

**EXPLANATORY MEMORANDUM TO**  
**THE COMPETITION (AMENDMENT ETC.) (EU EXIT) (NO. 2) REGULATIONS**  
**2019**

**2019 No. 1245**

**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 The 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 withdrawal agreement is reached between the UK and the European Union. These Regulations retain decisions made by the European Commission under EU regulations. These decisions contain commitments given by parties to address competition concerns identified in the course of EU anti-trust investigations or merger reviews, which relate to the supply or acquisition of goods or services in the UK.
- 2.2 Currently, the UK benefits from these commitments as a result of the UK's anti-trust enforcement and merger control systems being integrated with the EU. These Regulations ensure that the UK can continue to benefit from the commitments after exiting the EU in order to prevent any potential harm to UK consumers and businesses.
- 2.3 The Regulations make amendments to the savings and transitional provisions in the Competition (Amendment etc.) (EU Exit) Regulations 2019 to clarify the law and procedure to be applied in private law claims, which involve 'combined elements' following the UK's exit from the EU e.g. claims involving breaches of both the domestic and European prohibitions and claims which involve behaviour which spans exit day.
- 2.4 The Regulations amend the following domestic legislation:
  - the Competition Act 1998 and secondary legislation issued under it;
  - the Enterprise Act 2002; and
  - the Competition (Amendment etc) (EU Exit) Regulations 2019 ("the principal Exit Regulations").
- 2.5 The Regulations make consequential amendments to a number of other pieces of primary and secondary legislation.

## *Explanations*

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

- 2.6 *Council Regulation (EC) 139/2004 (Regulation 139/2004) on the control of concentrations between undertakings* (the EUMR) allows the European Commission to clear a merger subject to conditions and obligations which are offered by the parties in the form of commitments.
- 2.7 Under the EUMR, where such commitments are not complied with by the parties, this may have the effect of making the merger clearance void, or could lead to the Commission revoking the clearance, ordering the dissolution of the merger or applying financial sanctions.
- 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) provides that, where the European Commission has commenced an investigation into an alleged infringement of the prohibitions imposed by Articles 101 and 102 of the *Treaty on the Functioning of the European Union* (TFEU) it may, rather than conclude the investigation through making an infringement decision, accept commitments from the parties to meet its concerns.
- 2.9 Where the proposed commitments are acceptable, the European Commission may by decision make them binding on the parties. This also has the effect of preventing the European Commission from taking any further action in relation to the investigation, so long as those commitments are considered to deal with its concerns and are complied with by the parties.
- 2.10 Commitments provided under either the EUMR or Regulation 1/2003 may address competition concerns within the UK, either specifically or as part of EU- or EEA-wide commitments. Compliance with these commitments is monitored and enforced by the European Commission.

### Why is it being changed?

- 2.11 It was previously thought that the European Commission would continue to monitor and enforce commitments related to the UK which it had accepted prior to the UK leaving the EU. However, in March 2019, the European Commission published guidance indicating that after the UK exited the EU “*parties may in certain circumstances consider requesting the Commission to waive, modify or substitute*” merger commitments that address issues in UK markets only (or markets including only the UK and a third country).
- 2.12 If the European Commission were to allow such requests, leading to variation or removal of merger commitments insofar as they relate to the UK, the Competition and Markets Authority (CMA) would be unable to enforce the original commitments or put in place new commitments to remedy the harm. To do so would require the UK competition authorities to retrospectively consider a merger that has previously been cleared during the UK’s membership of the EU. The CMA’s inability to retrospectively consider the merger could lead to an enforcement gap damaging to UK consumers and businesses. A similar risk has been identified for commitments under which competition concerns in the UK may be addressed as part of EU- or EEA-wide commitments.

