

PRACTICE DIRECTION APPLICATION FOR A WARRANT UNDER THE COMPETITION ACT 1998

Interpretation

1. In this practice direction –
 - (1) ‘the Act’ means the Competition Act 1998;
 - (2) ‘the Commission’ means the European Commission;
 - (3) ‘the Director’ means –
 - (a) the Director General of Fair Trading; or
 - (b) in relation to an application for a warrant by a regulator entitled pursuant to section 54 and Schedule 10 of the Act to exercise the functions of the Director General of Fair Trading, that regulator;
 - (4) ‘officer’ means an officer of the Director;
 - (5) ‘named officer’ means the person identified in a warrant as the principal officer in charge of executing that warrant, and includes a named authorised officer under section 63 of the Act; and
 - (6) ‘warrant’ means a warrant under section 28, 62 or 63 of the Act.

Application for a warrant

- 2.1 An application by the Director for a warrant must be made to a High Court judge using the Part 8 procedure as modified by this practice direction.
- 2.2 The application is made without notice and the claim form may be issued without naming a defendant. Rules 8.1(3), 8.3, 8.4, 8.5(2)–(6), 8.6(1), 8.7 and 8.8 do not apply.

Confidentiality of court documents

- 3.1 The court will not effect service of any claim form, warrant, or other document filed or issued in an application to which this practice direction applies, except in accordance with an order of the judge hearing the application.
- 3.2 CPR rule 5.4 does not apply, and paragraphs 3.3 and 3.4 have effect in its place.
- 3.3 When a claim form is issued the court file will be marked ‘Not for disclosure’ and, unless a High Court judge grants permission, the court records relating to the application (including the claim form and documents filed in support and any warrant or order that is issued) will not be made available by the court for any person to inspect or copy, either before or after the hearing of the application.

- 3.4 An application for permission under paragraph 3.3 must be made on notice to the Director in accordance with Part 23.

(Rule 23.7(1) requires a copy of the application notice to be served as soon as practicable after it is filed, and in any event at least 3 days before the court is to deal with the application.)

Contents of claim form, affidavit and documents in support

- 4.1 The claim form must state –
- (1) the section of the Act under which the Director is applying for a warrant;
 - (2) the address or other identification of the premises to be subject to the warrant; and
 - (3) the anticipated date or dates for the execution of the warrant.
- 4.2 The application must be supported by affidavit evidence, which must be filed with the claim form.
- 4.3 The evidence must set out all the matters on which the Director relies in support of the application, including all material facts of which the court should be made aware. In particular it must state –
- (1) the subject matter (i.e. the nature of the suspected infringement of the Chapter I or II prohibitions in the Act, or of Articles 81 or 82 of the Treaty establishing the European Community) and purpose of the investigation to which the application relates;
 - (2) the identity of the undertaking or undertakings suspected to have committed the infringement;
 - (3) the grounds for applying for the issue of the warrant and the facts relied upon in support;
 - (4) details of the premises to be subject to the warrant and of the possible occupier or occupiers of those premises;
 - (5) the connection between the premises and the undertaking or undertakings suspected to have committed the infringement; and
 - (6) the name and position of the officer who it is intended will be the named officer.
- 4.4 There must be exhibited to an affidavit in support of the application –
- (1) the written authorisation of the Director containing the names of –
 - (a) the officer who it is intended will be the named officer; and
 - (b) the other officers who it is intended may accompany him in executing the warrant; and
 - (2) in the case of an application under section 62 or 63 of the Act, if it is intended that Commission officials will accompany the named officer in executing the warrant, the written authorisations of the Commission containing the names of the Commission officials.

- 4.5 There must also be filed with the claim form –
- (1) drafts of –
 - (a) the warrant; and
 - (b) an explanatory note to be produced and served with it; and
 - (2) the written undertaking by the named officer required by paragraph 6.2 of this practice direction.

(Examples of the forms of warrant, and explanatory notes to be produced and served with them, are annexed to this practice direction.)

- 4.6 If possible the draft warrant and explanatory note should also be supplied to the court on disk in a form compatible with the word processing software used by the court.

Listing

5. The application will be listed by the court on any published list of cases as 'An application by D'.

Hearing of the application

- 6.1 An application for a warrant will be heard and determined in private, unless the judge hearing it directs otherwise.
- 6.2 The court will not issue a warrant unless there has been filed a written undertaking, signed by the named officer, to comply with paragraph 8.1 of this practice direction.

