

## EXPLANATORY MEMORANDUM TO

### THE COMPETITION (AMENDMENT ETC.) (EU EXIT) REGULATIONS 2019

2019 No. 93

#### 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 Act.

#### 2. Purpose of the instrument

- 2.1 These Regulations use the powers under the European Union (Withdrawal) Act 2018 (EUWA) to correct deficiencies in competition legislation arising from EU exit and are drafted for a scenario where no agreement is reached between the UK and the European Union. These Regulations revoke EU competition regulations, European Commission decisions made under EU regulations, and treaty rights which will be incorporated into UK law by virtue of the EUWA. These Regulations amend the following domestic legislation:
- the Competition Act 1998 and secondary legislation issued under it;
  - the Enterprise Act 2002 and secondary legislation issued under it;
  - European Block Exemption Regulations; and
  - other legislation containing competition provisions.
- 2.2 Currently, the UK antitrust enforcement and merger control systems are integrated with the EU. These Regulations separate the two systems and make provision for a smooth transition to a standalone UK competition regime after exiting the EU.

#### *Explanations*

##### What did any relevant EU law do before exit day?

- 2.3 Articles 101, 102 and 106 of the Treaty on the Functioning of the European Union (TFEU) prohibit anti-competitive conduct and abuses of a dominant position that affect the Single Market. Article 101(3) provides an exemption from competition rules for certain types of agreements that benefit consumers and the economy. Articles 53, 54, 57(1), 59(1) and 59(2) of the European Economic Area Agreement (EEA Agreement) provide similar prohibitions within the EEA.
- 2.4 Chapters I and II of the Competition Act 1998 substantially mirror Articles 101 and 102 of the TFEU and apply to anti-competitive conduct and abuse of a dominant position which occur or have effect in the UK.
- 2.5 Under the Competition Act and, at present, under EU law (as discussed in paragraph 2.8 below), the Competition and Markets Authority (CMA) and sector regulators are empowered to investigate and enforce infringements of both EU and UK competition law. Section 60 of the Competition Act requires that, to the extent possible, when UK competition regulators and courts are considering questions under Chapters I and II of the Competition Act, they should follow relevant decisions of the Court of Justice of the European Union (CJEU). It further provides a general duty on UK courts and the CMA to “have regard to any decision or statement of the European Commission” when considering questions under Chapters I and II.

- 2.6 Under UK law, claimants may bring follow-on actions for damages in UK courts for infringements of EU competition law, based on decisions by the European Commission. These decisions are binding on UK courts. Claimants may also use decisions of Member State competition authorities as ‘prima facie’ evidence of an infringement of EU law.
- 2.7 The European Commission can make Block Exemption Regulations (BERs) (see paragraph 6.7 of this Explanatory Memorandum) exempting certain categories of agreements from the Article 101(1) TFEU prohibition. Seven BERs are currently in force under EU law, relating to vertical agreements, motor vehicles, research and development, technology transfers, specialisation, liner shipping consortia, and road, rail and inland waterway transport. Section 10 of the Competition Act provides a ‘parallel exemption’ from the prohibitions under UK competition law for agreements which fall within the scope of the BERs or benefit from an individual exemption decision under EU law.
- 2.8 Council Regulation (EC) 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (Regulation 1/2003) sets out the European Commission’s powers to investigate and enforce Articles 101 and 102 of the TFEU. Regulation 1/2003 includes cooperation arrangements between Member States’ national competition authorities, including the exchange of information relevant to investigations and enforcement action. Regulation 1/2003 also provides that, when applying national competition law, Member State national competition authorities must apply Articles 101 and 102 of the TFEU in parallel, if it is suspected that those provisions have also been infringed. The Competition Act includes provisions giving effect to the implementation of Regulation 1/2003 in the UK.
- 2.9 Council Regulation (EC) 139/2004 on the control of concentrations between undertakings (the EUMR) established the ‘one-stop shop’ for merger control in the EU. Under the one-stop shop, if a merger triggers the turnover thresholds set out in the EUMR (has a ‘Community dimension’) then the European Commission has exclusive competence to review that merger. In such circumstances, Member State national competition authorities are prohibited from applying national merger control rules.
- 2.10 The Enterprise Act 2002, which sets out the domestic regime for merger control, also includes provisions dealing with the interaction between the two merger regimes, for example, giving effect to provisions under the EUMR which allow for the transfer of cases between the European Commission and the CMA in certain circumstances.
- 2.11 Various EU regulations issued under the TFEU, such as the EUMR and Regulation 1/2003, implement the rules on competition enforcement and merger control in the Single Market and empower the European Commission to make the BERs. The European Commission issues decisions under some of these regulations (for example, decisions that undertakings have infringed EU competition law).

