

**2022 No. 1272**

**COMPETITION**

**The Competition Act 1998 (Specialisation Agreements Block Exemption) Order 2022**

*Made* - - - - at 1.24 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 specialisation 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 a retained block exemption regulation 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.

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(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.

(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 (Specialisation 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<sup>(a)</sup> arising by virtue of this Order for the category of agreements<sup>(b)</sup> specified in this Order;

“competing undertaking”, in relation to a specialisation agreement, means—

- (a) an undertaking that is active on the same relevant market as a party to the agreement, or
- (b) an undertaking that, in the absence of the specialisation agreement, would, on realistic grounds and not just as a mere theoretical possibility, be likely to undertake, within not more than three years, the necessary additional investments or other necessary costs to enter a relevant market;

“connected undertakings”, in relation to a party to a specialisation agreement, means—

- (a) undertakings in relation to which the party to the specialisation 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 specialisation 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 specialisation 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 of the parties to the specialisation agreement or their respective connected undertakings referred to in paragraphs (a) to (d), or
  - (ii) one or more of the parties to the specialisation agreement or one or more of their connected undertakings referred to in paragraphs (a) to (d) and one or more third parties;

“distribution”, other than in the definition of “product”, means the provision of specialisation products;

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

(b) Under section 59 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).

“downstream product” means a product for which a specialisation product is used as an input by one or more parties to a specialisation agreement and which is subsequently sold by the party or parties concerned on the market;

“joint”, in relation to distribution, means (other than in the expression “joint team, organisation or undertaking”) activities where the work involved is—

- (a) carried out by the parties to a specialisation agreement through a joint team, organisation or undertaking, or
- (b) undertaken by a third party distributor jointly appointed by the parties to a specialisation agreement on an exclusive or non-exclusive basis, provided that the third party distributor is not a competing undertaking,

and references to distributing a specialisation product “jointly” are to be construed accordingly;

“joint production agreement” means a specialisation agreement of a kind referred to in article 3(2)(c);

“preparation of services” means activities carried out prior to and with a view to the provision of services to customers;

“product” means a good or a service, and includes both intermediate goods or services and final goods or services, but does not include distribution or rental services;

“production” means the manufacture of goods or the preparation of services, including by way of subcontracting, and “produce” and related expressions are to be construed accordingly;

“reciprocal specialisation agreement” means a specialisation agreement of a kind referred to in article 3(2)(b);

“relevant market”, in relation to a specialisation agreement, means—

- (a) a product and geographic market to which one or more of the specialisation products belongs, and
- (b) where any of the specialisation products is an intermediate product which one or more of the parties use wholly or partly as an input for their own production of a downstream product, a product and geographic market to which the downstream product belongs;

“specialisation agreement” has the meaning given in article 3(2);

“specialisation product” means a product which is produced under a specialisation agreement;

“unilateral specialisation agreement” means a specialisation agreement of a kind referred to in article 3(2)(a).

(2) In this Order—

- (a) any reference to a “party” to an agreement is a reference to an undertaking which is a party to the agreement and, in relation to a particular specialisation agreement, a reference to “the parties” is a reference to the undertakings which are party to the agreement concerned, and
- (b) any reference to “the specialisation products” is, in relation to a particular specialisation agreement, a reference to the specialisation products produced under the specialisation agreement concerned.

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

## Block Exemption

3.—(1) The category of agreements identified in paragraph (2) as specialisation agreements, which includes the types of agreement referred to in paragraph (4), is specified for the purposes of section 6 of the Competition Act 1998(a).

(2) Subject to paragraph (3), for the purposes of this Order the following are specialisation agreements—

- (a) an agreement entered into between two or more undertakings which are active on the same product market and by virtue of which—
  - (i) one or more of the parties agree that they will, wholly or partly, cease or refrain from producing a particular product and will purchase the product concerned from the other party or parties, and
  - (ii) the other party or parties agree to produce the product concerned and supply it to the party or parties who (wholly or partly) cease or refrain from producing it;
- (b) an agreement entered into between two or more undertakings which are active on the same product market and by virtue of which—
  - (i) two or more of the parties agree, on a reciprocal basis, that they will, wholly or partly, cease or refrain from producing a particular, but different, product and will purchase the product concerned from the other party or parties involved in the reciprocal arrangement, and
  - (ii) in each case the other party or parties agree to produce the product concerned and supply it to the party or parties who (wholly or partly) cease or refrain from producing it;
- (c) an agreement—
  - (i) entered into between two or more undertakings which are already active on the same product market or which wish to enter a product market by way of the agreement concerned, and
  - (ii) by virtue of which two or more of the parties agree to produce a particular product jointly.

(3) Specialisation agreements which include provisions which relate to the assignment or licensing of intellectual property rights to one or more of the parties are specified provided that those provisions—

- (a) do not constitute the primary object of the specialisation agreements concerned, and
- (b) are directly related to and necessary for the implementation of the specialisation agreements concerned.

(4) Specialisation agreements are specified even if the obligations under the agreements relating to the purchase or supply of any of the specialisation products include provisions under which—

- (a) one or more of the parties accept an exclusive purchase obligation or an exclusive supply obligation, or
- (b) the parties distribute any of the specialisation products jointly and do not sell them independently.