- 2.13 The potential for an enforcement gap also arises with respect to commitments provided in anti-trust cases in lieu of an infringement decision. Whilst the UK competition authorities would not be barred from opening a new investigation, an enforcement gap would be in place for the period of time it would take a regulator to investigate the case which, depending on its complexity, could run for a number of years.
- 2.14 The principal Exit Regulations currently revoke all EU Decisions made by the European Commission under the EUMR and Regulation 1/2003, which would include commitments which relate to the UK. There is also currently no provision made for the UK competition authorities to be able to monitor and enforce these commitments once the UK has left the EU.
- 2.15 The principal Exit Regulations make changes to the provisions which apply in relation to private law damages claims for infringements of competition law after exit. They provide that after exit, while UK consumers and businesses will continue to be able to pursue private law follow-on damages claims based on CMA decisions, decisions made by the European Commission on or after exit day will no longer be binding on UK courts, nor will decisions made after exit by national competition authorities in other member States be treated as prima facie evidence of an infringement.
- 2.16 The principal Exit Regulations make transitional provisions for private law claims relating to domestic infringements and EU infringements, however do not expressly address the position in relation to claims which involve ‘combined elements’, that is, those which involve breaches of the domestic and EU prohibitions after exit day, or claims which involve behaviour which spans exit day.

What will it now do?

- 2.17 The Regulations will amend the principal Exit Regulations to preserve, as retained EU law, commitments that “*relate to the supply or acquisition of goods or services in the United Kingdom*” and empower the UK competition authorities to monitor and enforce those commitments.
- 2.18 The Regulations contain a list of EU Decisions that are to be preserved as retained EU law which include such commitments as well as providing for any EU decisions made between 15 August 2019 and exit day to be preserved if they too contain commitments that relate to the supply or acquisition of goods or services in the United Kingdom. The list of EU Decisions to be preserved includes those relating to 12 anti-trust cases and those concerning 31 merger clearance cases.
- 2.19 The Regulations include provisions for the amendment and interpretation of these commitments to ensure they operate effectively in domestic law.
- 2.20 The powers granted to the UK competition authorities to monitor and enforce these commitments will broadly mirror those which are available where such commitments are given under the UK competition regime, except where specific provision is required to cater for any particularities of these commitments arising as a result of them being originally provided to the European Commission.
- 2.21 The Regulations include minor drafting changes to the transitional provisions in the principal Exit Regulations. These changes clarify the applicable law and procedure to be applied in private law damages claims, which deal with breaches of both the domestic and EU prohibitions after exit day, or claims which involve behaviour which spans exit day.

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

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

- 3.1 The instrument is made using the urgent procedure, as provided for in paragraph 5(2) of Schedule 7 to the EUWA. In accordance with the requirements of paragraph 34(2) of that Schedule, the Minister has made a statement on the use of the urgent procedure in Part 2 of the Annex to this Explanatory Memorandum.

#### *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 the Regulations includes Scotland and Northern Ireland.
- 3.3 The 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 The Parliamentary Under Secretary of State, Minister for Small Business, Consumers and Corporate Responsibility, Kelly Tolhurst, has made the following statement regarding Human Rights:

“In my view the provisions of the Competition (Amendment etc.) (EU Exit) (No.2) Regulations 2019 are compatible with the Convention rights.”

### **6. Legislative Context**

#### Competition Act 1998

- 6.1 The Competition Act sets out the domestic competition regime, 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.
- 6.2 In particular, under the domestic regime set out in the Competition Act 1998, where the UK competition authorities have started an investigation but have yet to make a decision on whether the relevant domestic prohibitions have been infringed, they are empowered to accept commitments (‘domestic commitments’) from the parties involved to take action (or refrain from taking action) for the purposes of addressing the competition concerns which have been identified. The UK competition authorities

are also empowered to vary, substitute or release those domestic commitments where appropriate and take action to enforce them where they are not being complied with.

