EXPLANATORY MEMORANDUM TO

THE DIGITAL MARKETS, COMPETITION AND CONSUMERS ACT 2024 AND CONSUMER RIGHTS ACT 2015 (TURNOVER AND CONTROL) REGULATIONS 2024

2024 No. 1243

1. Introduction

1.1 This Explanatory Memorandum has been prepared by the Department for Business and Trade and is laid before Parliament by Command of His Majesty

2. Declaration

2.1 Justin Madders, Parliamentary Under-Secretary of State (Minister for Employment Rights, Competition and Markets) at the Department for Business and Trade confirms that this Explanatory Memorandum meets the required standard.

2.2 Sarah Adcock, Director for Consumer and Competition Policy, at the Department for Business and Trade confirms that this Explanatory Memorandum meets the required standard.

3. Contact

3.1 Miriam Brooks at the Department for Business and Trade email: Miriam.brooks@businessandtrade.gov.uk can be contacted with any queries regarding the instrument.

Part One: Explanation, and context, of the Instrument

4. Overview of the Instrument

What does the legislation do?

4.1 This instrument makes regulations under paragraph 16H(2) to (4) of Schedule 5 to the 2015 Act and sections 8(4) and (5), 90(2) and (3), 204(2) to (4), 312(6) and (7), and 337(1)(b) of the 2024 Act.

4.2 This instrument sets out how the Competition and Markets Authority (CMA), civil courts and other enforcers will estimate or calculate turnover for the purposes of assessing whether an undertaking should be designated as having Strategic Market Status (SMS), or to determine the statutory maximum for penalties that non-compliant entities may be required to pay under the 2024 Act. These penalties relate to the 2024 Act's provisions relating to digital markets, and to the enforcement of consumer protection law and the motor fuel regime. The consumer penalties regime requires an assessment to be made as to when a person controls another person. This instrument also sets out the circumstances in which a person is considered to have such control over another person.

4.3 The 2024 Act sets out that only those businesses that have been designated as having SMS, following an evidence-based investigation that determines that they meet certain criteria, will be subject to the digital markets regime. One of these criteria is the turnover condition. The CMA will only be able to designate a firm with SMS if it estimates that the undertaking under investigation or, where the undertaking is part of

a group, that group, has either a UK turnover of more than £1 billion or global turnover of more than £25 billion. This instrument makes regulations for the estimation of turnover for the purpose of SMS designation.

4.4 The 2024 Act allows the CMA or other enforcers or courts to impose an appropriate turnover-based penalty on undertakings for failure to comply with a regulatory requirement or investigatory measure imposed under Part 1 of the 2024 Act. For failure to comply with regulatory requirements under the digital markets regime, the CMA can impose penalties of a fixed amount, an amount calculated by reference to a daily rate or a combination of a fixed amount and a daily rate. The penalties for fixed amount can be up to 10% of worldwide turnover, and for a daily rate up to 5% of the daily worldwide turnover for each day a breach continues.

4.5 The CMA may also impose penalties on an undertaking (other than individuals) for failure to comply with an investigative measure under the digital markets regime. The maximum penalty is 1% of the undertaking's worldwide turnover for fixed amount and 5% of the undertaking's worldwide daily turnover for an amount calculated by reference to a daily rate. This instrument makes regulations for the calculation of turnover for the purpose of determining digital markets penalties.

4.6 Part 3 of the 2024 Act restates and updates the current court-based consumer law enforcement framework contained in Part 8 of the Enterprise Act 2002. It also introduces monetary penalties of up to 10% of worldwide turnover for breaches of consumer law, with lower penalties for breaches of procedural steps. The CMA is granted direct enforcement powers for consumer law and is also empowered to impose monetary penalties at the same level. This instrument makes regulations for the calculation of turnover for the purpose of determining consumer enforcement penalties.

4.7 Part 3 of the 2024 Act defines turnover as including not only the turnover of the infringing person, but also the turnover of any persons that control or are controlled by them. These regulations set out a definition of 'control' for those purposes.

