

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

* 2.3 Surname

* 2.4 Email (this won't be published)

* 2.5 I am giving my contribution as

- ☐ Academic/research institution
- ☐ Business association
- ☒ Company/business organisation
- ☐ Consumer organisation
- ☐ EU citizen
- ☐ Environmental organisation
- ☐ Non-EU citizen
- ☐ Non-governmental organisation (NGO)
- ☐ Public authority
- ☐ Trade union
- ☐ Other

2.6 Other - please specify

If you chose "Other", please specify whether you are contributing as lawyer/law firm, economic consultancy or something else:

* 2.7 Organisation name

255 character(s) maximum

If available, please provide your ID number of the [EU Transparency Register](#). If your organisation is not registered, we invite you to register, although it is not compulsory to be registered to reply to this consultation.

2.8 Transparency register number

255 character(s) maximum

Check if your organisation is on the [transparency register](#). It's a voluntary database for organisations seeking to influence EU decision-making.

* 2.10 Organisation size

- Micro (1 to 9 employees)
- Small (10 to 49 employees)
- Medium (50 to 249 employees)
- Large (250 or more)

* 2.11 The main activities of your organisation:

Text of 1 to 250 characters will be accepted

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

Text of 1 to 250 characters will be accepted

* 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](#)):

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

* 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 |

<input type="radio"/> Austria	<input type="radio"/> Finland	<input type="radio"/> Mauritius	<input type="radio"/> Slovenia
<input type="radio"/> Azerbaijan	<input type="radio"/> France	<input type="radio"/> Mayotte	<input type="radio"/> Solomon Islands
<input type="radio"/> Bahamas	<input type="radio"/> French Guiana	<input type="radio"/> Mexico	<input type="radio"/> Somalia
<input type="radio"/> Bahrain	<input type="radio"/> French Polynesia	<input type="radio"/> Micronesia	<input type="radio"/> South Africa
<input type="radio"/> Bangladesh	<input type="radio"/> French Southern and Antarctic Lands	<input type="radio"/> Moldova	<input type="radio"/> South Georgia and the South Sandwich Islands
<input type="radio"/> Barbados	<input type="radio"/> Gabon	<input type="radio"/> Monaco	<input type="radio"/> South Korea
<input type="radio"/> Belarus	<input type="radio"/> Georgia	<input type="radio"/> Mongolia	<input type="radio"/> South Sudan
<input type="radio"/> Belgium	<input checked="" type="radio"/> Germany	<input type="radio"/> Montenegro	<input type="radio"/> Spain
<input type="radio"/> Belize	<input type="radio"/> Ghana	<input type="radio"/> Montserrat	<input type="radio"/> Sri Lanka
<input type="radio"/> Benin	<input type="radio"/> Gibraltar	<input type="radio"/> Morocco	<input type="radio"/> Sudan
<input type="radio"/> Bermuda	<input type="radio"/> Greece	<input type="radio"/> Mozambique	<input type="radio"/> Suriname
<input type="radio"/> Bhutan	<input type="radio"/> Greenland	<input type="radio"/> Myanmar /Burma	<input type="radio"/> Svalbard and Jan Mayen
<input type="radio"/> Bolivia	<input type="radio"/> Grenada	<input type="radio"/> Namibia	<input type="radio"/> Sweden
<input type="radio"/> Bonaire Saint Eustatius and Saba	<input type="radio"/> Guadeloupe	<input type="radio"/> Nauru	<input type="radio"/> Switzerland
<input type="radio"/> Bosnia and Herzegovina	<input type="radio"/> Guam	<input type="radio"/> Nepal	<input type="radio"/> Syria
<input type="radio"/> Botswana	<input type="radio"/> Guatemala	<input type="radio"/> Netherlands	<input type="radio"/> Taiwan
<input type="radio"/> Bouvet Island	<input type="radio"/> Guernsey	<input type="radio"/> New Caledonia	<input type="radio"/> Tajikistan
<input type="radio"/> Brazil	<input type="radio"/> Guinea	<input type="radio"/> New Zealand	<input type="radio"/> Tanzania
