EXPLANATORY MEMORANDUM TO THE

ENTERPRISE ACT 2002 (ENFORCEMENT UNDERTAKINGS)

ORDER 2006

2006 No. 0354

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) and 16(1) of Schedule 24 of the Enterprise Act 2002 ("the 2002 Act") certain undertakings given to Ministers under Section 75G of the Fair Trading Act 1973 ("the 1973 Act") in relation to merger situations. The effect of this is to transfer to the Office of Fair Trading (OFT) rights to enforce the specified undertakings by civil proceedings and also the powers to supersede, vary or release them. It also provides for the rights of third parties who have suffered loss or damage caused by contravention of any such undertaking.

2.2 The Order contains consequential amendments made under section 277 of the Enterprise Act 2002. The undertakings listed in paragraphs 4-16 of the Schedule to the Order refer to action requiring the consent, approval or agreement of the Secretary of State. Article 4 of the Order provides that such consent, approval or agreement may be granted 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.

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. The provisions of Section 75G of the 1973 Act empowered the Secretary of State to accept undertakings designed to remedy or prevent effects detrimental to the public interest that arise from mergers. This is in lieu of referring the relevant merger to the Commission. Section 75J of the 1973 Act provided that the Secretary of State could supersede, vary or release any such undertakings that were so given.

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 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 and 16 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 or 16[1].

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 Paragraph 16 of Schedule 24 provides 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 and provides 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

[1] This is the second occasion that orders have been 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.

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 OFT responsibility for enforcing 16 merger undertakings accepted under Section 75G of the 1973 Act. A separate order, being made in parallel to this one, similarly transfers to the Commission responsibility for decisions on 16 merger undertakings and 5 monopoly undertakings given to the Secretary of State under Section 88 of the 1973 Act as well as for decisions on varying or revoking two orders made under Section 56 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 order.