

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

Belen

* 2.3 Surname

Irissarry

* 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:

AEDC gathers numerous professionals (principally lawyers, economists and academics) who specialise in the study and application of European and national regulations in the Competition law.

* 2.7 Organisation name

255 character(s) maximum

Spanish Association for the Protection of Competition (Asociación Española para la Defensa de la Competencia, hereafter "AEDC").

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.

793306734969-23

* 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*

We organise regular conferences and seminars for the study of developments in Competition law and its relevant regulations, analysing and considering their practical application and evolution.

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

Text of 1 to 250 characters will be accepted

Our members have been involved in competition law cases in all sectors of economy.

* 2.15 Country of origin

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

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

- 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
- Cayman Islands

- Central African Republic
- Chad
- Chile
- China

- Christmas Island
- Clipperton
- Cocos (Keeling) Islands
- 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
- Iran

- Iraq

- Ireland
- Isle of Man
- Israel

- Italy

- Jamaica
- Japan
- 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
- Pakistan

- Palau

- Palestine
- Panama
- Papua New Guinea
- Paraguay
- Peru
- Philippines
- 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
- Turks and Caicos Islands
- Tuvalu

- Uganda
- Ukraine
- United Arab Emirates
- United Kingdom
- United States
- United States Minor Outlying Islands

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

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

* 3.6 How often do you consult the **R&D BER** for guidance on a horizontal cooperation agreement?

- Frequently (several times per year)
- Occasionally (once or twice per year)
- Never

* 3.7 How often do you consult the **Specialisation BER** for guidance on a horizontal cooperation agreement?

- Frequently (several times per year)
- Occasionally (once or twice per year)
- Never

* 3.8 How often do you consult the **HGL** for guidance on a horizontal cooperation agreement?

- Frequently (several times per year)
- Occasionally (once or twice per year)
- Never

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

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

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

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

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

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

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

Text of 1 to 1500 characters will be accepted

The HBERs and the HGL have provided clarity and predictability in a significant number of areas. However, the Contributors believe that certain provisions in the HBERs and the HGL need to be clarified and adapted to tackle the new challenges faced by the EU at a global level. We provide additional details in our answers 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 Section 3 of the HGL provide useful guidance. This being said, there are areas where legal certainty could be improved. Although Contributors are willing to admit that grey areas are unavoidable when the assessment depends on economic realities, legal concepts should be clear. We develop our arguments in our answers to the questions below and in the document attached to this reply.

* 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 legal status of the R&D BER guarantees legal certainty as it legally binds National Competition Authorities and national courts. Therefore, it adds value compared to a situation where only the HGLs would be available.

* 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

The Specialisation BER and Section 4 of the HGL provide useful guidance. But, again, there are areas where legal certainty could be improved. Although Contributors are willing to admit that grey areas are unavoidable when the assessment depends on economic realities, legal concepts should be clear. We develop our arguments in our answers to the questions below and in the document attached.

* 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

Unlike the HGLs, the Specialization BER is legally binding for National Competition Authorities and national tribunals, guaranteeing legal certainty and uniformity, and thereby adding value compared to a scenario where only the HGLs would be available.

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

Section 2 of the HGL was an important first step for bringing legal certainty and uniformity in this field. However, there are still imprecisions which have led to a lack of uniform interpretation of the rules applicable across the EU, leading to different conclusions on very similar matters (i.e. the rent-a-car cases in the Spanish and the French airports). A more clear framework is essential to guarantee that procompetitive exchanges are not unduly discouraged:

- Safe harbours for exchanges between companies with combined shares below 20% or 25% of the market are necessary in order not to discourage efficiency enhancing information exchanges which are unlikely to have any anticompetitive effects
- A checklist approach would need to be avoided, an analysis as to why an information exchange can actually lead to a competitive harm is needed (effects analysis always required)
- The efficiencies aspects of information exchanges should be developed further
- Exchanges unrelated to future prices/quantities should not be considered as a restriction by object. The effects analysis should be the general rule
- No presumption of harm should be applied for information exchanges regarding future prices or quantities
- Specific guidance is required regarding information exchanges using algorithms.
- Guidance on the conditions under which public unilateral communications may amount to anticompetitive public signalling is also needed

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

- Yes
- No
- Do not know

* 4.15 In your view, have the HGL provided sufficient legal certainty on **commercialisation agreements** in the sense of Section 6 of the HGL

