

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

Fields marked with \* are mandatory.

### 1

## Introduction

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### Background and aim of the public questionnaire

Article 101(1) of the Treaty on the Functioning of the European Union ('the Treaty') prohibits agreements between undertakings that restrict competition unless they generate efficiencies in line with Article 101(3) of the Treaty. Agreements generate efficiencies in line with Article 101(3) of the Treaty if they contribute to improving the production or distribution of goods or services, or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefits; they only impose restrictions that are indispensable for the attainment of these objectives and do not eliminate competition in respect of a substantial part of the product in question. The prohibition contained in Article 101(1) of the Treaty covers, amongst others, agreements entered into between actual or potential competitors (so-called 'horizontal agreements').

Commission Regulations (EU) No 1217/2010 (Research & Development Block Exemption Regulation - 'R&D BER') and 1218/2010 (Specialisation Block Exemption Regulation - 'Specialisation BER'), together referred to as the 'Horizontal block exemption regulations' (or 'HBERs'), exempt from the prohibition contained in Article 101(1) of the Treaty those R&D and specialisation agreements for which it can be assumed with sufficient certainty that they satisfy the conditions of Article 101(3) of the Treaty. The Commission Guidelines on horizontal cooperation agreements ('HGL') provide binding guidance on the Commission for the interpretation of the HBERs and for the application of Article 101 of the Treaty to other horizontal agreements. The HBERs will expire on 31 December 2022.

This public questionnaire represents one of the methods of information gathering in the evaluation of the HBERs, together with the HGL, which was launched on 5 September 2019. The purpose of this questionnaire is to collect views and evidence from the public and stakeholders on how the current rules work for them. The Commission will evaluate the current HBERs, together with the HGL, based on the following criteria:

- Effectiveness (Have the objectives been met?),
- Efficiency (Were the costs involved proportionate to the benefits?),
- Relevance (Do the objectives still match current needs or problems?),
- Coherence (Does the policy complement other actions or are there contradictions?), and
- EU added value (Did EU action provide clear added value?).

The collected information will provide part of the evidence base for determining whether the Commission should let the HBERs lapse, prolong their duration without changing them or prolong them in a revised form, together with the accompanying HGL.

The responses to this public consultation will be analysed and the summary of the main points and conclusions will be made public on the Commission's central public consultations page. **Please note that your replies will also become public as a whole, see below under Section 'Privacy and Confidentiality'.**

Nothing in this questionnaire may be interpreted as stating an official position of the Commission.

### **Submission of your contribution**

You are invited to reply to this public consultation by answering the questionnaire online. To facilitate the analysis of your replies, we would kindly ask you to keep your answers concise and to the point. You may include documents and URLs for relevant online content in your replies.

While the questionnaire contains several questions of a more general nature, notably Section 4 and 5 also contain questions that are aimed at respondents with more specialised knowledge of the HBERs and HGL. We invite all respondents to provide answers to the questionnaire. In case a question does not apply to you or you do not know the answer, please choose the field 'Do not know' or 'Not applicable'.

For your information, you have the option of saving your questionnaire as a 'draft' and finalising your response later. In order to do this you have to click on 'Save as Draft' and save the new link that you will receive from the EUSurvey tool on your computer. Please note that without this new link you will not be able to access the draft again.

The questionnaire is available in English, French and German. You may however respond in any EU language.

In case of questions, you can contact us via the following functional mailbox: [COMP-HBERS-REVIEW@ec.europa.eu](mailto:COMP-HBERS-REVIEW@ec.europa.eu).

In case of technical problem, please contact the Commission's [CENTRAL HELPDESK](#).

### **Duration of the consultation**

The consultation on this questionnaire will be open for 14 weeks, from 6/11/2019 to 12/2/2020.

### **Privacy and confidentiality**

#### **\* 1.1 Publication privacy settings**

The Commission will publish the responses to this public consultation. You can choose whether you would like your details to be made public or to remain anonymous.

##### ☒ **Anonymous**

Only your type of respondent, country of origin and contribution will be published. All other personal details (name, organisation name and size, transparency register number) will not be published.

