

**EXPLANATORY MEMORANDUM TO**  
**THE STATE AID (EU EXIT) REGULATIONS 2019**  
**2019 No. XXXX**

**1. Introduction**

- 1.1 This explanatory memorandum has been prepared by the Department for Business, Energy and Industrial Strategy (the Department) and is laid before Parliament by Act.

**2. Purpose of the instrument**

- 2.1 This instrument makes appropriate provision to correct deficiencies in retained EU law relating to State aid that arise from the withdrawal of the United Kingdom from the EU. This instrument modifies the rights, powers, liabilities, obligations, restrictions, remedies and procedures preserved by section 4 of the European Union (Withdrawal) Act 2018 (the Act) that relate to State aid (State aid rights) and amends and restates the procedure that applies to State aid cases. The overall effect is to transpose the EU State aid regime as set out in Articles 107 and 108 of the Treaty on the Functioning of the European Union (TFEU) into domestic law and give the Competition and Markets Authority (CMA) the function of regulating the regime in place of the EU Commission (Commission).

*Explanations*

What did any relevant EU law do before exit day?

- 2.2 State aid is support in any form (financial or kind) from any level of government which gives a business or another entity an advantage that could not be obtained in the normal course of business. State aid is governed by Articles 107 to 109 of the TFEU – and a number of EU regulations made under those TFEU Articles. Article 107(1) defines State aid and sets out the general prohibition on giving aid. The prohibition operates by effectively providing that aid is incompatible with the internal market insofar as it affects trade between Member States unless the aid has been approved by the Commission. Article 107(2) and (3) sets out when the Commission has no discretion in approving aid (i.e. when it must be approved) and those much larger areas where the Commission enjoys broad discretion over whether to approve aid.
- 2.3 Article 108 sets out the Commission’s role in policing the system and its rights to examine aid. Article 108(3) obliges Member States to notify aid in advance and not to award this aid until it has been approved (known as the standstill obligation). If a Member State gives aid without prior approval, this is known as unlawful aid. If this comes to the Commission’s attention and they investigate and discover that the aid is incompatible with the internal market, the Commission will order the Member State to abolish the aid measure and recover any aid already granted with interest.
- 2.4 While the Commission has exclusive competence to examine whether aid is compatible with the internal market, national Courts are able to enforce the Article 108(3) standstill obligation and a competitor can apply to the domestic Courts to uphold this right. In these circumstances, a national court is able to suspend an aid measure until the Commission has considered the compatibility of the measure.

- 2.5 In addition to the TFEU Articles, there are a number of EU regulations and decisions that contain relevant State aid provisions. These broadly consist of procedural regulations and exemptions regulations.
- 2.6 The procedural regulations are the EU Procedural Regulation (2015/1589) (Procedural Regulation) and the EU Implementing Regulation (794/2004) (Implementing Regulation). The Procedural Regulation sets out at a high level the way in which the system operates and makes clear the roles and responsibilities of the Commission and the Member States. The Procedural Regulation also sets out the procedures to be followed in notifications and investigations and gives the Commission information gathering powers. The Implementing Regulation sets out in more detail how the system will work in specific areas – this includes how Member States must calculate interest when recovering aid.
- 2.7 The exemption regulations are made up of three block exemptions and four de minimis regulations. These are the General Block Exemption Regulation (GBER), the Agricultural Block Exemption Regulation (ABER), the Fisheries Block Exemption Regulation (FBER), the general de minimis regulation, the Services of General Economic Interest (SGEI) de minimis regulation, the agricultural de minimis regulation and the fisheries de minimis regulation. Each of these regulations set out the conditions under which an aid measure is exempt from the requirement to notify the Commission in advance. The conditions are tightly defined, but the amounts of money that can be given in this way are relatively high. The modernisation of the rules in 2014 means that around 90% of aid measures do not now need prior approval from the Commission and can be given immediately, provided the conditions are satisfied. Any aid given under the block exemptions, however, is still a State aid and the Commission monitors compliance rigorously.
- 2.8 There is also a Commission decision taken under Article 106(3) of the TFEU which block exempts aid for SGEI from the requirement to notify. There is no definition of an SGEI, but in general it is a service aimed at final consumers which the market does not provide or does not provide to the extent or at the quality the state desires. Examples of SGEIs include postal services and rural transport.

Why is it being changed?

