

## EXPLANATORY MEMORANDUM TO

### THE ENTERPRISE ACT 2002 (SPECIFICATION OF ADDITIONAL SECTION 58 CONSIDERATION) ORDER 2020

2020 No. 627

#### 1. Introduction

- 1.1 This explanatory memorandum has been prepared by The Department for Business, Energy & Industrial Strategy and is laid before Parliament by Command of Her Majesty.
- 1.2 This memorandum contains information for the Joint Committee on Statutory Instruments.

#### 2. Purpose of the instrument

- 2.1 This Order amends section 58 of the Enterprise Act 2002 (c. 40) (the “Act”) to specify the need to maintain in the United Kingdom (“UK”) the capability to combat, and to mitigate the effects of, public health emergencies as a public interest consideration under that section. This will enable the Secretary of State to intervene on the basis of this consideration in mergers and acquisitions that come within the scope of Part 3 of the Act (“qualifying mergers”).
- 2.2 This Order is necessary to ensure that the Government has the powers available to intervene in qualifying mergers to preserve critical UK public health and crisis mitigation capabilities, including those needed to fight, and to mitigate the effects of, the current COVID-19 pandemic, and ultimately therefore to safeguard the welfare of the British people.

#### 3. Matters of special interest to Parliament

##### *Matters of special interest to the Joint Committee on Statutory Instruments*

- 3.1 This Order needs to come into force on the day after it is laid before Parliament because there may at any time be a need for the Government to use the new powers it provides for in relation to the current COVID-19 pandemic.

##### *Matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business (English Votes for English Laws)*

- 3.2 The territorial application of this instrument includes Scotland and Northern Ireland.
- 3.3 In the view of the Department, for the purposes of House of Commons Standing Order No. 83P of the Standing Orders of the House of Commons relating to Public Business, the subject-matter of this instrument would not be within the devolved legislative competence of any of the Northern Ireland Assembly as a transferred matter, the Scottish Parliament or the National Parliament for Wales if equivalent provision in relation to the relevant territory were included in an Act of the relevant devolved legislature.

#### 4. Extent and Territorial Application

- 4.1 The extent of this instrument is the entirety of the UK.

4.2 The territorial application of this instrument is the entirety of the UK.

## **5. European Convention on Human Rights**

5.1 The Parliamentary Under Secretary of State, Nadhim Zahawi MP, has made the following statement regarding Human Rights:

“In my view the provisions of The Enterprise Act 2002 (Specification of Additional Section 58 Consideration) Order 2020 are compatible with the Convention rights.”

## **6. Legislative Context**

6.1 The legislative framework for the assessment of UK mergers (including acquisitions) is contained in Part 3 of the Act. Along with investigation of competition issues, this provides for Government intervention on public interest grounds in three types of case: ordinary public interest cases; special public interest cases; and European merger cases.

### *Ordinary public interest cases*

6.2 Section 42 of the Act allows the Secretary of State to intervene in a merger on public interest grounds where he has reasonable grounds to suspect it may be, or may if it comes to fruition become, a “relevant merger situation” (see the next paragraph) and believes that one or more of the public interest considerations specified in section 58 of the Act may be relevant to the case. Section 58 currently specifies national security, media plurality (an umbrella term covering a number of media-related considerations) and the stability of the UK financial system as public interest considerations. This last consideration was added during the 2007-08 financial crisis by The Enterprise Act 2002 (Specification of Additional Section 58 Consideration) Order 2008 (S.I. 2008/2645).

6.3 Section 23 of the Act provides that a “relevant merger situation” arises where two or more enterprises cease to be distinct, and at least one of the following thresholds is met: the enterprise taken over has a UK turnover of more than £70 million (the “turnover test”); or, the merger has resulted in the creation or enhancement of at least a 25% share of supply or purchase in, or in a substantial part of, the UK of goods or services of any description (the “share of supply test”).

6.4 The Enterprise Act 2002 (Share of Supply Test) (Amendment) Order 2018 (S.I. 2018/578) and The Enterprise Act 2002 (Turnover Test) (Amendment) Order 2018 (S.I. 2018/593), both of which came into force on 11 June 2018, amended the share of supply test and the turnover test, respectively. The turnover threshold was lowered from £70 million to £1 million for takeovers of “relevant enterprises”, i.e. those active in any of the following sectors: military or dual-use goods subject to export control; computer processing units; or quantum technology. The share of supply test was amended so that the test is additionally met if the takeover is of a “relevant enterprise” that already had at least a 25% share of supply or purchase in, or in a substantial part of, the UK of goods or services before the merger. The goods or services must be connected to the activities by virtue of which it qualifies as a “relevant enterprise”. These changes were made to enable the Secretary of State to intervene in additional mergers which might give rise to national security implications.

