
STATUTORY INSTRUMENTS

1996 No. 2199

EUROPEAN COMMUNITIES

The EC Competition Law (Articles 88 and 89) Enforcement Regulations 1996

<i>Made</i>	- - - -	<i>23rd August 1996</i>
<i>Laid before Parliament</i>		<i>27th August 1996</i>
<i>Coming into force</i>	- -	<i>28th August 1996</i>

The Secretary of State, being the Minister designated⁽¹⁾ for the purposes of section 2(2) of the European Communities Act 1972⁽²⁾ in relation to measures relating to the procedure for, nature of and enforcement of decisions concerning competition between undertakings, in exercise of the powers conferred by that section hereby makes the following Regulations:

Title, commencement and extent

1.—(1) These Regulations may be cited as the EC Competition Law (Articles 88 and 89) Enforcement Regulations 1996 and shall come into force on the day after the day on which they are laid before Parliament.

(2) These Regulations extend to Northern Ireland.

Interpretation

2.—(1) In these Regulations —

“the 1973 Act” means the Fair Trading Act 1973;⁽³⁾

“Commission” means the Commission of the European Communities;

“the Director” means the Director General of Fair Trading;

“the MMC” means the Monopolies and Mergers Commission;

“practice” means any form of conduct or any other matter which may constitute an abuse of a dominant position;

“qualifying undertaking” means an undertaking which is —

(a) in the case of an individual, a citizen of the United Kingdom and Colonies, or

(1) S.I.1996/1912.
(2) 1972 c. 68.
(3) 1973 c. 41.

- (b) a body corporate incorporated under the law of the United Kingdom, or of a part of the United Kingdom, or
- (c) a person carrying on business in the United Kingdom, either alone or in partnership with one or more other persons.

(2) References in these Regulations to Articles are (except where the contrary intention appears) references to Articles of the treaty establishing the European Community.

(3) Except in the case of the word “undertaking” in regulations 14, 20, 22 and 24, expressions used in these Regulations and in Article 85, 86, 88 or 89 shall have the meaning they bear in the treaty establishing the European Community.

(4) Any provision of these Regulations which is expressed to apply to, or in relation to, an agreement is to be read as applying equally to, or in relation to, a decision by an association of undertakings or a concerted practice (but with any necessary modifications).

Preliminary investigation by the Director

3.—(1) If it appears to the Secretary of State that the United Kingdom might have a duty under Article 88 to rule on the question —

- (a) whether or not there is or has been in existence an agreement prohibited by Article 85 to which a qualifying undertaking is a party, or
- (b) whether or not the carrying on of a practice by a qualifying undertaking constitutes an infringement of Article 86,

he may ask the Director to carry out an investigation (a “preliminary investigation”) and to advise the Secretary of State of the outcome.

(2) In carrying out a preliminary investigation, the Director shall take into account all representations made to him by persons appearing to him to have a substantial interest in the subject matter of the investigation.

Action by the Secretary of State on an agreement

4.—(1) This paragraph applies where, following a preliminary investigation by the Director of an agreement, it appears to the Secretary of State —

- (a) that there is or has been in existence an agreement, to which at least one of the parties is or was a qualifying undertaking, and
- (b) that the United Kingdom has a duty under Article 88 to rule on the question whether or not the agreement is prohibited by Article 85.

(2) Where paragraph (1) applies, the Secretary of State may, if it appears to him that the agreement does not or did not fall within Article 85(1), decide to certify that, on the basis of the facts in his possession, there are no grounds for action on his part in respect of the agreement.

(3) Where paragraph (1) applies, the Secretary of State may, if it appears to him that the agreement falls within Article 85(1) or did so fall, but that the conditions for application of Article 85(3) are met or were met in respect of the agreement, declare the provisions of Article 85(1) inapplicable to the agreement.

(4) Where paragraph (1) applies and the Secretary of State has not made a decision under paragraph (2) or a declaration under paragraph (3), he may refer the agreement to the MMC for investigation and report.

(5) Where, following a preliminary investigation by the Director, it appears to the Secretary of State that there may be, or may have been, in existence an agreement to which at least one of the parties is or was a qualifying undertaking, and that, if so, the United Kingdom would have a duty

to rule on the agreement under Article 88, the Secretary of State may refer the suspected agreement to the MMC for investigation and report.