- 2.9 The Act preserves most EU State aid law as retained EU law in accordance with sections 3 and 4. Section 4 provides that the State aid rights continue to be recognised in domestic law on and after exit day. Section 3 provides that direct EU legislation forms part of domestic law on and after exit day.
- 2.10 In relation to State aid, the retained EU law contains a number of deficiencies that mean the law would not operate effectively in a domestic setting without amendment.
- 2.11 The amendments made by this instrument do not materially alter the substance of the EU State aid framework.
- 2.12 There will be no material change to the definition of aid or to the general prohibition on giving aid. However, changes are needed to give the CMA the function of regulating the regime, to set out how aid givers must fulfil their obligations to notify aid in the new system and to clarify how appeals against certain State aid decisions made by the CMA will be made. There are also numerous deficiencies in the retained EU law (both the procedural regulations and the exemption regulations) that need to

be corrected in relation to references to the EU concepts, such as the internal market and functions of the Commission.

*What will it do now?*

- 2.13 This SI is being made to ensure that the retained EU law operates effectively and provides for a functioning State aid regime to be in place on and after exit day. This is important to give certainty and continuity for business, to prevent distortions of competition and to ensure that less prosperous regions of the UK are not disadvantaged by support provided in wealthier regions.
- 2.14 Once the UK has left the EU, the Commission will cease to have authority to approve and monitor new aid granted by public authorities in the UK. The policy after exit is to have a UK body in place to regulate State aid and to deal with approvals and ensure that the regime is working effectively. The SI provides for the CMA to become the independent regulator with functions to regulate State aid.
- 2.15 In accordance with the Withdrawal Act powers, the SI only makes amendments to the retained EU law where appropriate to correct deficiencies. The policy intention is to mirror the EU State aid law as far as practical as this is familiar to both aid givers and beneficiaries and should reassure them that this is a continuation of the existing regime.
- 2.16 The SI covers agricultural aid as the Department for Environment, Food and Rural Affairs (Defra) will continue to make payments under the Common Agricultural Policy (CAP) for a limited period after exit and it is important that there is appropriate cover for these.

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

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

- 3.1 None.

*Matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business (English Votes for English Laws)*

- 3.2 The territorial application of this instrument includes Scotland and Northern Ireland.

### **4. Extent and Territorial Application**

- 4.1 The territorial extent of this instrument is the whole of the United Kingdom.
- 4.2 The territorial application of this instrument is the whole of the United Kingdom.
- 4.3 However, the territorial extent of the amendments in Schedule 10 to these regulations is the same as the provisions they amend.

### **5. European Convention on Human Rights**

- 5.1 The Minister for Small Business, Consumers and Corporate Responsibility, Kelly Tolhurst, has made the following statement regarding Human Rights:

“In my view the provisions of the State Aid (EU Exit) Regulations 2019 are compatible with the Convention rights.”

## **6. Legislative Context**

- 6.1 This SI is being made using the powers in section 8 of the Act. This provides for a Minister to make such provision as the Minister considers appropriate to prevent, remedy or mitigate: (a) any failure of retained EU law to operate effectively or (b) any other deficiency in retained EU law, in both cases arising from the withdrawal of the United Kingdom from the EU.
- 6.2 The retained EU law in this context is comprised of two categories of EU law.
- 6.3 First, the State aid rights which continue on and after exit day to be recognised and available in domestic law in accordance with section 4 of the Act. The main State aid rights are those derived from Articles 107(1) and 108(3) of the TFEU.
- 6.4 Secondly, the direct EU legislation preserved by section 3 of the Act and EU-derived legislation preserved by section 2 of the Act. The legislation preserved by section 3 relevant to this instrument is:
- Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty;
  - Council Decision (2010/787/EU) of 10 December 2010 on State aid to facilitate the closure of uncompetitive coal mines;
  - Council Regulation (EU) 2015/1588 of 13 July 2015 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to certain categories of horizontal State aid;
  - Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union;
  - Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty (the “General Block Exemption Regulation”);
  - Commission Regulation (EU) No 702/2014 of 25 June 2014 declaring certain categories of aid in the agricultural and forestry sectors and in rural areas compatible with the internal market in application of Articles 107 and 108 of the Treaty on the Functioning of the European Union (the “Agricultural Block Exemption Regulation”);
  - Commission Regulation (EU) No 1388/2014 of 16 December 2014 declaring certain categories of aid to undertakings active in the production, processing and marketing of fishery and aquaculture products compatible with the internal market in application of Articles 107 and 108 of the Treaty on the Functioning of the European Union (the “Fisheries Block Exemption Regulation”);
  - Commission Regulation (EU) No 360/2012 of 25 April 2012 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to de minimis aid granted to undertakings providing services of general economic interest;

- Commission Regulation (EU) No 1407/2013 of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to de minimis aid;
- Commission Regulation (EU) No 1408/2013 of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to de minimis aid in the agriculture sector;
- Commission Regulation (EU) No 717/2014 of 27 June 2014 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to de minimis aid in the fishery and aquaculture sector;
- Regulation (EC) No 1370/2007 of the European Parliament and of the Council of 23 October 2007 on public passenger transport services by rail and by road;
- Commission Decision 2012/21/EU of 20 December 2011 on the application of Article 106(2) of the Treaty on the Functioning of the European Union to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest;
- regulations made under Article 42 of the TFEU in relation to agriculture and fisheries;
- individual decisions of the Commission addressed to the UK.

