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OFFICIAL REPORT

First Delegated Legislation Committee

DRAFT STATE AID (EU EXIT) REGULATIONS 2019

Wednesday 10 April 2019

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The Committee consisted of the following Members:

Chair: DAVID HANSON

† Esterson, Bill (*Sefton Central*) (Lab)
 † Griffiths, Andrew (*Burton*) (Con)
 † Harrington, Richard (*Watford*) (Con)
 † Harris, Rebecca (*Lord Commissioner of Her Majesty's Treasury*)
 Hepburn, Mr Stephen (*Jarrow*) (Lab)
 † Hughes, Eddie (*Walsall North*) (Con)
 † Keegan, Gillian (*Chichester*) (Con)
 Lammy, Mr David (*Tottenham*) (Lab)
 † Mann, John (*Bassetlaw*) (Lab)
 Nandy, Lisa (*Wigan*) (Lab)

† Newton, Sarah (*Truro and Falmouth*) (Con)
 † O'Brien, Neil (*Harborough*) (Con)
 † O'Hara, Brendan (*Argyll and Bute*) (SNP)
 † Scully, Paul (*Sutton and Cheam*) (Con)
 † Smith, Nick (*Blaenau Gwent*) (Lab)
 † Tolhurst, Kelly (*Parliamentary Under-Secretary of State for Business, Energy and Industrial Strategy*)
 † Whitfield, Martin (*East Lothian*) (Lab)

Anwen Rees, *Committee Clerk*

† **attended the Committee**

First Delegated Legislation Committee

Wednesday 10 April 2019

[DAVID HANSON *in the Chair*]

Draft State Aid (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 State Aid (EU Exit) Regulations 2019.

It is a great pleasure to serve under your chairmanship, Mr Hanson. The draft regulations were laid before the House on 21 January. They transpose into UK domestic law the EU state aid regime, as set out in articles 107 and 108 of the treaty on the functioning of the European Union and in various EU regulations. By so doing, they transfer the state aid regulatory functions of the European Commission to the UK's Competition and Markets Authority. The draft regulations will therefore ensure that state aid rules continue to operate in a domestic context after exit day in the event of a no-deal exit. If passed, the regulations will come into force on exit day.

State aid is any Government subsidy or support provided to an economic operator that gives it an advantage that it could not get on the open market and that distorts competition between EU member states. The EU therefore has tough rules governing the way that subsidies can be given, to stop companies gaining an unfair advantage over their competitors. However, there are good policy justifications for state aid—when the rules enable it to be given—if the benefit from giving aid outweighs the potential harm that a subsidy would cause.

The rules are intended not to prevent public authorities from supporting industries and business, or indeed nationalising assets, but to minimise distortion to competition. Ultimately, spending decisions within the framework of the rules—how much, to whom and for what—are for successive Governments, the devolved Administrations and local authorities to make. To be clear, the state aid rules are about supporting fair and open competition, and the UK has long been a vocal proponent of them. Ultimately, the rules are good for taxpayers, consumers and businesses.

There are three main reasons to maintain the state aid rules and establish a UK regime when we leave the EU. First, it will provide continuity and clarity for public authorities that grant state aid and for organisations that receive it. That will give confidence to the wider business community, which will benefit from the continued protection provided by the rules. Secondly, it will help to maintain a level playing field throughout the whole of the United Kingdom.

Nick Smith (Blaenau Gwent) (Lab): In appendix 1, there is a letter from Mick Antoniw AM, who chairs the Constitutional and Legislative Affairs Committee of the National Assembly in Cardiff. The letter is dated 6 February 2019. It points out the “problem that the Welsh Government and the UK Government disagree as to whether State Aid is devolved.”

Mr Antoniw states:

“The Welsh Government has requested from the UK Government, an explanation of their legal position but there has been no response.”

Can the Minister please give us the Government's legal position on that?

Kelly Tolhurst: The hon. Gentleman may be referring to the commitment, made by my noble Friend in the other place, to write to the Committee. He still plans to do so. The Government's position is that state aid is a reserved matter.

Martin Whitfield (East Lothian) (Lab): The Minister referred to the regulations being UK-wide and mentioned the devolved Administrations in Scotland, Wales and Northern Ireland. In the light of the Government's contention that state aid is a reserved matter, can she share with the Committee the Scottish and Welsh Governments' responses to the draft regulations?

Kelly Tolhurst: I thank the hon. Gentleman for his intervention requesting further clarity. We consulted the devolved Administrations before laying the draft regulations. It is true that there is a lack of agreement with the devolved Administrations on whether state aid is a reserved matter. We maintain that it is. The statutory instrument will bring over EU regulations so that they work in a domestic setting. We are not proposing any changes.

The European Commission's powers will be transferred to the CMA. That will not result in fewer powers or less involvement for the devolved Administrations. Under the domestic regulations, they will still be responsible for submitting their own state aid requirements directly to the CMA. They will not lose any powers that they have at the moment.

Martin Whitfield: I am grateful for that clarification. It is therefore the case that, in essence, the devolved Administrations have the responsibility but not the authority, and they run the risk of having punitive damages found against them should it be decided that they are exercising state aid.

Kelly Tolhurst: No, I am afraid I disagree. Currently, the devolved Administrations are responsible for aid givers, and they will potentially be aid givers. Under current EU regulations, the devolved Administrations have to notify the Commission of the giver of that aid. The SI will not change that. In a no-deal situation, the CMA will act as the notified body. There is no change. I disagree with the hon. Gentleman's statement, but I respect his attempt to push that point and get further clarification.

Nick Smith: Mr Antoniw's letter was dated 6 February, which is now over two months ago. May I press the Minister on when we will get the Government's legal position? Can she give us a date, please?

Kelly Tolhurst: I thank the hon. Gentleman for his intervention. I believe that the Secretary of State replied to that letter, but I will have to go back and look at what letters he has sent before I can clarify further. I am more than happy to let the hon. Gentleman know after the Committee, if that is agreeable to him.

Bill Esterson (Sefton Central) (Lab): On a point of order, Mr Hanson. We appear to be missing a crucial piece of information in the guise of this letter from the Secretary of State, which would resolve this discussion once and for all. Should we now adjourn while the Minister gets her hands on that letter, and ensure that all Committee members have a copy?

