

2021 No. 1169

COMPETITION

**The Competition Act 1998 (Carbon Dioxide) (Public Policy
Exclusion) Order 2021**

<i>Made</i>	- - - -	<i>20th October 2021</i>
<i>Laid before Parliament</i>		<i>21st October 2021</i>
<i>Coming into force</i>	- -	<i>15th November 2021</i>

The Secretary of State, in exercise of the powers conferred by section 71(3) of, and paragraph 7(1), (2) and (3) of Schedule 3 to, the Competition Act 1998(a), makes the following Order.

The Secretary of State is satisfied that there are exceptional and compelling reasons of public policy why the prohibition contained in Chapter I of Part I of the Competition Act 1998 ought not to apply to, or ought to be deemed never to have applied in relation to, agreements of the descriptions specified in this Order.

Citation and commencement and extent

1.—(1) This Order may be cited as the Competition Act 1998 (Carbon Dioxide) (Public Policy Exclusion) Order 2021 and comes into force on 15th November 2021.

(2) This Order extends to England and Wales, Scotland and Northern Ireland.

Interpretation

2. In this Order—

“CF” means CF Fertilisers UK Limited, a company incorporated in England and Wales (company number 03455690), and any company which is a group undertaking in relation to CF Fertilisers UK Limited;

“the Chapter I exclusion period” means the period beginning with 30th September 2021 and ending with whichever is the earlier of—

- (a) the revocation of this Order; or
- (b) the expiry of this Order in accordance with article 7;

“CO₂” means carbon dioxide produced at—

- (a) the plant at Billingham, Cleveland operated by CF; or
- (b) the plant at Wilton, Teesside operated by Ensus UK Limited, a company incorporated in England and Wales (company number 05816694);

“the CO₂ negotiation period” means the period beginning with 30th September 2021 and ending with 12th October 2021;

“consumer” means a person who is, or seeks to be, supplied with CO₂ by a distributor;

“distributor” means any of the following—

- (a) Air Liquide UK Limited, a company incorporated in England and Wales (company number 00232592);
- (b) BOC Limited, a company incorporated in England and Wales (company number 00337663);
- (c) Nippon Gases UK Limited, a company incorporated in England and Wales (company number 09938383);
- (d) any company which is a group undertaking in relation to any of the companies referred to in paragraphs (a) to (c);

“essential user” means a consumer who requires CO₂ for the purpose of maintaining the supply of essential goods or services, such as goods or services relating to animal welfare, energy, food, water or health;

“group undertaking” has the meaning given by section 1161(5) of the Companies Act 2006^(a);

“qualifying activities” has the meaning given by article 3.

Qualifying activities

3.—(1) For the purposes of this Order a qualifying activity is any activity specified in paragraph (2) insofar as it—

- (a) is for the purpose referred to in article 4(4)(a); and
- (b) in the case of a qualifying activity specified in paragraph (2)(b) or (c), does not involve the sharing between distributors of any information regarding costs or pricing.

(2) The activities specified in this paragraph are—

- (a) sharing information during the CO₂ negotiation period in relation to—
 - (i) the price payable by a distributor for the purchase of CO₂;
 - (ii) the quantity of CO₂ purchased or to be purchased by a distributor;
 - (iii) the term of any contract relating to the purchase by a distributor of CO₂; and
 - (iv) the names of consumers;
- (b) sharing information and coordination as regards the allocation, movement and distribution of CO₂ to consumers and, in particular, essential users during the Chapter I exclusion period; and
- (c) sharing information on the day to day stock position and shortages of CO₂ within any part of the United Kingdom during the Chapter I exclusion period.

Exclusion from the Chapter I prohibition

4.—(1) The Chapter I prohibition does not apply to agreements^(b) between two or more distributors which—

- (a) relate to a qualifying activity specified in article 3(2)(b) or (c);
- (b) are notified to the Secretary of State in accordance with article 5(1); and
- (c) meet the conditions set out in paragraph (4).

(a) 2006 c. 46.

(b) Under section 59 of the Competition Act 1998 (interpretation) references in Part I of that Act to “agreement” are to be read with section 2(5) and (6) of the Act which provide that, unless the context otherwise requires, a provision of Part I of the Act which is expressed to apply to, or in relation to, an agreement is to be read as applying equally to, or in relation to, a decision by an association of undertakings or a concerted practice (but with any necessary modifications).

(2) The Chapter I prohibition is to be deemed never to have applied in relation to an agreement referred to in paragraph (1) which was entered into in the period beginning with 30th September 2021 and ending with the day before the day on which this Order comes into force.

