

EXPLANATORY MEMORANDUM TO

THE COMPETITION (AMENDMENT ETC.) (EU EXIT) REGULATIONS 2020

[2020] No. 1343

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 Regulations use powers under the European Union (Withdrawal) Act 2018 (as amended) to implement provisions on competition law contained in the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community ('the Withdrawal Agreement'). The Withdrawal Agreement provisions ensure the orderly conclusion of EU antitrust and merger cases that relate to UK markets by giving the European Commission competence to conclude its ongoing investigations. They also provide for the transfer of the responsibility to monitor and enforce EU remedial requirements from the European Commission to the UK's competition authorities.
- 2.2 The Regulations amend UK competition law to ensure that UK competition authorities can continue to support ongoing EU competition cases after the end of the Transition Period. The Regulations give powers to UK competition authorities to monitor and enforce transferred EU remedial requirements. The Regulations amend transitional and savings provisions made in earlier legislation, so that the UK's competition system functions as intended at the end of the Transition Period.
- 2.3 The Regulations amend the following domestic legislation:
- the Competition Act 1998 and secondary legislation issued under it;
 - the Enterprise Act 2002 and secondary legislation issued under it;
 - the Competition (Amendment etc.) (EU Exit) Regulations 2019; and
 - other legislation containing competition provisions.

Explanations

What did any relevant EU law do before the end of the transition period?

- 2.4 Articles 101, 102 and 106 of the Treaty on the Functioning of the European Union ('TFEU') prohibit anticompetitive agreements and abuses of a dominant position that affect the Single Market and Council Regulation (EC) 139/2004 on the control of concentrations between undertakings ('the EUMR') establishes the 'one-stop shop' for merger control in the EU. European Union competition law is preserved in the UK during the Transition Period. Chapters I and II of the Competition Act 1998 ('CA98') largely mirror Articles 101 and 102 TFEU and prohibit anticompetitive conduct and abuse of a dominant position which occur or have effect in UK markets. These are known as the 'domestic prohibitions'. The Enterprise Act 2002 ('EA02') establishes the UK's regime for merger control and sets out how the UK and EU merger regimes interact.

- 2.5 Under UK competition law, the Competition and Markets Authority ('CMA') and certain sector regulators may investigate and take enforcement action against infringements of both UK and EU competition law in UK markets. Section 60 of the CA98 requires that, as far as possible, when UK courts and competition authorities are considering questions under the domestic prohibitions, they must act to ensure consistency with the principles laid down by and decisions of the Court of Justice of the European Union ('CJEU') in relation to corresponding questions arising in EU law. Section 60 also places a duty on the domestic courts and competition authorities to have regard to any relevant decision or statement of the European Commission.
- 2.6 Under UK law, claimants may bring follow-on actions in domestic courts for damages relating to an infringement of EU competition law. Decisions of the European Commission that EU competition law has been infringed are binding for that purpose. Claimants may also use decisions of Member States' national competition authorities as prima facie evidence of an infringement of EU law.
- 2.7 Council Regulation (EC) 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty ('Regulation 1/2003') sets out the European Commission's powers to investigate and enforce Articles 101 and 102. Regulation 1/2003 includes cooperation arrangements between national competition authorities, including provisions to obtain and exchange information to support investigations and enforcement.
- 2.8 Regulation 1/2003 requires the CMA to consider Articles 101 and 102 in parallel with a suspected breach of domestic competition law if the agreement or conduct under investigation may affect the Single Market. In such cases, the CMA is relieved of competence to investigate breaches of Articles 101 or 102 if the European Commission opens an investigation into the same matter. In practice, the European Commission's opening of a case suspends any relevant ongoing CMA investigation, because of the requirement to apply domestic and EU law in parallel. A domestic investigation may be opened or recommenced once the European Commission's investigation has concluded, providing that any decision reached in relation to the application of Articles 101 and 102 does not run counter to a decision adopted by the European Commission. The CA98 contains some measures that relate to Regulation 1/2003, for example powers for the CMA to assist competition investigations of the European Commission and Member States' national competition authorities.
- 2.9 Under the EUMR, if a merger triggers the relevant turnover thresholds (i.e. it has a 'Community dimension') then the European Commission has exclusive competence to review the merger. In such circumstances, the CMA is prohibited from applying its domestic merger control rules. In addition to establishing a domestic regime for merger control, the EA02 gives effect to provisions under the EUMR that enable merger cases to be transferred between the European Commission and the CMA and that allow the CMA to disclose information to the European Commission for the purpose of fulfilling an obligation under EU law.

