

EXPLANATORY MEMORANDUM TO

THE COMPETITION ACT 1998 (CORONAVIRUS) (PUBLIC POLICY EXCLUSIONS) (AMENDMENT AND REVOCATION) ORDER 2020

2020 No. 933

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 makes amendments to four existing orders, which were made to exclude certain agreements from the application of the prohibition contained in Chapter 1 of the Competition Act 1998 (“the Act”) for the purpose of supporting essential business co-ordination in response to the spread of severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2, “coronavirus”). The amendments in this order are made in response to reports of the Joint Committee on Statutory Instruments for doubtful vires. This order also revokes the orders relating to groceries supply and dairy produce.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 This instrument amends the Competition Act 1998 (Health Services for Patients in Wales) (Coronavirus) (Public Policy Exclusion) Order 2020 (S.I. 2020/435), which was reported by the Joint Committee on Statutory Instruments in its 12th report of Session 2019-2021 for doubtful vires in relation to articles 2 and 5(1). The Competition Act 1998 (Dairy Produce) (Coronavirus) (Public Policy Exclusion) Order 2020 (S.I. 2020/481) was reported by the Joint Committee on Statutory Instruments in its 13th report of Session 2019-2021 for doubtful vires in relation to article 7. Both instruments were reported for doubtful vires due to sub-delegation.

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)

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),(2) and (3) 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 Five orders were made under the powers in paragraph 7 of Schedule 3 to the Act for reasons relating to coronavirus. These are:
- the Competition Act 1998 (Health Services for Patients in England) (Coronavirus) (Public Policy Exclusion) Order 2020 (S.I. 2020/368) (“the Health Services for Patients in England Order”);
 - the Competition Act 1998 (Groceries) (Coronavirus) (Public Policy Exclusion) Order 2020 (S.I. 2020/369) (“the Groceries Order”);
 - the Competition Act 1998 (Solent Maritime Crossings) (Coronavirus) (Public Policy Exclusion) Order 2020 (S.I. 2020/370) (“the Solent Crossings Order”);
 - the Competition Act 1998 (Health Services for Patients in Wales) (Coronavirus) (Public Policy Exclusion) Order 2020 (S.I. 2020/435) (“the Health Services for Patients in Wales Order”);
 - the Competition Act 1998 (Dairy Produce) (Coronavirus) (Public Policy Exclusion) Order 2020 (S.I. 2020/481) (“the Dairy Produce Order”).
- 6.3 This instrument amends the Health Services for Patients in England, Groceries, Solent Crossings and Health Services for Patients in Wales Orders in response to comments made in the 12th and 13th Reports of the Joint Committee on Statutory Instruments (‘JCSI’), which reported the Health Services for Patients in Wales and Dairy Produce Orders for doubtful vires. Further information is provided in paragraph 7 of this explanatory memorandum. This instrument also revokes the Groceries and Dairy Produce Orders.

7. Policy background

What is being done and why?

- 7.1 On 27 March 2020, the Government made the Health Services for Patients in England Order, the Groceries Order and the Solent Crossings Order. On 17 April 2020, the Government made the Health Services for Patients in Wales Order. On 30 April 2020, the Government made the Dairy Produce Order. These orders (referred to collectively as the “Coronavirus Public Policy Exclusion Orders”) temporarily exclude certain agreements, which would ordinarily breach competition law, from the application of the prohibition in UK competition law in relation to certain types of anti-competitive behaviour, including collusion and cartels. The Coronavirus Public Policy Exclusion Orders facilitate coordination between businesses that is needed to ensure the continuity of essential services and address the adverse effects of coronavirus with minimum risk of enforcement action by the Competition and Markets Authority or legal action from third parties.

