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STATUTORY INSTRUMENTS

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**2022 No. 0000**

**COMPETITION**

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

*Made* - - - - \*\*\*  
*Laid before Parliament* \*\*\*  
*Coming into force* - - 31st May 2022

The Competition and Markets Authority(a) has recommended that the Secretary of State make an order specifying certain categories of vertical agreements(b) for the purposes of section 6 of the Competition Act 1998(c).

In accordance with section 8 of the Competition Act 1998, 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.

The Secretary of State has decided to give effect to the recommendation without modifications and makes the following Order in exercise of the powers conferred by sections 6(2), (5), (6) and (7), 71(3) and 75 of the Competition Act 1998.

**Citation and commencement**

**1.** This Order—

- (a) may be cited as the Competition Act 1998 (Vertical Agreements Block Exemption) Order 2022; and
- (b) comes into force on 31st May 2022.

**Interpretation**

**2.—(1)** In this Order—

“block exemption” means the exemption from the Chapter 1 prohibition arising by virtue of this Order for the category of agreements specified in this Order;

“buyer” means the purchaser of the contract goods or services and includes an undertaking which, under an agreement to which the Chapter 1 prohibition applies, sells goods or services on behalf of another undertaking;

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(a) The Competition and Markets Authority was established by section 25 of the Enterprise and Regulatory Reform Act 2013 (c. 24).  
(b) As defined in article 3(2).  
(c) 1998 c. 41. Section 6 was amended by the Enterprise and Regulatory Reform Act 2013 to give the function of making recommendations to the Competition and Markets Authority. This was previously the responsibility of the Director General for Fair Trading and then the Office of Fair Trading.

“connected undertaking”, in relation to a party or parties to an agreement, means—

- (a) undertakings in relation to which a party to the 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 supervisory board, board of management or bodies legally representing the undertaking, or
  - (iii) has the right to manage the undertaking’s affairs;
- (b) undertakings which directly or indirectly have, in relation to a party to the 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 a party to the 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) parties to the agreement or their respective connected undertakings referred to in paragraphs (a) to (d), or
  - (ii) one or more of the parties to the agreement or one or more of their connected undertakings referred to in paragraphs (a) to (d) and one or more third parties;

“contract goods or services” has the meaning given in article 3(2);

“customer of the buyer” means an undertaking not party to the agreement which purchases the contract goods or services from a buyer which is party to the agreement;

“excluded restriction” has the meaning given in article 10(2);

“hardcore restriction” has the meaning given in article 8(2);

“online intermediation service” means a service that allows undertakings to offer goods or services to other undertakings or to end users with a view to facilitating direct transactions between such undertakings or between such undertakings and end users, irrespective of whether and where those transactions are ultimately concluded and that constitutes an information society service within the meaning of Article 1(1)(b) of Directive (EU) 2015/1535 of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information on the field of technical regulations and of rules on Information Society services (codification)(a);

“selective distribution system” means a distribution system where the supplier undertakes to sell the contract goods or services, either directly or indirectly, only to distributors selected on the basis of specified criteria and where these distributors undertake not to sell such goods or services to distributors not authorised by the supplier within the geographical area reserved by the supplier in the vertical agreement in order to operate that system;

“supplier” includes an undertaking that provides online intermediation services irrespective of whether it is a party to the transaction it facilitates;

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

“vertical restraint” means a restriction on competition in a vertical agreement to which the Chapter 1 prohibition applies.

(2) In this Order, other than in article 15, references to “the agreement” are to be read as references to the vertical agreement claiming the benefit of the block exemption.

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

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(a) OJ No. L 241, 17.9.2015, p.1

### Block Exemption

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

(2) Subject to paragraphs (3), (4), (5) and (6), for the purposes of this Order a vertical agreement is an agreement or a concerted practice entered into between two or more undertakings each of which operates, for the purposes of the agreement or the concerted practice, at a different level of the production or distribution chain, and relating to the conditions under which the parties may purchase, sell, or resell certain goods or services (“the contract goods or services”).

(3) Vertical agreements entered into between an association of undertakings and its members, or between such an association and its suppliers, are specified provided—

- (a) all members of the association are retailers of goods; and
- (b) the combined annual turnover of each individual member of the association and their respective connected undertakings does not exceed £44 million.

(4) Vertical agreements containing provisions which relate to the assignment to the buyer or use by the buyer of intellectual property rights are specified provided—

- (a) that those provisions do not constitute the primary object of such agreements and are directly related to the use, sale or resale of goods or services by the buyer or its customers; and
- (b) in relation to the contract goods or services, those provisions do not contain restrictions of competition having the same object as vertical restraints which are not exempted by virtue of this Order.

