

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

Fields marked with \* are mandatory.

### 1

## Introduction

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### 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](mailto: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

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\* 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

Francesca

\* 2.3 Surname

Risso

\* 2.4 Email (this won't be published)

fri@amchameu.eu

\* 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*

American Chamber of Commerce to the EU

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.

5265780509-97

\* 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*

AmCham EU speaks for American business committed to Europe on trade, investment and competitiveness issues. It aims to ensure a growth-orientated business and investment climate in Europe.

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

*Text of 1 to 250 characters will be accepted*

- Banking and financial services
- Climate Action
- Competition
- Consumers
- Culture and media
- Customs & Trade
- Defence, aerospace and security
- Digital economy and society
- Economy, finance and the euro
- etc.

**\* 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                          |

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

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

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

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- \* 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?)

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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*

Both BER and the HGL provide valuable insights in the Commission's reasoning and certainly do help in making horizontal collaborations antitrust-compliant.

This being said, the devil is in the detail. Certain policy choices are difficult to understand, or language seems contradictory or difficult to reconcile (e.g. the inability in the context of joint exploitation under the SBER to entrust distribution to one of the parties while allowing a joint organization or independent third party; or the concern in the HGL over price fixing in commercialization agreements (para. 234) on one hand, and the language that distribution agreements are on the more limited side of joint commercialization agreements on the other (para. 226), leaving open whether the determination of the resale price by the distributor amounts to "price fixing").

If these not so clear concepts could be clarified, streamlined, or simply further spelled out, this would add great practical value to the entire set of rules.

### ***Legal certainty provided by the HBERs and the HGL***

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4.3 In your view, have the R&D BER and Section 3 of the HGL on research and development agreements provided sufficient legal certainty on R&D agreements companies can conclude without the risk of infringing competition law?

- Yes
- No
- Do not know

\* 4.4 Please explain your reply

*Text of 1 to 1500 characters will be accepted*

The R&D BER have provided a high degree of guidance as to the antitrust compliance of R&D agreements. There are some smaller caveats (e.g. the boundaries between research and development). A different question (to which we do not pretend to have an answer) is whether the technological evolution and the emerging competition policy for the digital age might require certain adaptations, for example because the R&D BER is market share based, and the concept of market definition in rapidly developing industries is partially put in question in the Commission's Report on competition policy in the digital era.

\* 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 R&D BER operates with relatively clear definitions, and the HGL is occasionally more epic and less straightforward to apply. However, the HGL provide a very good explanatory background to the concepts used in the R&D 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*

With some smaller caveats, the SBER and the S4HGL are particularly clear and easy to handle, all the more as they interrelate with merger control, where many well-developed concepts exist.

\* 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*

Just as the R&D BER, the SBER works with easy to understand definitions, that are further explained by the HGL. The SBER is even more “clear cut” (in the positive sense) and easy to apply than the R&D BER.

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 HGL establish with sufficient clarity stand-alone information exchanges as a mortal sin - HGL discusses information exchanges mainly as a restriction of competition by object, often in the context of other hard-core infringements. The Digital Era Report suggests that more guidance is needed on permitted information sharing, and Commissioner Vestager has often spoken about the competitive benefits of information sharing.

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

- Yes
- No
- Do not know

\* 4.14 Please explain your reply

*Text of 1 to 1500 characters will be accepted*

The HGL on joint purchasing are clear as to the policy intentions but lack sharpness and clarity as to the boundaries between justified and collusive conduct. There is new case law in the area (e.g. Battery Recycling), and there have been important policy modifications, for example in the agricultural sector. In our view, the lack of clear definitions as they can be found in the BERs makes it more difficult to find guidance and comfort in 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

\* 4.16 Please explain your reply

*Text of 1 to 1500 characters will be accepted*

Same as for purchasing agreements. For example, what exactly is “price fixing” in the context of a distribution agreement? One of the competing parties has to determine the resale price. If there is exclusive distribution, what is the difference between the distributor determining the price and price fixing? Given the closeness to market and the higher degree of antitrust liability, more conceptual clarity would be desirable.