The Chair: I am grateful for your point of order, Mr Esterson. The documents before the Committee are the draft State Aid (EU Exit) Regulations 2019 and the accompanying explanatory memorandum. If there is Government correspondence relating to the content of those documents, that is a matter for the Minister to explain to the Committee, but it is not seminal to the draft regulations before us today.

Martin Whitfield: Further to that point of order, Mr Hanson. I draw attention to paragraph 7.15 of the explanatory memorandum, which discusses the role of the courts. Specific reference is made to the Court of Session in Scotland as an arbiter in this matter. That seems somewhat to conflict with the answers I have received from the Minister, and it goes to the heart of this.

The Chair: Again, I refer the hon. Gentleman to the document before the Committee. The Minister has ownership of it, and it is for her to explain its contents. If there are queries about responsibilities or intergovernmental correspondence, it is for her to explain that to the Committee, and it is then for the Committee either to support or to reject the regulations, based on the evidence she brings forward.

Andrew Griffiths (Burton) (Con): Further to that point of order, Mr Hanson. Is it not a fact that if any member of this Committee feels that they have been given insufficient documentation, they can vote against the regulations at the end?

The Chair: Not only that, but Mr Esterson has indicated that he might wish to have an adjournment. It is perfectly possible to table a motion that the Committee should now adjourn. A vote would be taken and the Committee would determine it. There are a number of options. The key point is that the documents before us have been tabled by the Government and speak for themselves. The Minister has to explain them to all members of the Committee accordingly.

Kelly Tolhurst: The Government made it clear in the intergovernmental agreements on the European Union (Withdrawal) Act 2018 that state aid would be a reserved matter. The SI before us relates to a UK-wide regime and would transpose retained EU law into UK law. Any further discussions or decisions on future state aid policy that might or might not be introduced will obviously not be for this Committee. As I said in a previous answer to the hon. Member for Sefton Central, I will happily provide him with the letter to which he has referred. However, I point out that the Secretary of State has communicated comprehensively with colleagues and with the devolved Administrations, and through officials. There has been no lack of communication between the Secretary of State and the devolved Administrations.

The hon. Member for East Lothian referred to appeals against decisions. The CMA is not the arbiter; it will be the decision maker, and the courts—either the High

Court in England and Wales, or the Court of Session in Scotland—will make the judgment on an appeal. Looking at how the EU regulations already work, the Commission makes a decision and the courts then make a decision on an appeal. All law will always be a mixture of legal judgments and future policies. There is no contradiction in what I have said. The CMA will effectively be the decider and will hold the powers, and it will be for the courts to decide whether that decision is correct.

Brendan O'Hara (Argyll and Bute) (SNP): I appreciate the fact that the Minister is taking so many interventions. This SI, like so many others, seems completely half-baked. Given that there is such opposition to it in Cardiff and Edinburgh, can she tell us whether the discussions with the devolved Administrations have ceased, or are they ongoing? Has any thought been given to what indemnifying policy or process could be given to the Scottish and Welsh Governments, should they be found in breach of these state aid regulations?

Kelly Tolhurst: I point out to the hon. Gentleman that the devolved Administrations are highly aligned with the policy position on setting a UK-wide state aid regime. Our conversations with the devolved Administrations are ongoing and will continue as they are. The Secretary of State has made it very clear that he is committed to meeting the devolved Administrations to discuss these matters and many others in relation to how we exit the EU. In fact, the Prime Minister has made it clear that, were we to enter into an agreement with the European Union and therefore not be in a no-deal situation, we would extend the opportunities for devolved Administrations to feed in.

Andrew Griffiths: Does my hon. Friend agree that just because we do not like the answer to a question, it does not mean the answer is incorrect? Is not what we are doing here just transposing the current EU regime into UK law, with the CMA replicating the role that the Commission currently undertakes?

Kelly Tolhurst: I thank my hon. Friend for that contribution. That is absolutely what we are doing here today. We have before us a no-deal SI, so in the event of no deal we will be replicating the EU laws in the domestic setting. The SI is extremely important for fairness and competition in the UK, so there really should be no resistance from the Committee to what is in it, because it is a fundamental of how we already work, and in a no-deal situation it would be important were we to enter into any future trade deals with the European Union.

I will continue with my opening remarks. Maintaining a level playing field across the whole UK means that the richer parts of the UK will not be able unfairly to distract investment away from less prosperous parts of the country. The existing principles and practices of the regulation of state aid will remain substantively unchanged in the domestic regime, in accordance with the aims and powers under the withdrawal Act. These regulations will therefore have minimal impact on public authorities that grant state aid or entities that receive it.

Instead, the regulations correct deficiencies in the retained EU law relating to state aid. That includes correcting references to EU concepts, such as the internal market and the functions of the Commission, which will ensure that the law remains operable in a domestic

[Kelly Tolhurst]

setting while minimising the impact on stakeholders. An alternative test of trade within the United Kingdom, however, would inadvertently change the scope of the rules by catching local measures that are currently not caught.

The main practical change under the new regime is that rules will be regulated and enforced by the CMA in place of the European Commission. The CMA is well placed to take over the European Commission's role of approving, investigating and monitoring state aid across the whole UK. It has extensive experience and understanding of markets as the UK's competition regulator, and is independent of the Government in its decision making. To prepare for its new role, the CMA has received £20 million from the Treasury contingency fund to prepare for EU exit in 2019-20, in addition to the £23.6 million it received for the year 2018-19, which specifically included £3.3 million for its state aid function.

The Government are working to ensure that the CMA will be ready to take on the new role and have every confidence in its ability to do so. The CMA is on track to recruit all the staff needed to start working on state aid by exit date, if necessary. The CMA will adopt the Commission's existing state aid guidelines, which provide clear parameters for how and when aid should be approved. The CMA will also receive investigatory and enforcement powers broadly equivalent to those of the European Commission, although I should explain one point of divergence from the EU regime.

Under the EU rules, the European Council has the power in exceptional circumstances to intervene and approve aid before the European Commission has reached a decision. That power does not easily translate into the UK context and we do not consider it appropriate to use the regulations to vest the Government with similar powers. The regulations will still allow the Government to act swiftly if necessary, much as they have been able to do under the existing regime. Ultimately, the Government could bring forward legislation to amend the state aid rules if they deemed that to be absolutely necessary—an option that is not available to the European Council in the EU context.