Why is it being changed?

- 2.10 The Competition (Amendment etc.) (EU Exit) Regulations 2019 (the '2019 Regulations') create a standalone domestic competition regime and were made to prepare the UK statute book for the possibility of the UK's withdrawal from the EU without an agreement. The 2019 Regulations were scheduled to come into force at the point of withdrawal and provisions within them made reference to "exit day". The

2019 Regulations will now come into force at the end of the Transition Period and references within the instrument require amendment to reflect the position set out in the Withdrawal Agreement. Where this Explanatory Memorandum refers to provisions in the 2019 Regulations that relate to “exit day”, those references should be read as referring to the end of the Transition Period. The Regulations reflect this by replacing “exit day” with “IP completion day”, which means the end of the Transition Period, where it arises in the 2019 Regulations. This includes the reference to “exit day” in section 60A of the CA98, which was inserted by the 2019 Regulations to replace the previous section 60 of the CA98, so that the body of EU competition case law that is established before the end of the Transition Period is included in a ‘precedent bank’ (see paragraph 7.6 for more detail). The 2019 Regulations also contain provisions that do not reflect the arrangements under the Withdrawal Agreement in the following ways.

- 2.11 Under the 2019 Regulations, the CMA is prevented from investigating merger cases that have been decided by the European Commission before exit day and antitrust cases in which an infringement decision has been made by the European Commission before exit day. The CMA is otherwise free to open competition cases that affect UK markets after exit day, even where the European Commission has opened its own investigation into a matter. The 2019 Regulations also switch off the CMA’s powers to assist the European Commission and other EU Member States’ national competition authorities with investigations after exit day. Article 92 of the Withdrawal Agreement gives the European Commission continued competence to conclude antitrust and merger cases that it initiated before the end of the Transition Period (‘continued competence cases’). The 2019 Regulations will need to be adjusted to reflect this and the CMA’s powers to assist European Commission investigations will need to be preserved for continued competence cases.
- 2.12 For the purposes of follow-on claims for damages, the 2019 Regulations ensure that European Commission decisions adopted before exit day can be relied upon as binding evidence of a breach of competition law under the CA98. The 2019 Regulations, however, do not reflect the continued competence of the European Commission under Article 92 of the Withdrawal Agreement and the binding effect on the UK of decisions adopted by the European Commission under Article 92, as provided by Article 95 of the Withdrawal Agreement.
- 2.13 Further legislation is also required to reflect the arrangements under Article 95 of the Withdrawal Agreement, which provide for the transfer of responsibility to monitor and enforce EU remedial requirements from the European Commission to the UK’s competition authorities (see section 7 of this explanatory memorandum).

What will it now do?

- 2.14 These Regulations ensure that changes made to the domestic competition regime by the 2019 Regulations have effect with reference to the end of the Transition Period, rather than to exit day.
- 2.15 Claimants seeking damages for breaches of competition law on a follow-on basis will be able to rely upon European Commission decisions adopted before the end of the Transition Period, and after that in relation to continued competence cases, as binding evidence of a breach of competition law under the CA98.
- 2.16 The CMA will be prevented from investigating the effects of anticompetitive behaviour that arise in the UK before the end of the Transition Period, if the European

Commission has relieved the CMA of competence under Regulation 1/2003 and its investigation is continuing under Article 92 of the Withdrawal Agreement. The CMA will also be prevented from adopting a decision in any later investigation that conflicts with a European Commission decision on the same matter. These Regulations preserve the powers of the CMA to support the European Commission's investigations of continued competence cases after the end of the Transition Period.

- 2.17 By virtue of the Withdrawal Agreement, the CMA will be prevented from investigating merger cases that are decided by the European Commission before the end of the Transition Period, or after that if the case is a continued competence case. However, to the extent that the thresholds under the EA02 are met, these Regulations ensure that the CMA can investigate a merger over which the European Commission retained competence if the European Commission decision in respect of that merger is subsequently annulled and the European Commission is not competent to consider the UK effects as part of a re-examination. The CMA will also be able to investigate any merger cases that are initiated after the end of the Transition Period.
- 2.18 These Regulations give powers to the CMA and relevant sector regulators to monitor and enforce commitments and directions that are transferred to the UK in accordance with Article 95 of the Withdrawal Agreement.

