

EXPLANATORY MEMORANDUM TO
THE COMPETITION ACT 1998 (CORONAVIRUS) (PUBLIC POLICY
EXCLUSIONS) (REVOCATIONS) ORDER 2021

2021 No. 773

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 instrument revokes four Orders, three of 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 coordination in response to the spread of severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2, “coronavirus”). The other was made as a contingency measure to protect the security of food supply in the United Kingdom in the event of possible disruption caused by the combination of coronavirus and the end of the Transition Period following the United Kingdom’s withdrawal from the European Union.

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 instrument 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 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 negative resolution procedure and does not amend primary legislation no statement is required.

6. Legislative Context

- 6.1 The Act prohibits certain types of agreements between, and decisions of, undertakings that prevent, restrict or distort competition, including, for example, collusion and cartels. This is known as the ‘Chapter 1 prohibition’. 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 application of the Chapter 1 prohibition.

- 6.2 Six Orders were made under paragraph 7 of Schedule 3 to the Act to address or alleviate the effects, or likely effects, of coronavirus. These are referred to collectively as the “Coronavirus Public Policy Exclusion Orders” and comprise:
- 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 No.1 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 (Solent Maritime Crossings) (Coronavirus) (Public Policy Exclusion Order) 2020 (S.I. 2020/370) (“the Solent Crossings Order”);
 - the Competition Act 1998 (Dairy Produce) (Coronavirus) (Public Policy Exclusion) Order 2020 (S.I. 2020/481) (“the Dairy Produce Order”);
 - the Competition Act 1998 (Groceries) (Public Policy Exclusion Order) 2020 (S.I. 2020/1568) (“the Groceries No.2 Order”).

- 6.3 The Groceries No.1 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). The Health Services for Patients in England Order, the Solent Crossings Order and the Health Services for Patients in Wales Order are still in force. The Groceries No.2 Order expired on 31 March 2021.

7. Policy background

What is being done and why?

- 7.1 The Coronavirus Public Policy Exclusion Orders excluded certain agreements temporarily from the application of the Chapter 1 prohibition. The Orders ensured that businesses in certain sectors could coordinate to respond to the effects of coronavirus and secure essential and lifeline services without fear of facing legal action for a breach of UK competition law.
- 7.2 As set out above, two of the six Coronavirus Public Policy Exclusion Orders have already been revoked. The Dairy Produce Order was revoked on 25 September 2020 after it expired on 1 August 2020. The Groceries No.1 Order was revoked on 8 October 2020 because it was no longer needed. Three of the four remaining Orders are still in force and one has expired but has not yet been revoked.
- 7.3 The Health Services for Patients in England Order, which came into force on 28 March 2020, was made to cover contractual arrangements between independent healthcare providers and NHS England. These contractual arrangements enabled independent healthcare providers to support the NHS by expanding its capacity to respond to the spread of coronavirus in England. The contractual arrangements expired on 31 March 2021.
- 7.4 The Health Services for Patients in Wales Order, which came into force on 21 April 2020, was made to cover contractual arrangements between independent healthcare

providers and NHS Wales bodies managed by the Welsh Health Specialised Services Committee. These contractual arrangements enabled independent healthcare providers to support NHS Wales bodies by expanding their capacity to respond to the spread of coronavirus in Wales. The last of these contractual arrangements expired on 31 March 2021.

- 7.5 The Solent Maritime Crossings Order, which came into force on 28 March 2020, was made to enable collaboration between the Solent crossing operators in order to ensure the continuity of their lifeline services as the main providers of transportation between the Isle of Wight and mainland UK.
- 7.6 The Groceries No.2 Order, which came into force on 11 January 2021, was made as a contingency measure to prepare for possible short-term disruption to UK food supply that could have been caused by the combination of the continuing effects of coronavirus and the potential effects of the end of the Transition Period on 31 December 2020 following the UK's withdrawal from the European Union.
- 7.7 This instrument revokes the Health Services for Patients in England Order and Health Services for Patients in Wales Order because the contractual arrangements that they covered have expired and the Orders are therefore no longer needed. This instrument revokes the Solent Maritime Crossings Order because the Secretary of State is satisfied that the exceptional and compelling reasons of public policy that the Order was made to deal with, namely the severe disruption to Isle of Wight ferry crossing services, have abated. The Groceries No.2 Order expired at the end of 31 March 2021 in line with the sunset provision included in it and it is revoked by this instrument for completeness.
- 7.8 These four Orders will be revoked 28 calendar days after the date on which this instrument is laid before Parliament. In respect of the Orders which related to the provision of health services and Solent maritime crossings, this will provide a 28-day notice period for businesses to wind down in an orderly manner coordination done under the respective Orders.