*What is being changed?*

- 2.12 These Regulations address deficiencies in competition legislation arising from the UK’s exit from the EU. As a result of leaving the EU, the UK will no longer be a part of the EU competition system. The amendments are intended to render the statute book functional by removing references to EU law and institutions and duties on UK bodies which relate to current EU obligations.

- 2.13 These Regulations remove provisions empowering the CMA and sector regulators to investigate and enforce EU competition law and provisions that provide for reciprocal investigation cooperation that would be inappropriate if there is no agreement in place between the UK and EU (or Member States).
- 2.14 Section 60A of the Competition Act will replace former section 60 and modify the relationship between Chapters I and II of the Competition Act and EU law after exit (see paragraph 7.4 of this Explanatory Memorandum).
- 2.15 If an infringement decision under EU law is reached by the European Commission after exit, claimants who wish to pursue follow-on damages claims in UK courts will no longer be able to rely on that decision as a binding finding of an infringement under the Competition Act, and likewise, UK courts will not be required under the Competition Act to treat infringement decisions of a Member State national competition authority as ‘prima facie’ evidence of an infringement.
- 2.16 These Regulations remove irrelevant and inappropriate references in the Enterprise Act that relate to being part of the ‘one-stop shop’ for merger control in the EU.
- 2.17 The BERs will be brought into UK law under the EUWA and these regulations amend them so that they operate effectively in domestic legislation after exit. For example, Euros are changed to Pounds Sterling. Section 10 of the Competition Act will be amended to provide an exemption from domestic competition rules based on compliance with the amended BERs. A new section 10A empowers the Secretary of State to vary or revoke the BERs.
- 2.18 Under the EUWA, at the point of exit, the rights contained in EU and EEA treaty articles, EU competition regulations and European Commission decisions will be incorporated into UK law. These Regulations ‘switch off’ the treaty rights and revoke the EU regulations and Commission decisions, as they are redundant after exit.

What will it do now?

- 2.19 These Regulations provide that the CMA and sector regulators will investigate anti-competitive conduct in the UK market solely under UK law. To the extent that the UK jurisdictional thresholds are met, the CMA will have the power to review all mergers that affect the UK market even where the transaction is also being reviewed by the European Commission. Businesses that currently benefit from the BERs will continue to be exempt under UK law.
- 2.20 After exit, UK consumers and businesses will continue to be able to pursue private follow-on damages claims based on CMA decisions under UK competition law, but UK courts will no longer be bound by EU rulings.
- 2.21 New Section 60A of the Competition Act will provide UK courts and competition regulators with clarity as to how Chapters I and II are to be interpreted after exit.
- 2.22 The UK has domestic equivalents to the EU and EEA treaty rights, which will continue to protect business and consumers from anti-competitive conduct in the UK after exit.
- 2.23 These changes do not represent a policy change to the operation of competition law in the UK. They preserve, so far as possible, the rights, responsibilities and protections offered by the existing system.

### **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 The territorial application of these Regulations includes Scotland and Northern Ireland.

3.3 These Regulations are made to cover the entire United Kingdom (see the EUWA) and the territorial application of these Regulations is not limited either by the EUWA or by the Regulations. Different provisions have different application depending on the application of the legislation that is the subject of modification.

3.4 These Regulations amend certain Northern Ireland legislation.

### **4. Extent and Territorial Application**

4.1 The territorial extent of these Regulations is the entirety of the United Kingdom.

4.2 The territorial application of these Regulations is the entirety of the United Kingdom, although different provisions have different application depending on the application of the legislation that is the subject of modification.

4.3 These Regulations include modifications of Northern Ireland legislation.

### **5. European Convention on Human Rights**

5.1 Parliamentary Under-Secretary of State Kelly Tolhurst has made the following statement regarding Human Rights: “In my view the provisions of the Competition (Amendment etc.) (EU Exit) Regulations 2019 are compatible with the Convention rights.”

### **6. Legislative Context**

#### *Competition Act 1998*

6.1 The Competition Act provides for competition enforcement cooperation between the UK, the European Commission and Member State national competition authorities and grants rights to claimants to pursue private damages claims based on enforcement decisions of the CMA, the European Commission and Member State competition authorities (see also the background provided in paragraphs 2.4-2.8 of this Explanatory Memorandum).