The warrant

- 7.1 The warrant must –
- (1) contain the information required by section 29(1) or section 64(1) of the Act;
 - (2) state the address or other identification of the premises to be subject to the warrant;
 - (3) state the names of –
 - (a) the named officer; and
 - (b) any other officers who may accompany him in executing the warrant;
 - (4) in the case of an application under section 62 or 63 of the Act, state the names of any officials of the Commission who may accompany the named officer in executing the warrant;
 - (5) set out the action which the warrant authorises the persons executing it to take under the relevant section of the Act;

- (6) give the date on which the warrant is issued;
- (7) include a statement that the warrant continues in force until the end of the period of one month beginning with the day on which it issued; and
- (8) state that the named officer has given the undertaking required by paragraph 6.2.

7.2 Rule 40.2 applies to a warrant.

(Rule 40.2 requires every judgment or order to state the name and judicial title of the person making it, to bear the date on which it is given or made, and to be sealed by the court.)

7.3 Upon the issue of a warrant the court will provide to the Director –

- (1) the sealed warrant and sealed explanatory note; and
- (2) a copy of the sealed warrant and sealed explanatory note for service on the occupier or person in charge of the premises subject to the warrant.

Execution of warrant

8.1 A named officer attending premises to execute a warrant must, if the premises are occupied –

- (1) produce the warrant and an explanatory note on arrival at the premises; and
- (2) as soon as possible thereafter personally serve a copy of the warrant and the explanatory note on the occupier or person appearing to him to be in charge of the premises

8.2 The named officer must also comply with any order which the court may make for service of any other documents relating to the application.

8.3 Unless the court otherwise orders –

- (1) the initial production of a warrant and entry to premises under the authority of the warrant must take place between 9.30 a.m. and 5.30 p.m. Monday to Friday; but
- (2) once officers have entered premises under the authority of a warrant, they may, whilst the warrant remains in force –
 - (a) remain on the premises; or
 - (b) re-enter the premises to continue executing the warrant, outside those times.

8.4 If the officers executing a warrant propose to remove any items from the premises they must, unless it is impracticable –

- (1) make a list of all the items to be removed;
- (2) supply a copy of the list to the occupier or person appearing to be in charge of the premises; and

- (3) give that person a reasonable opportunity to check the list before removing any of the items.

Application to vary or discharge warrant

- 9.1 The occupier or person in charge of premises in relation to which a warrant has been issued may apply to vary or discharge the warrant.
- 9.2 An application under paragraph 9.1 to stop a warrant from being executed must be made immediately upon the warrant being served.
- 9.3 A person applying to vary or discharge a warrant must first inform the named officer that he is making the application.
- 9.4 The application should be made to the judge who issued the warrant, or, if he is not available, to another High Court judge.

IN THE HIGH COURT OF JUSTICE
[] DIVISION

CLAIM No. of 20

CLAIMANT:

[DIRECTOR GENERAL OF FAIR TRADING] or
[Name of 'Regulator' - section 54 and Schedule 10]
[insert address]

PREMISES TO WHICH THIS WARRANT RELATES:

[insert address]

**WARRANT TO ENTER PREMISES AND EXERCISE POWERS
UNDER SECTIONS 28 AND 29 COMPETITION ACT 1998**

To *[insert name of person/undertaking]*, who is believed to be the occupier of the premises described above ("the premises") and to any person in charge of, or operating at or from, the premises:

You should read the terms of this Warrant and the accompanying Explanatory Note very carefully. You are advised to consult a Solicitor as soon as possible. If you intentionally obstruct an officer or fail to comply with any requirement of the officers exercising their powers under the Warrant, you may be committing a criminal offence under sections 42-44 of the Competition Act 1998, the relevant terms of which are set out in Schedule C to this Warrant.

An application was made on *[insert date]* by Counsel for the Director General of Fair Trading *[or other name of Claimant]* ("the Director") to The Honourable Mr Justice *[insert name]* ("the Judge"), for a warrant under section 28(1) *[insert the relevant subsection (a), (b) or (c)]* of the Competition Act 1998 ("the Act") on the grounds that *[insert the text of the relevant subsection (a), (b) or (c) and section 28(3) as appropriate]*.

The Judge read the evidence in support of the application and was satisfied that the grounds in section 28(1) *[insert the relevant subsection (a), (b) or (c) and section 28(3) as appropriate]* of the Act have been met and accepted the undertakings by *[insert name]*, an officer of the Director authorised to act as the "named officer", set out in Schedule A to this Warrant. The named officer is the principal officer of the Director in charge of executing this Warrant.