6.5 The legislation preserved by section 2 that is relevant to this instrument is the Financial Transparency (EC Directive) Regulations 2009.

Articles 107(1) and 108(3)

- 6.6 The State aid rights derived from Articles 107(1) and 108(3) of the TFEU are preserved by section 4 of the Act because those rights are directly effective in the UK. The two Articles are dependent on each other and together create a prohibition against the granting of State aid unless it has been approved by the Commission. This right can be enforced directly in the national court (known as a breach of standstill claim).
- 6.7 It is the underlying State aid rights that are incorporated into domestic law in accordance with section 4 of the Act, rather than the Treaty wording itself. Regulation 3 of the SI sets out how those rights are modified and how they are preserved in domestic law on and after exit day. The Government believes that taking this approach in relation to the fundamental State aid provisions ensures the greatest clarity and certainty as any rewording could suggest an unintended difference.
- 6.8 The approach in regulation 3 is to modify the State aid rights by providing that they have effect as if: (a) Articles 107(1) and 108(3) were modified as set out in the second column of the table in regulation 3(4), and (b) they are subject to the conditions set out in third column of that table.
- 6.9 We have taken this approach for two reasons. First, it gives continuity and certainty for users by maintaining the established terminology (for example – state resources). Secondly, and more importantly, to maintain the link to relevant EU case law. There is a large amount of EU case law which shapes the interpretation of the concepts such as state resources and we do not wish to break this link. If we did it would lead to greater uncertainty for aid givers, beneficiaries and the CMA.

- 6.10 In particular, we have not included a specific definition of ‘aid’. This concept of aid takes its meaning from decades of EU case law and we have not attempted to codify the definition as this may risk inadvertently changing the intended meaning.
- 6.11 The modified versions of Article 107(1) and 108(3) effectively restate those Articles with deficiency corrections to make the State aid rights operable. The main changes in these Articles are:
- replacing references to the Commission with references to the CMA;
  - replacing references to compatibility with the internal market with references to approval by the CMA;
  - replacing the test of “affects trade between Member States” with a test of “affects trade between the United Kingdom and the European Union”.
- 6.12 The conditions in the third column of the table are effectively modified versions of the non-directly effective TFEU Articles that relate to State aid. These are Articles 93, 106(2) and 107(2) and (3). The third column also includes Article 346(1) which is discussed below.
- 6.13 Articles 93, 106(2) and 107(2) and (3) do not contain directly effective rights preserved by section 4 of the Act. However, they affect the operation of Articles 107(1) and 108(3) under the current EU law. After exit, the State aid rights would not operate effectively without the conditions in Articles 93, 106(2) and 107(2) and (3) applying in materially the same way as they do now.
- 6.14 The main changes to the non-directly effective TFEU Articles in the third column of the table are:
- replacing references to the Commission with references to the CMA;
  - replacing references to compatibility with the internal market with references to approval by the CMA;
  - omitting the specific reference to Germany in Article 107(2)(c);
  - replacing references to Member States with references to the United Kingdom;
  - replacing general references to areas eligible to receive regional aid in Articles 107(3)(a) and (c) with references to the specific areas eligible to receive regional aid in the United Kingdom by reference to the Assisted Areas Order 2014.

Article 346(1)

- 6.15 The Department considers that Article 346(1) of the TFEU also has direct effect in relation to State aid insofar as it narrows the scope of Articles 107(1) and 108(3). It is possible to demonstrate in a national Court that an aid measure is covered by Article 346 and is therefore not in breach of the standstill obligation. Article 346(1), so far as it operates to restrict the application of Articles 107(1) and 108(3) will be preserved by section 4.
- 6.16 However, the approach to correcting deficiencies with the Article 346(1) rights that are preserved by section 4, insofar as they relate to State aid, is slightly different. Rather than modify the rights, the approach in the regulations is to revoke the rights and include a modified version of Article 346(1) in the third column of the table in regulation 3. This is intended to make clear how Article 346(1) applies in relation to

the State aid rights after exit and is without prejudice to how Article 346(1) will continue to apply in relation to other subject areas.

