EXPLANATORY MEMORANDUM TO

THE COMPETITION ACT 1998 (PUBLIC POLICY EXCLUSION) (REVOCATION) ORDER 2011

2011 No. 2886

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

2. Purpose of the instrument

2.1 This order revokes the Competition Act 1998 (Public Policy Exclusion) Order 2007 No.1896, which excluded agreements between two or more members of the Team Complex Weapons (Team CW) or between a member of Team CW and any other person together with conduct by a member of Team CW from the prohibitions contained in Chapters I and II of the Competition Act 1998.

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. Paragraph 7(4) enables the Secretary of State, if satisfied that there are exception and compelling reasons of public policy, to disapply the Chapter II prohibition from conduct in particular circumstances.

4.2 The Chapter I and II prohibitions are modelled on and can apply in parallel to the prohibitions in Articles 101 and 102 of the Treaty for the Functioning of the EU (TFEU) in cases where there is an effect on trade between member States. No inconsistency between EC and domestic competition law resulted from the 2007 Order because the competition provisions of the EC Treaty are disapplied by virtue of Article 346(1)(b) which provides that "any Member State may take such measures as it considers necessary for the protection of the essential interests of its security which are connected with the production of or trade in arms, munitions and war material".

4.3 Section 14 to the Interpretation Act 1978 provides that the Secretary of State may revoke a previous order therefore rendering any future agreements which would previously have been excluded by the operation of the 2007 order, now subject to the prohibitions contained in Chapter I and II of the Competition Act 1998.

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 effective 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 provide for specified agreements or practices to be excluded from competition law on the basis that they are necessary in order to achieve a stated public policy goal that outweighs any anti competitive effect. The 2007 order excluded agreements and practices taking place between the industrial members of Team CW, which included the MoD, from the prohibitions contained in competition law on the public policy grounds that they were vital to the national security interests of the United Kingdom.

7.2 The UK's Ministry of Defence (MoD) Defence Industrial Strategy (DIS), published in December 2005 (Cmd. 6697), identified the need to maintain indigenous industrial capabilities and technologies within a number of defence sectors, including Complex Weapons, to ensure that the UK retains appropriate operational sovereignty. Operational sovereignty is defined as the ability for the UK to use its Armed Forces' capabilities with appropriate control and without third party constraints. DIS forecasted a significant decline in UK investment in Complex Weapons and with minimal planned design and development that would be unlikely to retain and sustain a core industrial capability based in the UK on which the UK Armed Forces could rely upon for its supply of complex weapons requirements.

7.3 Team CW was a group of legally separate UK based Complex Weapons suppliers. It had the aim of delivering long-term military capability in Complex Weapons suppliers through an appropriately resourced and sized UK based industrial sector, the MoD developed a Teaming Agreement with Team CW as an interim measure to test how a longer term construct would work. Following this assessment phase, there was an intent to move to a strategic Partnering Agreement should this be demonstrated to be the optimum course of action. The partnering arrangement required the industrial parties to exchange or share commercially sensitive information or act in collective dominance in a way that would breach the prohibitions contained in competition law. The Secretary of State therefore excluded these agreements and practices from the Competition Act 1998 by the 2007 order on the public policy grounds of national security.

7.4 Work commenced to develop an operating model for the proposed industrial Team CW alliance under the protection of the 2007 Order in 2008. However, in early 2009, and as part of the Assessment Phase, it became apparent from emerging legal advice that the proposed Alliance construct could prevent Team CW members from being able to export any products that had benefited from the exchanges of commercially sensitive information made possible by the protection afforded by the 2007 order. The ability to export their products is key to the CW companies and HMG so, once it became clear that such activity was incompatible with the provisions of the 2007 Order, there was no option but to consider other avenues for delivering a UK based CW industrial capability.

7.5 Against this background, the MoD revisited its original analysis to consider an alternative approach that could still deliver a UK based industrial capability to supply the UK Armed Forces with its complex weapons requirements. It concluded it could do so by moving initially to a bilateral partnering arrangement with the major UK CW prime contractor (MBDA UK) with suitable arrangements following with other key CW players. A consequence of this approach is that MOD will need to intervene more directly to achieve restructuring of the CW industrial sector. These arrangements do not require industrial firms to share commercially sensitive information and therefore the requirement for the exclusion given by the 2007 order no longer exists.

8. Consultation Outcome

8.1 In arriving at the decision to revoke the PPEO, MOD consulted with the Team CW members as the key entities affected by the proposal and in their role as broader representatives of the UK CW supply chain. No concerns were raised.

9. Guidance

9.1 The revocation of the 2007 Order makes any bilateral arrangement between MOD and a CW contractor subject to EU and UK competition law. No guidance is therefore required in relation to the operation of these arrangements other than to comply with the relevant provisions in the TFEU and the Competition Act 1998. The Office of Fair Trading publishes significant guidance to firms on complying with EU and UK competition law.

10. Impact

10.1 A validated Post Implementation review has been completed and laid in the House alongside this Explanatory Memorandum. It can also be accessed at the following link: http://www.legislation.gov.uk/

11 Regulating Small Business

11.1 This order applies to all business in the UK complex weapons sector, including small. However, as the firms in the proposed partnering alliance

were large defence contractors with large industrial and complex capabilities, it will have no adverse impact on SME's or microenterprises.

12. Monitoring and Review

12.1 This is a revocation order of a measure that was design to be an intervention in the UK complex weapons market. Therefore, review is not appropriate.

13. Contact

13.1 Further information or queries about the explanatory memorandum can be address to paul.bannister@bis.gsi.gov.uk (contact 0207 215 5009).