Action by the Secretary of State on a practice

5.—(1) This paragraph applies where, following a preliminary investigation by the Director of a practice, it appears to the Secretary of State that —

- (a) a practice is being, or has been, carried on by a qualifying undertaking, and
- (b) the United Kingdom has a duty under Article 88 to rule on the question whether or not the practice infringes Article 86.

(2) Where paragraph (1) applies, the Secretary of State may, if it appears to him that the practice does not infringe Article 86, decide to certify that, on the basis of the facts in his possession, there are no grounds for action on his part in respect of the practice.

(3) Where paragraph (1) applies and it appears to the Secretary of State that the practice may infringe Article 86, the Secretary of State may refer the practice to the MMC for investigation and report.

(4) Where, following a preliminary investigation by the Director, it appears to the Secretary of State that a practice may be being or may have been carried on by a qualifying undertaking, and that, if so, the United Kingdom would have a duty to rule on the practice under Article 88, the Secretary of State may refer the suspected practice to the MMC for investigation and report.

Publication of decisions by Secretary of State

6.—(1) Subject to paragraphs (3) and (4) below, the Secretary of State shall publish any decision to certify taken by him under regulation 4(2) or 5(2) and any declaration made by him under regulation 4(3) together with such an account of his reasons for making the decision or declaration as in his opinion is expedient for facilitating an understanding of his decision or of his declaration.

(2) Any publication of a decision or declaration under paragraph (1) shall be in such manner as appears to the Secretary of State to be appropriate.

(3) If it appears to the Secretary of State that it would be against the public interest to publish a particular matter which he would otherwise include in an account of his reasons required to be published under paragraph (1), the Secretary of State shall exclude that matter from the account before publishing it.

(4) Without prejudice to paragraph (3), if the Secretary of State considers that it would not be in the public interest to disclose any matter which he would otherwise include in an account of his reasons required to be published under paragraph (1),

- (a) relating to the private affairs of an individual whose interests would, in the opinion of the Secretary of State, be seriously and prejudicially affected by the publication of that matter, or
- (b) relating specifically to the affairs of a particular person whose interests would, in the opinion of the Secretary of State, be seriously and prejudicially affected by the publication of that matter,

the Secretary of State shall exclude that matter from the account before publishing it.

Variation of reference

7. The Secretary of State may at any time vary a reference made by him under these Regulations.

Publication of references

8. On making a reference under these Regulations or a variation of such a reference the Secretary of State shall arrange for the reference or variation to be published in such manner as he thinks most suitable for the purpose of bringing it to the attention of persons who, in his opinion, would be affected by it.

Time limit for report on a reference

9.—(1) Every reference under regulation 4, 5 or 20 shall specify a period (not being longer than six months beginning with the date of the reference) within which a report on the reference is to be made.

(2) The Secretary of State may give directions to the MMC allowing such further period for the purpose of reporting on a reference under these Regulations as may be specified in the directions, or, if the period has already been extended once or more than once by directions under this paragraph, allowing to the MMC such further extended period for that purpose as may be so specified.

Functions of the MMC on a reference of an agreement

10.—(1) On a reference under regulation 4 the MMC shall investigate and report on the questions —

- (a) whether such an agreement which is the subject of the reference exists or has existed;
- (b) whether any qualifying undertaking is or was a party to it;
- (c) whether the agreement falls within Article 85(1);
- (d) whether the agreement affects or has affected competition within the United Kingdom, and, if so, what are those effects.

(2) Where, during an investigation on a reference under regulation 4, it appears to the MMC —

- (a) that there may have existed or be in existence an agreement (other than that which is the subject of the reference) to which some or all of the parties to the agreement which is the subject of the reference are party;
- (b) that the parties to that other agreement include a qualifying undertaking; and
- (c) that the United Kingdom may have a duty to rule on that agreement under Article 88;

the MMC may investigate and report on that agreement as if it had been the subject of the reference.

(3) Where a report of the MMC on a reference under regulation 4 includes the conclusions that —

- (a) the agreement which is the subject of the reference (or is treated as the subject by virtue of the preceding paragraph) exists or has existed;
- (b) a qualifying undertaking is or was a party to it; and
- (c) the agreement falls within Article 85(1);

the MMC shall also investigate and report on the question whether in their opinion the conditions for application of Article 85(3) are met.

