

**EXPLANATORY MEMORANDUM TO**  
**THE COMPETITION ACT 1998 (CARBON DIOXIDE) (PUBLIC POLICY**  
**EXCLUSION) ORDER 2021**

**2021 No. 1169**

**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 This order excludes from the application of the prohibition contained in Chapter I of Part I of the Competition Act 1998 (“the Act”) certain agreements and concerted practices between producers and distributors of commercial carbon dioxide. The Order is made to protect the security of supply of commercial carbon dioxide to end users of carbon dioxide during a period of disruption to the UK’s commercial carbon dioxide supply chain.

**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.

**6. Legislative Context**

- 6.1 Paragraphs 7(1) and (2) of Schedule 3 to the Act provide that the Secretary of State may, if satisfied that there are exceptional and compelling reasons of public policy, by Order, exclude agreements from the Chapter I prohibition (see paragraph 7.1 below for an explanation of the Chapter I prohibition). In accordance with section 2(5) and (6) of the Act, unless the context otherwise requires, the references in paragraph 7 of Schedule 3 to an agreement are 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).
- 6.2 Paragraph 7(3) of Schedule 3 of the Act provides that the Order may deem the Chapter I prohibition never to have applied in relation to the excluded agreements.
- 6.3 Six Orders were made in 2020 under the powers in paragraph 7 of Schedule 3 to the Act in relation to sectors affected by the spread of coronavirus. Those Orders were:

- The Competition Act 1998 (Health Services for Patients in England) (Coronavirus) (Public Policy Exclusion) Order 2020 (S.I. 2020/368) (“the Health Services for Patients in England Order”);
- The Competition Act 1998 (Groceries) (Coronavirus) (Public Policy Exclusion) Order 2020 (S.I. 2020/369) (“the Groceries Order”);
- The Competition Act 1998 (Solent Maritime Crossings) (Coronavirus) (Public Policy Exclusion) Order 2020 (S.I. 2020/370) (“the Solent Crossings Order”);
- The Competition Act 1998 (Health Services for Patients in Wales) (Coronavirus) (Public Policy Exclusion) Order 2020 (S.I. 2020/435) (“the Health Services for Patients in Wales Order”);
- The Competition Act 1998 (Dairy Produce) (Coronavirus) (Public Policy Exclusion) Order 2020 (S.I. 2020/481) (“the Dairy Produce Order”); and
- The Competition Act 1998 (Groceries) (Public Policy Exclusion) Order 2020 (S.I. 2020/1568) (“the Groceries No.2 Order”).

6.4 The Groceries Order and the Dairy Produce Order were revoked by the Competition Act 1998 (Coronavirus) (Public Policy Exclusions) (Amendment and Revocation) Order 2020 (S.I. 2020/933). The remaining four Orders were revoked by the Competition Act 1998 (Coronavirus) (Public Policy Exclusions) (Revocations) Order 2021 (S.I. 2021/773).

6.5 An additional Order, the Competition Act 1998 (Football Broadcasting Rights) (Public Policy Exclusion) Order 2021 (S.I. 2021/1148), was also made on 14th October 2021.

## 7. Policy background

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

7.1 Section 2 of the Act prohibits agreements, decisions or concerted practices which may affect trade within the United Kingdom and which prevent, restrict or distort competition within the United Kingdom. This is known as the “Chapter I prohibition”.

7.2 Paragraph 7 of Schedule 3 to the Act gives the Secretary of State the power to exclude certain agreements (which term includes references to concerted practices such as information sharing – see section 2(5) of the Act) from the application of the Chapter I prohibition where he is satisfied that there are exceptional and compelling reasons of public policy why they ought not to apply. The exclusions may apply only in specified circumstances and may be retrospective.

7.3 The UK’s commercial carbon dioxide supply chain has been disrupted by the increasing cost of fuel in the UK. This led the main UK supplier of commercial carbon dioxide, CF Fertilisers UK Limited (“CF Fertilisers”), to cease production. A carbon dioxide shortage would have significant impacts across wider industry, including in animal welfare, food processing, and use in nuclear and healthcare.

7.4 On 21st September, the government agreed to provide short term financial support to CF Fertilisers to enable them to continue producing CO<sub>2</sub>. This support was to cover their financial losses resulting from CO<sub>2</sub> production up to a financial limit for a period of three weeks. In addition, the government made clear to CF Fertilisers and the three distributors that it supplied (Nippon Gases UK Limited (“Nippon”), Air Liquide UK Limited and BOC Limited) that they needed to use this time to find a longer-term

industry led and market-based solution to their viability challenges brought about due to significantly increased natural gas prices.

