

2001 No. 2916

EUROPEAN COMMUNITIES

**The EC Competition Law (Articles 84 and 85)
Enforcement Regulations 2001**

Made - - - - - *15th August 2001*

Laid before Parliament *16th August 2001*

Coming into force - - *17th August 2001*

The Secretary of State, being the Minister designated(a) for the purposes of section 2(2) of the European Communities Act 1972(b) 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:

Citation, commencement and extent

1.—(1) These Regulations may be cited as the EC Competition Law (Articles 84 and 85) Enforcement Regulations 2001 and shall come into force on the day after the day on which they are laid before Parliament.

(2) These Regulations shall extend to Northern Ireland.

Interpretation

2.—(1) In these Regulations—

“the Act” means the Competition Act 1998(c);

“the court” means—

(a) in England and Wales, the High Court;

(b) in Scotland, the Court of Session; and

(c) in Northern Ireland, the High Court;

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

“document” includes information recorded in any form;

“information” includes estimates and forecasts;

“investigating officer” has the meaning given in regulation 13(1);

“officer”, in relation to a body corporate, includes a director, manager or secretary and, in relation to a partnership in Scotland, includes a partner;

“person”, in addition to the meaning given by the Interpretation Act 1978(d), includes any undertaking;

“premises” does not include domestic premises unless—

(a) they are also used in connection with the affairs of an undertaking, or

(b) documents relating to the affairs of an undertaking are kept there,

but does include any vehicle;

(a) S.I. 1996/1912.

(b) 1972 c. 68.

(c) 1998 c. 41.

(d) 1978 c. 30.

“President” means the person appointed under paragraph 4 of Schedule 7 to the Act;
“the 1996 Regulations” means the EC Competition Law (Articles 88 and 89) Enforcement Regulations 1996(a);
“tribunal” means an appeal tribunal established in accordance with the provisions of Part III of Schedule 7 to the Act; and
“tribunal rules” means the rules made in accordance with section 48(2) of the Act.

(2) References in these Regulations to Articles are references to Articles of the treaty establishing the European Community(b).

(3) 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).

(4) Paragraph (3) above does not apply where the context otherwise requires.

(5) For the purposes of these Regulations, the power to require information, in relation to information recorded otherwise than in a legible form, includes power to require a copy of it in a legible form.

(6) Any power conferred on the Director by these Regulations to require information includes the power to require any document which he believes may contain that information.

Commencement of investigations by the Director

3.—(1) If it appears to the Director that the United Kingdom might have a duty under Article 84 to rule on the question—

- (a) whether or not there is or has been in existence an agreement which infringes or has infringed the prohibition in Article 81(1), or
- (b) whether or not conduct constitutes an infringement of the prohibition in Article 82,

he may commence an investigation under these Regulations.

(2) The Director may conclude that the United Kingdom might have such a duty if—

- (a) there are reasonable grounds for suspecting that there is or has been in existence an agreement which may infringe the prohibition in Article 81(1),
- (b) there are reasonable grounds for suspecting that the prohibition in Article 82 has been infringed,
- (c) a party to an agreement applies for an agreement to be considered under regulation 7, or
- (d) a person applies for conduct to be considered under regulation 10.

Exemptions

4.—(1) The Director may grant an exemption from the prohibition in Article 81(1) with respect to a particular agreement if—

- (a) a request for an exemption has been made to him under regulation 7 by a party to the agreement; and
- (b) the conditions for application of Article 81(3) are met.

(2) The exemption—

- (a) may be granted subject to such conditions or obligations as the Director considers it appropriate to impose; and
- (b) has effect for such period as the Director considers appropriate.

(3) That period must be specified in the grant of the exemption.

(4) On an application in accordance with the rules set out in Schedule 1, the Director may, in accordance with those rules, extend the period for which an exemption has effect.

(a) S.I. 1996/2199.

(b) References in these Regulations to Articles of the Treaty are to Articles as renumbered by the Treaty signed at Amsterdam on 2nd October 1997 amending the Treaty on European Union, the Treaties establishing the European Communities and certain related Acts.

Cancellation etc. of exemptions

5.—(1) If the Director has reasonable grounds for believing that there has been a material change of circumstance since he granted an exemption, he may by notice in writing—

- (a) cancel the exemption;
- (b) vary or remove any condition or obligation; or
- (c) impose one or more additional conditions or obligations.

(2) If the Director has a reasonable suspicion that the information on which he based his decision to grant an exemption was incomplete, false or misleading in a material particular, he may by notice in writing take any of the steps mentioned in paragraph (1).

(3) Breach of a condition has the effect of cancelling the exemption.

(4) Failure to comply with an obligation allows the Director, by notice in writing, to take any of the steps mentioned in paragraph (1).

(5) Any step taken by the Director under paragraph (1), (2) or (4) has effect from such time as may be specified in the notice.

(6) If an exemption is cancelled under paragraph (2) or (4), the date specified in the notice cancelling it may be earlier than the date on which the notice is given.

(7) The Director may act under paragraph (1), (2) or (4) on his own initiative or on a complaint made by any person.

Notification in relation to agreements

6.—(1) Regulation 7 provides for an agreement to be examined by the Director on the application of a party to the agreement who thinks that it may infringe the prohibition in Article 81(1).

- (2) Schedule 1 provides for the procedure to be followed—
 - (a) by any person making such an application; and
 - (b) by the Director, in considering such an application.

Notification for a decision in relation to agreements

7.—(1) A party to an agreement who applies for the agreement to be examined under this regulation must—

- (a) notify the Director of the agreement; and
- (b) apply to him for a decision.

(2) On an application under this regulation, the Director may make a decision as to whether the prohibition in Article 81(1) has been infringed.

(3) If an agreement is notified to the Director under this regulation, the application may include a request for the agreement to which it relates to be granted an exemption.

Effect of a decision that the prohibition in Article 81(1) has not been infringed

8.—(1) This regulation applies to an agreement if the Director has determined an application under regulation 7 by making a decision that the agreement has not infringed the prohibition in Article 81(1).

(2) The Director is to take no further action under these Regulations with respect to the agreement unless—

- (a) he has reasonable grounds for believing that there has been a material change of circumstance since he gave his decision; or
- (b) he has a reasonable suspicion that the information on which he based his decision was incomplete, false or misleading in a material particular; or
- (c) pursuant to Article 85(2), the European Commission has taken a reasoned decision recording an infringement of Article 81(1) and has authorised the United Kingdom to take measures needed to remedy the situation.

Notification in relation to conduct

9.—(1) Regulation 10 provides for conduct of a person which that person thinks may infringe the prohibition in Article 82 to be considered by the Director on the application of that person.

- (2) Schedule 1 provides for the procedure to be followed—
- (a) by any person making an application, and
 - (b) by the Director, in considering an application.

Notification for a decision in relation to conduct

- 10.—(1) A person who applies for conduct to be considered under this regulation must—
- (a) notify the Director of it; and
 - (b) apply to him for a decision.

(2) On an application under this regulation the Director may make a decision as to whether the prohibition in Article 82 has been infringed.

Effect of a decision that the prohibition in Article 82 has not been infringed

11.—(1) This regulation applies to conduct if the Director has determined an application under regulation 10 by making a decision that the conduct has not infringed the prohibition in Article 82.

(2) The Director is to take no further action under these Regulations with respect to the conduct unless—

- (a) he has reasonable grounds for believing that there has been a material change of circumstance since he gave his decision; or
- (b) he has a reasonable suspicion that the information on which he based his decision was incomplete, false or misleading in a material particular; or
- (c) pursuant to Article 85(2), the European Commission has taken a reasoned decision recording an infringement of Article 82 and has authorised the United Kingdom to take measures needed to remedy the situation.

Powers when conducting investigations

12.—(1) For the purposes of an investigation under regulation 3, the Director may require any person to produce to him a specified document, or to provide him with specified information, which he considers relates to any matter relevant to the investigation.

- (2) The power conferred by paragraph (1) is to be exercised by a notice in writing.
- (3) A notice under paragraph (2) must indicate—
- (a) the subject matter and purpose of the investigation; and
 - (b) the nature of the offences created by regulations 22 to 24.
- (4) In paragraph (1) “specified” means—
- (a) specified, or described, in the notice; or
 - (b) falling within a category which is specified, or described, in the notice.
- (5) The Director may also specify in the notice—
- (a) the time and place at which any document is to be produced or any information is to be provided;
 - (b) the manner and form in which it is to be produced or provided.
- (6) The power under this paragraph to require a person to produce a document includes power—
- (a) if the document is produced—
 - (i) to take copies of it or extracts from it;
 - (ii) to require him, or any person who is a present or past officer of his, or is or was at any time employed by him, to provide an explanation of the document;
 - (b) if the document is not produced, to require him to state, to the best of his knowledge and belief, where it is.

Power to enter premises without a warrant

13.—(1) Any officer of the Director who is authorised in writing by the Director to do so (“an investigating officer”) may enter any premises in connection with an investigation under regulation 3.

(2) No investigating officer is to enter any premises in the exercise of his powers under this regulation unless he has given to the occupier of the premises a written notice which—

- (a) gives at least two working days’ notice of the intended entry;
- (b) indicates the subject matter and purpose of the investigation; and
- (c) indicates the nature of the offences created by regulations 22 to 24.

