

PRACTICE DIRECTION – APPLICATION FOR A WARRANT UNDER THE COMPETITION ACT 1998

Interpretation

- 1.1 In this practice direction –
- (1) ‘the Act’ means the Competition Act 1998;
 - (2) ‘the Commission’ means the European Commission;
 - (3) ‘Commission official’ means a person authorised by the Commission for any of the purposes set out in section 62(10), 62A(12) or 63(10) of the Act;
 - (4) ‘the OFT’ means the Office of Fair Trading;
 - (5) ‘officer’ means an officer of the OFT;
 - (6) ‘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
 - (7) ‘warrant’ means a warrant under section 28, 28A, 62, 62A, 63, 65G or 65H of the Act.
- 1.2 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 OFT, references to the OFT shall be interpreted as referring to that regulator.

Application for a warrant

- 2.1 An application by the OFT 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 should be made to a judge of the Chancery Division at the Royal Courts of Justice (if available).
- 2.3 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 OFT 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 OFT 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 OFT 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;
 - (6) the name and position of the officer who it is intended will be the named officer;
 - (7) if it is intended that the warrant may pursuant to a relevant provision of the Act authorise any person (other than an officer or a Commission official) to accompany the named officer in executing the warrant, the name and job title of each such person and the reason why it is intended that he may accompany the named officer.
- 4.4 There must be exhibited to an affidavit in support of the application –

- (1) the written authorisation of the OFT containing the names of –
 - (a) the officer who it is intended will be the named officer;
 - (b) the other persons who it is intended may accompany him in executing the warrant; and
- (2) in the case of an application under section 62, 62A 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 forms of warrant under sections 28 and 62 of the Act, and explanatory notes to be produced and served with them, are annexed to this practice direction. These forms and notes should be used with appropriate modifications in applications for warrants under other sections of the Act.)

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), 64(1) or 65(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, Commission officials or other persons who may accompany him in executing the warrant;
- (4) set out the action which the warrant authorises the persons executing it to take under the relevant section of the Act;
- (5) give the date on which the warrant is issued;
- (6) 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
- (7) 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 OFT –

- (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 persons named in the warrant 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 persons executing a warrant propose to remove any items from the premises pursuant to the warrant 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.

Application under s.59 Criminal Justice and Police Act 2001

- 10.1 Attention is drawn to section 59 of the Criminal Justice and Police Act 2001, which makes provision about applications relating to property seized in the exercise of the powers conferred by (among other provisions) section 28(2) of the Act.
- 10.2 An application under section 59 –
 - (1) must be made by application notice in accordance with CPR Part 23; and
 - (2) should be made to a judge of the Chancery Division at the Royal Courts of Justice (if available).

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

CLAIM No. of 20

CLAIMANT:

[OFFICE 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 or other persons 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 Office of Fair Trading *[or other name of Claimant]* (“the OFT”) 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 OFT authorised to act as the “named officer”, set out in Schedule A to this Warrant. The named officer is the principal officer of the OFT 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 under section 25 *[insert the relevant subsection(s) (2), (3), (4), (5), (6), (7) as appropriate]* of the Act

by the OFT on the grounds that *[insert the text of the relevant subsection(s) (2), (3), (4), (5), (6), (7) as appropriate]*.

2. *[Set out the subject matter and purpose of the investigation]*.
3. 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.
4. By this Warrant the named officer and the other officers [and person(s)] *[The words in brackets shall be included if the Judge so orders pursuant to section 28(3A).]* named in Schedule B and authorised in writing by the OFT 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 stored in any electronic form 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 or from which it can readily be produced in a visible and legible form
 and the power to require such information to be produced includes the power to require any document to be produced which the named officer believes may contain that information;

