EXPLANATORY MEMORANDUM TO

THE COMPETITION ACT 1998 (MOTOR VEHICLE AGREEMENTS BLOCK EXEMPTION) ORDER 2023

2023 No. 501

1. Introduction

1.1 This explanatory memorandum has been prepared by the Department for Business and Trade and is laid before Parliament by Command of His 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 recommendation of the Competition and Markets Authority ("the CMA") that the Secretary of State should make a Motor Vehicle Agreements Block Exemption Order (MVBEO) that specifies certain vertical agreements in the motor vehicle aftermarket sector ("motor vehicle aftermarket agreements") to exempt them from the prohibition in Chapter I of Part 1 of the Act which prohibits agreements between businesses that prevent, restrict or distort competition. The Order exempts motor vehicle aftermarket agreements if they meet the general conditions relating to vertical agreements set out in the Competition Act 1998 (Vertical Agreements Block Exemption) Order 2022 ("the VABEO")[1] and the specific conditions relating to agreements in the motor vehicle aftermarket sector set out in the Order.

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 Motor Vehicle Block Exemption Regulation (EUR 2010/461) ("the retained MVBER") which was made under EU law and retained in UK law after the UK's withdrawal from the EU. The retained MVBER expires at the end of 31st May 2023.

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 extent of this instrument (that is, the jurisdiction(s) which the instrument forms part of the law of) is the entirety of the United Kingdom.

4.2 The territorial application of this instrument (that is, where the instrument produces a practical effect) is the entirety of the United Kingdom.

[1] https://www.legislation.gov.uk/uksi/2022/516/contents/made

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.

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 whether they meet these conditions, 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) is exempt from the Chapter I prohibition, providing greater certainty for a business.

6.3 By replacing the need for businesses to self-assess whether their agreements comply with the general conditions set out in section 9 of the Act with the much simpler assessment of whether a set of specified criteria has been met, 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. By enabling businesses to do so, block exemptions also benefit consumers (for example through the developments of new products).

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 ("EU Exit"), agreements which fell within the scope of these block exemptions were automatically exempt from the Chapter 1 prohibition under section 10 of the Act. Following EU Exit, the UK retained the EU block exemption regulations, which continue to provide "parallel exemptions" under section 10. The EU Motor Vehicle Block Exemption Regulation[2] ("the EU MVBER") therefore became the retained MVBER under UK law as of January 2021. The retained MVBER expires at the end of 31st May 2023.

6.5 Three expiring retained block exemption regulations were replaced in 2022 by the VABEO, the Competition Act 1998 (Research and Development Agreements Block Exemption) Order 2022[3] and the Competition Act 1998 (Specialisation Agreements Block Exemption) Order 2022[4]. The other block exemptions to be reviewed in due course include:

- Liner shipping consortia agreements – expires 25th April 2024
- Technology transfer agreements – expires 30th April 2026

[2] Commission Regulation (EU) No 461/2010 of 27 May 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 in the motor vehicle sector (OJ L 129, 28.5.2010, p. 52-57).
[3] https://www.legislation.gov.uk/uksi/2022/1271/contents/made
[4] https://www.legislation.gov.uk/uksi/2022/1272/contents/made

- Rail, road and inland waterways transport – no expiry date[5].

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 businesses and consumers based in the UK 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 vertical agreements in the motor vehicle aftermarket sector. Vertical agreements are agreements or concerted practices 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.

7.3 As referred to in paragraph 6.4, prior to EU Exit, 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), created "parallel exemptions" in respect of the Chapter 1 prohibition. Following EU Exit, the EU MVBER was retained in UK law and therefore forms part of UK law. As it expires at the end of May 2023, the CMA reviewed the retained MVBER 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 MVBER with a block exemption order under the Act. This recommendation was based on a review of the retained MVBER 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 motor vehicle aftermarket agreements in the UK; and relevant trade and industry associations. The CMA drew on additional evidence from an EU evaluation of the EU MVBER to which UK stakeholders contributed.

