

**EXPLANATORY MEMORANDUM TO**  
**THE COMPETITION ACT 1998 (RESEARCH & DEVELOPMENT AGREEMENTS**  
**BLOCK EXEMPTION) ORDER 2022**

**2022 No. [XXXX]**

**1. Introduction**

1.1 This explanatory memorandum has been prepared by the Department for Business, Energy and Industrial Strategy and is laid before Parliament by Command of Her Majesty.

**2. Purpose of the instrument**

2.1 The 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’s) recommendation that the Secretary of State should make a Research and Development Agreements Block Exemption Order (R&D BEO) that specifies certain categories of horizontal agreements to exempt them from the prohibition in Chapter I of Part 1 of the Act which prohibits agreements between firms that prevent, restrict or distort competition. The order exempts horizontal R&D agreements if they meet the conditions set out in the order and is made in parallel with an order that exempts horizontal specialisation agreements (the SABEO).<sup>1</sup>

2.2 The purpose of the order is to ensure that businesses are not prevented or disincentivised from entering into agreements that the CMA considers to be overall beneficial and not anticompetitive.

2.3 The order replaces the retained Research & Development Block Exemption Regulation (EUR 2010/1217) (retained R&D BER) which was made under EU law and retained in UK law after the UK’s withdrawal from the EU. The retained R&D BER expires on 31 December 2022.

**3. Matters of special interest to Parliament**

*Matters of special interest to the Joint Committee on Statutory Instruments*

3.1 None.

**4. Extent and Territorial Application**

4.1 The territorial extent of this instrument is the entirety of the United Kingdom.

4.2 The territorial application of this instrument is the entirety of the United Kingdom.

**5. European Convention on Human Rights**

5.1 As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

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<sup>1</sup> The Competition Act 1998 (Specialisation Agreements Block Exemption) Order 2022

## 6. Legislative Context

- 6.1 The Act prohibits agreements between undertakings that prevent, restrict or distort competition (known as the Chapter I prohibition). Section 9 of the Act sets out the conditions under which such an agreement is exempt from the Chapter I prohibition. This general exemption requires businesses to self-assess to consider whether they meet the statutory criteria which can lead to a reluctance to rely on the provision.
- 6.2 Section 6 of the Act provides that the Secretary of State, on advice of the CMA, may make a block exemption order covering agreements which fall under a particular category of agreements that are likely to be exempt under section 9 of the Act. Such an order may impose conditions or obligations subject to which the block exemption is to have effect. An agreement which falls into a category specified in a block exemption order (and that does not breach any of the conditions specified in the order) will not be prohibited under the Chapter I prohibition, providing greater certainty for a business.
- 6.3 By avoiding the need for businesses to self-assess whether their agreements comply with competition law, block exemptions can reduce compliance costs for businesses and increase their confidence to engage in transactions that have a benign or beneficial effect on competition.
- 6.4 A similar approach exists under EU law. The European Commission can make block exemption regulations, exempting certain categories of agreement from the prohibition under Article 101(1) of the Treaty on the Functioning of the European Union (TFEU). Before the UK's withdrawal from the EU, these block exemption regulations also applied in respect of the Chapter I prohibition as 'parallel exemptions' under section 10 of the Act. Following EU Exit, the UK retained the EU block exemption regulations and so, as of January 2021, the EU Research & Development Horizontal Block Exemption Regulation<sup>2</sup> became the retained R&D BER under UK law. The retained R&D BER expires on 31 December 2022.
- 6.5 The retained R&D BER is one of two retained horizontal block exemption orders which expire at the same time and were therefore reviewed and will be replaced in parallel. The R&D BEO is made alongside the SABEO.
- 6.6 The first retained block exemption regulation to expire was replaced in May 2022 by The Competition Act 1998 (Vertical Agreements Block Exemption) Order 2022.<sup>3</sup> The other block exemptions to be reviewed in due course include:
- Motor Vehicle vertical agreements – expires 31 May 2023
  - Liner shipping consortia agreements – expires 25 April 2024
  - Technology transfer agreements – expires 30 April 2026
  - Rail, road and inland waterways transport – no expiry date

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<sup>2</sup> Commission Regulation (EU) No 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 (OJ L 335, 18.12.2010, p. 36).

