STATUTORY INSTRUMENTS

2022 No. 1271

COMPETITION

The Competition Act 1998 (Research and Development Agreements Block Exemption) Order 2022

Made - - - -	*at 1.21 p.m. on 5th December 2022*
Laid before Parliament	*at 4.00 p.m. on 5th December 2022*
Coming into force	*1st January 2023*

The Competition and Markets Authority has recommended that the Secretary of State make an order specifying certain categories of agreements relating to research and development for the purposes of section 6 of the Competition Act 1998(**a**) ("the Act").

In accordance with section 8 of the Act(**b**), before making the recommendation the Competition and Markets Authority published details of the proposed recommendation and considered the representations about it which were made to it(**c**).

The Secretary of State has decided to give effect to the recommendation without modifications.

The Secretary of State has also decided to vary two retained block exemption regulations under section 10A(1) of the Act(**d**). Before coming to that decision, the Secretary of State has—

(a) in accordance with section 10A(2) of the Act, had regard to the conditions specified in section 9(1) for exemption from the prohibition in Chapter 1 of Part 1 of the Act, and

(b) in accordance with section 10A(5) of the Act, informed the Competition and Markets Authority of the proposed variations and taken into account that Authority's comments.

The Secretary of State therefore makes the following Order in exercise of the powers conferred by sections 6(2)(a), (5), (6) and (7), 10A(1) and 71(3) of the Act.

(**a**) 1998 c. 41. Section 6 was amended by paragraph 2 of Schedule 5 to the Enterprise and Regulatory Reform Act 2013 (c. 24) to give the function of making recommendations to the Competition and Markets Authority. The Competition and Markets Authority was established by section 25 of that Act. This function was previously the responsibility of the Director General for Fair Trading and then the Office of Fair Trading. Other amendments to section 6 were made by paragraph 38 of Schedule 25 to the Enterprise Act 2002 (c. 40) and S.I. 2004/1261. "Research and development" is defined in article 2(1) of this Order.

(**b**) Section 8 was amended by paragraph 38 of Schedule 25 to the Enterprise Act 2002 and paragraph 3 of Schedule 5 to the Enterprise and Regulatory Reform Act 2013.

(**c**) The Competition and Markets Authority's proposed recommendation and responses to its consultation can be found online at https://www.gov.uk/government/consultations/retained-horizontal-block-exemption-regulations-rd-and-specialisation-agreements-consultation or obtained by writing to Competition and Markets Authority, The Cabot, 25 Cabot Square, London E14 4QZ.

(**d**) Section 10A was inserted by S.I. 2019/93. "Retained block exemption regulation" is defined in section 10(12) of the Competition Act 1998 ("the Act"), which was also inserted by S.I. 2019/93.

Citation, commencement and extent

1. This Order—

(a) may be cited as the Competition Act 1998 (Research and Development Agreements Block Exemption) Order 2022,

(b) comes into force on 1st January 2023, and

(c) extends to England and Wales, Scotland and Northern Ireland.

Interpretation

2.—(1) In this Order—

"block exemption" means the exemption from the Chapter I prohibition(**a**) arising by virtue of this Order for the category of agreements(**b**) specified in this Order;

"connected undertakings", in relation to a party to an R&D agreement, means—

(a) undertakings in relation to which the party to the R&D agreement, directly or indirectly—

(i) has the power to exercise more than half the voting rights,

(ii) has the power to appoint more than half the members of the board of directors, or if there is no such board, the equivalent body or bodies responsible for the management of the undertaking, or

(iii) has the right to manage the undertaking's affairs;

(b) undertakings which directly or indirectly have, in relation to the party to the R&D agreement, the rights or powers listed in paragraph (a);

(c) undertakings in relation to which an undertaking referred to in paragraph (b) has, directly or indirectly, the rights or powers listed in paragraph (a);

(d) undertakings in relation to which the party to the R&D agreement together with one or more of the undertakings referred to in paragraphs (a), (b) or (c), or in relation to which two or more of the undertakings referred to in paragraphs (b) or (c), jointly have the rights or powers listed in paragraph (a);

(e) undertakings in relation to which the rights or the powers listed in paragraph (a) are jointly held by—

(i) two or more parties to the R&D agreement or their respective connected undertakings referred to in paragraphs (a) to (d), or

(ii) one or more of the parties to the R&D agreement or one or more of their connected undertakings referred to in paragraphs (a) to (d) and one or more third parties;

"contract product", in relation to an R&D agreement, means—

(a) a product arising out of the joint research and development or paid-for research and development to which the R&D agreement relates, or

(b) a product produced or provided applying a contract technology,

and includes products obtained through an R&D cluster and new products;

"contract technology", in relation to an R&D agreement, means a technology or process arising out of the joint research and development or paid-for research and development to which the R&D agreement relates, and includes technologies or processes obtained through an R&D cluster and new technologies or processes;

"excluded restriction" has the meaning given in article 12(2);

(**a**) "Chapter I prohibition" is defined in section 2(8) of the Act.