As a result of the application, this Warrant in relation to the premises was issued by the Judge on *[insert date]*.

1. This Warrant is issued in respect of an investigation by the Director into *[set out the subject matter and purpose of the investigation]*.
2. This Warrant continues in force until the end of the period of one month beginning with the day on which it is issued and may be executed on any one or more days within that period.
3. By this Warrant the named officer and the Director's other officers named in Schedule B and authorised in writing by the Director to accompany the named officer, are authorised to produce the Warrant between 9:30am and 5:30pm on a weekday *[unless the Judge has ordered otherwise]* and on producing the Warrant:

- (a) to enter the premises 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 referred to in this Warrant 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; and to retain possession of any documents so taken for a maximum period of 3 months;
 - (d) to take any other steps which appear to be necessary for preserving any documents of the relevant kind or preventing interference with them;
 - (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;
 - (g) to take action as mentioned in paragraphs 3(a) to (f) above in relation to any other documents on the premises relating to the investigation described in paragraph 1 above. *[Paragraph (g) to be included in a warrant under section 28(1)(b) if the Judge so orders pursuant to section 28(3).]*
4. Any person entering the premises by virtue of this Warrant may take with him such equipment as appears to him to be necessary.
 5. If there is no one at the premises when the named officer proposes to execute this 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 so informed, afford him or his legal or other representative a reasonable opportunity to be present when the Warrant is executed.
 6. If the named officer is unable to inform the occupier of the intended entry he must, when executing this Warrant, leave a copy of it in a prominent place on the premises.
 7. On leaving the premises, the named officer must, if they are unoccupied or the occupier is temporarily absent, leave them as effectively secured as he found them.
 8. Terms used in this Warrant have the following meanings in accordance with the Act:

“document” includes information recorded in any form;

“information” includes estimates and forecasts;

“occupier” means any person whom the named officer reasonably believes is the occupier of the premises; and

“premises” includes any vehicle on the premises.

SCHEDULE A

UNDERTAKINGS GIVEN TO THE COURT BY THE NAMED OFFICER

If the premises are occupied when the Warrant is to be executed:

1. To produce the Warrant and an Explanatory Note on arrival at the premises; and
2. As soon as possible thereafter to serve personally a copy of the Warrant and of the Explanatory Note on the occupier or person appearing to him to be in charge of the premises.

The Explanatory Note was produced to the Court with the application for the Warrant.

SCHEDULE B

NAMES OF OFFICERS AUTHORISED TO EXECUTE THE WARRANT

[insert name of the named officer] who is the Director's officer authorised in writing by the Director to be the named officer.

[insert name of each of the other officers] who are the Director's other officers authorised in writing by the Director to accompany the named officer.

SCHEDULE C

OFFENCES CREATED BY SECTIONS 42-44 OF THE ACT

The offences created by sections 42 to 44 of the Act in connection with the execution of a warrant under section 28 are set out below. Text marked as [...] denotes the omission of provisions that are not relevant for section 28 purposes.

- 42.- (1) A person is guilty of an offence if he fails to comply with a requirement imposed on him under section [...] 28.
- (2) If a person is charged with an offence under subsection (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 subsection (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.
- (7) A person who intentionally obstructs an officer in the exercise of his powers under a warrant issued under section 28 is guilty of an offence.
- 43.- (1) A person is guilty of an offence if, having been required to produce a document under section [...] 28-
- (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.

- 44.- (1) If information is provided by a person to the Director in connection with any function of the Director under Part I of the Act, 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 Part I of the Act, is guilty of an offence.

Section 42(6) provides that a person guilty of an offence under section 42(1) is liable -

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

Sections 42(7), 43(2) and 44(3) provide that a person guilty of an offence under any of sections 42(7), 43(1) or 44 respectively 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.

The statutory maximum fine on summary conviction is currently £5,000. The fine on conviction on indictment is unlimited.

SECTION 72 OF THE ACT

The text of section 72 is set out below. Text marked as [...] denotes the omission of provisions that are not relevant for section 28 purposes.

- 72.- (1) This section applies to an offence under any of sections 42 to 44 [...].
- (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 subsection (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, subsection (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 subsection (5) “partner” includes a person purporting to act as a partner.

DATED this [] day of [] 20
THE HONOURABLE MR JUSTICE []

EXPLANATORY NOTE TO WARRANT UNDER SECTIONS 28 AND 29 OF THE COMPETITION ACT 1998 ('THE ACT')

This Explanatory Note is provided for information only. It is not a detailed note of the powers under the Act which are subject to interpretation by the courts.