\* 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*

Clear standards that remain valid in line of case law developments.

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

- Yes
- No
- Do not know

\* 4.21 In your view, are there other types of horizontal cooperation agreements outside those identified in the current HGL that should have been specifically addressed in order to increase legal certainty?

- Yes
- No
- Do not know

\* 4.22 If Yes, please list those types of agreements and explain your reasons

*Text of 1 to 3000 characters will be accepted*

To be considered whether agreements between competitors relating to data should be addressed in a separate section.

### *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*

We do not yet have a clear view on this point.

- \* 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*

Sustainability agreements.

\* 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?)

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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*

The costs incurred by our members when assessing the application of the current R&D and Specialisation BERs and the HGL vary depending on the industry and type of the agreement in question. As a general rule, the costs include time spent by in-house lawyers drafting and reviewing agreements in order to ensure that they fall within the safe harbour of the guidance, as well as the time and resources to ensure that the partnering entity will not be in a position to disqualify the agreement from benefiting from the R&D and Specialisation BERs and the HGL (eg. market share thresholds). Significant costs are also incurred by our members when instructing external counsel for legal advice on specific application issues of the R&D and Specialisation BERs and the HGL, and supervision of the parties' meetings in order to ensure competition law compliance while the parties negotiate their agreement.

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

*Text of 1 to 1000 characters will be accepted*

It is difficult to provide an estimate of compliance costs with the R&D and Specialisation BERs and the HGL in monetary terms given the nature of our organisation. AmCham EU submits this response on behalf of all its members, which comprise companies, law firms and consultancies. It is therefore not possible to provide a comprehensive representative figure of the costs incurred.

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*

It is difficult to provide a meaningful estimate of our members' quantifiable costs in this respect. However, our members' collective view is that the costs generated by applying the R&D and Specialisation BERs and the HGL (external counsel legal fees, delays in implementation, legal uncertainty, dealing with potential complaints) is proportionate to the benefits which arise from having those instruments in place (in particular in regards to the legal certainty they help providing).

5.4 Please explain how you calculate these costs

*Text of 1 to 1500 characters will be accepted*

NA

\* 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

\* 5.6 Please explain your reply

*Text of 1 to 1500 characters will be accepted*

Compared to the previous legislative framework, we understand that the costs generated by the application of the R&D and Specialisation BERs and the HGL have decreased for our members, although not significantly. This is mainly due to the introduction of a number of clarifications brought by the current R&D BER in terms of hard-core restrictions and the grey list. In addition, the fact that, for instance, R&D funding agreements are now covered and exclusive licensing to one of the parties is permitted have also facilitated the application and hence reduced the costs.

Nonetheless, some costs are inevitable (and still persist) due to the need to determine whether these instruments are applicable in the first place, and second, the need to carry out case-by-case compliance assessments under Article 101(1) / 101(3) TFEU in case our members' agreements do not fall under the "safe harbours" of these instruments.

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

*Text of 1 to 1500 characters will be accepted*

As indicated earlier, due to the specific nature of AmCham EU and the diversity of its members it is very difficult to provide an estimate.

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*

As R&DBER provides a “safe harbour” for certain R&D agreements, its may lead to increased costs. Our members are currently able to calibrate their R&D arrangements to ensure compliance with the R&DBER /HGL while carrying out case-by-case compliance assessments for R&D agreements which do not fall within the R&DBER/HGL. The abolition of the R&DBER would require our members to carry out in-depth Art. 101 TFEU assessments for more R&D agreements in order to avoid possible non-compliance. The R&DBER relieves to a large extent the burden to assess whether agreements fall within the scope of Art. 101 TFEU. Such assessments are more complex and may likely require specialised in-house and external counsel advice. Also, a rise in complexity of assessments may increase the coordination between potential R&D partners before enabling them to conclude R&D agreements and legal uncertainty would increase. These effects would increase the costs for our members directly and also indirectly by having negative effect on timelines for conclusions R&D agreements. Abolition of the R&DBER could hinder innovation in Europe and may limit European players' abilities to compete in globalised markets which may lead to revenue losses vis-à-vis players facing more R&D-friendly regulatory environments. On immediate effects, there would be significant additional cost associated with abolition, as our members would be required to take immediate action to assess and potentially alter existing R&D agreements.

