EXPLANATORY MEMORANDUM TO

THE COMPETITION ACT (PUBLIC POLICY EXCLUSION) ORDER 2012

2012 No. 710

1. This explanatory memorandum has been prepared by the Department for Business, Innovation and Skills (BIS) and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

2.1 This order excludes from the Chapter I prohibition contained in the Competition Act 1998 ("the Act"), a Protocol between the Secretary of State for Energy and Climate Change (DECC) and representatives of the petroleum supply industry concerning the supply of oil and petroleum products in the event of significant disruption, or threat of significant disruption to normal supply. It also excludes agreements, decisions and practices implementing that Protocol.

3. Matters of Special Interest to the Joint Committee of Statutory Instruments

3.1 None.

4. Legislative Context

4.1 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 of a particular description either generally or in specified circumstances from the Chapter I prohibition. Such an Order does not and cannot exclude the application of EU competition law.

5. Territorial Extent and Application

5.1 This instrument applies to all of the United Kingdom.

6. European Convention on Human Rights

6.1 As this order is subject to the negative resolution procedure and does not amend primary legislation, no statement is required.

7. Policy Background

7.1 The policy objective of the Competition Act 1998 is to outlaw those agreements and practices that restrict or distort competition in the UK economy. Competition makes businesses efficient and innovative, drives investment in new and better products, pushes prices down and quality up, all of which make an important contribution to growth. The Competition Act 1998 does however provide that the Secretary of State can by Order exclude agreements or practices from the prohibitions in sections 2 and 18 of the Competition Act 1998 if there are exceptional and compelling reasons of public policy to do so.

7.2 Prior to 2004 the Office of Fair Trading (OFT) had the power to grant exemptions from the Chapter I prohibition to agreements etc. meeting certain criteria as set out in

section 9 of the Competition Act. The OFT granted an individual exemption[1] to a predecessor agreement of the Protocol, the Memorandum of Understanding (MoU) between the then Secretary of State for Trade and Industry and members of the petroleum industry concerning the supply of oil and petroleum products. The individual exemption expired at the end of September 2010 and the OFT no longer has power to grant an agreement an individual exemption. As a consequence of these changes businesses now have to make their own assessment ("self-assessment") as to whether their arrangements fall within the Chapter I prohibition and, if so, whether they meet the exemption criteria of section 9 the Competition Act. The degree of legal uncertainty inherent in the self-assessment regime is generally acceptable to businesses when considering whether to enter into commercial arrangements, since the residual legal uncertainty can be balanced against the commercial benefits that are expected to flow from the arrangements. However, neither the MoU nor the proposed Protocol are normal commercial arrangements, rather they are arrangements entered into by industry at the request of the Government to deal with exceptional circumstances. The Secretary of State considers it highly likely that the agreement is exempt from the Chapter I prohibition in any event. But without an order there will be a delay before actions can be taken whilst industry makes the assessment and furthermore industry considers there would remain an unacceptable risk of challenge on competition law grounds, which even successfully defended, which is the expected outcome, the significant time and resource spent in defending any challenges would make industry reluctant to engage in the activities covered by the Protocol. An order under paragraph 7(1) of Schedule 3 to the Act, excluding the Protocol from the Chapter I prohibition, will provide the necessary certainty to enable industry to act quickly.

7.3 Disruptions to fuel supply can have significant impacts on the UK economy. Fuel disruptions could be caused by a number of factors including scarcity of supply, a technical problem with part of the fuel supply infrastructure, severe weather, industrial action or public protest. In the event of such a disruption, it is also possible that stocks can be further depleted through a sudden increase in consumer demand (such as “panic buying”) and disruptions can occur on a regional or in a worst case scenario, on a national basis. Such disruptions will have significant implications for the delivery of essential services across the UK and the Government needs to ensure, as a matter of public policy vital to public security, that the downstream oil sector has the ability to minimise the disruption and cost by allocating the available fuel to emergency and other specific services in the most efficient manner.

7.4 The Government has developed a voluntary Protocol Agreement with Industry Associations and companies in the UK downstream oil sector the purpose of which, when activated, is to improve the distribution of oil fuels during a disruption. The Protocol enables the sharing of accurate information between the industry parties relating to any disruption of operations, availability of fuel stocks and fuel tanker movements. It also enables joint planning and coordinated supply action between the parties by sharing and redeploying assets.

