EXPLANATORY MEMORANDUM TO

THE ENTERPRISE ACT 2002 (PART 9 RESTRICTIONS ON DISCLOSURE OF INFORMATION) (AMENDMENT) ORDER 2024

2024 No. 1291

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 MP, 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 Alex Williams, Deputy Director for Competition Policy at the Department for Business and Trade confirms that this Explanatory Memorandum meets the required standard.

3. Contact

3.1 Aisha Osman at the Department for Business and Trade Telephone: 073 8594 8673 or email: aisha.osman2@businessandtrade.gov.uk can be contacted with any queries regarding the instrument.

Part One: Explanation, and context, of the Instrument

4. Overview of the Instrument

What does the legislation do?

4.1 The instrument amends Schedules 14 and 15 to the Enterprise Act 2002 ("the Act"). These Schedules are part of the regime in Part 9 of the Act which governs the disclosure of certain information relating to competition, consumer and related matters. Part 9 of the Act prohibits the disclosure of this information unless it is permitted under one of the "gateways" in that Part or the information is already in the public domain. This order amends Schedule 14 to ensure that the disclosure of information in relation to the disqualification of directors of Northern Ireland companies for competition infringements is covered by Part 9. It also amends Schedule 15 to allow the disclosure of information (a) to the Bank of England to facilitate its functions under various banking and financial services legislation and (b) to various public authorities to assist with their functions under the Procurement Act 2023.

Where does the legislation extend to, and apply?

4.2 The extent of this instrument (that is, the jurisdiction(s) which the instrument forms part of the law of) is the entirety of the United Kingdom.

4.3 The territorial application of this instrument (that is, where the instrument produces a practical effect) is the entirety of the United Kingdom.

5. Policy Context

What is being done and why?

5.1 The sharing of information among regulators and public bodies plays an important role in effective enforcement and regulation. There can therefore be significant benefits to ensuring that the Competition and Markets Authority (CMA) and other relevant public authorities are able to share information gathered in connection with the exercise of their functions. Nevertheless, such information sharing should be limited to where it is appropriate, and effective safeguards need to apply to protect personal data and commercially sensitive information.

5.2 This instrument will amend the legal framework for the sharing of information in relation to competition and consumer law enforcement matters (Part 9 of the Act) to add a number of enactments to Schedule 14 and 15 to the Enterprise Act 2002. These additions will enable the exchange of competition and consumer-protection related information between relevant public authorities for the purposes explained in the following paragraphs.

Addition of articles 13A to 13E of the Company Directors Disqualification (Northern Ireland) Order 2002 to the list of legislation in Schedule 14

5.3 Part 9 of the Act restricts the disclosure of "specified information" which relates to the affairs of an individual or any business of an undertaking. Specified information, defined in section 238 of the Act, is information which comes to a public authority in connection with the exercise of any function it has under or by virtue of:

(a) certain Parts of the Act (section 238(1)(a)),

(b) legislation specified in Schedule 14 to the Act (section 238(1)(b)), or

(c) subordinate legislation specified in an order made by the Secretary of State (section 238(1)(c)).

5.4 Article 2(2) of this instrument adds articles 13A to 13E of the Company Directors Disqualification (Northern Ireland) Order 2002 ("the NI Order") to the list of legislation in Schedule 14 to the Act. This amendment does not present a policy change but corrects what appears to be an oversight in order to bring the provisions concerning the disclosure of information in connection with competition disqualification orders and undertakings in Northern Ireland in line with the provisions related to Great Britain.

5.5 The Company Directors Disqualification Act 1986 ("CDDA 1986") includes provisions for the disqualification of directors of companies found to have infringed either the Chapter I or II prohibition[1] in the Competition Act 1998, where it is considered that the director's conduct makes them unfit to be concerned in the management of a company.

5.6 The CDDA 1986 applies to Great Britain, and the equivalent provision for Northern Ireland is made by the NI Order.

5.7 Information gathered by the CMA, or certain other regulators with functions under the Competition Act 1998, in connection with the exercise of functions under the CDDA

[1] The Chapter I and Chapter II prohibitions are rules prohibiting, respectively, anti-competitive agreements and abuse of a dominant position in a UK market.

1986 falls within the definition of specified information under section 238(1)(a) [2]. As a result, the disclosure of this information is subject to the regime in Part 9.

