

**EXPLANATORY MEMORANDUM TO**  
**THE COMPETITION ACT 1998 (DAIRY PRODUCE) (CORONAVIRUS) (PUBLIC**  
**POLICY EXCLUSION) ORDER 2020**

**2020 No. 481**

**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 producers of dairy products and between producers’ logistic services providers. The Order is made to support the dairy industry’s response to the market effects of the spread of severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2, “coronavirus”), which will ensure capacity is maintained to meet future demand and mitigate the environmental damage caused by wasted milk.

**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 of the unprecedented speed at which the outbreak of coronavirus has affected the dairy produce sector 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 respond to the effects of coronavirus, which include the rationalisation of supply and reduction of environmental waste. 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 the entirety of the United Kingdom.

## **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). The exclusions in the Order are therefore also capable of applying to the wider definition of “agreement” including concerted practices and decisions, if they meet the requirements in articles 5 or 6 of the Order.
- 6.4 This Order is one of a number of other Orders under the powers in paragraph 3 of Schedule 7 to the Act 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 The spread of coronavirus has caused serious difficulties for many businesses in the UK’s dairy sector, which is the UK’s largest farming sector. Farmers sell most of their milk to processors under a contract. A processor will typically supply a specific consumer-facing sector, for example hospitality or retail. Dairy traders operate within the supply chain to buy and sell milk and logistic services providers transport or store milk or milk products. The hospitality sector’s recent downturn, which has resulted from businesses closing to prevent the spread of coronavirus in the UK, has in turn reduced demand for dairy products. As a result, producers that service demand from the hospitality sector are facing significant over-supply of raw milk, which is a perishable product with a short shelf life.
- 7.3 In addition, half of the milk produced in the UK is consumed as fresh milk and the dairy sector’s processing capacity is built to serve this characteristic. This means that there is limited capacity for processing raw milk into other milk products, such as butter or milk powder, which have a longer shelf life. This is compounded by increased levels of staff

absence resulting from either illness or efforts to prevent the spread of coronavirus has reduced the sector's capacity for processing surplus raw milk.

- 7.4 The effects of over-supply and reduced processing capacity have been made more challenging because the sector is entering the 'Spring flush', during which the production of cows milk typically increases by 12% compared to the annual average. With limited options to respond to the over-supply of such a perishable product, farmers have needed to dispose of surplus milk, which can cause environmental damage.
- 7.5 Cross-sector co-operation is essential to support the dairy industry's response to these effects resulting from the spread of coronavirus. For example, farmers may need to reach agreements on how to most efficiently and effectively reduce levels of production, or processors may need to work together to identify and share available processing capacity. Logistic services providers may need to co-operate with each other to ensure that surplus dairy produce is processed and stored more efficiently and effectively. Such co-operation will reduce the quantity of raw milk that is wasted.
- 7.6 Co-operation of this kind would ordinarily breach UK competition law. In order to protect affected businesses in the dairy sector from the risk of legal action for their work to mitigate the serious effects of surplus raw milk at this time, the Government is legislating to exclude relevant agreements from the scope of competition law. This Order permits certain coordination between dairy produce suppliers and, separately, between logistics service providers.
- 7.7 For dairy produce suppliers, the Order permits certain agreements for two different purposes. The first purpose is to maximise the processing, transport and storage efficiency and the storage capacity of dairy produce, and to prevent or mitigate the need for the disposal of milk resulting from a disruption in demand caused by the effects of coronavirus. For this purpose, the Order permits agreements involving six different qualifying activities. These are agreements relating to:
- collecting and sharing information on surplus milk quantities, stock, and aggregate customer demand if the information relates to the current period of disruption;
  - collecting and sharing information on the availability of processing, storage and drying capacity if the information relates to the current period of disruption;
  - coordination on the deployment of staff;
  - coordination on the use of existing or new facilities;
  - coordination on the processing and storage of surplus milk; and
  - sharing information about the services of logistics service providers.
- 7.8 The second purpose is to prevent or mitigate the need for the disposal of surplus milk or to limit the environmental impact of any disposal of surplus milk resulting from a disruption in demand caused by the effects of coronavirus. For this purpose, the Order permits agreements involving two different qualifying activities, which are:
- coordination on the temporary reduction of milk production insofar as it does not involve coordination with the object of excluding one or more dairy produce suppliers from the market; and
  - sharing information on best practices of limiting the environmental impact of milk disposal.