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

- 8.1 This instrument does not directly relate to withdrawal from the European Union. It is not being made under the European Union (Withdrawal) Act 2018 but it does relate to the withdrawal of the UK from the European Union insofar as it revokes the Groceries No.2 Order.

9. Consolidation

- 9.1 This instrument brings to an end the Coronavirus Public Policy Exclusion Orders and revokes the Groceries No.2 Order. The need for consolidation does not arise.

10. Consultation outcome

- 10.1 By revoking the Coronavirus Public Policy Exclusion Orders, this instrument restores the application of competition law in relation to the sectors concerned. The Orders excluded only activities that were necessary for the purpose of mitigating disruption caused by coronavirus. The government's decision to revoke the Coronavirus Public Policy Exclusion Orders was reached through regular engagement with, and with the approval of, affected businesses. A formal consultation was therefore not required.

11. Guidance

11.1 The instrument does not require the publication of any guidance.

12. Impact

12.1 The Health Services for Patients in England Order and the Health Services for Patients in Wales Order excluded coordination carried out under contractual arrangements between the NHS and independent health care providers. The last of those contractual arrangements expired on 31 March 2021. The revocation of those Orders by this instrument will therefore not affect the businesses that coordinated under the contractual arrangements because that coordination has already ended.

12.2 The revocation of the Solent Maritime Crossings Order is unlikely to affect the Isle of Wight ferry operators because the exceptional and compelling reasons of public policy that the Order was made to deal with, namely severe disruption to Isle of Wight ferry crossing services, have abated. The ferry operators therefore no longer need to coordinate in the ways permitted by the Order to respond to the effects of coronavirus. Furthermore, the revocation of the Solent Maritime Crossings Order represents a return to normal market conditions rather than placing any new costs or burden on businesses in this market.

12.3 The revocation of the Groceries No.2 Order does not have an impact on business because the Order had a sunset clause and expired at the end of 31 March 2021. It is being revoked for completeness and does not represent a policy change.

12.4 This instrument will have no impact on charities or voluntary bodies because it revokes temporary Orders which 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. The revocation of the Coronavirus Public Policy Exclusion Orders will restore competition law fully to the markets in which it was temporarily disapplied. It therefore represents a return to normal market conditions rather than an introduction of new regulation. As such, an Impact Assessment is not required.

13. Regulating small business

13.1 The revocation of the Health Services for Patients in England Order and the Health Services for Patients in Wales Order will not impose direct costs on small businesses. This is because the contractual arrangements made under these Orders have expired and, consequently, the businesses acting under these arrangements will not be affected by this instrument. Furthermore, the businesses that were notified to the Secretary of State as having been party to agreements made under those Orders are not considered small businesses.

13.2 The revocation of the Solent Maritime Crossings Order is unlikely to impose costs on small businesses for the reasons set out at paragraph 12.2.

13.3 The revocation of the Groceries No.2 Order will not impose costs on small businesses for the reasons set out at paragraph 12.3.

14. Monitoring & review

- 14.1 This instrument does not require monitoring because it revokes three of the Coronavirus Public Policy Exclusion Orders that are still in force but are no longer needed, and the Groceries No.2 Order which has expired.

15. Contact

- 15.1 Pierrette Hebga Meinrad at the Department for Business, Energy and Industrial Strategy, email: Pierrette.HebgaMeinrad@beis.gov.uk Tel: 0300 068 2908, can be contacted with any queries regarding the instrument.
- 15.2 Alesha de Freitas, 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.