

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

Daniel

* 2.3 Surname

Harrison

* 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

Clifford Chance LLP

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

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

The legal sector, including competition law

* 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](#)):

69

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

Legal 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 |
| <input type="radio"/> Armenia | <input type="radio"/> Falkland Islands | <input type="radio"/> Marshall Islands | <input type="radio"/> Singapore |
| <input type="radio"/> Aruba | <input type="radio"/> Faroe Islands | <input type="radio"/> Martinique | <input type="radio"/> Sint Maarten |
| <input type="radio"/> Australia | <input type="radio"/> Fiji | <input type="radio"/> Mauritania | <input type="radio"/> Slovakia |

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

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

* 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

* 3.4 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

* 3.6 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

Our view is that, in general, the HBERs and the HGL have contributed to promoting competition in the EU by providing a reasonable degree of legal certainty for the most common horizontal arrangements.

The areas in which the contribution of the HBERs and HGL has been limited have, in general, been those in which those instruments have lacked clarity. We highlight those areas that we have encountered most often in our responses below.

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

The R&D BER and HGL provide a reasonable level of legal certainty to assess whether R&D agreements and/or specific clauses are exempted from Article 101. However, there are some areas where legal certainty could be improved. Specific issues are highlighted in our responses below.

More generally:

- We would welcome a clearer statement that the R&D BER and the Specialisation BER can both be applied to the same overall cooperation than is provided in footnote 4 of page 6 of the HG (i.e. that each block exemption "is defined by its own scope"). Alternatively, the Commission might consider combining the two BERs into a single Horizontal BER.
- We consider that there should be a general presumption that, for arrangements involving both R&D and subsequent production and/or commercialisation, it is the R&D that is the relevant "centre of gravity" of the arrangements, given that subsequent production/commercialisation cannot take place without the prior R&D.
- The most useful provisions of the HGL are those that set out specific safe harbours, such as joint purchasing between parties with market shares of 15% or less. To the extent possible, the Commission should consider whether such safe harbours could be provided for all of the types of agreement covered.
- Clarification of the degree of connection to which the exploited products must have with the R&D would also be useful, as the criterion of "decisiveness" in Recital 11 of the BER is difficult to apply in practice.

- * 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

Our view is that the HBERs and HGL have significant positive benefits for businesses and consumers due to the legal certainty they bring for a range of commercial arrangements.

- * 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

On the whole, the Specialisation BER and the related guidance in the HGL provide a reasonable level of legal certainty for the purpose of assessing whether production/specialisation agreements and/or specific clauses are exempted from the application of Article 101. However, there are some areas where we consider that legal certainty could be improved. These are highlighted in our responses below. See also our general comments in response to question 4.4, the first three bullet points of which are equally applicable to the Specialisation BER.

In addition, the Commission should consider whether it has identified any competition concerns arising from agreements to expand production that fall within the safe harbour of paragraph 169 HGL. If it has not, we submit that these should be included within the scope of the Specialisation BER.

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

- ☒ Yes
☐ No
☐ Do not know

- * 4.10 Please explain your reply

Text of 1 to 1500 characters will be accepted

On the whole, the Specialisation BER and the related guidance in the HGL provide a sufficient level of legal certainty for the purpose of assessing whether Specialisation agreements and/or specific clauses are exempted from the application of Article 101 of the Treaty. However, there are some areas where we consider that legal certainty could be improved. These are highlighted in our responses below.

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

We suggest: (i) Clarifying that (in line with e.g. Case C-286/13 Dole) it is not just exchanges of future pricing intentions that may amount to object restrictions, but also "price-setting factors" such as demand forecasts / information on factors affecting supply and demand levels. The HGL should draw a clear line between permissible discussions of "market colour" and impermissible disclosures of "price-setting factors"; (ii) a statement that a customer will not facilitate an unlawful exchange if it discloses one supplier's proposed pricing to another, to secure lower prices (a common misconception, which can give rise to significant anticompetitive effects); (iii) Clarification of the circumstances in which public announcements of intended (i.e. uncommitted) future prices, as public discussion of "price setting factors", will be considered to be a by-object restriction; (iv) Guidance on when and how businesses should "distance" themselves from an anticompetitive disclosure made by a non-competitor (e.g. as in the Eturas and VM Remonts judgments) or a non-human (e.g. algorithmic/machine learning processes); (v) Guidance on the disclosure of information for due diligence and integration planning in mergers and joint ventures (both full function and non-full function); (vi) A market share-based safe harbour (e.g. 20%), below which exchanges of information that are not by-object infringements may be assumed not to have anticompetitive effects

See also response to question 6.7.

