

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
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<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
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<input type="radio"/> Brazil	<input type="radio"/> Guinea	<input type="radio"/> New Zealand	<input type="radio"/> Tanzania
<input type="radio"/> British Indian Ocean Territory	<input type="radio"/> Guinea-Bissau	<input type="radio"/> Nicaragua	<input type="radio"/> Thailand
<input type="radio"/> British Virgin Islands	<input type="radio"/> Guyana	<input type="radio"/> Niger	<input type="radio"/> The Gambia
<input type="radio"/> Brunei	<input type="radio"/> Haiti	<input type="radio"/> Nigeria	<input type="radio"/> Timor-Leste
<input type="radio"/> Bulgaria	<input type="radio"/> Heard Island and McDonald Islands	<input type="radio"/> Niue	<input type="radio"/> Togo
<input type="radio"/> Burkina Faso	<input type="radio"/> Honduras	<input type="radio"/> Norfolk Island	<input type="radio"/> Tokelau
<input type="radio"/> Burundi	<input type="radio"/> Hong Kong	<input type="radio"/> Northern Mariana Islands	<input type="radio"/> Tonga
<input type="radio"/> Cambodia	<input type="radio"/> Hungary	<input type="radio"/> North Korea	<input type="radio"/> Trinidad and Tobago
<input type="radio"/> Cameroon	<input type="radio"/> Iceland	<input type="radio"/> North Macedonia	<input type="radio"/> Tunisia
<input type="radio"/> Canada	<input type="radio"/> India	<input type="radio"/> Norway	<input type="radio"/> Turkey
<input type="radio"/> Cape Verde	<input type="radio"/> Indonesia	<input type="radio"/> Oman	<input type="radio"/> Turkmenistan
<input type="radio"/> Cayman Islands	<input type="radio"/> Iran	<input type="radio"/> Pakistan	<input type="radio"/> Turks and Caicos Islands
<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

* 3.3 If Other, please specify

Text of 1 to 500 characters will be accepted

Purchasing of components from a competing manufacturer.

NB: Above and below, we have also included cases where such horizontal agreements were under consideration but ultimately not entered into. Since the R&D BER also applies to cooperation with non-competitors, we have ticked the box as well.

* 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

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 BER is very technical and not self-explanatory, very little case law makes the interpretation even more difficult.

In particular, the following points are unclear:

1) Joint exploitation - exclusive sales by Party A to Party B

In a scenario where Party A is charged with the production of the R&D product and sells it to Party B, can this supply relation be exclusive in the sense that Party A is not allowed to sell to anyone else (or, e.g., not to a competitor of Party B), or would this amount to a (hardcore) restriction of passive sales? We think such

exclusivity should be allowed: The distinction between active and passive sales only makes sense where the Parties have allocated territories or customers.

(see rest of answer in the box for Question 4.4)

* 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 clear-cut rules on hardcore restrictions are helpful as a starting point for the assessment even when the actual facts of the case differ somewhat from those scenarios. The approach of the R&D BER (and other BERs) with a list of absolute "no go's" is useful because it allows law practitioners who do not deal with such issues on a daily basis to quickly get a feeling for areas and topics where particular caution is required.

(rest of answer to 4.4:

2) Joint exploitation - exclusive purchasing by Party B from Party A

In the scenario as described above, can Party B commit to purchase the R&D product exclusively from Party A (and not produce it itself or have it produced by a third party, at least for a certain period of time)?

Exclusive purchasing is not mentioned anywhere in the BER, so it should be exempted, but clarification would be helpful.

3) "Field of use" restriction

In the scenario as described above, where the R&D product is a component of the final product, Party A should be allowed to restrict Party B from re-selling the R&D product on its own. Party B would then only be allowed to use it for the manufacturing of the final product and to sell it as a spare part (cf. field-of-use rule in the TT BER.).

* 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

For example:

It is not clear if the Specialisation BER applies to horizontal sub-contracting agreements, which are viewed as a form of joint production under the HGL.

It is not clear if an agreement can include both an exclusive purchase AND an exclusive supply obligation and still be covered by the BER (see Art. 2 (d) a - "parties accept an exclusive purchase OR exclusive supply obligation").

It is not clear if this also covers a situation where, instead of exclusivity, there is a minimum purchase volume.

If the specialisation relates to a component of a final product (where the parties, based on their business model, do not sell the component in question on its own but only use it as an input for the final product), an agreement that the parties will not start selling the component on its own should not be viewed as a "limitation of output or sales". (Consider that the component subject to specialisation is of an innovative nature and that one of the parties has invested heavily in it and is willing to share it with the other party on certain terms but wants to prevent the other party from sharing it with third parties in the same industry). Compare Art. 4 (1) c of the TT BER which exempts "the obligation on the licensee to produce the contract products only for its own use provided that the licensee is not restricted in selling the contract products actively and passively as spare parts for its own products".