Functions of the MMC on reference of a practice

11.—(1) On a reference under regulation 5 the MMC shall investigate and report on the questions —

- (a) whether the practice which is the subject of the reference is being carried on or has been carried on;

- (b) whether that practice infringes or has infringed Article 86;
- (c) whether any qualifying undertaking is carrying on or has carried on the practice;
- (d) whether the infringement of Article 86 has had an effect on competition in the United Kingdom and, if so, what are those effects.

(2) Where, during an investigation on a reference under regulation 5, it appears to the MMC that a practice similar in form and effect to the practice which is the subject of the reference may be being carried on or may have been carried on by a qualifying undertaking and that the United Kingdom may have a duty to rule on that practice under Article 88, the MMC may investigate and report on that practice as if it had been the subject of the reference.

Report of the MMC

12. Any report of the MMC shall include definite conclusions on the questions on which the MMC is required to report under regulation 10, 11 or 20 together with such an account of their reasons for those conclusions as in their opinion is expedient for facilitating a proper understanding of their conclusions.

Recommendations of MMC

13. Where a report of the MMC —

- (a) on a reference under regulation 4 includes the conclusions specified in regulation 10(3); or
- (b) on a reference under regulation 5 includes the conclusions that a qualifying undertaking has infringed Article 86;

the MMC shall, as part of their investigations, consider what action (if any) should be taken in respect of those conclusions by the Secretary of State or any Minister or public authority and may, if they think fit, include in their report recommendations as to such action.

Undertakings as an alternative to a reference

14.—(1) Where the Secretary of State has power to make a reference to the MMC under regulation 4, regulation 5 or regulation 20 he may, instead of making a reference, accept from such of the parties concerned as he considers appropriate undertakings to take such specified action as the Secretary of State considers appropriate —

- (a) to terminate or prevent the recurrence of the infringement of Article 85(1) or Article 86 which it appears to the Secretary of State has occurred or may have occurred, or
- (b) to enable him to make a declaration under paragraph (2).

(2) Where the Secretary of State has accepted undertakings under this regulation in respect of an agreement, and it appears to him that, if the undertakings are fulfilled, the conditions for application of Article 85(3) will be met in respect of the agreement, he may declare the provisions of Article 85(1) inapplicable to the agreement.

(3) The Secretary of State shall arrange to publish in such manner as appears to him to be appropriate —

- (a) any undertakings accepted by him under paragraph (1);
- (b) any declaration made by him under paragraph (2);
- (c) such an account of his reasons for his decision to accept undertakings, and, if it be the case, for making a declaration as in his opinion is expedient for facilitating an understanding of his decision or his declaration;
- (d) any variation or release of such an undertaking.

(4) Regulation 6(3) and (4) shall apply to the account referred to in paragraph (3)(c) as they apply to an account of the Secretary of State's reasons published under regulation 6(1).

(5) Where an undertaking has been accepted under paragraph (1), it shall be the duty of the Director —

(a) to keep under review the carrying out of that undertaking, and from time to time to consider whether, by reason of any change of circumstances, the undertaking is no longer appropriate and either —

(i) one or more of the parties to it can be released from it, or

(ii) it needs to be varied or to be superseded by a new undertaking, and

(b) if it appears to him that the undertaking has not been or is not being fulfilled, that any person can be so released or that the undertaking needs to be varied or superseded, to give such advice to the Secretary of State as he may think proper in the circumstances.

(6) Where it appears to the Secretary of State that an undertaking accepted by him under paragraph (1) or which has superseded such an undertaking has not been, is not being, or will not be fulfilled, the Secretary of State may by order made by statutory instrument exercise such one or more of the powers specified in regulation 21 as he may consider it requisite to exercise for the purpose of terminating or preventing the recurrence of the infringement of Article 85 or Article 86 which it appears to the Secretary of State has occurred; and those powers may be so exercised to such extent and in such manner as the Secretary of State considers requisite for that purpose.

(7) In determining whether, or to what extent or in what manner, to exercise any of those powers, the Secretary of State shall take into account any advice given by the Director under paragraph (5).