* 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 provisions of the HGL on joint purchasing could be improved as follows: (i) the distinction in paragraphs 205-206 between a "by object" purchasing cartel and a purchasing agreement (e.g. buying alliance) that is assessed by reference to its effects is not coherent. The Commission should clarify the significance of factors such as the disclosure of the joint purchasing arrangement to suppliers and the existence of a separate purchasing entity; (ii) Paragraph 208 of the HG sets out a safe harbour for joint purchasing between parties with market shares under 15%, as these are "in most cases" are unlikely to give rise to market power and are likely to satisfy the 101(3) criteria. This is useful guidance, but could go further. Unless the Commission has identified cases in which joint purchasing falling below the 15% thresholds has resulted in competitive harm, we consider that such arrangements could usefully be included in the Specialisation BER, as the resulting legal certainty would facilitate more procompetitive joint purchasing. We also consider that a 20% threshold would be more appropriate; (iii) The BER cover might also extend to joint purchasing arrangements between parties with common costs falling below a certain percentage threshold or where the value of the jointly purchased products falls below a certain percentage of their overall input costs (failing that, paragraph 214 might usefully include indicative thresholds, in the same way as paragraph 208).

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 should include guidance on joint bidding. In this respect, we disagree with the approach taken by the EFTA Court (Ski Taxi) and the Danish and Norwegian authorities, which treats joint bidding between actual or potential competitors as a by-object infringement if they are capable of bidding independently. Joint bidding between actual or potential rivals is typically driven by achievable efficiencies (and disclosed in advance to the customer), as consortium members may be capable of bidding independently, but have a minimal chance of winning on price or quality if they do. The prevalence of these efficiencies calls into question whether joint bidding reveals a sufficient degree of harm to competition such that it should not be treated as a by-object restriction, in line with the CJEU's recent judgment in Case C-307 (Generics UK), paragraph 105. The HGL should also clarify that the economic rationale of a joint bidding arrangement, which is naturally subject to the parties' reasonable discretion, is a relevant factor.

The HGL should also cover the common practice of cross-deliveries between competitors, i.e. where a business acquires volumes from a competitor, or arranges for a competitor to deliver to its customers, in circumstances where it does not have capacity to meet its customers' demand, or delivery can be made by the competitor more efficiently.

The Commission should also consider adding the 15% safe harbour for marketing agreements to a block exemption.

* 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 could be improved as follows:

- Paragraph 263 should recognise the significant consumer benefits of standardisation agreements that create interoperable products and reduce redundancy and waste. In addition, the European Parliament's recent move to mandate a common standard for phone chargers is a good example of why an obligation to comply with a standard may be indispensable for the achievement of significant efficiencies, such that the presumption against the indispensability of such obligations in paragraph 318 of the HGL should be removed.
- In line with our response to question 4.4, a market share-based safe harbour for standardisation agreements in paragraph 296 HGL would be a valuable addition to the HGL.

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

See our response to Question 4.22 below.

* 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 agree with Vice-President Vestager that this review of the HGL is an "opportunity to explain how companies can put together sustainability agreements without harming competition" (GCLC Conference Speech, October 2019). The current HGL fail to reflect the long standing case law of the EU courts according to which wider societal benefits form part of the "technical or economic progress" that may be taken into account under Article 101(3) (for example the "pursuit of public interest" in Case T-528/93 Métropole Télévision). The HGL should, in particular:

(i) recognise that the consumer welfare standard and the requirements of Articles 7, 9 and 11 TFEU allow, or even require, broader societal benefits to be taken into account, and that the difficulty of quantifying certain types of sustainability benefit is not an insurmountable obstacle in this respect. The HGL should outline methodologies for valuing benefits (such as the consumer "willingness to pay" adopted in the Dutch Chicken of Tomorrow case) not only for end consumers, but also for intermediate consumers such as retailers.