Scope of test

- 6.17 The Department has decided to use the test of “trade between the United Kingdom and the European Union” rather than “trade within the United Kingdom”. While the current test of “trade between Member States” has been held to have a very low bar which does capture some domestic activity, it does not include aid for purely local activities.
- 6.18 As long as the activity carried out by the beneficiary is tradeable, then any support to that entity from domestic sources can affect trade between Member States. If the UK gives aid to a ball bearing manufacturer then, at least theoretically this affects the export of ball bearings from other Member States. However, purely local measures (for example aid for a bakery in a small town) would not be caught.
- 6.19 If a test of “trade within the United Kingdom” was used then this may catch these local measures which are currently outside the rules.

Aid in urgent cases

- 6.20 Regulation 57 relates to the application of the state aid framework in urgent cases. It provides for aid to be granted in advance of CMA approval in circumstances where aid is required to be granted at very short notice and there is not enough time for the CMA to approve the aid under the notification procedure.
- 6.21 The regulation applies to three specific circumstances where not granting the aid in time would have potentially serious consequences for a particular region or the economy as a whole, deriving from the Commission’s guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty and its communications in relation to support measures in favour of banks in the context of the financial crisis. If the regulation is used by an aid grantor, the aid grantor then needs to notify the aid as soon as possible. If the aid is subsequently not approved by the CMA then the aid grantor will be ordered to recover the aid.
- 6.22 This regulation corrects a deficiency in retained EU law related to the UK not having the same concept of compatibility with the EU internal market after EU exit. The current EU test effectively provides that aid is incompatible with the internal market unless the Commission approves the aid. As the UK does not have the same concept of compatibility with the EU internal market, we have amended Article 107(1) to include an express prohibition against the granting of aid without CMA approval.
- 6.23 Including an express prohibition without a provision for aid in urgent cases would reduce the flexibility of aid grantors to grant aid in some urgent cases. Regulation 57 provides certainty that in practice the regime will operate in a way that is as close as possible to the current regime after EU exit where, in exceptional cases, aid which is compatible with the CMA’s guidelines is required to be granted urgently and it is not possible to obtain advance approval from the CMA.

Aid granted directly by a Westminster Act of Parliament

- 6.24 Schedule 3 to the regulations relates to the relationship between the domestic State aid regime and aid that may be granted in the future by a Westminster Act of Parliament.
- 6.25 It is a constitutional principle that one Act of Parliament cannot bind future Acts of Parliament. This instrument does not purport to restrict the ability of Parliament to

pass Acts in the future that directly grant State aid. To the extent an Act in the future grants State aid in a manner that is inconsistent with this instrument, that Act will repeal this instrument to the extent necessary.

- 6.26 Schedule 3 creates a process for the CMA to consider aid that may be granted directly by an Act of Parliament. It provides for a Minister of the Crown to seek from the CMA a non-binding advisory opinion in relation to proposals to grant aid by Act of Parliament. It also provides for a process for interested parties to request the CMA to prepare a non-binding advisory opinion.
- 6.27 The Department considers the circumstances in which Schedule 3 will apply to be limited. The circumstance in which it is most likely to occur is a tax exemption measure in a Finance Act.

#### The Procedural Regulation

- 6.28 The EU Procedural Regulation (2015/1589) sets out the procedure for how the Commission supervises and enforces the EU State aid regime. The Procedural Regulation is direct EU legislation incorporated into domestic law by section 3 of the Act. However, a large number of deficiency corrections were required to make the Procedural Regulation operable in a domestic setting. This instrument, using the powers in section 8 and paragraph 21 of Schedule 7 to the Act, restates the content of the Procedural Regulation with deficiency corrections.
- 6.29 Where practical, this instrument does not amend or further define established EU terminology that is being restated (for example misuse of aid or market information). This approach is consistent with the approach being taken to EU terminology in the TFEU Articles (see section 6.9 of this memorandum) and is being taken to provide consistency and to maintain the link to relevant EU case law.
- 6.30 The main corrections made by this instrument are:
- replacing references to the Commission with references to the CMA;
  - modifying the Commission's existing powers to issue administrative penalties and exercise powers of entry to introduce additional safeguards and to align with the CMA's existing powers under the Competition Act 1998 and Enterprise Act 2002 where practical;
  - providing for the CMA to be able to bring enforcement proceedings against public authorities if a public authority does not comply with a CMA order;
  - applying the existing information provisions in Part 9 of the Enterprise Act 2002 to information acquired by the CMA in the exercise of its new state aid functions.
- 6.31 The powers of entry provisions (in Schedule 4 to the regulations) and the information provisions in Part 9 of the Enterprise Act 2002 contain criminal offences. The policy rationale for these offences is set out in section 5 of Part 2 of this memorandum.