6.5 Pursuant to section 42(2) of the Act, the Secretary of State intervenes in a merger by giving an intervention notice (commonly known as a “public interest intervention

notice”) to the Competition and Markets Authority (“CMA”). This requires the CMA to investigate the merger (commonly known as a “Phase 1 investigation”) and to provide a report to the Secretary of State containing its advice on jurisdictional, and, if any arise, competition, issues, as well as a summary of any representations it has received about the case in relation to the public interest considerations cited in the intervention notice.

- 6.6 Once he has received this Phase 1 report, the Secretary of State may pursuant to section 45 of the Act make a “reference” to the CMA requiring it to carry out a more in-depth investigation (commonly known as a “Phase 2 investigation”), if he believes that the merger may be, or may if it comes to fruition become, a “relevant merger situation” and that it might operate against the public interest (including for competition reasons). Alternatively, pursuant to paragraph 3 of Schedule 7 to the Act, in lieu of making a Phase 2 reference the Secretary of State may accept whatever undertakings (commonly known as “undertakings-in-lieu”) he considers appropriate from the parties to address the public interest issues identified. Under paragraph 5 of Schedule 7, where he considers that undertakings-in-lieu have not or will not be fulfilled, or where he considers that they were accepted on the basis of false or misleading information, the Secretary of State has the the power to replace them with an order imposing remedies.
- 6.7 If a Phase 2 reference is made, section 50 of the Act requires the CMA to prepare a further report for the Secretary of State. Once he has received this Phase 2 report, the Secretary of State must pursuant to section 54 of the Act make a final decision on whether the merger is against the public interest, and, if he does so, he may pursuant to section 55 of the Act take whatever remedial action in his power he considers reasonable and practicable to address the public interest issues identified. This may be in the form of final undertakings accepted from the parties, as provided for by paragraph 9 of Schedule 7 to the Act, or in the form of an order imposing remedies, pursuant to paragraph 11 of Schedule 7. Under paragraph 10 of Schedule 7, the Secretary of State has an equivalent power to that in relation to undertakings-in-lieu to replace final undertakings with an order imposing remedies.

Special public interest cases

- 6.8 Section 59 of the Act allows the Secretary of State to intervene in a limited number of mergers of special public interest on the basis of the public interest considerations specified in section 58 of the Act where the standard jurisdictional thresholds relating to turnover and share of supply are not satisfied. These include for example, mergers involving Government defence contractors authorised to hold or receive confidential information. The subsequent process is similar to the ordinary public interest intervention procedure set out above, except that there is no competition assessment.

European merger cases

- 6.9 The European Council Merger Regulation (No 139/2004) gives the European Commission exclusive jurisdiction within the European Union (EU) to assess mergers (including acquisitions) with an EU dimension (i.e. those in which the parties meet certain global and EU-wide turnover thresholds) for any competition issues. At present this Regulation applies in the UK. The Act provides a mechanism, so long as the standard jurisdictional thresholds are met, for the Secretary of State to intervene in these mergers on the basis of the public interest considerations specified in section 58 of the Act (other than the stability of the UK financial system, which is expressed as

not applying in these cases). This is done by giving the CMA a European intervention notice under section 67 of the Act. The subsequent process is similar to the ordinary public interest intervention procedure set out above, except that it does not involve any competition assessment by the CMA, this being left to the European Commission. Most of the procedure in European merger cases is set out in The Enterprise Act 2002 (Protection of Legitimate Interests) Order 2003 (S.I. 2003/1592) (the “2003 Order”) rather than in the Act itself.

### Remedies

- 6.10 Schedule 8 to the Act sets out the remedies that may be contained in orders made by the Secretary of State in public interest and special public interest cases. This Order inserts a new paragraph 20BA into Schedule 8, giving the Secretary of State the power to include in orders made in relation to the new public interest consideration such provision as he considers appropriate for the purpose of maintaining in the UK the capability to combat, or to mitigate the effects, of public health emergencies. This Order also amends Schedule 3 to the 2003 Order to give the Secretary of State an equivalent power in European merger cases.