- 6.3 The principal Exit Regulations make amendments to the Competition Act 1998 and secondary legislation to separate the UK's anti-trust enforcement regime from the European legislative framework.
- 6.4 They also revoke Regulation 1/2003 as it will be irrelevant outside the Single Market, and EU regulations and EU decisions made under Regulation 1/2003. The principal Exit Regulations did not make any specific provision dealing with commitments given by parties to the European Commission under Regulation 1/2003.

#### Enterprise Act 2002

- 6.5 The Enterprise Act sets out the UK's statutory regime in relation to merger control. At domestic level, parties to a merger transaction who are seeking clearance for the deal may offer undertakings to the CMA in lieu of a reference for a full assessment of the transaction, or on the conclusion of an assessment, in order to secure clearance for the deal. These undertakings are kept under review by the CMA, which may vary, substitute or release them, and has enforcement powers should the parties not comply with them.
- 6.6 The EUMR sets out a "one stop shop" for merger control in the EU. Where a transaction has a European dimension, as defined in the EUMR, it will fall for consideration by the European Commission rather than the CMA. As referred to in paragraph 2.5 of this Explanatory Memorandum, the EUMR empowers the European Commission to attach to its decision to clear a proposed merger, conditions and obligations which have been offered by the parties in the form of commitments. Where parties fail to comply with commitments, it may have the effect of making the merger clearance void or allow the European Commission to revoke the clearance and require the transaction to be unwound or impose financial penalties.
- 6.7 The principal Exit Regulations revoke the EUMR, which would otherwise form part of domestic law on exit day as a result of the operation of the EUWA and all EU regulations and EU decisions made under the EUMR. They make the amendments required to the Enterprise Act to separate the UK's merger control regime from the system operated within the EU. The principal Exit Regulations did not make any specific provision dealing with commitments given by parties to the European Commission under the EUMR.

## **7. Policy background**

### *What is being done and why?*

- 7.1 As referred to in paragraph 2.10 of this Explanatory Memorandum, it was previously thought that the European Commission would continue to monitor and enforce commitments it had accepted, insofar as they related to the UK. However, its guidance published in March 2019 has made clear that there is a risk that this will not be the case. If this risk materialised it could lead to an enforcement gap damaging to UK consumers and business.
- 7.2 The Regulations seek to close the potential enforcement gap in the following ways.

Amendment of Schedule 3 to the principal Exit Regulations – amendment of retained direct EU legislation

- 7.3 Section 3 of the EUWA preserves as domestic law decisions made by the European Commission under the EUMR and Regulation 1/2003 before exit day, however the principal Exit Regulations currently revoke these. The Regulations amend Part 1 of Schedule 3 to the principal Exit Regulations in order to prevent the revocation of those decisions which contain commitments which relate to the UK. Decisions made by the European Commission before 15 August 2019 which are to be retained have been specifically listed. However, to ensure any relevant decisions made by the European Commission between the determination of that list on 15 August 2019 and the Regulations coming into force on Exit day, provision is also made for any such EU Decisions made between these dates, under either the EUMR or Regulation 1/2003, which contain commitments that relate to the supply or acquisition of goods or services in the UK, to be retained.
- 7.4 In order to ensure that within these decisions only commitments relevant to the UK are retained, the Regulations insert a new paragraph 2A into Schedule 3 to the principal Exit Regulations, which revokes any commitments which do not relate to the supply or acquisition of goods or services in the UK.
- 7.5 The Regulations insert a new paragraph 2B into Schedule 3 to the principal Exit Regulations which requires the CMA to publish guidance as to how it will interpret and apply the test of whether or not commitments relate to the supply or acquisition of goods or services in the UK.
- 7.6 In order to ensure that those commitments which are retained in domestic law operate effectively, the Regulations make provision amending them and in relation to their interpretation. In particular the Regulations:
- insert new paragraph 12, providing that the commitments should be read as though provisions related to the powers of the European Commission to modify or enforce the commitments were omitted as these are no longer appropriate;
  - insert new paragraphs 13 and 14, making “glossing” provisions, providing that references to the European Commission, so far as the context permits or requires, must be read as a reference to the CMA, and references to the area of the EU or EEA, the internal market, a Member State, a party to the EEA agreement, must be read as though they included the UK. This will ensure that the commitments continue to operate effectively in relation to the UK;
  - insert new paragraph 15, providing that any approval or any other decisions made under a retained EU commitment decision made by the European Commission immediately before exit is to be deemed to have been given or made by the CMA. This will mean that a Monitoring Trustee approved by the European Commission is also deemed to have been approved by the CMA;
  - insert new paragraph 16, which deals with interpretation provisions within the retained decisions and provides that where any such provision requires the commitments to be interpreted in the light of EU law, EU competition law, or a notice issued by the European Commission under either the EUMR or Regulation 1/2003, the provision should be read as if it referred to EU law, EU competition law, or the European Commission notice, as they have effect immediately before exit day; it also ensures that such interpretation provisions