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*

It is difficult to provide a meaningful / quantifiable estimate of AmCham EU's members' potential change (increase) in costs in this respect.

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

- Would increase
- Would decrease
- Do not know

\* 5.12 Please explain your reply

*Text of 1 to 1500 characters will be accepted*



The “safe harbour” for certain specialization and joint production agreements created by the Specialisation BER provides our members with vital legal certainty which has the effect of limiting to a certain degree the costs and time spent on ensuring regulatory compliance. Our members are currently able to calibrate their commercial policies and activities in order to ensure general compliance with the terms of the Specialisation BER while carrying out case-by-case compliance assessments in those cases that are not covered by the Specialisation BER. Therefore, a wholesale abolition of the Specialisation BER would inevitably lead to significantly increased costs because it would require our members to carry out Article 101(1) / 101(3) TFEU assessments for many more types of agreements and arrangements in order to avoid any situation of non-compliance arising. This assessment is more complex and may, very likely, require more specialised in-house as well as external legal counsel advice, which in turn would increase the costs for our members. Such a development would also inevitably claim more management time as it would prolong management deliberations over even simple agreements and arrangements. Finally, there would also be significant and immediate additional costs associated with abolition, as our members would be required to take immediate action in order to alter their existing contractual arrangements.

### 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*

It is difficult to provide a meaningful / quantifiable estimate of AmCham EU's members' potential change (increase) in costs in this respect.

### **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*

As described above, the Specialisation BER and similarly the R&D BER, through the "safe harbours" which they have created, provide vital legal certainty which limits the costs and time spent on ensuring regulatory compliance. They allow our members to calibrate their commercial policies and activities in order to ensure general compliance with the terms of the Specialisation and R&D BERs while carrying out case-by-case compliance assessments only in those cases which are not covered by the Specialisation and R&D BERs. This limits the need for specialised in-house as well as external legal advice to only the more complex cases. It also avoids complicating management deliberations over the more simple agreements and arrangements thereby saving management time.

Simultaneously, the HGL provide in-house as well as external legal counsel with an analytical framework for the most common horizontal cooperation agreements. As such, they constitute an invaluable legal resource and a roadmap to the Commission's understanding of the law surrounding those agreements. Additionally, similarly to the Specification and R&D BERs, the HGL assist in-house counsel to navigate the rules in respect of the most common horizontal cooperation agreements thus limiting costs for our members by allowing them to only engage specialised external legal counsel in only the more complicated cases.

### **Benefits vs. costs**

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

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

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

\* 5.16 Please explain your reply

*Text of 1 to 1500 characters will be accepted*

While it is difficult to conduct a meaningful cost/benefit analysis in this respect, our members' collective view is that the costs generated by applying the R&D BER to specific horizontal agreements is proportionate to the benefits which arise from having the legal certainty of the R&D BER in place. Any wholesale overhaul of the R&D BER would entail additional costs for members in the necessary recalibration of existing horizontal agreements in order to ensure continued compliance with EU law, but again this may be judged as proportionate taking into consideration the advantages of having a well-tailored R&D BER to match commercial realities in the market (e.g. in respect of online sales). Any complete abolition of the R&D BER would lead to a material and significant increase in costs incurred by members on the inevitably increased costs associated with ensuring compliance on a case-by-case basis.

\* 5.17 Regarding the **Specialisation BER**

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

\* 5.18 Please explain your reply

*Text of 1 to 1500 characters will be accepted*

While it is difficult to conduct a meaningful cost/benefit analysis in this respect, our members' collective view is that the costs generated by applying the Specialisation BER to specific horizontal agreements is proportionate to the benefits which arise from having the legal certainty of the Specialisation BER in place. Any wholesale overhaul of the Specialisation BER would entail additional costs for members in the necessary recalibration of existing horizontal agreements in order to ensure continued compliance with EU law, but again this may be judged as proportionate taking into consideration the advantages of having a well-tailored Specialisation BER to match commercial realities in the market (e.g. in respect of online sales). Any complete abolition of the Specialisation BER would lead to a material and significant increase in costs incurred by members on the inevitably increased costs associated with ensuring compliance on a case-by-case basis.