<input type="radio"/> British Indian Ocean Territory	<input type="radio"/> Guinea-Bissau	<input type="radio"/> Nicaragua	<input type="radio"/> Thailand
<input type="radio"/> British Virgin Islands	<input type="radio"/> Guyana	<input type="radio"/> Niger	<input type="radio"/> The Gambia
<input type="radio"/> Brunei	<input type="radio"/> Haiti	<input type="radio"/> Nigeria	<input type="radio"/> Timor-Leste
<input type="radio"/> Bulgaria	<input type="radio"/> Heard Island and McDonald Islands	<input type="radio"/> Niue	<input type="radio"/> Togo
<input type="radio"/> Burkina Faso	<input type="radio"/> Honduras	<input type="radio"/> Norfolk Island	<input type="radio"/> Tokelau
<input type="radio"/> Burundi	<input type="radio"/> Hong Kong	<input type="radio"/> Northern Mariana Islands	<input type="radio"/> Tonga
<input type="radio"/> Cambodia	<input type="radio"/> Hungary	<input type="radio"/> North Korea	<input type="radio"/> Trinidad and Tobago
<input type="radio"/> Cameroon	<input type="radio"/> Iceland	<input type="radio"/> North Macedonia	<input type="radio"/> Tunisia
<input type="radio"/> Canada	<input type="radio"/> India	<input type="radio"/> Norway	<input type="radio"/> Turkey
<input type="radio"/> Cape Verde	<input type="radio"/> Indonesia	<input type="radio"/> Oman	<input type="radio"/> Turkmenistan
<input type="radio"/> Cayman Islands	<input type="radio"/> Iran	<input type="radio"/> Pakistan	<input type="radio"/> Turks and Caicos Islands
<input type="radio"/> Central African Republic	<input type="radio"/> Iraq	<input type="radio"/> Palau	<input type="radio"/> 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 type="radio"/> United Kingdom |
| <input type="radio"/> Clipperton | <input type="radio"/> Jamaica | <input type="radio"/> Peru | <input type="radio"/> United States |
| <input type="radio"/> Cocos (Keeling) Islands | <input type="radio"/> Japan | <input type="radio"/> Philippines | <input type="radio"/> United States Minor Outlying Islands |
| <input type="radio"/> Colombia | <input type="radio"/> Jersey | <input type="radio"/> Pitcairn Islands | <input type="radio"/> Uruguay |
| <input type="radio"/> Comoros | <input type="radio"/> Jordan | <input type="radio"/> Poland | <input type="radio"/> US Virgin Islands |
| <input type="radio"/> Congo | <input type="radio"/> Kazakhstan | <input type="radio"/> Portugal | <input type="radio"/> Uzbekistan |
| <input type="radio"/> Cook Islands | <input type="radio"/> Kenya | <input type="radio"/> Puerto Rico | <input type="radio"/> Vanuatu |
| <input type="radio"/> Costa Rica | <input type="radio"/> Kiribati | <input type="radio"/> Qatar | <input type="radio"/> Vatican City |
| <input type="radio"/> Côte d'Ivoire | <input type="radio"/> Kosovo | <input type="radio"/> Réunion | <input type="radio"/> Venezuela |
| <input type="radio"/> Croatia | <input type="radio"/> Kuwait | <input type="radio"/> Romania | <input type="radio"/> Vietnam |
| <input type="radio"/> Cuba | <input type="radio"/> Kyrgyzstan | <input type="radio"/> Russia | <input type="radio"/> Wallis and Futuna |
| <input type="radio"/> Curaçao | <input type="radio"/> Laos | <input type="radio"/> Rwanda | <input type="radio"/> Western Sahara |
| <input type="radio"/> Cyprus | <input type="radio"/> Latvia | <input type="radio"/> Saint Barthélemy | <input type="radio"/> Yemen |
| <input type="radio"/> Czechia | <input type="radio"/> Lebanon | <input type="radio"/> Saint Helena Ascension and Tristan da Cunha | <input type="radio"/> Zambia |
| <input type="radio"/> Democratic Republic of the Congo | <input type="radio"/> Lesotho | <input type="radio"/> Saint Kitts and Nevis | <input type="radio"/> Zimbabwe |
| <input type="radio"/> Denmark | <input type="radio"/> Liberia | <input type="radio"/> Saint Lucia | |

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

at least 1 choice(s)

Multiple choice is possible

☐ Austria
☐ Belgium
☐ Bulgaria
☐ Croatia
☐ Cyprus
☐ Czech Republic
☐ Denmark
☐ Estonia
☐ Finland
☐ France
☐ Germany
☐ Greece