only apply so far as is consistent with any subsequent amendments to the retained EU commitments made by domestic law;

- insert new paragraph 17 which provides that other provisions of the retained EU commitments which refer to matters under the commitments being subject to the application of EU competition law or applicable EU competition rules (e.g. provisions which say that merger parties can enter into particular types of arrangements provided they are consistent with applicable EU competition rules) are read instead as references to either the Competition Act 1998 or the Enterprise Act 2002, as applicable;
- insert new paragraph 18 which provides that references in the retained EU commitments to the EUMR and Regulation 1/2003 are references to those regulations as at exit day; and
- insert new paragraph 19, which makes specific provision in relation to European Commission Decision of 20.7.2016 addressed to the International Swaps and Derivatives Association, Inc. relating to a proceeding under Article 101 of the Treaty on the Functioning of the European Union and Article 53 of the EEA Agreement in case AT.39745 – CDS Information Market, which is preserved in domestic law by virtue of the new paragraph 2(1)(c) inserted into Schedule 3. The commitments comprised in this decision include a reference to Article 37(1) of Regulation (EU) No. 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Regulation (EU) No 648/2012. Article 37 stipulates a time limit which is relevant to the operation of the commitments comprised in the decision. New paragraph 19 expressly provides that the reference to article 37 should be read as a reference to the provision as it has effect immediately before exit day to ensure that the commitment will continue to operate effectively after exit. Paragraph 19 ensures that references to Article 37 are not read as though to the version retained under section 3 of the EUWA and does not capture the domestic modifications made to the instrument, which would have been the case if the amendment was not made. This would have been problematic in relation to Article 37, as it is revoked by the domesticated version of the Regulations.

#### Amendment of the Enterprise Act 2002

- 7.7 The Regulations further amend the Enterprise Act 2002 in order to give the CMA powers to deal with the retained commitments after exit day.
- 7.8 The powers are similar to those which would have been available to it had these been domestic undertakings accepted in the course of its own merger investigation (see Chapters 4 and 5 of Part 3 of the Act). Where there are any deviations, these are largely to address the particularities relating from the commitment being provided to the European Commission. Specifically, the Regulations:
- insert a new section 84A (similar to section 82 of the Enterprise Act 2002), which outlines the concept of a retained EU merger commitment, deeming these to have been accepted by the CMA and providing that these commitments will retain their character as retained EU merger commitments even if varied or superseded;

