EXPLANATORY MEMORANDUM TO

THE ENTERPRISE ACT 2002 (MERGERS AND MARKET INVESTIGATIONS) (DETERMINATION OF CONTROL AND TURNOVER FOR PENALTIES) REGULATIONS 2024

2024 No. 1236

1. Introduction

1.1 This explanatory memorandum has been prepared by the Department for Business and Trade and is laid before Parliament by Command of His Majesty.

2. Declaration

2.1 Justin Madders, Parliamentary Under-Secretary of State (Minister for Employment Rights, Competition and Markets) at the Department for Business and Trade confirms that this Explanatory Memorandum meets the required standard.

2.2 Sarah Adcock, Director for Consumer and Competition Policy, at the Department for Business and Trade confirms that this Explanatory Memorandum meets the required standard.

3. Contact

3.1 Simon Harris at the Department for Business and Trade. Email: simon.harris@businessandtrade.gov.uk.

Part One: Explanation, and context, of the Instrument

4. Overview of the Instrument

What does the legislation do?

4.1 This instrument makes regulations under sections 94AB(9) to (11), 111(9) to (11), 167B(9) to (11) and 174D(11) to (13) of the Enterprise Act, 2002 (the "2002 Act"), as amended by the Digital Markets, Competition and Consumers Act 2024 ('the 2024 Act').

4.2 This instrument sets out how the Competition and Markets Authority (CMA) will calculate turnover for the purposes of the enforcement of competition law. It also sets out the circumstances in which a person is considered to have control over an enterprise.

4.3 The 2024 Act amends the 2002 Act to allow the CMA to impose an appropriate turnover-based penalty for failure to comply with an investigative requirement or for breaching a remedy (i.e., an undertaking or order) agreed or imposed under Part 3 or Part 4 of the 2002 Act. These are turnover-based penalties of a fixed penalty of up to 1% of worldwide turnover and / or a daily penalty of up to 5% of daily worldwide turnover for failure to comply with an investigative measure, and a fixed penalty of up to 5% of worldwide turnover and / or a daily penalty of up to 5% of daily worldwide turnover for breaching a remedy.

Where does the legislation extend to, and apply?

4.4 The extent of this instrument (that is, the jurisdiction(s) which the instrument forms part of the law of) is England and Wales, Scotland and Northern Ireland.

4.5 The territorial application of this instrument (that is, where the instrument produces a practical effect) is England and Wales, Scotland and Northern Ireland.

5. Policy Context

What is being done and why?

5.1 The 2024 Act amends the 2002 Act to introduce turnover based penalties for persons who own or control an enterprise that fail to comply with an investigative requirement or that breach a remedy agreed or imposed under Part 3 or Part 4 of the 2002 Act. Turnover based penalties enable the issuing of penalties proportionate to the size of the enterprise concerned and provide a more effective deterrent. The 2024 Act also amends the 2002 Act to make provision for determining when an enterprise is to be treated as being controlled by a person. These regulations set out how turnover should be calculated for these purposes.

What was the previous policy, how is this different?

5.2 Previously, persons that failed to comply with an investigative requirement could be issued with fixed maximum penalties of up to £30,000 and / or a daily penalty of up to £15,000. No financial penalties were available for breaches of remedies. Ultimately, breaches could only be enforced through a court order. Persons who own or control an enterprise will now be subject to turnover-based penalties for failing to comply with an investigative measure as well as breaching a remedy.

5.3 These regulations contain special provisions for calculating turnover for financial institutions, insurance undertakings, and credit institutions. The drafting of these provisions draw on similar provisions in existing precedents such as the Competition Act 1998 (Determination of Turnover for Penalties) Regulations 2024 and the National Security and Investment Act 2021 (Monetary Penalties) (Turnover of a Business) Regulations 2021 with amendments made to update certain terms. Specifically, compared to the precedents mentioned above, this instrument contains a more up-to-date definition of ‘credit institution’ and ‘insurance undertaking’ (including definitions of overseas insurance and reinsurance undertakings to cover the turnover of such firms outside the UK), while still substantively capturing the same group of entities that were captured by the existing precedent SIs mentioned above. For completeness, this instrument refers to a relevant EU accounting directive with regard to which the listed income items used to calculate the turnover of financial/credit institutions should be interpreted. This is consistent with the approach taken in the existing secondary legislation cited above and ensures both business and legal certainty.

5.4 The definition of ‘insurance undertaking’ does not include UK-based undertakings carrying out insurance activities without authorisation under the Financial Services and Markets Act 2000. If the CMA needed to calculate turnover for such an undertaking, they should use the methodology outlined in the provision for calculation of turnover of undertakings (that are not financial) under these regulations.

5.5 These regulations contain provisions that outline how turnover will be determined where accounts are filed using a currency other than sterling. These provisions are needed since the regimes can apply to undertakings outside of the UK. The provisions

are consistent with analogous provisions in the National Security and Investment Act 2021 (Monetary Penalties) (Turnover of a Business) Regulations 2021, with an appropriate amendment to specify that it is the CMA, not the Secretary of State, that will determine the exchange rate. These provisions are harmonised across the regimes.