- 7.9 For logistics service providers, the Order permits agreements relating to three qualifying activities for the purpose of maximising the processing, transport and storage efficiency and the storage capacity of dairy produce, and preventing or mitigating the need for the disposal of milk resulting from a disruption in demand caused by the effects of coronavirus. These are agreements relating to:
- sharing information on labour availability;
  - coordination on and sharing of staff or facilities; and
  - sharing information on the capacity, size, type or destination of delivery vehicles.
- 7.10 The direct sharing of information relating to costs or prices is not included in the scope of these agreements. This Order only applies to activities undertaken to respond to the effects of coronavirus during a specific period (the ‘dairy produce demand disruption period’), so the sharing of information or collusion on future business planning is also not included in the scope of these agreements.
- 7.11 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 which are parties to the agreement;
  - a description of the nature of the agreement;
  - the date the agreement was made; and
  - the dairy produce to which it relates.
- 7.12 This Order is intended to disapply competition law only in respect of agreements needed as a result of the coronavirus outbreak during the disruption period. The Secretary of State must publish a notice if, more than 28 days before the Order is due to expire, he believes that there is no longer a significant disruption or a threat of significant disruption to the demand for dairy produce in the UK as a result of coronavirus. The period under which agreements are considered excluded from competition law provisions 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.
- 7.13 The Order will expire at the end of three months beginning on the day on which it comes into force. The dairy produce demand period will also end on that date unless it has already been brought to an end through the earlier publication of a notice by the Secretary of State.
- 7.14 Some businesses may have engaged in the activities covered by this Order before it was laid in order to respond to the immediate effects of the coronavirus outbreak. The Government has deemed it necessary for the Order to apply retrospectively. The Order deems the Chapter 1 prohibition not to have applied to agreements relating to qualifying activities between 1 April 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 Order enables dairy producers, processors, traders and logistics service providers to work together to reduce the amount of raw milk wasted in a time of oversupply. The reduction in waste is intended to happen in two ways: (i) working together to most efficiently match supply to demand, reducing the amount of oversupply; and (ii) sharing and coordinating the use of facilities to more effectively and efficiently deal with any remaining oversupply.
- 12.2 While there is a provision for coordination on reducing production of milk, it should be noted that the ability to do this is limited. Production can be reduced by changes to cows' diet but this is neither a long-term solution nor sufficient for dealing with oversupply because its effects are marginal.
- 12.3 There are not expected to be costs to business. Compared to the situation where the over-supply issues remain but this Order was not in place, it is expected that dairy producers, processors, traders and logistic services providers would benefit in the short term, and in the medium term also the hospitality sector. In the short term, compared to the situation where this Order was not in place, the Order will enable dairy producers to sell a larger amount of the milk that their farms produce and waste a smaller amount (for which they do not receive revenue) and allow processors to increase their production of storable products for sale. As a result of increased coordination, there may also be an increase in the demand for the services of traders and logistic services providers.
- 12.4 In the medium term, it is expected that this will help ensure dairy producers can continue to operate on a viable basis as they will not have incurred the cost of wasting significant quantities of raw milk. This is important because it will ensure that there is not a shortage of capacity once demand returns to normal levels. A shortage of milk capacity in the medium term would lead to a shortage of milk supply for processors and, therefore, insufficient supply and higher prices for the hospitality sector. Additionally, ensuring that producers can sustain their business will benefit the wider dairy sector in the longer term, particularly those businesses that rely on a robust supply of raw milk for their own production and services.
- 12.5 There are not expected to be significant impacts on the public sector.
- 12.6 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.
- 12.7 As outlined above, the measure is expected to help preserve the production capacity for raw milk, ensuring that there will be enough supply when demand returns to normal

levels. This means that prices are less likely to rise, benefiting both the sectors that purchase raw milk for their production processes and consumers who purchase the end products. There are also important environmental benefits associated with reduced waste of raw milk; excess supply must be disposed of and can pollute both land and waterways.

- 12.8 It should be noted that if this measure were not in place and oversupply were not reduced while there is disruption to the demand for milk it is unlikely that consumers would experience a decrease in prices during this time. This is primarily because the milk would be disposed of rather than entering the supply chain.
- 12.9 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 medium to long-term reduction in supply capacity of an essential good and for environmental damage – outweighs this risk. Additionally, measures have been put in place to reduce the adverse impacts on competition, for example businesses will not be able to share sensitive information relating to costs or pricing or share information or collude on future business planning. As described in paragraph 7.8 dairy produce suppliers also must not coordinate with the object of excluding one or more competitors.

### **13. Regulating small business**

- 13.1 This instrument does not place additional regulatory requirements on small businesses; instead it excludes certain activities from certain aspects of competition law. The Competition Act 1998 applies to all businesses regardless of size.

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

- 14.1 This instrument will expire at the end of a period of three months beginning with the day on which it comes into force.
- 14.2 The disruption period may be brought to an end before the Order expires. If, more than 28 days before the Order is due to expire, the Secretary of State considers that there is no longer a significant disruption or threat of significant disruption to the demand for dairy produce and, therefore, that the disruption period should be brought to an end, he must publish a notice giving at least 28 days' notice that the disruption period is to come to an end. Relevant Government departments will keep under constant review whether there is significant, or a threat of significant, disruption to the demand for dairy produce in the United Kingdom caused by a reason relating to coronavirus.

### **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](mailto: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.