7.5 In July 2022, the CMA published a draft recommendation and consulted on it publicly for six weeks.[6] The CMA considered the views presented, resulting in the CMA's final recommendation to the Secretary of State on 30 September 2022 and published on 4 October 2022.[7]

7.6 The CMA found that the evidence it gathered during its review shows that a motor vehicle 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

[5] These block exemptions' expiry dates are subject to the Retained EU Law (Revocation and Reform) Bill.

[6] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1092916/MVBER_Proposed_Recommendation_Consultation_Document.pdf

[7] https://www.gov.uk/government/consultations/retained-motor-vehicle-block-exemption-regulation-consultation

categories of motor vehicle aftermarket 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.

7.7 Allowing the retained MVBER to expire without replacing it could lead to significant increased uncertainty among businesses and potentially fewer benign or economically beneficial motor vehicle aftermarket agreements being made. This Order thus helps to avoid future harm to businesses and consumers alike.

7.8 A motor vehicle block exemption has benefits for businesses. Firstly, it provides legal certainty by assuring businesses that their agreements comply with competition law provided they meet the conditions of the exemption. Secondly, it avoids placing on businesses the burden of scrutinising many essentially benign motor vehicle aftermarket 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 CMA 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's recommendation to replace the retained MVBER broadly in line with the status quo. It does, however, introduce some important amendments tailored to the needs of UK consumers and businesses 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 MVBER exempts from the Chapter I prohibition agreements in the motor vehicle aftermarket sector which are assumed to confer sufficient benefits to outweigh any potentially anti-competitive effects. By virtue of satisfying the conditions of the retained MVBER, as well as the conditions of the economy-wide VABEO, motor vehicle aftermarket agreements are automatically exempt from the Chapter I prohibition.

7.12 The exemption in Article 2 of the retained MVBER applies to motor vehicle aftermarket agreements (see 7.13) and is subject to conditions that include sector-specific conditions regarding hardcore restrictions (see 7.14-7.15). These conditions need to be met in addition to the conditions set out in the VABEO which apply to all vertical agreements, economy-wide (e.g., market share conditions, hardcore and excluded restrictions)[8]. The CMA is also entitled to withdraw the benefit of the exemption under the retained MVBER in respect of individual agreements under section 10(5)(d) of the Act.

Scope of the block exemption

7.13 The retained MVBER provides an exemption for vertical agreements relating to the conditions under which the parties may purchase, sell or resell spare parts for motor

[8] See the Explanatory Memorandum for the VABEO for further details on the conditions for the VABEO which need to be satisfied for an agreement to benefit from the retained MVBER: https://www.legislation.gov.uk/en/uksi/2022/516/memorandum/contents

vehicles or provide repair and maintenance services for motor vehicles (Article 4 of the retained MVBER).

Hardcore restrictions

7.14 The motor vehicle aftermarket agreement must not contain any hardcore restrictions to claim the benefit of the exemption (Article 4 of the retained MVBER). Hardcore restrictions are provisions in agreements that are in general considered to be serious restrictions of competition. If a motor vehicle aftermarket agreement contains a hardcore restriction, the entire agreement falls outside of the retained MVBER and does not benefit from the 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.

7.15 In addition to the economy-wide list of hardcore restrictions set out in the VABEO, the following sector-specific hardcore restrictions apply under the retained MVBER:

- the restriction of the sales of spare parts for motor vehicles by members of a selective distribution system to independent repairers which use those parts for the repair and maintenance of a motor vehicle;
- the restriction, agreed between a supplier of spare parts, repair tools or diagnostics or other equipment and a manufacturer of motor vehicles, of the supplier's ability to sell those goods to authorised or independent distributors, repairers or end users; and
- the restriction, agreed between a manufacturer of motor vehicles which uses components for the initial assembly of motor vehicles and the supplier of such components, of the supplier's ability to place its trademark or logo effectively and in an easily visibly manner on the components supplied or on spare parts.

Excluded restrictions

7.16 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 provisions are not covered by the block exemption. Unlike hardcore restrictions, if excluded restrictions can be severed from the rest of the agreement, the remaining motor vehicle aftermarket agreement still benefits from the block exemption (subject to meeting all other conditions). The economy-wide list of excluded restrictions set out in the VABEO applies, however, the retained MVBER does not include additional sector-specific excluded restrictions.

Why is it being changed?