Subject matter and powers

Officers of the Director General of Fair Trading (the 'Director') have been authorised under Warrant to enter and search the premises identified in the Warrant in connection with an investigation under the Act. The subject matter of this investigation is set out in paragraph 1 of the Warrant. The officers will not elaborate on this.

Paragraph 3 of the Warrant sets out the powers of the named officer¹ and other investigating officers under section 28 of the Act for the purposes of the present investigation. On entering the premises, the named officer and other investigating officers will, as a matter of practice, produce evidence of their identity when producing the Warrant.

Unless the Court has ordered otherwise, the initial production of the Warrant and entry to premises must take place between 9.30 a.m. and 5.30 p.m. Monday to Friday and, once officers have entered premises under the authority of the Warrant, they may outside those times and whilst the Warrant remains in force, remain on the premises or re-enter the premises to continue executing the Warrant.

Access to legal advice

You are advised to seek legal advice. If the named officer and other investigating officers consider it reasonable in the circumstances to do so and if they are satisfied that you are complying with, or will comply with, such conditions as they consider it appropriate to impose, the named officer and other investigating officers will grant a request to allow a reasonable time for your legal adviser to arrive at the premises before the investigation continues.

If you decide to seek legal advice you should do so promptly and this must not unduly delay or impede the investigation. Any delay must be kept to a strict minimum.

If you have an in-house legal adviser on the premises, or if you have received prior notice of the intended entry, the named officer and other investigating officers will not wait for your external legal adviser to arrive.

¹ The named officer is the principal officer of the Director who, together with the Director's other investigating officers, is authorised by the Warrant to exercise the powers under section 28 of the Act. His name and the names of the other investigating officers are set out in Schedule B to the Warrant.

Self-incrimination

The named officer and other investigating officers have powers, among other matters, to search and take copies of, or extracts from, documents covered by the Warrant, to require you to produce relevant computer information and to require you to provide an explanation of any such documents (which the Act defines as including information recorded in any form). However, if your undertaking is suspected of having committed an infringement of the Act, they cannot require you to provide answers or statements that might involve an admission on your part of the existence of that infringement.

Legally privileged communications

The powers under section 28 of the Act to search, take copies etc. (set out in paragraph 3(b) onwards in the Warrant) do not apply in respect of any ‘privileged communication’. This is defined in section 30 of the Act to mean 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 would be protected from disclosure in proceedings in the High Court on grounds of legal professional privilege.

For the purposes of section 30, a ‘professional legal adviser’ includes both an external and an in-house qualified legal adviser.

If you consider that a document or information is privileged, you should provide the named officer or other investigating officer with material of such a nature as to demonstrate to his satisfaction that the document or information, or parts of it, for which privilege is claimed, fulfil the conditions for it being privileged.

If you fail to do so, you should gather together the items for which privilege is claimed. These items will not be examined or copied unless you reach an agreement with the named officer that they may be examined or copied. If no agreement is reached on the day of the investigation, the named officer will request that you make a copy of the items and place this in a sealed envelope or package in his presence. The named officer will then discuss with you appropriate arrangements for the safe-keeping of these items pending resolution of the issue of privilege. For example, such arrangements may include a request that your legal adviser should give (or if no legal adviser is present, that you give), a written undertaking that the envelope or package will be retained safely and that its contents will not be concealed, removed, tampered with or destroyed until the issue of privilege is resolved.

Listing of items

Unless it is impracticable in all the circumstances, no item may be removed from the premises by the named officer or other investigating officers until they have prepared a list of all the items to be removed, a copy of the list has been supplied to you, and you have been given a reasonable opportunity to check that the list relates to all the items concerned, and only to those items. This does not entitle you or your legal adviser to insist that the list or its contents should take any particular form.

Confidentiality

You should note that, subject to the safeguards in relation to self-incrimination and legal privilege, you are **not** entitled to withhold a document or information by claiming that it is confidential.

Where it is possible to do so, it is suggested that after the investigation on the premises you should identify any information or document copied or taken that you consider to be confidential and provide a written explanation as to why it should be treated as such. For these purposes information is confidential if it is:

- (1) commercial information the disclosure of which would, or might, significantly harm the legitimate business interests of the undertaking to which it relates; or
- (2) information relating to the private affairs of an individual the disclosure of which would, or might, significantly harm his interests.²

A document will be treated as confidential to the extent that it contains confidential information.

It is for the Director to determine whether or not the information is to be disclosed in accordance with the Act.

