EXPLANATORY MEMORANDUM TO

THE ENTERPRISE ACT 2002 (MERGER FEES) (AMENDMENT AND REVOCATION) ORDER 2012

2012 No. 1878

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.

This memorandum contains information for the Joint Committee on Statutory Instruments.

2. Purpose of the Instrument

2.1 This Order amends the Enterprise Act 2002 (Merger Fees and Determination of Turnover) Order 2003 (Statutory Instrument 2003 No. 1370), which itself has been amended. It increases the amounts of fees payable by enterprises for the regulatory consideration of mergers – work done primarily by the Office of Fair Trading and the Competition Commission. It revokes an earlier amendment order (SI 2005/3558), which introduced previous levels of fees (now superseded, including in relation to the transitional provision included in that order).

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

3.1 The Order imposes fee increases other than for reasons of inflation. The reasons for the increases are to provide for a greater proportion of cost recovery for the merger regime, and thus a reduced impact on taxpayers. These are balanced against business opposition to achieving full cost recovery and the potential impact on the economy of a substantial increase in fees. The reasoning is explained further in section 7 below.

3.2 The level of merger fees is due to be reviewed again in 2015.

4. Legislative Context

4.1 Part 3 of the Enterprise Act 2002 enables the Office of Fair Trading (OFT) and Competition Commission (CC) to consider mergers. Section 121 of the Act allows for orders to be made requiring fees to be payable in respect of work undertaken on mergers. The orders define the amount of such fees and the scope of their application.

4.2 The Enterprise Act 2002 (Merger Fees and Determination of Turnover) Order 2003 (SI 2003 No.1370) ("the 2003 Order") establishes the detail of merger fees. This includes: when a fee is or is not payable, the amount payable, and who is responsible for paying. It also provides an exemption from fees for

4.3 This order increases the fees for a third time and introduces a new higher fee band. The new fee levels are £40,000 for those mergers where the value of the annual UK turnover of the enterprise being acquired is below £20 million, £80,000 where the annual UK turnover of the enterprise being acquired is between £20 million and £70 million, and £120,000 where the annual UK turnover of the enterprise being acquired is between £70 million and £120 million. This order also introduces a new higher fee band of £160,000 for those mergers where the value of the UK annual turnover of the enterprise being acquired is above £120 million. The table in paragraph 7 of this Memorandum shows the changes since 2003 including those effected by this Order.

4.4 Article 1(2) contains a transitional provision. Where, in the case of a completed merger, a decision in relation to a possible reference is made by the OFT or a merger reference is made by the Secretary of State under sections 22 or 45(2) or (3) of the Enterprise Act 2002 or by the OFT under Section 32(b) of the Water Industry Act 1991, fees will only be payable at the new higher rate where the decision or reference relates to two or more enterprises which completed their merger on or after 1st October 2012. This is because some time may elapse between the completion of the merger and the making of a reference. Section 27 of the Enterprise Act 2002 governs when two or more enterprises cease to be distinct.

4.5 In the case of anticipated mergers, the usual rules will apply so that, in general fees will be payable at the new higher rate if the decision or reference is made on or after 1st October 2012.

5. Territorial Extent and Application

5.1 This instrument applies to all of the United Kingdom.

6. European Convention on Human Rights

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

7. Policy Background

- What is being done and why

7.1 The Government's policy is that fees for statutory services should normally be set to recover the full cost of the service provided. The system of charging fees to enterprises to meet costs of carrying out merger control functions was first introduced in October 1990. Fees were set at a level designed to recover approximately the full regulatory costs incurred then. Those original fee levels have been increased twice since their introduction, however the income

7.2 In the 2011 consultation: *A competition regime for growth: a consultation on options for reform*, Government proposed two different options for achieving full cost recovery under a voluntary notification regime (where parties are not required to notify their merger to the competition authorities). These were to increase fees within a three band fee structure or to increase fees within a four band fee structure.[1] Government estimated that the cost of the merger scheme for the coming years was likely to be in the region of £9 million per annum. This was a broad estimate since the actual costs incurred would vary depending on the nature and number of cases investigated, and the number of cases referred for a phase two investigation.

7.3 On considering the consultation responses the Government recognised the strength of feeling against significantly increasing merger fees to achieve full cost recovery and was also concerned about the potential impact on the economy of a substantial increase of fees. It has therefore decided to increase fees to around 60% cost recovery. This involves the introduction of a new fee band and increases each fee band as shown in the table below:

Value of the UK turnover of the enterprise being acquired	**Fee before April 2006**	**Fee between April 2006 – October 2009**	**Current level of fees (from October 2009)**	**Proposed level of fees (from October 2012)**
Below £20m	£5k	£15k	£30k	£40k
Between £20m - £70m	£10k	£30k	£60k	£80k
Above £70m (from October 2012 this will be £70m - £120m)	£15k	£45k	£90k	£120k
Above £120m (new from October 2012)	n/a	n/a	n/a	£160k

- Consolidation

7.4 Not applicable.

[1] The Government also looked at options of achieving full cost recovery if a mandatory notification regime were introduced.

8. Consultation Outcome

8.1 The Government consulted on the proposed increase in merger fees between 16 March and 13 June 2011. The Government's response to the submissions received was published on 15th March 2012. A copy of the consultation document, a summary of the responses received and the Government's response can be found on the BIS website at: http://www.bis.gov.uk/Consultations/competition-regime-for-growth?cat=closedwithresponse

8.2 Businesses were strongly against any increase in merger fees. They disputed the principle that merger control should be funded wholly through merger fees. Businesses also argued that a substantial effect on merger fees would lead to a chilling effect on merger activity. The Government recognises the strength of feeling against significantly increasing merger fees to achieve full cost recovery, and the potential impact on growth. However, it desired the burden to taxpayers to be reduced. The Government has therefore responded by increasing merger fees to approximately 60% recovery from 1st October 2012.

9. Guidance

9.1 The Office of Fair Trading produces detailed guidance on its operating procedures when investigating mergers which includes the merger fee, when it is payable, by whom and the amounts. This guidance is available on the OFT website (http://www.oft.gov.uk/OFTwork/mergers/).

10. Impact

10.1 The impact on business, charities or voluntary bodies is that the higher fees introduced by this order will apply where an enterprise is involved in a merger that is considered by the competition authorities in accordance with the Enterprise Act 2002 and qualifies to pay a fee in accordance with Section 121 of that Act.

10.2 The impact on the public sector is nil.

10.3 An Impact Assessment has been completed and published. A further copy of that original Impact Assessment will be published alongside this Explanatory Memorandum on www.legislation.gov.uk.

11. Regulating Small Business

11.1 Small and medium sized enterprises, as defined by sections 382 and 465 of the Companies Act 2006 are exempt from paying merger fees.

12. Monitoring and Review

12.1 The level of the merger fee is reviewed every three years. Therefore the next review is planned for 2015.

13. Contact

13.1 Nicholas Blaney at the Department of Business, Innovation and Skills, tel: 020 7215 6622 or email: nicholas.blaney@bis.gsi.gov.uk can answer any questions regarding the instrument.