6.2 As described in paragraph 2.8 of this Explanatory Memorandum, Regulation 1/2003 sets out the European Commission’s powers to investigate and enforce Articles 101 and 102 of the TFEU. Under Regulation 1/2003, the European Commission may take jurisdiction over cases that involve anti-competitive conduct in the Single Market, including in the UK. Where it does not, the CMA and sector regulators (for example Ofcom and Ofwat) may investigate the case under UK law (and under EU law, if there is an impact on the Single Market). The Competition Act includes provisions giving effect to obligations on the UK under Regulation 1/2003.

- 6.3 Paragraph 9 of Schedule 3 of the Competition Act provides an exclusion from the Chapter I prohibition for certain agreements between farmers or farmers' associations (or associations of such associations). These Regulations make no amendment to that provision, as the Agriculture Bill, introduced to the House of Commons on 12 September 2018, is amending paragraph 9 of Schedule 3, including removing any deficiencies associated with exiting the EU.
- 6.4 The Competition Act and secondary legislation issued under it contain definitions that refer to EU Regulations, Directives and Recommendations. For example, the definition of 'insurance undertaking' refers to Directive 2009/138/EC of the European Parliament and Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II).
- 6.5 Secondary legislation includes CMA and Competition Appeal Tribunal (CAT) procedural rules. These rules refer to Articles 101 and 102 of the TFEU, EU obligations, and instruments relating to civil judicial cooperation.
- 6.6 These Regulations make appropriate amendments to the Competition Act and secondary legislation to separate the UK's antitrust enforcement regime from the European legislative framework. They also revoke Regulation 1/2003 as it will be irrelevant outside the Single Market.

#### ***Block Exemption Regulations***

- 6.7 A description of the BERs regime is set out in paragraph 2.7 of this Explanatory Memorandum. The BERs are:
- Commission Regulation (EC) 906/2009 on the application of Article 81(3) of the Treaty (establishing the European Community) to certain categories of agreements, decisions and concerted practices between liner shipping companies (consortia);
  - Council Regulation (EC) 169/2009 applying rules of competition to transport by rail, road and inland waterway (under Article 83 of the Treaty establishing the European Community);
  - Commission Regulation (EU) 330/2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices;
  - Commission Regulation (EU) 461/2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices in the motor vehicle sector;
  - Commission Regulation (EU) 1217/2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of research and development agreements;
  - Commission Regulation (EU) 1218/2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of specialisation agreements; and
  - Commission Regulation (EU) 316/2014 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of technology transfer agreements.
- 6.8 These Regulations will amend the BERs (as retained in domestic law by the EUWA) to remove deficiencies, such as references to the TFEU, the internal market and EU

institutions. At present, under EU law BERs can be amended or revoked by the European Commission. This power will be transferred by these Regulations to the Secretary of State so that he can amend the retained BERs, acting in consultation with the CMA.

#### ***Enterprise Act 2002***

- 6.9 The Enterprise Act sets out the UK's statutory regime in relation to merger control and market investigations. It also establishes the specialist Competition Appeal Tribunal and provides a power for the Secretary of State to amend by regulation certain domestic provisions in the Competition Act so as to eliminate or reduce differences between those provisions and EU competition law.
- 6.10 As described in paragraph 2.9 of this Explanatory Memorandum, the EUMR sets out the 'one-stop shop' for merger control in the EU. The Enterprise Act gives domestic effect to provisions under the EUMR.
- 6.11 Secondary legislation made under the Enterprise Act contains definitions that refer to EU Regulations and Directives. For example, the definition of 'financial institution' refers to definitions set out in Regulation (EU) No. 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms.
- 6.12 As a result of the operation of the EUWA, the EUMR will form part of domestic law on exit day (as retained EU law). These Regulations revoke the EUMR and make the changes required to the Enterprise Act and secondary legislation made under it to separate the UK's merger control regime from the system operated within the European Union.

#### ***Other Legislation containing Competition Provisions***

- 6.13 Sector regulators have the power to enforce UK and EU competition law in their sectors, alongside the CMA. These concurrent powers are set out in the Competition Act, secondary legislation issued under it and in the relevant sectoral legislation. These Regulations remove references to EU competition law in the relevant sector legislation (those Acts are amended in Schedule 1 of these Regulations).
- 6.14 The Company Directors Disqualifications Act 1986 and the Company Directors Disqualification (Northern Ireland) Order 2002 provide that competition regulators may seek disqualification orders against directors of companies that have infringed EU or UK competition law. These Regulations remove references to EU competition law and amend the reference made to section 60 of the Competition Act in alignment with the changes set out in paragraphs 7.3-7.4 of this Explanatory Memorandum.
- 6.15 Schedule 11 to the Communications Act 2003 contains a parallel provision to section 60 of the Competition Act. These Regulations modify that Schedule to make parallel provision to that contained in section 60A of the Competition Act.
- 6.16 The Designation of the Competition and Markets Authority as a National Competition Authority Regulations 2014 give effect to European Community rules on competition and designate the CMA as a national competition authority for the purposes of enforcing EU law. These Regulations revoke those Regulations.