(5) In this article—

“exclusive purchase obligation”, in relation to a specialisation agreement, means an obligation to purchase any of the specialisation products only from one or more of the parties to the agreement;

“exclusive supply obligation”, in relation to a specialisation agreement, means an obligation not to supply any of the specialisation products to a competing undertaking who is not a party to the agreement;

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

“intellectual property rights” includes industrial property rights, know-how and copyright and related rights;

“know-how”, in relation to a specialisation agreement, means a package of non-patented practical information, resulting from experience and testing, which is—

- (a) not generally known or easily accessible,
- (b) significant and useful for the use, sale or resale of any of the specialisation products, 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).

#### *Conditions, obligation and consequences of breach*

### **Block exemption subject to conditions and obligation**

4. The block exemption has effect in relation to a specialisation agreement subject to the conditions specified in articles 5 and 7 and the obligation specified in article 8.

### **Market share thresholds and effect of breach**

5.—(1) The combined market share of the parties to the specialisation agreement must not exceed 20% of any relevant market.

(2) Subject to paragraph (3), breach of the condition imposed by paragraph (1) has the effect of cancelling the block exemption in respect of the specialisation agreement concerned.

(3) Where the combined market share of the parties to the specialisation agreement does not exceed the 20% threshold referred to in paragraph (1) at the time the agreement is entered into, but subsequently rises above that level, 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 20% market share threshold was first exceeded.

### **Rules for applying thresholds**

6.—(1) For the purposes of applying the market share thresholds provided for in article 5 the following rules apply—

- (a) the market share of a party 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;
- (b) the market share of a party 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 party’s position in the relevant market, calculated as an average of the party’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.

### **Hardcore restrictions and effect of breach**

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

- (a) the fixing of prices when selling any of the specialisation products to third parties, except for the fixing of prices charged to immediate customers in the context of joint distribution,
- (b) the limitation of output or sales, subject to the exceptions set out in paragraph (2), or
- (c) the allocation of markets or customers.

- (2) A specialisation agreement does not breach the condition in paragraph (1)(b) by—
- (a) in the case of a unilateral specialisation agreement or a reciprocal specialisation agreement, including provisions agreeing the amount of products that a party or parties—
    - (i) are to cease or refrain from producing, or
    - (ii) are to produce for the other party or parties to the specialisation agreement,
  - (b) in the case of a joint production agreement, including provisions which relate to setting capacity and production volumes for any of the specialisation products, or
  - (c) in the context of joint distribution, setting sales targets for any of the specialisation products.
- (3) Breach of the condition imposed by paragraph (1) has the effect of cancelling the block exemption in respect of the specialisation agreement concerned.

### **Obligation to provide information and effect of breach**

**8.—**(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 specialisation agreement to which the request for information under paragraph (1) relates.

(3) In this article, “relevant day” means—

- (a) where notice to provide information under paragraph (1) is given under article 10(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 10(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**

**9.—**(1) If the CMA considers that a particular specialisation 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 specialisation 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.

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**(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.

## Notices in writing

- 10.** For the purposes of articles 8 and 9, 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 specialisation 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

**11.—(1)** In this article, a “pre-existing specialisation 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, and
- (b) immediately before that date satisfied the conditions for exemption provided for in Commission Regulation (EU) 1218/2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of specialisation agreements(b).

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

(3) Articles 8 to 10 apply to a pre-existing specialisation agreement as they apply to a specialisation agreement.

## Amendment to retained block exemption regulation

**12.—(1)** 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(c) is amended as set out in paragraph (2).

(2) In Article 9, for “Regulation (EU) No 1218/2010” substitute “the Competition Act 1998 (Specialisation Agreements Block Exemption) Order 2022”.

## Review

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

- (a) carry out a review of this Order,

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

(b) EUR 2010/1218, as amended by S.I. 2019/93.

(c) EUR 2014/316, as amended by S.I. 2019/93.

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

## Expiry

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

*Kevin Hollinrake*  
Parliamentary Under Secretary of State

At 1.24 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 (“the Act”). It gives effect to the Competition and Markets Authority’s (“CMA”) recommendation that certain specialisation 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 14).

The block exemption can be cancelled before 31st December 2035 in respect of some specialisation agreements if:

- there is a breach of the condition relating to market share in article 5, although if the condition 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 was first exceeded (see article 5(3));
- a hardcore restriction is included in the agreement (see article 7);
- 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 8(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 9(1)).



The CMA is given a power to ask for information about agreements to which a person is a party (see article 8(1)).

A transitional provision also ensures that the Chapter I prohibition does not apply for two years to pre-existing agreements which satisfied the conditions for exemption provided for in Commission Regulation (EU) 1218/2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of specialisation agreements (EUR 2010/1218) but which do not otherwise satisfy the conditions for exemption provided for in this Order.

The Order also amends 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 (EUR 2014/316) to replace the reference in that regulation to Commission Regulation (EU) 1218/2010, which expires on 31st December 2022, with a reference instead to this Order.

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](http://www.legislation.gov.uk).

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£6.90

<http://www.legislation.gov.uk/id/uksi/2022/1272>

ISBN 978-0-34-824203-4



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