4.8 Under the motor fuels regime, the CMA can impose a penalty on an undertaking for non-compliance with an information notice, the falsification or concealment of information, or the provision of false or misleading information in response to a request for information. The maximum penalty which may be imposed is a fixed penalty of up to 1% of worldwide turnover and/or a daily penalty of up to 5% of daily turnover. This instrument makes regulations for the calculation of turnover for the purpose of determining motor fuels penalties.

Where does the legislation extend to, and apply?

4.9 The extent of this instrument (that is, the jurisdiction(s) which the instrument forms part of the law of) is the United Kingdom.

4.10 The territorial application of this instrument (that is, where the instrument produces a practical effect) is the United Kingdom.

5. Policy Context

What is being done and why?

5.1 The 2024 Act introduced the following reforms:

- a new competition regime for digital markets;
- enhanced powers in competition investigations;

- enhanced consumer enforcement powers; and
- updating existing consumer rights and introducing new ones.

5.2 The policy intent in developing these regulations is to set out a clear and transparent methodology for calculating turnover, which is consistent with existing, tried and tested statutory frameworks (including those for calculating competition penalties) and with accounting principles and practices.

5.3 **Digital Markets**: Previous competition laws were not designed to address the unique barriers to competition in digital markets. To rectify this, the 2024 Act establishes a new digital markets regime which provides the CMA with new, faster, more effective tools to address such barriers to competition in digital markets.

5.4 The 2024 Act contains provisions requiring the CMA, the courts and other enforcers to estimate or calculate a business's turnover. This is for the purposes of assessing whether a business should be designated as having SMS, or to determine the statutory maximum for penalties that non-compliant undertakings may be required to pay.

5.5 The turnover condition for SMS designation empowers the CMA to designate undertakings as having SMS for the purposes of the digital markets regime. By prescribing specific turnover thresholds, it ensures that only the very largest firms are in scope for SMS investigation and provides certainty to firms that are out of scope. Because the regulatory power to designate an undertaking as having SMS requires the estimation of turnover, it is necessary – and sub-sections (4) and (5) of section 8 of the 2024 Act empower the Secretary of State – to set out in regulations how turnover should be estimated for this purpose.

5.6 The introduction of turnover based penalties enables the issuing of penalties proportionate to the size of the business involved, providing a more effective deterrent for businesses not complying with investigative measures or breaching the remedies, conduct requirements or other measures imposed by regulators under the digital markets regime. Because penalties under the digital markets regime are capped at a percentage of turnover, it is necessary – and sub-sections (2) and (3) of section 90 of the 2024 Act empower the Secretary of State – to set out in regulations how turnover should be calculated for this purpose.

5.7 **Consumer enforcement**: The consumer enforcement reforms described above are principally intended to:

- increase the deterrent effect of consumer enforcement proceedings (the UK was previously the only country in the G7 not to have monetary penalties for breaches of consumer law); and
- allow the CMA to undertake enforcement proceedings more quickly, to ensure consumer harms are tackled swiftly.

5.8 Any UK-connected trader that commits a commercial practice that breaches specified consumer laws and harms the collective interests of consumers can be enforced against. In practice this means the vast majority of firms selling consumer products (including services) from the UK or to UK consumers will be in scope.

5.9 Because these enforcement powers include monetary penalties that are capped at a percentage of turnover, it is necessary – and s204 of the 2024 Act and the new paragraph 16H to Schedule 5 of the 2015 Act empower the Secretary of State – to set out in regulations how turnover should be calculated for those purposes.

5.10 As outlined below, many of the approaches taken in the consumer provisions rely on existing approaches that are proven to have worked well in other turnover-based

penalty regimes. However, the trigger events identified are specific to the relevant stages of the court-based or CMA direct enforcement processes and seek to strike a balance between (i) linking the turnover period to the time when the relevant infringement was being committed (to ensure any financial benefits are captured) while (ii) ensuring the turnover period is reasonably representative of the infringer's (and bodies captured by the concept of control) current income.

5.11 Pursuant to s204 of the 2024 Act and new paragraph 16H to Schedule 5 of the 2015 Act, 'turnover' includes the turnover of persons that control or are controlled by the person in breach. It is therefore necessary to set out a definition of 'control' for those purposes. The effect of the provisions is that anyone with a controlling interest in a body corporate as defined in accordance with the definition of 'parent undertaking' under the Companies Act 2006.