7.17 The retained MVBER expires at the end of 31st May 2023. The CMA has concluded, and the Secretary of State has agreed, that further provision should be made for a block exemption in respect of motor vehicle aftermarket 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 motor vehicle aftermarket 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.

7.18 In addition, the EU MVBER 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 customers and businesses based in the UK.

What will it now do?

7.19 The Order makes provision for a block exemption for motor vehicle aftermarket agreements which meet the specified conditions (in the Order itself as well as in the VABEO). The conditions largely follow the existing approach in the retained MVBER, with the following modifications.

Restrictions on access to repair and maintenance information and tools and training

7.20 A lack of appropriate access to information and tools and training used for the purpose of repair and maintenance services in a manner that puts independent operators on a level playing field with authorised repairers, authorised distributors and other authorised partners can lead to a decline in the market position of independent operators. It may ultimately lead to consumer harm in the form of a significant reduction in choice of spare parts, higher prices for repair and maintenance services, a reduction in choice of repair outlets and potential safety problems. Consequently, such restrictions should not continue to automatically benefit from the block exemption but instead be assessed against the Chapter 1 prohibition.

7.21 The MVBEO therefore treats such restrictions as excluded restrictions. Motor vehicle aftermarket agreements containing excluded restrictions cannot fully benefit from the block exemption and may not benefit at all (article 6 of the MVBEO).

Definitions

7.22 As noted in paragraph 7.13, the retained MVBER provides an exemption for vertical agreements relating to the conditions under which the parties may purchase, sell or resell spare parts for motor vehicles (among others). The MVBEO updates and clarifies the scope and meaning of this provision by replacing the reference to ‘spare parts’ with a reference to ‘aftermarket goods’. A new definition of ‘aftermarket goods’ has been introduced in article 2 of the MVBEO to set out that this means spare parts (which is defined as including software), any software which is required to repair or replace a part or system of a motor vehicle, but which is not a spare part, together with any code or other information necessary for the use of this software or software which is a spare part, and liquids used in the braking system, steering system, engine or elsewhere in a motor vehicle as a coolant, lubricant, cleaner or otherwise, in so far as the liquids are necessary for the effective operation of the motor vehicle (but not fuel).

7.23 The MVBEO introduces new definitions for ‘authorised partner’, ‘repair and maintenance information’, ‘vehicle information’, and ‘independent operator’ to support the introduction of the excluded restriction. Definitions of ‘authorised distributor’, ‘authorised repairer’, ‘independent distributor’, and ‘independent repairer’ as well as ‘goods’, ‘agreement’, ‘MVA agreement’, ‘connected undertaking’, ‘original part’, ‘part’, ‘spare part’, ‘repair and maintenance services’, ‘repair and maintenance tool’, and ‘supplier’ have been added or amended to clarify their meaning and facilitate easier assessment by readers and businesses relying on the block exemption.

Other provisions

7.24 Article 9 imposes an obligation on parties to an agreement in respect of which the block exemption is claimed to provide information to the CMA in connection with that agreement, if requested by the CMA. This obligation is necessary to allow the CMA to examine agreements that it believes may not meet the conditions of the block exemption and 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.

7.25 Article 10 gives the CMA the power to cancel the block exemption in respect of a particular motor vehicle aftermarket 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.

7.26 Article 11 specifies how the CMA is to give notice in writing of information requests, proposals or decisions made under the Order.

Transitional provisions

7.27 The MVBEO 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 met the conditions of the retained MVBER immediately before its expiry will be treated as agreements that benefit from the MVBEO until the end of 31st May 2024. Agreements entered into after the retained MVBER's expiry will need to meet the conditions of the new block exemption (the MVBEO) in order to benefit from the exemption.

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 of the Act that deals with motor vehicle aftermarket agreements. It replaces a piece of retained EU law that expires at the end of 31st May 2023. 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 MVBER in 2022. It received 14 responses from a wide variety of stakeholders, the vast majority of which, from across the motor vehicle aftermarket, agreed that that the CMA should recommend to the Secretary of State that he should make a block exemption order to replace the retained MVBER.

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-motor-vehicle-block-exemption-regulation-consultation.

