EXPLANATORY MEMORANDUM TO

THE ENTERPRISE ACT 2002 (PART 8 DOMESTIC INFRINGEMENTS) ORDER 2013

2013 No. [DRAFT]

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 adds the Consumer Rights (Payment Surcharges) Regulations 2012[1] to the list of consumer protection measures that may be enforced within the framework of Part 8 of the Enterprise Act 2002[2]. The Order is laid in draft for approval by resolution of each House.

3. Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None

4. Legislative Context

4.1 The Consumer Rights (Payment Surcharges) Regulations 2012 implement Article 19 of the EU Consumer Rights Directive[3]. They prohibit traders from charging consumers payment surcharges that exceed the cost borne to them for accepting a given means of payment. The Consumer Rights Directive requires that adequate and effective means exist in national law to ensure compliance with the provisions of the Directive. It also requires that the penalties laid down for breaches of the Directive are effective, proportionate and dissuasive.

4.2 Article 2 of this Order enables the enforcers listed in Part 8 of the Enterprise Act 2002 to apply to the courts for enforcement orders against traders that have engaged, are engaging in or are likely to engage in conduct which breaches the Regulations, if that conduct harms the collective interests of consumers in the United Kingdom. Although the Regulations implement an EU Directive, article 2 of the Order specifies them as a 'domestic infringement' (rather than a

[1] S.I. 2012/3110.
[2] 2002 c.40.
[3] Directive 2011/83/EU of the European Parliament and of the Council on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council (OJ L 304, 22.11.2011, p. 64.).

'Community infringement') for the purposes of the 2002 Act, because the obligations in the EU Directive take effect only from June 2014. Article 2 is made in exercise of the power in section 211 of the 2002 Act.

4.3 The enforcement procedures under the 2002 Act will apply in addition to the regime of injunctions and individual remedies for consumers provided for in the Regulations. Article 3 of the Order amends regulation 7(4) of the Regulations so that, in considering a complaint under that regime in the Regulations, an enforcement authority may take into account any enforcement action taken under the 2002 Act. That provision was not included in the Regulations when made, because the possibility of any enforcement action under the 2002 Act is contingent on Parliament approving this Order. Article 3 is made in exercise of the power in section 2(2) of the European Communities Act 1972.

5. Territorial Extent and Application

5.1 This instrument applies to the whole of the United Kingdom.

6. European Convention on Human Rights

6.1 The Parliamentary Under-Secretary of State for Employment Relations, Competition and Consumers, Jo Swinson MP, has made the following statement regarding Human Rights:

In my view the provisions of the Enterprise Act 2002 (Part 8 Domestic Infringements) Order are compatible with the Convention rights.

7. Policy background

7.1 The Consumer Rights (Payment Surcharges) Regulations 2012 prohibit traders from charging consumers payment surcharges that exceed the cost borne to them for accepting a given means of payment.

7.2 This Order allows the enforcers specified under Part 8 of the Enterprise Act to apply to the courts for civil enforcement orders. If traders continue to act in breach of such an order, they could face criminal penalties for contempt of court.

8. Consultation outcome

8.1 A 6 week formal consultation was published on the 3rd September 2012. The consultation sought views on issues surrounding enforcement of the Regulations, among other things.

8.2 Around 1000 consumers responded via the online survey, and a further 60 substantive responses were received from businesses, business

representatives and consumer organisations. Businesses agreed that criminal sanctions would be disproportionate against traders who breached the provisions and endorsed civil enforcement powers. Generally, consumers were in favour of criminal sanctions.

9. Guidance

9.1 The Department for Business, Innovation and Skills will publish guidance to accompany the Consumer Rights (Payment Surcharges) Regulations 2012. The guidance will provide more information to traders on how to comply with the Regulations, and how they can be enforced, including under the provisions of Part 8 of the Enterprise Act.

10. Impact

10.1 An Impact Assessment which deals with the impact of the Consumer Rights (Payment Surcharges) Regulations 2012 and this Order is attached to this memorandum.

11. Regulating small business

11.1 The instrument applies in relation to small business.

11.2 To minimise the impact of the requirements on firms employing up to 20 people, the Consumer Rights (Payment Surcharges) Regulations 2012 contain exemptions from the prohibition on payment surcharges for new businesses and micro-businesses. Accordingly, the prohibition will not be enforced under the provisions of Part 8 of the Enterprise Act in relation to such exempt businesses.

11.3 Small businesses were consulted as part of the formal consultation published on the 3rd September 2012. In light of this, the decision was taken to assist small businesses by providing the above exemptions.

12. Monitoring & review

12.1 The aim of the Order is to provide for effective and proportionate enforcement of the Consumer Rights (Payment Surcharges) Regulations 2012 under the provisions of Part 8 of the Enterprise Act.

12.2 The Department intends to review the impact of the Regulations and this Order, together with other provisions implementing the Consumer Rights Directive by 2016. The UK will also be able to contribute views to the Commission in the course of its review of the Directive in 2016.

13. Contact

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