- (g) to take action as mentioned in paragraphs 4(a) to (f) above in relation to any other documents on the premises relating to the investigation described in paragraphs 1 and 2 above. *[Paragraph (g) to be included in a warrant under section 28(1)(b) if the Judge so orders pursuant to section 28(3).]*
- 5. Pursuant to section 50 of the Criminal Justice and Police Act 2001, the powers set out in paragraph 4 of this Warrant include the powers-
 - (a) in relation to the power in paragraph 4(b)-
 - (i) to take copies of any document in order to determine later and elsewhere whether (or the extent to which) the document is of the relevant kind, where in all the circumstances it is not reasonably practicable to determine this on the premises; and
 - (ii) to take copies of any document comprised in something else where in all the circumstances it is not reasonably practicable to separate, on the premises, the document which is of the relevant kind from a document which is not but in which it is comprised; and
 - (b) in relation to the power in paragraph 4(c), the same powers as in 5(a) above except that the references to taking copies of any document are to be treated as references to taking possession of the document itself.
- 6. Any person entering the premises by virtue of this Warrant may take with him such equipment as appears to him to be necessary.
- 7. 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.
- 8. 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.
- 9. 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.
- 10. 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” means premises (or any part of premises) not used as a dwelling; and includes any land or means of transport.

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 PERSONS AUTHORISED TO EXECUTE THE WARRANT

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

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

[insert name of each of the other person(s)] who is *[insert job title of each person]* and who *[is/are]* authorised in writing by the OFT to accompany the named officer. *[This paragraph shall be included if the Judge so orders pursuant to section 28(3A).]*

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 OFT in connection with any function of the OFT under Part 1 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 OFT in connection with any of its functions under Part 1 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 Office of Fair Trading ('the OFT') *[[if the Judge so orders pursuant to section 28(3A), insert the following here and elsewhere as indicated]* and other persons] 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 2 of the Warrant. The officers [and other persons] will not elaborate on this.

Paragraph 4 of the Warrant sets out the powers of the named officer¹ and other officers [and other persons] under section 28 of the Act for the purposes of the present investigation. On entering the premises, the named officer will, as a matter of practice, produce evidence of the identity of the other officers in addition to his 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 [and other persons] 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 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 officers will grant a request to allow a reasonable time for your legal adviser to arrive at the premises before the inspection continues.

If you decide to seek legal advice you should do so promptly and this must not unduly delay or impede the inspection. 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 inspection, the named officer and other officers [and other persons] will not wait for your external legal adviser to arrive.

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

Self-incrimination

The named officer and other officers [and other persons] 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 information which is stored in any electronic form 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.

You should note also that, any statement made by a person in response to a requirement imposed by the named officer or other officers [or other persons] in exercise of their powers under paragraph 4 of the Warrant, may not be used in evidence against him on a prosecution for an offence under section 188 of the Enterprise Act 2002 (the cartel offence) unless, in the proceedings –

- (a) in giving evidence, he makes a statement inconsistent with it, and
- (b) evidence relating to it is adduced, or a question relating to it is asked, by him or on his behalf.

Legally privileged communications

The powers under section 28 of the Act to search, take copies etc. (set out in paragraph 4(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 officer [or other person] 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 inspection, 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 officers [or other persons] 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 inspection on the premises you should identify any part or parts of 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 interests¹.

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

It is for the OFT to determine whether or not the information is to be disclosed in accordance with Part 9 of the Enterprise Act 2002 and any applicable obligation or power to disclose information pursuant to Council Regulation (EC) No. 1/2003².

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

² Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1, 4.1.2003, p.1.

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 officers [and other persons] to enter and remain on the premises;
- (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.

Application under section 59 Criminal Justice and Police Act 2001

Your attention is drawn to section 59 of the Criminal Justice and Police Act 2001, which makes provision about applications relating to property seized in the exercise of the powers conferred by (among other provisions) section 28(2) of the Act.

An application under section 59 –

- (1) must be made by application notice in accordance with Part 23 of the Civil Procedure Rules; and
- (2) should be made to a judge of the Chancery Division at the Royal Courts of Justice (if available).