(3) The Chapter I prohibition is to be deemed never to have applied in relation to agreements entered into during the CO₂ negotiation period which—

- (a) are between CF and any distributor or between two or more distributors;
- (b) relate to a qualifying activity specified in article 3(2)(a);
- (c) are notified to the Secretary of State in accordance with article 5(1); and
- (d) meet the conditions set out in paragraph (4).

(4) The conditions referred to in paragraphs (1)(c) and (3)(d) are that—

- (a) the purpose of the agreement is to prevent or mitigate disruption to the supply of CO₂ to distributors, consumers and, in particular, essential users in any part of the United Kingdom during the Chapter I exclusion period;
- (b) the agreement does not have as its object or effect the prevention, restriction or distortion of competition within the United Kingdom, except in relation to qualifying activities specified in article 3 in a market for the provision of CO₂ to distributors, consumers and, in particular, essential users in any part of the United Kingdom; and
- (c) in the case of an agreement relating to a qualifying activity referred to in article 3(2)(a), the term of any contract for the purchase by a distributor of CO₂ that arises out of or in connection with the qualifying activity expires no later than the end of 31st January 2022.

Notification to the Secretary of State

5.—(1) An agreement is notified to the Secretary of State in accordance with this paragraph if the following details of the agreement are given to the Secretary of State in writing within 14 days of the relevant date—

- (a) the names of the undertakings which are parties to the agreement;
- (b) a description of the nature of the agreement; and
- (c) the date the agreement was entered into.

(2) In this article the “relevant date”, in relation to an agreement, means—

- (a) in the case of an agreement entered into before the coming into force of this Order, the date this Order comes into force;
- (b) in any other case, the date on which the agreement is entered into.

Register of agreements

6.—(1) The Secretary of State must compile and maintain a register of agreements notified under this Order.

(2) The register must be kept in such form as the Secretary of State considers appropriate.

(3) The Secretary of State must publish the register when it is first compiled and each time it is revised.

Expiry

7. This Order expires at the end of 31st January 2022.

20th October 2021

Paul Scully
Parliamentary Under Secretary of State
Department for Business, Energy and Industrial Strategy

EXPLANATORY NOTE

(This note is not part of the Order)

This Order excludes from the Chapter I prohibition in the Competition Act 1998 (c. 41) agreements between CF and any distributor and agreements between two or more distributors which are for the purpose of preventing or mitigating disruption to the supply of CO₂ to distributors, consumers and essential users in the United Kingdom.

The Chapter I prohibition precludes agreements between undertakings, decisions by associations of undertakings or concerted practices which may affect trade within the United Kingdom and which have as their object or effect the prevention, restriction or distortion of competition within the United Kingdom. The Secretary of State, where satisfied that there are exceptional and compelling reasons of public policy for doing so, may exclude an agreement or an agreement of a particular description from the Chapter I prohibition. A provision of Part I of the Competition Act 1998 (and of this Order) which is expressed to apply to, or in relation to, an agreement is to be read as applying equally to, or in relation to, a decision by an association of undertakings or a concerted practice (but with any necessary modifications).

Article 3 of the Order specifies the activities to which an agreement must relate in order to qualify for an exclusion. Article 3(2)(a) specifies activities relating to the sharing of information between 30th September 2021 and 12th October 2021 (the CO₂ negotiation period) relating to the purchase of CO₂, specifically information regarding price, quantity, the term of any contract and the names of consumers. Article 3(2)(b) and (c) specify activities relating to the sharing of information and coordination with regards to the allocation, movement and distribution of CO₂ during the Chapter I exclusion period and information sharing regarding the day to day stock position and shortages of CO₂ during that period.

Article 4(1) grants an exclusion from the Chapter I prohibition in respect of agreements between the distributors relating to the activities specified in article 3(2)(b) and (c) and article 4(2) applies the exclusion retrospectively to any such agreements which were entered into between 30th September 2021 and the day before the day on which this Order comes into force. Article 4(3) grants an exclusion from the Chapter I prohibition retrospectively in respect of any agreements between CF and the distributors, or between the distributors, relating to the activities specified in article 3(2)(a) which were entered into during the CO₂ negotiation period.

Article 4 also sets out other requirements which an agreement must meet in order to qualify for exclusion.

Articles 5 and 6 provide for agreements to be notified to the Secretary of State and for a register of the agreements to be compiled and published by the Secretary of State.

Article 7 provides that the Order expires at the end of 31st January 2022.

No impact assessment has been prepared for this Order. An Explanatory Memorandum has been prepared for this Order and is available alongside this instrument on the UK Legislation website www.legislation.gov.uk.

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