- 7.2 The Coronavirus Public Policy Exclusion Orders permit co-ordination between specified businesses in certain sectors which: falls within a list of permitted activities set out in the respective order; relates to addressing challenges caused by coronavirus; and takes place during a specific period of time – a “disruption period” – established by the relevant order, for example “the dairy produce disruption period”.
- 7.3 The Coronavirus Public Policy Exclusion Orders each define the disruption period as beginning on a specific date and ending on a date specified in a notice published by the Secretary of State when he believes there is no longer significant disruption or a threat of significant disruption caused by a reason relating to coronavirus. To allow businesses to wind down their co-ordination in an orderly manner, the Secretary of State is required to publish the notice at least 28 days before the date on which the relevant disruption period is to end.
- 7.4 In its 12th report of Session 2019-2021 published on 22 May 2020, the JCSI reported the Health Services for Patients in Wales Order on the grounds that the provision allowing the Secretary of State to specify the date on which “the healthcare disruption period” will end may constitute sub-delegation beyond what was envisaged under the Act. The order was reported for doubtful vires in relation to articles 2 and 5(1). The JCSI’s 13th report published on 5 June 2020 reported the Dairy Produce Order for similarly doubtful vires in relation to article 7.
- 7.5 This order makes amendments in response to the JCSI’s comments. While the JCSI did not make comments about the Groceries, Health Services for Patients in England, or Solent Crossings Orders, provisions identical to those on which the JCSI commented are included in each of these three Orders. This order therefore amends those three orders in addition to the Health Services for Patients in Wales Order. The Dairy Produce Order is not amended because it expired at the end of 1 August 2020 in line with its sunset provision.
- 7.6 This order removes the provisions allowing the Secretary of State to end the disruption period by specifying an end-date in a published notice from the Health Services for Patients in England, Groceries, Solent Crossings and Health Services for Patients in Wales Orders. The definitions of the disruption period in these orders are also amended to provide that they will end when the respective order is revoked by statutory instrument. To ensure consistency with the original policy, the relevant government departments will keep such disruption periods under constant review and will revoke the Health Services for Patients in England, Health Services for Patients in Wales and Solent Crossings Orders when there are no longer exceptional and compelling reasons for these to remain in place. The revocation date (i.e. the date on which the order ceases to have effect) will be at least 28 days after the revocation instrument is laid.
- 7.7 In addition to making these amendments, this order revokes the Dairy Produce Order and the Groceries Order. As the Dairy Produce Order has expired, it is revoked for completeness on the date on which this order comes into force. The Secretary of State is also satisfied that the exceptional and compelling reasons for which the Groceries Order was required have abated. The Groceries Order is therefore revoked on 8 October 2020 in line with the end of contracts to supply essential groceries to shielded people.

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 amending the Coronavirus Public Policy Exclusion Orders, all of which are temporary and will be brought to an end by revocation within a relatively short time frame. As a result, the need for consolidation does not arise.

10. Consultation outcome

- 10.1 The order does not change the policy of the orders that it amends and so does not require formal consultation.

11. Guidance

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

12. Impact

- 12.1 Amending the process by which temporary public policy exclusion orders will cease to be in force (requiring a statutory instrument to bring them to an end rather than the Secretary of State issuing a notice to do so) does not have a material impact on business. The notice period for businesses that one or more of the Coronavirus Public Policy Exclusion Orders is coming to an end will remain at least 28 days, and the decision to bring forward legislation to revoke one or more of the Coronavirus Public Policy Exclusion Orders will still be taken by the Secretary of State based on the same factors and evidence as would be the case when revoking via a notice. Any familiarisation costs associated with recognising this change in procedure for revoking the orders are likely to be negligible; the relevant government department will communicate this change directly to the small number of businesses affected and be clear that it is a matter of procedure only.
- 12.2 Revoking the Dairy Produce Order also does not have an impact on business. This order had a three-month sunset clause and expired on 1 August 2020. This revocation is for completeness only and does not represent any policy change.
- 12.3 Revoking the Groceries Order will affect the businesses in the grocery sector who were conducting activities permitted under the temporary order, which will now cease to be permitted. Following discussions with affected businesses, the Government has concluded that the exceptional conditions that created the need for otherwise unlawful coordination in the grocery sector have abated or are expected to abate in the near future. The revocation of the order represents a return to normal competitive market conditions, rather than placing any new costs or burdens on businesses.
- 12.4 There is no impact on charities or voluntary bodies. The orders do not apply to charities or voluntary bodies.
- 12.5 There is no significant impact on the public sector.
- 12.6 An Impact Assessment has not been prepared for this instrument. There are two types of provision in this instrument: first, those that amend and second, those that revoke the existing orders. The amending provision does not directly regulate business; as outlined at 12.1, it simply changes the process by which the Secretary of State brings orders to an end but not any of the factors underpinning the decision to do so. As such, this provision is out of scope of Better Regulation and does not require an Impact Assessment. Any future decisions by the Secretary of State to use these powers would be subject to appropriate analysis. The provisions to revoke two of the existing orders are a return to the normal application of competition law in these markets, ending an

exceptional temporary relaxation, rather than an introduction of new regulation. As such, an Impact Assessment is also not required for these provisions.

13. Regulating small business

- 13.1 The legislation may apply to activities that are undertaken by small businesses.
- 13.2 The provision to amend the process by which the orders cease to be in force will not impose costs on small businesses, for the reasons set out at 12.1. The provision to revoke the Dairy Produce Order will also not impose costs on small businesses, for the reasons set out at 12.2. It is unlikely that revoking the Groceries Order will impose direct costs on small businesses as it was large retailers and wholesale distributors who notified the Secretary of State for BEIS that they were coordinating under the order (as was legally required of any parties making use of provisions under the order).

14. Monitoring & review

- 14.1 Additional monitoring is not required for this instrument. This instrument revokes or makes technical amendments to four of the five Coronavirus Public Policy Exclusion Order and revokes the Groceries and Dairy Produce Orders, which exclude certain agreements from the application of UK competition law in order to prevent or mitigate disruption due to reasons relating to coronavirus. As such, the legislation which this instrument amends is already under constant review by relevant government departments, to assess whether this disruption remains.

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.