EXPLANATORY MEMORANDUM TO

THE ENTERPRISE ACT 2002 (ENFORCEMENT UNDERTAKINGS AND ORDERS) ORDER 2004

2004 No. 2181

1. This explanatory memorandum has been prepared by the Department for Trade and Industry and is laid before Parliament by Command of Her Majesty.

2. Description

2.1 This Order provides for the transfer of enforcement rights by civil proceedings under sections 93 and 93A of the Fair Trading Act 1973 ("the 1973 Act") of certain undertakings given to Ministers in relation to merger and monopoly situations under section 88 of the 1973 Act and of certain orders in relation to monopoly situations made by Ministers under section 56 of the 1973 Act from any person (which would include the Secretary of State) to the Office of Fair Trading ("the OFT") and the Competition Commission ("the Commission"). It also provides for the rights of third parties who have suffered loss or damage caused by contravention of any such undertaking or order. It further provides for the transfer of powers to supersede, vary or release any such undertaking from Ministers to the Commission; and for the transfer of powers to vary or revoke any such order from Ministers to the Commission.

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

3.1 None.

4. Legislative background

4.1 The Enterprise Act 2002 ("the 2002 Act") introduced new legislative regimes to control mergers and investigate markets. These new regimes replaced the old merger and monopoly regimes under the 1973 Act with effect from 20 June 2003.

4.2 Under the 1973 Act, the Secretary of State had powers to refer qualifying merger and monopoly situations to the Commission for investigation and report. Qualifying merger and monopoly situations were those that satisfied criteria set out in the 1973 Act. Where the Commission reported that there were detriments to the public interest arising from such situations, a range of remedies were available to the Secretary of State. Such remedies included a power under section 88(2) of that Act to accept undertakings from the parties designed to overcome any adverse effects upon the public interest; and, in relation to monopoly situtations, a power to make orders under section 56 of that Act. Section 88(4) of the 1973 Act provided the Secretary of State with powers to supersede, vary or release undertakings accepted under section 88(2); and section 88(5) of that Act provided the Secretary of State with powers to vary or revoke orders made under section 56.

4.3 Sections 93 and 93A of the 1973 Act provided that any breach of an undertaking accepted under section 88 or an order made under section 56 was enforceable by any person by way of civil proceedings.

4.4 Paragraphs 13 and 14 of Schedule 24 to the 2002 Act ("Schedule 24") make savings in relation to the enforcement of undertakings accepted and orders made under the 1973 Act; and in relation to the Secretary of State's powers under the 1973 Act to supersede, vary or release undertakings accepted under that Act and to vary or revoke orders made under that Act.

4.5 Paragraphs 15 to 17 of Schedule 24 provide the Secretary of State with powers to apply certain merger and market control provisions of the 2002 Act to undertakings accepted and orders made under the 1973 Act where such undertakings and orders are specified in an order made under paragraphs 15 to 17. This Order is the first order that has been made under paragraphs 15 to 17 of Schedule 24.

4.6 Paragraph 15 of Schedule 24 ("paragraph 15") provides the Secretary of State with a power to transfer from any person (which would include the Secretary of State) to the OFT and the Commission ("the competition authorities") the enforcement rights in relation to any undertaking accepted under section 88 of the 1973 Act and any order made under section 56 of that Act which is specified in an order made under that paragraph. Any order made under paragraph 15 will also provide for the rights of third parties who have suffered loss or damage caused by contravention of any undertaking or order specified in such an order.

4.6 Sub-paragraphs (1), (2) and (5) of paragraph 15 provide that where the Secretary of State makes an order under these sub-paragraphs, the enforcement provisions in section 94(1) to (6) of the 2002 Act will be substituted for the enforcement provisions in sections 93 and 93A of the 1973 Act in relation to any undertaking or order specified in such an order. Section 94(1) to (5) of the 2002 Act provides for the rights of third parties who have suffered loss or damage caused by contravention of any such undertaking or order. Section 94(6) of that Act provides that compliance with undertakings and orders specified in such an order will be enforceable by civil proceedings brought by the OFT. Sub-paragraphs (3) and (5) of paragraph 15 provide that where the Secretary of State makes an order under these sub-paragraphs, the Commission will also have the right the enforce by civil proceedings any undertaking or order specified in such an order.

4.7 Paragraph 16 of Schedule 24 provides the Secretary of State with a power to transfer from the Secretary of State to the Commission the powers to supersede, vary or release any undertaking accepted under section 88 of the 1973 Act and specified in an order made under that paragraph.

4.8 Paragraph 17 of Schedule 24 provides the Secretary of State with a power to transfer from the Secretary of State to the Commission the powers to vary or revoke any order made under section 56 of the 1973 Act and specified in an order made under that paragraph.

5. Extent

5.1 This Order applies to all of the United Kingdom.

6. European Convention on Human Rights

Not applicable.

7. Policy background

7.1 The new regimes to control mergers and investigate markets introduced by the 2002 Act reflect one of that Act's key aims of shifting responsibility for competition decisions which do not raise public interest issues (essentially those related to national security and media mergers) from Ministers to the competition authorities.

7.2 Under the 2002 Act, the merger control regime under the 1973 Act has been replaced with a new regime that removes Ministers from the decision-making process in most cases and leaves them to be dealt with by the competition authorities. The new regime has also changed the test against which mergers are assessed to one focused on competition. The Government considered this to be the most effective package to update and improve the merger regime in ways that increase strategic certainty for business while improving its effectiveness in focusing assessment on competition issues. Under the 2002 Act, Ministers can intervene in only those merger cases that raise specified public interest considerations.

7.3 The 2002 Act has also replaced the 1973 Act's monopoly regime with a new power to investigate markets. As with mergers, Ministers have been removed from the decision-making process in the majority of cases and there has been a change of the test against which markets are assessed to one focused on competition. The introduction of these reforms has updated and improved the competition framework in ways that have increased strategic certainty for companies while improving its effectiveness in targeting cases that could damage consumer interests. These reforms have helped to bring the system of monopoly regulation into line with modern economic thinking and best practice in international competition policy.

7.4 The exercise of the order-making powers in paragraphs 15 to 17 of Schedule 24 to transfer responsibility from the Secretary of State to the competition authorities for enforcing and making decisions in relation to the monopoly and merger undertakings accepted under the 1973 Act and specified in Schedule 1 to this Order, and in relation to orders made under the 1973 Act and specified in Schedule 2 to this Order, delivers the policy of removing Ministers from the decision-making process in the majority of merger and monopoly or market cases.

7.5 The transfer of responsibility from Ministers to the competition authorities should not have an adverse effect on the parties concerned, as the law provides that in making any such decision the competition authorities will be bound to apply the same criteria as the Secretary of State would have had to apply in the same situation.

Parties have been notified of the proposed transfer of responsibility and none have offered objections.

8. Impact

8.1 A Regulatory Impact Assessment has not been prepared for this instrument as it has no impact on business, charities or voluntary bodies.

8.2 The impact on the public sector is expected to be negligible.

9. Contacts

Ian Lomas at the Department of Trade and Industry (Tel: 020 7215 5009 or e-mail: Ian.Lomas@dti.gsi.gov.uk) can answer any queries regarding the instrument in relation to merger undertakings. Marie Cawley at the Department of Trade and Industry (Tel: 020 7215 6771 or e-mail: Marie.Cawley@dti.gsi.gov.uk) can answer any queries regarding the instrument in relation to monopoly undertakings and orders.