5.8 By contrast, information obtained by the CMA and other relevant regulators relating to competition disqualification orders and undertakings in relation to NI registered companies is currently not covered by the regime in Part 9 because it does not fall within any of the limbs of the definition of specified information in section 238 of the Act. The amendment will correct this by adding the NI Order to Schedule 14 and so will protect the information concerned and ensure it can be disclosed, where necessary, under the gateways in Part 9.

Addition of the Procurement Act 2023 to the list of legislation in Schedule 15

5.9 One of the disclosure gateways under Part 9 of the Act is the statutory functions gateway in section 241. Section 241(3) allows a public authority to disclose specified information to another person for the purposes of facilitating the exercise of any function that person has under, amongst other things, enactments specified in Schedule 15 to the Act. Article 2(3) of this instrument adds the Procurement Act 2023 to Schedule 15.

5.10 The Procurement Act 2023, which received Royal Assent in October 2023 and is due to come into force on 24th February 2025, introduced reforms to the UK public procurement regime to create a simpler and more transparent system.

5.11 The Procurement Act 2023 introduces a new exclusion regime which, among other things, requires contracting authorities to exclude suppliers from relevant procurement procedures as a result of a range of undesirable activities, including (for the first time) some competition-related infringements. The mandatory exclusion grounds under the Procurement Act 2023 include cases where the CMA or another regulator has made a decision that a particular supplier has infringed the prohibition in Chapter I of the Competition Act 1998 (which prohibits anti-competitive agreements and practices) within the last 5 years.

5.12 The Procurement Act 2023 also creates discretionary exclusion grounds. These cover decisions by the CMA or other regulators that the Chapter II prohibition (abuse of dominance) has been infringed and "potential" competition infringements, i.e. situations where an alleged competition infringement (of either the Chapter I or Chapter II prohibitions) has not been investigated, or where a case is being investigated but has not yet concluded. The discretionary exclusion ground allows contracting authorities to consider whether a supplier's conduct, in the absence of a formal finding of breach of the law, would constitute an infringement or offence under competition law.

5.13 The Procurement Act 2023 also creates a power for a Minister of the Crown to add excluded or excludable suppliers to a central, public Debarment List for a specified period of time. For the purpose of considering whether a supplier could be added to the Debarment List, a relevant authority may investigate whether a mandatory or discretionary exclusion ground applies to that supplier.

5.14 It could be difficult for contracting authorities to determine whether an investigation under the Competition Act 1998 is being or has been undertaken. Without a statutory

[2]Under section 238(1)(a) specified information includes information which comes to a public authority in in connection with functions it has under or by virtue of Part 7 of the Act. Part 7 inserted the sections on competition disqualification into the CDDA so information in connection with those functions comes to the CMA by virtue of Part 7 of the Act.

information gateway, the CMA and other regulators are unable to share any information with contracting authorities (or the Procurement Review Unit charged with addressing systemic or institutional breaches of public procurement law) beyond what is in the public domain (i.e. non-confidential versions of competition infringement decisions with limited detail), due to the information-sharing restrictions in Part 9 of the Act.

5.15 Article 2(3) therefore adds the Procurement Act 2023 to Schedule 15 to the Act in order to create an information sharing gateway which will enable the CMA and other regulators to share specified information with contracting authorities and the Procurement Review Unit for the purposes of facilitating their functions under the Procurement Act 2023. This access will help ensure that fully informed exclusion and debarment decisions can be made and that public bodies are not contracting with suppliers that may pose a risk to the delivery of public contracts, the government's reputation or the achievement of value for money. Access to this information will also ensure a consistency of approach across the public sector (both among contracting authorities and with decisions under competition law) and reduce the potential for unwarranted exclusions or legal challenges of decisions made by an individual contracting authority.

Addition of enactments covering additional Bank of England functions to the list of legislation in Schedule 15

5.16 It is in the public interest for the CMA and the Bank of England to co-operate, as appropriate, in order to help facilitate their respective functions. As of December 2023, the CMA and the Bank of England have entered into a Memorandum of Understanding (MoU) which envisages closer cooperation on issues where they have shared interests. Among other things, the MoU sets out how the CMA and the Bank will share information (subject to the relevant legal constraints) to assist each other in carrying out their respective functions.

5.17 More generally, the CMA might hold specified information that could facilitate the Bank of England's various functions. For example, in producing the August 2023 Monetary Policy Report, the Bank of England reviewed CMA data, including aggregated data regarding actual and future expectations of groceries retailers' profits. Such information sharing can clearly be in the public interest.