(5) Vertical agreements entered into between competing undertakings are specified only to the extent that they are non-reciprocal, and—

- (i) the supplier is a manufacturer and a distributor of goods, while the buyer is a distributor and not a competing undertaking at the manufacturing level;
- (ii) the supplier is a provider of services at several levels of trade, while the buyer provides its goods or services at the retail level and is not a competing undertaking at the level of trade where it purchases the contract services;
- (iii) the supplier is a wholesaler of goods, while the buyer is a distributor and not a competing undertaking at the wholesale level; or
- (iv) the importer is an importer of goods, while the buyer is a distributor and not a competing undertaking at the level of trade where it purchases the goods or at the importation level.

(6) This Order does not apply to vertical agreements the subject matter of which falls within the scope of any retained block exemption regulation<sup>(a)</sup> or of any block exemption order<sup>(b)</sup>, unless otherwise provided for in such a regulation or order.

(7) In this article—

“actual competitor” means an undertaking active on the same relevant market;

“competing undertaking” means an actual competitor or a potential competitor;

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

“know-how” means a package of non-patented practical information, resulting from experience and testing by the supplier, which is—

- (a) not generally known or easily accessible;
- (b) significant and useful to the buyer for the use, sale or resale of the contract goods or services; and

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(a) “Retained block exemption regulation” is defined in section 10(12) of the Competition Act 1998.

(b) “Block exemption order” is defined in section 6(2) of the Competition Act 1998.

- (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);

“potential competitor” means an undertaking that, in the absence of the vertical agreement, would, in case of a small but permanent increase in relative prices be likely to undertake, within a short period of time, the necessary additional investments or other necessary switching costs to enter the relevant market.

- 4.—(1) For the purpose of calculating total annual turnover within the meaning of article 3(4)—
  - (a) the turnover achieved during the previous financial year by the relevant party to the vertical agreement and the turnover achieved by its connected undertakings in respect of all goods and services, excluding all taxes and other duties, are to be added together;
  - (b) no account is to be taken of dealings between the party to the vertical agreement and its connected undertakings or between its connected undertakings.

(2) The block exemption remains applicable where, for any period of two consecutive financial years, the total annual turnover is no greater than 110 per cent of the total annual turnover threshold.

5. This block exemption has effect subject to the conditions and the obligation specified in articles 6 to 12.

### **Conditions and consequences of breach of conditions**

#### *Market share threshold*

- 6.—(1) The block exemption applies on condition that—
  - (a) the market share held by the undertaking party to the agreement who is a supplier does not exceed 30% of the relevant market on which it sells the contract goods or services; and
  - (b) the market share held by the undertaking party to the agreement who is a buyer does not exceed 30% of the relevant market on which it purchases the contract goods or services.

(2) For the purposes of paragraph (1), where in an agreement involving more than two parties an undertaking buys the contract goods or services from one undertaking party to the agreement and sells the contract goods or services to another undertaking party to the agreement, the market share of the first undertaking must respect the market share threshold provided for in that paragraph both as a buyer and a supplier.

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

- (a) the market share—
  - (i) of the supplier is to be calculated on the basis of market sales value data (including sales to vertically integrated distributors for the purposes of sale); and
  - (ii) of the buyer is to be calculated on the basis of market purchase value data;and where market sales value or market purchase value data are not available, estimates based on other reliable market information, including market sales and purchase volumes, may be used to establish the market share of the undertaking concerned;
- (b) the market share is to be calculated on the basis of data relating to the preceding calendar year.

(2) If a market share is initially not more than 30% but subsequently rises above that level without exceeding 35%, the block exemption continues to apply for a period of two consecutive calendar years following the year in which the 30% market share threshold was first exceeded.

(3) If a market share is initially not more than 30% but subsequently rises to 35% or more, the block exemption continues to apply for one calendar year following the year in which the level of 35% was first reached.

(4) The benefit of paragraphs (2) and (3) may not be combined so as to exceed a period of two calendar years.