5.6 The instrument makes provisions for the definition of 'subsidy'. This definition is consistent with the definition currently in place under the National Security and Investment Act (Monetary Penalties) (Turnover of a Business) Regulations 2021, with a slight modification to widen its reach. The modification removes a condition that financial assistance should only be considered if it has or could have impacts on competition, trade or investment. This means that smaller amounts of financial assistance, which are less likely to impact on competition, would also be considered for the purpose of this instrument in line with the policy objective of ensuring that the CMA are able to look as widely as possible to calculate turnover. As such, the definition was chosen as it is the most up-to-date definition of 'subsidy', and therefore is different from the definition under the Competition Act 1998 (Determination of Turnover for Penalties) Order 2000, Enterprise Act 2002 (Merger Fees and Determination of Turnover) Order 2003.

6. Legislative and Legal Context

How has the law changed?

6.1 Schedule 10 to the 2024 Act has inserted s.111(4A) and s.174D(4) to the 2002 Act and amended s.110 and s.174A of the 2002 Act to introduce turnover-based penalties of either a fixed penalty of up to 1% of worldwide turnover, a daily penalty of up to 5% of daily worldwide turnover, or both, for failure to comply with an investigative measure under the 2002 Act.

6.2 Schedule 11 to the 2024 Act has inserted s.94AA and s.167A to the 2002 Act to introduce turnover-based penalties of either a fixed penalty of up to 5% of worldwide turnover, a daily penalty of up to 5% of daily worldwide turnover, or both, for failure to comply with a competition remedy under the 2002 Act.

6.3 In both cases, the Secretary of State is empowered to set out how fixed and daily turnover should be calculated for the purpose of determining the maximum penalty.

6.4 Schedule 11 to the 2024 Act has inserted s.94AB(9) to the 2002 Act which empowers the Secretary of State to make regulations to determine when an enterprise is to be treated as being controlled by a person, for the purposes of the relevant provisions in Part 3 and 4 of the 2002 Act.

Why was this approach taken to change the law?

6.5 The Government's objectives are to maintain, to the extent possible, consistency with existing statutory frameworks for the calculation of turnover. As such, where relevant, the approaches taken by existing secondary legislation under the Competition Act 1998 and the Enterprise Act 2002, have been used as a starting point for these regulations. Any departure from these approaches has been to adapt the regulations to the new legal provisions inserted in the 2002 Act by the 2024 Act and to reflect the policy rationale in ensuring that the turnover calculation is pragmatic and avoids unnecessary burden for the authority concerned.

7. Consultation

Summary of consultation outcome and methodology

7.1 The proposed regulations were consulted on between July and September 2024, alongside The Competition Act 1998 (Determination of Turnover for Penalties) Regulations 2024 and The Digital Markets, Competition and Consumers Act 2024 and Consumer Rights Act 2015 (Turnover and Control) Regulations 2024. The consultation response will be published on 1 January 2025. Seven respondents answered questions relating to the three instruments in draft form. The respondents were comprised of a mixture of external stakeholders, including trade associations and public bodies. The majority of the comments made by respondents were supportive of the draft provisions. In particular, respondents indicated support for consistency with other existing secondary legislation and regimes.

7.2 One change was made following the consultation. In response to a comment about the interpretation of income items used to calculate the turnover of credit/financial institutions, the draft has been updated to include a reference to the relevant EU accounting directive in accordance with which the listed income items are to now be interpreted. This update brings this instrument in line with existing secondary legislation dealing with the calculation of turnover for financial institutions under competition law and addresses concerns regarding business and legal certainty raised by consultees.

8. Applicable Guidance

8.1 Under the 2024 Act, the CMA is required to consult on and publish guidance on how it will exercise its functions in relation to the calculation or estimation of turnover. This guidance will be made available on the CMA's website: https://www.gov.uk/government/organisations/competition-and-markets-authority.

Part Two: Impact and the Better Regulation Framework

9. Impact Assessment

9.1 A full Impact Assessment has not been prepared for this instrument because these regulations set out the technical provisions under the 2024 Act. Estimates of the impact of the entire regime are set out in the Impact Assessment for the 2024 Act. Specifying precisely how particular maximum permitted penalties are to be calculated is not expected to have an impact on compliant businesses.

Impact on businesses, charities and voluntary bodies

9.2 The impact on business is neutral, since it does not create new impacts beyond those made by the 2024 Act. There will be no impact for the vast majority of businesses, including small and micro businesses. Only those businesses that fail to comply with an investigative requirement or that breach a remedy agreed under imposed under Part 3 or Part 4 of the 2002 Act will be subject to fines capped at the levels set out in this instrument. Charities and voluntary bodies will be affected in so far as they qualify as an enterprise under the 2002 Act.

9.3 The impact on the public sector is neutral because the regulations are set within the implementation of the 2024 Act.

10. Monitoring and review

What is the approach to monitoring and reviewing this legislation?

10.1 The approach to monitoring this legislation is that this instrument will be reviewed in line with CMA monitoring and associated parliamentary oversight of each regime established by the 2024 Act.

10.2 The instrument does not include a statutory review clause.

Part Three: Statements and Matters of Particular Interest to Parliament

11. Matters of special interest to Parliament

11.1 None.

12. European Convention on Human Rights

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

13. The Relevant European Union Acts

13.1 This instrument is not made under the European Union (Withdrawal) Act 2018, the European Union (Future Relationship) Act 2020 or the Retained EU Law (Revocation and Reform) Act 2023 ("relevant European Union Acts").