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

CLAIM No. of 20

CLAIMANT:

OFFICE OF FAIR TRADING
[insert address]

PREMISES TO WHICH THIS WARRANT RELATES:

[insert address]

**WARRANT TO ENTER PREMISES AND EXERCISE POWERS
UNDER SECTIONS 62 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 any person in the exercise of his 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 Office of Fair Trading (“the OFT”) to The Honourable Mr Justice *[insert name]* (“the Judge”), for a warrant under section 62(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 62(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 OFT authorised to act as the “named officer”, set out in Schedule A to this Warrant. The named officer is the principal officer of the OFT 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 inspection by the European Commission ordered by its Decision *[insert Decision number]* dated *[insert date]* into *[set out the subject matter and purpose of the inspection]*.

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 persons named in Schedule B 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 for books and records which a Commission official has power to examine, using such force as is reasonably necessary for the purpose;
 - (c) to take or obtain copies of or extracts from such books and records; and
 - (d) to seal the premises, any part of the premises or any books or records which a Commission official has power to seal, for the period and to the extent necessary for the inspection.
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:

"books and records" includes books and records stored on any medium;

"Commission official" means any of the persons authorised by the European Commission to conduct the inspection ordered by the Decision specified in paragraph 1 of this Warrant and whose name is set out in Schedule B;

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

“premises” means any premises (and includes any land or means of transport) of an undertaking or association of undertakings which a Commission official has power to enter in the course of the inspection ordered by the Decision specified in paragraph 1 of this Warrant; and for the avoidance of doubt, “premises” does not include the homes of directors, managers or other members of staff of the undertaking or association of undertakings concerned.

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 PERSONS AUTHORISED TO EXECUTE THE WARRANT

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

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

[insert name of each of the other person(s)] who is *[insert job title of each person]* and who *[is/are]* authorised in writing by the OFT to accompany the named officer. *[This paragraph shall be included if the Judge so orders pursuant to section 62(5A).]*

[insert name of each of the Commission officials] who are the persons authorised by the European Commission to conduct the inspection ordered by the Decision specified in paragraph 1 of this Warrant.

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 Office of Fair Trading (the 'OFT') *[[if the Judge so orders pursuant to section 62(5A), insert the following here and elsewhere as indicated]*, other persons] and European Commission officials ('Commission officials') 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 inspection of the premises has been ordered by a decision of the European Commission. The subject matter of this inspection is set out in paragraph 1 of the Warrant and in the European Commission's decision. The officers [, other persons] and Commission officials will not elaborate on this.

Paragraph 3 of the Warrant sets out the powers of the named officer¹, the other officers [, other persons] and the Commission officials under section 62 of the Act for the purposes of the present inspection. On entering the premises, the named officer and the Commission officials will, as a matter of practice, produce evidence of the identity of the other officers in addition to 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 the officers [, the other persons] and Commission officials 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 Commission officials.

¹ The named officer is the principal officer of the OFT who, together with the other officers [, other persons] and Commission officials, is authorised by the Warrant to exercise the powers under section 62 of the Act. His name and the names of the other officers [, other persons] and Commission officials are set out in Schedule B to the Warrant.

Self-incrimination

You may be requested to provide explanations on facts or documents relating to the subject matter and purpose of the inspection. 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 Act¹, 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 under section 62 of the Act (set out in paragraph 3(b) onwards in the Warrant) 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 Commission officials 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 Commission officials that they may be examined or copied. If no agreement is reached on the day of the inspection, the named officer or the Commission officials 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. The European Commission may adopt a decision requiring the documents to be handed over. You can challenge this by bringing proceedings for review of that decision before the Court of First Instance of the European Communities.

1 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 Commission officials 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 inspection 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 28 of Council Regulation (EC) No. 1/2003¹).

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 officers [, other persons] and the Commission officials to enter and remain on the premises;

¹ Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1, 4.1.2003, p.1.

- (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, the inspection or the investigation.

In issuing the Warrant the judge was satisfied that the applicable statutory grounds were met, in particular that the measures authorised by the Warrant are neither arbitrary nor excessive having regard to the subject matter of the inspection ordered by the European Commissions decision specified in paragraph 1 of the Warrant. The Court cannot question the need for the inspection or the investigation, nor the lawfulness of the assessments of fact and law made by the European Commission in adopting the decision to order the inspection. Such issues may be raised only in proceedings for review of that decision brought before the Court of First Instance of the European Communities.