(**b**) Under section 59(1) of the Act (interpretation) references in Part 1 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 1 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).

"exploitation of the results", in relation to an R&D agreement, means (other than in article 3(2))—

(a) the production or distribution of a contract product or the application of a contract technology, or

(b) the assignment or licensing of intellectual property rights, or the communication of know-how, required for that production or application;

"financing party" means a party to an agreement relating to research and development that finances the research and development concerned while not carrying out any of the research and development activities itself;

"intellectual property rights" means—

(a) industrial property rights (in particular, patents, design rights and trademarks), and

(b) copyright and related rights;

"joint", in relation to activities carried out under an R&D agreement, means (other than in the expression "joint team, organisation or undertaking") activities where the work involved is—

(a) carried out by the parties to the R&D agreement through a joint team, organisation or undertaking,

(b) jointly entrusted by the parties to a third party, or

(c) allocated between the parties by way of specialisation relating to research and development or specialisation relating to exploitation;

"know-how" means a package of practical information, resulting from experience and testing, which is—

(a) not generally known or easily accessible,

(b) significant and useful for the production of new or existing products or the application of new or existing technologies or processes, and

(c) described in a sufficiently comprehensive manner so as to make it possible to verify that it fulfils the criteria in paragraphs (a) and (b);

"paid-for research and development" means research and development that is carried out by one or more parties to an agreement and financed by one or more financing parties;

"product" means a good or a service, and includes both intermediate goods or services and final goods or services;

"R&D agreement" has the meaning given in article 3(2);

"R&D cluster" means research and development efforts directed primarily towards a specific aim or objective which—

(a) cannot be defined as a specific product or technology, or

(b) involves a substantially broader target than products or technologies on a specific market;

"research and development" means—

(a) activities aimed at acquiring know-how relating to existing or new products, technologies or processes,

(b) the carrying out of theoretical analysis, systematic study or experimentation, including experimental production,

(c) technical testing of products or processes,

(d) the establishment of facilities necessary for any of the activities referred to in paragraphs (a) to (c), and

(e) the obtaining of intellectual property rights for the results of those activities;

"specialisation relating to exploitation", in relation to an R&D agreement, means an arrangement between the parties to the agreement under which—

(a) they allocate between them individual tasks relating to the exploitation of the results, such as production or distribution of a contract product, or

(b) restrictions are imposed on one or more of the parties to the agreement regarding the exploitation of the results, such as restrictions in relation to particular geographical areas, customers or fields of use,

and includes a case where only one of the parties produces and distributes a contract product on the basis of an assignment or exclusive licence granted by the other parties;

"specialisation relating to research and development", in relation to an R&D agreement, means an arrangement under which each of the parties to the agreement is involved in the research and development activities to which the agreement relates and the parties divide the research and development work involved in those activities between them in the way that they consider most appropriate, but does not include paid-for research and development;

"third party", in relation to a party to an R&D agreement, means a person(**a**) other than a party to the agreement or a person acting on behalf of a party to the agreement.

(2) In this Order—

(a) references to a party to an R&D agreement having or being given "access" to the results of research and development, to intellectual property rights or to know-how are references to the party having or being given, as a minimum, the right to use the results, intellectual property rights or know-how,

(b) references to a "new" product, technology or process, in relation to an R&D agreement falling within article 3(2)(a) or (b), are references to a product, technology or process that does not exist at the time when the agreement is entered into and that will, if emerging, create its own new market and not improve, substitute or replace an existing product, technology or process, and

(c) in the case of an R&D agreement falling within article 3(2)(c) or (d), references to the research and development to which the agreement relates are to be read as references to the research and development carried out under the prior agreement falling within article 3(2)(a) or (b) between the same parties.

(3) For the purposes of this Order, the terms "party" and "undertaking" include their respective connected undertakings.

Block exemption

3.—(1) The category of agreements identified in paragraph (2) as R&D agreements is specified for the purposes of section 6 of the Competition Act 1998(**b**).

(2) Subject to paragraph (3), for the purposes of this Order an R&D agreement is an agreement entered into between two or more parties which relates to the conditions under which those parties pursue—

(a) joint research and development, including cases where the agreement concerned also provides for joint exploitation of the results of that research and development,

(b) paid-for research and development, including cases where the agreement concerned also provides for joint exploitation of the results of that research and development,

(c) joint exploitation of the results of research and development carried out under a prior agreement falling within paragraph (a) between the same parties, or

(d) joint exploitation of the results of research and development carried out under a prior agreement falling within paragraph (b) between the same parties.

