

EXPLANATORY MEMORANDUM TO

THE COMPETITION ACT 1998 (SOLENT MARITIME CROSSINGS) (CORONAVIRUS) (PUBLIC POLICY EXCLUSION) ORDER 2020

2020 No. 370

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 maritime operators providing passenger and freight crossing services across the Solent. The Order applies to the following companies: Hovertravel Limited, Red Funnel Limited and its associated subsidiary, and Wightlink Limited and its associated sister company. The Order is made to assist these operators to respond to 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 of the speed at which the virus outbreak has affected these maritime operators has 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 of 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 Hovertravel, Wightlink, Red Funnel and their associated subsidiaries and sister companies (“the Solent crossing operators”) each provide maritime transportation across the Solent between the Isle of Wight and ports in mainland UK. These three businesses provide the only means by which passengers, freight and services flow between the island and the mainland. This includes essential ‘lifeline services’, such as the transportation of medical supplies to the Isle of Wight resident or the transportation of the residents themselves to the mainland for essential healthcare.
- 7.3 The outbreak of the coronavirus has significantly reduced demand for the services provided by the Solent operators. There is a significant risk that, in conjunction with the likely increase in staff absence due to illness or self-isolation, the Solent operators will be unable to continue to provide lifeline services to Isle of Wight residents.
- 7.4 An effective response by the Solent crossing operators to these effects of the coronavirus outbreak requires coordination that would ordinarily breach domestic competition rules. For example, the Solent crossing operators may need to agree an integrated timetable that allows at least a minimal service to continue to operate.

- 7.5 The Order permits three kinds of agreement (“qualifying activities”) between the Solent crossing operators during the period of disruption for the purpose of responding to coronavirus. These relate to:
- coordination on the use of timetables;
 - coordination on the routes operated by any Solent operator; and
 - coordination on the deployment of labour or facilities.
- 7.6 The direct sharing of confidential 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; and
 - the date the agreement was made.
- 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 operation of Solent crossings 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 ‘crossings 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 The Solent crossing operators 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 16 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 Solent crossing maritime operators (those operating between the Isle of Wight and mainland UK). The Solent crossing operators will be able to utilise this exclusion on an optional basis, where necessary to ensure the continued running of services to transport essential goods and key personnel (including medical staff) to and from the Isle of Wight during the coronavirus outbreak. During this period there is likely to be a large overall reduction in demand for these maritime services, threatening viability, but an essential requirement to keep these services running. While the objective of this instrument is not commercial, businesses who rely upon the Solent crossing operators' services to meet demand for their own goods and services (e.g. food retailers on the Isle of Wight) are likely to benefit, compared to the scenario where operators could not coordinate and there would be a risk of services running at a far reduced frequency or not at all.
- 12.2 This instrument will benefit the public sector. It will ensure that key public sector staff, including NHS workers, will be able to travel to work at a time when these services are in high demand. It is likely to also aid local authorities in providing essential services and assistance during this time, relative to a scenario where this instrument was not in place.
- 12.3 A full impact assessment has not been prepared because this is an emergency instrument that is expected to be in place for less than 12 months. In the short run, the instrument will ensure the continued supply of essential products and services (including food, medicine and healthcare), to Isle of Wight residents, which will have a broad range of health benefits. This is in addition to the benefits to business and the public sector set out above. 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 – Isle of Wight residents not having access to essential goods and services during the coronavirus outbreak – significantly outweighs this risk. Additionally, the activities in scope of this order are narrow, relating only to timetabling, routes and staffing, and do not include activities which would be riskier for long-term competitiveness, such as the sharing of commercially sensitive financial information.
- 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 services provided by the Solent operators. This will ensure that any adverse impact that results from the Order is kept to a minimum.

13. Regulating small business

- 13.1 The legislation does not place additional regulatory requirements on small businesses.

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 operation of Solent maritime crossings 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.