I mentioned earlier that state aid rules help to ensure fair and open competition throughout the UK. Over the past year the Government have engaged extensively with each of the devolved Administrations and shared drafts of the regulations. As agreed, each devolved Administration will be responsible for managing the communication between their respective aid givers and the CMA. The Government have offered to sign a supporting memorandum of understanding with the devolved Administrations about the operation of the state aid regime, which we still hope to agree. Those discussions have indicated broad agreement on the substance of the Government's policy to establish a UK-wide state aid regime that mirrors the EU's. We will of course continue to work closely with the devolved Administrations on the development of state aid policy in the longer term.

As we leave the EU, the draft regulations will give certainty to public authorities and recipients of state aid, and help to maintain confidence for businesses across the UK. Commitments on state aid support free trade, as is recognised in the political declaration. The CMA has the expertise, operational independence and resources to enforce a UK state aid regime.

Martin Whitfield: I wonder whether the Minister will address the exemptions. With respect to Horizon 2020, with an uncertain no-deal departure date—or, we hope, no no-deal departure—what will happen where people have submitted applications but have not heard or are in the process of appealing decisions? With respect to the specified EU projects in schedule 2, what is the position on our contribution to CERN? CERN has always stood outside the EU, but our contribution is a Government-funded payment within the EU. How would the state aid rules apply to that?

Kelly Tolhurst: The draft regulations are not intended to stop any existing schemes in a no-deal situation, which is why we have the exemption list. The Treasury has been clear that all the projects that were committed to prior to EU exit will be honoured. I cannot go into detail about the specific project the hon. Gentleman mentions, because I do not have all the details to hand, but I am happy to give him further clarification on that.

I emphasise that the intention of the draft regulations, and the reason for including those projects in schedule 2, is to ensure that there are no unintended consequences of transposing the EU regulations and that state aid recipients have clarity and understand what will not be subject to state aid. I point out that in 2017, under the current state aid regime, 97% of state aid issued in the UK was pre-exempt. I commend the draft regulations to the Committee.

2.53 pm

Bill Esterson: It is always a pleasure to serve under your chairmanship, Mr Hanson, given your formidable expertise and experience, which you demonstrated in response to the points of order.

The Minister rightly made clear the importance of the draft regulations. Given the number of these SIs that are being debated in the main Chamber, it is highly odd that something so important, detailed, extensive and far-reaching, with so much impact on all our constituencies up and down the country, is not. However, there is nothing I can do about that. All I can do is make my comments and present my analysis in this forum.

Andrew Griffiths: Given that we are just transposing the current EU regime into UK law and providing for the CMA to take over from the Commission, can the hon. Gentleman tell us what the Labour party would do differently?

Bill Esterson: The hon. Gentleman tempts me down various different routes. I shall come to how the Government have diverged from their normal practice of straight transposition with these regulations. That applies particularly to the debate we had about the devolved Administrations. These regulations do not follow the normal pattern, as will become clear as I set out my argument.

State aid plays a vital role in our economy. Ensuring that we have a functioning state aid regime means that putting in place regulations that deliver exactly what is needed is very important. It is therefore essential that we carry out the detailed scrutiny this afternoon in the same way that the Lords did on 14 March. Given the scale of the regulations and their far-reaching nature, I will put on the record our concern about whether we have been provided with sufficient evidence of whether

they deliver the technical details required for a functioning state aid regime that supports our economy and communities up and down the country. We will, however, do what we can to tease out some of the concerns that we have been able to identify about the technical nature of what is being proposed.

This set of regulations comes to 80 pages. I, and other Members, have been on Public Bill Committees that have been allocated many days, if not weeks, to consider far shorter Bills with line-by-line scrutiny, quite often following pre-legislative evidence sessions from expert witnesses. Yet we are given 90 minutes, of which about 64 remain, and we will have to do our best to identify the key areas for such scrutiny. It is a most unsatisfactory situation, but we will do what we can.

John Mann (Bassetlaw) (Lab): I hear that we may be free next week. Will my hon. Friend propose that the Committee adjourn until then, so that we can sit throughout the week in order to do the necessary, detailed line-by-line scrutiny—a proposal that I would be totally in accord with?

The Chair: Order. Just for your information, Mr Mann, whether the Committee is adjourned or not, it can last only an hour and a half, come what may—and we have already had 27 minutes.

Bill Esterson: Fortunately, Mr Hanson, you have answered my hon. Friend's question very well. I think his point was that we are really not doing this justice, and are not in a position to do so. However, we will do what we can.

Paragraph 2.1 of the explanatory memorandum describes what the regulations do. It says:

“The overall effect is to transpose the EU State aid regime as set out in Articles 107 and 108 of the Treaty on the Functioning of the European Union (TFEU) into domestic law and give the Competition and Markets Authority...the function of regulating the regime in place of the EU Commission”.

Paragraph 2.2 says:

“State aid is support in any form (financial or kind) from any level of government which gives a business or another entity an advantage that could not be obtained in the normal course of business. State aid is governed by Articles 107 to 109 of the TFEU—and a number of EU regulations made under those TFEU Articles. Article 107(1) defines State aid and sets out the general prohibition on giving aid. The prohibition operates by effectively providing that aid is incompatible with the internal market insofar as it affects trade between Member States unless the aid has been approved by the Commission.”

However, the proposed regulations apply only to aids that affect trade between the UK and the EU. That on its own is somewhat odd, as it applies in the event of a no-deal Brexit, when we would be a third country, with no agreement with the EU and no prospect of reciprocal arrangements. Certainly none would be in place. Under no deal, aids in the EU that affect trade between the EU and the UK will not be subject to article 107 and 108. On subsidies, EU rules are much more stringent than those of the WTO, so in the light of the Treasury's own estimates of serious contraction of the economy, it is of real concern that the Government are limiting their ability to stimulate the economy through the use of state aid, by retaining EU restrictions on its application. *[Interruption.]* I am starting to answer the question from the hon. Member for Burton, and there is more to come that will address his points.

What will the state aid regime post Brexit mean in practice? Paragraph 2.8 of the explanatory memorandum refers to postal services and rural transport. Will we see additional support for our post offices? That is part of the Minister's brief so she should be able to answer that. Sadly, post offices continue to close, despite her protestations that she has done a deal with WHSmith.