(8) The provisions contained in an order under paragraph (6) may be different from those contained in the undertaking.

(9) On the making of an order under paragraph (6), the undertaking accepted under paragraph (1) or which has superseded such an undertaking shall be released by virtue of this regulation.

Duty of Director to assist MMC

15. It shall be the duty of the Director, for the purpose of assisting the MMC in carrying out an investigation on a reference made to them under these Regulations, to give to the MMC —

(a) any information which is in his possession and which relates to matters falling within the scope of the investigation and which is either requested by the MMC for that purpose or is information which in his opinion it would be appropriate for that purpose to give to the MMC without any such request, and

(b) any other assistance which the MMC may require and which it is within his power to give in relation to such matters;

and the MMC shall take account of any information given to them for that purpose under this regulation.

Procedures of MMC and General Provisions as to Reports

16. The following provisions of the 1973 Act, namely sections 81 (procedures in carrying out investigations), 82 (general provisions as to reports), 83(4) (laying before Parliament and publication of reports), 85(5) (attendance of witnesses and production of documents), and Part II of Schedule 3(6)

(4) Section 83(1) was amended and subsection (1A) inserted by the Competition Act 1980 (c. 21), section 22; subsection (3A) was inserted by the Companies Act 1989 (c. 40), Schedule 20, paragraph 12.

(5) Section 85(6) was amended by the Magistrates' Courts Act 1980 (c. 43), section 32(2); section 85(5) and words in section 85(6) were repealed by the Companies Act 1989, Schedule 24; and section 85(7) was substituted by and subsection (7A) inserted by the Companies Act 1989, Schedule 20, paragraph 13.

(performance of functions of the MMC) shall apply in relation to references under these Regulations and reports of the MMC on such references as if —

- (a) a reference under these Regulations was a reference under the 1973 Act;
- (b) functions of the MMC under these Regulations were functions in relation to an investigation under the 1973 Act;
- (c) a report of the MMC under these Regulations were a report under the 1973 Act;
- (d) in section 83 references to the Minister or Ministers were references to the Secretary of State;
- (e) in section 85(6) the references to a fine on summary conviction were to a fine not exceeding the statutory maximum;
- (f) in paragraph 11 of Schedule 3 the reference to a monopoly reference were to a reference under these Regulations and the reference to section 52 were a reference to regulation 7;
- (g) paragraph 16(2) of Schedule 3 were omitted.

Laying aside of references

17.—(1) If, at any time during an investigation by the MMC on a reference under these Regulations, it appears to the Secretary of State that the United Kingdom is not under a duty under Article 88 to rule on the agreement or practice which is the subject of the reference, the Secretary of State may direct the MMC to lay the reference aside.

(2) The MMC shall comply with any direction under paragraph (1) but shall furnish to the Secretary of State such information as he may require as to the results until then of their investigations.

Director to receive copies of reports

18. The MMC shall send a copy of every report on a reference under these Regulations to the Director and the Secretary of State shall take account of any advice given to him by the Director with respect to such a report.

Exemptions under Article 85(3)

19.—(1) Where —

- (a) the report of the MMC on a reference under regulation 4 includes the conclusions specified in regulation 10(3); and
- (b) it appears to the Secretary of State that the United Kingdom is under a duty under Article 88 to rule on the question whether or not the agreement concerned is prohibited by Article 85;

the Secretary of State may, if it appears to him that the conditions for application of Article 85(3) are met in respect of the agreement, declare the provisions of Article 85(1) inapplicable to the agreement.

(2) Before deciding whether to make such a declaration the Secretary of State shall have regard to the recommendations of the MMC and to their opinion as to whether the conditions for application of Article 85(3) are met.

(3) The Secretary of State shall publish any declaration under paragraph (1) in such manner as appears to him to be appropriate.

General provisions about exemptions

20.—(1) This regulation applies to any declaration made by the Secretary of State —

- (a) under regulation 4(3);
- (b) under regulation 14(2);
- (c) under regulation 19(1);

and to any renewal of such a declaration under paragraph (3) below.

(2) A declaration to which this regulation applies —

- (a) shall have effect from such date as may be stated in the declaration being a date not earlier than the date on which the agreement or these Regulations came into force whichever is the later, and
- (b) shall have effect for the period stipulated in the declaration.

