PARLIAMENTARY DEBATES

HOUSE OF COMMONS
OFFICIAL REPORT

Third Delegated Legislation Committee

DRAFT COMPETITION (AMENDMENT ETC.) (EU EXIT) REGULATIONS 2019

Wednesday 5 December 2018

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Sunday 9 December 2018

The Committee consisted of the following Members:

Chair: Sir Christopher Chope

† Blackman, Bob *(Harrow East)* (Con)
† Charalambous, Bambos *(Enfield, Southgate)* (Lab)
† Creasy, Stella *(Walthamstow)* (Lab/Co-op)
† Davies, Chris *(Brecon and Radnorshire)* (Con)
† Day, Martyn *(Linlithgow and East Falkirk)* (SNP)
† Esterson, Bill *(Sefton Central)* (Lab)
† Glindon, Mary *(North Tyneside)* (Lab)
Grogan, John *(Keighley)* (Lab)
† Harris, Rebecca *(Lord Commissioner of Her Majesty's Treasury)*
† Metcalfe, Stephen *(South Basildon and East Thurrock)* (Con)
† O'Brien, Neil *(Harborough)* (Con)
† Pursglove, Tom *(Corby)* (Con)
† Quince, Will *(Colchester)* (Con)
† Smith, Nick *(Blaenau Gwent)* (Lab)
† Tolhurst, Kelly *(Parliamentary Under-Secretary of State for Business, Energy and Industrial Strategy)*
† Trevelyan, Anne-Marie *(Berwick-upon-Tweed)* (Con)
† Yasin, Mohammad *(Bedford)* (Lab)

Ian Bradshaw, *Committee Clerk*

† attended the Committee

Third Delegated Legislation Committee

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[Sir Christopher Chope *in the Chair*]

Draft Competition (Amendment etc.) (EU Exit) Regulations 2019

2.30 pm

The Parliamentary Under-Secretary of State for Business, Energy and Industrial Strategy (Kelly Tolhurst): I beg to move,

That the Committee has considered the draft Competition (Amendment etc.) (EU Exit) Regulations 2019.

It is a pleasure to serve under your chairmanship for the first time, Sir Christopher. Competition law exists to foster competitive markets to the benefit of consumers. Specifically, anti-trust law prohibits companies from engaging in anti-competitive agreements and abusing a dominant market position. Merger rules exist to ensure that mergers do not substantially lessen competition and harm consumers. The UK has a world-renowned competition regime, but currently the domestic system is highly integrated with the European Union competition system.

The primary aim of this statutory instrument, therefore, is to remove provisions in domestic legislation that are associated with being part of the EU competition system. Although the draft withdrawal agreement with the EU sets out separation arrangements on competition, the Government are preparing for all contingencies. Should we leave the EU without an agreement in place, this SI would minimise litigation risk for the Competition and Markets Authority and provide legal clarity and certainty for businesses and consumers. The SI has been the subject of extensive consultation with stakeholders, including the CMA, the Competition Appeal Tribunal and specialist competition lawyers. The views expressed were taken into account in developing the content of the SI.

The SI revokes the retained versions of EU competition legislation and switches off directly effective treaty rights contained in European economic area and EU treaties. They will become part of UK law as retained EU law at the point of exit, but they will be redundant, as the UK has its own competition regime, which will continue to protect consumers from anti-competitive behaviour. The SI makes amendments to the Competition Act 1998, the Enterprise Act 2002 and other primary and secondary legislation containing competition provisions. An impact assessment was not undertaken for the SI, as the impact for business and the Exchequer will be minimal.

The 1998 Act sets out the prohibitions against anti-competitive conduct in the UK and empowers the CMA and UK sector regulators to investigate and take enforcement action against infringements of those prohibitions. Under EU law and that Act, the CMA and sector regulators also have the power to investigate and take enforcement action against infringements of EU competition law. The Act also provides for investigation co-operation among the UK, the European Commission and member states' national competition authorities. This SI amends the Act to remove the CMA's power to investigate anti-competitive agreements under EU competition law, as it will investigate solely under UK law after exit.