Our towns and villages, many of which do not have access to the internet, depend on post offices. Those who rely on cash, including many smaller businesses especially, need a full postal service system. Labour's plans for a full postal bank network would be allowed under the draft regulations, so why not adopt it, to the benefit of residents and businesses? That is entirely what the exemptions covered by the regulations anticipate. I live in hope for the Minister's answer. The draft regulations show that she could intervene far more extensively if she wished, and I hope that she will take the opportunity to do so.

Similarly, will we see better rural bus services? My constituents would certainly welcome such Government intervention, rather than allowing private bus companies to continue to cherry-pick routes and leave those in rural communities with inadequate or non-existent public transport.

The Chair: Order. It would really help the Committee if the hon. Gentleman at least said “The State Aid (EU Exit) Regulations 2019” when making his points. We can use examples but we have to keep the meat of the discussion on the document before the Committee.

Bill Esterson: Absolutely, Mr Hanson. I quoted paragraph 2.8 of the explanatory memorandum for the State Aid (EU Exit) Regulations 2019, which refers to support for postal services and rural transport as examples of services of a general economic interest that are covered by the regulations. I was using them as an example. I am glad that you asked me to clarify why I was doing so and are happy that I have done so.

Paragraph 2.13 of the explanatory memorandum refers to the operation of a functioning state aid regime. It says:

“This is important to give certainty and continuity for business, to prevent distortions of competition and to ensure that less prosperous regions of the UK are not disadvantaged by support provided in wealthier regions.”

That point was alluded to by my hon. Friends in their interventions. Does that commitment to provide support for our less prosperous regions mean that the Government will invest to replace the money that is currently delivered by the EU to areas such as the Liverpool city region? That area has historically benefited from European Union funding under the European regional development fund and similar programmes, which is the kind of investment in infrastructure and skills that my constituents have needed and will continue to need.

Such investment has delivered both success for businesses and high-skilled and well-paid jobs in the regions and nations of the UK. The explanatory memorandum's reference to having a functioning state aid regime in place is a reminder that the Government need to continue such support once we have left the EU—from day one of the application of the regulations, without a gap in between. I would be interested to hear what the Department has in store to ensure that there is no gap between European funding and national funding.

Martin Whitfield: Before my hon. Friend progresses through the explanatory memorandum, may I draw him back to the extent and territorial application of the statutory instrument? We talked earlier about the negotiations with the devolved Administrations, and the Minister said there was some concern—I apologise if I misquote her—about the quality of the discussion. Will my hon. Friend set out his understanding of how the devolved Administrations view the statutory instrument? Is he able to enlighten the Committee on that?

Bill Esterson: My hon. Friend is quite right to pursue that point further. I prepared a section of my speech on that, and I will pick up his point in detail when I reach it. I have identified some additional points from what he said earlier and the Minister's reply.

Paragraph 6 of the explanatory memorandum covers the legislative context. It lists no fewer than 14 pieces of legislation affected by the regulations and underlines just how much of a challenge it is for the Committee to scrutinise these changes, which are vast in scale and have far-reaching consequences. The volume of legislation listed in paragraph 6.4 demonstrates why it simply is not possible for us to say whether the regulations deliver the technical changes the Minister claims are being made. It is not that she is wrong; it is that I have no way of telling whether she is right or wrong. That is an important distinction. [*Interruption.*] I am perfectly capable of reviewing the legislation, as the hon. Member for Burton points out. Unlike him, I do not have the legal background—

Andrew Griffiths *indicated dissent.*

Bill Esterson: Oh, the hon. Gentleman does not have a legal background either—never mind. We are in danger of being diverted again.

In paragraph 6.10 of the explanatory memorandum, the Government say they will rely on EU case law in their application of state aid rules, but there is legal opinion that we may have to rely on case law from before we joined the EU—this point was picked up in the Lords—as we will no longer be bound by the treaties of the EU. That may be tested in the UK courts, and it may take years to resolve. That has been the case with other regulations passed in Committees like this, and Ministers have not been able to give a satisfactory answer—presumably because there are conflicting legal views about how it would be resolved. Before we joined the European Union, there was of course no comprehensive state aid regime to regulate what was and was not permitted, so the difference between the two options is very significant.

The information provided to us does not give us the evidence we need to make a reasonable judgment about the technical adequacy of the regulations. For a simple example of that, I refer Members to paragraph 6.14 of the explanatory memorandum. I have no doubt about the need to omit specific references to Germany in article 107(2)(c) of the EU regulation, but I also have no way of knowing whether such a technical change is appropriate. More to the point, we have no way of knowing whether all the necessary technical changes of a nature similar to those identified in paragraph 6.14 and a number of other paragraphs have been made.

A further example of our inability to form an opinion can be found in the wording of paragraph 6.28, which states that

“a large number of deficiency corrections were required to make the Procedural Regulation operable in a domestic setting.”

The explanatory memorandum does not describe in detail what that large number of deficiency corrections is, it does not say what the evidence base is for asserting the need for those corrections, and it does not give back-up expert witness evidence in support of that assertion. That sentence is a pretty fair indication that we have an impossible task and are being asked to approve something with a clear lack of evidence to support doing so.

The CMA is being asked to take on responsibility for oversight of the state aid regime from the European Commission. In paragraph 7.2 of the explanatory memorandum, the Government refer to

“the costs and benefits of setting up a completely new body or having an established regulator take this on”.

I note the information before us does not give the details of that cost-benefit analysis or why the decision was taken to choose the CMA rather than setting up a new body.

That takes me back to the points made in earlier interventions about the devolved Administrations. Paragraph 10.1 refers to the discussions with the devolved Administrations and the CMA. It sounded to me in those earlier exchanges as though the Minister was in danger of being right in the middle of a constitutional crisis. Without publication of the Secretary of State's response to the letter from the Welsh Government, this dispute has not been resolved to anybody's satisfaction. How can we judge what the outcome is or should be without sight of that response?