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

*Hardcore restrictions*

**8.**—(1) A vertical agreement must not contain a hardcore restriction.

(2) A hardcore restriction is one or more provisions which, directly or indirectly, in isolation or in combination with other factors under the control of the parties, has as its object—

- (a) the restriction of the buyer’s ability to determine its onward sale price, without prejudice to the possibility of the supplier imposing a maximum sale price or recommending a sale price, provided that any such provisions do not amount to a fixed or minimum sale price as a result of pressure from, or incentives offered by, any of the parties;
- (b) the restriction of the geographical area into which, or of the customers to whom, a buyer party to the agreement, without prejudice to a restriction on its place of establishment, may sell the contract goods or services, except—
  - (i) the restriction of active sales into the exclusive geographical area or to an exclusive customer group reserved to the supplier or allocated by the supplier to another buyer, where such a restriction does not limit sales by the customers of the buyer,
  - (ii) the restriction of active sales or passive sales to end users by a buyer operating at the wholesale level of trade,
  - (iii) the restriction of active sales or passive sales by the members of a selective distribution system to distributors not authorised by the supplier, located within the geographical area where the distribution system is operated, and
  - (iv) the restriction of the buyer’s ability to sell components, supplied for the purposes of incorporation, to customers who would use them to manufacture the same type of goods as those produced by the supplier;
- (c) the restriction of active sales or passive sales to end users by members of a selective distribution system operating at the retail level of trade, without prejudice to the possibility of prohibiting a member of the system from operating out of an unauthorised place of establishment;
- (d) the restriction of cross-supplies between distributors within a selective distribution system, including between distributors operating at different level of trade;
- (e) the restriction, agreed between a supplier of components and a buyer who incorporates those components, of the supplier’s ability to sell the components as spare parts to end-users or to repairers or other service providers not entrusted by the buyer with the repair or servicing of its goods;
- (f) a wide retail parity obligation or measure that has the same effect as a wide retail parity obligation (which includes any course of action, including entering into agreements or engaging in concerted practices, which has the object of replicating the anti-competitive effects of a wide retail parity obligation).

(3) The exception in paragraph (2)(b)(i) to (iv) permits—

- (a) the combination of exclusive and selective distribution in the same or different geographical areas;
- (b) shared exclusivity in a geographical area or for a customer group by allowing the allocation of a geographical area to more than one distributor;
- (c) the provision of greater protection for members of selective distribution systems against sales from outside the geographical area to unauthorised distributors inside that geographical area.

(4) In paragraph (2), a reference to a restriction of an active sale or passive sale, in relation to the selling of goods and services online, includes a restriction that, directly or indirectly, in isolation or combination with other factors, has as its object—

- (a) the prevention of buyers or their customers effectively using the internet for the purposes of selling their goods or services online or from effectively using one or more online advertising channels;
- (b) the restriction of the geographical area into which or the customer group to whom the buyers may sell the contract goods or services; or
- (c) in the case of selective distribution, the restriction of active or passive sales by members of the selective distribution system operating at the retail level of trade.

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

“exclusive distribution” means a distribution system where the supplier allocates a geographical area or customer group exclusively to itself or to one or a limited number of buyers, determined in proportion to the allocated geographical area or customer group in such a way as to secure certain volumes of business that preserves their investment efforts, and restricts other buyers from actively selling into the exclusive customer group;

“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 outside those geographical areas or customer groups, for instance to reach customers in one’s own geographical area (and general advertising or promotion is considered a reasonable way to reach such customers if it would be attractive for the buyer to incur those costs even if they would not reach customers in other distributors’ geographical areas or customer groups (whether exclusive or not));
- (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);

“wide retail parity obligation” means a restriction by reference to any of the supplier’s indirect sales channels (whether online or offline, for example online platforms or other

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

intermediaries), which ensures that the prices or other terms and conditions at which a supplier's goods or services are offered to end users on a sales channel are no worse than those offered by the supplier on another sales channel.

9. Breach of any of the conditions imposed by either of articles 6 or 8 has the effect of cancelling the block exemption in respect of that vertical agreement.

*Excluded restrictions*

10.—(1) A vertical agreement must not contain an excluded restriction.

(2) An excluded restriction means—

- (a) any non-compete obligation, the duration of which is indefinite or exceeds five years (and a non-compete obligation which is automatically renewable beyond a period of five years is deemed to have been concluded for an indefinite duration);
- (b) any direct or indirect obligation causing the buyer, after termination of the agreement, not to manufacture, purchase, sell or resell any goods or services;
- (c) any direct or indirect obligation causing the members of a selective distribution system not to sell the brands of particular competing suppliers.

(3) Despite paragraph (2)(a), the time limitation of five years does not apply where the contract goods or services are sold by the buyer from premises or land owned by the supplier or leased by the supplier from third parties not connected with the buyer, provided that the duration of the non-compete obligation does not exceed the period of occupancy of the premises or land by the buyer.

