EXPLANATORY MEMORANDUM TO

THE ENTERPRISE ACT 2002 (PROTECTION OF LEGITIMATE INTERESTS) (AMENDMENT) ORDER 2014

2014 No. [XXXX]

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 amends the Enterprise Act 2002 (Protection of Legitimate Interests) Order 2003 (S.I. 2003/1592) ("the 2003 Order"). Most of the amendments are consequential on the abolition of the Office of Fair Trading and the Competition Commission by the Enterprise and Regulatory Reform Act 2013 (c.24) and the transfer of their competition functions to the new Competition and Markets Authority, and on other substantive changes made by that Act to the merger control regime in Part 3 of the Enterprise Act 2002 (c.40) ("the Enterprise Act"). The Order also makes a small number of unrelated amendments to the 2003 Order.

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

3.1 None

4. Legislative Context

4.1 The 2003 Order was made under section 68 of the Enterprise Act. Section 67 of the Enterprise Act and the 2003 Order provide a scheme for preventing, mitigating or remedying adverse public interest effects resulting from, or which may result from, the creation of a "European relevant merger situation". A "European relevant merger situation" is a merger situation engaging competition issues over which the European Union has sole jurisdiction by virtue of Council Regulation (EC) No. 139/2004 of 20th January 2004 on the control of concentrations between undertakings (OJ No L24, 29.1.04, p. 1) ("the EU Merger Regulation"). Although the European Union has sole jurisdiction in such cases, the EU Merger Regulation permits Member States to take appropriate measures to protect certain legitimate interests.

Section 67 of the Enterprise Act accordingly enables the Secretary of State to serve a "European intervention notice" in prescribed circumstances and this triggers the procedures under the 2003 Order. The 2003 Order follows (with modifications) provisions of Part 3 of the Enterprise Act relating to public interest and special public interest interventions in merger cases (respectively sections 43 to 55 and sections 60 to 66, together with provisions about publication in section 107). These provisions of the

Enterprise Act have been amended by the Enterprise and Regulatory Reform Act 2013 which, among other things, abolishes the Office of Fair Trading ("the OFT") and the Competition Commission and transfers the competition functions of these bodies to the Competition and Markets Authority ("the CMA") and makes changes to investigatory powers and powers to deal with pre-emptive action. This Order amends the 2003 Order to take account of the amendments to the Enterprise Act. It also makes a small number of unrelated amendments to the 2003 Order.

The CMA was established on 1st October 2013: the relevant provisions of the Enterprise and Regulatory Reform Act 2013 were brought into force by the Enterprise and Regulatory Reform Act 2013 (Commencement No 3, Transitional Provisions and Savings) Order 2013 (SI 2013/2227). The amendments to the merger control regime in Part 3 of the Enterprise Act will be brought into force on 1st April 2014 by the Enterprise Act 2013 (Commencement No 6, Transitional Provisions and Savings) Order 2014 (SI 2014/416 (C.17)) ("the Sixth Commencement Order"). That Order will also commence the provisions of the Enterprise and Regulatory Reform Act 2013 abolishing the Office of Fair Trading and the Competition Commission, transferring their competition functions to the CMA and conferring on the CMA its statutory duty (under section 25(3) of that Act) to seek to promote competition for the benefit of consumers.

5. Territorial Extent and Application

5.1 This instrument applies to all of the United Kingdom.

6. European Convention on Human Rights

Jenny Willott, the Parliamentary Under-Secretary of State for Employment Relations and Consumer Affairs has made the following statement regarding Human Rights:

In my view the provisions of the Enterprise Act 2002 (Protection of Legitimate Interests) (Amendment) Order 2014 No. [xxxx] are compatible with the Convention rights.

7. Policy background

7.1 The amendments are largely consequential on the wider changes to the competition regulatory framework introduced by the Enterprise and Regulatory Reform Act 2013.