(3) R&D agreements which include provisions relating to the assignment or licensing of intellectual property rights to one or more of the parties, or to an entity the parties establish to

(**a**) Under section 59(1) (interpretation) of the Act, "person", in addition to the meaning given by the Interpretation Act 1978 (c. 30), includes any undertaking.

(**b**) An agreement specified for the purposes of section 6 of the Act is exempt from the prohibition in Chapter 1 of Part 1 of the Act. See section 6(3) of the Act.

carry out the joint research and development or paid-for research and development to which the agreement relates or joint exploitation of the results, are specified provided that those provisions—

(a) do not constitute the primary object of the agreements, and

(b) are directly related to and necessary for the implementation of the agreements.

(4) In paragraph (2) references to "exploitation of the results" of research and development are references to the production or distribution of products or the application of technologies arising out of the research and development concerned or the assignment or licensing of intellectual property rights or the communication of know-how required for such production or application.

Conditions, obligation and consequences of breach

Block exemption subject to conditions and obligation

4. The block exemption has effect in relation to an R&D agreement subject to the conditions specified in articles 5 to 8, 10 and 12 and the obligation specified in article 14.

Access to the final results

5.—(1) The R&D agreement must provide—

(a) for all the parties to the agreement to have access to the final results of the joint research and development or paid-for research and development to which the agreement relates for the purposes of—

(i) further research and development, and

(ii) exploitation of the results, and

(b) for the access referred to in sub-paragraph (a) to be granted as soon as reasonably practicable after the final results of the research and development become available.

(2) For the purposes of paragraph (1), access to the final results of the research and development must—

(a) include access to any intellectual property rights and know-how resulting from the research and development to which the R&D agreement relates, and

(b) not be subject to limitations other than as referred to in paragraph (3).

(3) An R&D agreement does not breach the condition in this article by—

(a) requiring a party to the agreement to compensate another party to the agreement for obtaining access to the results for the purposes of further research and development or for the purposes of exploitation of the results, provided the compensation required is not so high as to effectively prevent such access;

(b) including provision under which one or more research institutes, academic bodies or undertakings that supply research and development as a commercial service without normally being active in the exploitation of results of research and development, agree to confine their use of the results for the purposes of further research;

(c) in cases where the parties to the agreement limit their rights of exploitation of the results in accordance with this Order and, in particular, where the agreement provides for specialisation relating to exploitation, limiting access to the results for the purposes of that exploitation accordingly.

(4) In paragraph (3)(b), "the exploitation of results of research and development" means the production or distribution of products or the application of technologies arising out of research and development or the assignment or licensing of intellectual property rights or the communication of know-how required for such production or application.

Access to pre-existing know-how

6.—(1) If the R&D agreement does not provide for joint exploitation of the results it must provide that each party to the agreement is to be granted access to any pre-existing know-how of the other parties if this know-how is indispensable for the purposes of its exploitation of the results.

(2) An R&D agreement does not breach the condition in paragraph (1) by requiring a party to the agreement to compensate another party to the agreement for obtaining access to its pre-existing know-how, provided the compensation required is not so high as to effectively prevent such access.

Joint exploitation

7.—(1) If the R&D agreement provides for joint exploitation of the results it must meet the conditions in paragraphs (2) and (3).

(2) The condition in this paragraph is that the joint exploitation must relate only to results which are—

(a) indispensable for the production of the contract product or the application of the contract technology concerned, and

(b) protected by intellectual property rights or constitute know-how.

(3) The condition in this paragraph is that, if one or more of the parties to the R&D agreement are charged with the production of a contract product by way of specialisation relating to exploitation, those parties must be required to fulfil orders for supplies of the contract product from the other parties to the agreement, except where—

(a) the R&D agreement also provides for distribution of the contract product by a joint team, organisation or undertaking or by a third party jointly entrusted with distribution of the contract product by the parties, or

(b) the parties to the agreement have agreed that only the party producing the contract product may distribute it.

Thresholds, market shares and duration of exemption

8.—(1) Where, in the case of an R&D agreement falling within article 3(2)(a) or (b), at the time the agreement is entered into, two or more of the parties to the agreement are—

(a) actual competitors or potential competitors, and

(b) if the R&D agreement relates to more than one contract product or contract technology, actual competitors or potential competitors in relation to the same contract product or contract technology,

the agreement must meet the condition in paragraph (2).

(2) The condition in this paragraph is that at the time the R&D agreement is entered into—

(a) in the case of an R&D agreement involving joint research and development, the combined market share of the undertakings which are parties to the agreement must not exceed 25% of any relevant product market or relevant technology market, and

(b) in case of an R&D agreement involving paid-for research and development ("the paid-for R&D agreement"), the combined market share of—

(i) each financing party in respect of the paid-for R&D agreement,

(ii) the other undertakings which are parties to the paid-for R&D agreement, and

(iii) each other undertaking with which each financing party has entered into an R&D agreement in relation to a contract product or contract technology which is the same as a contract product or contract technology to which the paid-for R&D agreement relates,

must not exceed 25% of any relevant product market or relevant technology market.