(3) The Secretary of State may renew a declaration to which this regulation applies for a further period if it appears to him that the conditions for application of Article 85(3) continue to be met in respect of the agreement at the expiry of the original declaration.

(4) A declaration to which this regulation applies may be made unconditionally or subject to such conditions as the Secretary of State thinks fit.

(5) It shall be the duty of the Director to keep under review the operation of any agreement in respect of which the Secretary of State has made a declaration to which this regulation applies and to advise the Secretary of State if at any time, he considers that the conditions for the application of Article 85(3) cease to be satisfied in respect of the agreement.

(6) If it appears to the Secretary of State in respect of a declaration to which this regulation applies: —

- (a) that there has been a material change of circumstances since the declaration was made; or
- (b) that any information given in respect of the agreement concerned to the Director, to the MMC or to the Secretary of State is or was in any material respect false or misleading; or
- (c) that any person who gave an undertaking under regulation 14 or 22 to the Secretary of State as a result of which the Secretary of State was able to make the declaration has not complied with it;

the Secretary of State may revoke or vary the declaration as he thinks fit.

(7) Before deciding whether to renew, revoke or vary a declaration to which this regulation applies, the Secretary of State may refer the matter to the MMC for investigation and report.

(8) On a reference under paragraph (7) above, the MMC shall investigate and report on the question whether in their opinion the conditions for application of Article 85(3) are met in respect of the agreement which is the subject of the reference.

(9) The MMC shall, as part of their investigations on a reference under paragraph (7) above, consider what action (if any) should be taken in respect of their conclusions by the Secretary of State or any Minister or public authority and may, if they think fit, include in their report recommendations as to such action.

Powers of Secretary of State to make Orders

21.—(1) Where —

- (a) paragraph (2) applies, or
- (b) pursuant to Article 89(2), the Commission has taken a reasoned decision relating to an infringement of Article 85 and has authorised the United Kingdom to take measures needed to remedy the situation;

the Secretary of State may by order made by statutory instrument exercise such one or more of the powers specified in Parts I and II of Schedule 8(7) to the 1973 Act as he considers it requisite to exercise for the purpose of terminating or preventing the recurrence of the infringement of Article 85 concerned or for the purpose of enabling him to make a declaration under regulation 19 or a renewal of such a declaration; and those powers may be so exercised to such extent and in such manner as the Secretary of State considers requisite for that purpose.

(2) This paragraph applies where —

- (a) it appears to the Secretary of State that the United Kingdom has a duty under Article 88 to rule on whether or not an agreement which is the subject of a report of the MMC on a reference under regulation 4 is prohibited under Article 85(1), and
- (b) the report includes the conclusions specified in regulation 10(3) and the Secretary of State has not declared Article 85(1) inapplicable to the agreement.

(3) Where —

- (a) the Secretary of State has received a report of the MMC on a reference under regulation 5(3) which concludes that there is or has been an infringement of Article 86 by one or more undertakings at least one of which is a qualifying undertaking and it appears to the Secretary of State that the United Kingdom has a duty under Article 88 to rule on whether or not that infringement has occurred; or
- (b) pursuant to Article 89(2), the Commission has taken a reasoned decision under Article 89(2) relating to an infringement of Article 86 and has authorised the United Kingdom to take measures needed to remedy the situation;

the Secretary of State may by order made by statutory instrument exercise any one or more of the powers specified in paragraph (4) for the purpose of terminating or preventing the recurrence of the infringement of Article 86 concerned.

(4) The powers which may be exercised under paragraph (3) are —

- (a) the power to prohibit a person named in the order from carrying on the practice constituting the infringement of Article 86 specified in the report of the MMC or decision of the Commission or from carrying on any other practice which is similar in form and effect to that practice; and
- (b) such one or more of the powers specified in Part I or II of Schedule 8 to the 1973 Act as the Secretary of State considers it requisite to exercise for the purpose mentioned in paragraph (3);

and those powers may be so exercised to such extent and in such manner as the Secretary of State considers requisite for the purpose mentioned in paragraph (3).

(5) In determining whether, or to what extent or in what manner, to exercise any of the powers under this regulation the Secretary of State shall have regard to any recommendations included in the report of the MMC.

