Law Society of Scotland

Consultation response

Retained Horizontal Block Exemption Regulations (R&D and specialisation agreements) Consultation

May 2022

Introduction

The Law Society of Scotland is the professional body for over 12,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

Our Competition Law sub-committee welcomes the opportunity to respond to the Competition & Market Authority's (CMA) – Retained Horizontal Block Exemption Regulations (R&D and specialisation agreements) Consultation[1]. We only seek to respond to some of the consultation's questions. We have the following comments to put forward for consideration.

Consultation questions

Question 1. Do you agree with the CMA's proposed recommendation to the Secretary of State to make a Block Exemption Order to replace the retained Specialisation BER with a new UK Specialisation BEO, rather than letting it lapse without replacement or renewing without varying the retained Specialisation BER? and Question 33. Do you agree with the CMA's proposed recommendation to the Secretary of State to make a Block Exemption Order to replace the retained R&D 81 BER with a new R&D BEO, rather than letting it lapse without replacement or renewing without varying the retained R&D BER?

We consider that legal certainty is best served by mirroring the reforms being made at the EU level into UK domestic law, subject to some changes that would bolster legal certainty for companies and other undertakings in the UK.

We are of the opinion that legal certainty would seem to be the key consideration given the self-assessment nature of the horizontal block exemption regulations (HBERs) and horizontal guidelines (HGs) and the paucity of decisional practice at both EU and UK law.

[1] Retained Horizontal Block Exemption Regulations (R&D and specialisation agreements) Consultation - GOV.UK (www.gov.uk)

Question 3. Do you agree with the CMA's proposed recommendation to expand the definition of 'unilateral specialisation agreement' to bring unilateral specialisation agreements between more than two parties within the scope of the Specialisation BEO?

We welcome this development, as we consider that parties to an agreement, however numerous, must still be within a market share safe harbour, and we consider that it makes eminent sense to extend the definition accordingly.

Question 4: Do you agree with the CMA's proposed recommendation to address the issue of horizontal subcontracting agreements with a view to expanding production through guidance rather than through changing Article 1 of the Specialisation BER?

We are of the opinion that firstly, as joint production also foresees no necessary reduction in the production of goods by the parties (para 259 of the HGs), it is difficult to see why a sub-contracting arrangement to increase the production of goods is also not block exempted.

Furthermore, we consider that the horizontal guidelines do not offer a different set of considerations (under either the Article 101 (1) or (3) analysis) for how such sub-contracting agreements would be assessed.

These two reasons would indicate that such agreements should be covered by the Specialisation BER.

Further, we consider that it is not clear from the consultation document what guidance could be given by the CMA that would be different to how a party would analyse other joint production agreements which is contained in the HGs that The Directorate-General for Competition is currently consulting on.

Question 16: Do you agree with the CMA's recommendation to retain the current conditions for exemption as set out in Article 2 of the Specialisation BER in the proposed Specialisation BEO?

The Specialisation BER (SPBER) states that licensing of Intellectual Property Rights is covered by the SPBER if "the licensing is not the main aim of the co-operation." We are of the opinion that in commercial terms, the main aim of the co-operation is to achieve the joint production or the relevant type of specialisation. In addition, we consider that it is difficult to conceptualise in what circumstances parties to such ventures would consider that the IP licensing is the main aim and not the commercial imperative of the co-operation.

We consider that the wording of the SPBER comes close to implying that there will be times in a specialisation/joint production where the licensing is the main aim, not the specialisation/joint production, however we consider that this makes little commercial sense.

Paragraphs 69-72 of The Technology Block Exemption Regulation (TTBER) guidelines are less equivocal and clearly state that the TTBER does not apply to IP transfer in the context of joint production and specialisation covered by the SPBER.

We are of the opinion that it would be more coherent and legally certain (and straightforward) to drop the words above and for the SPBER to merely state that IP licensing that is 'necessary' for the co-operation is covered by the SPBER.

Question 30: Do you agree with the CMA's recommendation to retain the current hardcore restrictions in the Specialisation BEO? and Question 31: Do you agree with the CMA's recommendation to address the issues regarding the hardcore restrictions that have been raised by stakeholders through the provision of guidance?

We consider that subject to one caveat, that the existing hardcore restrictions including the exclusions are largely coherent as they do not categorise restrictions that are inherent and necessary to the nature of the co-operation as hardcore. For example, it is necessary for parties to a specialisation agreement to agree the number of units etc of the products they want the other part to produce that they will purchase. We believe that in no sense is this an output restriction as the SPBER recognises.

We consider, however, that this logic does seem to break down when it comes to the market sharing/customer allocation hardcore restriction in Article 5(3) in the specific instance of joint production.

We would argue that outside joint production, a party can readily appreciate that a specialisation agreement can be effectively concluded without the parties co-ordinating to whom they sell the products they receive from the other party/parties. Each party figures out its needs and agrees them with the other/s. At the risk of over-conceptualising the matter, there is no logical commercial imperative linking the purchasing of products from partners with the destination of the products once received. We consider that such restriction on customers and markets must therefore be considered hardcore as provided for by Article 5(3).

If products/services are being jointly produced, we consider that it makes commercial sense that the parties decide all aspects of the commercial strategy in terms of how to sell the products/services. There may be times when it would make commercial sense to jointly sell those products. Article 5(3) would suggest that such a normal commercial corollary to the joint production would be a hardcore restriction. Provided that the co-ordination on customers and markets relates only to goods jointly produced and not cover (whether directly or indirectly) any goods the parties produce independently from each other, it is hard to see how such conduct should be deemed a hardcore restriction.

We suggest that a way in which UK businesses can be given greater legal certainty while only departing from the EU system in a measured way would be preferable. We consider that Article 5(3) should, be amended to state:

> "The allocation of markets or customers, with the exception of:
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> (a) In the context of joint production only where the parties will sell the products they have jointly produced, the joint setting of any sales strategy (including decisions on which markets or customers to prioritise or target) is not to be considered a hardcore restriction, provided that such agreement does not relate, cover or in any way take into account whether directly or indirectly, competing products produced by one or more of the parties."

Question 24: Do you agree with the CMA's proposed recommendation that the one-year grace period for the exemption to continue to apply after the 20% market share is exceeded be no longer subject to the requirement that the increased market share remain below 25%? And Question 63: The CMA invites views on whether the UK HBEOs should have a duration of twelve years

We consider that the twelve-year duration of the HBERs is not problematic as such. As the CMA is aware from its extensive work on digital issues, the role of digital companies and gatekeepers is an important general trend in current competition policy. Views were expressed in the EU consultation process on the reform of the HBERs and the HGs as to the possible need for competition authorities to give greater comfort to industries faced with competition from strong digital players in situations where in some cases co-operation beyond the safe harbour may be consistent with an acceptable countervailing market power on the part of those parties.

We are of the opinion that while the grace period is useful, it does not address the challenge that digital power may bring, and we suggest that a review mechanism could be introduced into the SPBER and R&D BER to allow the CMA to re-examine on a periodic basis the necessity in certain markets of increasing the market share safe harbours to meet the competition posed by large digital companies.

We consider that a more general point can be made linked to the above, namely we hope that the CMA in guidance can develop a more useful guide as how companies can self-assess beyond the market share safe harbour. We consider that the current EU HBERs are, on this point, convoluted and unspecific, as for instance, what degree of commonality of costs would be needed between the parties for this to begin to be problematic?

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