- insert a new section 84B (similar to section 87 of the Act), providing the CMA with the power to give directions to ensure compliance with a retained EU commitment;
- insert a new section 84C (similar to section 83 of the Act), enabling the CMA to make an enforcement order where a retained EU merger commitment is not being complied with or where false or misleading information has been given in connection with it. The enforcement order may make provision for the purpose of remedying, mitigating or preventing the competition concerns which the retained EU merger commitment concerned was intended to address. An order can override and replace the original retained EU merger commitment or add further measures, such as the appointment of a third party monitoring trustee to oversee a divestment or behavioural undertaking, or strengthening the reporting or monitoring obligations of an existing trustee. The CMA is only able to use the new section 84C order-making power where a retained EU merge commitment is not being complied with or false or misleading information has been provided. In such circumstances it may be that the retained EU merger commitments in place are insufficient to address the harm. The power to issue an order, especially in a case of non-compliance, also has a deterrent effect. The alternative to a section 84C order is for the CMA to go to Court to ensure compliance and, as mentioned, in some circumstances, compliance with the existing commitments alone may not be enough. Without the new 84C the CMA would not have one of the significant domestic remedies powers (section 83 of the Act) available to it in relation to retained EU merger commitments;
- amend section 86 of the Act which deals with the general provisions which apply to the making of enforcement orders under the Act to ensure that these general provisions apply to an enforcement order under the new section 84C. However, in one difference of approach, such an order will be permitted to extend to conduct outside the UK of the person who gave the retained EU merger commitment even if that person is not a UK national, UK incorporated company or a company carrying on business in the UK. This ensures that obligations which involve conduct outside the UK, agreed as part of the retained EU merger commitment signed up to by that person, are capable of being fully enforced;
- insert a new section 92A, which imposes a duty on the CMA to monitor compliance with and the continued appropriateness of retained EU merger commitments and related enforcement orders. This is similar to the duty which applies under section 92 of the Act in respect of domestic undertakings, except that the CMA will have the power to vary, supersede or release a commitment not only where there has been a change of circumstance but also for “any other reason”. Although the CMA is not expected to have to resort to it as a matter of course, this additional flexibility will allow the CMA to make adjustments which are needed to deal with any consequences arising from exit or from the transfer of the commitments from the European Commission to the CMA;
- insert a new section 95A (similar to section 94 of the Act), explicitly providing for the CMA to have a right to enforce the retained EU merger commitments through civil proceedings, notwithstanding the presence of arbitration provisions in such commitments. Section 95A does not affect the rights of any other person to bring civil proceedings; and



- make other relevant consequential amendments to the Enterprise Act 2002 to ensure that information powers, appeal rights and procedural requirements which would apply to domestic undertakings also apply to retained EU merger commitments. In particular, section 109 is amended.
- 7.9 Section 109 sets out the CMA’s powers to require persons to give evidence and to provide specified documents and information needed for a “permitted purpose” in connection with a merger inquiry. The Regulations amend section 109 so that the “permitted purposes” include assisting the CMA in carrying out any “commitments enforcement functions”, which include functions relating to the monitoring and variation, supersession or release of retained EU merger commitment.
- 7.10 Failure to comply with a notice under s. 109, requiring the production of documents and information and the attendance of witnesses, gives rise to the possibility of a financial penalty being imposed by the CMA and it is a criminal offence if a person intentionally alters, suppresses or destroys any document he has been required to produce by a notice under section 109. A person who commits such an offence is liable, on summary conviction, to a fine not exceeding the statutory minimum, and on indictment to imprisonment for a term not exceeding two years, or a fine, or both. These existing penalties will apply in relation to non-compliance as they would in relation to a case involving a domestic undertaking.