(3) Paragraph (2) does not apply—

- (a) if the Director has a reasonable suspicion that the premises are, or have been, occupied by—
 - (i) a party to an agreement which he is investigating under regulation 3; or
 - (ii) an undertaking the conduct of which he is investigating under regulation 3; or
- (b) if the investigating officer has taken all such steps as are reasonably practicable to give notice but has not been able to do so.

(4) In a case falling within paragraph (3), the power of entry conferred by paragraph (1) is to be exercised by the investigating officer on production of—

- (a) evidence of his authorisation; and
- (b) a document containing the information referred to in paragraph (2)(b) and (c).

(5) An investigating officer entering any premises under this regulation may—

- (a) take with him such equipment as appears to him to be necessary;
- (b) require any person on the premises—
 - (i) to produce any document which he considers relates to any matter relevant to the investigation; and
 - (ii) if the document is produced, to provide an explanation of it;
- (c) require any person to state, to the best of his knowledge and belief, where any such document is to be found;
- (d) take copies of, or extracts from, any document which is produced;
- (e) require any information which is held in a computer and is accessible from the premises and which the investigating officer considers relates to any matter relevant to the investigation, to be produced in a form—
 - (i) in which it can be taken away, and
 - (ii) in which it is visible and legible.

Powers to enter premises under a warrant

14.—(1) On an application made by the Director to the court in accordance with rules of court, a judge may issue a warrant if he is satisfied that—

- (a) there are reasonable grounds for suspecting that there are on any premises documents—
 - (i) the production of which has been required under regulation 12 or 13; and
 - (ii) which have not been produced as required;
- (b) there are reasonable grounds for suspecting that—
 - (i) there are on any premises documents which the Director has power under regulation 12 to require to be produced; and
 - (ii) if the documents were required to be produced, they would not be produced but would be concealed, removed, tampered with or destroyed; or
- (c) an investigating officer has attempted to enter premises in the exercise of his powers under regulation 13 but has been unable to do so and that there are reasonable grounds for suspecting that there are on the premises documents the production of which could have been required under that regulation.

(2) A warrant under this regulation shall authorise a named officer of the Director, and any other of his officers whom he has authorised in writing to accompany the named officer—

- (a) to enter the premises specified in the warrant, using such force as is reasonably necessary for the purpose;
- (b) to search the premises and take copies of, or extracts from, any document appearing to be of a kind in respect of which the application under paragraph (1) was granted (“the relevant kind”);
- (c) to take possession of any documents appearing to be of the relevant kind if—
 - (i) such action appears to be necessary for preserving the documents or preventing interference with them; or
 - (ii) it is not reasonably practicable to take copies of the documents on the premises;
- (d) to take any other steps which appear to be necessary for the purpose mentioned in sub-paragraph (c)(i);
- (e) to require any person to provide an explanation of any document appearing to be of the relevant kind or to state, to the best of his knowledge and belief, where it may be found;
- (f) to require any information which is held in a computer and is accessible from the premises and which the named officer considers relates to any matter relevant to the investigation, to be produced in a form—
 - (i) in which it can be taken away, and
 - (ii) in which it is visible and legible.

(3) If, in the case of a warrant under paragraph (1)(b), the judge is satisfied that it is reasonable to suspect that there are also on the premises other documents relating to the investigation concerned, the warrant shall also authorise action mentioned in paragraph (2) to be taken in relation to any such document.

(4) Any person entering premises by virtue of a warrant under this regulation may take with him such equipment as appears to him to be necessary.

(5) On leaving any premises which he has entered by virtue of a warrant under this regulation, the named officer must, if the premises are unoccupied or the occupier is temporarily absent, leave them as effectively secured as he found them.

(6) A warrant under this regulation continues in force until the end of the period of one month beginning with the day on which it is issued.

(7) Any document of which possession is taken under paragraph (2)(c) may be retained for a period of three months.

Entry of premises under warrant: supplementary

15.—(1) A warrant issued under regulation 14 must indicate—

- (a) the subject matter and purpose of the investigation;
- (b) the nature of the offences created by regulations 22 to 24.

(2) The powers conferred by regulation 14 are to be exercised on production of a warrant issued under that regulation.

(3) If there is no one at the premises when the named officer proposes to execute such a warrant he must, before executing it—

- (a) take such steps as are reasonable in all the circumstances to inform the occupier of the intended entry; and
- (b) if the occupier is informed, afford him or his legal or other representative a reasonable opportunity to be present when the warrant is executed.

(4) If the named officer is unable to inform the occupier of the intended entry he must, when executing the warrant, leave a copy of it in a prominent place on the premises.

(5) In this regulation—

“named officer” means the officer named in the warrant; and

“occupier”, in relation to any premises, means a person whom the named officer reasonably believes is the occupier of those premises.

Privileged communications

16.—(1) A person shall not be required, under any provision of these Regulations, to produce or disclose a privileged communication.

- (2) “Privileged communication” means a communication—
- (a) between a professional legal adviser and his client, or
 - (b) made in connection with, or in contemplation of, legal proceedings and for the purposes of those proceedings,

which in proceedings in the High Court would be protected from disclosure on grounds of legal professional privilege.

- (3) In the application of this regulation to Scotland—
- (a) references to the High Court are to be read as references to the Court of Session; and
 - (b) the reference to legal professional privilege is to be read as a reference to confidentiality of communications.

Decisions following an investigation

17.—(1) Paragraph (2) applies if, as the result of an investigation conducted under regulation 3, the Director proposes to make—

- (a) a decision that the prohibition in Article 81(1) has been infringed, or
- (b) a decision that the prohibition in Article 82 has been infringed.

(2) Before making the decision, the Director must—

- (a) give written notice to the person (or persons) likely to be affected by the proposed decision; and
- (b) give that person (or those persons) an opportunity to make representations.

Directions in relation to agreements

18.—(1) If—

- (a) the Director has made a decision that an agreement infringes the prohibition in Article 81(1), or
- (b) pursuant to Article 85(2) the European Commission has taken a reasoned decision recording an infringement of Article 81(1) and has authorised the United Kingdom to take measures needed to remedy the situation,

the Director may give to such person or persons as he considers appropriate such directions as he considers appropriate to bring the infringement to an end.

(2) Paragraph (1)(a) applies whether the Director’s decision is made on his own initiative or on an application made to him under these Regulations.

(3) A direction under this regulation may, in particular, include provision—

- (a) requiring the parties to the agreement to modify the agreement; or
- (b) requiring them to terminate the agreement.

(4) A direction under this regulation must be given in writing.

Directions in relation to conduct

19.—(1) If—

- (a) the Director has made a decision that conduct infringes the prohibition in Article 82, or
- (b) pursuant to Article 85(2) the European Commission has taken a reasoned decision recording an infringement of Article 82 and has authorised the United Kingdom to take measures needed to remedy the situation,

the Director may give to such person or persons as he considers appropriate such directions as he considers appropriate to bring the infringement to an end.

(2) Paragraph (1)(a) applies whether the Director’s decision is made on his own initiative or on an application made to him under these regulations.

(3) A direction under this regulation may, in particular, include provision—

- (a) requiring the person concerned to modify the conduct in question; or

- (b) requiring him to cease that conduct.
- (4) A direction under this regulation must be given in writing.

Enforcement of Directions

20.—(1) If a person fails, without reasonable excuse, to comply with a direction under regulation 18 or 19, the Director may apply to the court for an order—

- (a) requiring the defaulter to make good his default within a time specified in the order; or
- (b) if the direction related to anything to be done in the management or administration of an undertaking, requiring the undertaking or any of its officers to do it.

(2) An order of the court under paragraph (1) may provide for all of the costs of, or incidental to, the application for the order to be borne by—

- (a) the person in default; or
- (b) any officer of an undertaking who is responsible for the default.

(3) In the application of paragraph (2) to Scotland, the reference to “costs” is to be read as a reference to “expenses”.

Interim measures

21.—(1) This regulation applies if the Director—

- (a) has a reasonable suspicion that an agreement is or has been in existence which may infringe the prohibition in Article 81(1), or
- (b) has a reasonable suspicion that the prohibition in Article 82 has been infringed,

but has not completed his investigation into the matter.

(2) If the Director considers that it is necessary for him to act under this regulation as a matter of urgency for the purpose—

- (a) of preventing serious, irreparable damage to a particular person or category of person, or
- (b) of protecting the public interest,

he may give such directions as he considers appropriate for that purpose.

(3) Before giving a direction under this regulation, the Director must—

- (a) give written notice to the person (or persons) to whom he proposes to give the direction; and
- (b) give that person (or each of them) an opportunity to make representations.

(4) A notice under paragraph (3) must indicate the nature of the direction which the Director is proposing to give and his reasons for wishing to give it.

(5) A direction given under this regulation has effect while paragraph (1) applies, but may be replaced if the circumstances permit by a direction under regulation 18 or, as appropriate, regulation 19.

(6) In a case where it is suspected that there may be an infringement of the prohibition in Article 81(1), regulations 18(3) and 20 also apply to directions given under this regulation.

