

EXPLANATORY MEMORANDUM TO
THE COMPETITION ACT 1998 (HEALTH SERVICES FOR PATIENTS IN
ENGLAND) (CORONAVIRUS) (PUBLIC POLICY EXCLUSION) ORDER 2020

2020 No. 368

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
- 1.2 This memorandum contains information for the Joint Committee on Statutory Instruments.

2. Purpose of the instrument

- 2.1 This Order excludes from the application of the prohibition contained in Chapter 1 of the Competition Act 1998 (“the Act”) certain agreements between independent healthcare providers and between independent healthcare providers and NHS bodies. The Order is made to ensure that independent healthcare providers are able to support the NHS through expanding its capacity to respond to the spread of severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2, “coronavirus”) in England, which causes the disease Covid-19.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 The Order comes into force the day after it is laid and, therefore, breaches the convention that statutory instruments should not come into force until a minimum of 21 calendar days after laying.
- 3.2 This Order could not have been made sooner because the nature of co-operation between the NHS and private providers to respond to coronavirus has been agreed very quickly in response to the rapidly evolving virus outbreak in the UK. The Order needs to come into effect on the day after it is laid in order to give businesses affected by this Order the certainty that they can immediately undertake activities necessary to support the NHS in responding to coronavirus. Such an immediate response by these businesses is in the public interest.

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)

- 3.3 As the instrument is subject to the negative resolution procedure there are no matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business at this stage.

4. Extent and Territorial Application

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

- 4.2 The territorial application of this instrument is England, as it applies only in relation to agreements made to assist the National Health Service with healthcare provision in England.

5. European Convention on Human Rights

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

6. Legislative Context

- 6.1 Paragraphs 7(1) and (2) of Schedule 3 to the Act provide that the Secretary of State may, if satisfied that there are exceptional and compelling reasons of public policy, by order, exclude agreements from the Chapter 1 prohibition.
- 6.2 Paragraph 7(3) of Schedule 3 of the Act provides that the order may deem the Chapter 1 prohibition never to have applied in relation to the excluded agreements.
- 6.3 Under section 59 of the Act (interpretation) references in Part 1 of the Act to “agreement” are to be read with section 2(5) and (6) of the Act which provide that, unless the context otherwise requires, a provision of Part 1 of the Act which is expressed to apply to, or in relation to, an agreement is to be read as applying equally to, or in relation to, a decision by an association of undertakings or a concerted practice (but with any necessary modifications).
- 6.4 This Order is likely to be one of a number of other Orders under the powers in paragraph 3 of Schedule 7 to the Act to be made in relation to other sectors affected by coronavirus.

7. Policy background

What is being done and why?

- 7.1 The Act prohibits certain types of anti-competitive behaviour, including collusion and cartels. This is known as the ‘Chapter 1 prohibition’. This prohibition covers agreements between businesses that prevent, restrict or distort competition. Paragraph 7 of Schedule 3 to the Act gives the Secretary of State the power to exclude certain agreements from the application of the Chapter 1 prohibition where he is satisfied that there are exceptional and compelling reasons for public policy why it ought not to apply. The exclusion can cover an agreement or category of agreements, may apply only in specified circumstances and may be retrospective.
- 7.2 The spread of coronavirus is expected to place a significant burden on the NHS, requiring additional capacity to be created to treat both Covid-19 patients and others. As part of the response to this, NHS England (NHSE) has commissioned independent healthcare providers to provide extra capacity for treatment of patients. These arrangements are likely to require providers to work together to meet local needs, including sharing potentially sensitive information.
- 7.3 Co-operation of this kind is likely to be essential in responding to coronavirus. However to operate effectively, it will require providers to engage in agreements or practices which would ordinarily be considered anticompetitive. For example, they may need to reach agreements to share staff or facilities, or to discuss division of healthcare services locally. In order to protect providers from the risk of legal action for their work in

supporting the NHS at this time, the Government is legislating to exclude relevant agreements from the scope of competition law.

7.4 The Order permits five kinds of agreement between independent providers and between independent providers and NHS bodies, for the purpose of responding to coronavirus. These are agreements relating to:

- sharing information about capacity to provide certain services;
- coordination on deployment of staff;
- sharing or loan of facilities;
- joint purchasing of goods, facilities or services; and
- division of activities, including agreement to limit or expand the scale or range of services supplied by one or more providers.