(6) For the purpose of this regulation and of regulation 14(6), Schedule 8 to the 1973 Act shall be construed as if —

- (a) an order under section 56 were an order under these Regulations;
- (b) paragraph 3 were omitted,
- (c) references to the appropriate Minister were references to the Secretary of State.

(7) It shall be the duty of the Director to keep under review the action (if any) taken in compliance with an order made under regulation 14(6) or under this regulation, and from time to time to consider

whether, by reason of any change of circumstances, the order should be varied or revoked or should be superseded by a new order, and —

- (a) if it appears to him that the order has in any respect not been complied with, to consider whether any action (by way of proceedings in accordance with section 93 of the 1973 Act as applied by regulation 24 or otherwise) should be taken for the purpose of securing compliance with the order, and (where in his opinion it is appropriate to do so) to take such action himself or give advice to the Secretary of State or other person by whom such action might be taken; or
- (b) if it appears to him that the order needs to be varied or revoked, or to be superseded by a new order, to give such advice to the Secretary of State as he may think proper in the circumstances.

Undertakings following a report

22.—(1) In any circumstances where the Secretary of State has power to make an order under regulation 21 it shall be the duty of the Director to comply with any request of the Secretary of State to consult with any persons mentioned in the request (“the relevant parties”) with a view to obtaining from them undertakings to take action indicated in the request made to the Director as being action requisite in the opinion of the Secretary of State, for the purpose of terminating or preventing the recurrence of the infringement of Article 85 or 86 concerned, or of enabling the Secretary of State to make a declaration under regulation 19.

(2) Subsections (2) to (5) of section 88 of the 1973 Act shall apply in relation to consultation under paragraph (1), undertakings given in pursuance of them and orders made under regulation 21, as if —

- (a) references to the appropriate Minister were references to the Secretary of State;
- (b) references to powers under section 56 were to powers under regulation 21;
- (c) references to the “relevant parties” were construed in accordance with paragraph (1) above.

Procedure relating to orders made under these Regulations

23.—(1) No order made under these Regulations which exercises any of the powers specified in Part II of Schedule 8 to the 1973 Act and no order varying or revoking any such order shall be made unless a draft of the order has been laid before Parliament and approved by a resolution of each House of Parliament; and the provisions of Schedule 9(8) to the 1973 Act shall apply with respect to the procedure to be followed before laying before Parliament a draft of any such order as they apply to an order such as is mentioned in section 91(1) of the 1973 Act.

(2) Any statutory instrument whereby any order is made under any provision of these Regulations, other than an instrument whereby an order is made to which the preceding paragraph applies, shall be subject to annulment in pursuance of a resolution of either House of Parliament.

(3) Section 91(2) of the 1973 Act shall apply to an order made under these Regulations (other than an order to which paragraph (1) applies) as it applies to an order made under section 56 of the 1973 Act other than an order such as is mentioned in section 91(1) of the 1973 Act.

(8) Paragraph 4 of Schedule 9 was amended by the Companies Act 1989 (c. 40) Schedule 20, paragraph 20 and Schedule 24.

Provisions as to orders and enforcement

24. Sections 90 (general provisions to orders), 92(9) (investigation of company), 93 (enforcement of orders), and 93A(10) (enforcement of undertakings) of the 1973 Act shall apply in relation to orders made under these Regulations as if —

- (a) references to orders made under section 56 of the 1973 Act were references to orders made under these Regulations;
- (b) the words “either for all persons or” in subsection (2) of section 90 were omitted;
- (c) subsections (5) and (6) of section 90 were omitted;
- (d) references to the Minister were references to the Secretary of State;
- (e) references to an order to which section 90 of the 1973 Act applies were references to an order made under these Regulations; and
- (f) references to undertakings accepted by the Secretary of State under section 75G of the 1973 Act were to undertakings accepted by the Secretary of State under regulation 14 or regulation 22.

False or misleading information

25. Section 93B (false or misleading information) of the 1973 Act(11) shall apply in relation to information furnished by any person to the Secretary of State, the Director or the MMC in connection with any of their functions under these Regulations as it applies to information furnished to the Secretary of State in connection with any of his functions under Parts IV, V or VI of the 1973 Act.

26. Section 129 of the 1973 Act(12) (time limit for prosecutions) shall apply in relation to offences under these Regulations as it applies to offences under the 1973 Act.

