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STATUTORY INSTRUMENTS

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**1998 No. 1271**

**MONOPOLIES AND MERGERS**

**The Restriction on Agreements and Conduct  
(Specified Domestic Electrical Goods) Order 1998**

<i>Made</i>	- - - -	<i>19th May 1998</i>
<i>Laid before Parliament</i>		<i>20th May 1998</i>
<i>Coming into force</i>	- -	<i>1st September 1998</i>

Whereas the Secretary of State, in accordance with section 91(2) of the Fair Trading Act 1973<sup>(1)</sup>, published on 15th August 1997 a notice stating her intention to make this Order, indicating the nature of the provisions to be embodied in it and stating that any person whose interests were likely to be affected by it and who was desirous of making representations in respect of it should do so in writing before 17th October 1997;

And whereas the Secretary of State has considered the representations made to her in accordance with the notice;

Now, therefore, the Secretary of State, being the appropriate Minister within the meaning of section 56 of the said Act, in exercise of the powers conferred on her by sections 56(2) and 90(2), (3), (4) and (7) of, and paragraphs 1, 4, 6, 7 and 11 of Schedule 8 to, the said Act, and for the purpose of remedying or preventing adverse effects specified in reports of the Monopolies and Mergers Commission entitled “Domestic Electrical Goods: I—A report on the supply in the UK of televisions, video cassette recorders, hi-fi systems and camcorders” and “Domestic Electrical Goods: II—A report on the supply in the UK of washing machines, tumble dryers, dishwashers and cold food storage equipment”, and all other powers enabling her in that behalf, hereby makes the following Order:—

**Citation, commencement and interpretation**

1.—(1) This Order may be cited as the Restriction on Agreements and Conduct (Specified Domestic Electrical Goods) Order 1998 and shall come into force on 1st September 1998.

(2) In this Order—

“agreement”, as used in article 12 but not elsewhere in this Order, has the meaning given in article 12(4);

“Article 85.1” and “Article 85.3” have the meanings given in article 12(4);

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(1) 1973 c. 41.

“camcorder” means a machine which is—

- (a) designed to record sequences of live visual images onto video cassettes;
- (b) designed to be carried about easily while being used; and
- (c) intended primarily for the use of consumers;

“cold food storage equipment” means a machine which is—

- (a) designed to store food at a temperature near or below 0° Celsius; and
- (b) intended primarily for the use of consumers,

but does not include a machine designed to be connected to a gas supply;

“compliance measures” has the meaning given in article 10(2);

“consumer” has the same meaning as in section 137(2) of the Fair Trading Act 1973;

“dealer” means a person carrying on a business of selling specified goods, whether by wholesale or by retail;

“dishwasher” means a machine which is—

- (a) designed to wash cutlery, crockery, cooking equipment and similar items; and
- (b) intended primarily for the use of consumers,

but does not include a machine designed to be connected to a gas supply;

“hi-fi system” means a machine (whether or not it includes a radio receiver)—

- (a) which is designed, when connected to an electricity supply but without otherwise being linked to apparatus not forming part of the machine, to reproduce sounds recorded on both tapes and discs, whether digital or analogue; and
- (b) which is intended primarily for the use of consumers,

but does not include a machine—

- (a) which is designed to reproduce recorded visual images;
- (b) which is designed to be carried about easily while being used; or
- (c) which is designed for use in a motor vehicle,

and for the purposes of this definition “machine” includes a group of machines sold as a single package;

“permitted grounds” has the meaning given in articles 5 and 6;

“requesting dealer” has the meaning given in article 4(1);

“specified goods” means camcorders, cold food storage equipment, dishwashers, hi-fi systems, televisions, tumble dryers, video cassette recorders, washing machines or any of them;

“supplier” means a person carrying on a business of selling specified goods other than a business in which such goods are sold only by retail;

“supplier’s criteria” has the meaning given in article 6(2);

“television” means a television receiver as defined in section 1(7) of the Wireless Telegraphy Act 1949(2);

“tumble dryer” means a machine which is—

- (a) designed to dry clothes or other fabrics by means of heated air blown into a rotating drum; and
- (b) intended primarily for the use of consumers,

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(2) 1949 c. 54; section 1(7) was added by the Broadcasting Act 1990 (c. 42), Schedule 18, paragraph 1(6).

but does not include a machine which is designed to be connected to a gas supply;

“video cassette recorder” means a machine which—

- (a) is designed to:
  - (i) record television programmes on to video cassettes; and
  - (ii) play video cassettes so that sounds and visual images recorded on them can be reproduced on a television receiver linked to the machine; and
- (b) is intended primarily for the use of consumers; and

“washing machine” means a machine which is—

- (a) designed to wash clothes and other fabrics; and
  - (b) intended primarily for the use of consumers,
- but does not include a machine which is designed to be connected to a gas supply.