(7) In the case of a suspected infringement of the prohibition in Article 82, regulations 19(3) and 20 also apply to directions given under this regulation.

Offences

22.—(1) A person is guilty of an offence if he fails to comply with a requirement imposed on him under regulations 12, 13 or 14.

(2) If a person is charged with an offence under paragraph (1) in respect of a requirement to produce a document, it is a defence for him to prove—

- (a) that the document was not in his possession or under his control; and
- (b) that it was not reasonably practicable for him to comply with the requirement.

(3) If a person is charged with an offence under paragraph (1) in respect of a requirement—

- (a) to provide information,
- (b) to provide an explanation of a document, or

(c) to state where a document is to be found,
it is a defence for him to prove that he had a reasonable excuse for failing to comply with the requirement.

(4) Failure to comply with a requirement imposed under regulation 12 or 13 is not an offence if the person imposing the requirement has failed to act in accordance with that regulation.

(5) A person is guilty of an offence if he intentionally obstructs an officer acting in the exercise of his powers under regulation 13.

(6) A person guilty of an offence under paragraph (1) or (5) is liable—

- (a) on summary conviction, to a fine not exceeding the statutory maximum;
- (b) on conviction on indictment, to a fine.

(7) A person who intentionally obstructs an officer in the exercise of his powers under a warrant issued under regulation 14 is guilty of an offence and 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.

Destroying or falsifying documents

23.—(1) A person is guilty of an offence if, having been required to produce a document under regulation 12, 13 or 14—

- (a) he intentionally or recklessly destroys or otherwise disposes of it, falsifies it or conceals it, or
- (b) he causes or permits its destruction, disposal, falsification or concealment.

(2) A person guilty of an offence under paragraph (1) is 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.

False or misleading information

24.—(1) If information is provided by a person to the Director in connection with any function of the Director under these Regulations, that person is guilty of an offence if—

- (a) the information is false or misleading in a material particular, and
- (b) he knows that it is or is reckless as to whether it is.

(2) A person who—

- (a) provides any information to another person, knowing the information to be false or misleading in a material particular, or
- (b) recklessly provides any information to another person which is false or misleading in a material particular,

knowing that the information is to be used for the purpose of providing information to the Director in connection with any of his functions under these Regulations, is guilty of an offence.

(3) A person guilty of an offence under this regulation is 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.

Appeals

25.—(1) Any party to an agreement in respect of which the Director has made a decision may appeal to the tribunal against, or with respect to, the decision.

(2) Any person in respect of whose conduct the Director has made a decision may appeal to the tribunal against, or with respect to, the decision.

(3) In this regulation “decision” means a decision of the Director—

- (a) as to whether the prohibition in Article 81(1) has been infringed,
- (b) as to whether the prohibition in Article 82 has been infringed,
- (c) as to whether to grant an exemption,

- (d) in respect of an exemption—
 - (i) as to whether to impose any condition or obligation under regulation 4(2)(a) or 5(1)(c),
 - (ii) where such a condition or obligation has been imposed, as to the condition or obligation,
 - (iii) as to the period fixed under regulation 4(2)(b),
- (e) as to—
 - (i) whether to extend the period for which an exemption has effect, or
 - (ii) the period of any such extension,
- (f) cancelling an exemption,
- (g) withdrawing or varying a decision in paragraph (a) to (f) following an application under regulation 26,

and includes a direction given under regulation 18, 19 or 21.

(4) The making of an appeal under this regulation does not suspend the effect of the decision to which the appeal relates.

(5) Schedule 2 makes further provision about appeals.

Third party appeals

26.—(1) A person who does not fall within regulation 25(1) or (2) may apply to the Director asking him to withdraw or vary a decision (“the relevant decision”) falling within paragraphs (a) to (f) of regulation 25.

- (2) The application must—
 - (a) be made in writing, within such period as is specified in the rules in Schedule 1; and
 - (b) give the applicant’s reasons for considering that the relevant decision should be withdrawn or (as the case may be) varied.
- (3) If the Director decides—
 - (a) that the applicant does not have a sufficient interest in the relevant decision,
 - (b) that, in the case of an applicant claiming to represent persons who have such an interest, the applicant does not represent such persons, or
 - (c) that the persons represented by the applicant do not have such an interest,

he must notify the applicant of his decision.

(4) If the Director, having considered the application, decides that it does not show sufficient reason why he should withdraw or vary the relevant decision, he must notify the applicant of his decision.

(5) Otherwise, the Director must deal with the application in accordance with the rules in Schedule 1.

(6) The applicant may appeal to the tribunal against a decision of the Director notified under paragraph (3) or (4).

(7) The making of an application does not suspend the effect of the relevant decision.

Appeal tribunals

27.—(1) Any appeal made to the tribunal under regulation 25 or 26 is to be determined by a tribunal constituted by the President in accordance with paragraph 27 of Schedule 7 to the Act.

(2) The tribunal rules shall apply to an appeal under regulation 25 or 26 save that any reference in the tribunal rules to the provisions of the Act shall be deemed to be to the equivalent provisions in these Regulations.

Appeals on point of law etc.

28.—(1) An appeal lies on a point of law arising from a decision of the tribunal.

- (2) An appeal under this regulation may be made only—
 - (a) to the appropriate court;
 - (b) with permission and in accordance with the requirements of the tribunal rules; and

(c) at the instance of a party or at the instance of a person who has a sufficient interest in the matter.

(3) In paragraph (2)—

“the appropriate court” means—

(a) in relation to proceedings before a tribunal in England and Wales, the Court of Appeal;

(b) in relation to proceedings before a tribunal in Scotland, the Court of Session;

(c) in relation to proceedings before a tribunal in Northern Ireland, the Court of Appeal in Northern Ireland;

“party”, in relation to a decision, means a person who was a party to the proceedings in which the decision was made; and

“permission” means permission of the tribunal in question or of the appropriate court.

General restrictions on disclosure of information

29.—(1) No information which—

(a) has been obtained under or as a result of any provision of these Regulations, and

(b) relates to the affairs of any individual or to any particular business of an undertaking, is to be disclosed during the lifetime of that individual or while that business continues to be carried on, unless the condition mentioned in paragraph (2) is satisfied.

(2) The condition is that consent to the disclosure has been obtained from—

(a) the person from whom the information was initially obtained under or as a result of any provision of these Regulations (if the identity of that person is known); and

(b) if different—

(i) the individual to whose affairs the information relates, or

(ii) the person for the time being carrying on the business to which the information relates.

(3) Paragraph (1) does not apply to a disclosure of information—

(a) made for the purpose of—

(i) facilitating the performance of any functions of the Director, the Civil Aviation Authority, the Competition Commission, or the Secretary of State under these Regulations, or the Fair Trading Act 1973(a), or the Competition Act 1980(b), or the Civil Aviation Act 1982(c), or the Airports Act 1986(d); or the Licensing of Air Carriers Regulations 1992(e), or Part IV of the Airports (Northern Ireland) Order 1994(f), or Part I of the Transport Act 2000(g) or the Act;

(ii) facilitating the performance of any functions of the European Commission in respect of Community law about competition;

(iii) facilitating the performance by the Comptroller and Auditor General of any of his functions;

(iv) criminal proceedings in any part of the United Kingdom;

(b) made with a view to the institution of, or otherwise for the purposes of, civil proceedings brought under or in connection with these Regulations;

(c) made in connection with the investigation of any criminal offence triable in the United Kingdom or in any part of the United Kingdom; or

(d) which is required to meet a Community obligation.

(4) If information is disclosed to the public in circumstances in which the disclosure does not contravene paragraph (1), that paragraph does not prevent its further disclosure by any person.

(5) A person who contravenes this regulation is guilty of an offence and liable—

(a) on summary conviction, to a fine not exceeding the statutory maximum; or

(a) 1973 c. 41.

(b) 1980 c. 21.

(c) 1982 c. 16.

(d) 1986 c. 31.

(e) S.I. 1992/ 2992.

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

(g) 2000 c. 38.

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

Director to have regard to certain matters in relation to the disclosure of information

30.—(1) This regulation applies if the Director is considering whether to disclose any information acquired by him under, or as a result of, any provision of these Regulations.

(2) He must have regard to the need for excluding, so far as is practicable, information the disclosure of which would in his opinion be contrary to the public interest.

(3) He must also have regard to—

(a) the need for excluding, so far as is practicable—

(i) commercial information the disclosure of which would, or might, in his opinion, significantly harm the legitimate business interests of the undertaking to which it relates, or

(ii) information relating to the private affairs of an individual the disclosure of which would, or might, in his opinion, significantly harm his interests; and

(b) the extent to which the disclosure is necessary for the purposes for which the Director is proposing to make the disclosure.

Defamation

31. For the purposes of the law relating to defamation, absolute privilege attaches to any advice, notice or direction given, or decision made, by the Director in the exercise of any of his functions under these Regulations.

Findings of fact by the Director

32.—(1) Unless the court directs otherwise or the Director has decided to take further action in accordance with regulation 8(2) or 11(2), a Director's finding which is relevant to an issue arising in proceedings which are brought otherwise than by the Director in respect of an alleged infringement under these Regulations of the prohibition in Article 81(1) or of the prohibition in Article 82 is binding on the parties if—

(a) the time for bringing an appeal in respect of the finding has expired and the relevant party has not brought such an appeal; or

(b) the decision of a tribunal on such an appeal has confirmed the finding.