27. Section 132 of the 1973 Act(13) (offences by bodies corporate) shall apply in relation to offences under these Regulations as if —

- (a) the reference to section 85(6) were a reference to that subsection as it is applied by regulation 16, and
- (b) the reference to section 93(B) were a reference to that section as it is applied by regulation 25.

Restrictions on disclosure of information

28.—(1) Subject to paragraphs (2) to (4), no information with respect to any particular business which has been obtained under or by virtue of the provisions of these Regulations shall, so long as that business continues to be carried on, be disclosed without the consent of the person for the time being carrying on that business.

(2) Paragraph (1) does not apply to any disclosure of information which is made —

- (a) for the purpose of facilitating the performance of any functions of the Director, the Civil Aviation Authority, the MMC, or the Secretary of State under these Regulations, or the Fair Trading Act 1973(14), or the Restrictive Trade Practices Act 1976(15), or the Resale

(9) Subsections (2) and (3) of section 92 were substituted by the Companies Consolidation (Consequential Provisions) Act 1995 (c. 9) Schedule 2.

(10) Section 93A was inserted by the Companies Act 1989, section 148.

(11) Section 93B was inserted by the Companies Act 1989, section 151.

(12) Section 129(2) and (4) were amended by the Magistrates' Courts Act 1980 (c. 43) Schedule 7, paragraph 118. Subsection (4) has also been amended by S.I. 1981/1675 (N.I. 26), Schedule 6, Pt I, and by S.I. 1980/704 (N.I.6), Schedule 1, Pt II. Section 129(3) was amended by the Criminal Procedure (Scotland) Act 1975 (c. 21), section 460(7) and 461, Schedule 10, and by the Criminal Procedure (Consequential Provisions) (Scotland) Act 1995 (c. 40), Schedule 4, paragraph 9.

(13) Section 132 was amended by the Companies Act 1989 (c. 40) Schedule 20, paragraph 17.

(14) 1973 c. 41.

Prices Act 1976⁽¹⁶⁾, or the Competition Act 1980⁽¹⁷⁾, or the Civil Aviation Act 1982⁽¹⁸⁾, or the Airports Act 1986⁽¹⁹⁾; or the Licensing of Air Carriers Regulations 1992⁽²⁰⁾, or Part IV of the Airports (Northern Ireland) Order 1994⁽²¹⁾, or

- (b) for facilitating the performance by the Commission of its functions under Article 89, or
- (c) in pursuance of a Community obligation within the meaning of the European Communities Act 1972.

(3) Paragraph (1) does not apply to any disclosure of information which is made for the purpose of any proceedings before the Restrictive Practices Court or of any other legal proceedings, whether civil or criminal under these Regulations, the 1973 Act or the Restrictive Trade Practices Act 1976.

(4) Nothing in paragraph (1) shall be construed —

- (a) as limiting the matters which may be included in, or made public as part of, a report of the MMC; or
- (b) as applying to any information which has been made public as part of such a report or of a decision or declaration made by the Secretary of State under these Regulations or as part of an account published with such a decision or declaration.

(5) Any person who discloses any information in contravention of this regulation shall be guilty of an offence and shall be liable —

- (a) on summary conviction, to a fine not exceeding the statutory maximum;
- (b) on conviction on indictment, to imprisonment for a term not exceeding two years or to a fine or to both.

Amendments to other enactments

29.—(1) In paragraph (a) of section 133(2) of the 1973 Act (exceptions from the general restriction on the disclosure of information obtained under or by virtue of certain provisions of that Act), after “or the Coal Industry Act 1994” there shall be inserted the words “or the EC Competition Law (Articles 88 and 89) Enforcement Regulations 1996”.

(2) In paragraph (a) of section 41(1) of the Restrictive Trade Practices Act 1976 (exceptions from the general restriction on the disclosure of information obtained under or by virtue of that Act), after “or the Coal Industry Act 1994” there shall be inserted the words “or the EC Competition Law (Articles 88 and 89) Enforcement Regulations 1996”.

(3) In section 19(3) of the Competition Act 1980, (exceptions from the general restriction on the disclosure of information obtained under or by virtue of that Act) there shall be inserted at the end the following sub-paragraph —

“(q) the EC Competition Law (Articles 88 and 89) Enforcement Regulations 1996;”.