(3) Where, in the case of an R&D agreement falling within article 3(2)(a) or (b), two or more of the parties to the agreement are undertakings competing in innovation at the time the agreement is entered into and—

(a) if more than one new product or technology would be covered by the R&D agreement, the R&D efforts which each of those parties independently engage in or, in the absence of the agreement, would be able and likely independently to engage in, concern research and development of a new product or technology which relates to the same new product or technology covered by the R&D agreement, or

(b) if more than one aim or objective would be covered by the R&D agreement, the R&D efforts which each of those parties independently engage in or, in the absence of the agreement, would be able and likely independently to engage in, concern an R&D cluster pursuing an aim or objective which relates to the same aim or objective covered by the R&D agreement,

the agreement must meet the condition in paragraph (5).

(4) For the purposes of paragraph (3)—

(a) research and development of a new product or technology relates to a new product or technology that would be covered by the R&D agreement, if it is research and development of a new product or technology which is the same as, or is likely to be substitutable for, the new product or technology that would be covered by the R&D agreement, and

(b) an R&D cluster pursues an aim or objective which relates to an aim or objective that would be covered by the R&D agreement, if the R&D cluster pursues an aim or objective which is the same, or substantially the same, as the aim or objective that would be covered by the R&D agreement.

(5) The condition in this paragraph is that at the time the R&D agreement is entered into there must be three or more of the following—

(a) competing R&D efforts comparable with those of the parties to the R&D agreement, or

(b) third parties that are able independently to engage in a research and development effort which concerns—

(i) research and development of a new product or technology which is the same as, or likely to be substitutable for, a new product or technology that would be covered by the R&D agreement, or

(ii) an R&D cluster pursuing an aim or objective which is the same, or substantially the same, as an aim or objective that would be covered by the R&D agreement.

(6) Where, in the case of an R&D agreement falling within article 3(2)(a) or (b), the parties to the agreement are not competing undertakings at the time the agreement is entered into or the agreement meets all the conditions in paragraphs (2) and (5) to which it is subject—

(a) the block exemption has effect in relation to the R&D agreement concerned for the duration of the research and development to which the agreement relates, and

(b) if the R&D agreement concerned provides for joint exploitation of the results, the block exemption is extended for a further period ending seven years after the time a contract product or contract technology is first put on the market within the United Kingdom, or if more than one contract product or contract technology is put on the market within the United Kingdom, after the time the first of them is put on the market.

(7) In the case of an R&D agreement falling within article 3(2)(c) or (d), the block exemption has effect in relation to the agreement for the period beginning with the date the agreement is entered into and ending seven years after the time a contract product or contract technology is first put on the market within the United Kingdom, or if more than one contract product or contract technology is put on the market within the United Kingdom, after the time the first of them is put on the market, on condition that—

(a) at the time the prior agreement falling within article 3(2)(a) or (b) was entered into the parties to the prior agreement were not competing undertakings, or

(b) the prior agreement met all the conditions in paragraphs (2) and (5) to which it was subject.

(8) The block exemption continues to have effect in relation to an R&D agreement after the end of the seven year period under paragraph (6)(b) or (7) (as the case may be), subject to the condition that the combined market share of the undertakings which are parties to the R&D agreement must not exceed 25% of any market to which a contract product or contract technology belongs.

(9) For the purposes of this article, the parties to an R&D agreement are not competing undertakings at the time the agreement is entered into, if neither paragraph (1) nor paragraph (3) applies to the agreement.

(10) In this article—

"actual competitor", in relation to a contract product or contract technology, means an undertaking that is supplying an existing product, technology or process capable of being improved, substituted or replaced by the contract product or contract technology on the relevant geographic market;

"competing R&D effort", in relation to an R&D agreement, means a research and development effort in which a third party engages, alone or in cooperation with other third parties, and which concerns—

(a) research and development of a new product or technology which is the same as, or likely to be substitutable for, a new product or technology that would be covered by the R&D agreement, or

(b) an R&D cluster pursuing an aim or objective which is the same, or substantially the same, as an aim or objective that would be covered by the R&D agreement,

and does not include any research and development effort in which any of the parties to the R&D agreement is also engaged (including as a financing party);

"potential competitor", in relation to a contract product or contract technology, means an undertaking that, in the absence of the R&D agreement relating to the contract product or contract technology, on realistic grounds and not just as a mere theoretical possibility, would be likely, within not more than three years, to undertake the necessary additional investments or incur the necessary costs to supply a product, technology or process capable of being improved, substituted or replaced by the contract product or contract technology on the relevant geographic market;