### **Prohibition of recommended resale prices for specified goods**

2. It shall be unlawful for a supplier, by publication or otherwise, to notify to dealers prices recommended or suggested as appropriate to be charged by those dealers for specified goods.

### **Agreements concerning a dealer’s ability to set prices**

3. It shall be unlawful for a supplier to make an agreement, or carry out an agreement (whenever made), to the extent that it restricts, directly or indirectly, a dealer’s determination of the prices at which he advertises or sells specified goods.

### **Prohibition on withholding supply of specified goods from dealers**

4.—(1) It shall be unlawful for a supplier on grounds other than permitted grounds (as to which see articles 5 and 6) to withhold, or to agree or to threaten to withhold, supplies of any specified goods from any dealer who requests supply of those goods (“the requesting dealer”).

(2) For the purposes of this article, and notwithstanding articles 5 and 6, a ground shall not be regarded as a permitted ground unless that ground is referred to in a written statement of reasons that the supplier gives to the requesting dealer at the time of withholding (or of the threat to withhold) explaining why the supplier has withheld (or threatened to withhold) the specified goods requested from him.

### **Permitted grounds**

5. For the purposes of article 4, permitted grounds are—
- (a) that the value of the requesting dealer’s orders from the supplier of the specified goods requested in the calendar year in which the request is made is, or is likely to be—
    - (i) less than a minimum value; or
    - (ii) more than a maximum value,set generally by the supplier in relation to orders by dealers for the specified goods requested;
  - (b) that the order is—
    - (i) below a minimum size; or
    - (ii) above a maximum size,

set generally by the supplier in relation to orders by dealers for the specified goods requested;

- (c) that the supplier does not have, and could not reasonably be expected to have in the near future, the specified goods requested available for supply; or
- (d) that the supplier—
  - (i) has reasonable cause to believe that the price for the supply of the specified goods requested may not be duly paid; or
  - (ii) has not had sufficient opportunity to conduct reasonable checks on the requesting dealer's ability to pay for that supply.

6.—(1) For the purposes of article 4, and provided that all the conditions in paragraph (3) are satisfied, it is also a permitted ground that the requesting dealer does not satisfy one or more of the supplier's criteria.

(2) "The supplier's criteria" means the criteria used by the supplier to determine to which dealers in the United Kingdom he will supply the specified goods requested.

(3) The conditions referred to in paragraph (1) are—

- (a) that none of the supplier's criteria—
  - (i) relate to, or have the object of increasing or maintaining, the prices at which dealers advertise or sell, have advertised or sold, or are likely to advertise or sell, specified goods; or
  - (ii) relate to the margin of profit achieved or to be achieved by dealers on the sale of specified goods;
- (b) that none of the supplier's criteria apply, or are applied by the supplier, so as to discriminate between different dealers on the ground of—
  - (i) the prices at which those dealers advertise or sell, have advertised or sold, or are likely to advertise or sell, specified goods; or
  - (ii) the margin of profit achieved or to be achieved by those dealers on the sale of specified goods;
- (c) that none of the supplier's criteria relate to—
  - (i) the question of whether dealers are willing to sell goods to any consumer, or only to certain consumers; or
  - (ii) the days on, or the times at, which dealers' premises are open for the sale of goods to consumers,

but this subparagraph is subject to paragraph (4);

- (d) that the supplier supplies the goods requested to all dealers that meet the supplier's criteria (save in circumstances where a permitted ground under article 5 applies in relation to a particular request for supply); and
- (e) that the requesting dealer has been or is given a written statement of the supplier's criteria currently in force in relation to the goods requested.

(4) Supplier's criteria to the effect that dealers should supply the specified goods requested either wholly or mainly by way of wholesale or wholly or mainly by way of retail shall not be regarded as criteria relating to the matters set out in paragraph (3)(c).

### **Unlawful discrimination**

7. It shall be unlawful for a supplier to discriminate between one dealer and another in the prices he charges them for any goods on the ground that one dealer has advertised or sold, or is likely to advertise or sell, any specified goods at lower prices than the other.

### **Unlawful preference**

8.—(1) It shall be unlawful for a supplier to give any preference to any dealer on the ground of the prices at which the dealer has advertised or sold, or is likely to advertise or sell, any specified goods.

(2) For the purposes of paragraph (1), a supplier shall be regarded as giving a preference to a dealer where he treats that dealer materially more favourably than he treats another dealer with regard to—

- (a) terms or conditions as to credit, discounts, or other matters;
- (b) times or methods of delivery or other matters arising in the execution of the contract between the supplier and that dealer; or
- (c) other matters relating to the supply of goods by him to that dealer.