5.12 **Motor fuels**: In 2021-2022, petrol and diesel prices rose by 60 pence per litre following the Russian invasion of Ukraine, the government requested the CMA to looking into this. The CMA's market study in July 2023 found weakened competition among fuel retailers and recommended the government establish an ongoing road fuels monitoring function.

5.13 Part 5, section 311 to 318 of the 2024 Act sets out provisions that provide the CMA with information gathering powers enabling it to obtain specified information relevant to the retail of motor fuel. The provisions give the CMA power to request undertakings involved in the distribution, supply or retail of petrol and diesel for information to assess competition in the retail of motor fuel and impact on consumers.

5.14 To ensure compliance with these information gathering requests, section 312 of the 2024 act sets out that the CMA can impose financial penalties on undertakings that fail to comply with an information notice issued under section 311 of the 2024 Act without reasonable excuse. In line with the CMA's wider competition and consumer regimes as updated by the 2024 Act, the CMA can impose a maximum fixed amount equal to 1% of the total value of the undertaking's turnover (both inside and outside the UK) or a daily rate up to 5% of the total value of the undertaking's daily turnover (both inside and outside the UK).

5.15 Because these enforcement powers include monetary penalties that are capped at a percentage of turnover, it is necessary – and sub-section (6) and (8) of section 312 of the 2024 Act empower the Secretary of State – to set out in regulations how turnover should be calculated for those purposes.

What was the previous policy, how is this different?

5.16 The substantive approach taken throughout the instrument draws on that in the existing secondary legislation in place under the Competition Act 1998 (Determination of Turnover for Penalties) Order 2000, Enterprise Act 2002 (Merger Fees and Determination of Turnover) Order 2003 and National Security and Investment Act 2021 (Monetary Penalties) (Turnover of a Business) Regulations 2021 in relation to the calculation of turnover.

5.17 There are some appropriate differences in terms throughout the regimes covered by this instrument. The digital markets and motor fuel regimes both use the term 'undertaking' to describe the entities subject to these provisions, whereas the consumer regime uses the term 'person'. This difference in terms reflects the terminology used in the underlying statutory framework governing each regime.

5.18 The provisions introduced by the 2024 Act, including those that require the estimation or calculation of turnover (which is provided for in this instrument), reflect the Government's intention to establish the digital markets regime and enhance the investigative and enforcement powers of the CMA, civil courts, and other enforcement agencies for the motor fuels regime, and for consumer protection.

5.19 Each regime contains provisions that outline the amounts which are, and which are not, to be taken into account when estimating or determining turnover. The substantive approach to determining turnover is consistent with existing regulations on turnover calculation in place under the competition law regime, and under the National Security and Investment Act 2021.

5.20 The specific drafting used in each of the Schedules reflects the definitions used in the primary legislation, i.e. the 2024 Act. In particular:

- Schedules 1 and 2 refer to the supply of 'products'. The term 'products' is defined in s.118 of the 2024 Act for the purposes of Part I of that Act and includes all goods, services and digital content. Schedules 3 and 4 replicate this definition for the purposes of the consumer protection and motor fuels regimes.
- In Schedules 1, 2 and 4, the term 'supply' will have its ordinary meaning, since the ordinary meaning of the term is considered broad enough to capture the various modes of supply that may generate turnover for the purposes outlined above. Under Schedule 3, the non-exhaustive definition of 'supply' under s.222 of the 2024 Act automatically applies in so far as it is relevant for the purposes of calculating turnover under Part 3 of the 2024 Act.

5.21 The provisions related to the digital markets and consumer regimes both state that 'direct or indirect' revenue should be used for the calculation or estimation of turnover. The policy intention behind this is that the turnover of an undertaking should include indirect revenue generated from services that are free to end-users but are still monetised by the undertaking. Such services are increasingly common in the supply of digital products, such as services which are monetised through third-party advertising. The provisions related to the motor fuels regime do not specify this, as undertakings subject to the motor fuels regime do not generate indirect revenue.