(4) Despite paragraph (2)(b)—

- (a) any direct or indirect obligation causing the buyer, after termination of the agreement, not to manufacture, purchase, sell or resell goods or services is not an excluded restriction, provided that the following conditions are fulfilled—
  - (i) the obligation relates to goods or services which compete with the contract goods or services;
  - (ii) the obligation is limited to the premises and land from which the buyer has operated during the contract period;
  - (iii) the obligation is indispensable to protect know-how transferred by the supplier to the buyer; and
  - (iv) the duration of the obligation is limited to a period of one year after termination of the agreement; and
- (b) a restriction which is indispensable to protect know-how transferred by the supplier to the buyer which has not entered the public domain, whether or not it is time limited, is not an excluded restriction.

(5) In this article, “non-compete obligation” means any direct or indirect obligation causing the buyer not to manufacture, purchase, sell or resell goods or services which compete with the contract goods or services, or any direct or indirect obligation on the buyer to purchase from the supplier or from another undertaking designated by the supplier more than 80 % of the buyer's total purchases of the contract goods or services and their substitutes on the relevant market, calculated on the basis of the value or, where such is standard industry practice, the volume of its purchases in the preceding calendar year.

11. Breach of the condition imposed by article 8 has the effect of cancelling the block exemption in respect of the vertical agreement to the extent that the agreement contains an excluded restriction.

**Obligation to provide information**

12.—(1) A person must, within a period of ten working days commencing with the relevant day, supply to the Competition and Markets Authority such information in connection with those vertical agreements to which it is a party as the Competition and Markets Authority may require.

(2) If there is a failure to comply with the obligation imposed by paragraph (1) without reasonable excuse, the Competition and Markets Authority may, subject first to giving notice in writing of its proposal and considering any representations made to it, by notice in writing cancel this block exemption in respect of any vertical agreement to which the request for information under paragraph (1) relates.

(3) In this Article—

“relevant day” means—

- (a) the day on which a person receives notice in writing to provide information under paragraph (1), or
- (b) where notice to provide information under paragraph (1) is given by publication pursuant to article 14(b), the day on which the notice is published;

“working day” means a day which is not a Saturday, Sunday or any other day on which the Competition and Markets Authority is closed for business.

### **Cancellation in individual cases**

**13.**—(1) If the Competition and Markets Authority considers that a particular vertical agreement is not one which is exempt from the Chapter 1 prohibition as a result of section 9 of the Competition Act 1998, it may, subject to paragraph (2), by notice in writing cancel this block exemption in respect of that vertical agreement.

(2) If the Competition and Markets Authority proposes to cancel the block exemption in accordance with this Article, it must first give notice in writing of its proposal and must consider any representations made to it.

### **Notices in writing**

**14.** For the purposes of articles 12 and 13, notice in writing is to be given by—

- (a) the Competition and Markets Authority 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 relevant vertical agreement, or
- (b) where it is not reasonably practicable for the Competition and Markets Authority to comply with paragraph (a), the Competition and Markets Authority publishing its request for information, decision or proposal in—
  - (i) the register maintained by the Competition and Markets Authority under rule 20 of the Competition and Markets Authority’s 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 provision**

**15.**—(1) In this article, a “pre-existing vertical agreement” means an agreement or concerted practice entered into before 31st May 2022 which on 31st May 2022—

- (a) does not fall into the category specified in article 3, or satisfy the conditions provided for in this Order, and

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

(b) immediately before that date satisfied the conditions for exemption provided for in Commission Regulation (EU) No 330/2010 of 20 April 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<sup>(a)</sup>.

(2) A pre-existing vertical agreement is to be treated as a vertical agreement specified in article 3 and meeting the conditions provided for in this Order until 1st June 2023.

(3) Articles 12 to 14 apply to a pre-existing vertical agreement as they apply to a vertical agreement.

### Expiry

16. This Order ceases to have effect on 1st June 2028.

	<i>Name</i>
	Parliamentary Under Secretary of State
Date	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 recommendation that certain vertical agreements (as defined in 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 the block exemption Order are exempt from the prohibition in Chapter 1 of the Act.

The recommendation was made by the Competition and Markets Authority following consultation in accordance with section 8(1) of the Act.

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 Chapter 1 prohibition)).

The block exemption applies from 31st May 2022 and will cease to have effect on 1st June 2028.

A transitional provision also ensures that the Chapter 1 prohibition does not apply for 12 months to pre-existing agreements which satisfied the conditions for exemption provided for in Commission Regulation (EU) No 330/2010 of 20 April 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 (EUR 2010/330) but which do not otherwise satisfy the conditions for exemption provided for in this Order.

Guidance on the block exemption is available from the Competition and Markets Authority at [\*\*\*].

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(a) EUR 2010/330, as amended by S.I. 2019/93.