### **Procuring breaches of articles 4, 7 or 8**

9. It shall be unlawful for a dealer to procure a supplier to contravene the provisions of article 4, 7 or 8.

### **Directions by the Secretary of State as to compliance measures**

10.—(1) The Secretary of State may give directions to any supplier of, or dealer in, specified goods to take such compliance measures within his competence as may be specified or described in those directions for the purpose of securing his compliance with this Order.

(2) “Compliance measures” means steps—

- (a) to introduce, maintain, or develop arrangements to ensure that any directors, employees, or agents of the supplier or dealer do not act in such a way that he contravenes any provision of article 2, 3, 4, 7, 8 or 9; or
- (b) (in the case of a supplier) to draw dealers' attention to their freedom to determine the prices at which they advertise or sell specified goods that he supplies to them.

(3) The Secretary of State may vary or revoke any directions given under paragraph (1).

### **Registrable agreements**

11. Nothing in this Order shall have the effect that it is unlawful to make or to carry out an agreement in so far as it is an agreement to which the Restrictive Trade Practices Act 1976(3) applies (or would apply if made).

### **Article 85.3 of the EC Treaty**

12.—(1) Nothing in articles 4 to 9 of this Order shall have the effect that it is unlawful to make or carry out a provision of an agreement insofar as the making or carrying out of that provision is exempted (as to which see paragraph (2)).

(2) The making or carrying out of a provision of an agreement is exempted if pursuant to Article 85.3, Article 85.1 has been declared inapplicable in the case of—

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(3) 1976 c. 33.

- (a) that agreement; or
  - (b) a category of agreements of which that agreement is a member.
- (3) For the purposes of paragraph (2)(b), the fact that an agreement—
- (a) does not have an effect on trade between Member States; or
  - (b) does not have as its object or effect the prevention, restriction or distortion of competition within the common market,

shall not prevent that agreement being regarded as a member of a category of agreements in the case of which Article 85.1 has been declared inapplicable.

- (4) In this article—

“agreement” means an agreement between undertakings, a decision of an association of undertakings or a concerted practice, within the meaning of Article 85.1; and

“Article 85.1” and “Article 85.3” are references—

- (a) to the corresponding Articles of the EC Treaty; and
- (b) to Articles 53.1 and 53.3 respectively of the Agreement on the European Economic Area signed at Oporto on 2nd May 1992, as adjusted by the Protocol signed at Brussels on 17th March 1993.

19th May 1998

*Nigel Griffiths,*  
Parliamentary Under-Secretary of State for  
Competition and Consumer Affairs,  
Department of Trade and Industry

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## EXPLANATORY NOTE

*(This note is not part of the Order)*

Article 2 of this Order prohibits suppliers of specified goods (that is to say, camcorders, cold food storage equipment, dishwashers, hi-fi systems, televisions, tumble dryers, video cassette recorders or washing machines) from recommending or notifying a price at which those goods should be resold.

Article 3 prohibits suppliers of specified goods from making or carrying out of any agreement to the extent that it restricts a dealer's determination of the prices at which he sells those goods.

Article 4 prohibits suppliers of specified goods from withholding those goods from dealers save on grounds permitted under article 5 or 6. It also provides that a ground for withholding shall not in any event be regarded as a permitted ground unless the supplier sets it out in writing to the dealer at the time of the withholding. Article 5 provides for certain permitted grounds relating to the nature or circumstances of an order for specified goods. Article 6 provides for permitted grounds relating to criteria generally employed by the supplier to choose his dealers.

Article 7 prohibits discrimination by suppliers against dealers on the ground of the prices at which those dealers supply specified goods. Article 8 prohibits the giving of preference by suppliers to dealers on the ground of the prices at which those dealers supply specified goods.

Article 9 prohibits dealers from procuring any contravention by suppliers of certain provisions of the Order.

Article 10 gives the Secretary of State power to issue directions to suppliers or dealers relating to steps taken by them to ensure their compliance with the Order.

Article 11 excludes from the scope of the Order the making or carrying out of any agreement insofar as it is an agreement to which the Restrictive Trade Practices Act 1976 applies.

Article 12 excludes from the scope of articles 4 to 9 of the Order the making or carrying out of provisions in agreements that are covered by an exemption under Article 85.3 of the EC Treaty (or Article 53.3 of the EEA Agreement). The exclusion applies even where the making or carrying out of such an agreement does not in fact, for the reasons set out in Article 12(3), infringe Article 85.1 of the EC Treaty (or Article 53.1 of the EEA Agreement).

Copies of the reports of the Monopolies and Mergers Commission on which the Order is based (Cm 3675 and Cm 3676) may be obtained from The Stationery Office.

A Regulatory Appraisal has been drawn up by the Department of Trade and Industry and is available from the Consumer Affairs and Competition Policy Directorate, Department of Trade and Industry, Room 6.R.11, 1 Victoria Street, London SW1H 0ET, Telephone 0171 215 5607. Copies have been placed in the libraries of both Houses of Parliament.