

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

Fields marked with * are mandatory.

1

Introduction

Background and aim of the public questionnaire

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

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

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

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

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

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

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

Submission of your contribution

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

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

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

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

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

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

Duration of the consultation

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

Privacy and confidentiality

*** 1.1 Publication privacy settings**

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

Anonymous

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

Public

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

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

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

2 About you

* 2.1 Language of my contribution

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

* 2.2 First name

Markus

* 2.3 Surname

Erdmann

* 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

VW activities cover: development, manufacture, marketing, sale and distribution of passenger cars, commercial vehicles, trucks, buses, chassis, engines and motor bikes, including related products, mobility solutions, financial and insurance services.

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

Text of 1 to 250 characters will be accepted

Automotive, financial Services and mobility Services.

*** 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](#)):**

Mainly manufacture of motor vehicles (29.10), but also others in Division 29 and others (related to the manufacture of motor vehicles)

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

Passenger cars, light commercial vehicles, trucks, buses, Coaches, spart parts, accessories, mobility Services, financial services

*** 2.15 Country of origin**

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

- | | | | |
|-------------------------------------------|------------------------------------------|-------------------------------------|--------------------------------------------------------|
| <input type="radio"/> Afghanistan | <input type="radio"/> Djibouti | <input type="radio"/> Libya | <input type="radio"/> Saint Martin |
| <input type="radio"/> Åland Islands | <input type="radio"/> Dominica | <input type="radio"/> Liechtenstein | <input type="radio"/> Saint Pierre and Miquelon |
| <input type="radio"/> Albania | <input type="radio"/> Dominican Republic | <input type="radio"/> Lithuania | <input type="radio"/> Saint Vincent and the Grenadines |
| <input type="radio"/> Algeria | <input type="radio"/> Ecuador | <input type="radio"/> Luxembourg | <input type="radio"/> Samoa |
| <input type="radio"/> American Samoa | <input type="radio"/> Egypt | <input type="radio"/> Macau | <input type="radio"/> San Marino |
| <input type="radio"/> Andorra | <input type="radio"/> El Salvador | <input type="radio"/> Madagascar | <input type="radio"/> São Tomé and Príncipe |
| <input type="radio"/> Angola | <input type="radio"/> Equatorial Guinea | <input type="radio"/> Malawi | <input type="radio"/> Saudi Arabia |
| <input type="radio"/> Anguilla | <input type="radio"/> Eritrea | <input type="radio"/> Malaysia | <input type="radio"/> Senegal |
| <input type="radio"/> Antarctica | <input type="radio"/> Estonia | <input type="radio"/> Maldives | <input type="radio"/> Serbia |
| <input type="radio"/> Antigua and Barbuda | <input type="radio"/> Eswatini | <input type="radio"/> Mali | <input type="radio"/> Seychelles |
| <input type="radio"/> Argentina | <input type="radio"/> Ethiopia | <input type="radio"/> Malta | <input type="radio"/> Sierra Leone |

- Armenia
- Aruba
- Australia
- Austria
- Azerbaijan
- Bahamas
- Bahrain
- Bangladesh
- Barbados
- Belarus
- Belgium
- Belize
- Benin
- Bermuda
- Bhutan
- Bolivia
- Bonaire Saint Eustatius and Saba
- Bosnia and Herzegovina
- Botswana
- Bouvet Island
- Brazil
- British Indian Ocean Territory
- British Virgin Islands
- Brunei
- Bulgaria
- Burkina Faso
- Burundi
- Cambodia
- Cameroon
- Canada
- Cape Verde
- Falkland Islands
- Faroe Islands
- Fiji
- Finland
- France
- French Guiana
- French Polynesia
- French Southern and Antarctic Lands
- Gabon
- Georgia
- Germany
- Ghana
- Gibraltar
- Greece
- Greenland
- Grenada
- Guadeloupe
- Guam
- Guatemala
- Guernsey
- Guinea
- Guinea-Bissau
- Guyana
- Haiti
- Heard Island and McDonald Islands
- Honduras
- Hong Kong
- Hungary
- Iceland
- India
- Indonesia
- Marshall Islands
- Martinique
- Mauritania
- Mauritius
- Mayotte
- Mexico
- Micronesia
- Moldova
- Monaco
- Mongolia
- Montenegro
- Montserrat
- Morocco
- Mozambique
- Myanmar /Burma
- Namibia
- Nauru
- Nepal
- Netherlands
- New Caledonia
- New Zealand
- Nicaragua
- Niger
- Nigeria
- Niue
- Norfolk Island
- Northern Mariana Islands
- North Korea
- North Macedonia
- Norway
- Oman
- Singapore
- Sint Maarten
- Slovakia
- Slovenia
- Solomon Islands
- Somalia
- South Africa
- South Georgia and the South Sandwich Islands
- South Korea
- South Sudan
- Spain
- Sri Lanka
- Sudan
- Suriname
- Svalbard and Jan Mayen
- Sweden
- Switzerland
- Syria
- Taiwan
- Tajikistan
- Tanzania
- Thailand
- The Gambia
- Timor-Leste
- Togo
- Tokelau
- Tonga
- Trinidad and Tobago
- Tunisia
- Turkey
- Turkmenistan