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

- * 2.17 Please specify whether your company/business organisation has been the addressee of a Commission decision under Article 7 or Article 9 of Regulation (EC) No 1/2003
- Yes
No
Do not know

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

- * 3.1 Has your company/business organisation been involved in horizontal cooperation agreements since the current HBERs and the HGL were introduced in 2010?
- ☒ Yes
☐ No
☐ Do not know
☐ Not applicable
- * 3.2 Please specify the type of your horizontal cooperation agreements
- at least 1 choice(s)*
- Multiple answers possible
- ☒ R&D agreements in the sense of art.1(1)(a) of the R&D BER and Section 3 of the HGL
- ☐ Specialisation agreements in the sense of art. 1(1)(a) of the Specialisation BER and Section 4 of the HGL

- ☒ Agreements involving information exchange in the sense of Section 2 of the HGL
- ☒ Purchasing agreements in the sense of Section 5 of the HGL
- ☒ Commercialisation agreements in the sense of Section 6 of the HGL
- ☒ Standardisation agreements in the sense of Section 7 of the HGL
- ☐ Other horizontal cooperation agreements

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

- ☒ Yes
- ☐ No
- ☐ Do not know

* 3.5 If Yes, please specify

at most 3 choice(s)

Optional question, multiple answers possible

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

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

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

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

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

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

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

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

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

The **purpose of the EU competition rules** is to ensure that competition is not distorted to the detriment of the public interest, individual undertakings and consumers. In line with this objective, the Commission's policy is to leave companies maximum flexibility when concluding horizontal co-operation agreements in

order to increase the competitiveness of the European economy while at the same time promoting competition for the benefit of European businesses and consumers.

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

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

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

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

Text of 1 to 1500 characters will be accepted

- The SBER and the R&D BER as well as the guidelines on horizontal cooperation agreements (hereafter "Horizontal Guidelines") have generally contributed to legal certainty.
- However, some concepts were not practical, and markets and needs for collaboration have evolved as well. So it is the right time to revise and amend the Horizontal Guidelines to reflect new market dynamics and challenges resulting from an increasing focus on digitalization and other new forms of cooperation.
- Over the past few years, markets have significantly changed and have become fast-moving due to increasing digitalization. This requires companies to act more agile and to cooperate more often to create innovative digital solutions for customers, to ensure interoperability and to create new technological standards all to the benefit of customers.
- European companies need to engage in cooperations, form part of ecosystems and participate in creative formats such as e.g. hackathons in order to foster innovation. This is all the more necessary if they want to catch up in the digital field which is currently largely dominated by big US and Asian incumbents.
- In addition, there is a strong need on developing sustainable solutions to reduce the environmental impact. This might equally require companies to cooperate to obtain better and faster solutions.

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 strict requirements and the complexity of the R&D BER create great uncertainty with companies as to whether or not their joint R&D agreement is compliant with EU competition rules. This is particularly true in cases where the joint R&D agreement does not strictly comply with all requirements of the R&D BER, especially those included in Art. 3 R&D BER.

The revised R&D BER and the Horizontal Guidelines should emphasize more strongly the generally pro-competitive nature of joint R&D cooperations and provide clearer guidance to ensure that companies have sufficient comfort entering into a pro-competitive R&D cooperation even if not all requirements in Art. 3 of the R&D BER are strictly included.

Overall, the R&D BER should be simplified. It is an extremely complex BER which makes it difficult to get the desired legal certainty.

In addition,

- mere paid for R&D should be treated under the subcontracting notice
- the reference to technology market shares should be removed
- the market share threshold should be increased to at least 30%
- the requirement in Art. 3.2 R&D BER that agreements must explicitly stipulate full access rights to results should be removed
- the obligation to license background IP in Art. 3.3 R&D BER should be removed as well.

* 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

While the R&D BER should be significantly simplified, the existence of a safe harbor and a list with black clauses increases legal certainty compared to a situation where only guidelines with relatively straightforward examples exist.

* 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 antitrust assessment of specialisation agreements continues to be very difficult. Further guidance should be provided to increase legal certainty.

The market share threshold should be increased to 30% to allow also larger companies and thus their consumers to benefit from the efficiencies generated by a specialisation. This is especially important where European companies lack the scale of non-European players (e.g. digital field) to enhance their competitiveness and create a level playing field.