5.22 While the substantive approach to turnover calculation is consistent with that in the existing secondary legislation under the Competition Act 1998, Enterprise Act 2002, and the National Security and Investment Act 2021, the policy has changes from existing secondary instruments in so far as no reference is made to an undertaking or group's 'ordinary activities'. This reflects changes in accounting practices and specifically the approach in Part 15 (accounts and reports) of the Companies Act 2006.

5.23 The sections of this instrument pertaining to digital markets penalties, consumer penalties, and motor fuels penalties contain provisions relating to the trigger event that will be used to determine the period for calculation of turnover. For digital markets and motor fuels penalties, the trigger event is the date of the provisional decision to impose a penalty. For consumer penalties, the trigger events relate to the specificities of the consumer enforcement framework: For court penalty for infringement or breach of court undertaking, the date of issue of the original application. For court penalty for breach of undertaking to public enforcer, the date of issue of the application for a penalty for breach of the undertaking. For court penalty of failure to comply with info notice, the date of application for penalty. For CMA penalty imposed by Final Infringement Notice, a Final Breach of Undertaking Enforcement Notice or a Final Breach of Directions Enforcement Notice, the Provisional Infringement Notice. For

CMA penalty imposed by Final False Information Enforcement Notice or Final Enforcement Notice given for failure to comply with an information notice, the giving of the Provisional Final False Information Enforcement Notice or Provisional Enforcement Notice respectively.

5.24 The sections of this instrument pertaining to the digital markets penalties, consumer penalties, and motor penalties contain provisions relating to the relevant period of business activity during which turnover is to be taken into account for the purposes of determining maximum penalties. The relevant period would be the most recent accounting period ("the relevant accounting period") prior to the trigger event (referred to in the draft regulations as the 'decision date') with an adjustment made to reflect a 12-month period where the relevant period is not equal to 12 months.

5.25 In the sections of this instrument that relate to SMS designation under the digital markets regime, the trigger event and relevant period are set out in the 2024 Act, and therefore are not elaborated on in this instrument.

5.26 These regulations contain special provisions for calculating turnover for financial institutions, insurance undertakings, and credit institutions that form all or part of a business for the purposes of the digital markets and consumer regimes. The drafting of these provisions draw on similar provisions in existing precedents such as the Competition Act 1998 (Determination of Turnover for Penalties) Regulations 2024 and the National Security and Investment Act 2021 (Monetary Penalties) (Turnover of a Business) Regulations 2021 with amendments made to update certain terms. Specifically, compared to the precedents mentioned above, this instrument contains a more up-to-date definition of 'credit institution' and 'insurance undertaking' (including definitions of overseas insurance and reinsurance undertakings to cover the turnover of such firms outside the UK), while still substantively capturing the same group of entities that were captured by the existing precedent SIs mentioned above. For completeness, this instrument refers to a relevant EU accounting directive with regard to which the listed income items used to calculate the turnover of financial/credit institutions should be interpreted. This is consistent with the approach taken in the existing secondary legislation cited above and ensures both business and legal certainty.

5.27 The definition of 'insurance undertaking' does not include UK-based undertakings carrying out insurance activities without authorisation under the Financial Services and Markets Act 2000. If the CMA needed to calculate turnover for such an undertaking, they should use the ordinary calculation and activities for a non-insurance undertaking under these regulations.

5.28 Each regime contains provisions that outline how turnover will be determined where accounts are filed using a currency other than sterling. These provisions are needed since the regimes can apply to undertakings outside of the UK. The provisions are consistent with analogous provisions in the National Security and Investment Act 2021 (Monetary Penalties) (Turnover of a Business) Regulations 2021, with an appropriate amendment to specify that it is the CMA, not the Secretary of State, that will determine the exchange rate. These provisions are harmonised across the regimes.

5.29 The concept of control for consumer penalties was introduced by the 2024 Act. However, the test in the regulations adopts the approach used in the National Security and Investment Act 2021 (Monetary Penalties) (Turnover of a Business) Regulations 2021, which itself relies on the definition of 'parent undertaking' in s1162 of the Companies Act 2006. This approach will ensure – through the use of an established

legal test – that bodies that legally or in practice control or materially influence the actions of an infringer will be in scope of turnover calculation.