<sup>3</sup> <https://www.legislation.gov.uk/uksi/2022/516/contents/made>

## 7. Policy background

### *What is being done and why?*

- 7.1 Competition law and its enforcement contribute to ensuring that market failures are prevented or remedied by prohibiting agreements between businesses that prevent, restrict or distort competition. This can include, for example, price-fixing, dividing up markets or obligations to supply a product exclusively to a particular buyer. In so doing, competition law protects UK businesses and UK consumers from illegal, anticompetitive behaviours across the economy.
- 7.2 However, certain types of agreements – which would ordinarily be captured by this prohibition – are generally considered to be beneficial and not anticompetitive. This includes horizontal cooperation agreements, understood as agreements between actual or potential competitors, that meet certain conditions. R&D agreements are a type of horizontal cooperation agreement which can facilitate early breakthroughs in research and product development and support more efficient resource allocation through collaborative R&D.
- 7.3 As referred to in paragraph 6.4, prior to the UK’s withdrawal from the EU, block exemption regulations made by the European Commission which exempt certain categories of agreement from the Article 101(1) TFEU prohibition (which is equivalent to the Chapter I prohibition in UK law) were applied to the Chapter I prohibition as “parallel exemptions”. The EU R&D BER was retained in UK law after EU Exit and therefore forms part of UK law. As it expires in December 2022, the CMA reviewed the retained R&D BER for the purpose of making a recommendation to the Secretary of State about whether to replace it and, if so, how.
- 7.4 The CMA recommended that the Secretary of State replace the retained R&D BER with a block exemption order under the Act. This recommendation was based on a review of the retained R&D BER and its effect on UK markets. It drew on relevant evidence gathered from businesses with operations in the UK relying on the retained block exemption; law firms advising businesses on the application of competition law to horizontal agreements in the UK; and relevant trade and industry associations. The CMA also conducted stakeholder engagement with UK Research and Innovation to understand the impact of the retained R&D BER on the universities sector and small and medium-sized enterprises. The CMA drew on additional evidence from an EU evaluation of the EU R&D BER and related EU Guidelines (the EU Guidelines on Horizontal Cooperation), to which the CMA and UK stakeholders contributed.
- 7.5 In April 2022, the CMA published a draft recommendation and consulted on it publicly for four weeks.<sup>4</sup> The CMA carefully considered the views presented, resulting in the CMA’s final recommendation to the Secretary of State on 24 June 2022 and published on 28 June 2022.<sup>5</sup>
- 7.6 The CMA found that the evidence it gathered during its review shows that an R&D block exemption is a relevant and useful tool for businesses operating in the UK. The CMA also noted that it is beneficial in particular to have a ‘safe harbour’ for

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<sup>4</sup> <https://www.gov.uk/government/consultations/retained-horizontal-block-exemption-regulations-rd-and-specialisation-agreements-consultation#:~:text=Consultation%20description,responses%20by%206%20May%202022>.

<sup>5</sup> <https://www.gov.uk/government/consultations/retained-horizontal-block-exemption-regulations-rd-and-specialisation-agreements>

categories of R&D agreements that are considered likely to satisfy the requirements for exemption under section 9, as such agreements will often generate benefits through promoting efficiencies, lower costs, and/or promoting innovation. In so doing, the R&D BEO will support the UK Innovation Strategy<sup>6</sup>.