\* 5.19 Regarding the **HGL**

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

\* 5.20 Please explain your reply

*Text of 1 to 1500 characters will be accepted*

While it is difficult to conduct a meaningful cost/benefit analysis in this respect, our members' collective view is that the costs generated by applying the HGL to specific horizontal agreements is proportionate to the benefits which arise from having the legal certainty of the HGL in place. Any wholesale overhaul of the HGL would entail additional costs for members in the necessary recalibration of existing horizontal agreements in order to ensure continued compliance with EU law, but again this may be judged as proportionate taking into consideration the advantages of having a well-tailored HGL to match commercial realities in the market (e.g. in respect of online sales). Any complete abolition of the HGL would lead to a material and significant increase in costs incurred by members on the inevitably increased costs associated with ensuring compliance on a case-by-case basis.

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

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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	<p>We note that the approach to market definition is of central importance to conducting competitive assessments in respect of many different types of horizontal agreement covered under the HGL. The Commission recently announced (9 December, 2019) that it plans to review its relevant market definition notice.</p> <p>In support of the idea of revising the approach on market definition, Commissioner Vestager specifically highlighted questions over the continued relevance of using the set formula of demand- and supply-side substitutability and the SSNIP test in determining relevant markets.</p>	<p>(For example) paragraphs 10, 43, 118, 198 of the VGL.</p>	<p>Suggest that the recently-announced reconsideration of the Market Definition Notice will potentially have important knock-on effects on future approach to conducting competitive analyses of horizontal cooperation agreements</p>
2	<p>Importance of cooperation/pooling of resources by companies engaged in R&amp;D in respect of green technologies – given in particular the significance of the objectives set out under the European Commission’s new “Green Deal”</p>	<p>R&amp;D Block Exemption Regulation &amp; Section 3 of the HGL</p>	<p>In view of the importance of the EU’s new Green Deal and the ambitious objectives set out under the Commission’s related policy proposals, suggest that it would be desirable – as well as consistent and coherent – to see an expansion of the R&amp;D BER and Section 3 of the HGL in order to explicitly recognize the importance of cooperation with respect to R&amp;D in green technology fields.</p>

3	<p>Since the HGL were introduced in 2010, there have been several case law developments, including Case C-286/13-P Dole Food and Dole Fresh Food Europe v Commission (including findings in respect of bilateral exchanges of information on pricing decisions) and C-194/14 P AC Treuhand v Commission which the Commission may wish to factor into any revisions in Section 2 of the HGL in respect of information exchanges.</p>	<p>(For example) paragraphs 60-63 of the HGL (Section 2, Information Exchange)</p>	
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*

AmCham EU supports the continuation of the R&D BER and Section 3 of the HGL. Please see response at Section 6.1 above in respect of significance of the Commission's "Green Deal" and the need to ensure that the R&D BER and related guidelines remain relevant.

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

- Still relevant
- No longer relevant
- Do not know

\* 6.5 Please explain your reply

*Text of 1 to 1500 characters will be accepted*

The Specialisation BER has provided a useful framework for the development of joint production projects and has provided a basis on which companies are able to gain additional and much-needed legal certainty with respect to the safe harbour for categories of agreement between companies falling below the applicable market share thresholds. For those companies exceeding the market share thresholds, Section 4 of the HGL have provided useful guidance for companies on issues that go beyond the scope of the content in the Specialisation BER itself. In the view of AmCham EU's members, there have not been economic changes or other changes in the way that companies (legitimately) cooperate such as to mean that the Specialisation BER or Section 4 of the HGL are no longer relevant, and AmCham EU would support the renewal of both.