Kelly Tolhurst: I would like to clarify what I said earlier on that particular point, where I alluded to the fact that the Secretary of State had responded. I understood it to mean a letter that had been sent to the Secretary of State earlier in the year, which is known and has been published. I had not appreciated that the letter that the hon. Gentleman referred to was the letter sent to the Lords Committee, which my hon. Friend Lord Henley of the other House will respond to. I hope to clarify that point, since the hon. Gentleman raised it.

Bill Esterson: I am grateful to the Minister for that intervention, which tells us that we have not had the response from the Secretary of State. I am pleased that we got that on the record.

The Secondary Legislation Scrutiny Committee (Sub-Committee B) report, published on 7 February, refers to this issue and asked

“whether the Devolved Administrations were content with the approach”.

It is pretty clear that there has not been an answer to that question, let alone the more detailed letter published as evidence given to that Committee, which my hon. Friend the Member for Blaenau Gwent quoted from earlier and which I will quote from in more detail now. Not only are those responses not recorded, but it does not appear they have been made.

Nick Smith: I think what we heard from the Minister in her intervention on my hon. Friend was that the Government have still not published their legal position

on this matter. We have all been effectively waiting for it for two months. Can he try to elicit from the Minister when we are likely to see that legal position made clear?

Bill Esterson: That is absolutely the right question to ask. I will just make clear exactly what questions we want answered by quoting from the letter published on the website as evidence to the Secondary Legislation Scrutiny Committee, which raised significant concerns:

“These Regulations transfer functions to non-devolved public authorities, namely the Competition and Markets Authority and the Secretary of State”—

we will come back to him later—

“and giving functions to non-devolved public authorities restricts the legislative competence of the National Assembly for Wales.”

It also said that

“there is the added problem that the Welsh Government and the UK Government disagree as to whether State Aid is devolved”, and quoted the advice of the Welsh Government Counsel General, which said:

“The Welsh Government’s position is 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. However, the UK Government do not consider it as such”—

the Minister has made that point already—

“(as was noted in the Intergovernmental Agreement) and therefore they have not requested Welsh Ministerial consent. The Welsh Government has requested from the UK Government, an explanation of their legal position but there has been no response.”

As we have just confirmed, that is still the case.

The Welsh Government go on to say:

“The approach being adopted by the UK Government therefore appears to be a breach of paragraph 8 of the Intergovernmental Agreement”

on the European Union (Withdrawal) Act 2018, which states:

“The UK Government will be able to use powers under clauses 7, 8 and 9 to amend domestic legislation in devolved areas but, as part of this agreement, reiterates the commitment it has previously given that it will not normally do so without the agreement of the devolved administrations. In any event, the powers will not be used to enact new policy in devolved areas; the primary purpose of using such powers will be administrative efficiency”.

It is pretty clear that the Welsh Government think this is a matter significantly beyond administrative efficiency. They say:

“In reaching this view we also note that the UK Government has not responded to the Welsh Government’s request for an explanation of their position that State Aid is a reserved matter.

In his letter to us”—

the Welsh Government—

“the Counsel General has confirmed that the Welsh Ministers do not intend on granting to the UK Government unilateral consent for these Regulations.

It is our understanding that discussions between the Welsh Government and the Secretary of State for Business, Energy and Industrial Strategy are ongoing.”

I understand that the Scottish Government have similar concerns, but I have been unable to find public confirmation in writing. Perhaps the Minister will be able to clarify one way or the other—I do not think we quite got that from her earlier.

I mentioned the phrase “constitutional crisis”. I do not know whether that is a fair representation or not, but it sounds pretty serious to have such substantial

disagreement. Given the seriousness and the importance of these regulations, I suggest that it would have been extremely beneficial to have resolved this before it came to the Committee.

Paragraph 10.2 of the explanatory memorandum refers to the August 2018 technical notice and discussions with a variety of stakeholders, including the Confederation of British Industry and the Federation of Small Businesses. The responses to the technical notices have not been published with the explanatory memorandum. Paragraph 12.3 states that

“the instrument will not have a significant impact on business.”

From this discussion so far, it is pretty clear that how the CMA chooses to operate the state aid regime, and how funding to the regions and nations of the UK is operated—for example, to replace ERDF funding—will have an enormous impact on business and the economy, as well as on our constituents in the poorer parts of the country.

The Minister might wish to comment on what I have already said, and I also have a number of questions for her. She said earlier that the CMA has expertise, but these are entirely new responsibilities. Hence I referred to the cost-benefit analysis of whether a new body should be created or whether these powers should go to an existing organisation. The decision was taken to give them to the CMA, which is taking on the role of national regulator in addition to its significant current responsibilities.

How are the preparations going for the CMA to take on those new responsibilities? How many staff have been recruited? Has it even been possible to identify the necessary staff with the skills, experience and expertise needed to fulfil the functions required under those new responsibilities? Does the CMA have the capacity to discharge these new duties? Why have the Government chosen to significantly expand this agency in London, missing the opportunity to support the economy across the country? This is a form of state aid, is it not? We might think it ironic that we have regulations on state aid but the Government have chosen not to use such an opportunity to support the economy and jobs in other parts of the country.

Is there a plan to review how the existing state aid guidelines operate in a UK-only context once the new regime has been set up? What will be the engagement and involvement of the devolved Administrations according to the Government’s plan, notwithstanding the fact that the way this is addressed has yet to be resolved? What is their plan on the involvement of local and regional government, industry bodies, trade unions and civil society?

The Secondary Legislation Scrutiny Committee not unreasonably asked for clarity on whether primary legislation would be needed to introduce state aid, and under what circumstances that might apply. This is referred to in a number of places in the explanatory memorandum, including in paragraph 7.6. I should be grateful for clarification from the Minister on what certainty exists around the regime that is being created by these regulations and whether, given the complexities involved, these regulations are in fact inadequate. As the explanatory memorandum says, primary legislation is needed. When will that legislation be introduced? Perhaps she can tell us of any plans to do that.