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 these Regulations includes Scotland and Northern Ireland.
- 3.3 These Regulations are made to cover the entire United Kingdom. Different provisions have different application depending on the application of the legislation that is the subject of modification.
- 3.4 These Regulations amend certain Northern Ireland legislation.

4. Extent and Territorial Application

- 4.1 The territorial extent of these Regulations is the entirety of the United Kingdom.
- 4.2 The territorial application of these Regulations is the entirety of the United Kingdom, although different provisions have different application depending on the application of the legislation that is the subject of modification.
- 4.3 These Regulations include modifications of Northern Ireland legislation.

5. European Convention on Human Rights

- 5.1 Parliamentary Under Secretary of State Paul Scully has made the following statement regarding Human Rights:

“In my view the provisions of the Competition (Amendment etc.) (EU Exit) Regulations 2020 are compatible with the Convention rights.”

6. Legislative Context

The Competition Act 1998

- 6.1 The CA98 sets out the prohibitions against anticompetitive agreements and abuse of a dominant position in the UK, empowers the CMA to enforce UK and EU competition law in UK markets, provides for enforcement cooperation between the UK, the European Commission and EU national competition authorities and grants private rights to pursue claims for damages based on enforcement decisions of the CMA, the European Commission and national competition authorities.
- 6.2 Regulation 1/2003 sets out the European Commission's powers to investigate and enforce Articles 101 and 102 TFEU in the Single Market, which includes the UK until the end of the Transition Period. Regulation 1/2003 requires the CMA to apply EU law where it is investigating anticompetitive behaviour that may affect trade between EU Member States under domestic law. If the European Commission opens a case relating to the UK, the CMA is relieved temporarily of competence by Regulation 1/2003 to apply EU law to the matter. This has the practical effect of suspending the CMA's investigation entirely because of the requirement for the CMA to apply UK and EU law in parallel.
- 6.3 The European Commission's antitrust investigations are concluded either: by the finding of an infringement, in which case it may attach remedial directions to resolve the anticompetitive behaviour; by the acceptance of commitments from parties to modify their behaviour in a particular way, in which case no infringement decision is made; by the finding of no infringement; or by administrative closure. The effect of a European Commission investigation suspending a national competition authority's ability to investigate a matter is temporary. Once the European Commission has concluded its investigation, it is open to national competition authorities to open or continue an investigation into the same matter, providing that any decision they reach subsequently on Articles 101 or 102 does not run counter to the European Commission's decision on the same matter.
- 6.4 Regulation 1/2003 provides that national competition authorities, including the CMA, may carry out inspections on behalf of each other and the European Commission for the purpose of investigating whether Articles 101 or 102 have been infringed. The CA98 gives effect to these provisions in UK law.
- 6.5 Under the CA98, where the CMA has started an investigation but has yet to decide whether the domestic prohibitions have been infringed, it may accept commitments from the parties involved to take action (or refrain from taking action) for the purpose of addressing the competition concerns that have been identified. The CMA has powers to vary, substitute or release commitments where appropriate and to take enforcement action in the event of non-compliance.
- 6.6 The 2019 Regulations amend the CA98 as required to create a standalone UK competition regime. The 2019 Regulations revoke Regulation 1/2003 on exit day, which otherwise would form part of domestic law as retained EU law. The Regulations amend the CA98 and the 2019 Regulations to reflect arrangements under the Withdrawal Agreement and ensure that the UK's competition regime functions independently at the end of the Transition Period.