(2) In this regulation—

“a Director's finding” means a finding of fact made by the Director in the course of—

(a) determining an application for a decision under regulation 7 or 10, or

(b) conducting an investigation under regulation 3;

“relevant party” means—

(a) in relation to the prohibition in Article 81(1), a party to the agreement which is alleged to have infringed the prohibition; and

(b) in relation to the prohibition in Article 82, the undertaking whose conduct is alleged to have infringed the prohibition.

(3) Rules of court may make provision in respect of assistance to be given by the Director to the court in the proceedings referred to in paragraph (1).

Offences by bodies corporate etc.

33.—(1) This regulation applies to an offence under any of regulations 22 to 24 or 29(5).

(2) If an offence committed by a body corporate is proved—

(a) to have been committed with the consent or connivance of an officer, or

(b) to be attributable to any neglect on his part,

the officer as well as the body corporate is guilty of the offence and liable to be proceeded against and punished accordingly.

(3) In paragraph (2) “officer”, in relation to a body corporate, means a director, manager, secretary or other similar officer of the body, or a person purporting to act in any such capacity.

(4) If the affairs of a body corporate are managed by its members, paragraph (2) applies in relation to the acts and defaults of a member in connection with his functions of management as if he were a director of the body corporate.

(5) If an offence committed by a partnership in Scotland is proved—

- (a) to have been committed with the consent or connivance of a partner, or
- (b) to be attributable to any neglect on his part,

the partner as well as the partnership is guilty of the offence and liable to be proceeded against and punished accordingly.

(6) In paragraph (5) “partner” includes a person purporting to act as a partner.

Crown application

34.—(1) Any provision made by or under these Regulations binds the Crown except that—

- (a) the Crown is not criminally liable as a result of any such provisions; and
- (b) nothing in these Regulations affects Her Majesty in her private capacity.

(2) Paragraph (1)(a) does not affect the application of any provision of these Regulations in relation to persons in the public service of the Crown.

(3) Paragraph (1)(b) is to be interpreted as if section 38(3) of the Crown Proceedings Act 1947^(a) (interpretation of references in that Act to Her Majesty in her private capacity) were contained in these Regulations.

(4) If, in a case where it is suspected that there may be an infringement of the prohibition in Article 81(1) or in respect of a suspected infringement of the prohibition in Article 82 otherwise than by the Crown or a person in the public service of the Crown, an investigation is conducted under regulation 3—

- (a) the power conferred by regulation 13 may not be exercised in relation to land which is occupied by a government department, or otherwise for purposes of the Crown, without the written consent of the appropriate person; and
- (b) regulation 14 does not apply in relation to land so occupied.

(5) In any case in which consent is required under paragraph (4), the person who is the appropriate person in relation to that case is—

- (a) in relation to any land which is occupied by a government department that department; and
- (b) in relation to any other land which is otherwise occupied for purposes of the Crown the person occupying the land for such purposes.

(6) If the Secretary of State certifies that it appears to him to be in the interests of national security that the powers of entry—

- (a) conferred by regulation 13, or
- (b) that may be conferred by a warrant under regulation 14,

should not be exercisable in relation to premises held or used by or on behalf of the Crown and which are specified in the certificate, those powers are not exercisable in relation to those premises.

(7) Any amendment of an enactment made by these Regulations binds the Crown to the extent that the enactment amended binds the Crown.

Amendments to other enactments

35.—(1) In section 133(2)(a) of the Fair Trading Act 1973^(b) for the words “EC Competition Law (Articles 88 and 89) Enforcement Regulations 1996” there shall be substituted the words “EC Competition Law (Articles 84 and 85) Enforcement Regulations 2001”.

(2) In section 19(3)(q) of the Competition Act 1980^(c) for the words “the EC Competition Law (Articles 88 and 89) Enforcement Regulations 1996” there shall be substituted the words “the EC Competition Law (Articles 84 and 85) Enforcement Regulations 2001”.

(a) 1947 c. 44.
(b) 1973 c. 41.
(c) 1980 c. 21.

(3) In section 74(3)(o) of the Airports Act 1986^(a) for the words “the EC Competition Law Enforcement Regulations 1996” there shall be substituted the words “the EC Competition Law (Articles 84 and 85) Enforcement Regulations 2001”.

(4) In article 49(3)(r) of the Airports (Northern Ireland) Order 1994^(b) for the words “the EC Competition Law (Articles 88 and 89) Enforcement Regulations 1996” there shall be substituted the words “the EC Competition Law (Articles 84 and 85) Enforcement Regulations 2001”.

(5) In paragraph 1(o) of Schedule 11 to the Act for the words “the EC Competition Law (Articles 88 and 89) Enforcement Regulations 1996” there shall be substituted the words “the EC Competition Law (Articles 84 and 85) Enforcement Regulations 2001”.

Past agreements and infringements

36. Nothing in these Regulations shall enable or require the Director to investigate or make a decision in relation to an agreement which was determined, or on conduct which has ceased, before 28th August 1996 being the date on which the 1996 Regulations came into force.

Revocation and transitional provision

37.—(1) Subject to paragraph (2), the 1996 Regulations are hereby revoked.

(2) Any information which was obtained under or by virtue of the provisions of the 1996 Regulations and which was subject to the restrictions on disclosure of information in regulation 28 of the 1996 Regulations shall be treated as if it was information obtained under or as a result of a provision of these Regulations.

15th August 2001

Alan Johnson
Minister of State for the Regions and Employment Relations,
Department of Trade and Industry

(a) 1986 c. 31.

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

RULES

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Form of application

1.—(1) An application under regulation 7 for an agreement to be examined, or under regulation 10 for conduct to be considered, shall consist of:

- (a) Form ERN; and
- (b) the copies of Form ERN required by rule 3 below.

(2) The documents referred to in sub-paragraphs (1)(a) and (b) above shall be submitted to the Director.

Joint applications

2. Where a joint application is submitted, Form ERN shall be submitted to the Director by or on behalf of all the applicants, and a joint representative may be appointed as authorised to act on behalf of some or all of the applicants for the purposes of these rules.

Copies

3.—(1) Two copies of Form ERN, in addition to the original, shall be submitted to the Director.

(2) Supporting documents submitted as part of Form ERN shall be either originals or true copies, and the applicant shall certify that each copy is a true copy of the original.

Content of application

4.—(1) The information submitted as Form ERN shall, subject to paragraph (3) below, be correct and complete.

(2) If the applicant considers that the Director would find any part of the information contained in the application to be confidential, in the sense given to that word by sub-paragraph (1)(c) of rule 21 below, he shall set out that part of the information in a separate annex to the application marked “confidential information” and provide a written explanation as to why he considers that the Director should treat it as such.

(3) The Director may, by giving notice in writing to the applicant, dispense with the obligation to submit any particular information, including any supporting document, forming part of Form ERN, if he considers that such information or document is unnecessary for the examination of the agreement, or the consideration of the conduct, which is the subject of the application.

(4) Where the applicant knows of material changes in the information contained in the application he shall without delay communicate those changes to the Director.

Date of application

5.—(1) Except where paragraph (3) below applies, an application is made (and notification for the purposes of regulations 7 or 10, whichever is applicable, is given) on the date on which Form ERN is received by the Director.

(2) The Director shall acknowledge receipt of an application by giving notice in writing to the applicant without delay.

(3) Where the Director finds that the information submitted as Form ERN is incomplete he shall, without delay and in any event within one month from the date on which that information was received by the Director, give notice in writing to the applicant of which information, by reference to the Annex hereto, is outstanding.

(4) Where the Director has invoked paragraph (3) above he shall give notice in writing to the applicant of such time limit as the Director considers is appropriate for the outstanding information to be received by him.

(5) Where the Director has invoked paragraph (3) above the application shall be made (and notification for the purposes of regulations 7 or 10, whichever is applicable, shall be given) on the date on which he receives the outstanding information.

(6) If the Director has invoked paragraph (3) above and has not received the outstanding information by the date of expiry of the time limit notified to the applicant under paragraph (4) above, or of such further period, if any, as he considers appropriate, he shall return the information submitted as Form ERN to the applicant and shall inform him in writing that his application has not been made in accordance with this rule.

Notification of application to other parties

6.—(1) An applicant who is a party to an agreement must take all reasonable steps to notify all other parties to the agreement of whom he is aware that an application has been made for a decision.

(2) If the conduct to which an application relates is conduct of two or more persons, the applicant must take all reasonable steps to notify all of the other parties of whom he is aware that an application has been made for a decision.

(3) Notification by an applicant under paragraphs (1) or (2) above shall be written and shall be given within seven working days from the date on which the applicant receives acknowledgement of receipt of his application by the Director; the applicant shall provide a copy of the notification to the Director without delay.

Public register

7.—(1) The Director shall maintain a register in which there shall be entered, in respect of every application made under regulation 7 or 10, a summary of the nature and objectives of the agreement or conduct which is the subject of the application (as referred to in Part 4 of the Annex hereto) and an indication of the final outcome of the application.

