

## EXPLANATORY MEMORANDUM TO

### THE COMPETITION ACT 1998 (GROCERIES) (PUBLIC POLICY EXCLUSION) ORDER 2020

2020 No. 1568

#### 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.

#### 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 groceries. The order is made as a contingency measure to protect the security of supply of grocery products to consumers in the United Kingdom in the event that there is disruption to the UK’s grocery supply chain.

#### 3. Matters of special interest to Parliament

*Matters of special interest to the Joint Committee on Statutory Instruments.*

- 3.1 None.

*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)*

- 3.2 As the order is subject to 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 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 Five orders were made earlier in 2020 under the powers in paragraph 7 of Schedule 3 to the Act in relation to sectors affected by the spread of severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2, “coronavirus”). Those orders were:
- 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”); and
  - The Competition Act 1998 (Dairy Produce) (Coronavirus) (Public Policy Exclusion) Order 2020 (S.I. 2020/481) (“the Dairy Produce Order”).
- 6.5 The Groceries Order and the Dairy Produce Order were revoked by the Competition Act 1998 (Coronavirus) (Public Policy Exclusions) (Amendment and Revocation) Order 2020 (S.I. 2020/933) because they were no longer needed. The Health Services for Patients in England Order, Solent Crossings Order and Health Services for Patients in Wales Order remain in force.

## 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 UK’s grocery supply chain is operating under increasing pressure because of the continuing challenges related to coronavirus. The end of the Transition Period (this being the implementation period as defined in section 1A(6) of the European Union (Withdrawal Act) 2018) following the UK’s withdrawal from the European Union could present further short-term disruption for the UK’s grocery supply chain. The combination of these factors could have an impact on the grocery supply chain for a short period of time. Any effects of supply-side disruption could be exacerbated by higher consumer demand, as was the case when the Groceries Order was made in spring 2020.
- 7.3 The Government should take the steps necessary to allow the food industry to respond to disruption to the supply of food. The response might require coordination between

businesses across the grocery supply chain, which would ordinarily breach UK competition law. This order is made in exercise of the Secretary of State's powers to disapply UK competition law where there are exceptional and compelling reasons of public policy to do so. It is a contingency measure so that suppliers of groceries can prepare for the possibility that there is disruption to the grocery supply chain caused by the continuing effects of coronavirus and the end of the Transition Period.

- 7.4 The order disapplies UK competition law only for the purpose of preventing or mitigating disruption to the supply of groceries to consumers in the UK that occurs during the 'groceries supply disruption period'. The groceries supply disruption period, under which agreements that meet the requirements in article 4 of the order are considered excluded from the Chapter 1 prohibition, begins on 17 December 2020 and ends at the end of 31 March 2021, or earlier if the order is revoked before that date.
- 7.5 The order will enable suppliers of groceries to undertake effective coordination that is necessary to prepare for and respond to possible disruption to the grocery supply chain. For example, if there is a need to manage product stock because of a severe spike in demand or disrupted supply chains, it is likely to be more effective for supermarkets to act in concert than individually when putting in place limits on the number of products that customers can purchase, or if there is a need to rationalise product lines or streamline supply chains, coordination between suppliers is likely to make this action more effective.
- 7.6 Such coordination would ordinarily breach the Chapter 1 prohibition. The purpose of this order is therefore to enable businesses to undertake the necessary coordination without fear of legal action.
- 7.7 The order permits nine kinds of agreement ("qualifying activities") between groceries suppliers. The purpose of a qualifying activity must be to prevent or mitigate disruption to the supply of groceries to consumers in the United Kingdom that occurs during the groceries supply disruption period. As set out in article 3 of the order, the qualifying activities relate to:
- coordination on limiting purchases by consumers of particular groceries;
  - sharing of staff or facilities;
  - coordination on the range of groceries to be supplied, including simplifying the supply chain and product specifications;
  - sharing information about stock levels and shortages;
  - sharing information about the services provided by logistic service providers;
  - coordination on assistance for particular groups of consumers, for example critical workers and vulnerable or socially isolated consumers;
  - coordination on temporary closure of stores or opening hours;
  - coordination on supply to consumers in areas of the United Kingdom that are particularly vulnerable to shortages of groceries; and
  - sharing information on the passage of groceries to, from or through any port within the United Kingdom.
- 7.8 The direct sharing of information relating to costs or prices is not included in the scope of these qualifying activities. The sharing of information or colluding on future

business planning is also not included in the scope of the qualifying activities. Only those activities listed as qualifying activities are permitted under this Order. Any other activity will not be excluded by the order, even if it is part of an agreement that includes qualifying activities that are excluded by the order.

