EXPLANATORY MEMORANDUM TO

THE COMPETITION ACT 1998 (HEALTH SERVICES FOR PATIENTS IN ENGLAND) (CORONAVIRUS) (PUBLIC POLICY EXCLUSION) ORDER 2022

2022 No. 124

1. Introduction

1.1 This explanatory memorandum has been prepared by the Department for Business, Energy and Industrial Strategy and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

2.1 This Order temporarily excludes from the application of the prohibition contained in Chapter 1 of the Competition Act 1998 ("the Act") certain agreements between independent healthcare providers and between independent healthcare providers and NHS England (NHSE) and other NHS bodies. The Order is made to ensure that independent healthcare providers are able to support NHSE through expanding its capacity to respond to the spread of coronavirus.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

4. Extent and Territorial Application

4.1 The territorial extent of this instrument is England and Wales, Scotland and Northern Ireland.

4.2 The territorial application of this instrument is England, as it applies only in relation to agreements made to assist the National Health Service with healthcare provision in England.

5. European Convention on Human Rights

5.1 As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

6. Legislative Context

6.1 Paragraphs 7(1) and (2) of Schedule 3 to the Act provide that the Secretary of State may, if satisfied that there are exceptional and compelling reasons of public policy, by Order, exclude agreements from the Chapter I prohibition (see paragraph 7.1 below for an explanation of the Chapter I prohibition). In accordance with section 2(5) and (6) of the Act, unless the context otherwise requires, the references to an agreement in paragraph 7 of Schedule 3 are to be read as applying equally to, or in relation to, a decision by an association of undertakings or a concerted practice (but with any necessary modifications).

6.2 Paragraph 7(3) of Schedule 3 to the Act provides that the Order may deem the Chapter I prohibition never to have applied in relation to the excluded agreements.

6.3 Seven Orders were made in 2020 and 2021 under the powers in paragraph 7 of Schedule 3 to the Act in relation to sectors affected by the spread of coronavirus. Those Orders were:

- The Competition Act 1998 (Health Services for Patients in England) (Coronavirus) (Public Policy Exclusion) Order 2020 (S.I. 2020/368) ("the Health Services for Patients in England Order");
- The Competition Act 1998 (Groceries) (Coronavirus) (Public Policy Exclusion) Order 2020 (S.I. 2020/369) ("the Groceries Order");
- The Competition Act 1998 (Solent Maritime Crossings) (Coronavirus) (Public Policy Exclusion) Order 2020 (S.I. 2020/370) ("the Solent Crossings Order");
- The Competition Act 1998 (Health Services for Patients in Wales) (Coronavirus) (Public Policy Exclusion) Order 2020 (S.I. 2020/435) ("the Health Services for Patients in Wales Order");
- The Competition Act 1998 (Dairy Produce) (Coronavirus) (Public Policy Exclusion) Order 2020 (S.I. 2020/481) ("the Dairy Produce Order");
- The Competition Act 1998 (Groceries) (Public Policy Exclusion) Order 2020 (S.I. 2020/1568) ("the Groceries No.2 Order"); and
- The Competition Act 1998 (Football Broadcasting Rights) (Public Policy Exclusion) Order 2021 (S.I. 2021/1148) ("the Football Broadcasting Rights Order").

6.4 Of these only the Football Broadcasting Rights Order remains in force.

7. Policy background

What is being done and why?

7.1 Section 2 of the Act prohibits agreements, decisions or concerted practices which may affect trade within the United Kingdom, and which have as their object or effect the prevention, restriction or distortion of competition within the United Kingdom. This is known as the "Chapter I prohibition".

7.2 Paragraph 7 of Schedule 3 to the Act gives the Secretary of State the power to exclude certain agreements (which term includes concerted practices such as information sharing – see section 2(5) of the Act) from the application of the Chapter I prohibition where he is satisfied that there are exceptional and compelling reasons of public policy why they ought not to apply. The exclusions may apply only in specified circumstances and may be retrospective.

7.3 In light of the significant burden placed on the NHS by the spread of coronavirus, the Health Services for Patients in England Order was made in March 2020, allowing NHSE to commission independent healthcare providers to provide extra capacity for treatment of both Coronavirus patients and others.

7.4 Cooperation of this kind was essential in responding to coronavirus. It did however require providers to engage in agreements or practices which would or might ordinarily be considered anticompetitive. In order to protect providers from the risk of legal action for their work in supporting the NHS, the Government at the time legislated to exclude relevant agreements from the scope of competition law.

7.5 The contractual arrangements expired on 31 March 2021. Following consultation with NHSE and independent health services providers, the Government subsequently

revoked the Health Services for Patients in England Order as it was not needed anymore (see the Competition Act 1998 (Coronavirus) (Public Policy Exclusions) (Revocations) Order 2021 (S.I. 2021/773)).

7.6 With the rise of the highly transmissible Omicron variant of coronavirus in the UK in December 2021, rapid and unprecedented levels of growth put considerable pressures on the NHS in England. As part of the Government's response, the Secretary of State for Health and Social Care sought to ensure the NHS had access to the additional capacity it may need to ensure all patients can continue to receive urgent treatment for coronavirus and other conditions. To that end, on 7 December 2021 he requested that NHSE and independent sector providers explore options to utilise independent healthcare providers' capacity in response to the developing coronavirus situation. The Secretary of State subsequently approved a Direction on 23 December 2021 giving NHSE the power to commission services from independent sector providers nationally for this purpose. Arrangements were subsequently negotiated and became active between NHSE and 10 independent sector providers on 10 January 2022, expiring on 31 March 2022.