(ii) address the limits to what is achievable by applying competition law. For instance, animal welfare and the elimination of exploitation of farmers in third countries are laudable aims, but the structure of Article 101(3) implies that these must be assessed by reference to the benefits to EU consumers of the relevant products (not the direct benefits for animals or third country farmers) e.g. in terms of the value consumers place on the products (which was insufficient to justify an agreement between Dutch retailers to discontinue sales of chickens not meeting their "chicken of tomorrow" standard), reductions in supply shocks caused by unsustainable production (see the Fairtrade Foundation's "Building Sustainable Supply Chains Through Business Collaboration – Exploring the Implications of Competition Law"), or benefits for the global environment of which the EU forms a part.

(iii) explore the circumstances in which joint action may satisfy the indispensability criterion, in particular due

to "first mover disadvantages", as well as the different ways in which such objectives may be achieved proportionately (e.g. through joint commitments to minimum purchasing volumes of sustainable products rather than the complete exclusion of non-sustainable ones).

However, additional guidance in the HGL is unlikely to suffice, in our view. This should be an area in which the Commission expresses a willingness to finally apply its Notice on informal guidance relating to novel questions of competition law, so that businesses can obtain sufficient legal certainty to proceed with such initiatives, and to contribute to the development of tools for the quantification and weighing of the benefits of sustainability. agreements.

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

Article 1(1)(t): The definition of "potential competitor", and the question of whether a business would supply a given technology or process within three years "on realistic grounds", is difficult to apply. This results in excessively cautious application of the R&D BER - particularly when a party is active in a broad "innovation space" - and so limits pro-competitive cooperation. We suggest (i) clarification in paragraph 10 of the HG of the circumstances in which realistic grounds may be considered to arise, and a presumption that they will not if a party has not in the past 3 years carried out any R&D in respect of the relevant product technology or process; and (ii) limiting the definition to entry within two years.

Article 1(1)(m): The HGL should clarify that the different forms of joint exploitation can be combined (e.g. production by a third party and joint distribution by the parties).

* 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

Given that paid-for research does not involve significant cooperation between the parties (other than commissioning the research), we consider that the requirement for full access to the final results of paid-for R&D is unduly restrictive and should be removed.

In addition, the HGL could usefully provide guidance on objective methods to safely determine that compensation for the purposes of Article 3(3) is not so high as to effectively impede access.

* 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 regularly encounter difficulties in determining market shares for technology markets, as the "reliable market information" required by Article 7 is often not available. In addition, the dynamic nature of many innovation markets means that market shares often fluctuate substantially, and even high market shares tend not to indicate lasting market power. We therefore submit that the Commission should consider raising the 25% market share threshold, and increasing the periods of time specified in Article 7(d) and (e) within parties may benefit from the BER when their market shares exceed the relevant threshold. At minimum, the R&D BER should apply the same approach as the Technology Transfer BER (Article 8(2)) and apply a two year period for any increase above the relevant threshold, irrespective of its magnitude.

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

- ☐ Yes
☒ No
☐ Do not know

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

Text of 1 to 1500 characters will be accepted

Article 4(1) should make it clear that, where the R&D results in a number of different contract products and technologies, the seven year period applies to each such product or technology separately, from the date on which it is first put on the market (and not a single period for all contract products or technologies running from the date on which any resulting product or technology is first put on the market).

Article 4(2) should refer to "periods" (plural), given that Article 4(1) refers to two different periods.

* 4.31 The list identified in Article 5 of the R&D BER which make the exemption not available for agreements that have as their object certain restrictions or limitations ('hardcore restrictions')

- ☒ Yes
- ☐ No
- ☐ Do not know

* 4.33 The list of obligations included in agreements to which the exemption does not apply ('excluded restrictions'), identified in Article 6 of the R&D BER

- ☐ Yes
- ☒ No
- ☐ Do not know

* 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

For consistency, Article 6(a) of the R&D BER should be aligned with the approach in Article 5(1)(b) of the Technology Transfer BER (and the explanation in paragraph 139 of the Technology Transfer Guidelines), whereby a right of termination is available only if the relevant intellectual property rights are committed exclusively to the research and development project.

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

(i) The definition of "distribution" should make it clearer that some forms of joint distribution are excluded. In particular, in the DONG/DUC case the Commission denied the application of the Specialisation BER on the basis that the joint distribution of the parties' jointly produced natural gas did not give rise to sufficient efficiencies and was therefore considered to fall into a separate category of "joint co-ordination of sales" (see Competition Policy Newsletter Number 2, Summer 2003).

(i) See also our response to Question 4.24 regarding the definition of "potential competitor", which applies equally in the context of specialisation. A sensible safe harbour would provide for a presumption of no potential competition if a party has not carried out any internal assessment of the merits of entering the relevant market within the past 3 years.