Application to vary or discharge the Warrant

You are entitled to apply to the Court to vary or discharge the Warrant. If you intend to make such an application, you must first inform the named officer. An application to stop the Warrant from being executed must be made immediately upon it being served.

The application must be made to the judge who issued the Warrant, or if he is not available, to another High Court judge.

If you are making an immediate application to stop the Warrant from being executed, the named officer will delay starting or continuing a search of the premises for a reasonable period (not exceeding two hours) while you make your application, provided that you

- (1) permit the named officer and other investigating officers to enter and remain on the premises;

² SI 2000/293, The Competition Act 1998 (Director's rules) Order 2000, rule 30(1)(c).

- (2) keep the named officer informed of the steps you are taking in relation to the application; and
- (3) comply with any other conditions that the named officer imposes.

Examples of conditions that the named officer may impose pursuant to (3) above include: that you do not disturb or move any document or information that is the subject of the Warrant; and/or you do not tell anyone other than your legal adviser about the Warrant or the investigation.

are authorised to produce the Warrant between 9:30am and 5:30pm on a weekday *[unless the Judge has ordered otherwise]* and on producing the Warrant to enter the premises and search for books and records which the officials of the European Commission have power to examine, using such force as is reasonably necessary for the purpose.

4. Any person entering the premises by virtue of this Warrant may take with him such equipment as appears to him to be necessary.
5. If there is no one at the premises when the named officer proposes to execute this 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 so informed, afford him or his legal or other representative a reasonable opportunity to be present when the Warrant is executed.
6. If the named officer is unable to inform the occupier of the intended entry he must, when executing this Warrant, leave a copy of it in a prominent place on the premises.
7. On leaving the premises, the named officer must, if they are unoccupied or the occupier is temporarily absent, leave them as effectively secured as he found them.
8. Terms used in this Warrant have the following meanings in accordance with the Act:

“occupier” means any person whom the named officer reasonably believes is the occupier of the premises; and

“premises” includes land or means of transport which an official of the European Commission has power to enter in the course of the investigation.

SCHEDULE A

UNDERTAKINGS GIVEN TO THE COURT BY THE NAMED OFFICER

If the premises are occupied when the Warrant is to be executed:

1. To produce the Warrant and an Explanatory Note on arrival at the premises; and
2. As soon as possible thereafter to serve personally a copy of the Warrant and of the Explanatory Note on the occupier or person appearing to him to be in charge of the premises.

The Explanatory Note was produced to the Court with the application for the Warrant.

SCHEDULE B

NAMES OF OFFICERS AND OFFICIALS AUTHORISED TO EXECUTE THE WARRANT

[insert name of the named officer] who is the Director’s officer authorised in writing by the Director to be the named officer.

[insert name of each of the other officers] who are the Director’s other officers authorised in writing by the Director to accompany the named officer.

[insert name of each of the officials of the European Commission] who are the officials of the European

Commission authorised for the purpose of the investigation.

SCHEDULE C

OFFENCE CREATED BY SECTION 65 OF THE ACT

The offence created by section 65 of the Act in connection with the execution of a warrant under section 62 is set out below. Text marked as [...] denotes the omission of provisions that are not relevant for section 62 purposes.

- 65.- (1) A person is guilty of an offence if he intentionally obstructs any person in the exercise of his powers under a warrant issued under section 62 [...].
- (2) A person guilty of an offence under subsection (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.

The statutory maximum fine on summary conviction is currently £5,000. The fine on conviction on indictment is unlimited.

SECTION 72 OF THE ACT

The text of section 72 is set out below. Text marked as [...] denotes the omission of provisions that are not relevant for section 62 purposes.

- 72.- (1) This section applies to an offence under [...] section [...] 65.
- (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 subsection (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, subsection (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 subsection (5) “partner” includes a person purporting to act as a partner.

DATED this [] day of [] 20
THE HONOURABLE MR JUSTICE []

EXPLANATORY NOTE TO WARRANT UNDER SECTIONS 62 AND 64 OF THE COMPETITION ACT 1998 ('THE ACT')

This Explanatory Note is provided for information only. It is not a detailed note of the powers under the Act or of the European Commission's powers of enquiry and investigation which are subject to interpretation respectively by the courts and the Court of Justice of the European Communities.

Subject matter and powers

Officers of the Director General of Fair Trading (the 'Director') and officials of the European Commission have been authorised under Warrant to enter and search the premises identified in the Warrant in connection with an investigation under the EC competition rules. The investigation has been ordered by a decision of the European Commission. The subject matter of this investigation is set out in paragraph 1 of the Warrant and in the European Commission's decision. The Director's officers and officials of the European Commission will not elaborate on this.