(2) The register shall be open to public inspection:

- (a) at the Office of Fair Trading, between 10.00 a.m. and 4.30 p.m. on every working day; and
- (b) on the Office of Fair Trading's website on the Internet.

(3) In determining an application under regulation 7 or 10, the Director must take into account any representations made to him by persons other than the applicant.

Consultation of public following applications

8.—(1) On an application under regulation 7 for an agreement to be examined:

- (a) if the Director proposes to grant an exemption, whether or not subject to conditions or obligations, he shall consult the public; and
- (b) if the Director proposes to make a decision that the prohibition in Article 81(1) has not been infringed, he may consult the public.

(2) If, on an application under regulation 10 for conduct to be considered, the Director proposes to make a decision that the prohibition in Article 82 has not been infringed, he may consult the public.

Investigations

9.—(1) An officer shall grant a request of the occupier of premises entered by the officer (“the occupier”) to allow a reasonable time for the occupier’s legal adviser to arrive at the premises before the investigation continues, if the officer considers it reasonable in the circumstances to do so and if he is satisfied that such conditions as he considers it appropriate to impose in granting the occupier’s request are, or will be, complied with.

(2) For the purposes of paragraph (1) above, “a reasonable time” means such period of time as the officer considers is reasonable in the circumstances.

(3) A person required by the Director under regulation 12(6)(a)(ii) to provide an explanation of a document may be accompanied by a legal adviser.

Proposed infringement and conditional exemption decisions

10.—(1) If the Director proposes to make a decision that the prohibition in Article 81(1) or the prohibition in Article 82 has been infringed he shall give written notice:

- (a) where an application has been made, to the applicant and, subject to rules 17 and 18 below, to those persons whom the applicant has identified in the application as being the other parties to the agreement, or the other persons, if any, who are engaged in the conduct, as the case may be, which the Director considers has led to the infringement; and
- (b) where no application has been made, subject to rules 17 and 18 below, to each person who the Director considers is a party to the agreement, or is engaged in the conduct, as the case may be, which the Director considers has led to the infringement.

(2) If the Director proposes to grant an exemption subject to conditions or obligations, he shall give written notice to the applicant and, subject to rules 17 and 18 below, to those persons whom the applicant has identified in the application as being the other parties to the agreement to which the application relates.

(3) A written notice given under paragraph (1) or (2) above shall state the facts on which the Director relies, the matters to which he has taken objection, the action he proposes and his reasons for it.

(4) A written notice given under paragraph (1) or (2) above shall specify a period within which each person referred to in sub-paragraph (1)(a) or (b) or paragraph (2) above, whichever is applicable, may indicate to the Director any part of the information contained in the notice which he considers the Director would find to be confidential, in the sense given to that word by sub-paragraph (1)(c) of rule 21 below.

(5) Subject to paragraph (6) below, the Director shall give each person referred to in sub-paragraph (1)(a) or (b) or paragraph (2) above, whichever is applicable, a reasonable opportunity to inspect the documents in the Director’s file relating to the proposed decision.

(6) The Director may withhold any document:

- (a) to the extent that it contains information which a person has stated to the Director to be, and which the Director has found to be, confidential, in the sense given to that word by sub-paragraph (1)(c) of rule 21 below;
- (b) which is, in the opinion of the Director, otherwise confidential; or
- (c) which is internal, in the sense given to that word by sub-paragraph (1)(e) of rule 21 below.

(7) Subject to rules 17 and 18 below, the Director shall give each person referred to in sub-paragraph (1)(a) or (b) or paragraph (2) above, whichever is applicable, written notice of the period within which that person may make written representations to him on the information referred to in paragraph (3) above.

(8) The Director shall give each person referred to in sub-paragraph (1)(a) or (b) or paragraph (2) above, whichever is applicable, a reasonable opportunity to make oral representations to him on the information referred to in paragraph (3) above.

Notice of decision

11.—(1) If the Director has made a decision as to whether or not an agreement has infringed the prohibition in Article 81(1), or as to whether or not conduct has infringed the prohibition in Article 82, he shall, without delay:

- (a) give written notice of the decision:
 - (i) where the decision was made following an application, to the applicant and, subject to rules 17 and 18(2) below, to those persons whom the applicant has identified in the application as being the other parties to the agreement, or the other persons, if any, who are engaged in the conduct, as the case may be; and

- (ii) where no application has been made, subject to rules 17 and 18(2) below, to each person who the Director considers is a party to the agreement, or is engaged in the conduct, as the case may be,

stating in the decision the facts on which he bases it and his reasons for making it; and

- (b) publish the decision.

(2) Where the Director determines an application for a decision by exercising his discretion not to give a decision, he shall give written notice of that fact to:

- (a) the applicant; and
- (b) subject to rules 17 and 18 below, those persons whom the applicant has identified in the application as being the other parties to the agreement, or the other persons, if any, who are engaged in the conduct, as the case may be.

Further action after a decision

12. If, having made a decision that an agreement has not infringed the prohibition in Article 81(1), or that conduct has not infringed the prohibition in Article 82, the Director proposes to take further action under the Regulations, he shall:

- (a) where the decision was made following an application, consult the applicant and, subject to rules 17 and 18 below, those persons whom the applicant has identified in the application as being the other parties to the agreement, or the other persons, if any, who are engaged in the conduct, as the case may be, which is the subject of the decision; and
- (b) where no application has been made, subject to rules 17 and 18 below, consult each person who the Director considers is a party to the agreement, or is engaged in the conduct, as the case may be, which is the subject of the decision.

Directions

13.—(1) Where the Director gives a direction to a person under regulation 18 or 19, he shall at the same time inform that person in writing of the facts on which he bases the direction and his reasons for giving it.

- (2) The Director shall publish directions given under regulation 18, 19 or 21.

Interim measures

14.—(1) Subject to paragraph (2) below, if the Director proposes to give a direction under regulation 21, he shall give each person to whom he proposes to give the direction a reasonable opportunity to inspect the documents in the Director's file relating to the proposed direction.

- (2) The Director may withhold any document:
 - (a) to the extent that it contains information which a person has stated to the Director to be, and which the Director has found to be, confidential, in the sense given to that word by sub-paragraph (1)(c) of rule 21 below;
 - (b) which is, in the opinion of the Director, otherwise confidential; or
 - (c) which is internal, in the sense given to that word by sub-paragraph (1)(e) of rule 21 below.

(3) Where the Director gives a direction to a person under regulation 21, he shall at the same time inform that person in writing of the facts on which he bases the direction and his reasons for giving it.

Application for extension of exemption

15.—(1) An application under regulation 4(4) for an extension of the period for which an exemption has effect shall consist of Form ERN, and the copies of Form ERN required under paragraph (4) below, and shall be submitted to the Director.

- (2) If the Director proposes to grant the application, he shall consult the public.

(3) If the Director has made a decision as to whether or not to grant the application, he shall:

- (a) give written notice of the decision to:
 - (i) the applicant; and
 - (ii) subject to rules 17 and 18(2) below, those persons whom the applicant has identified in the application as being the other parties to the agreement; and
- (b) publish the decision,

stating in the decision the facts on which he bases it, his reasons for it and, if appropriate, the period of extension granted.

(4) Rules 2 (joint applications), 3 (copies), 4 (content of application), 5 (date of application) and 7 (public register) above shall apply to an application submitted under this rule as they apply, to the extent that they apply, to an application submitted under rule 1 above; rule 5(1) and (5) above shall also apply as if the parts in brackets were omitted from them.

Cancellation etc. of exemption

16.—(1) If the Director proposes to take any of the steps mentioned in regulation 5(1), he shall consult the public, the person who applied for the exemption and, subject to rules 17 and 18 below, those persons whom that person identified in his application as being the other parties to the agreement to which the exemption relates.

(2) If the Director issues a notice in writing under regulation 5(1), he shall:

- (a) give notice in writing of his decision to do so to:
 - (i) the person who applied for the exemption; and
 - (ii) subject to rules 17 and 18(2) below, those persons whom the person who applied for the exemption identified in his application as being the other parties to the agreement; and
- (b) publish the decision,

stating in the decision the facts on which he bases it and his reasons for it.

Associations of undertakings

17.—(1) Where a rule requires the Director to give written notice, or notice in writing, of any matter to an association of undertakings and the notice does not relate to an agreement or to conduct which is the subject of an application to the Director by that association, he shall give such notice to the director, secretary, manager or other similar officer of the association on its behalf.

(2) Where a rule requires the Director to give written notice, or notice in writing, of any matter to each of more than fifty members of an association of undertakings, he may, instead of giving such notice to any such member, give such notice to the director, secretary, manager or other similar officer of the association on that member's behalf, provided that individual notice shall be given to any member who has made an application to the Director in respect of the agreement or the conduct to which the notice relates.

Time limits and giving notices

18.—(1) Where it is not reasonably practicable for the Director to give written notice to a person:

- (a) other than the applicant, under rule 10(1), (2) or (7) or rule 11(2) above;
- (b) other than the applicant, in order to consult that person under rule 12 above;
- (c) other than the person who applied for the exemption and the public, in order to consult that person under rule 16(1) above; or
- (d) in order to consult that person under rule 20(6) below,

in particular having regard to the number of persons to whom such notice is required to be given, he may, instead of so doing, take all the steps mentioned in paragraph (3) below.