7.9 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. As set out in article 5 of the order, notifications 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;
- a description of the nature of the disruption that the agreement seeks to prevent or mitigate; and
- the groceries to which the agreement relates.

7.10 The period of possible disruption to the supply of groceries to the UK is expected to be in the run-up to Christmas and in the first three months of 2021. Therefore, the order will expire at the end of 31 March 2021. Once the order has expired or is revoked (whichever is the earlier), the exclusion of the agreements notified to the Secretary of State from the Chapter I prohibition provided by the order shall cease to apply from that date onwards. The continuation after the revocation or expiry of the order of any coordination that was part of these agreements will therefore not be covered by the order.

7.11 The order will come into force on 11 January 2021. In order to undertake contingency planning for possible disruption, the Government believes that some businesses may engage in activities covered by this order before it comes into force because of the need to prepare for disruption that could occur over the Christmas and New Year period. 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 17 December 2020 and the date which is the day before the order comes into force to provide businesses with certainty that any contingency planning undertaken during that period which is covered by this order will not face legal action.

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

8.1 This instrument is not being made under the European Union (Withdrawal) Act 2018 but does relate, in part, to the withdrawal of the UK from the European Union as it would apply in the event of significant disruption to the UK's grocery supply chain, including any disruption that may occur as a result of the Transition Period coming to an end.

## **9. Consolidation**

9.1 This is the first order dealing with the combined effect of coronavirus and the end of the Transition Period and it will expire on 31 March 2021, if it is not revoked before this date. As a result, the need for consolidation does not arise.

## **10. Consultation outcome**

- 10.1 The order has not been subject to formal consultation. However, certain industry stakeholders, including trade associations, were engaged in the development of the order to ensure that it provided sufficient scope for the industry to undertake the activities necessary to prepare for and mitigate possible disruption to the UK's groceries supply chain. A range of industry bodies was made aware of the development of the order through industry fora that are led by the Department for Environment, Food and Rural Affairs.

## **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 businesses; it is a temporary exclusion for certain, specific practices ordinarily prohibited under domestic competition law for businesses in the groceries sector. Grocery suppliers will be able to use this exclusion on an optional basis, where necessary to prevent or mitigate disruption to the supply of food and other essential household goods to UK consumers, meaning that any related familiarisation costs will be optional.
- 12.2 While the objective of this instrument is not commercial, retailers in the groceries sector could benefit from some of these measures because they will be better able to ensure continuity of supply to consumers and/or 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 due only to being better able to meet consumer demand. It should be noted that sharing of information on pricing, or other pricing coordination is not permitted under the scope of this instrument, nor is colluding on any future business planning.
- 12.3 There is not expected to be a significant impact on the public sector.
- 12.4 A full impact assessment has not been prepared because this is short-term contingency legislation that will be in place for 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, this risk is significantly outweighed by the impact of not putting in place contingency measures to ensure that retailers can prevent or mitigate possible disruption to the supply of groceries to UK consumers. Additionally, measures have been put in place to minimise the longer-term risks to competition, for example, businesses will not be able to share information relating to costs or prices.
- 12.5 The order will expire at the end of 31 March 2021. The order will be kept under regular review and the Secretary of State can revoke it earlier than 31 March 2021 if it is no longer needed. 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 may apply to activities that are undertaken by small businesses.

- 13.2 This order does not place requirements on small businesses; as outlined above, all businesses would be able to use the exclusions on an optional basis, where necessary to prevent or mitigate disruption to the supply of food and other essential household items.
- 13.3 It is possible that there may be some adverse effects on small businesses if larger retailers choose to engage in the activities permitted by this order and smaller retailers do not. For example, while the order is in force, larger retailers could gain a competitive advantage over smaller retailers by sharing information that small businesses would not be privy to. Over the long term, larger retailers may also gain a competitive advantage from understanding how their competitors operate. However, as outlined above, measures have been put in place to minimise any longer-term effects and smaller retailers are also able to make and notify agreements.

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

- 14.1 The approach to monitoring this legislation is for the relevant government departments to keep under constant review whether there is disruption to the supply of groceries to consumers in the United Kingdom. The legislation will expire at the end of 31 March 2021.
- 14.2 The order 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](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.