

## UK MINISTERS ACTING IN DEVOLVED AREAS

### 81 - The State Aid (EU Exit) Regulations 2019

*Laid in the UK Parliament: 21 January 2019*

#### Sifting

Subject to sifting in UK Parliament?	No
Procedure:	Affirmative
Date of consideration by the House of Commons European Statutory Instruments Committee	N/A
Date of consideration by the House of Lords Secondary Legislation Scrutiny Committee	04/02/2019
Date sifting period ends in UK Parliament	N/A
Written statement under SO 30C:	Paper 20
SICM under SO 30A (because amends primary legislation)	Not required

#### Scrutiny procedure

Outcome of sifting	N/A
Procedure	Affirmative
Date of consideration by the Joint Committee on Statutory Instruments	Not known
Date of consideration by the House of Commons Statutory Instruments Committee	Not known
Date of consideration by the House of Lords Secondary Legislation Scrutiny Committee	Not known

#### Commentary

These Regulations are proposed to be made by the UK Government pursuant to section 8(1) of, and paragraph 21 of Schedule 7 to, the European Union (Withdrawal) Act 2018.

They modify the rights, powers, liabilities, obligations, restrictions, remedies and procedures preserved by section 4 of the European Union (Withdrawal) Act 2018 (the Act) that relate to State aid (State aid rights) and amends and restates the procedure that applies to State aid cases.

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 (CMA) the function of regulating the regime in place of the EU Commission (Commission).

In his letter to the Committee's Chair dated 25 January 2019, the Counsel General stated:

“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 (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.”

Given the significant effect of these Regulations, Members may wish to consider writing to the Secondary Legislation Scrutiny Committee of the House of Lords to make observations endorsing the Counsel General’s arguments. It may also wish to draw the matter to the attention of the Constitution Committee of that House.

Legal Advisers make the following comments in relation to the Welsh Government’s statement dated 25<sup>th</sup> January 2019 regarding the effect of these Regulations:

This Committee welcomes the detailed analysis, and commends this approach to the Government. It facilitates the work of the Committee and the understanding of Members when the statement contains a full explanation of the Welsh Government’s position.

The Counsel General’s letter and statement and the content of the Explanatory Memorandum to these Regulations confirm their effect. The letter and statement also explain the extent to which these Regulations would enact new policy in devolved areas.

Legal Advisers consider that significant issues arise under paragraph 8 of the Memorandum on the European Union (Withdrawal) Bill and the Establishment of Common Frameworks in relation to these Regulations. That paragraph states:

“Under this agreement, the UK Government has committed to ensure that clause 11 regulations will not affect the operation of the Sewel convention and that related practices and conventions in relation to future primary legislation, including legislation giving effect to common frameworks, will continue to apply. Accordingly, those established practices and conventions will operate as if clause 11 regulations had not been made.”

The Counsel General’s letter and statement demonstrate that in this case functions are being transferred to a non-devolved public authority in a way that affects the Assembly’s legislative competence without seeking the Assembly’s consent. That appears to be a clear breach of paragraph 8.

As no consent memorandum has been laid, no consent motion under Standing Order 30A.10 may be tabled in relation to these Regulations.