The Enterprise Act 2002

- 6.7 The EA02 sets out the UK's regime for merger control and provides a 'gateway' through which information can be disclosed by UK competition authorities to the European Commission in order to fulfil obligations under EU law. The CMA has powers under the EA02 to investigate the effect on competition of mergers that meet the relevant thresholds. The EA02 also contains provisions enabling OFCOM and the Secretary of State to investigate (or require the investigation of) transactions that meet relevant thresholds on public interest grounds.
- 6.8 As described in paragraph 2.9 of this explanatory memorandum, the EUMR sets out a 'one-stop shop' for merger control in the EU. Where a transaction has a 'Community dimension', defined in the EUMR as meeting certain thresholds related to turnover within EU Member States, the European Commission is the competent authority to investigate the transaction's effects in the UK rather than the CMA. The European Commission can also refer such merger cases to be investigated by the CMA and the UK retains the right under the EUMR to intervene on public interest grounds in mergers with a Community dimension that are being investigated by the European Commission. If a decision by the European Commission relating to a merger is subsequently annulled by the CJEU following an appeal, the European Commission can re-examine the merger under the EUMR. The EA02 contains provisions in respect of the EUMR.
- 6.9 The European Commission can attach conditions and obligations, which are offered by the parties in the form of commitments, to its decision to clear a proposed merger. Where parties fail to comply with commitments, it may have the effect of making the merger clearance void or allow the European Commission to revoke the clearance and require the transaction to be unwound or impose financial penalties.
- 6.10 Under UK law, parties to a merger transaction may offer undertakings to the CMA in lieu of a reference for a full assessment of the transaction, or on the conclusion of an assessment, in order to secure clearance of the deal. These undertakings are kept under review by the CMA. The CMA may vary, substitute, or release them and it has enforcement powers to secure compliance with them.
- 6.11 The 2019 Regulations amend the EA02 to create a standalone UK merger regime. The 2019 Regulations also revoke the EUMR on exit day, which otherwise would form part of domestic law as retained EU law. The Regulations amend the EA02 and the 2019 Regulations to reflect arrangements under the Withdrawal Agreement and ensure that the UK's merger regime functions independently at the end of the Transition Period.

Other legislation containing competition provisions

- 6.12 The 'concurrency framework' is established by the CA98, secondary legislation issued under it and relevant sector legislation. The concurrency framework empowers sector regulators to enforce UK and EU competition law in UK markets concurrently with the CMA. The 2019 Regulations remove provisions in this body of legislation that give powers to sector regulators to enforce EU competition law in UK markets. These Regulations ensure that the concurrency framework gives powers to sector regulators to monitor and enforce EU antitrust commitments and remedial directions that are transferred to a UK regulator as provided for by Article 95 of the Withdrawal Agreement. The allocation procedure that ordinarily applies to cases where there are

regulators with concurrent powers will apply where the new powers are to be exercised.

- 6.13 Schedule 2 to the 2019 Regulations made technical amendments to subordinate legislation made under the CA98 and EA02. The Regulations ensure those amendments have effect with reference to the end of the Transition Period instead of exit day. The Regulations also insert an amendment to the Water Mergers (Modification of Enactments) Regulations 2004, which is consequential to the changes made by the Regulations to the EA02, to deal with merger commitments that are transferred to the UK in accordance with Article 95 of the Withdrawal Agreement.

Other European Union legislation and decisions

- 6.14 The 2019 Regulations revoke EU legislation and decisions made under that legislation, which otherwise will become part of the body of retained EU law on exit day. The Regulations ensure that these are revoked insofar as they form part of domestic law on or after the end of the Transition Period. The Regulations also revoke Regulation (EU) 2019/452 of the European Parliament and of the European Council of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union. This EU Regulation becomes applicable to the UK on 11 October 2020 and is revoked so that it does not form part of retained EU law at the end of the Transition Period.

7. Policy background

Implementation of the Withdrawal Agreement

- 7.1 The UK's competition system is established principally by the CA98, which contains the domestic prohibitions, and the EA02, which sets out the UK's merger control regime. While the UK was an EU Member State and for the duration of the Transition Period, the UK's antitrust and merger regimes were integrated with the EU's competition system and UK competition authorities had powers to enforce UK and EU competition law in UK markets.
- 7.2 Competition law is enforced in the UK primarily by the CMA and, until the end of the Transition Period, the European Commission. The CA98 and EA02 are supplemented by other primary and secondary legislation, including the concurrency framework.
- 7.3 Title X of the Withdrawal Agreement contains provisions on competition law, which among other things:
- give the European Commission continued competence to conclude investigations that it has initiated before the end of the Transition Period into the effects of anticompetitive behaviour and mergers in the UK that arise before the end of the Transition Period;
 - make binding on the UK decisions of the EU that are adopted before the end of the Transition Period, and afterward in relation to continued competence cases, and that relate to the UK; and
 - allow by mutual agreement the transfer of responsibility for the monitoring and enforcement of EU remedial requirements that relate to the UK from the European Commission to the UK's competition authorities.
- 7.4 The 2019 Regulations were made to prepare for the UK's possible withdrawal from the EU without an agreement. The Regulations amend the 2019 Regulations to ensure