7.2 Articles 20 to 23 of the Order contain transitional provisions and savings. These operate in conjunction with transitional provisions and savings made by the Sixth Commencement Order in relation to amendments to Part 3 (mergers) of the Enterprise Act commenced by that Order. The 2003 Order contains a mixture of free-standing provisions (articles 3 to 14 and Schedule 2), provisions which apply provisions of the Enterprise Act with modifications (articles 2 and 15 and Schedules 1 and 3) and provisions making consequential changes to primary legislation (article 16 and Schedule 4). The transitional provisions and savings in the Sixth Commencement Order relating to

amendments to provisions of Part 3 of the Enterprise Act apply to those provisions as applied by the 2003 Order. However, they do not apply to new provisions of the Enterprise Act which the present amending Order is applying for the first time (namely sections 94A, 110A and 110B) or to changes made by the present Order to free-standing provisions of the 2003 Order. In the light of that -

(a) Article 20(1) to (5), (7) and (8) contains general transitionals relating to the transfer by the present Order of functions under the 2003 Order from the Office of Fair Trading and the Competition Commission to the CMA.

(b) Article 21 contains transitional provisions relating to amendments made by the present Order to free-standing provisions of the 2003 Order, and also with the application of new sections 94A, 110A and 110B. Article 21 sets out the starting point for the transition and is subject to the particular provision then made by articles 22 and 23.

(c) Article 22(1) supplements transitional provisions and savings made by the Sixth Commencement Order in relation to the repeal of section 31 of the Enterprise Act by the Enterprise and Regulatory Reform Act 2013. Section 31 is currently applied with modifications by the 2003 Order, and is repealed as it so applies. The present Order removes references to section 31 from the 2003 Order. The Sixth Commencement Order makes various savings in relation to notices given under section 31 before 1st April 2014 (when the repeal takes effect). Article 22(1) of the present Order supplements that by making corresponding savings of provisions of the 2003 Order modifying those saved provisions.

(d) Article 22(2) supplements transitional provisions in the Sixth Commencement Order relating to the amendment of section 109 of the Enterprise Act and the insertion of new sections 110A and 110B in that Act, which together provide for enhanced investigation powers. Section 109 is already applied with modifications by the 2003 Order, and the present Order makes amendments to those modifications. The Sixth Commencement Order deals with the transition for section 109 as applied by the 2003 Order, and article 22(2) of the present Order supplements that by dealing in the same way with the modifications which it makes to that section as so applied. Article 22(2) also deals with the transition for new sections 110A and 110B.

(e) Article 23(1) and (2) deals with the revocation by the present Order of the free-standing power in paragraph 1 of Schedule 2 to the 2003 Order to accept certain undertakings. The power is revoked with effect from 1st April 2014, but article 23(1) and (2) makes savings in relation to undertakings accepted before that date. This follows the approach in the Sixth Commencement Order relation to the repeal of a similar power to accept undertakings under the Enterprise Act.

(f) Article 23(3) deals with particular provisions of the Enterprise Act which are applied by the 2003 Order and which are, as so applied, affected by particular

amendments made to the Enterprise Act 2002 by the Enterprise and Regulatory Reform Act 2013. It cancels out that effect for transitional purposes.

(g) Article 23(4) deals with new section 94A of the Enterprise Act 2002 (financial penalty for breach of interim measures), which is applied by amendments made to the 2003 Order by the present Order. It mirrors the transitional provision relating to that new section in the Sixth Commencement Order.

8. Consultation outcome

8.1 The Department for Business, Innovation and Skills published a draft Order for consultation in July 2013. There were no substantive comments.

9. Guidance

9.1 No guidance is required - the Order amends aspects of a pre-existing legal mechanism that relates only to the internal administration of the competition regime by regulatory authorities.

10. Impact

10.1 There is no impact on business, charities or voluntary bodies; or on the public sector as a consequence of this Order.

10.2 The impact assessment completed for Parts 3 and 4 of the Enterprise and Regulatory Reform Bill, introduced to Parliament on 23rd May 2012, contained an assessment of the effect that the reforms to the competition regime will have on the costs of business and the public and voluntary sector. It can be found at the website: https://www.gov.uk/government/publications/strengthening-competition-and-creating-a-single-market-authority

11. Regulating small business

11.1 The Enterprise Act 2002 merger provisions to which this Order relates apply to small businesses.

12. Monitoring & review

12.1 No review is required – the Order preserves a pre-existing provision in response to reforms to the competition regulatory framework.

13. Contact

Stephen Childerstone at the Department for Business, Innovation and Skills; Telephone: 0207-215 0354; or email: Stephen.childerstone@bis.gsi.gov.uk can answer any queries regarding the instrument.