5.30 The instrument makes provisions for the definition of 'subsidy'. This definition is consistent with the definition currently in place under the National Security and Investment Act (Monetary Penalties) (Turnover of a Business) Regulations 2021, with a slight modification to widen its reach. The modification removes a condition that financial assistance should only be considered if it has or could have impacts on competition, trade or investment. This means that smaller amounts of financial assistance, which are less likely to impact on competition, would also be considered for the purpose of this instrument in line with the policy objective of ensuring that the CMA are able to look as widely as possible to calculate turnover. As such, the definition was chosen as it is the most up-to-date definition of 'subsidy', and therefore is different from the definition under the Competition Act 1998 (Determination of Turnover for Penalties) Order 2000, Enterprise Act 2002 (Merger Fees and Determination of Turnover) Order 2003**.**

6. Legislative and Legal Context

How has the law changed?

6.1 This instrument implements the 2024 Act which, as explained above, introduces a new digital markets regime, provides for enhanced consumer enforcement powers, and for new information gathering powers in relation to the monitoring of competition in the motor fuels market.

6.2 Section 8 of the 2024 Act provides that the Secretary of State may, by order, make provision regarding how the total value of UK or global turnover is to be estimated for the purpose of SMS designation under the new digital markets regime. Regulation 2 and Schedule 1 of the instrument make provision in this regard.

6.3 Section 85 of the 2024 Act allows the CMA to impose a penalty, subject to the statutory maximum set out in Section 86, for the undertaking's failure to comply with a regulatory requirement. Similarly, Section 87 allows for the imposition of such penalty for an undertaking's failure to comply with an investigative measure. The calculation of statutory maximums involves the determination of turnover (in the relevant period) or daily turnover depending on the nature of the penalty imposed. Section 90 of the 2024 Act provides that the Secretary of State may, by order, make provision regarding how turnover is to be calculated for the purpose of digital markets penalties. Regulation 3 and Schedule 2 of the instrument make provision in this regard.

6.4 Section 204 of the 2024 Act and Paragraph 16H inserted into Schedule 5 of the CRA 2015 by way of Schedule 17 of the 2024 Act provide that the Secretary of State may, by order, make provision regarding the determination of turnover for the calculation of maximum penalties for consumer enforcement. The Secretary of State may also make provision for determining when a person controls or is controlled by another person since the relevant turnover under Section 204 includes the turnover of persons who control or are controlled by the infringer. Regulations 4-7 and Schedule 3 of the instrument make provision in this regard.

6.5 Section 312 of the 2024 Act allows the CMA to impose a penalty, subject to the statutory maximum set out in that Section, for an undertaking's failure to comply with an investigative measure. The calculation of statutory maximums involves the determination of turnover (in the relevant period) or daily turnover depending on the

nature of the penalty imposed. Section 312(6) of the 2024 Act provides that the Secretary of State may, by order, make provision regarding how turnover is to be calculated for the purpose of motor fuel penalties. Regulation 8 and Schedule 4 of the instrument make provision in this regard.

Why was this approach taken to change the law?

6.6 The government's objectives are to maintain, to the extent possible, consistency with existing statutory frameworks for the calculation of turnover. As such, where relevant, the approaches taken by existing secondary legislation under the Competition Act, 1998, Enterprise Act 2002, and the National Security and Investment Act 2021 have been used as a starting point for these regulations. Any departure from these approaches, as explained in detail in the preceding sections, has been to adapt the regulations to the underlying legal framework established by the 2024 Act and to reflect the policy rationale in ensuring that the turnover calculation is pragmatic and avoids unnecessary burden for the authority concerned.

6.7 The DMCC Act required regulations across different regimes, i.e., digital markets, competition and consumer enforcement, for the calculation of turnover. It was decided that these should be set out in a single instrument, ensuring consistency and accessibility for the end-user.