#### Powers of entry

- 6.32 Under the Procedural Regulation, the Commission can, when investigating a case of alleged misuse of aid, enter an aid beneficiary's premises, ask questions and examine and take away copies of books and papers. If the aid beneficiary refuses to allow the Commission to enter the premises the Member State must give all necessary

assistance to the Commission to allow the Commission to carry out the monitoring visit.

- 6.33 We consider that the proposed powers of entry give the CMA similar powers to the Commission in order to properly investigate misuse of aid cases. The obligation on the Member State to enable the Commission to carry out the monitoring visit is deficient after EU exit. We have corrected this deficiency to create a process whereby the CMA can apply to court to obtain a warrant to enter premises.
- 6.34 We have also included a number of additional safeguards in the procedures to provide additional reassurance that the powers will only be exercised when appropriate and necessary. Some of these safeguards are modelled on existing CMA powers of entry in sections 27 and 28 of the Competition Act 1998.

#### *Block exemptions and de minimis regulations*

- 6.35 Schedule 9 to these regulations makes deficiency corrections to certain provisions of retained EU law. These are mainly to the General Block Exemption Regulation, two de minimis regulations and the SGEI decision. These instruments all provide for aid to be exempt from the notification requirement in Article 108(3) of the TFEU. The amendments made by this Schedule are to correct deficiencies to enable those exemptions to operate effectively.

#### *European Economic Area*

- 6.36 As explained at section 6.17, under these regulations the fourth limb of the test for aid will refer to trade between the UK and the EU. Since EEA States also apply the EU State aid rules, the Government has also considered whether the test should refer to trade between the UK and the EEA. However, given the way the “trade” test is applied, the Government believes that in practice, an apparent extension of the main test to the EEA would not make any material difference. This is because in practice, a measure that affects trade between the UK and the EEA will likely also affect trade between the UK and the EU.
- 6.37 The regulations therefore revoke the directly effective EEA treaty provisions related to State aid. However, to the extent that any references to EEA states exist in the GBER (including as modified by the EEA Agreement), these have been maintained. This is to ensure continuity and certainty for schemes that may currently rely on the scope of exemptions including EEA states.

## **7. Policy background**

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

- 7.1 This SI is being made to ensure that there is an operable domestic State aid regime in place on Exit day. The SI corrects deficiencies in the retained EU law, including transferring the regulatory functions of the Commission to the CMA. The policy aims to provide continuity and give confidence to business, to minimise distortions of competition and to prevent wealthier parts of the UK subsidising local undertakings at the expense of those in other parts of the country. The State aid rules also provide security for consumers. Companies which are aid dependent tend not to be innovative. This in turn can lead to higher prices and poorer customer service.
- 7.2 On exit the Commission will no longer have competence to deal with new State aid in the UK, so in order to make the regime function, an independent domestic body was

needed to regulate the regime, including assessing measures and investigating complaints. After consideration of the costs and benefits of setting up a completely new body or having an established regulator take this on, it was decided that the CMA should take on this role. This reflects its expertise in competition matters and its proven record in handling sensitive issues and analysing complex problems.

- 7.3 In bringing across the rules in the UK under the Act, the substantive rules will be frozen as they stand at Exit day. The powers currently held by the Commission to make and amend block exemption and de minimis regulations will not be transposed to the domestic regime. These are currently in the Enabling Regulation (2015/1588) and the Government does not think it is an appropriate correction to transfer these powers to the CMA or the Secretary of State.
- 7.4 The power of the Council to approve aid under Article 108(2) of the TFEU is not preserved by section 4 of the Act. The Government does not consider inserting this power to be an appropriate correction to the retained EU law and it is not included in the SI.
- 7.5 The Government's view is that there are a number of other ways in which aid can be given at short notice within the normal rules. There is sufficient flexibility in the proposed regime to enable aid that is notified to the CMA to quickly be approved in exceptional circumstances without this power, whether such circumstances arise as a result of a systemic crisis or an individual company or financial institution in difficulty.
- 7.6 In the unlikely event that the CMA considered they could not approve critical Government support within the existing State aid framework, the Secretary of State would have the option of issuing further guidance relating to the approval of aid under Article 107(3). Ultimately, the Government could bring forward primary legislation to provide aid if absolutely necessary.
- 7.7 The CMA will have similar investigatory and enforcement powers to the Commission. In particular:
- (a) during a formal investigation, the CMA will be able require information from undertakings and will be able to issue administrative penalties against undertakings for failure to comply;
  - (b) during a preliminary examination of a misuse of aid case where it is suspected an aid beneficiary has misused aid in contravention of a CMA approval, the CMA will be able to exercise powers of entry to acquire information required for the examination.
- 7.8 Although it is expected that the CMA will rarely be required to use these powers, they are a significant deterrent and an appropriate tool in a robust State aid regime. The regime needs to be seen to be equally as robust as the current one if competitors – including overseas competitors - are to have confidence in its operation
- 7.9 The powers of entry provisions will be backed by appropriate criminal sanctions, as is normal for powers of this type. As outlined in the Minister's statement in the Annex, the Department considers these powers are necessary and appropriate for the State aid functions of the CMA. The CMA needs to have the full panoply of powers available to it as it takes on this new task.
- 7.10 The CMA will also have similar powers as the Commission to order aid grantors (who will be public authorities) to suspend, terminate or recover unlawful or misused aid.