[Bill Esterson]

Will the CMA retain the strict EU interpretation of state aid rules or allow a loosening of them to enable support for the economy, not least given the loss of EU funding and those Treasury forecasts of economic contraction after we leave the EU? If that is not to happen, why are the Government not moving straight to a less strict system, as covered by WTO rules, rather than via this halfway house given that we will no longer be governed by EU state aid rules once we leave? Usually the answer to such questions is that this is because under the withdrawal Act these regulations are deliberately limited in scope, but if that is true, why are the Government not complying with the withdrawal Act in respect of competences and the devolved Administrations, as I think we have demonstrated in some detail—it is certainly the opinion of the Welsh Government from the letter that I quoted earlier? It seems that the Government are content to follow the process of creating SIs when it suits, but not with any consistency. Again, the oversight appears to be of concern, as so often with this Government. The Secretary of State will have oversight day to day, but Parliament will have to wait to receive reports from the CMA. Perhaps the Minister can spell out the system of reporting to Parliament.

Then there is the consultation by the CMA itself, which ended on 18 March. Would it not have been a good idea if, along with the response to the Welsh Government, we had been shown the responses to that consultation before considering this instrument? We know the Government have been struggling with consultation and impact assessments, and ensuring that all regulations are in place on Brexit day, whenever that is, but for this SI there is the additional concern that there is a massive economic imperative, the need for state aid support across the country, and for the replacement of significant investment in communities such as the ones that my hon. Friends and I represent. The concerns about CMA capacity and expertise, and the uncertainty about whether primary legislation will be needed and about overreach into devolved national competences, are therefore all of real concern. The lack of expert evidence is especially important, on a subject that is so significant to our country, our economy, our constituents and our communities.

I am afraid that the way this matter has been addressed suggests a lack of understanding or interest from the Government on state aid. UK state aid is less than a third, proportionately, of the scheme in Germany, and slightly more than half that in France. The Government did not support Sheffield Forgemasters in 2010, and abandoned Labour's plans to do so. They failed to ensure that contracting supported domestic train manufacturing at Bombardier and steel production at SSI, and stopped the EU using trade remedies to defend our steel industry in the 2015 steel crisis. We know the Government's attitude to state aid. Sadly, their casual approach with the regulations shows that they are ill prepared for Brexit. Yet again they are failing to support industries, economies, jobs and communities across the country.

It is entirely understandable that our Labour colleagues in the House of Lords tabled a motion of regret that the draft regulations were not accompanied by a strategy for consultation on the use of state aid after the UK has

left the EU. I entirely agree with their lordships. The entirely unsatisfactory approach to engagement with the Welsh and Scottish Governments further reinforces the perception that the Lords were absolutely right in their regret of the way that the regulations have been handled.

3.27 pm

John Mann: I am rather opposed to the regulations. I do not disagree with what my hon. Friend said, but I take a more robust view, more in line with that of the Labour party leader, on state aid—namely, that we should have state aid without any restrictions. Indeed, that was one of the arguments used very successfully during the EU referendum campaign as a reason why we should leave the European Union. Many people in areas such as mine were very persuaded by that argument.

I recall leading a joint mining union delegation to Brussels to try to keep Harworth and Welbeck collieries alive, as Harworth colliery, which was one of the most productive in the world, was on the verge of closing down. There was unfair competition worldwide, and the country's alternative was to bring in South African and Australian coal in particular. Having met Ministers here, we went to Brussels, where they were very polite. We got a cup of coffee and biscuits, which demonstrated what the answer would be. The answer was, "No. You signed up to this when you joined the European Union. You knew what you were signing up to, and such state aid is prohibited."

Our argument was that we had a highly productive colliery and that we had an energy plan in the country that matched whatever the environmental protocols of the day were, pre-Kyoto. We wanted to dig the coal in my constituency as opposed to importing it, damaging the environment as fuel was used to ship over coal from Australia and South Africa. We were unsuccessful because of the state aid rules.

I had an earlier experience of why the state aid rules have worked against this country in the fledgling industries of the future. In 1988, I led the world-leading project on what came to be called DVDs—at the time, it was called interactive video—with Dr George Harland of the Open University, the late Vincent Hanna and Tony Lazzarini, an expert software engineer. We were the top award winners in the world at the time, but the competition was American, and in California the Americans were subsidising hugely, on both state level and national level, their industries competing against the fledgling ideas of geniuses elsewhere. I do not include myself in their number; I was merely a process producer or facilitator of the genius of the people I had managed to get together. They were world leaders—provably the best—but the Americans, through state aid in California and through the use of military contracts that tied in a state obligation on developing technology, wiped us out. Silicon Valley, as it became known, made huge gains.

The Chair: Order. I am listening carefully to the hon. Gentleman. He is discussing state aid in general terms, but I would be grateful if he linked his comments to the provisions of the statutory instrument, which transfers powers from the European Union to another body. The instrument is very specific.

John Mann: The instrument is very specific, and what I am doing is outlining why I will vote against it. I object to the transfer—there should be no transfer and

no restrictions on giving support to the innovative entrepreneurial industries of the future. When we have left the European Union, we should not hamstring ourselves with these regulations and have the Competition and Markets Authority say, “No, we can’t give support.” Areas like mine will be more than willing to give support to incubate those new sectors, yet as outlined in the instrument, all that is permitted under the European Union is European-level projects, such as Horizon, where the European Union gives state aid—sometimes wisely or even very wisely, in my view—but stops individual nation states and the governmental levels beneath them doing so. My objection to the regulations is that they will not allow local government or national Governments, parliamentarians or local councillors, to act in the interests of existing industries or the new industries of the future in the way that is economically rational.

We will be competing with India, China and America, and their approach, without a level playing field. We are hamstringing ourselves. The SI is a mistaken SI. The Government should withdraw it and go back to the drawing board. Do not give these powers to the CMA. Do not hamstring us. I hope that the Labour Front Benchers will, for those reasons—and because Jeremy agrees with me—robustly oppose the regulations.

3.33 pm

Martin Whitfield: It is a great pleasure to serve under your chairmanship, Mr Hanson, and to follow my hon. Friend the Member for Bassetlaw. I will take a couple of minutes to explore the situation around devolved authorities and this statutory instrument. I will focus on Scotland, from which, if I understand my hon. Friend the Member for Sefton Central correctly, there has been no formal response, but where there is great disquiet about the direction of the SI.

Bill Esterson: I have no way of knowing whether there has been a formal response, because the Government have not published anything.

Martin Whitfield: I am grateful for that clarification. I understand the Government’s position: they say the matter is reserved, for which the authority is the “Frameworks Analysis: Breakdown of areas of EU Law that intersect with devolved competences in Scotland, Wales and Northern Ireland” from 9 March 2018; but under the devolved model in Scotland, everything not in the schedule to the devolution Act is devolved to the Scottish Parliament. Where in that schedule is the matter reserved to this place?