that relevant provisions take effect with reference to the end of the Transition Period and to reflect the arrangements described in paragraph 7.3.

Amendment of the Competition Act 1998

- 7.5 Under the CA98, the CMA and sector regulators are empowered to investigate and take enforcement action against businesses that breach UK and EU competition law. Claimants may use these enforcement decisions as a basis for bringing private actions for damages in UK courts.
- 7.6 Section 60A was inserted into the CA98 by the 2019 Regulations to replace section 60 of the CA98, which places an obligation on UK competition regulators and courts to act consistently with relevant principles and decisions laid down by the CJEU when interpreting UK competition law in relation to corresponding matters (see paragraph 2.5). Section 60A modifies the relationship between the domestic prohibitions and retained EU law after exit day and provides that UK competition regulators and courts must continue to act consistently with the relevant principles and decisions laid down by the CJEU before exit day when interpreting corresponding matters in UK competition law, but they may depart from such pre-exit day EU case law in the light of specified circumstances. This creates a ‘precedent bank’ of relevant EU competition case law that was established while the UK was an EU Member State but allows flexibility, where appropriate, to depart from such case law in certain circumstances. These Regulations replace the reference to “exit day” in s.60A with “IP completion day” so as to include within that precedent bank case law that was established before the end of the transition period.
- 7.7 Under Regulation 1/2003, the European Commission’s antitrust investigations can be concluded by: the finding of an infringement, in which case remedial directions may be issued as part of the infringement decision to stop the anticompetitive behaviour; the acceptance of commitments in lieu of an infringement decision; the finding of no infringement; or administrative closure (see paragraph 6.3). Under the CA98, the CMA can similarly impose directions or accept commitments (see paragraph 6.5) when investigating whether the domestic or EU prohibitions have been infringed. Where a party fails to comply with a commitment accepted under Regulation 1/2003, the European Commission has powers to impose periodic penalty payments. The CMA has powers under the CA98 to apply to the courts to secure compliance with commitments and directions. While the CA98 does not give express powers to the CMA to require the provision of documents or information to it for the purpose of monitoring domestic commitments and directions, a requirement for the party to provide information to enable the CMA to do so is often part of the commitments accepted or directions imposed.
- 7.8 Article 95 of the Withdrawal Agreement provides that, unless otherwise agreed between the European Commission and the UK’s designated competition authority, the European Commission will continue to monitor and enforce commitments given, or enforcement directions imposed, in relation to the UK. By mutual agreement, the responsibility to monitor and enforce such commitments and directions can be transferred to the UK’s designated national competition authority.
- 7.9 The Regulations insert provisions into the CA98 to give the CMA the powers required to monitor and enforce ‘transferred EU antitrust commitments’ and ‘transferred EU antitrust directions’ in accordance with Article 95. The provisions inserted by these Regulations are modelled on the CMA’s powers under the CA98 to monitor and

enforce domestic commitments and directions. The powers required for monitoring and enforcement purposes only are inserted; the commitments and directions themselves remain EU instruments and matters such as review, variation and substitution are for the European Commission. Information gathering powers to allow the CMA to monitor compliance with transferred commitments and directions are inserted by the Regulations because the CMA will not have had the opportunity to include such powers in the original commitments and directions decisions and these are considered necessary and appropriate to enable the CMA to fulfil its monitoring and enforcement functions.

