

EXPLANATORY MEMORANDUM TO
THE COMPETITION ACT 1998 (GROCERIES) (CORONAVIRUS) (PUBLIC
POLICY EXCLUSION) ORDER 2020

2020 No. 369

1. Introduction

- 1.1 This explanatory memorandum has been prepared by the Department for Business, Energy and Industry 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 suppliers of specified groceries and logistic service providers of those groceries. The Order is made to ensure the security of supply of these groceries to consumers in the United Kingdom during the spread of severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2, “coronavirus”).

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 The Order could not have been made sooner because the demand by consumers and resulting pressure on the groceries sector, which this Order seeks to mitigate, have been unprecedented. It is in the public interest to ensure that relevant businesses are not delayed from carrying out the activities that are temporarily excluded from competition law by this Order, which are necessary to address the effects of the coronavirus outbreak.

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 Order 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 Order is the entirety of the United Kingdom.
- 4.2 The territorial application of this Order is the entirety of the United Kingdom.

5. European Convention on Human Rights

- 5.1 As the Order 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 outbreak of the coronavirus has placed significant strain on the groceries supply-chain in the United Kingdom. An effective response to the coronavirus outbreak for this sector requires coordination between different parts of the supply-chain. For example, groceries suppliers (e.g. supermarkets and the businesses that supply to them) may need to work together and agree to limit the sale of particular groceries or to simplify product specifications through the supply-chain so that consumers can continue to purchase essential items; or to agree to share staff in the event of severe spikes in demand for products or widespread absence of staff due to illness. Businesses from other areas of food supply that would not normally supply to retailers but now wish to do so to support the coronavirus response may also seek to work together and with retailers to increase the supply of groceries to consumers.
- 7.3 It is equally important that those businesses that provide essential logistical services to groceries suppliers (e.g. haulage companies or other support services) can continue their normal operations, without which groceries suppliers would not be able to provide essential goods to consumers. For example, logistic service providers may need to agree to share staff or information relating to the available storage capacity of their

warehouses. Such coordination as explained above would ordinarily breach domestic competition rules.

- 7.4 The Order permits eight kinds of agreement (“qualifying activities”) between groceries suppliers for the purpose of responding to coronavirus. These relate to:
- coordination on quantities of certain groceries to be supplied;
 - coordination on the deployment of staff;
 - coordination on the range of groceries to be supplied;
 - sharing information about stock levels;
 - sharing information about the services of logistic service providers;
 - coordination on supply to particularly critical or vulnerable consumers;
 - coordination on store opening hours; and
 - coordination on supply to consumers in geographically vulnerable areas.
- 7.5 The Order permits five kinds of agreement (“qualifying activities”) between logistic service providers for the purpose of responding to coronavirus. These relate to:
- sharing information about staff availability;
 - coordination on the deployment of staff;
 - sharing information about storage and warehouse capacity;
 - sharing information about potential storage or warehouse capacity; and
 - sharing information about vehicles.
- 7.6 The direct sharing of information relating to costs or prices is not included in the scope of these exclusions. The exclusion only applies to activities undertaken in relation to the coronavirus response, so sharing of information or collusion on future business planning is also not included.
- 7.7 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 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 groceries to which the agreement relates.
- 7.8 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 supply of groceries to consumers in the United Kingdom the Secretary of State must publish a notice stating this. The period under which agreements are considered excluded from competition law provisions (the ‘groceries supply 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.

- 7.9 Some businesses may have engaged in the activities covered by this Order before it was laid in response to the immediate effects of the coronavirus outbreak. The Government has 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 place additional regulatory requirements on business; it is a temporary exclusion for certain, specific practices ordinarily prohibited under domestic competition law for businesses in the groceries sector. Grocery suppliers and logistic services providers will be able to utilise this exclusion on an optional basis, where necessary to ensure the continued supply of food and other essential household goods to UK consumers during the coronavirus outbreak, where there is both high demand for these items and likely staff shortages in the sector to fulfil this demand due to sickness. While the objective of this instrument is not commercial, the groceries sector could benefit from some of these measures as they will be better able to meet increased demand from consumers for their products, compared to a scenario where they could not coordinate during this time. Any additional revenue earned by the sector is expected to be only due to increased demand by consumers. It should be noted that sharing of information on pricing, or other pricing coordination is not permitted under the scope of this instrument.
- 12.2 There is not expected to be a significant impact on the public sector.
- 12.3 A full impact assessment has not been prepared because this is emergency legislation that will be in place for a limited period, expected to be less than 12 months. In the short run, the impact will be continuity of the supply of food and essential household goods, benefiting consumers and the broader economy. While there are some longer-term risks inherent to relaxing competition law in this way, such as firms gaining knowledge of how their competitors operate, the impact of not taking this action – the disruption of essential food and groceries supply to UK consumers – significantly outweighs this risk. Additionally, measures have been put in place to minimise these longer-term risks to competition, e.g. for example businesses will not be able to share information relating to costs or prices.

- 12.4 The Order will be kept under regular review to ensure that it is only in force for as long as there is significant disruption to the supply of groceries to consumers in the United Kingdom. This will ensure that any adverse impacts that result from the Order are kept to a minimum.

13. Regulating small business

- 13.1 The legislation may apply to activities that are undertaken by small businesses.
- 13.2 This regulation does not place requirements on small businesses; as outlined above, all businesses would be able to utilise these exemptions on an optional basis, where necessary to ensure the continued supply of food and other essential household items.

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 supply of groceries to consumers in the United Kingdom caused by a reason relating to coronavirus.
- 14.2 The regulation does not include a statutory review clause.

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 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.