- Yes
- No

Do not know

* 4.17 In your view, have the HGL provided sufficient legal certainty on **standardisation agreements** in the sense of Section 7 of the HGL

Yes

No

Do not know

* 4.19 In your view, have the HGL provided sufficient legal certainty on **other types of horizontal cooperation agreements** that are currently not specifically addressed in the HGL (for example sustainability agreements)

Yes

No

Do not know

* 4.20 Please explain your reply

Text of 1 to 1500 characters will be accepted

Sustainability has become a central topic worldwide. Companies may need to cooperate to comply notably with increasing environmental requirements and/or to achieve certain sustainability goals.

However, the current situation for sustainability agreements is unclear. The removal by the current HGL of the relevant Section on Environmental Agreements included in the former 2001 Horizontal Guidelines has left open the question of whether the principles set forth in said Horizontal Guidelines would be still applicable today. In particular, taking into account that there may be some tension between sustainability principles and EU Competition law. This uncertainty is even greater when considering that the HGL need to be read in conjunction with the Commission's Guidelines on the application of -former- article 81(3) EC Treaty. These Guidelines clearly state that non-economic interests should not be considered in the framework of Article 101.3 TFEU. However, sustainability considerations might embrace not short run economic interest and their promotion through market forces to counterweight certain restraints of competition. Therefore, more clarity is needed on aspects such as whether and how to quantify the environmental gains, how to identify the beneficiaries (direct consumers, indirect beneficiaries, future generations) or how to interpret the non-elimination of competition condition when most companies in a sector adhere to a sustainability project.

* 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

Identification of pro-competitive horizontal agreements

The R&D BER and the Specialisation BER set out a number of conditions that R&D and specialisation agreements need to meet in order to benefit from the block exemption. The HGL provide additional guidance on how to interpret these conditions. These conditions have been defined with the purpose to give exemption only to those agreements for which it can be assumed with sufficient certainty that they generate efficiencies that outweigh, in line with Article 101(3) of the Treaty, the harm caused by the

restriction of competition.

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

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

- Yes
- No
- Do not know

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

Text of 1 to 1500 characters will be accepted

The definition of "connected undertakings" is confusing. An undertaking is, according to the case law of the Courts "an economic unit for the purpose of the subject matter of the agreement in question even if in law that economic unit consists of several persons, natural or legal (Case 170/83), Hydrotherm, p. 11). As others regulations do, the Specialization BER refers to "undertakings" having certain powers over other "undertakings" which is inconsistent. It is submitted that the Regulation should refer to "connected companies" or "connected entities" as there should only be one "undertaking".

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

- Yes
- No
- Do not know

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

- Yes
- No
- Do not know

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

- Yes
- No
- Do not know

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

- Yes
- No
- Do not know

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

- Yes
- No
- Do not know

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

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

- Yes
- No
- Do not know

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

Text of 1 to 1500 characters will be accepted

The definition of "connected undertakings" is confusing. An undertaking is, according to the case law of the Courts "an economic unit for the purpose of the subject matter of the agreement in question even if in law that economic unit consists of several persons, natural or legal (Case 170/83), Hydrotherm, p. 11). As others regulations do, the Specialization BER refers to "undertakings" having certain powers over other "undertakings" which is inconsistent. It is submitted that the Regulation should refer to "connected companies" or "connected entities" as there should only be one "undertaking".

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

- Yes
- No
- Do not know

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

Text of 1 to 1500 characters will be accepted

Recital 8 declares that "the application of this Regulation to unilateral and reciprocal specialisation agreements should be limited to scenarios where the parties are active on the same product market". I is submitted that this requirement is not needed. The fact that the parties are only potential competitors or even no direct competitors at all should not cause losing the protection of the safe harbour. Indeed, as recital 4 recalls, the exemption need not to establish a restriction of competition in the first place.

Reciprocal specialization agreements under which one of the parties to the agreement agrees to supply the product concerned only where the capacity of the other party is fully utilized are also exempted. Such arrangements pose no more risk to competition than the long-term and exclusive arrangements that are permitted under the BER, but may enable parties to achieve added efficiencies through specialization.

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

- Yes
- No
- Do not know

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

Text of 1 to 1500 characters will be accepted

Contributors note that the 20% market share may not be completely aligned with the market share taken into account in the framework of merger control rules, where combined market shares below 25% are considered unproblematic (paragraph 18 of the Horizontal Merger Guidelines). This could push undertakings engaging in horizontal cooperation towards the much deeper level of integration of mergers in order to avoid competition law concerns.