7.10 For the purpose of implementing Article 95 in relation to transferred EU antitrust commitments and directions, Regulation 4 makes the following amendments to the CA98:

- sections 40ZB and 40ZC, modelled on sections 31E and 34 of the CA98, are inserted to give the CMA the function of monitoring compliance with transferred EU antitrust commitments and directions and empower it to apply to the court for an order to secure compliance with such commitments and directions;
- section 40ZD, modelled on section 26 of the CA98, is inserted to give the CMA a power to gather information for the purposes of monitoring compliance with transferred EU antitrust commitments and directions, or considering when an application for enforcement should be made under sections 40ZB or 40ZC. Section 30A of the CA98 is amended so that statements made under section 40ZD cannot be used as evidence for prosecution under the cartel offence in the EA02, unless the criteria are met;
- section 40 of the CA98 is amended so that the CMA can impose a penalty for failure to comply with a request for information made under section 40ZD; and
- provision is made for certain sector regulators to be able to monitor and enforce transferred EU antitrust commitments and directions under the concurrency framework.

7.11 The Regulations amend transitional and savings provisions in the 2019 Regulations in relation to the CA98 in the light of the UK's withdrawal from the EU with an agreement. In particular, these Regulations:

- replace references in the 2019 Regulations to “exit day” with references to “IP completion day”, so that provisions in the 2019 Regulations make appropriate reference to the end of the Transition Period;
- amend Schedule 3 to the CA98 so that the domestic prohibitions do not apply to legal requirements that arise under the Withdrawal Agreement;
- amend provisions in Part 3 of Schedule 4 to the 2019 Regulations, which apply a modified body of competition law that applied before exit day to, among other things, redress schemes and private damages claims. The Regulations reflect the continuing application of EU competition law in the UK during the Transition Period and the European Commission's continued competence after the end of the Transition Period under Article 92. This modified body of competition law applies to redress schemes and private damages claims that relate to infringements of Article 101 and 102 that occur before the end of the Transition Period;

- amend Part 6 of Schedule 4 to clarify the approach that should be taken by domestic courts in relation to private damages claims that involve infringements of both the domestic prohibitions and Articles 101 or 102 and claims that involve behaviour which spans the end of the Transition Period. The modified body of competition law described above applies to any claim involving an infringement of EU law;
- make provision for the CMA, the Competition Appeal Tribunal or the appropriate UK court to take into account any relevant penalty or fine issued by an EU body either before the end of the Transition Period, or afterward in relation to a continued competence case, when deciding the amount of penalty under the CA98;
- replace paragraph 8 of Schedule 4 to the 2019 Regulations with paragraphs 8, 8A and 8B to reflect the continued competence of the European Commission under Article 92 of the Withdrawal Agreement. These provisions apply where, before the end of the Transition Period, the CMA is relieved of competence to investigate anticompetitive behaviour in the UK by Regulation 1/2003 (see paragraph 2.8). In these circumstances, the CMA continues to be relieved of competence to investigate the effects of anticompetitive behaviour that arise in the UK before the end of the Transition Period and are being investigated by the European Commission until the European Commission’s investigation has concluded. Where the European Commission concludes its case before the end of the Transition Period, or afterward in relation to a continued competence case, the CMA may not reach a decision regarding the acceptance or imposition of remedies in any subsequent investigation that conflicts with the European Commission’s decision on the same matter;
- insert and amend provisions in Schedule 4 to 2019 Regulations to ensure that the powers of the CMA contained in Part 2 of the CA98 are preserved in order to assist the European Commission’s antitrust investigations for continued competence cases; and
- insert a new Part 6A making provision equivalent to Part 2 of Schedule 1 to the CA98 in order to clarify that the domestic prohibitions do not apply to merger cases over which the European Commission has continued competence under Article 92 of the Withdrawal Agreement.

Amendment of the Enterprise Act 2002

- 7.12 The EA02 sets out the UK’s system of merger control, placing a duty upon the CMA to review mergers that meet the thresholds for turnover or share of supply. The UK is part of the EU’s ‘one-stop shop’ system of merger control until the end of the Transition Period, in which the European Commission has exclusive competence to investigate mergers where its thresholds are met (subject to the possibility of referring cases to individual Member States) or where Member States refer a case to be investigated by the European Commission on their behalf.
- 7.13 Under the EUMR, the European Commission can approve a merger with the acceptance of commitments (see paragraph 6.9). Under the EA02, the CMA can similarly accept undertakings (referred to as ‘commitments’ in this explanatory memorandum for ease) to remedy anticompetitive aspects of a merger. The CMA has powers under the EA02 to monitor and enforce such commitments.