### ***Other European Regulations and European Commission Decisions***

- 6.17 EU regulations, including Regulation 1/2003 and the EUMR, implement Single Market competition rules. This EU legislation will become part of the body of retained EU law on exit day and will be immediately revoked by these Regulations.
- 6.18 European Commission decisions issued under EU legislation (for example, infringement decisions) will also become part of domestic law as a result of the EUWA and will be immediately revoked by these Regulations.
- 6.19 A number of European Council Regulations provide enabling powers to the European Commission to make BERs. These Regulations revoke those regulations (see Part 1 of Schedule 3 to the Regulations). However, BERs made under the enabling powers are saved and amended by these Regulations, as described in paragraphs 6.7-6.8 of this Explanatory Memorandum.

### ***Rights under EU Treaties***

- 6.20 As described in paragraphs 2.3 and 2.18 of this Explanatory Memorandum, the rights contained in TFEU and EEA Agreement treaty articles will form part of domestic law on exit day. These Regulations will ‘switch off’ those rights.

### ***Provision for the Charging of Merger Fees***

- 6.21 These Regulations use the powers provided in Paragraph 1(1) of Schedule 4 to the EUWA to make provision for the charging of fees in connection with the exercise of functions conferred upon the CMA and the Secretary of State by paragraphs 19 and 28 of Schedule 4 to the Regulations (saving and transitional provision).

## **7. Policy background**

### ***Competition Act 1998***

- 7.1 Under the Competition Act, the CMA and sector regulators are empowered to investigate and take enforcement action against businesses that infringe UK and EU competition law, and claimants may use these enforcement decisions as a basis for bringing actions for damages. The Competition Act provides for competition enforcement cooperation with the European Commission and Member State competition authorities.
- 7.2 These Regulations amend the Competition Act and secondary legislation under the Act to remove redundant and inappropriate provisions relating to EU law. These amendments make provision for the departure of the UK from the EU competition framework and render the Competition Act functional at the moment of exit. In particular, they:
- bring an end to the CMA and sector regulators’ investigatory and enforcement functions in relation to Articles 101 and 102 of the TFEU and make associated transitional provisions, which will ensure the integrity of CMA investigations live at the point of exit and protect pre-exit commitments, redress schemes, and infringement decisions of the CMA (and associated penalties and rights to appeal) in connection with Article 101 or 102;
  - amend sections 47A and 58A of the Competition Act so that under the Act decisions of the European Commission reached after exit day will no longer be binding on UK courts in follow-on claims for damages and make associated

transitional provisions, which ensure that European Commission decisions reached *before* exit day will continue to be a binding basis of damages, including if they are only made final (i.e. after any appeals have been exhausted or the time for an appeal to be brought has expired) after exit;

- amend paragraph 35 of Schedule 8A to the Competition Act so that UK courts will no longer be required under the Competition Act to treat a decision of a Member State national competition authorities as prima facie evidence of a breach of Article 101 or 102 for the purposes of a follow on claim for damages, and make associated transitional provisions, which will ensure that decisions of national competition authorities reached before exit day retain the statutory status of prima facie evidence (even if they are only made final after exit day);
- repeal Parts 2 and 2A of the Competition Act, which give effect to Articles 20, 21 and 22(2) of Regulation 1/2003 and which concern the inspection of business premises and personal premises by the CMA on behalf of, or in conjunction with, the European Commission or on behalf of a Member State national competition authority. This repeal will have immediate effect upon exit (this does not affect or curtail the prosecution of offences committed before exit day under these Parts);
- adapt the definitions of small- or medium-sized enterprise, insurance undertaking, financial institution and provisions specifying items included in calculating turnover (which refer to EU Regulations, Recommendations and Directives) to ensure they function after exit; and
- amend CMA and CAT procedural rules to ensure that they align with the amendments being made to the Competition Act and to the Civil Procedure Rules.

7.3 These Regulations repeal section 60 of the Competition Act, which provides that, in so far as possible, the CMA and UK courts must interpret UK competition law in a manner that is consistent with EU competition law and must have regard to any decision or statement of the European Commission.

7.4 Section 60A will replace former section 60 and modify the relationship between the domestic prohibitions and EU law after exit. Section 60A provides that competition regulators and UK courts will continue to be bound by an obligation to ensure no inconsistency with pre-exit EU competition case law when interpreting UK competition law, but that they may depart from such pre-exit EU case law where it is considered appropriate in the light of specified circumstances. Section 60A will apply from the point of exit to all competition regulator investigations and UK court cases whether the facts of those cases arose before or after exit.