(iii) We consider that restricting the definition of unilateral specialisation to agreements between two parties only is unjustified, as the available efficiencies and competitive effects of such agreement do not change (or are even greater) if more than two parties are involved (provided their market shares are below the relevant thresholds).

(iv) We would also welcome clarification that parties can contract-out responsibility for production to a third party without the specialisation arrangement losing its status as such under Article 1(1)(b) and (c).

* 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

See our response to question 4.44.

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

- ☒ Yes
- ☐ No
- ☐ Do not know

* 4.45 If Yes, please list those types of agreements and explain your reasons

Text of 1 to 3000 characters will be accepted

The Commission should consider whether it has identified any competition concerns arising from agreements with a view to expanding production, joint purchasing agreements and commercialisation agreements and that fall within the safe harbours provided for in paragraphs 169, 208 and 240 respectively. If it has not, we submit that they should be included within a BER. See also our responses to questions 4.8, 4.14 and 4.16.

* 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

See our response to question 4.22 (misapprehension that competition law prevents disclosures by a customer of one supplier's pricing information to another) and question 4.24 (uncertainties regarding the definition of potential competition leading to excessively cautious application of the BERs and HGL and resulting avoidance of procompetitive collaboration).

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

Not applicable

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

Text of 1 to 1000 characters will be accepted

Not applicable

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

Not applicable

5.4 Please explain how you calculate these costs

Text of 1 to 1500 characters will be accepted

Not applicable

- * 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

Our view is that the R&D BER has significant positive benefits for businesses and consumers due to the legal certainty it brings for a range of R&D projects. Consequently, its removal or withdrawal would result in significant additional compliance costs.

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

Not known

- 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

Our view is that the Specialisation BER has significant positive benefits for businesses and consumers due to the legal certainty it brings for a range of specialisation and joint production arrangements. Consequently, its removal or withdrawal would result in significant additional compliance costs.

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

Not known

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

Our view is that the R&D and Specialisation BERs have significant positive benefits for businesses and consumers due to the legal certainty they bring for a range of horizontal cooperation arrangements. The HGL's are valuable for assessing whether arrangements falling outside the BERs would be considered in breach of Article 101(1). In practice, however, the guidance on how to assess horizontal cooperation agreements under Article 101(3) is very rarely applied, in our experience, as businesses are not willing to assume the risk that the Commission or a national competition authority will share their assessment of the application of the Article 101(3) criteria to the agreement in question. This is a consequence of the paucity, since the entry into force of Regulation 1/2003, of cases in which the Commission and national authorities and courts have found that the Article 101(3) criteria were met.

The lack of precedents is also a reason why examples of different types of their agreement and their assessment in the HGL and particularly useful, and the Commission should therefore consider expanding its use of examples in the HGL as much as possible.

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

The legal certainty of the BERs and the relatively simple and objective criteria mean that they do not usually create costs of such magnitude that the relevant cooperation cannot go ahead.

* 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

The legal certainty of the BERs and the relatively simple and objective criteria mean that they do not usually create costs of such magnitude that the relevant cooperation cannot go ahead.

* 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

The relatively simple and objective criteria of the safe harbours in paragraphs 169, 208 and 240 mean that their application does not usually create costs of such magnitude that the relevant cooperation cannot go ahead. For agreements falling outside these provisions, it is typically necessary to instruct economists and carry out extensive legal analysis, the resulting costs of which can sometimes deter small cooperation projects. For agreements that require an assessment under Article 101(3), the lack of legal certainty afforded by the HGL and the very high evidentiary standard set in Commission infringement decisions means that the costs and legal risks are usually prohibitive and the proposed cooperation does not go ahead even if the parties are confident of significant efficiencies.

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	Possibilities for collusion or price signalling through autonomous algorithmic / machine learning processes	Paras 64-94 HGL	No examples yet of autonomous non-human collusion, but the UK case of Trod (online posters) is an example of collusion through online pricing software programmed for that purpose.
2	CJEU confirmation that a parent exercising decisive influence over a joint venture forms part of a single economic entity with that undertaking	Paragraph 11 HGL	See our response to question 7.2
3	Increased enforcement against information exchange in the context of due diligence and integration planning in mergers and joint ventures	Paras 64-94 HGL	The infringement decision against Altice (Case M.7993)
4	CJEU case law on the circumstances in which a business may be liable for horizontal collusion resulting from the conduct of a third party that is not a competitor	Paras 64-94 HGL	Judgments in Case C-74/14 Eturas, Case C-542/14 VM Remonts
5	Increased demand from consumers and businesses for sustainable, ethical and environmentally-friendly business practices	Not currently addressed	See our response to question 4.22
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

The correct response to the trends identified would be to cater for them in the BERs and HGL, not to eliminate the BERs and HGL.