Also mere joint production or supply agreements between competitors should be exempted.

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

- ☒ Yes
- ☐ No
- ☐ Do not know

* 4.10 Please explain your reply

Text of 1 to 1500 characters will be accepted

The existence of safe harbor thresholds always creates more legal certainty than mere guidelines.

In this section we would like to have your opinion on the extent to which the HGL have provided sufficient legal certainty on horizontal cooperation agreements companies can undertake without the risk of infringing competition law. Please specify your answer according to the different types of horizontal agreements.

* 4.11 In your view, have the HGL provided sufficient legal certainty on agreements involving **information exchange** in the sense of Section 2 of the HGL?

- ☐ Yes
- ☒ No
- ☐ Do not know

* 4.12 Please explain your reply

Text of 1 to 1500 characters will be accepted

The Commission qualifies the exchange of commercially sensitive information between competitors outside the scope of a legitimate cooperation agreement as a restriction by object. This practice has created significant uncertainty within companies. Many companies have adopted an extremely restrictive approach to information exchange out of fear of ending up in the “restriction by object box”.

Information exchange outside the scope of a cartel agreement should not be a “by object” restriction but the actual effects on competition should be assessed. Any abstract assessment of information exchange can lead to prohibiting information exchange which is neutral for competition or even pro-competitive. The uncertainty on the side of companies becomes even greater when dealing with these new cooperation models in the digital field such as ecosystems, etc. These cooperation models indispensably require a certain degree of information exchange and data sharing between the participating companies. However, companies are currently lacking clear guidance with regard to the boundaries of permitted information exchange in such cooperations. Especially with regard to ecosystems, it should be clarified that exchange and collaboration within the ecosystem (intra-ecosystem) can only harm competition in case there is not sufficient competition from other ecosystems (inter-ecosystem). It should be clarified that information exchange within a dual distribution system should be governed by VBER.

* 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

Para. 208 of the HGL states that purchasing agreements between competitors are unlikely to give rise to restrictive effects on competition if the parties to the joint purchasing arrangement have a combined market share not exceeding 15% on both the purchasing and the selling markets. These thresholds are too low and should be increased to 30% (in line with the VBER).

The HGL currently do not distinguish between purchasing agreements in relation to so-called “direct” and “indirect” material.

- Direct material refers to products and services that are a direct input into the final product that a company sells on the selling market.
- Indirect material refers materials that are used in a production process and which are no direct input to the end products sold by a party on the selling market (e.g. office supplies, travel agency services for employees, etc.).
- A purchasing agreement in relation to indirect material can have no impact on competition on the selling markets. Yet, the HGL foresee the same safe harbor threshold and guidance on individual assessment as for purchasing agreements for direct material.
- The HGL should explicitly clarify that purchasing agreements relating to “indirect” material both between competitors and non-competitors on the selling markets are unlikely to have potential restrictive effects on competition in the absence of a dominant position by the purchasing alliance on the purchasing markets.

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

- ☐ Yes
☐ No

☒ Do not know

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

☒ Yes

☐ No

☐ Do not know

* 4.18 Please explain your reply

Text of 1 to 1500 characters will be accepted

The HGL provide sufficient guidance on standardisation agreements.

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

☐ Yes

☒ No

☐ Do not know

* 4.20 Please explain your reply

Text of 1 to 1500 characters will be accepted

The HGL do not address a number of cooperation models that became more relevant over the past few years:

First, the new HGL should cover "new" cooperation models and the exchange of information within an ecosystem as described above.

Second, there is an increasing need for data pooling in the digital world both between competitors and non-competitors. Data pooling provides companies with a larger data base for analytical purposes and allows to improve their solutions and to create innovative solutions to the benefit of customers. The Horizontal Guidelines should explicitly recognize that data pooling is pro-competitive .

Third, any obligation to grant access to data should be limited to clear Art 102 TFEU cases. Also a clear distinction between B2C- and B2B-relationships with regard to data access, in particular when involving companies with market power, should be included in the Horizontal Guidelines. B2C relationships function very different from relationships in the B2B field. For B2B, customers are significantly more sensitive about their data, often insist on retaining control over their data and have sufficient countervailing power. Therefore, a less restrictive and more flexible approach is needed in the B2B area.