- 7.14 The Regulations insert provisions into the EA02 to give powers to the CMA to monitor and enforce ‘transferred EU merger commitments’ in accordance with Article 95 of the Withdrawal Agreement. As with the approach taken to transferred EU antitrust commitments and directions, the provisions inserted by the Regulations are modelled on the CMA’s powers to monitor and enforce domestic commitments. They are varied where necessary and domestic powers deemed inappropriate for the purpose of implementing Article 95 (for example, those which allow the CMA to vary, substitute and release commitments) are not applied to transferred EU merger commitments.
- 7.15 For the purpose of implementing Article 95 in relation to transferred EU merger commitments, Regulations 8, 9 and 10 make the following amendments to the EA02:
- section 95A, modelled on sections 92 and 94 of the EA02, is inserted to assign to the CMA the function of monitoring compliance with transferred EU merger commitments and gives the CMA a right to enforce the transferred EU merger commitments through civil proceedings. The CMA must ensure the register referred to in section 91 of the EA02 is kept up to date with the details of the commitments that are transferred to it;
 - section 95B, modelled on section 87 of the EA02, is inserted to provide the CMA with a power to give directions to secure compliance with transferred EU merger commitments, which can only be given for this purpose and may be varied or revoked by the CMA. The CMA may apply to the court to secure compliance with directions given under section 95B;
 - section 109A is inserted to allow the CMA to use its information gathering powers under section 109 of the EA02 for the purpose of carrying out its monitoring and enforcement functions under sections 95A(1) or 95B; and
 - section 120 of the EA02 is amended so that decisions taken by the CMA in connection with transferred EU merger commitments can be reviewed by the Competition Appeal Tribunal.
- 7.16 The Regulations amend transitional and savings provisions in Part 7 of Schedule 4 to the 2019 Regulations in the light of the UK’s withdrawal from the EU with an agreement. These Regulations:
- remove paragraph 19, which prevents the CMA from investigating a merger that has been decided by the European Commission before exit day, unless that merger is subsequently annulled in full or in part by the European Court following an appeal. In the light of the Withdrawal Agreement including, for example, the provisions of Title X which preserve the European Commission’s exclusive competence over continued competence cases, a separate jurisdiction bar in domestic legislation is no longer required. The CMA will be solely responsible for investigating any merger that is initiated after the end of the Transition Period which affects UK markets;
 - insert paragraph 19A, which applies where a European Commission merger decision in a case over which it had competence is annulled in full or in part following an appeal. If the European Commission re-examines the merger under the EUMR after the end of the Transition Period but does not consider the effects in the UK as part of its re-examination, the CMA may investigate the merger under the EA02 to avoid a possible enforcement gap in the UK. Provision is made so that the normal four-month time limit placed on the UK’s

- ability to investigate a completed merger does not include any time during which the European Commission may have had competence over the case;
- replace references to “exit day” with references to “IP completion day” in transitional provisions dealing with merger cases that are referred from the European Commission to the CMA, and vice versa;
 - amend transitional provisions relating to cases involving European Intervention Notices (‘EIN’) which are issued by the Secretary of State to protect the public interest to ensure such interventions can be initiated or completed after the end of the Transition Period;
 - ensure that an EIN given before the end of the Transition Period and for which the European Commission’s merger review has not started for the purposes of Article 92 of the Withdrawal Agreement is treated as though it were a domestic public interest intervention notice given under section 42 of the EA02 to be considered by the CMA;
 - remove transitional provisions that are no longer needed in the light of the European Commission’s continued competence under Article 92; and
 - save and amend the effect of section 240 of the EA02 so that the CMA can share information with the European Commission for the purposes of ongoing antitrust or merger cases for which the European Commission has continued competence after the end of the Transition Period.

Amendment of other relevant domestic legislation

- 7.17 The 2019 Regulations amend primary and secondary legislation that contain competition provisions so as to cut the ties between the UK and EU competition regimes. The Regulations replace references in those amendments to “exit day” with references to “IP completion day” so that they have effect with reference to the end of the Transition Period.
- 7.18 The Regulations amend domestic legislation that gives effect to the concurrency framework so that relevant sector regulators, including those in Northern Ireland, can exercise the enforcement functions described earlier in relation to transferred EU commitments and directions.

