EXPLANATORY MEMORANDUM TO

THE ENTERPRISE ACT 2002 (MERGERS) (INTERIM MEASURES: FINANCIAL PENALTIES) (DETERMINATION OF CONTROL AND TURNOVER) ORDER 2014

2014 No. 533

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.

2. Purpose of the instrument

2.1 The Order makes provision to determine when an enterprise is to be treated as controlled by a person, and the turnover of an enterprise, for the purpose of imposing an administrative penalty for failure to comply with interim measures under a new power created by the Enterprise and Regulatory Reform Act 2013.

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

3.1 None

4. Legislative Context

4.1 The Order makes provision, for the purposes of section 94A of the Enterprise Act 2002, for determining when an enterprise is to be treated as controlled by a person; and for determining the turnover of an enterprise.

4.2 The Enterprise and Regulatory Reform Act 2013 made changes to the law on merger control under Part 3 of the Enterprise Act – including changes to the provisions of the Enterprise Act relating to interim measures in merger inquiries (sections 72, 80 and 81 and paragraph 2 of Schedule 7).

4.3 As part of this reform of the law on interim measures the 2013 Act inserted new section 94A of the Enterprise Act, which enables the CMA or (depending on the circumstances) the Secretary of State to impose a financial penalty where a person has failed, without reasonable excuse, to comply with an interim measure. Section 94A provides that the penalty must not exceed 5% of the total value of the turnover (both in and outside the United Kingdom) of the enterprises owned or controlled by the person in question. For these purposes, section 94A(3), (4) and (5) confers power on the Secretary of State to make provision, by order, for determining when an enterprise is to be treated as controlled by a person, and for determining the turnover (both in and outside the United Kingdom) of an enterprise. "Enterprise" is defined in section 129(1) of the Enterprise Act. Transitional provisions relating to the application of new section 94A are contained in paragraphs 3 and 5(4) of the Schedule to the

Enterprise and Regulatory Reform Act 2013 (Commencement No 6, Transitional Provisions and Savings) Order 2014 (SI 2014/416 (C.17)).

4.4 Article 2 of the present Order makes provision for determining when an enterprise is to be treated as controlled by a person.

4.5 Article 3 and the Schedule make provision for determining the turnover of an enterprise.

5. Territorial Extent and Application

5.1 This instrument applies to all of the United Kingdom.

6. European Convention on Human Rights

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

7. Policy background

7.1 Section 31 of the Enterprise and Regulatory Reform Act 2013 creates a new administrative sanction under which the CMA (or the Secretary of State in respect of public interest cases) may impose a penalty of a fixed amount that it considers appropriate on a person who – without reasonable excuse – fails to comply with either a Phase 1 or Phase 2 merger control interim measure. Section 31 adds new sections 94A and 94B to the Enterprise Act 2002.

7.2 The penalty is capped at 5 percent of the aggregate worldwide turnover of the enterprises owned or controlled by the person subject to the penalty; and will exist alongside the existing civil enforcement procedures in Part 3 of the Enterprise Act 2002.

8. Consultation outcome

8.1 BIS consulted on the proposals for the standard 12-week period as part of its consultation on a number of statutory instruments implementing elements of the new competition regime. Responses were received from around two dozen respondents to this consultation as a whole. The majority of these were law firms. Details of the responses to the consultation, and the Government Response, will be published at: https://www.gov.uk/government/consultations/competition-regime-cma-priorities-and-draft-secondary-legislation

8.2 The consultation gave rise to concerns about the way in which any 'material influence' test would be applied in determining whether an enterprise is controlled by a person. Respondents suggested that this was not a sufficiently

high standard on which to base fines; that it would lead to uncertainty and complexity; would be time consuming; and would encourage conflicts between the regulator and businesses.

8.3 In response to the consultation, the Government concluded that – if these interim measures are to carry strong deterrent penalties – the 'material influence' test should be included in the Order. The Government considers that the combination of the way in which the legislation is framed; the detail provided in published guidance; and procedural safeguards such as the right of appeal to the Competition Appeal Tribunal will provide sufficient certainty for those potentially affected.

9. Guidance

9.1 Under new section 94B of the Enterprise Act 2002, the CMA is required to prepare and publish (following the approval of the Secretary of State) a statement of policy on the use of these powers; and in particular on the considerations relevant to determining the amount of any penalty.

9.2 The CMA published its statement of policy on administrative penalties – as approved by the Secretary of State, and including detail on how the 'material influence' test will be applied – on 10th January 2014 at: https://www.gov.uk/government/publications/administrative-penalties-statement-of-policy-on-the-cmas-approach

10. Impact

10.1 The impact assessment completed for Parts 3 and 4 of the Enterprise and Regulatory Reform Bill, introduced to Parliament on 23rd May 2012, contained an assessment of the effect that the reforms to the competition regime will have on the costs of business and the public and voluntary sector. It can be found at the website: https://www.gov.uk/government/publications/strengthening-competition-and-creating-a-single-market-authority

11. Regulating small business

11.1 The legislation applies to small business.

12. Monitoring & review

12.1 There is no specific requirement in the Enterprise and Regulatory Reform Act 2013 to review the operation of section 31.

12.2 The impact assessment for the Enterprise and Regulatory Reform Act 2013 competition provisions stated that there would be a review of the competition regime introduced by the Act in April 2018.

13. Contact

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