- 7.7 Allowing the retained R&D BER to expire without replacing it could lead to significant increased uncertainty among businesses and potentially fewer benign or economically beneficial R&D agreements being made. This order thus helps to avoid future harm to businesses and consumers alike.
- 7.8 An R&D block exemption has benefits for businesses. Firstly, it provides legal certainty by assuring businesses that their agreements comply with competition law. Secondly, it avoids placing on businesses the burden of scrutinising many essentially benign R&D agreements. Thirdly, it ensures consistency of approach by providing a common framework for businesses to assess their agreements against.
- 7.9 In addition, the block exemption ensures that the CMA does not need to scrutinise essentially benign or beneficial agreements and allows the UK's competition authority to effectively use its resources to enforce competition law across the UK by targeting more detrimental forms of anti-competitive agreements and practices.
- 7.10 The order gives effect to the CMA recommendation to replace the retained R&D BER broadly in line with the status quo. It does, however, introduce some important amendments to improve the block exemption provisions and the current legal framework.

### ***Explanations***

#### *What did any law do before the changes to be made by this instrument?*

- 7.11 The retained R&D BER exempts from the Chapter I prohibition categories of R&D agreements which are assumed to confer sufficient benefits to outweigh any potentially anti-competitive effects. By virtue of satisfying the conditions of the retained R&D BER, R&D agreements are automatically exempt from the Chapter I prohibition.
- 7.12 The exemption in Article 2 of the retained R&D BER applies to R&D agreements (see 7.13) and is subject to conditions, including condition regarding full access to results and pre-existing know-how (see 7.14), market share (see 7.15-7.16), hardcore restrictions (see 7.17-7.18) and excluded restrictions (see 7.19-7.20). The CMA is also entitled to withdraw the benefit of the retained R&D BER in respect of individual agreements under section 10(5)(d) of the Act.

#### Scope of the block exemption

- 7.13 The retained R&D BER provides an exemption for agreements where two or more parties agree to collaborate in relation to the research and development of existing or new products, technologies, or processes. The agreement (or a subsequent agreement) may involve the joint exploitation of the results of the R&D, and it may also cover paid-for R&D (where one-party finances R&D conducted by the other).

#### Access to results and pre-existing know-how

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<sup>6</sup> <https://www.gov.uk/government/publications/uk-innovation-strategy-leading-the-future-by-creating-it>

- 7.14 Under Article 3 of the retained R&D BER, R&D agreements need to satisfy certain conditions for the block exemption to apply. The block exemption applies to agreements where all parties have full access to the final results of the joint or paid-for R&D, including any resulting intellectual property rights and know-how, for the purposes of further research and development and exploitation, as soon as they become available. The second condition relates to access to pre-existing know-how. This condition only applies to R&D agreements that do not include the joint exploitation of the R&D results and is limited to know-how that is indispensable for the exploitation of the R&D results.

#### Market share threshold and duration of exemption

- 7.15 According to Article 4 of the retained R&D BER, where the parties to an agreement are not competing undertakings, there is no market share threshold, and the exemption will apply for the duration of the R&D. Where the parties jointly exploit the results of the R&D, the exemption will continue to apply for 7 years from the time the contract products or technologies are first put on the market. Where the parties to an agreement are competing undertakings, the exemption applies for the periods mentioned above only if, at the time the agreement is entered into, the combined market share of the parties does not exceed 25% on the relevant product and technology markets. The exemption will continue to apply after these periods as long as the combined market share of the parties does not exceed 25% on the relevant markets.
- 7.16 Article 7 of the retained R&D BER sets out the grace periods available after the seven years of joint exploitation, which mean that rises in market shares above the 25% threshold will not lead to immediate loss of the exemption. When the parties' combined market share rises above 25%, parties can still benefit from the block exemption for a two-year grace period. If the parties' combined market share subsequently rises above 30%, the parties can still benefit from the block exemption for a grace period of a year from the point at which the combined market share first exceeded 30%.