7.5 The direct sharing of information relating to costs or prices is not included in the scope of these exclusions. This Order only applies to activities undertaken in relation to assisting the NHS in addressing the effects or likely effects of coronavirus, so the sharing of information or collusion on future business planning is also not included.

7.6 Agreements intended to benefit from the exclusion under this Order must be notified to the Secretary of State, who will compile, maintain and publish a register of agreements. Notification will need to cover:

- the names of the undertakings or bodies that are parties to the agreement;
- a description of the nature of the agreement;
- the date the agreement was made and the date it was implemented; and
- the health services to which it relates.

7.7 This Order is intended to disapply competition law only in respect of agreements needed as a result of coronavirus. When the Secretary of State believes that there is no longer a significant disruption or a threat of significant disruption to the provision of health services in England as a result of coronavirus the Secretary of State must publish a notice stating this. The period under which agreements are considered excluded from competition law provisions (the 'healthcare disruption period') will end on a date specified by the Secretary of State in the notice, which must be a minimum of 28 days after the date the notice is published. The period between the notice being published and the end of the disruption period is intended only to enable the orderly winding down of arrangements.

7.8 Some bodies may have engaged in the activities covered by this Order before it was laid in order to secure capacity for treatment of patients as the number of Covid-19 patients increased. The Government has, therefore, deemed it necessary for the Order to apply retrospectively. The Order precludes the Chapter 1 prohibition from applying to agreements relating to qualifying activities between 1 March 2020 and the date the Order comes into force.

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

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

9. Consolidation

- 9.1 This is the first order dealing with this issue and so the need for consolidation does not arise.

10. Consultation outcome

- 10.1 The Order has not been subject to any formal consultation in light of the urgency with which it needed to be made.

11. Guidance

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

12. Impact

- 12.1 This instrument does not commission the services of the private sector or set out any of the financial terms of the agreement. As such, the impacts of the agreement itself on the private providers and other businesses are not set out here. Instead, this instrument simply enables these private sector health providers to work together, and with the public sector, as required to more effectively and efficiently provide the services which have been commissioned separately. This could have some operational efficiency benefits to private health providers in scope, compared to a scenario where the services had been commissioned but these agreements were not permitted.
- 12.2 As above, the impacts on the public sector from the commissioning of services from private sector providers are not set out here. This instrument does mean, however, that NHS bodies and commissioning boards will be permitted to make certain agreements with private providers and/or their associations, which could have some public sector efficiency benefits compared to a scenario where these agreements were not permitted.
- 12.3 A full impact assessment has not been prepared because this is an emergency instrument that will be in place for a limited period, envisaged to be less than 12 months. In the short run, these exemptions will enable private sector providers to collaborate so that they can increase national capacity to treat patients during the health disruption period when the requirement for medical care is higher.
- 12.4 The impact of this is likely to be significant health benefits to the population and saved lives. While there are some longer term risks inherent to relaxing competition law in this way, such as firms gaining knowledge of how their competitors operate, the impact of not taking this action – the potential for individuals to lose their lives or be more severely affected by ill-health than they would be with increased availability of treatment – outweighs this risk. Additionally, measures have been put in place to minimise these longer-term risks to competition, such as prohibiting the direct sharing of any sensitive financial information (including costs and/or pricing) between healthcare providers.

13. Regulating small business

- 13.1 This instrument does not place additional regulatory requirements on small businesses; it excludes certain activities from certain aspects of competition law. The Act applies to all businesses regardless of size.

14. Monitoring & review

- 14.1 The approach to monitoring of this legislation is for the relevant Government departments to keep under constant review whether there is significant, or a threat of significant, disruption to the provision of health services to patients in England as a result of coronavirus. The regulation does not include a statutory review clause because it is an emergency measure, envisaged to be in place for less than one year.

15. Contact

- 15.1 Grace Readings at the Department for Business, Energy and Industrial Strategy Telephone: 0207 215 8665 or email: grace.readings@beis.gov.uk can be contacted with any queries regarding the instrument.
- 15.2 Chris 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.