Paragraph 3 of the Warrant sets out the powers of the named officer,³ the other investigating officers and the officials of the European Commission under section 62 of the Act for the purposes of the present investigation. On entering the premises, the named officer, the other investigating officers and the officials of the European Commission will, as a matter of practice, produce evidence of their identity when producing the Warrant.

Unless the Court has ordered otherwise, the initial production of the Warrant and entry to premises must take place between 9.30 a.m. and 5.30 p.m. Monday to Friday and, once officers have entered premises under the authority of the Warrant, they may outside those times and whilst the Warrant remains in force, remain on the premises or re-enter the premises to continue executing the Warrant.

Access to legal advice

You are advised to seek legal advice as explained in the European Commission's explanatory note to their Authorisation to Investigate, a copy of which will be produced to you by the officials of the European Commission.

³ The named officer is the principal officer of the Director who, together with the Director's other investigating officers and officials of the European Commission, is authorised by the Warrant to exercise the powers under section 62 of the Act. His name and the names of the other investigating officers and officials of the European Commission are set out in Schedule B to the Warrant.

Self-incrimination

You may be requested to provide oral explanations on the spot. However, if your undertaking is suspected of having committed an infringement of EC competition laws, or you have committed the offence of intentional obstruction under section 65 of the Act,⁴ you cannot be compelled to provide answers or statements that might involve an admission on your part of the existence of that infringement or offence.

Legally privileged communications

The powers of the Director's officers and officials of the European Commission do not apply in respect of documents or information that are legally privileged. The Court of Justice of the European Communities has recognised that correspondence between a client and an external legal adviser, entitled to practise in one of the Member States, is privileged where

- (a) the correspondence follows the initiation of proceedings by the European Commission and concerns the defence of the client; or
- (b) the correspondence existed before the initiation of proceedings but is closely linked with the subject matter of the proceedings.

Correspondence between a client and an external legal adviser who is not entitled to practise in one of the Member States or between a client and an in-house legal adviser is not recognised by the Court of Justice as being protected by legal privilege. However, where the in-house legal adviser is simply reporting the statement of an external legal adviser who is entitled to practise in one of the Member States, privilege will apply.

If you consider that a document or information is privileged, you should provide the officials of the European Commission with material of such a nature as to demonstrate to their satisfaction that the document or information, or parts of it, for which privilege is claimed, fulfil the conditions for it being privileged.

If you fail to do so, you should gather together the items for which privilege is claimed. These items will not be examined or copied unless you reach an agreement with the named officer or the officials of the European Commission that they may be examined or copied. If no agreement is reached on the day of the investigation, the named officer or the officials of the European Commission will request that you make a copy of the items and place this in a sealed envelope or package in his or their presence. They will then discuss with you appropriate arrangements for the safe-keeping of these items pending resolution of the issue of privilege. For example, such arrangements may include a request that your legal adviser should give (or if no legal adviser is present, that you give), a written undertaking that the envelope or package will be retained safely and that its contents will not be concealed, removed, tampered with or destroyed until the issue of privilege is resolved.

⁴ The relevant terms of this offence are set out in Schedule C to the Warrant.

Listing of items

Unless it is impracticable in all the circumstances, no item may be removed from the premises by the named officer or the officials of the European Commission until they have prepared a list of all the items to be removed, a copy of the list has been supplied to you, and you have been given a reasonable opportunity to check that the list relates to all the items concerned, and only to those items. This does not entitle you or your legal adviser to insist that the list or its contents should take any particular form.

Confidentiality

You should note that, subject to the safeguards in relation to self-incrimination and legal privilege, you are **not** entitled to withhold a document or information by claiming that it is confidential.

Where it is possible to do so, it is suggested that after the investigation on the premises you should identify any information or document copied that you consider to be confidential and provide a written explanation to the European Commission as to why it should be treated as such.

A document will be treated as confidential to the extent that it contains confidential information.

It is for the European Commission to determine, subject to review by the Court of Justice, whether or not the information is to be disclosed, subject to the duty not to disclose information of the kind covered by the obligation of professional secrecy (Article 287 (ex 214) of the Treaty establishing the European Community and Article 20 of Council Regulation (EEC) No. 17/62⁵).

Application to vary or discharge the Warrant

You are entitled to apply to the Court to vary or discharge the Warrant. If you intend to make such an application, you must first inform the named officer. An application to stop the Warrant from being executed must be made immediately upon it being served.

The application must be made to the judge who issued the Warrant, or if he is not available, to another High Court judge.