3.35 pm

Kelly Tolhurst: It is great to be able to answer a few of the questions put to me. I have faced the hon. Member for Sefton Central in Committee several times in recent weeks, but I hope that earlier he was not questioning my integrity by not understanding or believing what is in front of him. I hope he accepts that I always try to answer the questions as openly as they are put to me.

Bill Esterson: On a point of order, Mr Hanson. I am sure that had anything disorderly taken place or the suggestion the Minister just raised been made, you would have intervened and stopped it. May I have your confirmation that that is what would have happened, and that as it did not, nothing disorderly happened earlier?

The Chair: We are having a lively debate and views are being exchanged. The Minister is on her feet, responding to the points made, at length, by the hon. Gentleman, and I call on her to continue.

Kelly Tolhurst: Thank you, Mr Hanson. I think the hon. Gentleman’s point of order highlights that he was not questioning my integrity, so I thank him for pointing that out.

Andrew Griffiths: We have heard Opposition Members speak at such length and with such passion that one might have thought that, if they were so bothered and exercised about the subject, half of their members of the Committee would have turned up to take part.

Kelly Tolhurst: My hon. Friend makes a fair point.

In many of our debates on no-deal regulation, the fact that we are where we are regarding the powers in the withdrawal Act and bringing in retained European law through secondary legislation has been a bone of contention for the hon. Member for Sefton Central. I understand that he wants further scrutiny, but I assure him that the reason we are here today, dealing with a no-deal SI, is that we are retaining EU law and bringing it over so that in the event that there is no deal on exit day, we have a functioning domestic regime. The regulations have been laid and there have been opportunities to read and examine them. I do not believe that the Government in this case are shirking their responsibilities or not giving Parliament the opportunity to scrutinise. We have been debating for an hour in this Committee. The withdrawal Act does not allow us to make big policy changes; we can make the changes required. We are debating a no-deal SI, which will come into effect if we leave the European Union with no deal. If we can reach agreement on a deal, the regulations will not be relevant.

Bill Esterson: That is interesting. I read the regulations and the explanatory memorandum in some detail several times. Although the Minister is right that the regulations will apply in the event of no deal, it is pretty clear that they will also apply if there is a deal. Indeed, I checked this point with the Library, and the regulations will apply whatever the arrangements for our exiting the EU. Will she confirm that that is the case?

Kelly Tolhurst: The hon. Gentleman makes a good point. If we entered into an agreement, we would go into an implementation period, and we would be bound by EU rules as they stand until the end of that implementation period. In any arrangement for our future relationship with the European Union, state aid would be subject to debate and to further negotiation and agreement. It would not be right for me to anticipate that. I am here to talk about a no-deal scenario and the legislation in front of us.

On the hon. Gentleman’s shopping list of state aid requirements—the things he would like to spend money on—I point out that the Post Office effectively does receive state aid. We subsidise the Post Office. We have maintained our network of 11,500 post offices, unlike previous Governments, who have undertaken programmes of closures. I am proud to stand here as the Minister responsible for post offices and say that the Post Office is in a much better place financially than it has been for many years. We are committed to delivering postal

[*Kelly Tolhurst*]

services in rural areas, and there are a number of funds to support that. I am determined that that will continue under these regulations.

It is a matter for debate whether, how, where and how much money will be granted to other worthy schemes. It is not for us to decide today which schemes and which parts of the country will receive additional funding. This debate is about the regulations—the rules—and how those decisions will be made. I understand the hon. Gentleman's wants, but this debate is about the rules for agreeing or disagreeing.

The hon. Gentleman spoke about support for the regions. As he will know, the regional growth fund and most of the regional support funds granted through state aid are covered by the block exemption regulations, so these measures do not stop the Government supporting local communities and regions where required. This Government operate a successful industrial strategy and are determined to continue to invest in research and development, regional growth and opportunities, particularly for small and medium-sized enterprises. Let us not forget the funding available from the British Business Bank, which is an example of where those regulations have been used to benefit SMEs and provide access to finance.

On the devolved Administrations, I repeat that the Government consider the regulation of state aid to be reserved to the UK Government. However, individual choices about how and when to give aid within that framework are for public authorities, including devolved Administrations, to make. The devolved Administrations will have full autonomy in state aid case management and in dealing with the CMA. As I outlined, I recognise that there is a difference of view about whether the regulation of state aid is a reserved matter. However, given that the UK Government are closely aligned with the devolved Administrations on the substance of the policy, and given the limited scope to depart from mirroring the EU regime using powers in the regulations, it is not necessary to resolve that question now. The Government will continue to work closely with the devolved Administrations on the development of state aid policy.

Brendan O'Hara: The Minister says it is not necessary to decide that now. If not now, when will it be decided?

Kelly Tolhurst: As I have already outlined to the hon. Gentleman, the Government are clear that we believe state aid to be a reserved matter. I have tried to outline that a number of times, and I have outlined that there will be no loss to the devolved Administrations.

As I have said, under the current regulations, when the devolved Administrations decide to give aid they have to notify the European Commission. In the future, they will notify the CMA. As I have outlined, the Secretary of State will continue to consult, work with and have conversations with the devolved Administrations on any future aid policy. The Secretary of State has made that commitment, and there is no reason to suspect that it will not happen.

Nick Smith: Surely the Minister accepts that, although she may assert what the Government think, it is fair and reasonable for us to ask them to give us the legal explanation for their view. That is all we are asking for, and we should have it.

Kelly Tolhurst: As I have outlined, we expressed our belief in the intergovernmental agreement on the withdrawal Act that state aid is a reserved matter. That is our opinion, as I have said a number of times. It is not for the Committee to debate whether we were in the right when we expressed that position. The SI in front of us concerns a UK-wide regime. It is a no-deal SI that transposes EU law into UK law and remedies the deficiencies within that law for the UK domestic system, so that if we leave the European Union with no deal we have a functioning state aid regime, which is extremely important for us to trade with the European Union without a deal. If we leave without a deal, businesses will still want clarity over trade opportunities with the European Union. Therefore, the regulations are an important part of ensuring consistency and continuity for the business community and aid givers.