- 7.11 Public authorities must comply with CMA enforcement orders. In the unlikely event that a public authority fails to comply, the CMA must certify such non-compliance to the court. After hearing any witnesses, the court may then deal with the aid grantor as if it had committed a contempt of court. This is similar to how enforcement orders operate under the Freedom of Information Act 2000.

CMA adoption of Commission guidance

- 7.12 The CMA will adopt all of the Commission's existing State aid guidelines, frameworks, communications and notices that are currently relevant. These cover a wide range of sectors and types of aid and provide clear parameters for when aid should be approved. In line with the objectives of the Act and these regulations, this approach will provide continuity and certainty for aid grantors and beneficiaries.

Exemptions for Horizon 2020 and other Commission funded schemes

- 7.13 HM Treasury has guaranteed continued funding after EU exit to UK participants of a range of programmes currently funded by the EU, such as Horizon 2020. These EU programmes do not currently constitute State aid because the funds are allocated by EU institutions and are not paid directly from Member State resources.
- 7.14 After EU exit, however, there is a risk that payments for some programmes made as a result of HM Treasury's underwrite would become classed as State aid under these regulations. To avoid this unintended consequence, and ensure certainty for UK participants of EU programmes, the Government has concluded that specified EU projects, as detailed in Schedule 2, should be exempt from the scope of the retained State aid rules. This exemption applies to funding that has been bid for before exit day and was allocated before or after exit day.

Role of the courts

- 7.15 For stakeholders to have full confidence in the regime, it will require effective judicial oversight. Most decisions of the CMA will be subject to judicial review in the High Court (or Court of Session in Scotland). However, CMA decisions in relation to issuing penalties will be subject to a merits-based appeal in the High Court (or Court of Session in Scotland).
- 7.16 As is the case currently, the High Court (or Court of Session in Scotland) will continue to be able to hear breach of standstill cases brought by interested parties against aid grantors where aid grantors have allegedly provided aid without the approval of the CMA.

**8. European Union (Withdrawal) Act/Withdrawal of the United Kingdom from the European Union**

- 8.1 This instrument is being made using the power in section 8 of the European Union (Withdrawal) Act 2018 in order to address failures of retained EU law to operate effectively or other deficiencies arising from the withdrawal of the United Kingdom from the European Union. The instrument is also made under paragraph 21 of Schedule 7 to that Act. In accordance with the requirements of that Act the Minister has made the relevant statements as detailed in Part 2 of the Annex to this Explanatory Memorandum.

## **9. Consolidation**

- 9.1 The Department for Business, Energy and Industrial Strategy intends to publish a consolidated version of the General Block Exemption Regulation.

## **10. Consultation outcome**

- 10.1 A public consultation has not been conducted for this instrument. There have been technical discussions related to the instrument with the devolved administrations and the CMA.
- 10.2 The policy was explained in a Technical Notice published in August 2018. The Technical Notice was discussed with a variety of stakeholders including the Confederation of British Industry (CBI) and the Federation of Small Businesses (FSB).

## **11. Guidance**

- 11.1 The Secretary of State and the CMA will both issue guidance in relation to this instrument. The Secretary of State will provide guidance on the approach to approving aid under Article 107(3). The guidance will draw on the Commission Working Paper setting out the how to balance the good effects of an aid measure against any potential distortions of competition. The Department aims to publish this guidance in due course.
- 11.2 The CMA will produce guidance on the exercise of its new state aid functions. This will include guidance on the CMA's processes in relation to handling state aid cases. This guidance will be published in due course.
- 11.3 The CMA will also produce guidance on the exercise of its discretion to approve aid. By exit day, the CMA will be required to publish certain current Commission State aid guidelines as CMA statements of policy. These Commission guidelines provide the detailed framework under which certain types of aid are assessed.
- 11.4 The Government also intends to publish tables of origins and destinations showing how provisions of the Procedural Regulation have been restated.

## **12. Impact**

- 12.1 There is no, or no significant, impact on business, charities or voluntary bodies.
- 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 the instrument will not have a significant impact on business. The effect of the instrument is to effectively continue the existing State aid rules with deficiency corrections to make the retained EU law operable in a domestic setting.