7.5 These Regulations include transitional provisions that will prevent the CMA from opening investigations into infringements of UK competition law after exit where, before exit, the European Commission had relieved the CMA of competence and had reached an infringement decision (and which has not subsequently been annulled). After exit, the CMA will otherwise be free to conduct investigations into breaches of the domestic prohibitions occurring before or after exit day, including in cases where the CMA had ceased its investigation by virtue of the European Commission launching an investigation. This ability, given the equivalence of the Chapter I and



Chapter II prohibitions to the European prohibitions, ensures that there is no risk of an enforcement gap under UK law after exit.

- 7.6 Currently, if the European Commission is in the process of making an infringement decision, a business may apply to the CMA for approval of a redress scheme (under which a business offers compensation for its wrongdoing). Once the European Commission reaches a decision, the CMA may approve and then enforce the redress scheme. These Regulations remove references to European Commission decisions being the foundation for CMA approval of a redress scheme, as it would be inappropriate after exit. However, where the European Commission reaches an infringement decision before the UK leaves the EU, the CMA will continue to be able to approve and enforce such redress schemes.
- 7.7 These Regulations include transitional provisions that maintain the right of claimants to bring claims for alleged breaches of EU competition law on a ‘standalone basis’ (meaning the claimant must prove the undertakings infringed competition law) based on anti-competitive conduct that occurred while the UK was a Member State. For the purposes of calculating the limitation period to bring these claims in respect of a case which the European Commission has not concluded before exit day, the period before exit during which the European Commission was investigating will not be counted when calculating whether the time period to bring a standalone claim has expired.
- 7.8 These Regulations support the Government’s policy on EU exit, which is to preserve the domestic competition system, end the jurisdiction of the CJEU, and make appropriate provision for the UK competition system to operate independently of the EU system.

### ***Block Exemption Regulations***

- 7.9 The BERs provide an exemption from Article 101(1) of the TFEU for certain categories of agreements (as listed in paragraph 6.7 of this Explanatory Memorandum) that fall within the scope of Article 101(1) but nonetheless have countervailing benefits for consumers. Under the Research and Development BER, for example, competitors may cooperate across borders in the creation and marketing of new technology. BERs represent an important element of the antitrust enforcement regime, reducing compliance costs, providing legal certainty and exempting only those categories of agreement that overall can be expected to have a benign or beneficial effect on competition.
- 7.10 These Regulations ensure that the ‘retained BERs’ provide an exemption from the Chapter I prohibition and continue to feature the same market share thresholds and expiry dates as the EU block exemptions currently in force. These Regulations replace references to EU Treaties and institutions with references to domestic legislation and institutions, as appropriate, and amounts given in Euros are changed to Pounds Sterling.
- 7.11 The retained BERs will expire on dates between 2022 and 2026 (with the exception of the Rail, Road and Water BER, which does not have an expiry date), at which point the Government will decide whether to renew them. On their expiry the Secretary of State may replace a retained BER with a Block Exemption Order (BEO) made with existing powers under the Competition Act. At present, a BEO may be used to exempt agreements from the UK’s domestic prohibitions. Any new BEOs would be the subject of a recommendation from the CMA, following consultation under the process set out in the Competition Act.

7.12 The intention is that existing agreements between companies that benefitted from the parallel application of an EU exemption to the UK antitrust prohibitions prior to EU exit should continue to benefit from that exemption in the UK under the amended BERs after exit. Companies will also be able to benefit from the retained BERs within the UK when they enter into new agreements that meet the relevant criteria after EU exit.

*Enterprise Act 2002*

7.13 The Enterprise Act specifies the CMA's functions, powers and duties in relation to merger control and market investigations in the UK.

7.14 These Regulations revoke the EUMR, which will become part of domestic law by virtue of the EUWA on exit day, as the EUMR is irrelevant without participation in the EU competition regime. They also make the changes necessary to the Enterprise Act and secondary legislation issued under the Enterprise Act to separate the two merger control regimes. In particular, these Regulations remove provisions which will be redundant or no longer appropriate once the UK is no longer part of the EU merger control system, including:

- references to the UK having made a request (an Article 22 request) to the European Commission to consider a case under the EUMR instead of it being dealt with under the domestic regime;
- provisions which allow an extension of the statutory time limits for the CMA to call in a transaction for scrutiny in circumstances where the European Commission is considering an Article 22 request made by the UK under the EUMR; and
- the power of the Secretary of State to issue a European Intervention Notice in relation to a case which is being reviewed by the European Commission under the EUMR.

