

**2022 No. 0000**

**COMPETITION**

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

*Made* - - - - - \*\*\*  
*Laid before Parliament* - - - - - \*\*\*  
*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 and makes the following Order in exercise of the powers conferred by sections 6(2)(a), (5), (6) and (7) and 71(3) of the Act.

**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—

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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.

“actual competitor”, in relation to a party to a specialisation agreement, means an undertaking that is active on the same relevant market;

“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” means an actual competitor or a potential competitor;

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

- (a) undertakings in relation to which a 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 a 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 a 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) 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;

“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 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” has the meaning given in article 3(5);

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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).

“potential competitor”, in relation to a specialisation agreement, means 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 the relevant market;

“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, with the exception of distribution and 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” has the meaning given in article 3(5);

“relevant market”, in relation to a specialisation agreement, means a relevant product and geographic market to which one or more of the specialisation products belongs, and, in addition, 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 relevant 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” has the meaning given in article 3(5).

(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 and including the types of agreement specified 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 specialisation agreements are unilateral specialisation agreements, reciprocal specialisation agreements and joint production agreements.

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

(4) Specialisation agreements are specified even if the obligations under the agreements relating to the purchase and 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

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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.

- (b) the parties distribute any of the specialisation products jointly and do not sell them independently.

(5) For the purposes of this Order—

“joint production agreement” means an agreement—

- (a) 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
- (b) by virtue of which two or more of the parties agree to produce a particular product jointly;

“reciprocal specialisation agreement” means an agreement entered into between two or more undertakings which are active on the same product market and by virtue of which—

- (a) 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
- (b) 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;

“unilateral specialisation agreement” means an agreement entered into between two or more undertakings which are active on the same product market and by virtue of which—

- (a) one or more of the parties agree to cease or refrain from producing a particular product, in each case either wholly or partly, and to purchase the product concerned from the other party or parties, and
- (b) 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.

(6) 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 other than a party or parties to the agreement;

“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 and consequences of breach of conditions*

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

4. The block exemption has effect subject to the conditions specified in articles 5 and 7 and the obligation specified in article 9.

### **Market share thresholds**

5.—(1) The block exemption applies to a specialisation agreement on condition that the combined market share of the parties does not exceed 20 % of any relevant market to which any of the specialisation products belong.

(2) Paragraph (3) applies to a specialisation agreement where one or more of the specialisation product is an intermediate product that one or more of the parties use, wholly or partly, as an input for their own production of a downstream product, that they subsequently sell on the market.

(3) The block exemption applies to a specialisation agreement to which this paragraph applies on condition that the combined market share of the parties does not exceed 20 % of both—

- (a) any relevant market to which the specialisation product concerned belongs, and
- (b) any relevant market to which the downstream product concerned belongs.

### **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 relating to the preceding calendar year, or, where the preceding 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 preceding calendar years.

(2) If the combined market share of the parties is initially not more than 20% but subsequently rises above that level in at least one of the markets with which the specialisation agreement in question is concerned, the block exemption continues to apply for a period of two consecutive calendar years following the year in which the 20% market share threshold was first exceeded.

(3) 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**

7.—(1) The block exemption applies to a specialisation agreement on condition that it does 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, and
- (c) in the context of joint distribution, setting of sales targets for any of the specialisation products.

## **Effect of breach of conditions in article 5 or 7**

8. Subject to article 6(2), breach of any of the conditions imposed by articles 5 or 7 has the effect of cancelling the block exemption in respect of the specialisation agreement concerned.

## **Obligation to provide information**

9.—(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 request—

- (a) within a period of ten working days 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) If there is a failure to comply with the obligation imposed by paragraph (1) without reasonable excuse, 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 this 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 11(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 11(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;

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

## *Cancellation and notices*

### **Cancellation in individual cases**

10.—(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 this block exemption in respect of that specialisation agreement.

(2) If the CMA 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**

11. For the purposes of articles 9 and 10, 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—

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(a) “the CMA” is defined in section 59(1) of the Act.

- (i) the register maintained by the CMA 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, review and expiry*

**Transitional provision**

12.—(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) No 1218/2010 of 14 December 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 9 to 11 apply to a pre-existing specialisation agreement as they apply to a specialisation agreement.

**Review**

13.—(1) Before the end of the review period, the Secretary of State must—

- (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) In this article, “review period” means the period of five years beginning with the day on which this Order comes into force.

**Expiry**

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

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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.

Date

*Name*  
Parliamentary Under Secretary of State  
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 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 I of the Act.

The recommendation was made by the CMA 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 I prohibition)).

The block exemption applies from 1<sup>st</sup> January 2023 and will cease to have effect at the end of 31<sup>st</sup> December 2035.

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) No 1218/2010 of 14 December 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.

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.