* 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

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

Text of 1 to 1500 characters will be accepted

Non-compete provisions in joint production/specialization agreements are often a key condition for the realization of the efficiencies which these types of agreements as a rule give rise to and should therefore be considered ancillary. However, the rules regarding non-compete provisions under Article 101 TFEU are still unclear and they significantly differ -despite their similarities- from the principles set forth in the Commission's notice of ancillary restraints applicable in merger control cases. The treatment of these clauses should therefore be clarified and it should clearly be stated that non-compete provisions fulfilling the conditions of the Commission's notice on ancillary restraints cannot be considered as an allocation of markets or of customers determining that the exception is no longer available.

The HGL may expand the discussion of the differentiation between an unlawful market allocation arrangement and a legal specialization agreement. Given that being in one category or the other determines whether a certain agreement can benefit from the BER, the HGLs should issue specific guidance, not merely leaving this question to an example (p. 190 HGLs).

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

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

Text of 1 to 3000 characters will be accepted

Most horizontal agreements combine several stages of cooperation. This situation is currently solved by the recourse to the centre of gravity of the agreement, which would determine the set of rules applicable (and whether an agreement may fall in any BER). However, the interpretation of the centre of gravity is not clear and there are no precedents. This gives rise to uncertainty which in turn may push companies to tailor their agreements towards specialization or R&D out of antitrust concerns, and not on business needs. The situation becomes particularly striking since the Horizontal Guidelines do purport to apply to all horizontal restraints, which suggest such a holistic approach is indeed possible.

Consideration should be given to adopting a general horizontal BER, as it has been done with the vertical BER. This general BER would not only cover R&D and specialization, but also information exchanges, joint purchasing agreements, commercialization agreements and standardisation agreements. In the absence of restrictions by object, those agreements pursue efficiencies similar to those pursued by R&D and specialization agreements, and similarly, competition should not be restricted below a certain market share threshold.

In addition, the future Horizontal Guidelines would not only deal with each category of agreement, but also to different combinations of restrictions, as the Vertical Guidelines do when dealing with different combinations of vertical restraints.

* 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 Contributors have pointed out that uncertainties contained in the HGL have led to an overly cautious interpretation of the rules applicable and, as a consequence, some efficiency enhancing horizontal cooperation agreements are discouraged.

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

We are unable to provide a calculation as we are an association of lawyers representing multiple clients. However, legal compliance can indeed carry relevant costs for clients. In addition, it cannot be excluded that undertakings do not enter into agreements which may ultimately be pro-competitive in order to avoid competition law risks.

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

Text of 1 to 1000 characters will be accepted

We are unable to provide a calculation as we are an association of lawyers representing multiple clients. However, legal compliance can indeed carry relevant costs for clients. In addition, it cannot be excluded that undertakings do not enter into agreements which may ultimately be pro-competitive in order to avoid competition law risks.

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

We are unable to provide a calculation as we are an association of lawyers representing multiple clients. However, legal compliance can indeed carry relevant costs for clients. In addition, it cannot be excluded that undertakings do not enter into agreements which may ultimately be pro-competitive in order to avoid competition law risks.

5.4 Please explain how you calculate these costs

Text of 1 to 1500 characters will be accepted

We are unable to provide a calculation as we are an association of lawyers representing multiple clients. However, legal compliance can indeed carry relevant costs for clients. In addition, it cannot be excluded that undertakings do not enter into agreements which may ultimately be pro-competitive in order to avoid competition law risks.

* 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

Self-assessments implies higher compliance costs for companies. These compliance costs would not only refer to the corresponding legal costs, but also to the risks that a company needs to take when deciding whether to initiate a cooperation project with a company which is present in the same market.

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

Text of 1 to 1500 characters will be accepted

We are unable to provide a calculation as we are an association of lawyers representing multiple clients.

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

Self-assessments implies higher compliance costs for companies. These compliance costs would not only refer to the corresponding legal costs, but also to the risks that a company needs to take when deciding whether to initiate a certain cooperation project with a company which is present in the same market.

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

Text of 1 to 1500 characters will be accepted

We are unable to provide a calculation as we are an association of lawyers representing multiple clients.