☒ **Public**

Your personal details (name, organisation name and size, transparency register number, country of origin) will be published with your contribution.

Please note that your replies and any attachments you may submit will be published in their entirety even if you chose 'Anonymous'. Therefore, please remove from your contribution any information that you will not want to be published.

☒ 1.2 I agree with the [personal data protection provisions](#)

## 2 About you

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\* 2.1 Language of my contribution

- ☐ Bulgarian
- ☐ Croatian
- ☐ Czech
- ☐ Danish
- ☐ Dutch
- ☒ English
- ☐ Estonian
- ☐ Finnish
- ☐ French
- ☐ Gaelic
- ☐ German
- ☐ Greek
- ☐ Hungarian
- ☐ Italian
- ☐ Latvian
- ☐ Lithuanian
- ☐ Maltese
- ☐ Polish
- ☐ Portuguese
- ☐ Romanian
- ☐ Slovak
- ☐ Slovenian
- ☐ Spanish
- ☐ Swedish

\* 2.2 First name

Werner

\* 2.3 Surname

Berg

\* 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*

Provider 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*

Consumer & Retail Goods; Healthcare; Financial Services; Energy; Industrial Manufacturing and Transport.

**\* 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                                 |
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| <input type="radio"/> Antigua and Barbuda | <input type="radio"/> Eswatini                            | <input type="radio"/> Mali             | <input type="radio"/> Seychelles                                   |
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| <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                                  |

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| <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                               |
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| <input type="radio"/> Brazil                           | <input type="radio"/> Guinea                            | <input type="radio"/> New Zealand              | <input type="radio"/> Tanzania                             |
| <input type="radio"/> British Indian Ocean Territory   | <input type="radio"/> Guinea-Bissau                     | <input type="radio"/> Nicaragua                | <input type="radio"/> Thailand                             |
| <input type="radio"/> British Virgin Islands           | <input type="radio"/> Guyana                            | <input type="radio"/> Niger                    | <input type="radio"/> The Gambia                           |
| <input type="radio"/> Brunei                           | <input type="radio"/> Haiti                             | <input type="radio"/> Nigeria                  | <input type="radio"/> Timor-Leste                          |
| <input type="radio"/> Bulgaria                         | <input type="radio"/> Heard Island and McDonald Islands | <input type="radio"/> Niue                     | <input type="radio"/> Togo                                 |
| <input type="radio"/> Burkina Faso                     | <input type="radio"/> Honduras                          | <input type="radio"/> Norfolk Island           | <input type="radio"/> Tokelau                              |
| <input type="radio"/> Burundi                          | <input type="radio"/> Hong Kong                         | <input type="radio"/> Northern Mariana Islands | <input type="radio"/> Tonga                                |
| <input type="radio"/> Cambodia                         | <input type="radio"/> Hungary                           | <input type="radio"/> North Korea              | <input type="radio"/> Trinidad and Tobago                  |
| <input type="radio"/> Cameroon                         | <input type="radio"/> Iceland                           | <input type="radio"/> North Macedonia          | <input type="radio"/> Tunisia                              |
| <input type="radio"/> Canada                           | <input type="radio"/> India                             | <input type="radio"/> Norway                   | <input type="radio"/> Turkey                               |
| <input type="radio"/> Cape Verde                       | <input type="radio"/> Indonesia                         | <input type="radio"/> Oman                     | <input type="radio"/> Turkmenistan                         |
| <input type="radio"/> Cayman Islands                   | <input type="radio"/> Iran                              | <input type="radio"/> Pakistan                 | <input type="radio"/> Turks and Caicos Islands             |
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| <input type="radio"/> Chad                             | <input type="radio"/> Ireland                           | <input type="radio"/> Palestine                | <input type="radio"/> Uganda                               |
| <input type="radio"/> Chile                            | <input type="radio"/> Isle of Man                       | <input type="radio"/> Panama                   | <input type="radio"/> Ukraine                              |
| <input type="radio"/> China                            | <input type="radio"/> Israel                            | <input type="radio"/> Papua New Guinea         | <input type="radio"/> United Arab Emirates                 |
| <input type="radio"/> Christmas Island                 | <input type="radio"/> Italy                             | <input type="radio"/> Paraguay                 | <input type="radio"/> United Kingdom                       |
| <input type="radio"/> Clipperton                       | <input type="radio"/> Jamaica                           | <input type="radio"/> Peru                     | <input checked="" type="radio"/> United States             |
| <input type="radio"/> Cocos (Keeling) Islands          | <input type="radio"/> Japan                             | <input type="radio"/> Philippines              | <input type="radio"/> United States Minor Outlying Islands |
| <input type="radio"/> Colombia                         | <input type="radio"/> Jersey                            | <input type="radio"/> Pitcairn Islands         | <input type="radio"/> Uruguay                              |