- | | | | |
|--------------------------------------------------------|-----------------------------------|-------------------------------------------------------------------|------------------------------------------------------------|
| <input type="radio"/> Cayman Islands | <input type="radio"/> Iran | <input type="radio"/> Pakistan | <input type="radio"/> Turks and Caicos Islands |
| <input type="radio"/> Central African Republic | <input type="radio"/> Iraq | <input type="radio"/> Palau | <input type="radio"/> Tuvalu |
| <input type="radio"/> Chad | <input type="radio"/> Ireland | <input type="radio"/> Palestine | <input type="radio"/> Uganda |
| <input type="radio"/> Chile | <input type="radio"/> Isle of Man | <input type="radio"/> Panama | <input type="radio"/> Ukraine |
| <input type="radio"/> China | <input type="radio"/> Israel | <input type="radio"/> Papua New Guinea | <input type="radio"/> United Arab Emirates |
| <input type="radio"/> Christmas Island | <input type="radio"/> Italy | <input type="radio"/> Paraguay | <input 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

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

These include i.e. industry initiatives on white papers for certain Topics with industry-wide relevance.

* 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

The HBER have, in principle, contributed to promoting competition in the EU due to more legal certainty (safe harbors).
However, we suggest that reformed HBER should recognize how fast certain industries and sectors are changing, also by allowing more pro-competitive co-operations. This includes, in the automotive industry, not only changes through new big-data applications, but also by disruptive new technologies (like autonomous driving), as well as ground-braking shifts in the overall transportation sector. As the development of entirely new technologies requires large investments, co-operations are also needed to share costs and to ensure that European customers can fully benefit from new technologies.

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

Please see our answer to Question 6.1. (1-3).

* 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 main benefit lies in the safe harbors provided and the legal certainty generally provided under the BER, which is significantly more efficient in terms of costs and legal certainty as e.g. a situation with only guidelines or even without any secondary laws and / or guidance detailing the prohibition under Art. 101 (1) TFEU respectively the exemptions under Art. 101 (3) TFEU.

* 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

It would be appreciated to have more guidance on the application of the specialization BER or the horizontal guidelines within horizontal co-operations amongst competitors. This is important for those cases in which the business relationship focuses on the mere supply of goods, especially where they include a cross supply of goods and services.

* 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 main benefit lies in the safe harbors provided and the legal certainty generally provided under the BER, which is significantly more efficient in terms of costs and legal certainty as e.g. a situation with only guidelines or even without any secondary laws and / or guidance detailing the prohibition under Art. 101 (1) TFEU respectively the exemptions under Art. 101 (3) TFEU.

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

Uncertainty remains especially with respect to details on market information systems or benchmarks about certain financial figures and more specifically regarding the requirements of aggregation and or aging of data.

We would also appreciate more guidance with regard to innovative logistic initiatives in the broader context of a “digital economy” (see also European cloud platform GAIA-X). As an example, the frequent/real-time exchange of supply chain information (such as individual capacities or demand) could be characterized as potentially critical, but typically also benefits the industry as a whole and thus consumers, e.g. by preventing the sudden disruption of supply chains.

* 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 lack of legal certainty derives from the unclear wording of the HGL. They are in particular relevant with regard to a potential information exchange in the context of price and terms negotiations that are conducted by a centralized yet independent entity. In addition, the determination of the relevant product market in case of undertakings' non-primary products is often only possible with high efforts.

As an example, benefits would arise from the common purchase of travel services. Such costs are typically not essential for industry-related production (they are typically not even related to a specific product). However, theoretically air route-related markets and market-shares would have to be determined, which is sometimes not even possible. Thus, an establishment of safe-harbors for certain non-product-related general costs would be helpful. A limit of such a safe-harbor could be drawn if competitors on non-related markets had more than, e.g., 30% market share.