Finally, there is great uncertainty re new cooperation models to create sustainable solutions and environmentally-friendly solutions. This should be addressed in new HGL.

- * 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

The Horizontal Guidelines should clarify that joint bidding between competitors can only create potential restrictive effects on competition if a cooperation between competitors effectively leads to a reduction of the number of bids (i.e. competitive pressure) that a customer could receive. This should be the relevant test for assessing potential effects on competition of joint bidding between competitors.

In that respect, the guidelines should clarify that it is sufficient if e.g. only one of two competitors cannot submit an offer independently. In such a case, a cooperation between those competitors will not reduce the number of bids (i.e., competitive pressure) on the market as one of the two competitors would not have the ability to bid alone at all. On the contrary, the consortia might be able to submit a lower or technically better bid as a result of the cooperation between competitors to the benefit of the customer.

The Horizontal Guidelines should provide practice relevant examples of the reasons which can justify the creation of a consortium between competitors.

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

Mere paid for R&D should be treated under subcontracting notice. Sometimes companies consider outsourcing R&D to another company. This might have several reasons such as e.g. lack of expertise, lack of capacity, etc. Currently it would qualify as “paid for research” and thereby fall within the scope of the R&D BER. The idea when outsourcing R&D is usually similar to a subcontracting whereby the subcontractor produces the products and supply them exclusively to the principal. Therefore, these R&D cooperations should be treated under the subcontracting notice.

- * 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

Art. 3.2 R&D BER requires that any joint R&D agreements must explicitly stipulate full access rights to the results for the purposes of further research and development. This requirement is unnecessary and has a chilling effect on innovation. The pro-competitiveness of a joint R&D does not depend on future R&D efforts which are based on the results. Future competition on innovation is sufficiently safeguarded by the prohibition of Art. 5 (a) to include a hardcore restriction that limits the parties R&D activities in the same or a connected field after the completion of the joint R&D.

The revised R&D BER should therefore remove the strict and unnecessary and impractical requirements in Art. 3.2.

Article 3.3 of the R&D BER states that companies must stipulate in their R&D agreement that each party must be granted access to any pre-existing know-how (i.e. background know-how) of the other party, if this is indispensable for the exploitation of the results.

This requirement has a significant cooling-off effect on the willingness of companies to engage in joint R&D which would eventually be contravening the spirit of the R&D BER.

In times where innovation is crucial, the revised R&D BER should remove this requirement and leave it to the parties to the joint R&D agreement to stipulate access rights to background IP and rights of exploitation.

- * 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

The current R&D BER foresees that joint R&D agreements between competing companies are block exempted if the combined market share of those companies does not exceed 25% on the relevant product and technology market. A similar provision applies for non-competing companies after 7 years as from exploitation.

The notion of technology market is not practical and does not add any value for the assessment. In practice, it is highly unlikely that companies have a clear overview of all competing technologies. It is even more unlikely that companies can calculate their market share on such a market. The new R&D BER should remove the reference to technology markets and limit the market share threshold to relevant product markets.

As indicated above, joint R&D agreements are generally pro-competitive and drive innovation. The new R&D BER should therefore increase the market share thresholds from 25 % to at least 30%.

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

- ☐ Yes
- ☐ No
- ☒ Do not know

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

- ☐ Yes
- ☒ No
- ☐ Do not know

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

Text of 1 to 1500 characters will be accepted

Under the R&D BER, companies can generally agree by way of specialization that only one company will distribute the products while the other company will not distribute the products at all (i.e., will not sell the products actively and passively). Companies can also agree to allocate exclusively certain territories or customers to each other by way of specialisation. In that scenario, which is less far-reaching than the previous scenario in which only one company distributes the products, companies can only restrict active sales into the respective territory or to the respective customers allocated exclusively to the other company.

There is an obvious contradiction between these two scenarios.

Companies might have a legitimate interest to limit active and passive sales of the products by the other party of the R&D agreement. For example, companies might want to prevent that any party to the joint R&D cooperation sells the products to their competitors. Under the current rules, this would be a hardcore restriction.

In view of the overall pro-competitive nature of R&D cooperations, the revised R&D BER should remove this restriction on limiting passive sales and should allow the parties of an R&D cooperation to impose restrictions on each other under any form of specialization in the context of exploitation.