Currently, section 60 of the 1998 Act provides that competition regulators and UK courts must interpret UK competition law in a manner consistent with EU competition law. This SI repeals section 60 and introduces a new section 60A. It provides that UK courts and regulators will continue to ensure consistency with pre-exit EU competition case law when interpreting UK competition law. However, they may depart from that case law, where appropriate, in specified circumstances.

This approach aims to provide consistency and clarity in the law for courts, regulators and businesses that look to legal precedent when interpreting the law. It also allows the competition regulators and UK courts to depart, where appropriate, from EU case law. Currently, claimants can pursue private damages claims in UK courts, based on enforcement decisions of the European Commission and the CMA. After exit, claimants will still be able to bring private damages claims in UK courts. However, UK courts will not be bound by the European Commission decisions. This approach aligns with the European Union (Withdrawal) Act 2018, which provides that UK courts will not be bound by decisions of EU courts after exit.

The European Commission makes block exemption regulations, which exempt certain categories of agreements from EU competition law where they are believed to have a beneficial effect on competition. Agreements which benefit from an EU block exemption are also exempt from UK competition law. At exit, all of the seven current block exemptions will be incorporated into UK law as retained block exemptions. Agreements that meet the terms of the retained block exemptions will continue to be exempt from domestic competition law. The SI amends and retains block exemptions so that they operate effectively in domestic law. It also empowers the Secretary of State to vary or revoke the retained exemptions.

The Enterprise Act 2002 contains the rules on mergers. Currently, the CMA is responsible for investigating mergers, to ensure that they do not have anti-competitive effects in the UK market. However, if a merger triggers the turnover thresholds set out in the new EU merger regulation, it is reviewed by the European Commission, including the UK aspects of the merger. After exit, the EU merger regulation will no longer apply in the UK, and the UK dimensions of mergers will be reviewed solely by the CMA. The SI amends the 2002 Act to remove references to the EU merger regulation and other provisions related to being part of the EU's one-stop shop for merger clearance in the single market.

The SI also makes transitional arrangements for CMA anti-trust and merger cases that are live at the point of exit, so that those cases can continue to be managed effectively. It also makes minor amendments to two pieces of Northern Irish legislation, including removing references to the EU anti-trust prohibitions and amending a reference to section 60 of the Competition Act 1998. These changes align with changes being made to the 1998 Act and have been agreed with the permanent secretaries of the relevant Northern Ireland Departments.

Anti-trust law protects consumers from anti-competitive behaviour. The amendments contained in the SI provide legal clarity and continuity to businesses. Similarly, mergers are an important component of our healthy and growing economy. It is vital that we safeguard the legal framework that gives companies the confidence to engage in mergers in the UK. It is also important that consumers continue to be protected from mergers that diminish competition. This SI achieves those goals by maintaining the strength of the UK's current competition system, while making only those changes designed to separate the UK competition system from that of Europe in a no-deal scenario.

2.38 pm

Bill Esterson (Sefton Central) (Lab): It is a pleasure to serve under your chairmanship, Sir Christopher. I note that we have 82 minutes remaining for our deliberations.

I thank the Minister for writing to me in detail a few weeks ago about this important, detailed and complicated matter, which relates to how we adjust domestic competition law in the event of no deal. It is perhaps appropriate to ask the Minister to indicate what the Government's plans will be for addressing changes to domestic competition law if there is a deal.

The SI raises a number of questions, starting with what the consequences will be for existing competition proceedings under EU law. The UK element of disputes that involve overseas businesses with UK operations will be affected, so will the Minister explain how things will work in the event of no deal when businesses are involved in disputes that cross jurisdictions between the UK and the EU? I am not entirely clear that her speech or the explanatory memorandum have addressed how the Government see that issue being resolved.

The Minister said that no impact assessment had been carried out. An awful lot of legislation is being amended merely to cover the costs of leaving the EU. Will she take this opportunity to confirm that the Government will not allow no deal, to avoid those costs? Will she set out her view on how the Government will go about avoiding no deal? *[Interruption.]* I note that the Government Whip is shaking her head; I cannot possibly imagine why. I would be interested to hear the Minister's view.

If I have counted correctly, the Practical Law UK website describes a total of 18 pieces of legislation that will be amended by the draft regulations, with a further eight consequential changes and five more amendments that require secondary legislation. That is a significant shift in legislation. Is a statutory instrument appropriate for such a major change? When the Minister read out the title of the regulations, I noted that it includes the word "etc." Now, what does "etc." mean? *[Interruption.]* She points out that it covers a long list of potential areas.