7.15 Part 3 of the Enterprise Act includes provisions allowing the Secretary of State to intervene in a merger transaction to protect the public interest. The public interest grounds on which the Secretary of State may intervene are set out in section 58 of the Enterprise Act and include national security. Currently national security is defined as including 'public security', which is stated to have the same meaning as it does in the EUMR. These Regulations amend the definition of public security by removing reference to the EUMR. This amendment is intended to ensure that in future the point of reference for what public security means in the UK is not its meaning for the EU. Although the link to the definition in the EUMR is being removed in connection with EU exit, the intention is not to signal that what public security means for the UK is fundamentally different from its current meaning within the EU.

7.16 These Regulations repeal section 209 of the Enterprise Act. Section 209 provides a power for the Secretary of State to amend the domestic provisions of the Competition Act by regulation, so as to eliminate or reduce differences between those provisions and EU competition law. After exit the UK will no longer be bound by future changes in EU competition law. Consequently, there will be no automatic need for the Secretary of State to amend UK law to remove inconsistencies. Further, the power was delegated in the context of the UK's membership in the EU and a closer relationship to that jurisdiction than any other international competition regime. Given the change in that relationship, it is not appropriate to retain the power.

- 7.17 Section 16 of the Enterprise Act sets out the power of the Lord Chancellor to make regulations providing for the transfer of cases from UK courts to the CAT where they concern any question relating to whether there has been a breach of the competition prohibitions, as set out in the Competition Act. These Regulations amend section 16 to remove references to Articles 101 and 102 of the TFEU, as they will be irrelevant after exit. The Regulations include transitional provisions which will empower the Lord Chancellor to continue to make regulations with respect to the transfer of cases involving conduct that occurred pre-exit under Articles 101 and 102, if appropriate.
- 7.18 These Regulations include transitional provisions relating to exit for merger cases. These include a bar on the CMA launching a parallel investigation in relation to a merger in respect of which the European Commission has reached a merger decision before exit. There will, however, be some merger cases which are live at the point the UK exits the EU, that is cases which have been notified or referred to the European Commission under the EUMR, but on which a decision has not been reached before exit day. If the European Commission has not made a merger decision in the case or if a European Commission decision has been reached before exit but is later annulled in full or in part on appeal, the UK aspects of those cases will return to the jurisdiction of the CMA (provided the merger falls within the review thresholds set out in the Enterprise Act).
- 7.19 These Regulations also make transitional provision to ensure that in a case where a pre-exit decision by the European Commission is annulled, the CMA is not ‘timed out’ in terms of its ability to investigate the merger, if appropriate. This approach ensures that there is no enforcement gap under domestic law after exit.
- 7.20 There might also be merger cases decided or still under review by the European Commission at the point of exit where the Secretary of State has issued a European intervention notice to protect the public interest. These Regulations make transitional and saving provisions ensuring that the public interest intervention process can continue after exit in relation to the merger. In a case where the European Commission has not made a merger decision dealing with the competition aspects of the transaction before exit, these Regulations provide for the European intervention process to be converted into a domestic public interest intervention and make appropriate adjustments allowing the CMA to consider the impact of the merger on competition in the UK. These Regulations also preserve the ability of the Secretary of State to give a European Intervention Notice in any case already decided by the European Commission before exit, if he would have been entitled to give such a notice immediately before exit.
- 7.21 These Regulations amend secondary legislation issued under the Enterprise Act. These changes include amending the definition of insurance undertaking and financial institution so that the statute book is functional after exit. These amended definitions correct deficiencies but do not contain any substantive changes to the definitions.
- 7.22 These Regulations make relevant consequential amendments to the regime for mergers involving water companies, as set out in the Water Mergers (Modification of Enactments) Regulations 2004 (S.I. 2004/3202).
- 7.23 These regulations support the Government’s position on EU exit to end CJEU jurisdiction in the UK, preserve the existing legislative framework as far as possible and only make amendments that are necessary to enact EU exit. These Regulations

will ensure a smooth transition to a freestanding UK merger control regime from exit day.

#### *Other Domestic Legislation containing Competition Provisions*

- 7.24 Sector regulators have the power to enforce UK and EU competition law alongside the CMA under relevant sector legislation. After exit, the UK will no longer be part of the EU competition framework, and therefore, these Regulations bring to an end the power of the CMA and sector regulators to investigate anti-competitive behaviour in the Single Market. The transitional provisions relating to CMA investigations under Part 1 of the Competition Act and described in paragraphs 7.2 and 7.5-7.6 of this Explanatory Memorandum will also apply to sector regulators.