"relevant product market", in relation to an R&D agreement, means the market for products—

(a) capable of being improved, substituted or replaced by a contract product, and

(b) in relation to which—

(i) two or more of the undertakings which are parties to the agreement, or

(ii) in the case of an R&D agreement involving paid-for research and development, two or more of the undertakings referred to in paragraph (2)(b),

are actual competitors or potential competitors;

"relevant technology market", in relation to an R&D agreement, means the market for technologies or processes—

(a) capable of being improved, substituted or replaced by a contract technology, and

(b) in relation to which—

(i) two or more of the undertakings which are parties to the agreement, or

(ii) in the case of an R&D agreement involving paid-for research and development, two or more of the undertakings referred to in paragraph (2)(b),

are actual competitors or potential competitors;

"undertaking competing in innovation", in relation to an R&D agreement, means an undertaking which independently engages in, or, in the absence of the agreement, would be able and likely independently to engage in research and development efforts which concern—

(a) research and development of a new product or technology which is the same as, or likely to be substitutable for, a new product or technology that would be covered by the R&D agreement, or

(b) an R&D cluster pursuing an aim or objective which is the same, or substantially the same, as an aim or objective that would be covered by the R&D agreement.

Rules for applying thresholds

9.—(1) For the purposes of applying the market share thresholds provided for in article 8, the following rules apply—

(a) the market share of an undertaking is to be calculated on the basis of market sales value data, or, where market sales value data are not available, estimates based on other reliable market information, such as market sales volumes or expenditure on research and development;

(b) the market share of an undertaking is to be calculated on the basis of data or information relating to the calendar year preceding that in which the calculation is being made, or, where that calendar year is not representative of the undertaking's position in the relevant market, calculated as an average of the undertaking's market shares for the three calendar years preceding that in which the calculation is being made.

(2) The market share held by the undertakings referred to in paragraph (e) of the definition of "connected undertakings" in article 2(1) is to be apportioned equally to each undertaking having the rights or the powers listed in paragraph (a) of that definition.

(3) For the purposes of applying the threshold provided for in article 8(5)—

(a) the assessment of the comparability of competing R&D efforts is to be made on the basis of reliable information concerning elements such as—

(i) the size, stage and timing of the research and development efforts,

(ii) the availability of financial and human resources to the third party or parties pursuing the research and development efforts, their intellectual property rights, know-how or other relevant assets, and their previous research and development efforts, and

(iii) the ability of the third party or parties to exploit in the United Kingdom, directly or indirectly, any possible results of the research and development efforts, and the likelihood of their doing so, and

(b) the assessment of whether a third party is able independently to engage in a research and development effort of the kind referred to in article 8(5)(b) is to be made on the basis of reliable information concerning elements such as—

(i) the availability of financial and human resources to the third party or parties, their intellectual property rights, know-how or other relevant assets, and their previous research and development efforts, and

(ii) the ability of the third party or parties to exploit in the United Kingdom, directly or indirectly, any possible results of a research and development effort of that kind.

Hardcore restrictions

10.—(1) The R&D agreement must not, directly or indirectly, in isolation or in combination with other factors under the control of any of the parties to the agreement, have as its object—

(a) the restriction of the freedom of a party to the agreement to carry out research and development independently or in cooperation with third parties—

(i) in a field unconnected with a field to which the R&D agreement relates, or

(ii) in a field to which the R&D agreement relates or in a connected field, after the completion of the joint research and development or paid-for research and development;

(b) the limitation of output or sales, subject to the exceptions set out in paragraph (2);

(c) the fixing of prices when selling a contract product or licensing a contract technology to third parties, subject to the exceptions set out in paragraph (3);

(d) the restriction of the geographical area in which, or of the customers to whom, the parties may make passive sales of a contract product or license a contract technology, subject to the exception set out in paragraph (4);

(e) the imposition of a requirement not to make any, or to limit, active sales of a contract product or contract technology in particular geographical areas or to customers which have not been exclusively allocated to one of the parties by way of specialisation relating to exploitation;

(f) the imposition of a requirement that a party to the agreement refuse to meet demand for a contract product from customers in a geographical area allocated to another party to the agreement, or from customers otherwise allocated to one or more of the parties to the agreement by way of specialisation relating to exploitation, if those customers would market the contract product concerned in another geographical area within the United Kingdom;

(g) the imposition of a requirement to make it difficult for users or resellers to obtain a contract product from other resellers within the United Kingdom.