* 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

* 4.18 Please explain your reply

Text of 1 to 1500 characters will be accepted

This is true only partially. On the one hand it would be desirable to have clear rules, e.g. for Think Tanks, association work and other forms of cooperation in the field of the preparation, pre-standard development or rather in the development of technical white papers etc., if and when these forms of work can lead to de facto pre-standardization due to the involvement of strong market participants. On the other hand, the current and extremely broad definition of the term "standardization agreement" in point 257 in conjunction with the reference in footnote 1 to the fact that standardization can also be achieved by agreements between individual companies needs to be specified. There should be a safe harbor up to certain joint market shares for the product markets concerned, within which no effects comparable to de-fact standardization would occur and where therefore the strict rules on standardization settings do not apply.
Please also see supplement 2 (see answer to Q. 9.2).

* 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

* 4.21 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

Clarifications and supplements would be desirable, particularly with regard to international sustainability and compliance initiatives.
In addition, clarifications and supplements would be desirable for the case that companies act together in restructuring another company at the threat of insolvency. Please see our separate answer as supplement 1 (see answer to Q. 9.2).

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

Please see answer to Q. 4.34.

* 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

In particular, it would be desirable to have more clarity on what “full access” in the sense of Art. 3 par. 2 s. 1 R&D-exemption requires in terms of time. Some players assume that access for an unlimited period does not need to be granted, but that an “option period” of several years is also permissible. A clarification would be useful, as well as with regard to the question of what should be included in an access claim. It is also questionable, not at least from a legal and technical point of view, whether the regulatory approach in the form of the catalogue of minimum requirements in Art. 3 R&D-exemption is still appropriate in the overall context of the rest of the system and does not lead to more legal uncertainty. In particular, it deviates from the established flat-rate exemption system in the absence of hardcore restrictions (pursuant to Art. 5 R&D-exemption) and the prohibition of individual clauses (pursuant to Art. 6 R&D-exemption).

* 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

Such a proper identification is only possible if a sufficiently clear and legally secure market-definition exists, in particular based on previous decision-making practice on existing markets. In innovation-markets or in research projects where it is difficult to assign to a market or where the assignment to a market can change, especially the separation between the rigid borders of market share threshold of 25% on the one hand and the complete absence of market shares on the other hand is highly problematic. As mentioned above, it may lead to considerable legal uncertainty if the classification of a competitor within the framework of a research project dealing with new technologies with a revolutionary approach is based on known products and markets or is derived from them. The legal uncertainty then stems in particular from the rigid threshold or, in any event, from the blanket non-exemption linked to it, which in fact can make the R&D considerably more difficult or can even stop it.

* 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

Only partially, as in the daily business certain definitions and provision could be more precise. This applies especially to the differentiation of admissible “field of use” restriction as outlined in recital 15 and the content of the prohibition under Art. 5 lit. b) regarding hardcore restrictions on output or sales. Applies to the interplay between Art. 5 lit. a) and lit. b) (iv). Further it should be clarified in the context of Art. 5 lit. b) (iii) and lit. d) whether and to what extent passive sales need to be allowed in the context of specialization on exploitation.

* 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

* 4.34 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

Particularly, the interplay between the prohibition under Art. 6 lit. b) and the definition in Art. 1 para. 1 lit. g) and the conditions for exemption under Art. 3 para. 2 and 3 should be clarified with regard to the following: It should be deemed a sufficient exploitation vis-à-vis third parties, if the results of the joint R&D are incorporated within a complex product. This is to say that an exploitation of the results on a stand-alone basis is not necessary.

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

* 4.35 The definitions that apply for the purposes of the Specialisation BER, in Article 1

- Yes
- No
- Do not know

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

Text of 1 to 1500 characters will be accepted

Partially (see answer to Q. 4.8).

* 4.37 The explanations on the type of specialisation agreements to which the exemption applies, provided by Article 2 of the Specialisation BER

- Yes
- No
- Do not know

*

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

- Yes
- No
- Do not know

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

- Yes
- No
- Do not know

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

Text of 1 to 3000 characters will be accepted

* 4.44 Based on your experience, are there other types of horizontal cooperation agreements outside those identified in the R&D and Specialisation BERs which would satisfy the conditions of Article 101(3) of the Treaty?

- Yes
- No
- Do not know

* 4.46 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

Some of the, at least in our view, unintended results could be seen in the very strict interpretation of certain provisions and the resulting uncertainty, especially in paid-for R&D setups with research institutes, where the number of projects might be reduced due to uncertainties.