Amendment of the Competition Act 1998

- 7.11 The Regulations further amend the Competition Act 1998 in order to give the CMA powers to deal with the retained commitments after exit day.
- 7.12 They insert provisions into the Competition Act 1998 to deem retained EU anti-trust commitments to have been accepted by the CMA and provide it with similar powers to those which would have been available to it had these been domestic commitments accepted in the course of an investigation undertaken under section 25 of the Competition Act 1998 (see sections 31A to 31C and section 31E). Where there are any deviations, these are largely to address the fact that these commitments have not arisen as a result of the CMA conducting its own investigation. Specifically, the Regulations:
- insert a new section 31G, which defines a retained EU anti-trust commitment and deems these to have been accepted by the CMA. It also provides that these commitments will retain their character as retained EU anti-trust commitments even if varied or substituted;
  - insert a new section 31H (similar to section 31B of the Competition Act 1998), providing that, for as long as the retained EU anti-trust commitment is in force and not released, the CMA will be precluded (notwithstanding the circumstances outlined in section 31H(7)) from opening or concluding any investigation into the agreement or conduct to which the commitment relates. This largely reflects the bar applied where the CMA accepts domestic commitments, with associated exceptions. However, an additional exception has been included to enable the CMA to open an investigation where it has reasonable grounds to suspect competition concerns will arise on expiry of the commitments. This will enable the CMA to obtain information to make an assessment as to whether these concerns will materialise and what action may be required to address this. This largely mirrors the position which currently exists as a matter of EU law and is considered appropriate in circumstances

where the CMA will not have previously undertaken its own investigation to already have this information in its possession;

- insert a new section 31I (similar to section 31A of the Competition Act 1998) which gives the CMA power to vary, substitute and release retained EU anti-trust commitments. This allows for variation or substitution if the CMA is satisfied the revised commitments will address its current competition concerns. The CMA will have power to release commitments on request from the person who gave the commitments, or where it has reasonable grounds to believe the commitments are no longer necessary;
- insert a new section 31J (similar to section 31C of the Competition Act 1998) enabling the Secretary of State to require the CMA to prepare a report of its findings in any case where it is reviewing, or has reviewed the effectiveness of a retained EU anti-trust commitment, and providing that any such report must be published;
- insert a new section 31K (similar to section 31E of the Competition Act 1998) enabling the CMA to apply to the court for an order to enforce an EU anti-trust commitment should a person from whom the CMA is deemed to have accepted such commitments fail to comply with them; and
- insert a new section 31L giving the CMA powers to obtain information for the purposes of deciding whether a retained EU anti-trust commitment should be varied, substituted or released. This again reflects that the CMA will not have undertaken its own investigation under section 25 before accepting the commitments, and did not play a part in agreeing the commitments, and so has not had the opportunity to ensure that the commitments themselves contain information gathering provisions.

7.13 The Regulations make provision to ensure rights of appeal extend to decisions related to retained EU anti-trust commitments and provide for procedural requirements to be adhered to as with domestic commitments. In particular, they:

- amend regulation 14 of the principal Exit Regulations, so as to amend section 46(3) of the Competition Act 1998 to provide that a decision by the CMA to either release or keep a retained EU anti-trust commitment may be appealed to the Competition Appeal Tribunal (CAT) by a party to the commitment;
- amend regulation 15 of the principal Exit Regulations, so as to amend section 47(1) of the Competition Act 1998 to provide that a decision to accept or release retained EU anti-trust commitments, or to accept variations or substitutions other than variations which are not material in any respect, may be appealed to the CAT by a person who is not a party to the agreement, but whom the CAT considers has a sufficient interest in the decision; and
- make consequential amendments to Schedule 6A to the Competition Act 1998 in relation to the procedural requirements that apply to the variation, substitution or release of retained EU anti-trust commitments.

*Amendments to the Competition Act 1998 (Concurrency) Regulations 2014*

7.14 Sector regulators have the power to enforce UK and EU competition law in their sectors, alongside the CMA. These powers are set out in the Competition Act 1998 and the relevant sectoral legislation which empowers the regulators to exercise functions set out in Part 1 of the Competition Act 1998 on a concurrent basis. As the

Regulations amend the functions in Part 1 of the Competition Act 1998, the regulators will therefore also have the power to deal with retained EU anti-trust commitments which are relevant to their sectors. The Competition Act 1998 (Concurrency) Regulations 2014 set out how cases are to be allocated between regulators in cases where powers may be exercised on a concurrent basis. The Regulations amend that instrument to take account of the new functions inserted into Part 1 of the Competition Act 1998 to ensure that cases can be allocated appropriately after exit day.