The draft regulations cover a lot of ground—a vast array of legislation is being amended. The Minister used the phrase "highly integrated", which gives us a clue about the complexity. I suggest that there is rather more involved than changing the wording from "EU" to "UK" in multiple pieces of legislation. It is a surprise to Opposition Members that a statutory instrument is considered sufficient for such an important topic. Might it have been better to scrutinise the impact on each of the specific pieces of legislation that she described? She summarised the situation in her opening remarks, but there seems to be quite a lot more to it than is perhaps implied in the explanatory memorandum.

According to the Practical Law UK website, the Competition and Markets Authority has indicated that it will have a much bigger role after Brexit. That is self-evident, given the competition law responsibilities that the UK is to take on from the EU. What assessment have the Government made of the CMA's capacity and of its ability to address its additional responsibilities?

The CMA will also have a new role in relation to state aid. Will the Minister spell out what that role will be? We know that the Government have often been reluctant to use state aid. They are far less prepared to do so than other countries, including our European partners, or to organise tenders in a way that supports UK businesses. I remember the lengthy debates we had in 2010, when I was first elected to Parliament, about the competition between Siemens and Bombardier for Crossrail trains. The contract went to Siemens rather than to UK-based Bombardier, which shows the Government's reluctance to support UK-based industry.

I read on Friday that the Government had issued the tender for fleet solid support ships as an international competition, on the grounds that they are not naval ships. There is no one in the navy or in the shipbuilding industry who regards fleet solid support ships as anything other than naval ships; it seems that only the Government do that. However, the consequence is that we now have an international tender, rather than a domestic opportunity for domestic shipyards, which is causing huge problems for the workers at Cammell Laird shipyard in the Liverpool city region. As the Government do not regard these ships as being naval, I wonder—because it is in the papers—whether they are covered by the liner shipping block exemption. Perhaps the Minister can answer that question.

What consultation has been undertaken regarding potential future divergence between the EU and the UK on competition law? Perhaps the Minister has the results of that consultation and can share them with us.

I put to the Minister comments made by the UK Trade Policy Observatory:

> "An issue which was addressed in the EU (Withdrawal) Act 2018 is the scenario where UK courts are obliged to follow EU judgments that pre-date Brexit. The new s60A (7) provides that the relevant court or decision-maker may disapply the interpretative obligation if they consider that to be appropriate in the light of various criteria".

What guidance will the Government give to decision makers?

The UK Trade Policy Observatory also says that

> "a claimant for a private damages action will have to open new proceedings in the UK courts, and would be well-advised to do so now for any current investigations before the European Commission",

because

> "an infringement of EU competition will no longer be binding after Brexit for the purpose of follow-on actions in the UK courts."

I would be interested to know whether the Minister agrees with that observation. If she does not agree with it, what might her analysis be?

[Bill Esterson]

Significant, wide-ranging changes are being proposed in the event of no deal. Parliamentary scrutiny of them involves just the small selection of Members on this Committee, following a similar Committee sitting yesterday in the other place. As I have said, several dozen pieces of legislation are affected—sometimes, as the Minister indicated in her opening remarks, in significant ways.

This SI gives rise to many questions and I question whether we are able to do it justice. I am not a lawyer and neither is the Minister, although undoubtedly she has lawyers advising her. I question whether this process allows for adequate scrutiny. It is a very good example of why the Government really must do everything in their power to avoid the prospect of no deal.

2.49 pm

Martyn Day (Linlithgow and East Falkirk) (SNP): It is a pleasure to serve under your chairmanship today, Sir Christopher, and I am very grateful to have heard the Minister's explanation of the measure. All I would really say is that it is hard to see how Westminster will be able to handle competition issues any better than Brussels has.

I note that the political declaration discusses

"creating a free trade area combining deep regulatory and customs cooperation, underpinned by provisions ensuring a level playing field for open and fair competition".

Competition is clearly vital to our economy, and we must not fall behind our European neighbours. Many UK businesses are subject to EU competition laws already, and divergence would create unnecessary red tape.