#### Hardcore restrictions

- 7.17 The R&D agreement must not contain any hardcore restrictions (Article 5 of the retained R&D BER). Hardcore restrictions are provisions in agreements that are in general considered to be serious restrictions of competition. If an R&D agreement contains a hardcore restriction, the entire agreement falls outside of the retained R&D BER and does not benefit from the block exemption. The agreement would not automatically be considered to be in breach of the Chapter I prohibition and could still satisfy the conditions for individual exemption in section 9 of the Act. Given the seriousness of hardcore restrictions, however, an agreement containing these restrictions would be highly likely to fall within the Chapter I prohibition and unlikely to meet the conditions for individual exemption. Parties are, though, entitled to rebut this presumption by submitting efficiency claims to demonstrate procompetitive efficiencies that outweigh the likely harm.
- 7.18 Hardcore restrictions under the retained R&D BER include the restriction of the freedom of the parties to carry out R&D independently or in cooperation with third parties in a field unconnected with that to which the R&D relates or, after its completion, in the field to which it relates or in a connected field. Other hardcore restrictions under the retained R&D BER focus on territorial restrictions, price-fixing,

limitation of output or sales with a few exceptions, and prohibition or limitation of active sales, among others.

#### Excluded restrictions

- 7.19 R&D agreements containing excluded restrictions do not fully benefit from the block exemption (Article 6 of the retained R&D BER). Excluded restrictions are provisions in agreements for which it cannot be assumed with sufficient certainty that they fulfil the conditions for individual exemption. The relevant agreement provisions would not be covered by the block exemption. Unlike hardcore restrictions, if excluded restrictions can be severed from the rest of the agreement, the remaining R&D agreement may still benefit from the retained R&D BER.
- 7.20 Excluded restrictions under the retained R&D BER include restrictions linked to prohibiting challenges to the validity of intellectual property rights and licences granted to third parties.

#### Why is it being changed?

- 7.21 The retained R&D BER expires on 31 December 2022. The CMA has concluded, and the Secretary of State has agreed, that further provision should be made for a block exemption in respect of R&D agreements, in the form of a block exemption order made under section 6 of the Act. While the CMA has recommended that the new provision should in large part preserve the existing exemption for R&D agreements, it has also identified some important amendments to improve on the current legal framework and ensure that the exemption is most effective and appropriate for the UK market.
- 7.22 In addition, the original EU R&D BER was adopted with a view to market conditions across the EU and did not reflect specific characteristics of the UK market. Following EU Exit, the Secretary of State and the CMA are now able to take account of specific UK market conditions and the interests of UK customers and UK businesses.

#### What will it now do?

- 7.23 The order makes provision for a block exemption for R&D agreements which meet the specified conditions. The conditions largely follow the existing approach in the retained R&D BER, with the following modifications.

#### Test for undertakings competing in innovation

- 7.24 Under the retained R&D BER, R&D agreements between undertakings competing in innovation, that is, in the development of new products or technologies, are not subject to a market share threshold (but are instead treated as if they are not competing undertakings). However, the CMA has identified a risk to dynamic competition if this approach were to continue. Dynamic competition describes a situation where firms are making efforts or investments (for example through R&D) that may eventually lead to their entry or expansion based on the opportunity to win new sales and profits. This is important because it drives innovation by increasing the likelihood of new and improved products being made available and to better prices.
- 7.25 Under the R&D BEO, therefore, agreements between undertakings competing in innovation will be subject to a new test. Parties to such agreements will need to demonstrate that there are three or more competing R&D efforts in addition to and comparable with those of the parties to the R&D agreement. The change seeks to protect dynamic competition and drive innovation, which will provide new benefits to

consumers and businesses by ensuring that firms compete effectively where markets develop in the future.

#### Access to results and pre-existing know-how

- 7.26 The access requirements of the retained R&D BER are retained in substance in the R&D BEO. However, for clarity purposes and to provide a better description of the conditions for the block exemption, relevant provisions have been restructured and redrafted.
- 7.27 Article 5 of the R&D BEO requires that parties to the R&D agreement need to have full access to the final results of joint R&D or paid-for R&D for the purposes of further research and development and exploitation of the results. Access provided in the R&D agreement must include access to intellectual property rights and know-how, which must be granted as soon as reasonably practicable after the final results become available.
- 7.28 Article 6 of the R&D BEO sets out the conditions for access to pre-existing know-how in the context of R&D agreements that do not include joint exploitation of the results of joint R&D or paid-for R&D. Each party to the agreement must be provided access to any pre-existing know-how if this know-how of the other parties is indispensable for the purposes of the exploitation of the R&D results.
- 7.29 Article 7 of the R&D BEO stipulates that the block exemption applies to R&D agreements that include joint exploitation of results of joint R&D or paid-for R&D on the condition that the joint exploitation relates only to results that are indispensable for the production of the contract products or the application of contract technologies and are protected by intellectual property rights or constitute know-how.