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 Block Exemptions provide legal certainty and uniformity.

The HGLs provide useful guidance, despite not being legally binding for national competition authorities and national judges. However, the future HGL should further develop the application of Article 101(3) TFEU for each category of horizontal agreements, not only for clear cases but more specially for cases which are more in the "grey" or "middle" area and in relation to which guidance is particularly needed. In particular, account should be taken of the fact that the Commission no longer adopts decisions declaring that a certain agreement fulfils the conditions for exception. It currently chooses to close those case on the basis of its priority setting system.

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

Please refer to response to question 5.14.

* 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

Please refer to response to question 5.14.

* 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

Please refer to response to question 5.14.

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	Major trends and changes and articles of the HBERs or recitals of the HGL have been discussed in detail in the answers to the previous questions and in the document attached to this consultation.		
2			
3			
4			
5			
6			
7			

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

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

- Still relevant
- No longer relevant
- Do not know

* 6.3 Please explain your reply

Text of 1 to 1500 characters will be accepted

Despite having identified some room for improvement, this set of rules is still relevant.

* 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

Despite having identified some room for improvement, this set of rules is still relevant.

* 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

Despite having identified some room for improvement, this set of rules is still relevant.

* 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

Despite having identified some room for improvement, this set of rules is still relevant.

* 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

Despite having identified some room for improvement, this set of rules is still relevant.

* 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

Despite having identified some room for improvement, this set of rules is still relevant.

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

As previously stated, a review of the principles set forth in the Commission Guidelines on the application of Article 81(3) EC Treaty would be welcomed, in particular in relation to sustainability agreements and whether these agreements would be covered by the 101(3) TFEU exemption and under which conditions. In addition, the paragraphs regarding ancillary restraints should be clarified, updated and further developed for each category of horizontal agreements in the future HGL.

In addition, non-compete provisions in joint production/specialization agreements do not appear to be consistently dealt with in the different instruments available. First, para. 31 of the Commission Guidelines on the application of Article 81(3) of the Treaty refers to the TPS case, where the Commission accepted a non-compete clause only during the initial phase of the joint venture and for a period of three years. This example is not in line with the current treatment of non-compete clauses in the context of full function joint ventures, which the 2005 Notice on Ancillary Restraints admits for the lifetime of the joint venture. Similarly, the current legal treatment of post term non-compete clauses should be brought in line with recent Commission Decisions such as in the Commission Decision of 18 June 2012, COMP/39736 Siemens/Areva.

*** 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

There may be some incoherencies as regards sustainability agreements. They are at the top of the Commission's agenda but they have not been dealt with at EU level from a competition law perspective. In addition, there are real doubts as to whether the very few precedents in this field from the European Commission are still valid after the adoption of the Commission's Guidelines on Article 81 (3) EC Treaty.

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

Having a Block Exemption clearly adds value for companies as it provides for legal certainty not only as regards the EC but also vis a vis National Competition Authorities and national judges.

*** 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

A Block Exemption clearly adds value for companies as it guarantees legal certainty, not only as regards the EC but also vis a vis National Competition Authorities and national judges.

*** 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

Even if the HG are a soft law instrument which is not binding on National Competition Authorities or national courts, they provide a detailed and useful approach of the Commission's position as regards cooperation agreements between competitors and, in most cases, they are spontaneously taken as a reference by national competition authorities and national courts. Given that it is not always clear to find the line between a cooperation agreement which may be allowed to the one which will be not, the detailed analysis made by the HG, category by category, is of course welcome.

That said, as already stated, Contributors discussed about the possibility to adopt a general horizontal BER not only covering R&D and specialisation but also joint purchasing and commercialization agreements so that the HGL only complement and expand on the exemptions contained in the relevant BERs.

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 Commission's current review of rules applicable to horizontal agreements represents a unique opportunity to clarify the rules regarding the notion of restrictions "by object", in particular in view of the judgments of the European Court of Justice objecting to the sometimes excessive recourse to this category and insisting on the need of a restrictive interpretation. A clear delimitation of the boundaries of the category of restriction by object is particularly necessary regarding horizontal cooperation agreements, in view of their greater exposure to competition rules, the principle of legality and the implications that too broad interpretations have on the burden of proof and the rights of companies subject to an investigation.

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

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/Asociaci_n_Espa_ola_Defensa_Competencia__AEDC__response.pdf

* 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