Having said that, I do not oppose today's regulations. They are somewhat sensible and necessary given the circumstances in which we find ourselves, but I seek some reassurance from the Minister on what additional costs they come with. Financial regulators are already underfunded, and I wonder what increased cost will come from the measures.

2.50 pm

Bob Blackman (Harrow East) (Con): It is a pleasure to serve under your chairmanship once again, Sir Christopher. I am not a lawyer, but before I came to this place, I worked for BT for some 19 years. During that time, I developed the training for 100,000 people on the consequences of the Competition Act 1998 and the Enterprise Act 2002 for the company.

The consideration I ask of my hon. Friend the Minister is twofold. The legislation should protect consumers from anti-competitive behaviour and also ensure that we do not get companies merging together to create monopolies that damage the rights of the consumer. As we leave the European Union, the companies involved in that potential behaviour are large corporate companies across the world. As we are passing this legislation, what is there to protect us? What rights will there be in our courts to prevent large companies across the world from damaging our economy? What protections will there be for consumers to prevent that from happening?

2.52 pm

Kelly Tolhurst: I was wondering whether I might be able to start by answering the hon. Member for Saffron Central.

Bill Esterson: Sefton Central.

Kelly Tolhurst: I apologise; I often get annoyed when people refer to my constituency as Rochester and "Stroud", rather than "Strood".

The hon. Gentleman asked what we would do with the regulations if we entered into a deal, bearing in mind that we are talking about this statutory instrument as a no-deal SI. This SI is about retaining EU law. Were we to enter into a deal, we would bring further SIs to the House to modify the current regulations.

The hon. Gentleman expressed concern about how we would work cross-jurisdictionally and is unsatisfied with the explanatory memorandum. The CMA, our regime and how the UK has dealt with competition law over the years have a high regard internationally. We co-operate and are part of a number of international bodies. We are regarded as having a world-class framework and operation. There is absolute commitment from the Government to ensuring that, where we can, we co-operate with other states and the EU. Even in a no-deal scenario, the intention will be to ensure that regulators at that level will be able to seek to enter into co-operation agreements bilaterally to ensure that consumers are protected. Ultimately, the European Union and the UK are committed to protection for consumers, as I have said a number of times over the past few weeks in Committees.

Bill Esterson: Is the problem not that, if there is no deal, by definition there will not be an agreement to ensure that co-operation? How does the Minister envisage the CMA and our competition framework coping in that situation?

Kelly Tolhurst: The hon. Gentleman is right: if we enter a no-deal situation, we will not have a deal with the European Union. However, our world-respected bodies, such as the CMA and other regulators, are communicating on a daily and weekly basis with their counterparts in not only Europe but other parts of the world. There is nothing to suggest that that co-operation, communication and co-working would change, and we would seek for it to be continued. We still want to co-operate with our international partners, and I cannot foresee a situation, with or without a deal, where that would not happen. That is my understanding.

With regard to the hon. Gentleman's question about whether it is right that we are debating this big SI in a short Committee, I highlight that the SI changes two big pieces of legislation. Remember that we are retaining EU law, so the SI is not a change in policy; it is about retaining what we have, to make it fit so that on day one, were we to leave the European Union without a deal, our statute book would function.

The first piece of legislation is the Competition Act 1998, and the SIs that sit under it. We have all sat through a number of SI Committees. In the years I have been a Member of Parliament, many small statutory instruments have altered larger pieces of legislation. The second piece of legislation is the Enterprise Act 2002, and other SIs that have been introduced that relate to the EU, and to the block exemption that I mentioned. The "etc." refers to the other pieces of legislation, consideration of which we have all sat through. From looking at a hard copy of the Bill, a number of minor changes are clearly being made. That gives Members an idea of why we are discussing this matter in Committee, as opposed to having a wider debate.

With regard to whether the CMA is capable of continuing to do its job given the potential increase of work in a no-deal scenario, we expect that the CMA might have an increased case load of between five and seven antitrust cases in a year. We have also assessed—working with the CMA, obviously—that the CMA might have to deal with between 15 and 30 extra merger cases over a year.[1] The National Audit Office has looked at the CMA and believes that it has robust plans in place to operate and function after we leave the EU.