(2) Where it is not reasonably practicable for the Director to give:

- (a) written notice of the decision to a person, other than the applicant, under rule 11(1)(a) or 15(3)(a) above;
- (b) written notice of his decision to a person, other than the applicant, under rule 20(7) below;
- (c) notice in writing of his decision to a person under rule 16(2)(a), other than the person who applied for the exemption; or
- (d) written notice in order to consult a third party under rule 21(3) below,

in particular having regard to the number of persons to whom such notice is required to be given, he may, instead of so doing, take all the steps mentioned in sub-paragraph (3)(b) below.

(3) The steps mentioned for the purposes of paragraphs (1) and (2) above are the following:

- (a) publish the notice by means of entry in the register maintained by the Director under rule 7 above; and
- (b) cause the notice to be published in:
 - (i) the London, Edinburgh and Belfast Gazettes;
 - (ii) at least one national daily newspaper; and
 - (iii) if there is in circulation an appropriate trade journal which is published at intervals not exceeding one month, in such trade journal.

(4) Except where paragraph (1) or (2) above is invoked, where these rules allow or require written notice, or notice in writing, to be given to a person, such notice shall be treated as having been given on the date on which that person receives it.

(5) Where paragraph (1) or (2) above is invoked, the notice shall be treated as having been given on the date of its publication in accordance with the paragraph invoked.

(6) Where the time prescribed by these rules for doing any act expires on a day which is not a working day, the act is in time if done before 6 p.m. on the next following working day.

(7) Where an act done in accordance with these rules is done on a day which is not a working day, or after 6 p.m. on a working day, the act shall be treated as done on the next following working day.

Confidential third party information

19.—(1) If a person gives information to the Director in connection with the exercise of any of the Director's functions under the Regulations, in relation to an agreement to which that person is not a party, or in relation to conduct in which that person has not engaged, and that person considers that the Director would find any part of the information to be confidential, in the sense given to that word by sub-paragraph (1)(c) of rule 21 below, he shall set out that part of the information in a separate annex marked "confidential information" and provide a written explanation as to why he considers that the Director should treat it as such.

(2) The Director shall, if he proposes to disclose, in connection with the exercise of any of his functions under the Regulations, any of the information contained in an annex provided in accordance with paragraph (1) above, give the person who provided the information:

- (a) written notice of his proposed action; and
 - (b) a reasonable opportunity to make representations to him,
- if it is reasonably practicable for him to do so.

Third party appeals

20.—(1) An application under regulation 26(1) asking the Director to withdraw or vary a decision shall:

- (a) be submitted in writing to the Director within one month from the date of publication of that decision by means of entry in the register maintained by the Director under rule 7 above;
- (b) comply with paragraph (2) below; and
- (c) include the documents specified in paragraph (3) below.

(2) An application submitted under paragraph (1) above shall be signed by the applicant or by a duly authorised representative of the applicant, and shall state the applicant's reasons:

- (a) for considering that he has a sufficient interest in the decision referred to in paragraph (1) above; or
- (b) where he claims to represent persons who have a sufficient interest in that decision:
 - (i) for claiming that he represents those persons; and
 - (ii) for claiming that those persons have a sufficient interest in that decision.

(3) The documents specified for the purposes of paragraph (1) above are the following:

- (a) three copies of the application; and
- (b) where the application is signed by a solicitor or other representative of an applicant, written proof of that representative's authority to act on that applicant's behalf.

(4) The application is made on the date on which it is received by the Director; the Director shall acknowledge receipt of the application by giving notice in writing to the applicant without delay.

(5) Where the applicant knows of material changes in the information contained in the application he shall without delay communicate those changes to the Director.

(6) If the Director proposes to grant the application, he shall, subject to rules 17 and 18 above, consult all persons whom he was required by these rules to notify of the decision referred to in paragraph (1) above.

(7) If the Director grants the application, he shall give written notice of his decision to the applicant, and, subject to rules 17 and 18(2) above, to all persons whom he was required by these rules to notify of the decision referred to in paragraph (1) above, stating in his decision the facts on which he bases it and his reasons for it, and he shall publish his decision.

Interpretation and supplemental

21.—(1) In these rules:—

- (a) "agreement" shall be construed by reference to regulation 2(3);
- (b) "applicant" means:
 - (i) in rules 2, 3(2), 4(2) and (3), 5(2), (3), (4) and (6), 6, 7(3) and 20(2) and (3)(b) above and paragraph (1)(i) below, person who is making the application; and
 - (ii) in rules 4(4), 10, 11, 12, 15(3)(a) and 20(4), (5) and (7) above, person who has made the application;
- (c) information is confidential if it is:
 - (i) commercial information the disclosure of which would, or might, significantly harm the legitimate business interests of the undertaking to which it relates; or
 - (ii) information relating to the private affairs of an individual the disclosure of which would, or might, significantly harm his interests;
- (d) "Form ERN" means, subject to rule 4(3) above:

- (i) the information, including any supporting document, required by the Annex hereto; and
 - (ii) the declaration made in the form set out in Part 2A of the Annex hereto;
- (e) “internal” document includes the following:
- (i) a document produced within the office of either the Director or a regulator concerning a case; and
 - (ii) correspondence between the Director and a regulator, or between regulators, concerning a case; and
 - (iii) correspondence between the Director, or a regulator, and a government department or another competition authority, concerning a case;
- (f) “an officer” means an investigating officer within the meaning of regulation 13(1) or a named officer of the Director authorised by a warrant issued under regulation 14;
- (g) “regulator” has the meaning given to it by section 54 of the Act;
- (h) “working day” means day which is not Saturday, Sunday or any other day on which the Office of Fair Trading is closed for business; and
- (i) “other party” in relation to conduct of two or more persons, means one of those persons other than the applicant.
- (2) Where the Director, if he proposes to take action, is required to consult a person, he shall:
- (a) except where otherwise indicated, give written notice to that person; and
 - (b) state in that notice the action he proposes, his reasons for it and the period within which that person may make written representations to him on these matters.
- (3) Where the Director, if he proposes to take action:
- (a) is required to consult the public; or
 - (b) proposes to consult the public in exercise of his discretion to do so,
- he shall publish a notice stating the action he proposes, his reasons for it and the period within which written representations may be made to him on these matters, and shall, subject to rules 17 and 18(2) above, consult any third party (being in relation to the agreement or conduct concerned, a person who is not a party to the agreement or who has not engaged in the conduct) who appears to him likely to be affected by the action he proposes.
- (4) Where the Director is required to publish a decision, a proposal or any other information, he shall do so by means of entry in the register maintained by him under rule 7 above.

Annex

FORM ERN

INFORMATION REQUIRED FOR APPLICATIONS FOR A DECISION UNDER THE EC COMPETITION LAW (ARTICLES 84 AND 85) ENFORCEMENT REGULATIONS 2001

PART 1: INTRODUCTION

This document lists the information and supporting documents which must be provided when making an application for a decision under regulation 7 or 10.

If the Applicant(s) considers that the Director would find any part of the information contained in the application to be confidential, in the sense given to that word by rule 21(1), he must set out that part of the information in a separate annex to the application marked “confidential information” and provide a written explanation as to why he considers that the Director should treat it as such.

This document must also be used when making an application under regulation 4(4) (see rule 15).

PART 2: INFORMATION TO BE PROVIDED BY THE UNDERTAKING(S) MAKING THE APPLICATION

1. INFORMATION ABOUT THE UNDERTAKING(S) SUBMITTING THE APPLICATION (THE “APPLICANT(S)”) AND THE OTHER PARTIES TO THE AGREEMENT

1.1 Please give the full name, address (by registered office, where appropriate, and principal place of business, if different), telephone and fax numbers and e-mail address (where available) of the Applicant(s) and a brief description of the nature of its business. If the Applicant(s) is a partnership, sole trader or other unincorporated body trading under a business name, give the name(s) and address(es) of the partners or proprietor(s). Please quote any reference which should be used.

1.2 Please give the full name, address, telephone and fax numbers and e-mail address (where available) of any representative(s) who has been authorised to act for the Applicant(s), indicating whom they represent and in what capacity (e.g. a solicitor).

1.3 Where the declaration to be made in the form set out in Part 2A is signed by a solicitor or other representative of the Applicant(s), please provide written proof of that representative's authority to act on behalf of the Applicant(s).

1.4 If a joint application is being submitted, indicate whether or not a joint representative has been appointed. If a joint representative has been appointed, give his full name, address (by registered office, where appropriate, and principal place of business, if different), telephone and fax numbers and e-mail address (where available), and indicate whom he represents.

1.5 Please give full names, addresses (by registered office, where appropriate, and principal place of business, if different), telephone and fax numbers, nature of business, and brief description of the other parties to the agreement and any other persons engaging in the conduct which is the subject of the application, together with the name of a contact at each undertaking concerned, their address, telephone and fax numbers and details of their position in the undertaking.