#### *Northern Ireland Legislation*

- 7.25 Competition is reserved to Westminster (see paragraph 26 of Schedule 3 to the Northern Ireland Act 1998). These Regulations amend competition provisions in the Electricity (Northern Ireland) Order 1992, the Gas (Northern Ireland) Order 1996, the Water and Sewerage (Northern Ireland) Order 2006, and the Company Directors Disqualification (Northern Ireland) Order 2002.
- 7.26 These Regulations amend these Orders in alignment with the approach taken to amendments to the UK competition regime, including removing references to EU law and obligations under EU law in these Orders and making provision for a smooth transition to a standalone regime.

#### *Other European Regulations and European Commission Decisions*

- 7.27 These Regulations revoke various EU competition regulations (other than the block exemption regulations discussed in 7.9-7.12) as they have no legal effect outside membership of the European Union and would be inappropriate to keep on the UK statute book, as they relate to rules and obligations associated with participation in the EU competition system.
- 7.28 European Commission decisions made under some of the EU regulations are also revoked, as they will be redundant as a matter of domestic law but will remain in force and binding on those to whom they are addressed as a matter of EU law.

#### *Rights under EU Treaties*

- 7.29 As described in paragraph 2.18 of this Explanatory Memorandum, rights contained in the EU and EEA treaties will be redundant after exit. UK consumers and businesses will continue to be protected from anti-competitive conduct under the prohibitions in Chapters I and II of the Competition Act. There is an exception in the Competition Act for businesses that provide services of general economic interest which is similar to the provision in Article 101(3) of the TFEU. Article 106 will be irrelevant after exit.

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

- 8.1 These Regulations are being made using the power in section 8 of the EUWA to address failures of retained EU law and other deficiencies arising from the withdrawal of the United Kingdom from the European Union. The Regulations are also made

under the powers in paragraph 21 of Schedule 7 to the EUWA, which allow for consequential and transitional provision to be made.

8.2 These Regulations are further made under the powers in paragraph 1(1) of Schedule 4 to the EUWA, which allow for provision to be made in connection with the charging of fees (see paragraph 6.21 of this Explanatory Memorandum).

8.3 In accordance with the requirements of the EUWA the Minister has made the relevant statements as detailed in Part 2 of the Annex to the Explanatory Memorandum.

## **9. Consolidation**

9.1 There is no current plan to consolidate the legislation amended by these Regulations.

## **10. Consultation outcome**

10.1 Informal consultation has been undertaken with the CMA, sector regulators, the CAT and specialist competition lawyers. Their views have been taken into consideration in the development of these Regulations.

## **11. Guidance**

11.1 It is not necessary to issue guidance with respect to these Regulations.

## **12. Impact**

12.1 There is no significant impact on businesses, charities or voluntary bodies. Whilst businesses will incur costs from familiarising themselves with the changes to the operation of competition law following EU exit, these Regulations reduce the burden of familiarisation by providing greater clarity.

12.2 There is no significant impact on the public sector.

12.3 An Impact Assessment has not been prepared for these Regulations because there is a low impact on business.

## **13. Regulating small business**

13.1 These Regulations apply to activities that are undertaken by small businesses.

## **14. Monitoring & review**

14.1 As these Regulations are made under the EUWA, no review clause is required.

## **15. Contact**

15.1 Angela Brown at the Department for Business, Energy and Industrial Strategy, telephone: 020 7215 2766 or email: [angela.brown@beis.gov.uk](mailto:angela.brown@beis.gov.uk) can be contacted with any queries regarding the instrument.

15.2 Christopher Blairs (Deputy Director, 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 Kelly Tolhurst at the Department of Business, Energy and Industrial Strategy can confirm that this Explanatory Memorandum meets the required standard.

# Annex

## Statements under the European Union (Withdrawal) Act 2018

### Part 1

#### Table of Statements under the 2018 Act

This table sets out the statements that may be required under the 2018 Act.