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| <input type="radio"/> Comoros                          | <input type="radio"/> Jordan     | <input type="radio"/> Poland                                      | <input type="radio"/> US Virgin Islands |
| <input type="radio"/> Congo                            | <input type="radio"/> Kazakhstan | <input type="radio"/> Portugal                                    | <input type="radio"/> Uzbekistan        |
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| <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

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- \* 3.6 How often do you consult the **R&D BER** for guidance on a horizontal cooperation agreement?
- ☒ Frequently (several times per year)
  - ☐ Occasionally (once or twice per year)
  - ☐ Never
- \* 3.7 How often do you consult the **Specialisation BER** for guidance on a horizontal cooperation agreement?
- ☒ Frequently (several times per year)
  - ☐ Occasionally (once or twice per year)
  - ☐ Never
- \* 3.8 How often do you consult the **HGL** for guidance on a horizontal cooperation agreement?
- ☒ Frequently (several times per year)
  - ☐ Occasionally (once or twice per year)
  - ☐ Never

### 4 Effectiveness (Have the objectives of the current HBERs and HGL been met?)

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In this section, we would like to have your opinion on the extent to which the HBERs and the HGL have met their objectives.

The **purpose of the EU competition rules** is to ensure that competition is not distorted to the detriment of the public interest, individual undertakings and consumers. In line with this objective, the Commission's policy is to leave companies maximum flexibility when concluding horizontal co-operation agreements in order to increase the competitiveness of the European economy while at the same time promoting competition for the benefit of European businesses and consumers.

The **purpose of the HBERs and the HGL** is to make it easier for undertakings to cooperate in ways which are economically desirable and without adverse effect from the point of view of competition policy. The specific objectives of the HBERs and HGL are to ensure effective protection of competition and providing adequate legal certainty for undertakings.

\* 4.1 In your view, do you perceive that the HBERs and the HGL have contributed to promoting competition in the EU?

- ☐ Yes
- ☒ Yes, but they have contributed only to a certain extent or only in specific sectors
- ☐ They were neutral
- ☐ No, they have negatively affected competition in the EU
- ☐ Don't know

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

*Text of 1 to 1500 characters will be accepted*

The HBERs and the HGL have generally contributed to promoting competition in the EU. The safe harbours in the HBERs bring an important degree of legal certainty which in turn facilitates market performance. However, in our view there is room for improvement. See attached submission.

This review also presents an opportunity for the European Commission ("Commission") to clarify the approach to sustainability initiatives. The HGL could clarify that, in line with existing case law, proportionate attempts by competitors to bring about non-economic goals will not fall within the scope of competition law. We will submit detailed comments on sustainability in due course.

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

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

- ☐ Yes
- ☒ No
- ☐ Do not know

\* 4.4 Please explain your reply

*Text of 1 to 1500 characters will be accepted*



See attached submission.

\* 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 provides an important safe harbour which is important for legal certainty. However there is room for improvement - see attached submission.

\* 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*

See attached submission.

\* 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 provides an important safe harbour which is important for legal certainty. However there is room for improvement - see attached submission.

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 HGL are helpful but we would welcome clarity on a number of points. See attached submission.