5.18 Gateways under Part 9 of the Act already allow the CMA to share specified information with the Bank of England, including for the purpose of facilitating the exercise of the Bank's statutory functions under relevant legislation specified in Schedule 15 to the Act (section 241(3)). Notably, this includes the Financial Services and Markets Act 2000. However, other key operational statutes for the Bank are not covered by Schedule 15, creating potential barriers on effective information exchange between the CMA and the Bank.

5.19 The amendment made by article 2(3) of the Order will support the policy objective of facilitating additional useful information sharing between the CMA and the Bank of England in relation to some additional key functions of the Bank of England which are currently not captured in Schedule 15.

5.20 The enactments which will be added to Schedule 15 for this purpose are as follows:

- The Bank of England Act 1998: The Bank's monetary policy functions are enshrined in the Bank of England Act 1998. As such, its inclusion in Schedule 15 will enable the CMA to share information with the Bank to support the Bank in discharging its monetary policy functions.

- The Banking Act 2009: This Act provides for a special resolution regime which gives the Bank of England, the Prudential Regulation Authority, the Financial Conduct Authority and HM Treasury the tools to protect financial stability by resolving banks, building societies, investment firms, banking group companies and central counterparties (CCPs) that are failing, while protecting depositors, client assets, taxpayers and the wider economy. As such, its inclusion in Schedule 15 will enable the CMA to share information with the Bank to support the Bank in discharging its resolution functions.
- Schedule 11 (Central Counterparties) to the Financial Services and Markets Act 2023: This Schedule contains free-standing provision expanding the CCP resolution regime. The private sector purchaser stabilisation power broadly entails selling all or part of a CCP to a commercial purchaser, a potential consequence of its exercise being an increase in the concentration within relevant markets. It is likely that the CMA would hold relevant information which would be of significance to the public authorities with relevant statutory functions.

What was the previous policy, how is this different?

Addition of articles 13A to 13E of the Company Directors Disqualification (Northern Ireland) Order 2002 to the list of legislation in Schedule 14

5.21 This instrument does not change the existing policy on disclosure by the CMA of information relating to competition disqualification orders and undertakings. This instrument merely provides a clear legal basis for the protection and disclosure of this type of information in relation to the NI Order.

Addition of the Procurement Act 2023 to the list of legislation in Schedule 15

5.22 The Procurement Act 2023's exclusion regime requires contracting authorities to exclude suppliers from relevant procurement procedures as a result of a range of undesirable activities, including some competition-related infringements. This instrument is necessary for the delivery of this policy by creating an information sharing gateway which will enable the CMA and other regulators to share relevant information with contracting authorities and the Procurement Review Unit for the purposes of facilitating their functions under the Procurement Act 2023. No information sharing gateway currently exists for this new legislation, thereby necessitating the establishment of a new gateway for these purposes.

Addition of enactments covering additional Bank of England functions to the list of legislation in Schedule 15

5.23 This instrument extends the current policy that the sharing of information between the CMA and the Bank of England can be beneficial where it facilitates their respective functions. Currently, this is limited to certain functions (e.g., under the Financial Services and Markets Act 2000) which will now be expanded as outlined above.

6. Legislative and Legal Context

How has the law changed?

6.1 Part 9 of the Act prevents the disclosure of specified information which relates to the affairs of an individual or any business of an undertaking (section 237), unless the information is already lawfully in the public domain, or it is disclosed under one of the information-sharing gateways contained within Part 9. Specified information, defined in section 238 of the Act, includes information which comes to a public

authority in connection with the exercise of any function it has under an enactment specified in Schedule 14.

6.2 One of the statutory "gateways" which permits the disclosure of specified information is in section 241(3) of the Act. This provides that a public authority may disclose specified information to another person for the purposes of facilitating the exercise of any function that person has under or by virtue of, amongst other things, enactments specified in Schedule 15.

6.3 Part 9 of the Act contains provisions which enable the Secretary of State by order to amend the list of enactments contained in Schedules 14 and 15 to the Act.

6.4 This instrument makes free-standing amendments to those Schedules the Act.

6.5 As a result of the addition of articles 13A to 13E of the Company Directors Disqualification (Northern Ireland) Order 2002 to the list of legislation in Schedule 14 of the Act, any information obtained by a public authority in connection with the exercise of any statutory function under that Order is protected and can be disclosed under Part 9 of the Act. Similarly, the addition of the Procurement Act 2023 and the enactments covering additional Bank of England functions to Schedule 15 of the Act will permit the sharing of information with relevant UK public authorities to assist them in discharging their statutory functions under these enactments.