(2) An R&D agreement which provides for joint exploitation of the results does not breach the condition in paragraph (1)(b) by—

(a) setting production targets, where the joint exploitation of the results includes the joint production of a contract product;

(b) setting sales targets, where the joint exploitation of the results—

(i) includes the distribution of a contract product or the licensing of a contract technology, and

(ii) is carried out by a joint team, organisation or undertaking or is jointly entrusted to a third party;

(c) providing for practices constituting specialisation relating to exploitation; or

(d) restricting the freedom of a party to the agreement to produce, sell, assign or license a product, technology or process which competes with a contract product or contract technology during the period for which the parties have agreed to carry out joint exploitation of the results.

(3) An R&D agreement which provides for joint exploitation of the results does not breach the condition in paragraph (1)(c) by fixing prices charged to immediate customers or fixing licence fees charged to immediate licensees where the joint exploitation of the results—

(a) includes the distribution of a contract product or the licensing of a contract technology, and

(b) is carried out by a joint team, organisation or undertaking or is jointly entrusted to a third party.

(4) An R&D agreement does not breach the condition in paragraph (1)(d) by requiring or providing for the results of the research and development to which it relates to be licensed on an exclusive basis to another party to the agreement.

(5) In this article—

"active sales" means—

(a) actively targeting customers by for instance calls, e-mails, letters, visits or other direct means of communication,

(b) targeted advertising and promotion, by means of print or digital media, offline or online, including online media, digital comparison tools or advertising on search engines targeting customers in specific geographical areas or customer groups,

(c) advertisement or promotion that is only attractive for the buyer if it (in addition to reaching other customers) reaches a specific group of customers or customers in a

specific geographical area (and is considered active selling to that customer group or customers in that geographical area),

(d) offering on a website language options different to the ones commonly used in the geographical area in which the distributor is established, or

(e) using a domain name corresponding to a geographical area other than the one in which the distributor is established;

"digital comparison tools" means online intermediary services used by end users to compare prices, quality or other characteristics of, and potentially to switch or purchase, goods or services from a range of businesses;

"passive sales" means—

(a) sales in response to unsolicited requests from individual customers, including delivery of goods or services to such customers without the sale having been initiated through advertising actively targeting the particular customer group or geographical area,

(b) general advertising or promotion that reaches customers in other distributors' geographical areas or customer groups (whether exclusive or not) but which is a reasonable way to reach customers not in those other distributors' geographical areas or customer groups (whether exclusive or not), for instance to reach customers in a supplier's own geographical area, in that, for example, it would be attractive for the buyer to incur the costs of the general advertising or promotion concerned even if it would not reach customers in other distributors' geographical areas or customer groups (whether exclusive or not), or

(c) participating in a public procurement exercise undertaken in accordance with the Defence and Security Public Contracts Regulations 2011(**a**), the Public Contracts Regulations 2015(**b**), the Concession Contracts Regulations 2016(**c**) or the Utilities Contracts Regulations 2016(**d**).

Effect of breach of conditions in article 5, 6, 7, 8 or 10

11.—(1) Subject to paragraph (2), breach of any of the conditions imposed by article 5, 6, 7, 8(2), (5), (7) or (8) or 10 has the effect of cancelling the block exemption in respect of the R&D agreement concerned.

(2) In the case of a breach of the condition in paragraph (8) of article 8, if the combined market share of the undertakings which are parties to the agreement does not exceed the 25% threshold referred to in that paragraph at the end of the seven year period referred to in that paragraph, but subsequently rises above that level, the breach has the effect of cancelling the block exemption but only with effect from the end of the period of two consecutive calendar years following the year in which the 25% threshold referred to in article 8(8) was first exceeded.

Excluded restrictions

12.—(1) Subject to article 13, the R&D agreement must not contain an excluded restriction.

(2) Subject to paragraphs (3) and (4), an excluded restriction means—

(a) an obligation not to challenge, after completion of the research and development to which the agreement relates, the validity of intellectual property rights which—

(i) are held by a party to the agreement under the law of any part of the United Kingdom, and

(ii) are relevant to the research and development;

(**a**) S.I. 2011/1848.
(**b**) S.I. 2015/102.
(**c**) S.I. 2016/273.
(**d**) S.I. 2016/274.

(b) an obligation not to challenge, after the expiry of the agreement, the validity of intellectual property rights which—

(i) are held by a party to the agreement under the law of any part of the United Kingdom, and

(ii) protect the results of the research and development to which the agreement relates;

(c) an obligation not to grant licences to third parties to produce a contract product or to apply a contract technology

(3) As regards paragraph (2)(a) and (b), provision permitting termination of the R&D agreement in the event of one of the parties to the agreement challenging the validity of the intellectual property rights referred to in those sub-paragraphs is not an excluded restriction.

(4) As regards paragraph (2)(c), an obligation not to grant licences to third parties to produce a contract product or to apply a contract technology is not an excluded restriction if the agreement provides for exploitation of the results by at least one of the parties to the agreement and such exploitation relates to the contract product or contract technology concerned and takes place in the United Kingdom.