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

- ☐ Yes
- ☒ No
- ☐ Do not know

\* 4.14 Please explain your reply

*Text of 1 to 1500 characters will be accepted*

The HGL are helpful but we would welcome clarity on a number of points. See attached submission.

\* 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*

The HGL are helpful but we would welcome clarity on a number of points, particularly in relation to joint bidding. See attached submission.

- \* 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*

The HGL are helpful but we would welcome clarity on a number of points. See attached submission.

- \* 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*

We consider that the revised HGL should provide guidance on cooperation between competitors on sustainability initiatives. We will submit separate comments on this in due course.

- \* 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*

We consider that the revised HGL should provide guidance on cooperation between competitors on sustainability initiatives. We will submit separate comments on this in due course.

### ***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
- \* 4.26 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*

We consider that there is value in retaining the R&D BER (Regulation 1217/2010) (subject to our comments below). The block exemption provides legal certainty and is a useful tool for businesses entering into R&D cooperation but it, and the corresponding section of the HGL are too conservative in our view, and difficult to apply in practice. In our experience, legal certainty is accorded only to very obviously pro-competitive R&D efforts. The current review process should focus on simplifying those texts, in particular by removing any disincentive against innovation and growth. See attached submission.

- \* 4.27 The absence of a market share threshold for non-competing undertakings, the market share threshold of 25% for competing undertakings and the application thereof provided for in Articles 4 and 7 of the R&D BER
  - ☐ Yes
  - ☒ No

☐ Do not know

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

*Text of 1 to 1500 characters will be accepted*

We would argue that it is time to increase the threshold, or even abolish a market share test in light of the overwhelmingly positive effects of joint R&D. The current cap of 25% is not sufficient to indicate market power, since market shares at that level are unlikely to raise significant antitrust concerns. See attached submission.

- \* 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

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

*Text of 1 to 1500 characters will be accepted*

We are of the view that there should not be any R&D-related hard core restrictions, at most, some could be viewed as excluded restrictions (and moved to Article 6 of R&D BER). See attached submission.

- \* 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

\* 4.38 If No, please explain what aspect of this provision fails to correctly identify specialisation agreements that are compliant with Article 101 of the Treaty

*Text of 1 to 1500 characters will be accepted*

Two areas where we see a particular need for clarification: First, the assessment of economic factors when a co-operation enables the parties to launch a new product or service (cf. para. 163 of the HGL). Second, more guidance on how the Commission assesses the "overall effects" of production agreements that also provide for the joint production of the jointly manufactured goods or other "integrated commercialisation functions". See attached submission.

\* 4.39 The market share threshold of 20% and its application, provided for in Articles 3 and 5 of the Specialisation BER

- ☐ Yes  
☒ No  
☐ Do not know

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

*Text of 1 to 1500 characters will be accepted*

We suggest to evaluate the 20% 'safe harbour' thresholds in the HGL /Specialisation BER. The threshold should be increased to 25% which is, after all, a safe harbour for transactions under EU merger control. See attached submission.

\* 4.41 The list identified in Article 4 of the Specialisation BER which make the exemption not available for agreements that have as their object price fixing, certain limitations of output or sales or market or customer allocation ('hardcore restrictions')

- ☒ Yes  
☐ No  
☐ Do not know

4.43 Based on your experience, are there other elements, besides those listed in the previous questions that should have been clarified, added, or removed to improve the guidance given by the BERs?

*Text of 1 to 3000 characters will be accepted*

See attached submission.

\* 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

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

- ☐ Yes  
☒ No  
☐ Do not know

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

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

### **Costs**

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

*Text of 1 to 1500 characters will be accepted*

N/A

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

*Text of 1 to 1000 characters will be accepted*

N/A

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

*Text of 1 to 500 characters will be accepted*

N/A

5.4 Please explain how you calculate these costs

*Text of 1 to 1500 characters will be accepted*

N/A

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

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

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*

If the R&D BER were not in place, the costs of compliance for firms undertaking R&D would increase, which would ultimately be to the detriment of the consumers.