As Members will know, in 2017 in the spring statement the Chancellor put £3 billion aside over a two-year period for funding our EU exit. In the spring statement of this year, the Chancellor announced just under £24 million extra for the CMA. The CMA is going through a recruitment process to increase its number of workers. That will constitute a substantial increase in the size of the CMA, and I am reliably informed that the CMA is working to plan, and recruitment is on target at the moment.

State aid is not part of today's SI, but I am sure that the hon. Member for Sefton Central will be pleased to hear that the Government will soon lay an SI on that issue. I look forward to having greater conversations with him about the merits—or not—of state aid, and what he would like to see in the future.

Regarding divergence, as the hon. Gentleman explained and as I understand it, post-exit decisions in the European courts will be notable by UK courts, but not binding on UK courts. The idea that previous case law becomes part of UK case law history has come about because businesses need certainty and decision makers need to be able to look at that: it is quite right that pre-exit case law remains the bank of case law. However, as we have determined, UK courts will not be bound by that case law, although they will obviously have regard to it. Going forward, we need businesses to have assurance that previous case law has set the precedent, but as we have outlined in the SI, UK courts can diverge from it.

As regards the guidance that we will be giving on that point, it is case law: obviously, it will be defined by judgments. As the hon. Gentleman knows, markets, competition and things are changing all the time, so the guidance will also change over time. At that point, if necessary, we will give guidance to the relevant individuals. The hon. Gentleman mentioned bringing claims in the UK for things happening within the jurisdiction of the European Union. That is true: they will be brought here in the UK. I believe we can do so under UK law in UK courts. Also on that point, there is an ability to bring a civil, private claim in the UK under foreign tort law anyway.

My hon. Friend the Member for Harrow East asked what we will do to make sure that the UK protects its consumers from the big corporate organisations that are perceived to potentially cause restrictions and competition issues in the UK. As I outlined, our competition law in the UK is world renowned; we are respected internationally for the way we deal with such cases, and we already have great co-operation with international organisations.

To give one example, in the Google investigation a UK market was one of the main ones being investigated, and most of the claimants came from the UK market. I hope that gives my hon. Friend some comfort that, even if we are in a no-deal situation, if this SI is agreed we will be more than ready to take on those challenges and we will continue to maintain co-operation with our international partners and the European Union to make sure that the protection of UK consumers is at the heart of what they are doing.

Bob Blackman: I thank my hon. Friend for the explanation she has given. One aspect of European competition law is the economic assessment of what constitutes a monopoly. We could be in a position where something would not constitute a monopoly in the UK, but would be a direct threat to UK consumer interests, and would still be a monopoly in the European Union. What would be the position under the SI for consumers to gain protection as a result?

Kelly Tolhurst: My hon. Friend is right when he talks about the thresholds. Obviously, for the UK to take a particular action, the monopoly would have to meet our threshold abilities. It would, however, be down to the CMA to take forward cases, based on a number of different assessments. We do not expect—I do not expect—that the regulations will put the UK in a worse place. In fact, we could argue that there are benefits: under the regulations, the UK will make those decisions directly for UK consumers, rather than the decisions being taken at a distance. I hope that reassures my hon. Friend.

I thank the Committee for its consideration of the regulations. I thank the hon. Member for Sefton Central for his contribution and for the questions that he has asked me. He is absolutely right to do so, because it is an important debate and we are talking about the protection of UK consumers.

The amendments in the regulations are essential. If they were not passed, businesses would lack clarity as to how to act, and the CMA's decisions would face a considerable litigation risk. It is vital that consumers continue to be protected from anti-competitive behaviour in the event of no deal.

As I have outlined several times, the UK has a world-renowned competition system. The regulations make no change to that system beyond correcting the deficiencies in retained EU law. We can all agree that it is essential that the regulations are in place in the event of a no-deal outcome. The amendments will ensure legal clarity for businesses, reduce litigation and protect consumers. They will also provide a smooth transition from the current system in the EU to a stand-alone UK competition regime in the event of a no-deal exit. I trust that I have answered all the Committee's questions and I hope the Committee approves the regulations.

Question put and agreed to.

Resolved,

That the Committee has considered the draft Competition (Amendment etc.) (EU Exit) Regulations 2019.

3.7 pm

Committee rose.

1. *[Official Report, 17 December 2018, Vol. 651, c. 4MC.]*