Bill Esterson: I will repeat part of the quote that I read out from the Welsh Counsel General about clauses 7 to 9 of the withdrawal Act. It relates to the intergovernmental agreement that the Minister has just referred to, and states that

“the powers will not be used to enact new policy in devolved areas; the primary purpose of using such powers will be administrative efficiency”.

I put it to her that this is a million miles away from being just about administrative efficiency. By any definition, this is about new policy in devolved areas.

Kelly Tolhurst: I thank the hon. Gentleman for that, but the SI does not create new policy; it relates to retained EU law. As I said, if there are any future changes on state aid—I cannot answer hypothetical questions about what might be coming in future—we will continue to consult and work with the devolved Administrations. If we reach an agreement to leave the European Union with a deal, the devolved Administrations will have a greater opportunity, as outlined by the Prime Minister, who has been very clear that she wants to work with them on formulating the future relationship.

I reiterate that this would be a UK regime. The devolved Administrations would still be able to act as aid givers and make those decisions on where they want to put that aid; they will just have to notify the CMA rather than the European Commission. I highlight the fact that a number of aid options are covered through the block exemption, which I have already outlined; as I said in my opening comments, that covered 97% of the state aid given in the UK in 2017. I therefore believe that the regulations we have before us are sensible, valid and definitely required if we leave the European Union with no deal.

The hon. Member for Sefton Central also asked whether the CMA is the correct authority to take on the state aid function, and why another regulator would not be set up. Let us be clear that the CMA has an international reputation and is extremely well respected for the work it does within competition and markets. It also has relationships throughout the international community. I am absolutely assured that it is the right organisation to take on this function, because of its expertise, the respect it commands and its understanding of competition, which will enable it to ensure fairness while being able to guarantee that state aid is administered without restricting competition or giving unfair advantage. That goes to

the heart of what our state aid regime will be. In my view, the CMA is the right organisation to take that on and it has the necessary expertise, so there is no need to create a new regulator.

The hon. Gentleman also asked how the CMA's preparations are going. I have outlined already the funding that has gone to the CMA to enable it to prepare. I reassure him that we are indeed looking at the devolved Administrations; that is why the CMA has been strengthening its Edinburgh branch—it is expected that some state aid work will be happening in Edinburgh. I assure hon. Members that the CMA has done a great job so far with its recruitment and getting the numbers of people that it will require in place before exit day to manage the new state aid regime. There are only 24 people left to recruit and the CMA has made great strides in that respect.

The hon. Gentleman also talked about the guidance that is being reissued. The guidance that will be provided by the CMA on approving state aid will be issued prior to exit day. He talked about primary legislation and where the Secretary of State will be able to—*[Interruption.]*

The Chair: Order.

Richard Harrington (Watford) (Con): Mr Hanson, I apologise; I do not know what has happened to my phone. I apologise to the entire Committee.

The Chair: I am grateful to the hon. Gentleman. Once we can accept, but twice is too much.

Richard Harrington: I do not know what happened. I pressed every button to try to make it stop.

Kelly Tolhurst: The hon. Member for Sefton Central mentioned paragraph 7.6 of the explanatory memorandum. He read out the passage relating to how the Secretary of State would enact primary legislation. The Secretary of State would do so, in the event that the state aid rules were too restrictive, to provide any state aid that was required. That would rarely be used, but it is an option detailed in the explanatory memorandum.

The hon. Member for Bassetlaw mentioned the motion of regret that was moved in the other place, which focused on the provision of aid rather than the rules governing it. It is important to note that the motion was withdrawn and not divided on. I want to touch on his comments about state aid and the WTO. I understand that he is a great supporter of Brexit and that he might have concerns about this SI. I would like to explain that we have a set of rules here that relate to a no-deal situation. I want to reassure him that the state aid rules in front of us, and the European rules as they stand, have vast flexibility. Over the past 40 years, we have had only six negative judgments against the UK. The decision on whether to offer state aid is a matter for the Government of the day. The regulations before us have not been a barrier to the use of state aid, and they have not restricted our ability to fund the British Business Bank or other projects.

With regard to WTO rules, there are rules that would still need to be adhered to. These regulations would obviously help us establish a future trading relationship with the European Union, and it would be helpful to us

to have a clear regime in place, so that the European Union could have confidence in our ability to offer that trade. Quite rightly, as we would be a third country, WTO rules would still be used. They do not necessarily offer us any better protections or give us more flexibility in the long run, but I understand the concerns of the hon. Member for Bassetlaw.

I think I mentioned earlier that WTO rules do not stop any Government nationalising a service; the rules stop them paying more than the market rate for a particular asset. By the Opposition's admission, they would like us to have a deal with the European Union rather than to go into a no-deal situation, so I would have thought that the Opposition would welcome these regulations to give assurances. Indeed, were we to move to a customs union—the policy favoured by Opposition Front Benchers and their leader—there would need to be some kind of state aid regime.

I could keep rabbiting on forever about state aid. We need to provide continuity and certainty for public authorities that grant state aid and their beneficiaries. This approach will maintain business confidence, particularly in the event of the UK's leaving without a deal. The regulations safeguard competitiveness, and I commend them to the Committee.

Bill Esterson: On a point of order, Mr Hanson. In the light of the Minister's inability to deal with the point about the response from the Welsh Government to the Secretary of State, is there a way for the regulations to be further debated on the Floor of the House as part of their passage? That would give the Minister time to get us the answers to that question and others, because this is very unsatisfactory.

The Chair: Order. This Committee is the opportunity to consider the regulations. The hon. Gentleman can vote for or against the motion, and they will be reported to the House for approval in due course.

Question put.

The Committee divided: Ayes 9, Noes 5.

Division No. 1]

AYES

Griffiths, Andrew	Newton, Sarah
Harrington, Richard	O'Brien, Neil
Harris, Rebecca	Scully, Paul
Hughes, Eddie	Tolhurst, Kelly
Keegan, Gillian	

NOES

Esterson, Bill	Smith, Nick
Mann, John	
O'Hara, Brendan	Whitfield, Martin

Question accordingly agreed to.

Resolved,

That the Committee has considered the draft State Aid (EU Exit) Regulations 2019.

4.1 pm

Committee rose.

