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# WRITTEN STATEMENT

BY

THE WELSH GOVERNMENT

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**TITLE**        **The State Aid (EU Exit) Regulations 2019**

**DATE**        **25 January 2019**

**BY**            **Jeremy Miles AM, Counsel General and Brexit Minister**

## **The State Aid (EU Exit) Regulations 2019**

The 2019 Regulations make amendments to legislation in the field of State aid. Primarily, they:

- Transfer the State aid approval and regulatory functions of the European Commission to the Competition and Markets Authority (CMA);
- Transfer functions relating to the publishing of State aid policy and guidance to the CMA and Secretary of State.
- Replace the test of whether State aid affects trade between Member States with a test of whether State aid affects trade between the United Kingdom and the European Union;
- Restate large parts of the EU procedural provisions with appropriate deficiency corrections.

## **EU Directly Applicable**

- Articles 107 to 109 of the Treaty on the Functioning of the European Union.
- Commission Regulation (EU) No 702/2014 of 25 June 2014 declaring certain categories of aid in the agricultural and forestry sectors and in rural areas compatible with the internal market in application of Articles 107 and 108 of the Treaty on the Functioning of the European Union;
- Commission Regulation (EU) No 360/2012 of 25 April 2012 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to de minimis aid granted to undertakings providing services of general economic interest;
- Commission Regulation (EU) No 1407/2013 of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to de minimis aid;

- Commission Regulation (EU) No 1408/2013 of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to de minimis aid in the agriculture sector;
- Commission Regulation (EU) No 1388/2014 of 16 December 2014 declaring certain categories of aid to undertakings active in the production, processing and marketing of fishery and aquaculture products compatible with the internal market in application of Articles 107 and 108 of the Treaty on the Functioning of the European Union;
- Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty;
- Commission Decision 2012/21/EU of 20 December 2011 on the application of Article 106(2) of the Treaty on the Functioning of the European Union to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest;

**Any impact the SI may have on the Assembly's legislative competence and/or the Welsh Ministers' executive competence**

*Functions exercisable by the Competition and Markets Authority (CMA)*

This engages Paragraph 10 (1) of Schedule 7B to the Government of Wales Act 2006 (GOWA 2006). This provides that a provision of an Act of the Assembly cannot remove or modify, or confer power by subordinate legislation to remove or modify, any function of a public authority other than a devolved Welsh authority, unless the appropriate (UK) Minister consents to the provision. This means that any future attempt by the Assembly to legislate in relation to State aid and modify the functions of the CMA, for example by disapplying their functions in relation to Wales, would require the consent of the appropriate Minister of the Crown.

*Functions exercisable by the CMA with the consent of a Minister of the Crown*

This engages Paragraph 10 (1) of Schedule 7B to the Government of Wales Act 2006 (GOWA 2006). This provides that a provision of an Act of the Assembly cannot remove or modify, or confer power by subordinate legislation to remove or modify, any function of a public authority other than a devolved Welsh authority, unless the appropriate Minister consents to the provision. This means that any future attempt by the Assembly to legislate in relation to State aid and modify the functions of the CMA, for example by disapplying their function in relation to Wales, would require the consent of a Minister of the Crown.

*Functions exercisable by the Secretary of State (a Minister of the Crown) in consultation with the Welsh Ministers*

The exercise of a power by a Minister of the Crown in consultation with the Welsh Ministers engages Paragraph 11(2) of Schedule 7B to GOWA 2006. This provides that a provision of an Act of the Assembly cannot remove or modify, or confer power by subordinate legislation to remove or modify, any function of a Minister of the Crown not falling within sub paragraph (1) unless the Welsh Ministers have consulted the appropriate Minister about the provision. This means that if the Assembly brought forward legislation in the future in relation to State aid which sought to modify the Secretary of State's functions, as set out in the Regulations, it would have to consult the appropriate Minister before doing so.

### **The purpose of the amendments**

Part 2 amends retained EU law relating to the state aid framework that continues to be, or forms part of, domestic law by virtue of section 4 of the European Union (Withdrawal) Act 2018.

Part 3 sets out the process for the CMA to examine notified aid, unlawful aid, misused aid and existing aid schemes.

Part 4 includes provisions relating to enforcement.

Part 5 includes provisions relating to monitoring and reporting of aid.

Part 6 requires the CMA to adopt and publish statements of policy.

Chapter 1 of Part 7 includes general provisions relating to aid in urgent cases, interest rates and time periods.

Chapter 2 of Part 7 revokes certain retained EU law, inserts a schedule that contains transitional provisions and inserts schedules that make amendments to retained EU law and other legislation.

In particular, Schedule 8 includes transitional provisions setting out how these Regulations apply in relation to aid granted before exit day.

Schedule 9 contains amendments to the General Block Exemption Regulation.

Schedule 10 contains amendments to other legislation, including the Enterprise Act 2002 (c.40) and the Enterprise and Regulatory Reform Act 2013 (c.24).

Without the provisions provided in this SI, there would not be direct legal basis for the regulating of State aid in the UK.

The SI and accompanying Explanatory Memorandums, setting out the effect of each amendment is available here: <https://beta.parliament.uk/work-packages/K0I2OYMp>

### **Why consent was not given**

Despite the Welsh Government's position that State aid is a devolved matter and not a reserved matter under any heading of the Reserved Matters Schedule in the Government of Wales Act 2006, the UK Government do not consider it as such, and therefore they have not requested Welsh Ministerial consent under the terms of the Intergovernmental Agreement. The Welsh Government has requested from the UK Government, an explanation of their legal position but there has been no response.

Separately, the Welsh Government has argued that the State aid regulations should include a requirement to obtain Welsh Ministerial consent to the publishing of a statement of policy by the Competition and Markets Authority's (CMA's) (the Regulations provide that the consent of the Secretary of State must be obtained);, the publishing of guidance by the Secretary of State relating to the approval of aid under 107(3) of the Treaty on the Functioning of the EU (TFEU); and the fixing of administrative penalties in relation to a breach of the State aid rules (a Secretary of State function) given that State aid is not reserved. The Regulations as laid do not provide this.

Welsh Ministers have called to be given a meaningful role in the State aid regime going forward, however the Regulations that have been laid do not provide for this.

The Regulations make a number of consequential amendments to legislation in other devolved areas for which consent should have been sought under the

Intergovernmental Agreement. Consent for these amendments has not been sought by UK Government.

The following amendments in devolved areas have been identified.

- Water Industry (Determination of Turnover for Penalties) Order 2005
- Community Infrastructure Levy Regulations 2010
- Criminal Justice and Police Act 2001

However, the Welsh Government, having seen the draft regulations prior to them being laid in the House of Commons, believe that they do achieve the Welsh Minister's overarching policy objectives of securing and maintaining the confidence of EU partners, facilitating a dynamic alignment with EU State aid rules and enabling effective cross-UK alignment. This in turn will form an important cornerstone of our future relationship with the European Union. The Welsh Government will continue to work to ensure that a Memorandum of Understanding that will underpin the regulations provides for a meaningful role for Welsh Ministers in the administration of the UK wide State aid regime.