Amendments to other domestic legislation containing competition provision

7.15 The Regulations make amendments which are consequential to the amendments being made to the Enterprise Act 2002. In particular:

- where an order is made under the Enterprise Act 2002 imposing remedies on merger parties, certain sectoral specific and intellectual property legislation provides for the CMA or relevant authorities to amend licence conditions or intellectual property rights for the purposes of giving effect to, or taking account of, any provision made by such an order. The Regulations amend the relevant legislation to ensure that the same approach applies in relation to any order made by the CMA under the new section 84C;
- some sector specific legislation contains provisions enabling relevant authorities to make a reference to the CMA requiring it to investigate and report in connection with decisions by regulators to modify licence conditions or to make certain activities licensable activities. In these circumstances, provision is made for section 109 of the Enterprise Act 2002 to apply, giving the CMA powers to require the attendance of witnesses and production of documents for the purposes of its investigation. However, in these circumstances, section 109 is applied with some modifications to take account of the different purpose for which the power is being relied upon. The Regulations make consequential amendments to the sector specific legislation which relies on section 109, to ensure that the modifications made by the Regulations do not apply in circumstances where they would not be relevant.

Amendments to Savings and Transitional Provisions

7.16 The Regulations amend Schedule 4 to the principal Exit Regulations, which deal with savings and transitional provisions. As referred to in paragraph 2.20 of this Explanatory Memorandum, the principal Exit Regulations make transitional provisions for private law claims relating to domestic infringements and EU infringements, however do not expressly address the position in relation to claims which involve combined elements, that is which involve breaches of the domestic and EU prohibitions after exit day, or claims which involve behaviour which spans exit day. The Regulations make amendments to clarify the position and set out the relevant law and procedure to apply in these circumstances, which should assist parties to litigation and the courts after exit day.

Amendments to Northern Ireland legislation

7.17 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 Energy (Northern Ireland) Order 1992.

7.18 These Regulations amend these Orders in alignment with the approach taken to amendments to the UK competition regime.

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

8.1 This instrument is being made using the power in section 8 of the EUWA in order to address failures of retained EU law to operate effectively or other deficiencies arising from the withdrawal of the United Kingdom from the European Union. The instrument is also made under the powers in paragraph 21 of Schedule 7 to the EUWA which allow for supplementary, incidental, consequential, transitional and saving provisions to be made. In accordance with the requirements of that Act, the Minister has made the relevant statements as detailed in Part 2 of the Annex to this 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 and other sector regulators. Their views have been taken into consideration in the development of these Regulations.

## **11. Guidance**

11.1 Subject to these Regulations being approved by resolution by each House of Parliament, the CMA expects to publish guidance by exit day, in particular explaining how it expects to interpret and apply the test for EU Decisions made between 15 August 2019 and exit day that relate “to the supply or acquisition of goods or services in the UK”.

## **12. Impact**

12.1 There will be a small impact on businesses, which will largely fall only on businesses that are subject to ongoing commitments accepted by the European Commission.

12.2 These businesses may incur some costs of familiarisation with the changes, particularly if they wish to apply to have the commitments waived, modified or substituted. This could involve costs of internal management time and using external legal advice.

12.3 There is also the potential for these businesses to face an initial increase in requests for information relating to ongoing commitments or undertakings, as the CMA will not be as familiar with the cases as the European Commission had been.

12.4 All these costs would be likely to be short-term, one-off costs, rather than ongoing costs.

12.5 There is no significant impact on charities, voluntary bodies and the public sector.

12.6 There will be no additional wider costs to the economy, such as to consumers or workers, as a result of introducing this legislation. However, the introduction of this legislation avoids the risk of incurring significant economic costs that could have arisen due to an enforcement gap.