7.7 This instrument broadly replicates the Health Services for Patients in England Order and excludes relevant agreements from the scope of competition law to enable cooperation that is essential to enable an effective response to coronavirus pressures by NHSE and independent healthcare providers.

7.8 The Order permits agreements in relation to a range of specified activities between independent providers and between independent providers and NHS bodies, for the purpose of responding to coronavirus. These are agreements relating to:

- sharing information about capacity to provide certain services;
- coordination on deployment of staff;
- sharing or loan of facilities;
- joint purchasing of goods, facilities or services; and
- division of activities, including agreement to limit or expand the scale or range of services supplied by one or more providers.

7.9 The sharing between independent providers of information relating to costs or prices is not included in the scope of these exclusions. This Order only applies to activities undertaken in relation to assisting the NHS in addressing the effects or likely effects of coronavirus, so the sharing of information or collusion on future business planning is also not included.

7.10 Agreements intended to benefit from the exclusion under this Order must be notified to the Secretary of State, who will compile, maintain and publish a register of agreements. Notification will need to cover:

- the names of the independent providers or NHS bodies that are parties to the agreement;
- a description of the nature of the agreement;
- the date the agreement was made; and
- the health services to which it relates.

7.11 The Order will come into force on 9 March 2022 and will retrospectively disapply UK competition law in relation to relevant agreements from 7 December 2021. This retrospective application is necessary to ensure that preliminary discussions are

covered which Government recognises may have commenced following a request from the Secretary of State for Health and Social Care on that day to explore options to utilise independent healthcare providers' capacity in response to the developing coronavirus situation.

7.12 Article 7 of this Order provides that the Order expires at the end of 31 March 2022.

8. European Union Withdrawal and Future Relationship

8.1 This instrument does not relate to withdrawal from the European Union.

9. Consolidation

9.1 The previous Order under the powers in paragraph 7 of Schedule 3 to the Act that dealt with this matter, the Health Services for Patients in England Order, was revoked by the Competition Act 1998 (Coronavirus) (Public Policy Exclusions) (Revocations) Order 2021 (S.I. 2021/773). As a result, the need for consolidation does not arise.

10. Consultation outcome

10.1 The Order has not been subject to any formal consultation in light of the urgency with which it needed to be made. The representative body for affected companies was engaged in the development of the Order to ensure that it provided sufficient scope for the industry to undertake necessary activities.

10.2 The Secretary of State's intention to make this Order was notified to the relevant sector body by the Secretary of State for Health and Social Care on 23 December 2021.

11. Guidance

11.1 This order does not require the publication of any guidance.

12. Impact

12.1 There is no, or no significant, impact on business, charities or voluntary bodies as the instrument does not commission the services of the private sector or set out any of the financial terms of the agreement. Instead, this instrument simply enables these private sector health providers to work together, and with the public sector, as required to more effectively and efficiently provide the services which have been commissioned separately. This could have some operational efficiency benefits to private health providers in scope, compared to a scenario where the services had been commissioned but these agreements were not permitted.

12.2 There is no, or no significant, impact on the public sector. This instrument does mean, however, that NHS bodies and commissioning boards will be permitted to make certain agreements with private providers and/or their associations, which could have some public sector efficiency benefits compared to a scenario where these agreements were not permitted.

12.3 A full Impact Assessment has not been prepared for this instrument because this is an emergency instrument that will be in place for a limited period, expiring on 31 March 2022.

12.4 The Order will enable private sector providers to collaborate to increase national capacity in the short term to treat patients when the requirement for medical care is

higher. The impact of this is likely to be significant health benefits to the population and saved lives. While there are some longer-term risks inherent to relaxing competition law in this way, such as firms gaining knowledge of how their competitors operate, this risk is significantly outweighed by the impact of not taking this action which has the potential for individuals to lose their lives or be more severely affected by ill-health than they would be with increased availability of treatment. Additionally, measures have been put in place to minimise these longer-term risks to competition, such as prohibiting the direct sharing of any sensitive financial information (including costs and/or pricing) between healthcare providers.

13. Regulating small business

13.1 The legislation applies to activities that are undertaken by small businesses. It does not, however, place additional regulatory requirements on small businesses; it excludes certain activities from certain aspects of competition law. The Act applies to all businesses regardless of size.

14. Monitoring & review

14.1 The approach to monitoring of this legislation is for the relevant government departments to keep under constant review whether there is significant, or a threat of significant, disruption to the provision of health services to patients in England as a result of coronavirus. The legislation will expire at the end of 31 March 2022, unless it is revoked earlier.

14.2 The instrument does not include a statutory review clause as it is a temporary measure that will cease to have effect before the end of the period of 5 years beginning with the commencement date. It is therefore exempted from the requirement for a review provision (section 28(3)(d) of the Small Business Enterprise and Employment Act 2015).

15. Contact

15.1 Felix Lee at the Department for Business, Energy and Industrial Strategy Telephone: 0207 215 2139 or email: felix.lee2@beis.gov.uk can be contacted with any queries regarding the instrument.

15.2 Alesha De Freitas, Deputy Director for Competition Policy, at the Department for Business, Energy and Industrial Strategy can confirm that this Explanatory Memorandum meets the required standard.

15.3 Parliamentary Under Secretary of State Paul Scully at the Department for Business, Energy and Industrial Strategy can confirm that this Explanatory Memorandum meets the required standard.