(5) For the purposes of paragraph (4), the exploitation takes place in the United Kingdom if it involves—

(a) distribution of the contract product to customers (including third party distributors) in the United Kingdom,

(b) production of the contract product or the application of the contract technology within the United Kingdom, or

(c) the assignment or licensing of intellectual property rights, or the communication of know-how, required for the production of the contract product or the application of the contract technology, to a third party in the United Kingdom.

Effect of breach of condition in article 12

13. Breach of the condition imposed by article 12 has the effect, as regards an R&D agreement which contains an excluded restriction—

(a) which is not severable from the agreement, of cancelling the block exemption in respect of that agreement;

(b) which is severable from the agreement, of cancelling the block exemption in respect of that excluded restriction only.

Obligation to provide information and effect of breach

14.—(1) A person must supply to the CMA(**a**) such information in connection with any agreement claiming the benefit of the block exemption to which it is a party as the CMA may by notice in writing request—

(a) within a period of ten working days(**b**) commencing with the relevant day, or

(b) within such longer period of working days commencing with the relevant day as the CMA may, having regard to the particular circumstances of the case, agree with the person in writing.

(2) Where the CMA considers that a person has, without reasonable excuse, failed to comply with the obligation imposed by paragraph (1), the CMA may, subject first to giving notice in writing of its proposal and considering any representations made to it, by notice in writing cancel the block exemption in respect of any R&D agreement to which the request for information under paragraph (1) relates.

(3) In this article—

(**a**) "The CMA" is defined in section 59(1) of the Act.
(**b**) "working day" is defined in section 59(1) of the Act, the definition having been inserted by S.I. 2004/1261.

"relevant day" means—

(a) where notice to provide information under paragraph (1) is given under article 16(a), the day on which the person receives the notice in writing,

(b) where notice to provide information under paragraph (1) is given by publication under article 16(b), the day on which the notice is published, or

(c) if the day mentioned in sub-paragraph (a) or (b) (as the case may be) is not a working day, the next day that is a working day.

Cancellation and notices

Cancellation in individual cases

15.—(1) If the CMA considers that a particular R&D agreement is not one which is exempt from the Chapter I prohibition as a result of section 9 of the Competition Act 1998, it may, subject to paragraph (2), by notice in writing cancel the block exemption in respect of that R&D agreement.

(2) Before cancelling the block exemption, the CMA must—

(a) give notice in writing of its proposal to cancel the block exemption in accordance with paragraph (1), and

(b) consider any representations made to it.

Notices in writing

16. For the purposes of articles 14 and 15, notice in writing is to be given by—

(a) the CMA giving notice in writing of its request for information, decision or proposal to those persons whom it can reasonably identify as being parties to the R&D agreement concerned, or

(b) where it is not reasonably practicable for the CMA to comply with paragraph (a), the CMA publishing its request for information, decision or proposal in—

(i) the register maintained by the CMA under rule 20 of the rules set out in the Schedule to the Competition Act 1998 (Competition and Markets Authority's Rules) Order 2014(**a**),

(ii) the London, Edinburgh and Belfast Gazettes,

(iii) at least one national daily newspaper, and

(iv) if there is in circulation an appropriate trade journal which is published at intervals not exceeding one month, in such trade journal,

stating the facts on which it bases the request, decision or proposal, and its reasons for making it.

Transitional and other miscellaneous provision

Transitional provision

17.—(1) Subject to paragraph (2)—

(a) article 8(3) and (5) apply only to R&D agreements entered into on or after 1st January 2024, and

(b) article 8(9) has effect in relation to R&D agreements entered into before that date as if for the words from "neither" to the end there were substituted "paragraph (1) does not apply to the agreement".

(**a**) S.I. 2014/458, to which there are amendments not relevant to this instrument.

(2) An R&D agreement falling within article 3(2)(c) or (d) which is entered into on or after 1st January 2024 is to be treated as having been entered into before that date for the purposes of paragraph (1), if the research and development to which it relates was carried out under a prior agreement falling within 3(2)(a) or (b) between the same parties which was entered into before that date.

(3) In this article, a "pre-existing R&D agreement" means an agreement entered into before 1st January 2023 which on 1st January 2023—

(a) does not fall into the category specified in article 3, or falls within that category but does not satisfy the conditions provided for in this Order (including those conditions as modified under paragraph (1), where applicable), and

(b) immediately before that date satisfied the conditions for exemption provided for in Commission Regulation (EU) 1217/2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of research and development agreements(**a**).

(4) A pre-existing R&D agreement is to be treated as an R&D agreement specified in article 3 and meeting the conditions provided for in this Order until the end of 31st December 2024.

(5) Articles 14 to 16 apply to a pre-existing R&D agreement as they apply to an R&D agreement.