10.3 The Department for Business and Trade subsequently consulted on a draft version of the Order from 8 February to 1 March 2023 to make sure it delivers the policy correctly and effectively. Nine written responses were received from organisations representing the motor vehicle aftermarket, in addition to further engagement with

stakeholders and the CMA. Stakeholders welcomed the introduction of the MVBEO and were content that the Order achieved the intended outcome with suggestions proposing improvements to the drafting to clarify definitions and intent. The MVBEO was accordingly refined and improved. More information about the consultation, including the Government's response, can be found at: https://www.gov.uk/government/consultations/draft-order-the-competition-act-1998-motor-vehicle-agreements-block-exemption-order-2023-mvbeo.

11. Guidance

11.1 The CMA will publish further guidance to accompany this Order. The guidance will be available at http://www.gov.uk/cma or by writing to the CMA, The Cabot, 25 Cabot Square, London E14 4QZ. The CMA is consulting on the guidance for the Order between 18 April and 16 May 2023.

12. Impact

12.1 The impact of the Order on business, charities or voluntary bodies is expected to be small relative to the baseline option of renewing the block exemption unamended and preserving the status quo. The amendments introduced by the Order outlined above are expected to introduce an Equivalent Annual Net Direct Cost to Business of approximately £0.2m arising from familiarisation costs. This falls below the ±£5 million Equivalent Annual Net Direct Cost to Business threshold and is therefore classed as de minimis, with costs expected to fall primarily on a limited number of large businesses. Indirect costs are expected to arise from businesses self-assessing whether restrictions on access to technical and vehicle information comply with the exemption in section 9 of the Act, in the absence of the block exemption applying directly.

12.2 Furthermore, additional costs to comply with the hardcore restrictions concerning access to spare parts may arise following the update to the definition of spare parts to include essential software. Relative to the status quo, these changes should level the playing field between businesses operating in the aftermarket through improving the ability of independent operators to exert competitive pressure on authorised operators. In turn, this will deliver benefits to consumers in the form of lower prices and more choice in how and where they have their vehicles repaired. The extent to which these impacts are realised depends on the future actions taken by businesses following the implementation of the Order.

12.3 There is no, or no significant, impact on the public sector.

12.4 A full Impact Assessment has not been prepared for this instrument because the extent of the impact relies on businesses changing their behaviour following the amendments to the block exemption, so other than the costs associated with familiarisation, it is not expected to introduce a significant direct cost to business. The net indirect cost to business is expected to be limited in both scope and magnitude, consisting of legal and expert advice needed to assess and potentially amend existing vertical agreements. These indirect costs remain unquantified due to inherent uncertainty on where changes to vertical agreements will occur.

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 this group will benefit from the provisions set out in the Order where they engage in vertical agreements which satisfy the criteria set out in the MVBEO and the VABEO. The new Order introduces changes compared to the retained MVBER which may introduce costs to businesses, however these costs are likely to affect small businesses to a much lesser extent in comparison to large businesses. Potentially anticompetitive agreements that fall out of scope of the amended block exemption are likely to only arise from a limited number of large businesses who hold significant market share in the motor vehicles aftermarket or markets adjacent to it. In light of the expected 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 for the CMA to oversee its implementation. It will keep under review its application and effectiveness in achieving its policy and operational objectives.

14.2 The instrument does not include a statutory review clause and, in line with the requirements of the Small Business, Enterprise and Employment Act 2015, Parliamentary Under Secretary of State Kevin Hollinrake has made the following statement:

"It would not be appropriate to make provision for review within the Order. The Order will expire after six years. This provides an opportunity for the CMA to conduct a further review of the regime for vertical agreements in advance of the Order's expiry, taking account of market developments since the last review 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."

15. Contact

15.1 Felix Lee at the Department for Business and Trade Telephone: 0207 215 2139 or email: felix.lee2@beis.gov.uk can be contacted with any queries regarding the instrument.

15.2 Alex Williams, Deputy Director for Competition Policy, at the Department for Business and Trade can confirm that this Explanatory Memorandum meets the required standard.

15.3 Parliamentary Under Secretary of State Kevin Hollinrake at the Department for Business and Trade can confirm that this Explanatory Memorandum meets the required standard.