- 7.5 To facilitate the development of such a solution it was necessary for CF Fertilisers and the distributors to agree purchasing arrangements from CF Fertilisers that would ensure that CF Fertiliser's production of commercial carbon dioxide remained financially viable during the disruption caused by increased fuel prices. This required CF Fertilisers and the distributors to share information about costs, prices, expected purchase volumes, customers and contract term lengths during this period. This was done with the knowledge and agreement of the UK government to enable a rapid and effective resolution to this exceptional situation. This Order is made in exercise of the Secretary of State's powers to disapply UK competition law where there are exceptional and compelling reasons of public policy to do so. The Order retrospectively disapplies UK competition law in relation to these discussions between CF Fertilisers and the distributors for an initial two week 'CO<sub>2</sub> negotiation period' (see article 4(3)).
- 7.6 The Order also provides that any purchase contracts between CF Fertilisers and the distributors arising out of the discussions during the 'CO<sub>2</sub> negotiation period' must expire no later than the end of 31st January 2022 (see article 4(4)(c)). This period is intended to allow time for the market to stabilise after the recent disruption and permit the negotiation of longer-term supply arrangements on normal commercial terms.
- 7.7 Additionally, the UK government has recognised that during the 'Chapter I exclusion period' it may be necessary for the distributors to engage in further coordination and information sharing between themselves if there are further disruptions in the supply chain. This is a contingency measure to ensure that the distributors can allocate supplies of CO<sub>2</sub> most effectively. Article 4(1) of the Order disapplies UK competition law in relation to such collaboration and article 4(2) applies this exclusion retrospectively to any such collaboration which occurred between 30th September 2021 and the coming into force of the Order. The exclusion is limited to collaboration regarding the allocation, distribution and movement of CO<sub>2</sub> during the Chapter I exclusion period and information sharing regarding stock shortages during that period. The Chapter I exclusion period ends on 31st January 2022 or on the revocation of the Order (if earlier).
- 7.8 Article 5 of this Order requires that the agreements relating to information sharing between CF Fertilisers and the distributors during the CO<sub>2</sub> negotiation period and any agreements between the distributors relating to coordination and information sharing regarding supplies of CO<sub>2</sub> during the Chapter I exclusion period must be notified to the Secretary of State. Article 6 of this Order requires that the Secretary of State maintain a register of the agreements notified to him under this Order.
- 7.9 The Order will come into force on 15th November 2021. Article 7 of this Order provides that the Order expires at the end of 31st January 2022.

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

- 8.1 This instrument does not relate to withdrawal from the European Union.

## **9. Consolidation**

- 9.1 This is the first Order made under the powers in paragraph 7 of Schedule 3 to the Act that deals with the subject of carbon dioxide supplies. As a result, the need for consolidation does not arise.

## **10. Consultation outcome**

- 10.1 The Order has not been subject to formal consultation. However, the affected companies were engaged in the development of the Order to ensure that it provided sufficient scope for the industry to undertake the activities necessary to prepare for and mitigate possible disruption to the UK's commercial carbon dioxide supply chain.
- 10.2 The Secretary of State's intention to make this Order was publicised on 1 October 2021 and 11 October 2021.

## **11. Guidance**

- 11.1 This order does not require the publication of any guidance.

## **12. Impact**

- 12.1 There is no, or no significant, impact on business, charities or voluntary bodies. This instrument does not place additional regulatory requirements on businesses; it is a temporary exclusion for certain, specific practices ordinarily prohibited under domestic competition law for producers and distributors of commercial carbon dioxide.
- 12.2 There is no, or no significant, impact on the public sector.
- 12.3 An Impact Assessment has not been prepared for this instrument because this is short-term contingency legislation that will be in place for less than 12 months. This Order will help to ensure the stable supply of commercial carbon dioxide in the UK, thereby helping to avoid significant disruption to businesses. This will benefit consumers and the broader economy. While there are some longer-term risks inherent to relaxing competition law in this way, such as firms gaining knowledge of how their competitors operate, this risk is significantly outweighed by the impact of not putting in place contingency measures to ensure the continued supply of commercial carbon dioxide in the UK which could include shortages of supply for critical national infrastructure.

## **13. Regulating small business**

- 13.1 The legislation does not apply to activities that are undertaken by small businesses.

## **14. Monitoring & review**

- 14.1 The approach to monitoring this legislation is for the relevant government departments to keep under constant review whether there is disruption to the supply of commercial carbon dioxide in the United Kingdom. The legislation will expire at the end of 31st January 2022, unless it is revoked earlier.
- 14.2 The Order does not include a statutory review clause.

## **15. Contact**

- 15.1 David Middlemiss at the Department for Business, Energy and Industrial Strategy Telephone: 0207 215 8740 or email: [David.Middlemiss@beis.gov.uk](mailto:David.Middlemiss@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 Paul Scully at the Department for Business, Energy and Industrial Strategy can confirm that this Explanatory Memorandum meets the required standard.