Amendments to retained block exemption regulations

18.—(1) Commission Regulation (EU) 461/2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices in the motor vehicle sector(**b**) is amended as set out in paragraph (2).

(2) In Article 4, for "Regulation (EU) No 330/2010" substitute "the Competition Act 1998 (Vertical Agreements Block Exemption) Order 2022"(**c**).

(3) Commission Regulation (EU) 316/2014 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of technology transfer agreements(**d**) is amended as set out in paragraph (4).

(4) In Article 9, for "Regulation (EU) No 1217/2010" substitute "the Competition Act 1998 (Research and Development Agreements Block Exemption) Order 2022".

Review

19.—(1) The Secretary of State must from time to time—

(a) carry out a review of this Order,

(b) set out the conclusions of the review in a report, and

(c) publish the report.

(2) The report must in particular—

(a) set out the objectives intended to be achieved by the regulatory system established by this Order;

(b) assess the extent to which those objectives are achieved; and

(c) assess whether those objectives remain appropriate, and, if so, the extent to which they could be achieved with a system that imposes less regulation.

(3) The first report under this article must be published before the end of the period of five years beginning with the day on which this Order comes into force.

(**a**) EUR 2010/1217, as amended by S.I. 2019/93.
(**b**) EUR 2010/461, as amended by S.I. 2019/93.
(**c**) S.I. 2022/516.
(**d**) EUR 2014/316, as amended by S.I. 2019/93.

(4) Reports under this article are afterwards to be published at intervals not exceeding five years.

Expiry

20. This Order ceases to have effect at the end of 31st December 2035.

Kevin Hollinrake
Parliamentary Under Secretary of State
At 1.21 p.m. on 5th December 2022 Department for Business, Energy and Industrial Strategy

EXPLANATORY NOTE

(This note is not part of the Order)

This Order is a block exemption Order under section 6 of the Competition Act 1998 (c. 41) ("the Act"). It gives effect to the Competition and Markets Authority's ("CMA") recommendation that certain R&D agreements (as defined in article 3(2) of the Order) constitute a category of agreements which are likely to be exempt agreements as a result of section 9 of the Act. Agreements which fall within the category specified in article 3 of the Order are exempt from the prohibition in Chapter 1 of Part 1 of the Act ("the Chapter I prohibition").

The block exemption applies to such agreements to the extent that they fall within the scope of section 2 of the Act (agreements etc. preventing, restricting or distorting competition).

The block exemption applies from 1st January 2023 (see article 1(b)) and will cease to have effect at the end of 31st December 2035 (see article 20).

The block exemption may be cancelled before 31st December 2035 in respect of some R&D agreements if:

— there is a breach of the conditions relating to access to the results of the research and development (see article 5), access to pre-existing know-how (see article 6) or joint exploitation (see article 7);

— there is a breach of any of the conditions relating to market share and competition in innovation in article 8, although if the condition in article 8(8) relating to market shares following a period of joint exploitation is met initially, and only subsequently breached, the breach has the effect of cancelling the block exemption in respect of the agreement but only with effect from the end of the period of two consecutive calendar years following the year in which the market share threshold concerned was first exceeded (see article 11(2));

— a hardcore restriction is included in the agreement (see article 10);

— an excluded restriction is included in the agreement, although if the excluded restriction is severable from the agreement the block exemption is cancelled only in respect of the excluded restriction (see articles 12(1) and 13);

— the CMA cancels the effect of the exemption:

- because of a failure of an undertaking to provide it with information about the agreement (see article 14(2));
- because it considers that a particular agreement is not one which is exempt from the Chapter I prohibition as a result of section 9 of the Act (see article 15(1)).

The CMA is given a power to ask for information about agreements to which a person is a party (see article 14(1)).

A transitional provision also ensures that the Chapter I prohibition does not apply for 12 months to pre-existing agreements which satisfied the conditions for exemption provided for in Commission Regulation (EU) 1217/2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of research and development agreements (EUR 2010/1217) but which do not otherwise satisfy the conditions for exemption provided for in this Order. A further transitional provision ensures that new requirements designed to protect competition in innovation apply only in relation to R&D agreements entered into on or after 1st January 2024.

The Order also amends two retained block exemption regulations (as defined in section 10(12) of the Act) to update references in those regulations to other retained block exemption regulations which have expired, or are about to expire, so that they are instead references to block exemption orders under section 6 of the Act (including this Order) intended to replace the expired or expiring retained block exemption regulations.

Guidance on the block exemption is available from the CMA online at http://www.gov.uk/cma or by writing to Competition and Markets Authority, The Cabot, 25 Cabot Square, London E14 4QZ.

A full impact assessment has not been produced for this instrument as no, or no significant, impact on the private, voluntary or public sector is foreseen. 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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£6.90

http://www.legislation.gov.uk/id/uksi/2022/1271

ISBN 978-0-34-824202-7

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