## **13. Regulating small business**

- 13.1 The legislation applies to activities that are undertaken by small businesses but imposes no burdens on them, beyond having to keep records of amounts received.

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

- 14.1 The approach to monitoring of this legislation is that the CMA, as part of its annual performance report, will report on the exercise of its functions under this instrument. The report will be sent to the Secretary of State and laid before Parliament
- 14.2 As this instrument is made under the EU (Withdrawal) Act 2018, no review clause is required.

#### **15. Contact**

- 15.1 Edith Templeton at the Department for Business, Energy and Industrial Strategy  
Telephone: 0207 215 2207 or email: [edith.templeton@beis.gov.uk](mailto:edith.templeton@beis.gov.uk) can be contacted with any queries regarding the instrument.
- 15.2 Eve Cinnirella, Deputy Director for State aid at the Department for Business, Energy and Industrial Strategy can confirm that this Explanatory Memorandum meets the required standard.
- 15.3 Kelly Tolhurst MP at the Department for Business, Energy and Industrial Strategy can confirm that this Explanatory Memorandum meets the required standard.

# Annex

## Statements under the European Union (Withdrawal) Act 2018

### Part 1

#### Table of Statements under the 2018 Act

This table sets out the statements that may be required under the 2018 Act.

Statement	Where the requirement sits	To whom it applies	What it requires
Sifting	Paragraphs 3(3), 3(7) and 17(3) and 17(7) of Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) to make a Negative SI	Explain why the instrument should be subject to the negative procedure and, if applicable, why they disagree with the recommendation(s) of the SLSC/Sifting Committees
Appropriate-ness	Sub-paragraph (2) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) or jointly exercising powers in Schedule 2	A statement that the SI does no more than is appropriate.
Good Reasons	Sub-paragraph (3) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) or jointly exercising powers in Schedule 2	Explain the good reasons for making the instrument and that what is being done is a reasonable course of action.
Equalities	Sub-paragraphs (4) and (5) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) or jointly exercising powers in Schedule 2	Explain what, if any, amendment, repeals or revocations are being made to the Equalities Acts 2006 and 2010 and legislation made under them.  State that the Minister has had due regard to the need to eliminate discrimination and other conduct prohibited under the Equality Act 2010.
Explanations	Sub-paragraph (6) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) or jointly exercising powers in Schedule 2 In addition to the statutory obligation the Government has made a political commitment to include these statements alongside all EUWA SIs	Explain the instrument, identify the relevant law before exit day, explain the instrument's effect on retained EU law and give information about the purpose of the instrument, e.g., whether minor or technical changes only are intended to the EU retained law.
Criminal offences	Sub-paragraphs (3) and (7) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9, and	Set out the 'good reasons' for creating a criminal offence, and the penalty attached.

		23(1) or jointly exercising powers in Schedule 2 to create a criminal offence	
Sub-delegation	Paragraph 30, Schedule 7	Ministers of the Crown exercising sections 10(1), 12 and part 1 of Schedule 4 to create a legislative power exercisable not by a Minister of the Crown or a Devolved Authority by Statutory Instrument.	State why it is appropriate to create such a sub-delegated power.
Urgency	Paragraph 34, Schedule 7	Ministers of the Crown using the urgent procedure in paragraphs 4 or 14, Schedule 7.	Statement of the reasons for the Minister's opinion that the SI is urgent.
Explanations where amending regulations under 2(2) ECA 1972	Paragraph 13, Schedule 8	Anybody making an SI after exit day under powers outside the European Union (Withdrawal) Act 2018 which modifies subordinate legislation made under s. 2(2) ECA	Statement explaining the good reasons for modifying the instrument made under s. 2(2) ECA, identifying the relevant law before exit day, and explaining the instrument's effect on retained EU law.
Scrutiny statement where amending regulations under 2(2) ECA 1972	Paragraph 16, Schedule 8	Anybody making an SI after exit day under powers outside the European Union (Withdrawal) Act 2018 which modifies subordinate legislation made under s. 2(2) ECA	Statement setting out: a) the steps which the relevant authority has taken to make the draft instrument published in accordance with paragraph 16(2), Schedule 8 available to each House of Parliament, b) containing information about the relevant authority's response to— (i) any recommendations made by a committee of either House of Parliament about the published draft instrument, and (ii) any other representations made to the relevant authority about the published draft instrument, and, c) containing any other information that the relevant authority considers appropriate in relation to the scrutiny of the instrument or draft instrument which is to be laid.