1.6 Please provide details of the steps taken or to be taken to notify all the other parties to the agreement or conduct which is the subject of the application of whom the Applicant(s) is aware that the application is being submitted. Indicate whether those parties have received a copy of the application and if so, whether confidential information (as defined in rule 21(1)) was included in the copy of the application. If the Applicant(s) considers that it is not practicable to notify the other parties of the application, please give the reasons why it is not practicable.

1.7 Please identify the groups to which each party to the agreement or conduct which is the subject of the application belongs. For the purposes of the information required by this form, a group relationship exists where one undertaking—

- owns more than half the capital or business assets of another undertaking; or
- has the power to exercise more than half the voting rights in another undertaking; or
- has the power to appoint more than half the members of the supervisory board, board of directors or bodies legally representing the undertaking; or
- has the right to manage the affairs of another undertaking.
- An undertaking which is jointly controlled by several other undertakings (e.g. a joint venture) forms part of the group of each of these undertakings.

2. PURPOSE OF THE APPLICATION

2.1 Specify whether the application is being made in relation to the prohibition in Article 81(1), the prohibition in Article 82 or both.

2.2 State which provisions or effects of the agreement or conduct which is the subject of the application might in the Applicant's view raise questions of compatibility with the prohibition in Article 81(1) and/or the prohibition in Article 82, and give reasons for that view.

2.3 If the application is for an extension of an exemption, state the date of expiry of the existing exemption and the reasons why an extension is sought. Please also give details of any changes that have occurred in the relevant market(s) (see 6.2 and 6.3 below) and in the agreement itself since the grant of the exemption. Specify how any changes impact on the fulfilment by the agreement of the conditions set out in Article 81(3). Please also enclose a copy of the decision granting the exemption.

3. JURISDICTION

3.1 Please state whether the agreement or conduct which is the subject of the application is also the subject of an application to any competition authority outside the United Kingdom. If so, please provide brief details (where applicable) of the outcome of such application, if known.

3.2 Please provide details of any previous contacts of which the Applicant(s) is aware with the Office of Fair Trading or the European Commission relating to the agreement or conduct which is the subject of the application.

4. DETAILS OF THE AGREEMENT OR CONDUCT

4.1 Please provide a brief description of the agreement or conduct which is the subject of the application (including the nature, content, purpose, date(s) and duration).

4.2 If the application is made in relation to a written agreement, attach either an original of the most recent text of that agreement, or a copy certified by the applicant to be a true copy of the original. If the application is made in relation to an agreement which is not written, provide a full description of the agreement. If the application is made in relation to conduct, provide a full description of that conduct.

4.3 Identify any provisions in the agreement or aspects of the conduct which may restrict the parties in their freedom to take independent commercial decisions or to act on those decisions.

4.4 If the application relates to standard form terms and conditions, indicate the number of agreements expected to be entered into on those terms and conditions.

4.5 Please identify those Member States of the European Community trade between which may be affected by the arrangements. Please give reasons for your reply to this question, giving data on trade flows where relevant. Furthermore please state whether trade between the Community and any third countries is affected, again giving reasons for your reply.

5. INFORMATION ON THE PARTIES TO THE AGREEMENT OR CONDUCT AND THE GROUPS TO WHICH THEY BELONG

5.1 Please attach one copy of the most recent annual report and accounts (or equivalent for unincorporated bodies) for each party to the agreement or conduct and of the most recent annual report and accounts for the ultimate parent company of these undertakings.

5.2 Please list the product and/or services market(s) in which each party to the agreement or conduct and each member of the groups (within the meaning of 1.7 above) to which they belong are active.

6. THE RELEVANT PRODUCT AND GEOGRAPHIC MARKET(S)

6.1 A “*relevant product market*” comprises all those products and/or services regarded by the consumer of the products or acquirer of the services as interchangeable or substitutable by reason of the products’ characteristics, price and intended use. The “*relevant geographic market*” comprises the area in which the undertakings concerned are involved in the supply of products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because, in particular, conditions of competition are appreciably different in those areas.

6.2 Please supply and explain the definition of the relevant product market(s) which in the opinion of the Applicant(s) should form the basis of the analysis of the application. State the specific products or services directly or indirectly affected by the agreement or conduct which is the subject of the application and other products or services that may be viewed as substitutable. Give reasons for all assumptions or findings.

6.3 Please supply and explain the definition of the relevant geographic market(s) which in the opinion of the Applicant(s) should form the basis of the analysis of the application. Please identify the geographic scope of the relevant market(s), with reasons. Give reasons for all assumptions or findings.

6.4 For each of the relevant product and geographic market(s) identified in 6.2 and 6.3 above, give details of:

- (a) the level of concentration in the markets;
- (b) the nature and extent of vertical integration;
- (c) the direction and extent of trade within the European Community and/or between the Community and third countries;
- (d) the prevailing methods of distributing products and services, including the extent of the involvement of undertakings which are not party to the agreement or conduct which is the subject of the application (i.e. third parties), and their significance;
- (e) the significance of customer preferences, in terms of brand loyalty, product differentiation and the provision of a full range of products;
- (f) the categories and relative strengths of different types of customer, including private and public sector purchasers; and
- (g) the extent to which customers have long-term relationships with suppliers.

Where available, please provide a copy of the most recent long-term market studies (produced by the Applicant(s) in-house or commissioned by the Applicant(s) from outside consultants) which assess and/or analyse the relevant product market(s) and/or the relevant geographic market(s). Please supply references to any external published studies of the relevant product market(s) and/or the relevant geographic market(s) or, where available, please supply a copy of each such study with the application.

6.5 For each of the parties to the agreement or conduct which is the subject of the application, provide a list of all undertakings belonging to the same group (within the meaning of 1.7 above) which are active in the relevant product market(s) identified in 6.2 above, and those active in markets neighbouring the relevant product market(s)—that is, active in products and/or services which are regarded by the consumer as imperfect and partial substitutes for those products and/or services included in the relevant product market(s) as defined in 6.2 above. Such undertakings must be identified even if they sell the

product or service in question in geographic areas other than those in which the parties to the agreement or conduct which is the subject of the application operate. Please list the name, place of incorporation, exact product and/or service provided and the geographic scope of operation of each member of the group.

7. THE POSITION OF THE UNDERTAKINGS IN THE RELEVANT PRODUCT MARKET(S)

7.1 Please provide the following information in respect of each of the previous three calendar or financial years, as available:

- (a) the best estimates of the Applicant(s) of the market shares of each party to the agreement or conduct which is the subject of the application, in the products or services in the relevant product market(s) on the relevant geographic market(s), as identified in 6.2 and 6.3 above, and, if different, in the European Community, and in each Member State of the Community (for this section, where market shares are less than 20%, please simply state which of the following bands are relevant: less than 5%, less than 10%, less than 15%, less than 20%);
- (b) identify the five main competitors of each party to the agreement or conduct which is the subject of the application in the relevant product and geographic market(s), and give the best estimates of the Applicant(s) of their market shares in the products or services in the relevant product and geographic market(s); provide each competitor's name, address, telephone and fax numbers, and, where possible, a contact name;
- (c) identify the five customers of each party to the agreement or conduct which is the subject of the application, in the relevant product and geographic market(s), giving the customer's name, address, telephone and fax numbers, and, where possible, a contact name; and
- (d) details of each party to the agreement or conduct's interests in, and agreements with, any other undertakings competing in the relevant product and geographic market(s), together with the best estimates of the Applicant(s) of those other undertakings' market shares in the products or services in the relevant product and geographic market(s), if known.

Information requested in this section must be provided for the group to which each party to the agreement or conduct which is the subject of the application belongs (within the meaning of 1.7 above) and not in relation to the individual undertakings which are party to the agreement or conduct which is the subject of the application.

Justification for the figures provided in response to the above must be given. Thus, for each answer to (a), (b) and (d), total market value or volume must be stated, together with the sales or turnover of each of the undertakings in question. The source or sources of the information should also be given and one copy should be provided of any document, where available, from which information has been taken.

8. MARKET ENTRY AND POTENTIAL COMPETITION IN THE RELEVANT PRODUCT AND GEOGRAPHIC MARKET(S)

8.1 For each of the relevant product and geographic market(s) identified in 6.2 and 6.3 above, describe:

- (a) the factors influencing entry in product terms into the relevant product market(s); that is, the barriers which exist to prevent undertakings not presently manufacturing products or providing services within the relevant product market(s) from entering the market(s), taking account of, in particular but not exclusively, the extent to which:
 - entry is influenced by the requirements of government authorisation or standard-setting, in any form, and any legal or regulatory controls on entry to the market(s);
 - entry is influenced by the need to have access to transport infrastructure;
 - entry is influenced by the availability of aircraft, vessels or other vehicles required for providing services;
 - entry is influenced by the length of contracts between an undertaking and its suppliers and customers; and
 - research and development and licensing patents, know-how and other intellectual property rights are important; and
- (b) the factors influencing entry in geographic terms into the relevant geographic market(s); that is, the barriers which exist to prevent undertakings already marketing or providing products or services within the relevant product market(s) outside the relevant geographic market(s) from extending sales into the relevant geographic market(s), taking account of, in particular but not exclusively, the importance of:
 - trade barriers imposed by law;
 - local specifications or technical requirements;

- procurement policies;
- the existence of adequate and available local distribution and retailing facilities;
- the need to have access to transport infrastructure; and
- strong consumer preference for local brands or products.