(4) In section 74(3) of the Airports Act 1986⁽²²⁾ (exceptions from the general restriction on the disclosure of information obtained under or by virtue of that Act) there shall be inserted at the end the following sub-paragraph —

“(o) the EC Competition Law (Articles 88 and 89) Enforcement Regulations 1996.”.

(15) 1976 c. 34.

(16) 1976 c. 53.

(17) 1980 c. 21.

(18) 1982 c. 16.

(19) 1986 c. 31.

(20) S.I. 1992/2992.

(21) S.I. 1994/426 (N.I.1).

(22) 1986 c. 31.

(5) In article 49(3) of the Airports (Northern Ireland) Order 1994⁽²³⁾ (exceptions from the general restriction on the disclosure of information obtained under or by virtue of that Order) there shall be inserted at the end the following sub-paragraph —

“(r) the EC Competition Law (Articles 88 and 89) Enforcement Regulations 1996.”.

Past agreements and infringements

30. Nothing in these Regulations shall enable or require the Director or the MMC to investigate or report on an agreement which was determined, or on a practice which has ceased, before these regulations came into force.

Department of Trade and Industry
23rd August 1996

John M Taylor
Parliamentary Under Secretary of State for
Corporate and Consumer Affairs,

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EXPLANATORY NOTE

(This note is not part of the Regulations)

These Regulations make provision for the investigation of, and the making and enforcement of decisions in respect of, agreements or practices on which it appears to the Secretary of State the United Kingdom has a duty to rule under Article 88 of the EC Treaty.

Article 88 applies to cases where the Council of Ministers of the European Community has not made regulations under Article 87 giving effect to Articles 85 and 86 of the EC Treaty. Subject to the possibility of exemption under Article 85(3), Article 85 prohibits agreements between undertakings which have as their object or effect the prevention, restriction or distortion of competition within the common market and which may affect trade between Member States. Article 86 prohibits the abuse by one or more undertakings of a dominant position in the common market or in a substantial part of it in so far as it may affect trade between Member States.

No implementing regulation has been made under Article 87 in respect of air transport services between Member States of the European Community and countries outside the European Community or in respect of international maritime tramp vessel services.

Regulation 3 empowers the Secretary of State to request the Director General of Fair Trading to carry out a preliminary investigation where it appears to the Secretary of State that the United Kingdom might have a duty to rule on whether an agreement or practice is prohibited by Article 85 or 86.

Regulations 4 and 5 provide that the Secretary of State may, following such a preliminary investigation, decide to take no further action in respect of the agreement or practice, or in the case of an agreement, declare that the exemption provided for in Article 85(3) applies. Alternatively, the Secretary of State may decide to refer the matter to the Monopolies and Mergers Commission for investigation and report. Regulation 14 provides that the Secretary of State may accept enforceable undertakings from the persons concerned instead of making a reference to the MMC.

The Regulations make provisions for the publication of decisions to take no further action or exemption declarations made by the Secretary of State following a preliminary investigation (regulation 6) and for the procedures to be followed with regard to the MMC's investigation and report (regulations 7 to 13, and 15 to 18).

Following a report by the MMC which concludes that an agreement exists which falls within Article 85(1), the Secretary of State may declare an exemption or make an order for the purpose of terminating the infringement (regulations 19 and 21(1) and (2)). Where the MMC concludes that an infringement of Article 86 has occurred, the Secretary of State may make an order for the purpose of terminating the infringement (regulation 21(3) and (4)).

As an alternative to making an order, the Secretary of State may accept enforceable undertakings from the persons concerned (regulation 22).

The regulations also enable the Secretary of State to make orders where the Commission of the European Communities authorises the United Kingdom to take measures under Article 89 of the E.C. Treaty (regulations 21(1) and 21(3)).

The regulations contain provisions for the enforcement of orders (regulation 24) and provide for an offence of providing false or misleading information (regulation 25), and for restricting the disclosure of information with respect to a particular business obtained under the Regulations except for permitted purposes (regulation 28).

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Regulation 30 provides that the regulations may not be used to investigate agreements or practices which have ended before the regulations come into force.

The Regulations come into force on the day after they are laid before Parliament.