7.5 Fulfilling the obligations of the Protocol does mean however, that the industry parties would be required to, for example, share commercially sensitive information in a way that potentially breaches the prohibitions of the Competition Act 1998, if the exemption criteria are not met. All the parties to the Protocol are committed to limiting the steps taken in furtherance of the Protocol and avoiding anti-competitive effect. However, the Secretary of State is satisfied that the need for a speedy and flexible coordinated response in the event of an actual or threatened significant disruption to

[1] Decision of the Director General of Fair Trading No. CA98/8/2001, 25 October 2001

normal supply, as envisaged by the Protocol, would be compromised if industry parties must self-assess whether each and every step is excluded from the Chapter I prohibition. Industry parties are unwilling to become a party to the Protocol without the legal certainty of immunity from investigation and prosecution and the risk of a third party making a civil claim against them in the courts.

7.6 The activation of the Protocol would be a more measured mechanism than the Government resorting to taking emergency powers, which would lead to a substantially greater level of intervention in the downstream oil market. The Protocol is an emergency response measure and is not a substitute for emergency powers because the industry parties would be invited to undertake various activities to mitigate the impacts of a fuel disruption on a voluntary basis, rather than through a statutory direction by the Government.

8. Consultation Outcome

8.1 DECC consulted on the preparation of the Protocol during the period June 2010 to March 2011 with the Industry Associations representing the UK downstream Oil Sector: the UK Petroleum Industry Association, Downstream Fuel Association, Federation of Petroleum Suppliers, RMI Petrol Retailers Association, UK LPG; and Asda Group Ltd which is not a member of one of these Industry Associations. The most significant issues responded to related to their members unease of having to take action to share information under the Protocol without the cover of a legal exemption from investigation and subsequent prosecution under the Competition Act 1998, and in carrying out the assessments it would inevitably delay the companies' implementation of their response to DECC's requests

8.2 In a more extreme event where fuel supplies were severely disrupted, DECC may ask the parties to the Protocol to ensure that essential users would be given priority in allocation of any available fuel supplies. The members of the Industry Association pointed out that this would carry the significant risk that supplies to other users and intermediaries supplying not essential users will be temporarily restricted in the period that DECC has activated the Protocol, and as a result they are likely to suffer significant financial loss. These parties may seek to recover those losses and the oil companies are the obvious target for such damages claims. Whilst it is expected that the oil companies should be successful in defending most actions, the prospect of having to defend themselves coupled with the inevitable costs and diversion of management time is one the oil majors would want to avoid.

8.3 DECC also consulted the OFT and BIS in relation to the Protocol and the application of the Competition Act 1998.

8.4 The OFT held a public consultation in 2001 when reaching the decision to the grant an individual exemption to the MoU. No substantive responses to the public consultation were received. The OFT analysis and decision is published on the OFT website: http://www.oft.gov.uk/OFTwork/competition-act-and-cartels/ca98/decisions/oil-supply.

9. Guidance

9.1 DECC is the lead government department for coordinating the response to a significant disruption to oil supply or demand. More information about Downstream Oil Resilience and Emergency Planning is on the DECC website: http://www.decc.gov.uk/en/content/cms/meeting_energy/en_security/downstream_oil/downstream_oil.aspx

9.2 Testing the operation of the Protocol in exercises will also act as a form of guidance to the parties.

10. Impact

10.1 A validated Impact Assessment has been completed and laid in the House alongside this explanatory memorandum. It can also be accessed at the following weblink: http://www.legislation.gov.uk

11 Regulating Small Business

11.1 The order has no direct effect on small businesses.

12. Monitoring and Review

12.1 The Protocol provides for the OFT to be informed, at the earliest possible moment, of the activation and deactivation of the Protocol, and of any material changes to it. It also provides for the OFT to have access to meetings and documents concerning arrangements in furtherance of the Protocol, whether in the event of an emergency of during a resilience exercise.

12.2 Whilst such orders are normally reviewed after a three year period, the order, and Protocol which is a voluntary agreement between the industry parties, would not be subject to a regulatory review by BIS.

13. Contact

13.1 Further information or queries about the explanatory memorandum can be addressed to tony.monblat@bis.gsi.gov.uk (contact 0207 215 6982).