This is because in the absence of the block exemption, a company's R&D undertakings would be subject to scrutiny by NCAs and, potentially, national courts in the EEA. This would present a risk of divergent interpretation on key points.

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*



We are not in a position to provide this information.

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*

If the Specialisation BER were not in place, the costs of compliance for firms undertaking R&D would increase, which would ultimately be to the detriment of the consumers.

This is because in the absence of the block exemption, a company's R&D undertakings would be subject to scrutiny by NCAs and, potentially, national courts in the EEA. This would present a risk of divergent interpretation on key points.

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*

We are not in a position to provide this information.

**Benefits**

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

*Text of 1 to 1500 characters will be accepted*

See attached submission.

**Benefits vs. costs**

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

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

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

\* 5.17 Regarding the **Specialisation BER**

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

\* 5.19 Regarding the **HGL**

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

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

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

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

1000 characters max. for each row

	Major trends/changes	Articles of the HBERs and/or recitals of the HGL	Short explanation/concrete examples
1	Joint bidding	Paragraph 37 HGL	Very limited guidance in the current HGL. The Commission and Member States appear to be taking an increasingly hard line on joint bidding arrangements. See attached submission.
2	Sustainability	Not addressed.	We will provide separate comments in due course.
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*

See attached submission.

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

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

\* 6.5 Please explain your reply

*Text of 1 to 1500 characters will be accepted*

See attached submission.

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

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

\* 6.7 Please explain your reply

*Text of 1 to 1500 characters will be accepted*

See attached submission.

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

- ☒ Still relevant
- ☐ No longer relevant

☐ Do not know

\* 6.9 Please explain your reply

*Text of 1 to 1500 characters will be accepted*

See attached submission.

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

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

\* 6.11 Please explain your reply

*Text of 1 to 1500 characters will be accepted*

See attached submission.

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

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

\* 6.13 Please explain your reply

*Text of 1 to 1500 characters will be accepted*

See attached submission.

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

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

- ☐ Yes  
☒ No

☐ Do not know

\* 7.2 Please explain

*Text of 1 to 3000 characters will be accepted*

In the attached submission, we have flagged a number of smaller inconsistencies between the HBERs and the HGL. In addition, we note that the Guidelines on the application of Article 101(3) TFEU would need to be reviewed in order to accommodate some of the benefits that may stem from horizontal cooperation agreements, in particular in the area of sustainability. A major obstacle for companies seeking to collaborate on sustainability projects is the lack of recognition under the Article 101(3) TFEU Guidelines for benefits which arise over the longer term or which are not easy to quantify or which benefit consumers outside the market to which the agreement falling under Article 101(1) TFEU relates. We will submit detailed comments on sustainability in due course.

\* 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*

We do not see any incoherency. However, we note that safe harbours based on market shares should be consistent with comparable safe harbours used in other instruments, notably the Horizontal Merger Guidelines, which recognise that concentrations where the market share of the undertakings concerned does not exceed 25% are unlikely to impede effective competition.

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

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

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

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

- ☒ Yes  
☐ No  
☐ Do not know

\* 8.2 Please explain your reply

*Text of 1 to 1500 characters will be accepted*

The R&D BER adds value in the assessment of the compatibility of R&D agreements with Article 101 TFEU compared to, in their absence, a self-assessment exercise. See attached submission for further comments.

\* 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 adds value in the assessment of the compatibility of specialisation and joint production agreements with Article 101 TFEU compared to, in their absence, a self-assessment exercise. See attached submission for further comments.

\* 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 add value in the assessment of the compatibility of certain horizontal agreements with Article 101 TFEU. See attached submission for further comments.

## 9 Specific questions

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### Final comments and document upload

9.1 Is there anything else with regard to the R&D and Specialisation BERs and the HGL that you would like to add?

*Text of 1 to 3000 characters will be accepted*

See attached submission.

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

**63ccba78-fe03-4a92-b005-0045423a5e5a/BAKER\_MCKENZIE\_HORIZONTALS\_PAPER\_2020.PDF**

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

- ☒ Yes  
☐ No

## Contact

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