If you are making an immediate application to stop the Warrant from being executed, the named officer will delay starting or continuing a search of the premises for a reasonable period (not exceeding two hours) while you make your application, provided that you

- (1) permit the named officer, the other investigating officers of the Director and the officials of the European Commission to enter and remain on the premises;

5 OJ L13, 21.6.62, p204; OJ Sp Ed (1959–62) p87.

- (2) keep the named officer informed of the steps you are taking in relation to the application; and
- (3) comply with any other conditions that the named officer imposes.

Examples of conditions that the named officer may impose pursuant to (3) above include: that you do not disturb or move any document or information that is the subject of the Warrant; and/or you do not tell anyone other than your legal adviser about the Warrant or the investigation.

The Court cannot question the need for the investigation, nor the lawfulness of the assessments of fact and law made by the European Commission in adopting the decision to order the investigation. Such issues may be raised only in proceedings for review of that decision brought before the Court of First Instance of the European Communities.

IN THE HIGH COURT OF JUSTICE
[] DIVISION

CLAIM No. of 20

CLAIMANT:

DIRECTOR GENERAL OF FAIR TRADING
[insert address]

PREMISES TO WHICH THIS WARRANT RELATES:

[insert address]

**WARRANT TO ENTER PREMISES AND EXERCISE POWERS
UNDER SECTIONS 63 AND 64 COMPETITION ACT 1998**

To *[insert name of undertaking]*, who is believed to be the occupier of the premises described above (“the premises”) and to any undertaking in charge of, or operating at or from, the premises:

You should read the terms of this Warrant and the accompanying Explanatory Note very carefully. You are advised to consult a Solicitor as soon as possible. If you intentionally obstruct an officer in the exercise of the officer’s powers under the Warrant, you will have committed a criminal offence under section 65 of the Competition Act 1998, the relevant terms of which are set out in Schedule C to this Warrant.

An application was made on *[insert date]* by Counsel for the Director General of Fair Trading (“the Director”) to The Honourable Mr Justice *[insert name]* (“the Judge”), for a warrant under section 63(1) of the Competition Act 1998 (“the Act”) on the grounds that *[insert the text of the relevant subsections (1) and (2), (3) or (4) as appropriate]*.

The Judge read the evidence in support of the application and was satisfied that the grounds in section 63(1) and *[insert the relevant subsection (2), (3) or (4) as appropriate]* of the Act have been met and accepted the undertakings by *[insert name]*, an officer of the Director authorised to act as the “named authorised officer”, set out in Schedule A to this Warrant. The named authorised officer is the principal officer of the Director in charge of executing this Warrant.

As a result of the application, this Warrant in relation to the premises was issued by the Judge on *[insert date]*.

1. This Warrant is issued in respect of an investigation by the European Commission pursuant to its Decision *[insert Decision number]* dated *[insert date]* into *[set out the subject matter and purpose of the investigation]*.
2. This Warrant continues in force until the end of the period of one month beginning with the day on which it is issued and may be executed on any one or more days within that period.
3. By this Warrant the officers and officials named in Schedule B, being
 - the named authorised officer,
 - the Director’s other officers authorised in writing by the Director to accompany the named

- authorised officer, and
- the named officials of the European Commission authorised for the purpose of the investigation

are authorised to produce the Warrant between 9:30am and 5:30pm on a weekday *[unless the Judge has ordered otherwise]* and on producing the Warrant to enter the premises and search for books and records which the named authorised officer and other authorised officers have power to examine, using such force as is reasonably necessary for the purpose.

4. Any person entering the premises by virtue of this Warrant may take with him such equipment as appears to him to be necessary.
5. If there is no one at the premises when the named authorised officer proposes to execute this 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 so informed, afford him or his legal or other representative a reasonable opportunity to be present when the Warrant is executed.
6. If the named authorised officer is unable to inform the occupier of the intended entry he must, when executing this Warrant, leave a copy of it in a prominent place on the premises.
7. On leaving the premises, the named authorised officer must, if they are unoccupied or the occupier is temporarily absent, leave them as effectively secured as he found them.
8. Terms used in this Warrant have the following meanings in accordance with the Act:

“occupier” means any person whom the named authorised officer reasonably believes is the occupier of the premises; and

“premises” includes land or means of transport which an official of the European Commission would have power to enter if the investigation were being conducted by the European Commission.