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

In general, costs are significantly the lower the more detailed the rules of the R&D BER, Specialization BERs and HGLs are.

Expenses include regular legal expenses and sometimes expenses for detailed assessment re applicability of safe harbor. Costs for the application under the guidelines additionally include detailed assessments of external lawyers and also of competition economists, which can be significant.

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 main benefit lies in the safe harbors provided and the legal certainty generally provided under the BERs, which is significantly more efficient in terms of costs and legal certainty as e.g. a situation with only guidelines or even without any secondary laws and / or guidance detailing the prohibition under Art. 101 TFEU. However, as indicated in our submission, there remains room for improvement.

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 would assume the cost increase would be highly significant.

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 main benefit lies in the safe harbors provided and the legal certainty generally provided under the BERs, which is significantly more efficient in terms of costs and legal certainty as e.g. a situation with only guidelines or even without any secondary laws and / or guidance detailing the prohibition under Art. 101 TFEU. However, as indicated in our submission, there remains room for improvement.

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 would assume the cost increase would be highly significant and likely raise current costs by multiple times.

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 main benefit lies in the safe harbors provided and the legal certainty generally provided under the BERs, which is significantly more efficient in terms of costs and legal certainty as e.g. a situation with only guidelines or even without any secondary laws and / or guidance detailing the prohibition under Art. 101 TFEU. However, as indicated in our submission, there remains room for improvement.

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

n/a

* 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

n/a

* 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

Partially (see answer to Q. 7.2).

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	Many industry sectors face significant changes, also through new technologies.	in particular, para. 112 et seq. HGL	<p>For new technologies, it is often difficult to distinguish the development of entirely new products from the mere improvement of existing products.</p> <p>When a R&D co-operation (between competitors) intends to follow the so called “revolutionary approach”, i.e. the development of an entirely new product from scratch, this is even more complex. Furing such a development improvements of already existing, relatively simple products, could be discovered. Such improvements could qualify as R&D between actual or potential competitors on existing markets. If then market share thresholds are exceeded significantly, a potential exemption according to Art. 101 para 3 TFEU is hard to assess with sufficient legal certainty, especially since some scholars argue that such high market shares would exclude an exemptions. In order to gain more legal certainty, further details on the safe-harbor would be useful. They could offer, e.g. in case of high joint market shares at least an exclusion of fines, if access on FRAND terms for third parties is guaranteed.</p>
			It is difficult to assess how many remaining R&D poles for innovation and development additionally exist and

<p>2</p>	<p>The complex assessment of R&D poles.</p>	<p>If competitors have joint market shares above the respective thresholds of the R&D BER, the HGL do only provide legal certainty and orientation to a limited extent.</p>	<p>whether their number is sufficient (rather, the clarifications of the TTBER offer better indications; however, their application in the R&D context is not clear). Additionally, there is no precise clarification of circumstances which are usually sufficient to conclude that there is no detriment of competition (even if there is a sufficient number of R&D poles). A catalogue comparable to Art. 3 R&D BER would be helpful. In addition, we consider “comfort letters” in exceptional circumstances necessary. Such letters would need to be issued within short term (max 1 month) and should be binding.</p>
<p>3</p>	<p>In the context of digitalization, more and more complex product and IT landscapes evolve. Often no typical OEM-Tier1-relations exist anymore. More often systems have to be adapted or interfaces have to be developed case-by-case.</p>	<p>Significant clarification is needed in the cases of “contracted” R&D. The existing rules of the R&D BER on co-operation in the sense of “genuine common” R&D between competitors and Section 3 of the HGL (research and development agreements) are suitable.</p>	<p>IP rights, especially on individualized interfaces, should belong to the (fully paying) purchaser, even beyond (certain) market share thresholds. In addition, counter-exceptions of the applicability of the R&D BER are desirable, e.g. where R&D aspects are of minor importance for the respective supply relationship. Alternatively, „safe-harbors“ for aforementioned minor R&D co-operation aspects could be installed, even above market share thresholds. In this respect, we would like to point the Commission also towards its notice of 18 December 1978 concerning its assessment the certain subcontracting agreements in relation to Article 85 (1) of the EEC Treaty. In the field of “contracted” R&D the concession of exploitation rights is not appropriate, even if it concerns only indirect subsequent use in the case of further R&D. In this context, we want to stress that Art. 3 para 2 sentence 2 R&D BER (specialization in the context of</p>