## **Part 2**

### **Statements required when using enabling powers under the European Union (Withdrawal) 2018 Act**

#### **1. Appropriateness statement**

1.1 The Parliamentary Under Secretary of State for Small Business, Consumers and Corporate Responsibility, Kelly Tolhurst MP, has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

“In my view the State Aid (EU Exit) Regulations 2019 do no more than is appropriate”.

1.2 This is the case because the regulations only contain appropriate deficiency corrections to retained EU law. See section 2 of the main body of this memorandum for further explanation of the corrections made and the reasons for those corrections.

#### **2. Good reasons**

2.1 The Parliamentary Under Secretary of State for Small Business, Consumers and Corporate Responsibility, Kelly Tolhurst MP, has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

“In my view there are good reasons for the provisions in this instrument, and I have concluded they are a reasonable course of action”.

2.2 See sections 6 and 7 of the main body of this memorandum for further detail about the corrections made by this instrument and the reasons for those corrections. In summary though, the policy is that there should be a State aid regime in place to prevent distortions of competition and to prevent subsidy races between different regions of the UK. If there are no rules in place, public authorities in wealthier regions of the UK may seek to attract investment simply by outbidding those in poorer regions with the offer of higher subsidies for investors. This would lead to short term planning and displacement of employment rather than genuine job creation and genuine economic benefit.

2.3 There needs to be an independent regulator in place to police the regime and it is important that this regulator has all the powers that the Commission currently has if it is to have credibility.

#### **3. Equalities**

3.1 The Parliamentary Under Secretary of State for Small Business, Consumers and Corporate Responsibility, Kelly Tolhurst MP has made the following statement:

“The draft instrument does not amend, repeal or revoke a provision or provisions in the Equality Act 2006 or the Equality Act 2010 or subordinate legislation made under those Acts.”

3.2 The Parliamentary Under Secretary of State for Small Business, Consumers and Corporate Responsibility, Kelly Tolhurst MP has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

“In relation to the draft instrument, I, Kelly Tolhurst MP have had due regard to the need to eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the Equality Act 2010.”

- 3.3 The State aid rules are primarily aimed at ensuring that awards of aid to economic actors do not cause a distortion of competition in the wider market and the rules are neutral as respects individuals with protected characteristics. Public sector equality duty considerations may be more relevant for individual aid grantors when deciding who to award aid to.
- 3.4 To the extent that the rules do affect those with a protected characteristic it is in a positive way. For example, it is possible under the rules to give incentives to companies to employ disadvantaged workers – which includes older workers and the those with a disability.

#### **4. Explanations**

- 4.1 The explanations statement has been made in section 2 of the main body of this explanatory memorandum.

#### **5. Criminal offences**

- 5.1 The Parliamentary Under Secretary of State for Small Business, Consumers and Corporate Responsibility, Kelly Tolhurst MP, has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:
- “In my view there are good reasons for the creation of a criminal offence and for the penalty in respect of it in the State Aid (EU Exit) Regulations 2019.”
- 5.2 There are two categories of offence created by these regulations. First, the regulations apply Part 9 of the Enterprise Act 2002 to information acquired by the CMA as part of its state aid functions. There is a criminal offence in section 245 of that Act that will apply if information is disclosed in breach of Part 9. The offence is appropriate because the disclosure of sensitive information about undertakings or individuals can be harmful – for example, it may lead to significant economic disruption or cause harm to individuals. Therefore, sensitive information that the CMA will receive in connection with its new State aid functions will be subject to a general restriction on disclosure unless exceptions apply.
- 5.3 Secondly, the regulations create a power for the CMA to exercise powers of entry in relation to an undertaking’s business premises in a misuse of aid examination. Schedule 4 to the regulations includes a criminal offence of obstructing an officer or failing to comply with a requirement imposed by an officer. The offences and penalties are appropriate to support the purpose of the powers of entry provisions.

#### **6. Legislative sub-delegation**

- 6.1 The Parliamentary Under Secretary of State for Small Business, Consumers and Corporate Responsibility, Kelly Tolhurst MP has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:
- “In my view it is appropriate to create a relevant sub-delegated power in the State Aid (EU Exit) Regulations 2019.”

- 6.2 The regulations create a power for the CMA to publish statements of policy (under regulation 51) and various notices (under regulation 55). Some of these documents are of a legislative character and are exercisable otherwise than by statutory instrument.
- 6.3 The creation of the sub-delegated power is appropriate because these guidelines and notices are detailed and are expected to be updated frequently. This function would be expected of an independent regulator. It is appropriate for the CMA to exercise this power because the CMA is best placed to prepare statements of policy and notices containing the detail of the State aid regime. They are intended to reflect the CMA's policy on how it exercises its discretion and the content is appropriate to be included in guidance. The CMA will report on the use of the power in accordance with the Act.