EXPLANATORY MEMORANDUM TO THE

ENTERPRISE ACT 2002 (ENFORCEMENT UNDERTAKINGS

AND ORDERS) ORDER 2006

2006 No. 0355

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

2. **Description**

2.1 This order specifies for the purposes of paragraphs 15(1), 15(3)(a) and 16(1) of Schedule 24 of the Enterprise Act 2002 ("the 2002 Act") certain undertakings given to Ministers under Section 88 of the Fair Trading Act 1973 ("the 1973 Act") in relation to merger and monopoly situations. It also specifies for the purposes of paragraphs 15(2), 15(3)(b) and 17(1) of Schedule 24 of the 2002 Act, two orders made in 2005 under Section 56 of the 1973 Act. The effect of this is to transfer to the Competition Commission ("the Commission") rights to enforce the specified undertakings and orders by civil proceedings; the powers to supersede, vary or release the specified undertakings; and the powers to make an order so as to vary or revoke the specified orders. It also provides for the rights of third parties who have suffered loss or damage caused by contravention of any such undertaking or order.

2.2 The Order contains consequential amendments made under section 277(1) and (2) of the Enterprise Act 2002. The two Section 56 Orders transferred by this Order provide for consent to be given, in certain circumstances, by the Secretary of State. This is also the case with three other Section 56 Orders that were transferred in 2004[1]. Article 4 of this Order provides that such consent will be given by the "Office of Fair Trading" instead of the "Secretary of State". Article 4 also provides that where the monopoly or merger undertakings being transferred by the Order refer to a direction, determination or consent by the "Secretary of State" such direction, determination or consent may be given by the "Office of Fair Trading".

3. **Matters of Special Interest to the Select Committee on Statutory Instruments**

3.1 There are no matters of special interest.

4. **Legislative Background**

4.1 The 2002 Act came into effect from 20 June 2003, introducing new regimes governing the control of mergers and the investigation of markets. These new regimes replaced the merger and monopoly regimes established under the 1973 Act.

[1] The three orders were transferred by the Enterprise Act 2002 (Enforcement Undertakings and Orders) Order 2004 (SI 2004/2181).

4.2 Under the 1973 Act, the Secretary of State had powers to refer qualifying merger and monopoly situations to the Commission (which replaced the Monopolies and Mergers Commission on 1 April 1999) for investigation and report. Where the Commission subsequently reported that such situations gave rise to detriments to the public interest, a range of remedies were available to the Secretary of State. These included the power under Section 88 of the 1973 Act to accept undertakings from the parties concerned designed to remedy or prevent such detrimental effects. In relation to monopoly situations, a power to make orders designed to remedy or prevent such effects was provided by Section 56 of the 1973 Act. Section 88 of the 1973 Act also provided the Secretary of State with powers to supersede, vary or release any such undertakings that were accepted and to vary or revoke any orders that were made.

4.3 Sections 93 and 93A of the 1973 Act provided that any breach of an undertaking accepted under either Section 75(G) or 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 providing for the continued enforcement and amendment of undertakings accepted and orders made under the 1973 Act. 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 to orders made under the 1973 Act where such undertakings or orders are specified in an order made under paragraphs 15 to 17[2].

4.5 Paragraph 15 of Schedule 24 provides the Secretary of State with a power to transfer to the Office of Fair Trading (OFT) and the Commission, the enforcement rights in relation to undertakings accepted and orders made under the 1973 Act. The Secretary of State ceases to have those rights in respect of undertakings and orders so specified. An order under paragraph 15 will also provide for the rights of third parties who may have suffered loss or damage caused by contravention of any specified undertaking or order.

4.6 Paragraph 15 of Schedule 24 also provides that where an order is made under sub-paragraphs (1), (2) and (5), the enforcement provisions in Section 94(1) to (6) of the 2002 Act will apply to the undertakings and orders specified in that order in place of the enforcement provisions in Sections 93 and 93A of the1973 Act. This provides that the OFT and the Commission may bring civil proceedings to enforce those undertakings and orders and also provides that third parties who have suffered loss or damage caused by contravention of any undertaking may similarly bring civil proceedings.

4.7 Paragraphs 16 and 17 of Schedule 24 provide the Secretary of State with powers to transfer to the Commission and the OFT the powers to supersede, vary or release undertakings that have been specified in an order made under those paragraphs as well as the powers to make orders to vary or revoke orders that have been similarly specified by order. Those

[2] This is the second occasion that orders have been be made under paragraphs 15 to 17 of Schedule 24. The first order (SI 2004 No 2181), which came into force on 4 October 2004, transferred 27 merger undertakings and 10 monopoly undertakings to the Competition Commission.

paragraphs also provide that the Secretary of State ceases to have those powers in respect of undertakings and orders that have been so specified.

5. **Extent**

5.1 This instrument applies to all of the United Kingdom.

6. **European Convention on Human Rights**

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

7. **Policy Background**

7.1 The Enterprise Act 2002 transferred responsibility for merger control functions and for taking decisions on competition matters to the independent competition authorities – although Ministers retained powers to intervene in cases that raise specified public interest considerations. In accordance with this policy of removing ministers from the decision making process on the majority of merger, monopoly or market cases, the Government is transferring to the competition authorities responsibility for enforcing undertakings accepted and orders made under the 1973 Act and for making decisions on whether to supersede, vary or release such undertakings or to vary or revoke such orders.

7.2 This order transfers to the Commission responsibility for enforcing 16 merger undertakings and 5 monopoly undertakings accepted under Section 88 of the 1973 Act as well as responsibility for decisions on varying or revoking two orders the Government made in 2005 under Section 56 of the 1973 Act. A separate order, being made in parallel to this one, similarly transfers to the OFT responsibility for such decisions on 16 merger undertakings accepted under Section 75G of the 1973 Act. Later in 2006, we anticipate making a further order transferring to the competition authorities responsibility for most of the remaining undertakings that were given to the Secretary of State under the 1973 Act.

7.3 Transferring undertakings should have no adverse effect on the parties that gave them as, in reaching decisions on these, the competition authorities will have to apply the same legal criteria as would the Secretary of State. The parties to the undertakings specified in this order have been notified of the planned transfer of responsibility for such decisions.

8. **Impact**

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

9. **Contact**

9.1 Paul Bannister at the Department of Trade and Industry Tel: 0207 215 5009 or e-mail paul.bannister@dti.gsi.gov.uk can answer any queries regarding this instrument.