8.2 Estimate the amount of time required for entry into the relevant product and geographic market(s), taking account of the individual barriers to entry referred to in the answer to 8.1 above.

8.3 State whether any new undertakings have entered the relevant product market(s) in geographic areas where the parties to the agreement or conduct which is the subject of the application sell, during the last three years. Identify these undertakings by full name, address (by registered office, where appropriate, and principal place of business, if different), telephone and fax numbers and, where possible, a contact name. Please give the best estimates of the Applicant(s) of the market shares of each such undertaking in the products or services in the relevant product and geographic market(s).

9. EXEMPTION

If exemption from the prohibition in Article 81(1) is sought, explain how the agreement contributes to improving production or distribution and/or promoting technical or economic progress, and how consumers will be allowed a fair share of the resulting benefit. Explain how each restriction imposed by the agreement is indispensable to the attainment of those objectives, and how the agreement does not afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the products in question (as identified in 6.2 and 6.3 above).

10. OTHER INFORMATION

10.1 Please provide details of trade publications in which advertisements seeking the views of third parties might be placed.

10.2 Please give any other information which the Applicant(s) considers may be helpful.

11. SUPPORTING DOCUMENTS

Please ensure that the Applicant(s) has attached the following documents (where relevant) to the application:

- (a) if 1.3 above applies, written proof of the representative's authority to act on the Applicant(s) behalf;
- (b) if 2.3 above applies, a copy of the decision granting the exemption;
- (c) if 4.2 above applies with regard to a written agreement, either an original or certified copy, of the most recent version of the text of the agreement which is the subject of the application;
- (d) one copy of the most recent annual report and accounts (or equivalent for unincorporated bodies) for each party to the agreement or conduct and of the most recent annual report and accounts for the ultimate parent company of these undertakings (see 5.1 above);
- (e) where available, one copy of the most recent long-term market studies which assess and/or analyse the relevant market(s) (in-house studies produced by the Applicant(s) or commissioned by the Applicant(s) from outside consultants) (see 6.4 above);
- (f) where available, one copy of any external studies of the relevant product and/or the relevant geographic market(s) (see 6.4 above); and
- (g) where available, one copy of any document from which information has been taken and provided in answer to 7.1 above.

PART 2A:

Under regulation 24, it is an offence, punishable by a fine or imprisonment or both, to provide information which is false or misleading in a material particular if the undertaking or person providing it knows that it is false or misleading, or is reckless as to whether it is. If the undertaking or person is a body corporate, under regulation 33 its officers may be guilty of an offence.

Declaration

The undersigned declare that all the information given above and in the . . . pages annexed hereto is correct to the best of their knowledge and belief, and that all estimates are identified as such and are their best estimates of the underlying facts.

Place and date.....

Signatures

Status

Name(s) in block capitals.....

PART 3: ACKNOWLEDGEMENT OF RECEIPT

This acknowledgement of receipt will be returned to the address inserted below if the Applicant(s) provides the information requested below.

To be completed by the Applicant(s)

To:

.....
(name and address of Applicant(s))
.....
.....
.....

The application dated

concerning

involving the following undertakings:

1.

2.

[and others]

To be completed by the Office of Fair Trading

was received on

and registered under reference number

Please quote this number in all correspondence with the Office of Fair Trading

PART 4:—TO BE COMPLETED BY THE APPLICANT(S)

Information for the OFT public register

1. Please give the full names of the parties to the agreement(s) or conduct which is the subject of the application, as in the response to 1.1 and 1.5 above.
2. Please provide a short summary which does not contain any confidential information (no more than 250 words) of the nature and objectives of the agreement(s) or conduct which is the subject of the application.
3. Please describe the relevant product(s) or services(s) involved.

APPEALS

Interpretation

1. In this Schedule—

“the chairman” means a person appointed as chairman of a tribunal in accordance with paragraph 27(2)(a) of Schedule 7 to the Act;

“specified” means specified in rules.

General procedure

2.—(1) An appeal to the tribunal must be made by sending a notice of appeal to the tribunal within the specified period.

(2) The notice of appeal must set out the grounds of appeal in sufficient detail to indicate—

(a) under which provision of these regulations the appeal is brought;

(b) to what extent (if any) the appellant contends that the decision against, or with respect to which, the appeal is brought was based on an error of fact or was wrong in law; and

(c) to what extent (if any) the appellant is appealing against the Director’s exercise of his discretion in making the disputed decision.

(3) The tribunal may give an appellant permission to amend the grounds of appeal identified in the notice of appeal.

Decisions of the tribunal

3.—(1) The tribunal must determine the appeal on the merits by reference to the grounds of appeal set out in the notice of appeal.

(2) The tribunal may confirm or set aside the decision which is the subject of the appeal, or any part of it, and may—

(a) remit the matter to the Director,

(b) give such directions, or take such other steps, as the Director could himself have given or taken,

(c) grant or cancel an exemption or vary any conditions or obligations imposed in relation to the exemption by the Director, or

(d) make any other decision which the Director could himself have made.

(3) Any decision of the tribunal on an appeal has the same effect, and may be enforced in the same manner, as a decision of the Director.

(4) If the tribunal confirms the decision which is the subject of the appeal it may nevertheless set aside any finding of fact on which the decision was based.

4.—(1) A decision of the tribunal may be taken by a majority.

(2) The decision must—

(a) state whether it was unanimous or taken by a majority; and

(b) be recorded in a document which—

(i) contains a statement of the reasons for the decision; and

(ii) is signed and dated by the chairman of the tribunal.

(3) When the tribunal is preparing the document mentioned in sub-paragraph (2)(b), regulation 30 is to apply to the tribunal as it applies to the Director.

(4) The President must make such arrangements for the publication of the tribunal’s decision as he considers appropriate.

5. A person who without reasonable excuse fails to comply with any requirement imposed pursuant to tribunal rules which make provision for the matters referred to in—

(a) paragraph 9(1)(c) of Schedule 8 to the Act; or

(b) paragraph 9(1)(g) of Schedule 8 to the Act

is guilty of an offence and liable on summary conviction to a fine not exceeding level 3 on the standard scale.

EXPLANATORY NOTE

(This note is not part of the Regulations)

These Regulations are made under section 2(2) of the European Communities Act 1972 and make provision for the investigation of, and the making and enforcement of decisions in respect of, agreements or conduct on which it appears to the Director General of Fair Trading (“the Director”) the United Kingdom has a duty to rule under Article 84 of the Treaty. These Regulations revoke and replace the EC Competition Law (Articles 88 and 89) Enforcement Regulations 1996.

References in these Regulations to Articles of the Treaty are to Articles of the Treaty establishing the European Community as renumbered by the Treaty of Amsterdam.

Article 84 applies to cases where the Council of Ministers of the European Community has not made regulations under Article 83 giving effect to Articles 81 and 82 of the EC Treaty. Subject to the possibility of exemption under Article 81(3), Article 81 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 82 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 83 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.

The procedures in the Regulations are modelled on the Competition Act 1998 (“the Act”). They enable the Director to start an investigation on his own initiative, if he thinks there are reasonable grounds for suspecting that there is or has been in existence an agreement which may infringe the prohibition in Article 81(1), or if there are reasonable grounds for suspecting that the prohibition in Article 82 has been infringed. They also provide for the Director to investigate if a party to an agreement applies for an agreement to be considered under regulation 7 or if a person applies for conduct to be considered under regulation 10.

The Regulations provide that, when carrying out investigations, the Director has similar powers to those he has when investigating under the Act (including power to enter premises and power to require production of documents). The Regulations also include offences similar to those in the Act.

Under regulation 4, the Director can grant an exemption from the prohibition in Article 81(1) with respect to a particular agreement if he is requested to do so and the conditions for application of Article 81(3) are met. The exemption may be granted subject to such conditions and obligations as the Director considers it appropriate to impose. Regulation 5 makes provision in relation to cancellation etc. of exemptions.

If the Director decides that an agreement infringes the prohibition in Article 81(1) or that conduct infringes the prohibition in Article 82, he can give directions to bring the infringement to an end (regulations 18 and 19).

The Director can also give directions if he is authorised by the European Commission, following a reasoned decision recording an infringement of Article 81(1) or Article 82, to take measures needed to remedy the situation pursuant to Article 85.

There are also provisions concerning interim measures (regulation 21), appeals (regulations 25 to 28 and Schedule 2), disclosure of information (regulations 29 and 30), findings of fact by the Director (regulation 32) and Crown application (regulation 34) which are modelled on the provisions in the Act.

Schedule 1 sets out the procedural rules to be followed by the Director and by applicants and the form (form ERN) to be used if an application is made under regulation 7 or regulation 10. These are modelled on the Director’s rules as set out in the Schedule to the Competition Act 1998 (Director’s rules) Order 2000 (S.I. 2000/293) and Form N (Annex 1 to those rules).

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

2001 No. 2916

EUROPEAN COMMUNITIES

The EC Competition Law (Articles 84 and 85)
Enforcement Regulations 2001