Statement	Where the requirement sits	To whom it applies	What it requires
Sifting	Paragraphs 3(3), 3(7) and 17(3) and 17(7) of Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) to make a Negative SI	Explain why the instrument should be subject to the negative procedure and, if applicable, why they disagree with the recommendation(s) of the SLSC/Sifting Committees
Appropriate-Ness	Sub-paragraph (2) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) or jointly exercising powers in Schedule 2	A statement that the SI does no more than is appropriate.
Good Reasons	Sub-paragraph (3) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) or jointly exercising powers in Schedule 2	Explain the good reasons for making the instrument and that what is being done is a reasonable course of action.
Equalities	Sub-paragraphs (4) and (5) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) or jointly exercising powers in Schedule 2	Explain what, if any, amendment, repeals or revocations are being made to the Equalities Acts 2006 and 2010 and legislation made under them.  State that the Minister has had due regard to the need to eliminate discrimination and other conduct prohibited under the Equality Act 2010.
Explanations	Sub-paragraph (6) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9 and 23(1) or jointly exercising powers in Schedule 2 In addition to the statutory obligation the Government has made a political commitment to include these statements alongside all EUWA SIs	Explain the instrument, identify the relevant law before exit day, explain the instrument's effect on retained EU law and give information about the purpose of the instrument, e.g., whether minor or technical changes only are intended to the EU retained law.
Criminal offences	Sub-paragraphs (3) and (7) of paragraph 28, Schedule 7	Ministers of the Crown exercising sections 8(1), 9, and	Set out the 'good reasons' for creating a criminal offence, and the penalty attached.

		23(1) or jointly exercising powers in Schedule 2 to create a criminal offence	
Sub-delegation	Paragraph 30, Schedule 7	Ministers of the Crown exercising sections 10(1), 12 and part 1 of Schedule 4 to create a legislative power exercisable not by a Minister of the Crown or a Devolved Authority by Statutory Instrument.	State why it is appropriate to create such a sub-delegated power.
Urgency	Paragraph 34, Schedule 7	Ministers of the Crown using the urgent procedure in paragraphs 4 or 14, Schedule 7.	Statement of the reasons for the Minister's opinion that the SI is urgent.
Explanations where amending regulations under 2(2) ECA 1972	Paragraph 13, Schedule 8	Anybody making an SI after exit day under powers outside the European Union (Withdrawal) Act 2018 which modifies subordinate legislation made under s. 2(2) ECA	Statement explaining the good reasons for modifying the instrument made under s. 2(2) ECA, identifying the relevant law before exit day, and explaining the instrument's effect on retained EU law.
Scrutiny statement where amending regulations under 2(2) ECA 1972	Paragraph 16, Schedule 8	Anybody making an SI after exit day under powers outside the European Union (Withdrawal) Act 2018 which modifies subordinate legislation made under s. 2(2) ECA	Statement setting out: a) the steps which the relevant authority has taken to make the draft instrument published in accordance with paragraph 16(2), Schedule 8 available to each House of Parliament, b) containing information about the relevant authority's response to— (i) any recommendations made by a committee of either House of Parliament about the published draft instrument, and (ii) any other representations made to the relevant authority about the published draft instrument, and, c) containing any other information that the relevant authority considers appropriate in relation to the scrutiny of the instrument or draft instrument which is to be laid.

## Part 2

### Statements required when using enabling powers under the European Union (Withdrawal) 2018 Act

#### 1. Appropriateness statement

- 1.1 The Parliamentary Under-Secretary of State Kelly Tolhurst has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

“In my view the Competition (Amendment etc.) (EU Exit) Regulations 2019 do no more than is appropriate”.

- 1.2 This is the case because the Regulations correct legislative deficiencies arising from EU exit and the coming into force of the European Union (Withdrawal) Act 2018. They remove or replace references to obligations related to membership of the EU competition system that will become redundant after the withdrawal of the UK from the EU and make appropriate provision for the UK competition system to operate independently of the EU system. These Regulations do not change UK competition policy or impose any new liabilities.

#### 2. Good reasons

- 2.1 The Parliamentary Under-Secretary of State Kelly Tolhurst has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

“In my view there are good reasons for the provisions in these Regulations, and I have concluded they are a reasonable course of action”.

- 2.2 The reasons are that these Regulations address failures of retained EU law to operate effectively and other deficiencies arising from the withdrawal of the UK from the EU and the coming into force of the European Union (Withdrawal) Act 2018. The policy rationale for the changes is set out in section 7 of this Explanatory Memorandum.

#### 3. Equalities

- 3.1 The Parliamentary Under-Secretary of State Kelly Tolhurst has made the following statement(s):

“These draft Regulations do not amend, repeal or revoke a provision or provisions in the Equality Act 2006 or the Equality Act 2010 or subordinate legislation made under those Acts.”

- 3.2 The Parliamentary Under-Secretary of State Kelly Tolhurst has made the following statement regarding use of legislative powers in the European Union (Withdrawal) Act 2018:

“In relation to these draft Regulations, I, Kelly Tolhurst, have had due regard to the need to eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the Equality Act 2010.”



#### **4. Explanations**

- 4.1 The explanations statement has been made in section 2 of this Explanatory Memorandum