- 12.7 In the event that such a gap led to commitments relating to the UK falling away with no ability for the CMA to reimpose them, there could be harmful effects to competition in the relevant markets, that could lead to higher prices for consumers or reduced market innovation due to new entrants being excluded or less able to compete.
- 12.8 An Impact Assessment has not been prepared for these Regulations because there is a small impact on businesses.

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

- 13.1 These Regulations apply to activities that are undertaken by small businesses.
- 13.2 As an Impact Assessment has not been prepared for these Regulations because there is a small impact on businesses, no separate impact analysis or mitigations specifically in respect of small businesses have been prepared.

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

- 14.1 As this instrument is made under the EUWA, no review clause is required.
- 14.2 The approach to monitoring of this legislation is that the CMA, as part of its annual performance report, will report on the exercise of its functions under this instrument. The report will be sent to the Secretary of State and laid before Parliament.

### **15. Contact**

- 15.1 Daniel McCarthy at the Department for Business, Energy and Industrial Strategy, telephone: 0207 215 1471 or email: daniel.mccarthy@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 23(1) or jointly exercising powers in Schedule 2 to create a criminal offence	Set out the ‘good reasons’ for creating a criminal offence, and the penalty attached.
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) (No.2) Regulations 2019 do no more than is appropriate”. This is the case because the Regulations close the potential enforcement gap that would otherwise arise as a result of the UK’s exit from the European Union in relation to commitments given by parties to the European Commission under the EUMR or Regulation 1/2003 as they affect the UK market and further clarify the savings and transitional provisions regarding private law damages claims made in the Competition (Amendment etc.) (EU Exit) Regulations 2019.

#### **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 this instrument, and I have concluded they are a reasonable course of action”. 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 coming into force of the European Union (Withdrawal) Act 2018. A full summary of 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:

“The instrument does 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 the instrument, I 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 paragraph 2 of the main body of this explanatory memorandum.

#### **5. Legislative sub-delegation**

- 5.1 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 it is appropriate to create a relevant sub-delegated power in the Competition (Amendment etc.) (EU Exit) (No. 2) Regulations 2019.”

- 5.2 This is appropriate because the CMA is the lead regulatory body responsible for the enforcement of competition law, including merger control, in the UK. It will be responsible for enforcing the commitments in decisions made by the European Commission prior to exit day which are retained by these Regulations. It is appropriate to delegate a power to the CMA (and through the concurrency regime, the sectoral regulators) to vary, amend and release the retained commitments after exit day, by decision, as the appropriate, independent bodies responsible for assessing the relevant markets in the UK and dealing with the commitments as if they had originally been accepted under the domestic legislative regime.

#### **6. Urgency**

- 6.1 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 it is appropriate to use the urgent procedure to make the Competition (Amendment etc.) (EU Exit) (No. 2) Regulations 2019.”

- 6.2 This is appropriate because there is a need to ensure that this instrument is in place for exit day. The Government has concluded that the ‘made affirmative’ procedure provided for in the EU (Withdrawal) Act 2018 ensures that this instrument is in place for exit day. The Government considers it important to have this instrument in place urgently so as to address a potential enforcement gap which could arise after exit in connection with merger and anti-trust commitments given to the EU Commission that relate to the UK. These Regulations retain decisions made by the European Commission under EU regulations which would otherwise be revoked on exit. These decisions contain commitments given by parties to address competition concerns identified in the course of EU anti-trust investigations or merger reviews, which relate to the supply or acquisition of goods or services in the UK. Currently, the UK benefits from these commitments as a result of the UK’s anti-trust enforcement and merger control systems being integrated with the EU. These Regulations ensure that the UK can continue to benefit from the commitments after exiting the EU in order to prevent any potential harm to UK consumers and businesses. The Regulations will also provide confidence and certainty to the affected businesses and ensure the effective functioning of the statute book after exit. Using this procedure still allows for Parliamentary scrutiny and Parliament will need to approve its making for it to remain in force.