SCHEDULE A

UNDERTAKINGS GIVEN TO THE COURT BY THE NAMED AUTHORISED OFFICER

If the premises are occupied when the Warrant is to be executed:

1. To produce the Warrant and an Explanatory Note on arrival at the premises; and
2. As soon as possible thereafter to serve personally a copy of the Warrant and of the Explanatory Note on the occupier or person appearing to him to be in charge of the premises.

The Explanatory Note was produced to the Court with the application for the Warrant.

SCHEDULE B

NAMES OF OFFICERS AND OFFICIALS AUTHORISED TO EXECUTE THE WARRANT

[insert name of the named authorised officer] who is the Director’s officer authorised in writing by the Director to be the named authorised officer.

[insert name of each of the other authorised officers] who are the Director’s other officers authorised in writing by the Director to accompany the named authorised officer.

[insert name of each of the named officials of the European Commission] who are the named officials of the European Commission authorised for the purpose of the investigation.

SCHEDULE C

OFFENCE CREATED BY SECTION 65 OF THE ACT

The offence created by section 65 of the Act in connection with the execution of a warrant under section 63 is set out below. Text marked as [...] denotes the omission of provisions that are not relevant for section 63 purposes.

- 65.- (1) A person is guilty of an offence if he intentionally obstructs any person in the exercise of his powers under a warrant issued under section [...] 63.
- (2) A person guilty of an offence under subsection (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.

The statutory maximum fine on summary conviction is currently £5,000. The fine on conviction on indictment is unlimited.

SECTION 72 OF THE ACT

The text of section 72 is set out below. Text marked as [...] denotes the omission of provisions that are not relevant for section 63 purposes.

- 72.- (1) This section applies to an offence under [...] section [...] 65.
- (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 subsection (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, subsection (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 subsection (5) “partner” includes a person purporting to act as a partner.

DATED this [] day of [] 20
THE HONOURABLE MR JUSTICE []

]

EXPLANATORY NOTE TO WARRANT UNDER SECTIONS 63 AND 64 OF THE COMPETITION ACT 1998 ('THE ACT')

This Explanatory Note is provided for information only. It is not a detailed note of the powers under the Act or of the European Commission's powers of enquiry and investigation which are subject to interpretation respectively by the courts and the Court of Justice of the European Communities.

Subject matter and powers

Officers of the Director General of Fair Trading (the 'Director') and officials of the European Commission have been authorised under Warrant to enter and search the premises identified in the Warrant in connection with an investigation under the EC competition rules. The investigation has been ordered by a decision of the European Commission. The subject matter of this investigation is set out in paragraph 1 of the Warrant and in the European Commission's decision. The Director's officers and officials of the European Commission will not elaborate on this.

Paragraph 3 of the Warrant sets out the powers of the named authorised officer,⁶ the other investigating officers and the named officials of the European Commission under section 63 of the Act for the purposes of the present investigation. On entering the premises, the named authorised officer, the other investigating officers and the named officials of the European Commission will, as a matter of practice, produce evidence of their identity when producing the Warrant.

Unless the Court has ordered otherwise, the initial production of the Warrant and entry to premises must take place between 9.30 a.m. and 5.30 p.m. Monday to Friday and, once officers have entered premises under the authority of the Warrant, they may outside those times and whilst the Warrant remains in force, remain on the premises or re-enter the premises to continue executing the Warrant.

Access to legal advice

You are advised to seek legal advice. If you decide to do so you should act promptly and this must not unduly delay or impede the investigation. Any delay must be kept to a strict minimum.

⁶ The named authorised officer is the principal officer of the Director who, together with the Director's other investigating officers and the named officials of the European Commission, is authorised by the Warrant to exercise the powers under section 63 of the Act. His name and the names of the other investigating officers and the named officials of the European Commission are set out in Schedule B to the Warrant.

Self-incrimination

You may be requested to provide oral explanations on the spot. However, if your undertaking is suspected of having committed an infringement of EC competition laws, or you have committed the offence of intentional obstruction under section 65 of the Act,⁷ you cannot be compelled to provide answers or statements that might involve an admission on your part of the existence of that infringement or offence.

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8 OJ L13, 21.6.62, p204; OJ Sp Ed (1959–62) p87.

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Examples of conditions that the named authorised officer may impose pursuant to (3) above include: that you do not disturb or move any document or information that is the subject of the Warrant; and/or you do not tell anyone other than your legal adviser about the Warrant or the investigation.

The Court cannot question the need for the investigation, nor the lawfulness of the assessments of fact and law made by the European Commission in adopting the decision to order the investigation. Such issues may be raised only in proceedings for review of that decision brought before the Court of First Instance of the European Communities.