* 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 clear-cut rules on hardcore restrictions are helpful as a starting point for the assessment even when the actual facts of the case differ somewhat from those scenarios. The approach of the Specialisation BER (and other BERs) with a list of absolute "no go's" is useful because it allows law practitioners who do not deal with such issues on a daily basis to quickly get a feeling for areas and topics where particular caution is required.

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

1) The rules on information exchange in the HGL presume that the parties are ONLY in a horizontal relationship. However, there are more and more scenarios where parties are in horizontal and vertical relations at the same time, and where there is a legitimate need to provide even sensitive information for the

purpose of the vertical relationship.

One important example are dual distribution scenarios, where suppliers have close relations with wholesalers and retailers and work together for the benefit of both and of downstream customers, and where this cooperation brings with it an intense flow of information (e.g., stock, sales figures, planned marketing campaigns, performance of products ...).

2) The rules are difficult to apply in a scenario where competing companies are exploring possible cooperation scenarios. In such cases, it may not be clear right from the beginning what kind of cooperation exactly makes commercial sense, and during the exploration and negotiation phase, it may happen that - in good faith - sensitive information is exchanged that, in hindsight, was not necessary, because the cooperation failed entirely or because a different type of cooperation was ultimately entered into. E.g., companies may start out with the wish to explore joint purchasing of components and may find that they would actually both be interested in improving existing components in-house, so that joint R&D becomes an interesting option.

* 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

There is a considerable lack of legal certainty:

The HGL look at joint purchasing agreements primarily from a downstream perspective: E.g., do they spill over into the parties' downstream activities, or do they result in commonality of costs? In effect, based on the HGL and a pragmatic approach, joint purchasing practically benefits from an "exemption" if the parties' upstream and downstream market shares do not exceed 15%.

This approach disregards the supplier who can be regarded as the "victim" of the joint purchasing. Some argue that joint purchasing is in effect a price cartel "mirrored upstream" and should therefore be viewed as a hardcore violation - which is completely at odds with the "double 15%" rule of thumb.

A case brought by the Federal Cartel Office (steel purchasing by car manufacturers: probably high combined downstream market shares, but the cost of the input affected by the cartel only amounted to 1% of the total cost of production) raises the question if the practice could have been established lawfully as a joint purchasing agreement: probably practically non-existent downstream effects despite high combined shares, and upstream effects seem to play little role in the assessment under the HGL.

* 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

* 4.21 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

* 4.25 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

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

- ☐ Yes
- ☐ No
- ☒ Do not know

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

- ☐ Yes
- ☐ No
- ☒ Do not know

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

- ☐ Yes

- ☐ No
- ☒ Do not know

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

Text of 1 to 3000 characters will be accepted

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

- ☐ Yes
- ☐ No
- ☒ Do not know

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

- ☐ Yes
- ☐ No
- ☒ Do not know

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

Internal and external legal advice, including legal research and fact-finding.

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

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

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

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 clear-cut rules in the BERs as well as the more elaborate explanations in the HGL are helpful for the assessment even in cases where the actual facts of the case differ somewhat from the scenarios set out in these documents. The documents allow law practitioners who do not deal with such issues on a daily basis to quickly get a feeling for areas and topics where particular caution is required.

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	Dual distribution (direct sales to consumers by manufacturers)	Paragraphs 55 - 110 (information exchange)	Guidance on information exchange simply does not fit for dual distribution scenarios where the competitors are at the same time in a vertical relationship.
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

All types of horizontal cooperation agreements covered by the HGL and/or by BER are still relevant in practice.

* 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

All types of horizontal cooperation agreements covered by the HGL and/or by BER are still relevant in practice.

* 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

All types of horizontal cooperation agreements covered by the HGL and/or by BER are still relevant in practice.

* 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

All types of horizontal cooperation agreements covered by the HGL and/or by BER are still relevant in practice.

* 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

All types of horizontal cooperation agreements covered by the HGL and/or by BER are still relevant in practice.

* 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

All types of horizontal cooperation agreements covered by the HGL and/or by BER are still relevant in practice.

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

In an area of the law where non-compliance results in extreme fines, any concise and easy-to-access guidance that helps companies to act compliant is extremely helpful.

* 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

In an area of the law where non-compliance results in extreme fines, any concise and easy-to-access guidance that helps companies to act compliant is extremely helpful.

* 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

In an area of the law where non-compliance results in extreme fines, any concise and easy-to-access guidance that helps companies to act compliant is extremely helpful.

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

* 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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