* 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

The correct response to the trends identified would be to cater for them in the BERs and HGL, not to eliminate the BERs and HGL.

* 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

The correct response to the trends identified would be to cater for them in the BERs and HGL, not to eliminate the BERs and HGL. See also our response to question 4.12

* 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

The correct response to the trends identified would be to cater for them in the BERs and HGL, not to eliminate the BERs and HGL. See also our response to question 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

The correct response to the trends identified would be to cater for them in the BERs and HGL, not to eliminate the BERs and HGL. See also our response to question 4.16

* 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

The correct response to the trends identified would be to cater for them in the BERs and HGL, not to eliminate the BERs and HGL.

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

It is a matter of acute frustration for businesses that in over six decades of EU competition law the Commission has not formally expressed a clear position on whether a parent that exercises decisive influence over a joint venture can coordinate its competitive conduct with the JV, on the basis that they form part of the same undertaking. The uncertainty leads to significant and unnecessary costs, as businesses feel compelled to put into place information barriers and to forego efficiency-enhancing cooperation with their joint ventures, even in circumstances where they have received EUMR clearance which has expressly determined that a full coordination of activities between the JV and parent would not give rise to a significant impediment to effective competition. It also creates obstacles for parent companies wishing to monitor the competitive conduct of their joint ventures to ensure that they are not committing competition law infringement for which they as parent companies, will be held liable, for the very reason that they do form part of the same undertaking.

In our view, the CJEU judgment in Case C-179/12 Dow Chemical Company definitively confirms that a parent company and JV will form part of a single economic entity. Consequently, the Commission's reason for removing the useful confirmation of this point from the draft guidelines issued in respect of the previous review of the HGL no longer applies, so the relevant wording should be restored, i.e. "As a joint venture forms part of one undertaking with each of the parent companies that jointly exercise decisive influence and effective control over it, Article 101 does not apply to agreements between the parents and such a joint venture, provided the creation of the joint venture did not infringe EU competition law." We suggest also including a note to reflect the clarification of the CJEU in Dow Chemical that, for these purposes, two parent companies will not form part of the same economic entity with each other purely by virtue of their participation in the same JV.

* 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

-

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

Our view is that the R&D BER has significant positive benefits for businesses and consumers due to the legal certainty it brings for a range of R&D projects. Such arrangements are not (or are only very rarely) the subject of enforcement action by EU or national competition authorities or litigation in national courts. Consequently, in the absence of the R&D BER there would be insufficient available precedents to guide businesses and their advisers in how to assess the competition law compliance of their R&D projects.

* 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

Our view is that the Specialisation BER has significant positive benefits for businesses and consumers due to the legal certainty it brings for a range of specialisation and joint production arrangements. Such arrangements are not (or are only very rarely) the subject of enforcement action by EU or national competition authorities or litigation in national courts. Consequently, in the absence of the Specialisation BER there would be insufficient available precedents to guide businesses and their advisers in how to assess the competition law compliance of their specialisation and joint production projects.

* 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

Our view is that the HGL has significant positive benefits for businesses and consumers due to the legal certainty it brings for a range of horizontal cooperation arrangements. Many of the types of arrangement covered by the HGL are not (or are only very rarely) the subject of enforcement action by EU or national

competition authorities or litigation in national courts. Consequently, in the absence of the HGL there would be insufficient available precedents to guide businesses and their advisers in how to assess the competition law compliance of their horizontal cooperation arrangements.

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

The HGL are currently silent on the application of the ancillary restraints doctrine in the context of horizontal cooperation agreements. We consider that the HGLs should reflect a consistent treatment of joint ventures, whether or not full-function, such that a non-compete obligation (and related ancillary restraints such as non-solicitation clauses) should be acceptable for the lifetime of a joint venture, if circumscribed as required by the Commission's notice on restrictions directly related and necessary to concentrations.

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

The maximum file size is 1 MB

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

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

- ☒ Yes
☐ No

Contact

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