Other European Regulations

- 7.19 The 2019 Regulations revoke EU competition regulations that relate to participation in the EU competition system, as it would be inappropriate for them to be kept on the statute book once the UK is operating under a separate and sovereign competition regime. In that context, the Regulations revoke Regulation (EU) No 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union.

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

- 8.1 The Regulations are made using the power in section 41(1) of the European Union (Withdrawal Agreement) Act 2020 in order to ensure that amendments made by earlier legislation, which address failures of retained EU law and other deficiencies arising from the withdrawal of the United Kingdom from the European Union, have effect by reference to the end of the Transition Period.

- 8.2 The Regulations are made under the powers in section 8B of, and paragraph 21 of Schedule 7 to the European Union (Withdrawal) Act 2018 ('EUWA') (as amended) in order to implement provisions on competition law contained in Part 3 of the Withdrawal Agreement.
- 8.3 The Regulations are made under the powers in section 8 EUWA in order to address failures of retained EU law and other deficiencies arising from the withdrawal of the United Kingdom from the European Union, in particular to clarify the approach to be taken in relation to private damages claims that involve infringements of both the domestic and EU competition prohibitions and claims that involve behaviour which spans the end of the Transition Period.
- 8.4 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 There is no plan to consolidate the legislation amended by these Regulations.

10. Consultation outcome

Consultation has been undertaken with the CMA, the Competition Appeal Tribunal and sector regulators. Their views have been taken into consideration in the development of the Regulations.

11. Guidance

- 11.1 It is not necessary to issue guidance with respect to the regulations.

12. Impact

- 12.1 There will be no significant impact on businesses as a result of the Regulations. This will fall predominantly on businesses that are subject to ongoing commitments accepted or directions imposed by the European Commission, which may be affected by a transfer of those commitments or directions from the European Commission to the UK's competition authorities in accordance with Article 95 of the Withdrawal Agreement. These businesses may incur costs of familiarisation with the changes. This could involve internal management time or the use of external legal advice. These costs are assumed to be minimal and will only occur as a one-off cost.
- 12.2 There is no significant impact on charities, voluntary bodies or the public sector.
- 12.3 There will be no additional wider costs to the economy, such as to consumers or workers, as a result of the Regulations.
- 12.4 A full Impact Assessment has not been prepared for the Regulations. A de minimis Impact Assessment has been conducted, which estimates that there will be marginal costs to businesses as a result of these Regulations and these costs are expected to fall below £5 million.

13. Regulating small business

- 13.1 The legislation applies to activities that are undertaken by small businesses.
- 13.2 As an Impact Assessment has not been prepared for the Regulations because there is a small impact on businesses, no separate impact analysis or mitigations in respect of small businesses have been prepared.

14. Monitoring & review

14.1 As this instrument is made under the EUWA, no review clause is required.

15. Contact

15.1 Thomas Drew at the Department for Business, Energy and Industrial Strategy, Telephone: 0207 215 2763; or email: Thomas.drew@beis.gov.uk, can be contacted with any queries regarding the instrument.

15.2 Christopher Blairs, 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.

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 Paul Scully at the Department for Business, Energy and Industrial Strategy has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

“In my view the Competition (Amendment etc.) (EU Exit) Regulations 2020 do no more than is appropriate”.

1.2 The Regulations correct legislative deficiencies arising from the UK’s withdrawal from the EU with an agreement and make appropriate provision to implement provisions on competition law contained in the Withdrawal Agreement. The Regulations do not change UK competition policy or impose any new liabilities.

2. Good reasons

2.1 The Parliamentary Under Secretary of State Paul Scully at the Department for Business, Energy and Industrial Strategy 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 The Regulations amend domestic legislation to implement provisions on competition law contained in the Withdrawal Agreement and ensure that provisions made in earlier legislation to separate the UK’s competition regime from the EU’s competition framework take effect by reference to the end of the Transition Period.

3. Equalities

3.1 The Parliamentary Under Secretary of State Paul Scully at the Department for Business, Energy and Industrial Strategy has made the following statement(s):

“This 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 Paul Scully at the Department for Business, Energy and Industrial Strategy has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

“In relation to the draft instrument, I, Paul Scully 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.”

4. Explanations

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