\* 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*

AmCham EU believes that the guidance on information exchange provided in Section 2 of the HDL remains relevant today, and that the provision of suitable guidance is likely to remain relevant and useful for future years. In particular, the guidance in respect of the importance of market characteristics that should be taken into account when considering the impact of information exchanges has proved very helpful for companies as have the criteria for competitive assessment set out by the HGL – e.g. the age of data, the level of aggregation applied, the public versus non-public nature of the information, etc. The broader analytical framework for information exchanges outlined in Section 2 of the HGL remains relevant in today's market

conditions – the key questions facing companies in respect of the legality of information exchanges remain whether the information exchange can restrict competition by giving rise to collusive outcomes or restrictive effects on competition.

\* 6.8 Section 5 of the HGL on purchasing agreements is

- Still relevant
- No longer relevant
- Do not know

\* 6.9 Please explain your reply

*Text of 1 to 1500 characters will be accepted*

The guidance provided in Section 5 of the HGL on joint purchasing arrangement has provided welcome direction for companies when analyzing any purchasing agreements that they may have in place. The inclusion of the indicative 15% threshold for combined market share in the purchasing and selling markets is a useful tool which recognizes that parties to joint purchasing arrangements who do not have market power are unlikely to raise anticompetitive concerns. The recent focus of the Commission on enforcement with respect to purchasing cartels (ethylene purchasing, battery recycling, styrene monomer) indicate that the Commission is willing to pursue potential anticompetitive conduct in respect of purchasing arrangements, but given the generally accepted pro-competitive/efficiency-boosting role that joint purchasing can play, it would be particularly helpful if Section 5 of the HGL, in its revised form, were to include additional guidance on the circumstances under which joint purchasing arrangements will be seen as pro-competitive, as opposed to going so far in terms of any effect on price to constitute a restriction by object.

\* 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*

AmCham EU believes that the guidance provided in Section 6 of the HGL concerning commercialization agreements is still relevant. The balance struck in Section 6 between the relevance of market power, the factors which make a collusive outcome more or less likely, and the principles to be followed with respect to an assessment under Article 101(3) continue to be appropriate. AmCham EU notes the close relationship between the Vertical Block Exemption Regulation (VBER) /Vertical Guidelines (VGL) and certain aspects of commercialisation agreements (a factor recognized explicitly in the HGL themselves), and encourages the Commission to ensure that any changes brought about as part of the Commission's ongoing review of the existing VBER and VGL are fully aligned and coherent with the contents of Section 6 of the HGL

\* 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*

AmCham EU welcomes the confirmation provided in Section 7 of the HGL that standardization agreements can facilitate technical interoperability and compatibility and can give rise to efficiencies that can be passed on to consumers. Section 7 makes clear that the holding of standard essential patents (SEPs) does not automatically mean that a company holds market power. Additional guidance recognizing dynamics around the disclosure of IPR and royalty rates also continue to be helpful.

## 7 Coherence (Does the policy complement other actions or are there contradictions?)

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\* 7.1 In your view, are the HBERs and the HGL coherent with other instruments and /or case law that provide(s) guidance on the interpretation of Article 101 of the Treaty (e.g., other Block Exemption Regulations, the Vertical Guidelines and the Article 101(3) Guidelines)?

- Yes
- No
- Do not know

\* 7.2 Please explain

*Text of 1 to 3000 characters will be accepted*

In general yes – and subject to our submissions above with respect to coherence with e.g. the VBER and VGL.

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

- Yes
- No
- Do not know

\* 7.4 Please explain

*Text of 1 to 3000 characters will be accepted*

In general we find that the content of the HBERs and the HGL are coherent with other EU legislation currently in place. Please see further above our specific comments with respect to the need to ensure continued consistency/coherence between the HGL and the soon-to-be revised VBER and VGL. We also note that the new European Commission has identified IP policy/regulation and industrial policies as key to ensuring that EU policy objectives with respect to technological developments (e.g. 5G) are protected. It will be important for the Commission to ensure that any proposed changes to the HBERs and/or HGL are aligned with broader IP regulation and industrial policy.

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

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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*

No reply

\* 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*

No reply

\* 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*

No reply

## 9 Specific questions

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### 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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