#### Application of the market share

- 7.30 The market share threshold of 25% under Article 4 of the retained R&D BER will be maintained in Article 8 of the R&D BEO. However, the order introduces a single grace period of two years after the 25% market share threshold has been exceeded (Article 8 of the R&D BEO).
- 7.31 Article 9 of the R&D BEO also simplifies the calculation of the market share threshold. The market share threshold can now be calculated as an average of the parties' market shares of the three preceding calendar years if the preceding year's market share is not representative of their position on the relevant market.

#### Definitions

- 7.32 The R&D BEO introduces new definitions for 'R&D cluster', 'competing R&D effort', 'not competing undertaking', 'undertaking competing in innovation' and 'new product or technology', mainly to support the introduction of the new test for undertakings competing in innovation. The definition of 'research and development' is amended to cover earlier stages of R&D and the definition of 'research and development agreement' clarifies the type of agreements covered by the block exemption. The definitions of 'potential competitors' and 'intellectual property rights' are also modified to facilitate easier assessment by companies of what may constitute a potential competitor and to clarify what intellectual property rights include, respectively.

### Other provisions

- 7.33 Article 15 (as provided for by section 6(6)(c) of the Act) gives the CMA the power to cancel the block exemption in respect of a particular R&D agreement if it determines that it is not one which is exempt from the Chapter I prohibition as a result of section 9 of the Act.
- 7.34 Articles 14 and 16 include further provisions introducing an obligation to provide information to the CMA in connection with relevant R&D agreements as well as specifying how the CMA is to give notice in writing of information requests, decisions or proposals made under the order. These powers are necessary to allow the CMA to examine R&D agreements that meet the conditions of the block exemption but that the CMA believes may or may not meet the criteria for exemption under section 9 of the Act.

### Transitional provisions

- 7.35 The R&D BEO will provide for a transitional period to allow businesses that wish to take advantage of the ‘safe harbour’ to review and (if necessary) revise their existing agreements. Existing agreements that meet the conditions of the retained R&D block exemption will be treated as an agreement that benefits from the R&D BEO until the end of 31 December 2024. Agreements entered into after the retained R&D BER’s expiry will need to meet the conditions of the new block exemption (the R&D BEO) in order to benefit from the exemption. The test for undertakings competing in innovation will apply only to agreements entered into after 31 December 2023.

## **8. European Union Withdrawal and Future Relationship**

- 8.1 This instrument does not relate to withdrawal from the European Union / trigger the statement requirements under the European Union (Withdrawal) Act.

## **9. Consolidation**

- 9.1 This is the first order made under the powers in section 6 to the Act that deals with R&D agreements. It replaces a piece of retained EU law that expires on 31 December 2022. As a result, the need for consolidation does not arise.

## **10. Consultation outcome**

- 10.1 The CMA consulted on its proposed recommendation to the Secretary of State regarding the retained R&D BER along with the retained Specialisation BER in 2022. It received 3 written submissions primarily from the legal sector industry who agreed that the CMA should recommend to the Secretary of State that he should make a block exemption order to replace the retained R&D BER, adding to the broad range of evidence outlined in paragraph 7.4.
- 10.2 The CMA subsequently published the outcome of the consultation, its final recommendation to the Secretary of State and the consultation responses in full which can be viewed at: <https://www.gov.uk/government/consultations/retained-horizontal-block-exemption-regulations-rd-and-specialisation-agreements-consultation>.
- 10.3 The draft order is now being published for technical consultation ahead of its introduction, alongside this draft explanatory memorandum.