- * 4.33 The list of obligations included in agreements to which the exemption does not apply ('excluded restrictions'), identified in Article 6 of the R&D BER
- ☐ Yes
- ☐ No
- ☒ Do not know

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

- * 4.35 The definitions that apply for the purposes of the Specialisation BER, in Article 1
- ☐ Yes
- ☐ No
- ☒ Do not know
- * 4.37 The explanations on the type of specialisation agreements to which the exemption applies, provided by Article 2 of the Specialisation BER
- ☐ Yes
- ☒ No
- ☐ Do not know
- * 4.38 If No, please explain what aspect of this provision fails to correctly identify specialisation agreements that are compliant with Article 101 of the Treaty

Text of 1 to 1500 characters will be accepted

Also mere joint production or supply agreements without specialisation between competitors should be exempted.

- * 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

The market share threshold should be increased to 30% to allow also larger companies and thus their consumers to benefit from the efficiencies generated by a specialisation. This is especially important where European companies lack the scale of non-European players (e.g. digital field) to enhance their competitiveness and create a level playing field.

- * 4.41 The list identified in Article 4 of the Specialisation BER which make the exemption not available for agreements that have as their object price fixing,

certain limitations of output or sales or market or customer allocation ('hardcore restrictions')

- ☐ Yes
- ☐ No
- ☒ Do not know

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

Text of 1 to 3000 characters will be accepted

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

- ☒ Yes
- ☐ No
- ☐ Do not know

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

Text of 1 to 3000 characters will be accepted

- data pooling
- joint bidding
- joint purchasing
- sustainability cooperations

* 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

Chilling effects on pro-competitive cooperations due to lack of legal certainty and too restrictive interpretation of information exchange rules. Companies that fear to end up violating antitrust rules may be hesitant to engage in such cooperations or joint initiatives. The new forms of cooperations, especially in the digital field, are not covered and thus there is not sufficient legal certainty for companies.

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

Increased legal certainty created by the BERs and HGL have reduced costs for extensive legal outside counsel advice. It also allows companies to cooperate in more efficient manner with both competitors and non-competitors.

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

Text of 1 to 1000 characters will be accepted

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

Text of 1 to 500 characters will be accepted

5.4 Please explain how you calculate these costs

Text of 1 to 1500 characters will be accepted

*

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

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

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

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

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

* 5.9 Please explain your reply

Text of 1 to 1500 characters will be accepted

The safe harbor threshold and black clauses list in the BER increases legal certainty and allows companies to assess their cooperation more quickly.

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

Text of 1 to 1500 characters will be accepted

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

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

* 5.12 Please explain your reply

Text of 1 to 1500 characters will be accepted

see above

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

Text of 1 to 1500 characters will be accepted

Benefits

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

Text of 1 to 1500 characters will be accepted

Overall, the safe harbor threshold and black clauses list in the BERs increase legal certainty and allow companies to assess their cooperation more quickly. In addition, the HGL provides additional guidance /explanation and examples on how to assess these agreements.

Benefits vs. costs

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

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

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

* 5.17 Regarding the **Specialisation BER**

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

* 5.19 Regarding the **HGL**

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

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

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	Please see reply to question 4.2.		
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

The R&D BER and guidelines should be amended as indicated above. They should also be complemented to reflect potential new types of cooperation, e.g. sustainability, etc.

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

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

* 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

Please see the answer 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

Please see the answer to question 4.14.

* 6.10 Section 6 of the HGL on commercialisation agreements is

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

* 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 guidance on standardization agreements is still relevant today.

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

* 7.3 In your view, are the HBERs and the HGL coherent with other existing or upcoming legislation or policies at EU or national level?

- ☐ Yes
- ☐ No
- ☒ Do not know

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

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

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

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

- ☒ Yes
- ☐ No
- ☐ Do not know

* 8.2 Please explain your reply

Text of 1 to 1500 characters will be accepted

Overall, the R&D BER has had added value in assessing R&D agreements.

* 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

Overall, the Specialisation BER has had added value in assessing specialisation agreements.

* 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

Overall, the HGL has had added value in assessing horizontal cooperation agreements.

9 Specific questions

Final comments and document upload

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

Text of 1 to 3000 characters will be accepted

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

The maximum file size is 1 MB

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

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/Main_Theses_on_Reform_of_Horizontal_Block_Exemption_Regulation_-_12022020.pdf

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

- ☒ Yes
☐ No

Contact

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