Why was this approach taken to change the law?

6.6 Only by legislating to amend Schedules 14 and 15 could the necessary changes be made to the Part 9 regime to achieve the policy objectives outlined above.

7. Consultation

Summary of consultation outcome and methodology

7.1 This instrument was informed by a public consultation on the two main policy proposals[3]. In relation to the addition of enactments covering additional Bank of England functions to Schedule 15 to the Act, the consultation asked whether respondents agreed or disagreed with enabling the CMA and other relevant public authorities to share specified information with the Bank of England to support the Bank's functions under the legislation in question. In relation to the proposed addition of the Procurement Act 2023 to Schedule 15 of the Act the consultation asked whether respondents agreed or disagreed with enabling the disclosure of information about certain competition infringements or potential infringements to contracting authorities and the Procurement Review Unit for the purposes of determining whether to exclude or debar suppliers from relevant procurement procedures. The consultation was published online and was open for 4 weeks.

7.2 The government received one response to the consultation in which the respondent opposed the making of the amendment to enable the disclosure of information about certain competition infringements or potential infringements to contracting authorities and the Procurement Review Unit for the purposes of determining whether to exclude or debar suppliers from relevant procurement procedures. The government considered this response and decided to proceed with the policy changes set out in the consultation.

[3] https://www.gov.uk/government/consultations/competition-and-consumer-protection-related-information-sharing, GOV.UK

7.3 The government engaged with relevant devolved administrations on the content of the SI.

7.4 The Northern Ireland Department of the Economy and the Department for Business and Trade jointly agreed to make the amendment to bring to the Company Directors Disqualification (Northern Ireland) Order 2002 within the scope of the existing legal framework for information sharing contained within the Act.

8. Applicable Guidance

8.1 The CMA's existing Transparency and Disclosure Guidance (CMA6[4]) details the CMA's application of the information sharing gateways in Part 9 of the Act. This guidance will apply to the changes made, so that no further guidance is required.

Part Two: Impact and the Better Regulation Framework

9. Impact Assessment

9.1 A full Impact Assessment has not been prepared for this instrument due to the expected minimal impact. The instrument has been assessed to have an Expected Annualised Net Direct Cost to Business (EANDCB) well below the ± £10 million De Minimis threshold. Therefore, a full Impact Assessment is not required under the Better Regulation Framework. Instead, a De Minimis Self-Certification has been prepared.

Impact on businesses, charities and voluntary bodies

9.2 There is no, or no significant, impact on business, charities or voluntary bodies because the instrument predominantly concerns the information sharing powers between the CMA and other public authorities and the Bank of England, ensuring that adequate protections and pathways to secure information sharing exist to assist them in discharging their statutory functions. Given that most of the above instruments will not directly affect businesses in practice, and that only a small number of businesses relative to the UK business population are involved in CMA investigations each year in any case, the expected impacts on this group have been deemed negligible.

9.3 The legislation does not impact small or micro businesses.

9.4 There is no, or no significant, impact on the public sector. Whilst the instruments may lead to additional information sharing activity between the CMA and public authorities in some cases, any associated resource costs are expected to be insignificant given this instrument will only improve the ability of these bodies to perform their statutory functions without altering the wider framework. Consequently, this instrument is expected to deliver a net benefit to the public sector.

10. Monitoring and review

What is the approach to monitoring and reviewing this legislation?

10.1 The approach to monitoring this legislation is that due to the negligible impacts expected, no active monitoring or review is planned. The legislation amends the Act to remove barriers to information sharing between the CMA and other public

[4] https://www.gov.uk/government/publications/transparency-and-disclosure-statement-of-the-cmas-policy-and-approach, GOV.UK

authorities without affecting the existing wider framework, resulting in a minimal expected impact. As a result, a review has not been deemed proportionate.

10.2 This instrument does not include a statutory review provision under section 28 of the Small Business, Enterprise and Employment Act 2015 because the instrument amends primary legislation and does not make or amend any regulatory provision in relation to a qualifying activity carried on by business or voluntary and community bodies.

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 The Minister for Employment Rights, Competition and Markets has made the following statement regarding Human Rights:

"In my view the provisions of the Enterprise Act 2002 (Part 9 Restrictions on Disclosure of Information) (Amendment) Order 2024 are compatible with the Convention rights."

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").