## **11. Guidance**

- 11.1 The CMA will publish detailed guidance to accompany this order, the CMA Horizontal Agreements Guidance. The CMA will consult on the guidance in due course.

## **12. Impact**

- 12.1 The impact on business, charities or voluntary bodies of the order is limited relative to the baseline option of renewing the block exemption unchanged and preserving the status quo. The changes introduced by the order outlined above would create some limited costs and some limited benefits to businesses in industries that may currently use the block exemption, such as in research and development, science and innovation.
- 12.2 The main impact will likely result from agreements between undertakings competing in innovation having to meet the new test under the order. The order introduces a new requirement for these businesses as there would have to be three or more competing R&D efforts in addition to and comparable with those of the parties to the R&D agreement. In the short run, this requirement is likely to introduce a direct cost to business as a result of new familiarisation costs in the short term for affected businesses. In limited circumstances, it could also restrict the number of agreements benefitting from this part of the block exemption.
- 12.3 The cost to business is likely to be offset by benefits to both consumers and businesses brought about by this requirement, specifically that the order could protect dynamic competition and drive innovation, which will ensure that firms compete effectively where markets develop in the future. The order could also enable more agreements to benefit from the block exemption by simplifying the application of the market share threshold and enhancing legal clarity for businesses through improved legal drafting. These additional changes are expected to lead to a small indirect net benefit to business by simplifying access for a greater number of firms.
- 12.4 We consider the indirect impact to consumers to be small but positive, resulting from the protection of dynamic competition and the potential to foster innovation in the future.
- 12.5 There is no, or no significant, impact on the public sector.
- 12.6 A full Impact Assessment is not being prepared for this instrument. Considering the conclusions above, the total direct business impact is likely to be less than the  $\pm$ £5 million Equivalent Annual Net Direct Cost to Business threshold. Therefore, a full Impact Assessment is not required under the Better Regulation Framework's guidance. Instead, a De Minimis Self-Certification assessment is being prepared.

## **13. Regulating small business**

- 13.1 The legislation applies to activities that are undertaken by small businesses.
- 13.2 No specific action is proposed to minimise regulatory burdens on small businesses.
- 13.3 The basis for the final decision on what action to take to assist small businesses is that small businesses will benefit from its provisions where they engage in R&D agreements where such agreements satisfy the criteria set out in the block exemption. Where some of the changes the new order makes compared to the retained R&D BER introduce new business costs, these costs incurred by small businesses are outweighed

by benefits (e.g., in the context of a new test applying to undertakings competing in innovation). In light of the very limited costs for small businesses, we do not consider that further specific action is required to minimise regulatory burdens on small businesses.

#### **14. Monitoring & review**

- 14.1 The approach to monitoring of this legislation is that, once the block exemption Order has been made, the CMA will oversee its implementation. It will keep under review its application and effectiveness in achieving its policy and operational objectives, especially with regard to developments in the UK market that would impact its operation.
- 14.2 The R&D BEO will expire on 31 December 2035. This provides an opportunity for the CMA to conduct a review of the regime, taking account of market developments and any representations about it which are made to the CMA. The CMA is then expected to make a recommendation to the Secretary of State about whether and how to replace the block exemption order when it expires.
- 14.3 A statutory review clause is included in the instrument. A review every five years is required and will provide opportunities to consider earlier changes.

#### **15. Contact**

- 15.1 Felix Lee at the Department for Business, Energy and Industrial Strategy Telephone: 0207 215 2139 or email: [felix.lee2@beis.gov.uk](mailto:felix.lee2@beis.gov.uk) can be contacted with any queries regarding the instrument.
- 15.2 Alesha De-Freitas, Deputy Director for Competition Policy, at the Department for Business, Energy and Industrial Strategy can confirm that this Explanatory Memorandum meets the required standard.
- 15.3 Parliamentary Under Secretary of State Jane Hunt at the Department for Business, Energy and Industrial Strategy can confirm that this Explanatory Memorandum meets the required standard.