			exploitation), regularly and according to most scholars, allows a limitation/ specialization of the other party's exploitation only in certain time-limits (especially vis-a-vis a "competitor"). However, this is not always easily determined, as profits are many times generated by licensing property rights out as a form of exploitation.
4	Tendencies to more data and platform driven business models.	Para 55 et seq., 225 et seq. HGL	Data driven / platform business models require either different or more distinct considerations from an antitrust perspective that are not adequately covered by the existing rules. Consequently, there is a lack of guidance and thus legal certainty. This is in particular true for undertakings that offer either directly or by controlled entities data-based services such as cloud solutions via multilateral platforms and are at the same time user of such services.
5	The number of patent infringement / licensing law suits etc. has significantly increased in certain areas (e.g. telecommunications)	Para 269 HGL	Non-compliance with the FRAND commitment should be considered a violation of competition rules that should be enforced by competition authorities. We propose that the guidelines remain very clear on this point, and emphasize the relevance of the applicable competition law considerations. For further details see supplement 2 (see our answer to Q 9.2).
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

n/a

* 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

n/a

* 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

Section 2 on the HGL relating to information exchange is of high relevance for the day-to-day legal advice given. The Commission should consider to give even more guidance (e.g. level of aggregation, data used for a benchmark) to increase the legal certainty for undertakings.

* 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

Section 5 is still relevant, however some more flexibility in certain aspects would be appreciated (see answer to Q. 4.14)

* 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

Additional provisions in the HGL referring to the use of and offers made via multilateral platforms are urgently required. This is in particular true with a view to the prevention of unlawful information exchange and coordination within vertical integrated undertakings. National competition authorities such as the German Bundeskartellamt already try to give more legal guidance by e.g. more consultations and publications of case reports. A harmonized European approach would be appreciated. At this stage, legal uncertainty remains as to which requirements are needed to ensure antitrust compliance in particular, when taking into account the pending proceedings in this area. It is thus important to ensure one level playing field.

* 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

Is still relevant, however some more flexibility in certain aspects would be appreciated (see answer to Q. 4.18)

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

Apart from the contradictions and ambiguities already mentioned in this statement, challenges remain with the Commissions general view of Article 101 (3) TEU that consumer benefits are less likely if defined thresholds of BER are exceeded.

Although co-operations outside the scope of the BER could be beneficial and pro-competitive a legal assessment with a sufficient degree of legal certainty is either not possible at all or can only be reduced to a limited extend with the help of external legal and economist experts. Undertakings should be give the possibility to have a clear view of the Commission in particular in highly costly and sector-changing planned co-operations.

*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

European and national legislation and policies should enable a level playing field with international powerful competitors (e.g. „big data companies). However, the Commission should consider if such level playing field exists for sector changing future technologies with a view to the current rather strict concept of the BER and the HGL that currently lacks some important legal guidance and leaves room to further improve legal certainty. This is in particular true for co-operation models where a financial splitting of development costs and risks is artificial or not possible at all.

In addition, there are new trends in the fields of sustainability and compliance that are not properly reflected on European level but correspond to national rules or initiatives.

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 main benefit lies in the safe harbors provided and the legal certainty generally provided under the R&D-BER, which is significantly more efficient in terms of costs and legal certainty as e.g. a situation with only guidelines or even without any secondary laws and / or guidance detailing the prohibition under Art. 101 (1) TFEU respectively the exemptions under Art. 101 (3) TFEU.

* 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 main benefit lies in the safe harbors provided and the legal certainty generally provided under the Specialization-BER, which is significantly more efficient in terms of costs and legal certainty as e.g. a situation with only guidelines or even without any secondary laws and / or guidance detailing the prohibition under Art. 101 (1) TFEU respectively the exemptions under Art. 101 (3) TFEU.

* 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

On the one hand the HGL create additional guidance and thus a „safe harbor“ for undertakings. On the other hand, the HGL remains occasionally vague and not as specific and clear as needed on other areas.

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

Due to the fast changing trends and requirements the Commission should consider if the current validity of the BER and the guidelines are appropriate or should be shortened to e.g. 5 years to better reflect the fast changing trends and questions.

Alternatively and with a view to legal certainty, a new provision could be beneficial which would allow a revision of the existing rules prior to the end of the term of the BER if a sufficient - to be defined - number of requests from affected stakeholder has reached the Commission underlying the need for modifications.

In this context, more flexibility for experimenting formats and clauses for a limited time period could prove to be stimulating for innovation.

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

The maximum file size is 1 MB

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

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

- Yes
 No

Contact

COMP-HBERS-REVIEW@ec.europa.eu