EXPLANATORY MEMORANDUM TO

THE ENTERPRISE ACT 2002 (EU FOREIGN DIRECT INVESTMENT) (MODIFICATIONS) REGULATIONS 2020

2020 No. XXXX

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 The Enterprise Act 2002 (EU Foreign Direct Investments) (Modifications) Regulations (2020) Statutory Instrument ("the instrument") will ensure that the UK is in full compliance with Regulation (EU) 2019/452 of the European Parliament and of the European Council ("the FDI Regulation"). The FDI Regulation establishes a framework for the screening of foreign direct investments into the European Union.

2.2 The instrument will ensure the Competition and Markets Authority ("CMA") can gather information from businesses in response to a request made by EU Member States or the European Commission. The Secretary of State and the CMA will be able to share this information with EU Member States and the European Commission.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

Matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business (English Votes for English Laws)

3.2 The powers under which this instrument is made cover the entire United Kingdom (see the European Communities Act 1972) and the territorial application of this instrument is not limited either by the Act or by the instrument.

4. Extent and Territorial Application

4.1 The territorial extent of this instrument is the entirety of the United Kingdom.

4.2 The territorial application of this instrument is the entirety of the United Kingdom.

5. European Convention on Human Rights

5.1 The Minister for Small Business, Consumers and Labour Markets, and Minister for London, Paul Scully, has made the following statement regarding Human Rights:

"In my view the provisions of The Enterprise Act 2002 (EU Foreign Direct Investment) (Modifications) Regulations 2020 are compatible with the Convention rights."

6. Legislative Context

6.1 The FDI Regulation comes into force on 11 October 2020 and the UK is required to implement it in line with obligations in the Withdrawal Agreement. The instrument is required to implement the FDI Regulation.

6.2 When the Transition Period ends, the UK will no longer be part of the reciprocal arrangements set out in the FDI Regulation. A deficiency will therefore arise in the statute book which it will be necessary to address. The intention is to revoke the retained version of the FDI Regulation and this instrument by further Regulations to be laid before the House under the powers set out in the European Union (Withdrawal) Act 2018.

7. Policy background

What is being done and why?

7.1 The FDI Regulation establishes a framework for the screening of FDI into the European Union and sets up a formal channel of information exchange to raise awareness of cases where FDI might affect security or public order. The FDI Regulation requires EU Member States in some circumstances to gather and share information on FDI with other EU Member States and the European Commission. This does not affect the UK's ability to screen investments into the UK, as the UK and EU Member States will retain responsibility for their own national security.

7.2 While as a Regulation it has direct effect, there are some measures which require implementation at the domestic level to ensure that it can operate effectively in the UK. The instrument will allow the CMA to use the powers in the Enterprise Act 2002 for the purpose of the FDI Regulation. It will do this by making two non-textual amendments to the Enterprise Act 2002.

7.3 The first of these will give the CMA powers to gather information from the parties to a transaction that are not undergoing a domestic merger screening process. Examples of the type of information that could be requested include the approximate value of the FDI, or the date when the FDI is planned to be completed or has been completed. Under section 109 of the Enterprise Act 2002, the CMA already has powers to require the attendance of witnesses and production of documents for "permitted purposes". The instrument will ensure that these powers may also be used for the purpose of the FDI Regulation.

7.4 The instrument will allow the CMA to use the administrative penalty provisions in section 110(1) and section 111 of the Enterprise Act 2002 as well as the criminal offences in section 110(5) and section 117(2) to enforce compliance. Section 110(5) applies where a business intentionally alters, suppresses, or destroys a document they are required to supply. Section 117(2) applies where a person supplies false or misleading information. Section 125 of the Enterprise Act 2002 also applies to both of these offences. This section provides that a business' director, manager, secretary, or other person acting in a similar capacity may also face criminal charges where that business has committed the offence under S110(5) or S117(2) and the offence is committed with the consent or connivance of, or to be attributable to any neglect on the part of, that person. The extension of these administrative and criminal penalty provisions will make the CMA's information gathering powers meaningful by ensuring it can act against a failure to comply.

7.5 The second non-textual amendment to the Enterprise Act 2002 will allow the CMA or Secretary of State to share comments on an investment with EU Member States and the European Commission for the purposes of the FDI Regulation. Section 237 of the Enterprise Act 2002 contains a general restriction on the disclosure of information gathered by the CMA or Secretary of State. There is no existing exemption or gateway which would allow the CMA to share information as required by Articles 6(2), 7(1) and 8(2) of the FDI Regulation. Although the gateway in section 240 of the Enterprise Act 2002 allows disclosure for the purpose of a "Community obligation", disclosure under Articles 6(2), 7(1) and 8(2) of the FDI Regulation is permissive rather than pursuant to an "obligation". The instrument will provide a new gateway for disclosure, allowing the CMA and the Secretary of State to share information with EU Member States and the European Commission for the purpose of Article 6(2), 7(1) or 8(2) of the FDI Regulation.

8. European Union (Withdrawal) Act/Withdrawal of the United Kingdom from the European Union

8.1 This instrument does not relate to withdrawal from the European Union / trigger the statement requirements under the European Union (Withdrawal) Act.

9. Consolidation

9.1 There are no current consolidation plans.

10. Consultation outcome

10.1 No consultation was undertaken as the instrument will not make substantive policy changes. However, the CMA was consulted at every stage of the SI's development to ensure it was content with the practical implications of the SI.

11. Guidance

11.1 Under section 116 of the Enterprise Act 2002, the CMA will update its Statement of Policy and its guidance 'Administrative penalties: Statement of Policy on the CMA's approach'.

12. Impact

12.1 There is no, or no significant, impact on charities or voluntary bodies.

12.2 There is no, or no significant, impact on the public sector.

12.3 An Impact Assessment has not been prepared for this instrument because it will be in force for only 12 weeks. Few, if any, businesses will be affected.

12.4 The CMA already has information gathering powers for domestic merger investigations. In practice, this instrument extends the CMA's information gathering powers to those businesses not undergoing a Phase 1 or Phase 2 domestic merger investigation, for the purpose of the FDI Regulation only.

12.5 The possible impacts on business are:

1) companies might have to share information about a transaction before a formal domestic screening process starts; and

2) there will be penalties for parties who do not provide timely responses to questions.

12.6 However, since we expect very few, if any, requests from EU Member States for which the CMA will have to gather information from parties, and any information parties are required to share is not likely to place a significant burden on them, few are likely not to comply. The impact on business is therefore likely to be minimal.

13. Regulating small business

13.1 The legislation applies to activities that are undertaken by small businesses.

13.2 No specific action is proposed to minimise regulatory burdens on small businesses.

13.3 However, the overall burden on small businesses is expected to be minimal for the reasons set out above.

14. Monitoring & review

14.1 Monitoring of this legislation is not required as the instrument will be repealed at the end of the Transition Period on 31 December 2020.

14.2 A review provision, as required by section 28 of the Small Business, Enterprise and Employment Act 2015, is not appropriate for the reason given above.

15. Contact

15.1 Emily Corfield at the Department for Business, Energy and Industrial Strategy Telephone: 020 7215 4441 or email: emily.corfield@beis.gov.uk can be contacted with any queries regarding the instrument.

15.2 Chris Blairs, acting Director for Competition and Consumer Policy at the Department for Business, Energy and Industrial Strategy can confirm that this Explanatory Memorandum meets the required standard.

15.3 The Minister for Small Business, Consumers and Labour Markets, and Minister for London, Paul Scully at the Department for Business, Energy and Industrial Strategy can confirm that this Explanatory Memorandum meets the required standard.