## **7. Policy background**

### *What is being done and why?*

- 7.1 The UK believes in an open economy. This is why we welcome foreign investment into the UK. It creates jobs, boosts productivity and has helped us to become one of the largest economies in the world.
- 7.2 However, Government must ensure that critical UK public health and crisis mitigation capabilities are preserved, in order to safeguard the welfare of the British people. This Order helps the Government to meet this responsibility by enabling it to scrutinise and to take action in relation to qualifying mergers for the purpose of maintaining UK capability to combat, and to mitigate the effects of, public health emergencies. This could for example involve imposing conditions on a merger prohibiting any diminution of critical capabilities or even blocking the merger, where appropriate.
- 7.3 The need for this power has been brought into focus by the demands placed on the UK by the COVID-19 pandemic and its impact on the economy. The Government may for example need to act if an enterprise involved in the fight against COVID-19, a vaccine research company or a manufacturer of personal protective equipment for instance, finds itself the target of a takeover. Whilst the vast majority of takeovers are done for genuine business reasons, the Government is attuned to the fact that some critical public health capabilities must be kept in the UK to ensure delivery, self-reliance and self-determination. Likewise in relation to maintaining the capability to mitigate the effects of the pandemic, the Government may for example need to intervene if an internet service provider or food supply chain company becomes the subject of a takeover, given the potential for increased demand for internet services in a lockdown situation or disruption to food supply. Furthermore, as a result of the economic uncertainty caused by the pandemic, usually stable businesses may be suffering a short-term impact to their share price or profitability. This could leave UK enterprises with critical capabilities more vulnerable to takeover.
- 7.4 The power has not been limited to the present COVID-19 pandemic, as there is a need to preserve critical capabilities in relation to future public health emergencies also.

Furthermore, the Government needs to be able to act outside of and in advance of public health emergencies, to ensure that critical capabilities are not degraded before an emergency strikes.

- 7.5 The Government has always used its powers to intervene in mergers only when necessary and in a proportionate manner. This is why there have only been 20 interventions under the Act in 17 years. The Government does not see this additional public interest consideration as a significant change in our approach to intervention in mergers, but as a necessary and proportionate step to protect critical UK capabilities and the public. Furthermore, this Order does not require any business to take any direct action. The UK operates a voluntary notification mergers system.

## **8. European Union (Withdrawal) Act/Withdrawal of the United Kingdom from the European Union**

- 8.1 This instrument does not relate to withdrawal from the European Union / trigger the statement requirements under the European Union (Withdrawal) Act.

## **9. Consolidation**

- 9.1 There are no plans for consolidation in connection with this Order.

## **10. Consultation outcome**

- 10.1 This Order has not been subject to any formal consultation in light of the urgency with which it needs to be made.

## **11. Guidance**

- 11.1 The Government is issuing guidance alongside this Order and this will be placed on the Department's website and in the libraries of both Houses.
- 11.2 The guidance explains why the Government is amending the Act and describes the legal and practical effects of this Order.
- 11.3 The guidance will be subject to review and will be updated to ensure it remains relevant and as useful as possible.

## **12. Impact**

- 12.1 The impact on business arises predominantly from a low level of direct costs to business that this Order creates. These comprise of familiarisation and compliance costs in relation to the expected mergers and acquisitions cases that are assumed to fall within the scope of the regime per year. There is no impact on charities or voluntary bodies.
- 12.2 There is no, or no significant, impact on the public sector.
- 12.3 An Impact Assessment has not been prepared for this instrument, however a 'de minimis' self-certification has been signed off by the Department's Better Regulation Unit to verify that there is a reasonable expectation that the net aggregate impacts would be comfortably below the £5m threshold.
- 12.4 It has not been possible to assess the impact on foreign direct investment as a result of this Order. The associated benefits of this instrument are difficult to quantify and monetise. The proposals are likely to benefit society by ensuring that the UK economy is supported by well-functioning infrastructure and key services; and UK citizens are

also likely to have greater confidence that Government can take steps to maintain capability to combat or mitigate the impacts of public health emergencies.

### **13. Regulating small business**

- 13.1 The legislation applies to activities that are undertaken by small businesses.
- 13.2 No specific action is proposed to minimise regulatory burdens on small businesses.
- 13.3 The Government has concluded that the proposed measures are proportionate given the risks. To provide clarity and minimise impact, the Government will issue guidance as outlined in section 11.

### **14. Monitoring & review**

- 14.1 This Order does not include a review provision and, in line with the requirements of the Small Business, Enterprise and Employment Act 2015, the Parliamentary Under Secretary of State, Nadhim Zahawi MP, has made the following statement:  

“Having regard to the Statutory Guidance for Departments published under section 31(3) of the Small Business, Enterprise and Employment Act 2015, in my view, it is not appropriate to provide for a review of these provisions. It is difficult to imagine that the need to maintain critical UK public health and crisis mitigation capabilities will become less important over time. Furthermore, a review provision would be disproportionate in light of the limited economic impact of this measure on business.”
- 14.2 This measure will nevertheless be monitored and subject to regular review by the Department.

### **15. Contact**

- 15.1 Tara Deshpande at the Department for Business, Energy and Industrial Strategy Telephone: 0207 215 6301 or email: Tara.Deshpande@beis.gov.uk can answer any queries regarding the instrument.
- 15.2 Chris Blairs, Director at the Department for Business, Energy and Industrial Strategy. Email: Chris.Blairs@beis.gov.uk can confirm that this Explanatory Memorandum meets the required standard.
- 15.3 Nadhim Zahawi MP, Parliamentary Under Secretary of State at the Department for Business, Energy and Industrial Strategy.