still given. Updating them to better reflect these challenges would help.

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

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

- ☐ Yes
☒ No

☐ Do not know

* 7.2 Please explain

Text of 1 to 3000 characters will be accepted

The extension of the R&D BER (developed as a horizontal BER) to cover not only horizontal but also non-horizontal R&D agreements leads to inconsistencies especially with the Vertical BER.

The HGL (para 130/131) rightfully state that non-horizontal R&D cooperations usually do not restrict competition, be it in vertical scenarios (joint R&D between a raw material producer and a customer using the raw material as an input in its products) or in outsourcing cases where specialised research institutes are paid for research and hand over their results to their customer. Rather, they create efficiencies by bringing together complementary capabilities along the value chain. Nonetheless, the strict requirements of Art. 3 R&D BER as well as the market share thresholds in Art. 4 R&D BER are also applied to non-horizontal R&D agreements.

In contrast, pure vertical exchange contracts benefit from the exemption in the Vertical-BER without additional requirements and with a higher market share threshold. This does not appear appropriate given the arguably higher level of societal benefit brought about by joint R&D. Also, in practice great difficulties arise in distinguishing joint R&D (leading to the R&D BER being applicable) from the mere adaptation of a supplier's product to the customer's specifications – leading to the Vertical BER being applicable. In the best case, this leads to burdensome negotiations and assessments (with specialised external counsel), causing delays in the process. In the worst case, undertakings may abandon otherwise beneficial joint R&D projects. As described above, the R&D-BER is a clear misfit for non-horizontal R&D cooperations and should be amended to exempt these without any further restrictions.

* 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

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

The R&D BER is binding on national authorities and courts and therefore increases legal certainty compared to a situation without the R&D BER. The BER can therefore play an important role in aligning the application of EU competition law throughout Europe and thus strengthening the internal market.

* 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

The Specialisation BER is binding on national authorities and courts and therefore increases legal certainty compared to a situation without the Specialisation BER. The BER can therefore play an important role in aligning the application of EU competition law throughout Europe and thus strengthening the internal market.

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

- ☒ Yes
☐ No
☐ Do not know

* 8.6 Please explain your reply

Text of 1 to 1500 characters will be accepted

The HGL provide a useful summary of EU case law and can serve as a basic reference for the assessment of horizontal cooperation agreements.

At the same time, they are drafted in a general and ambiguous way and provide little concrete guidance. This leaves undertakings in doubt and opens the door to vastly different assessments of legal questions by national authorities and courts (which are not formally bound by the HGL in any event, but can only be bound by the strength of the argument presented). Providing more concrete examples in the HGL would benefit all users.

This is especially true against the extremely limited number of newer cases, due to the change in the legal regime to Reg. 1/2003. In certain areas of competition law, enforcement standards have become stricter since then, the forms of cooperation have evolved (esp. in the digital space, industry 4.0 etc.), societal demands towards undertakings are different today and the competitive threat from state-sponsored players from outside the EU has become more concrete.

Bringing the HGL up-to-date to reflect these developments would be highly beneficial for all users.

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

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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