7. Consultation

Summary of consultation outcome and methodology

7.1 The proposed regulations were consulted on between July and September 2024, and the consultation response will be published on 1 January 2025. 7 respondents answered questions relating to this instrument in its draft form. The respondents were comprised of a mixture of external stakeholders, including trade associations and public bodies. The majority of the comments made by respondents were supportive of our draft provisions. In particular, respondents indicated support for consistency with existing secondary legislation and regimes; the built-in flexibility of the provisions regarding the CMA's estimation of turnover relating to UK users for the purposes of SMS designation; and that the provisions will capture all forms of revenue, both direct and indirect.

7.2 A few changes have been made to the drafts following the consultation. This includes adding the words 'direct or indirect' in the core turnover provision to further clarify that revenue from free services should also be included in the calculation or estimation of turnover for the purposes of SMS designation, as well as digital and consumer penalties. In response to another comment about the interpretation of income items used to calculate the turnover of credit/financial institutions, the draft has been updated to include a reference to the relevant EU accounting directive in accordance with which the listed income items are to now be interpreted. This update brings this instrument in line with existing secondary legislation dealing with the calculation of turnover for financial institutions under competition law and addresses concerns regarding business and legal certainty raised by consultees.

8. Applicable Guidance

8.1 **Digital Markets**: Under the 2024 Act, the CMA is required to consult on and publish guidance on how it will exercise its functions conferred by the 2024 Act, including its functions in relation to the calculation or estimation of turnover. The Digital Markets

Unit within the CMA published its draft guidance on the CMA's website at https://connect.cma.gov.uk.

8.2 **Consumer enforcement:** s199 of the 2024 Act requires the CMA to prepare and publish a statement of policy in relation to the exercise of powers to impose a monetary penalty under its direct enforcement powers. The CMA consulted on this statement of policy in draft between 31 July and 18 September 2024. It will publish the final version of this statement, subject to the approval of the Secretary of State for Business and Trade, in early 2025.

8.3 The courts will not be obliged to have regard to guidance when they exercise their monetary penalty powers.

8.4 **Motor fuels**: Part 5, section 314 sets out that the CMA is required to publish a statement of policy on how it will exercise its powers to impose a penalty under section 311. It requires the CMA to consult the Secretary of State and then publish the statement of policy, which will include the considerations relevant to determining the nature and amount of any monetary penalty. The CMA published its draft guidance on 11 July 2024 for consultation until 23 August 2024 and the final guidance will be made available in due course.

Part Two: Impact and the Better Regulation Framework

9. Impact Assessment

9.1 A full Impact Assessment has not been prepared for this instrument because these regulations set out the technical provisions required to implement the 2024 Act. Estimates of the impact of the entire regime are set out in the Impact Assessment for the 2024 Act. Specifying precisely how particular maximum permitted penalties and turnover estimates for the purposes of SMS designation are to be determined is not expected to have an impact on compliant businesses. The impact assessment is available at https://bills.parliament.uk/bills/3453/publications.

Impact on businesses, charities and voluntary bodies

9.2 The impact on business is neutral, since this instrument does not create new impacts beyond those made by the 2024 Act. The impact on small or micro businesses is neutral for the same reason. These impacts can be found in the Impact Assessments cited in section 9.1 above.

9.3 The changes brought in by the 2024 Act predominantly impact small or micro businesses not complying with existing consumer law.

9.4 The impact on the public sector is neutral because the regulations are set within the implementation of the 2024 Act and establishment of the Digital Markets Unit.

9.5 There is no impact on charities or voluntary bodies since they will not be subject to these regimes.

10. Monitoring and review

What is the approach to monitoring and reviewing this legislation?

10.1 The approach to monitoring of this legislation is that this instrument will be reviewed in line with CMA monitoring and associated parliamentary oversight of each regime established by the 2024 Act.

10.2 The instrument does not include a statutory review clause, due to the above separate monitoring and oversight arrangements.

Part Three: Statements and Matters of Particular Interest to Parliament

11. Matters of special interest to Parliament

11.1 None.

12. European Convention on Human Rights

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

13. The Relevant European Union Acts

13.1 This instrument is not made under the European Union (Withdrawal) Act 2018, the European Union (Future Relationship) Act 2020 or the Retained EU Law (Revocation and Reform) Act 2023 ("relevant European Union Acts").