

SCHEDULE 1

Amendments to the Competition Act 1998

44. After Part 2, there is inserted—

“PART 2A

Article 22(1) investigations

65C Interpretation of Part 2A

(1) In this Part—

“Article 22(1) investigation” means an investigation conducted by the OFT on behalf and for the account of a competition authority of another Member State pursuant to Article 22(1) of the EC Competition Regulation;

“the Commission” means the European Commission;

“competition authority of another Member State” means a competition authority designated as such under Article 35 of the EC Competition Regulation by a Member State other than the United Kingdom;

“the EC Competition Regulation” means Council Regulation (EC) No. 1/2003 of 16th December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty; and

“investigating officer” has the meaning given in section 65F(1).

(2) In this Part, the following expressions have the same meanings as in Part 1—

“Article 81(1)”;

“Article 82”;

“the court”;

“document”;

“information”;

“officer”;

“the OFT”;

“person”;

“premises”

“the Treaty”; and

“working day”.

(3) For the purposes of this Part, the power to require information, in relation to information recorded otherwise than in a legible form, includes power to require a copy of it in a legible form.

(4) Any power conferred on the OFT by this Part to require information includes power to require any document which it believes may contain that information.

65D Power to conduct an Article 22(1) investigation

(1) In any of the following cases, the OFT may conduct an Article 22(1) investigation.

- (2) The first case is where there are reasonable grounds for suspecting that there is an agreement which—
 - (a) may affect trade between Member States; and
 - (b) has as its object or effect the prevention, restriction or distortion of competition within the Community.
- (3) The second case is where there are reasonable grounds for suspecting that the prohibition in Article 82 has been infringed.
- (4) The third case is where there are reasonable grounds for suspecting that, at some time in the past, there was an agreement which at that time—
 - (a) may have affected trade between Member States; and
 - (b) had as its object or effect the prevention, restriction or distortion of competition within the Community.
- (5) It is immaterial for the purposes of subsection (4) whether the agreement in question remains in existence.
- (6) A provision of this Part which is expressed to apply to, or in relation to, an agreement is to be read as applying equally to, or in relation to, a decision by an association of undertakings or a concerted practice.

65E Powers when conducting Article 22(1) investigations

- (1) For the purposes of an Article 22(1) investigation, the OFT may require any person to produce to it a specified document, or to provide it with specified information, which it considers relates to any matter relevant to the investigation.
- (2) The power conferred by subsection (1) is to be exercised by a notice in writing.
- (3) A notice under subsection (2) must indicate—
 - (a) the subject matter and purpose of the Article 22(1) investigation; and
 - (b) the nature of the offences created by sections 65L to 65N.
- (4) In subsection (1) “specified” means—
 - (a) specified, or described, in the notice; or
 - (b) falling within a category which is specified, or described, in the notice.
- (5) The OFT may also specify in the notice—
 - (a) the time and place at which any document is to be produced or any information is to be provided;
 - (b) the manner and form in which it is to be produced or provided.
- (6) The power under this section to require a person to produce a document includes power—
 - (a) if the document is produced—
 - (i) to take copies of it or extracts from it;
 - (ii) to require him, or any person who is a present or past officer of his, or is or was at any time employed by him, to provide an explanation of the document;
 - (b) if the document is not produced, to require him to state, to the best of his knowledge and belief, where it is.

65F Power to enter business premises without a warrant

(1) Any officer of the OFT who is authorised in writing by the OFT to do so (“an investigating officer”) may enter any business premises in connection with an Article 22(1) investigation.

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

- (a) gives at least two working days' notice of the intended entry;
- (b) indicates the subject matter and purpose of the Article 22(1) investigation; and
- (c) indicates the nature of the offences created by sections 65L to 65N.

(3) Subsection (2) does not apply—

- (a) if the OFT has a reasonable suspicion that the premises are, or have been, occupied by—
 - (i) a party to an agreement which it is investigating under section 65D; or
 - (ii) an undertaking the conduct of which it is investigating under section 65D; or
- (b) if the investigating officer has taken all such steps as are reasonably practicable to give notice but has not been able to do so.

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

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

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

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

(6) In this section “business premises” means premises (or any part of premises) not used as a dwelling.

65G Power to enter business premises under a warrant

- (1) On an application made by the OFT to the court in accordance with rules of court, a judge may issue a warrant if he is satisfied that—
- (a) there are reasonable grounds for suspecting that there are on any business premises documents—
 - (i) the production of which has been required under section 65E or 65F; and
 - (ii) which have not been produced as required;
 - (b) there are reasonable grounds for suspecting that—
 - (i) there are on any business premises documents which the OFT has power under section 65E to require to be produced; and
 - (ii) if the documents were required to be produced, they would not be produced but would be concealed, removed, tampered with or destroyed; or
 - (c) an investigating officer has attempted to enter premises in the exercise of his powers under section 65F but has been unable to do so and that there are reasonable grounds for suspecting that there are on the premises documents the production of which could have been required under that section.
- (2) A warrant under this section shall authorise a named officer of the OFT and any other of its officers whom the OFT has authorised in writing to accompany the named officer—
- (a) to enter the premises specified in the warrant, using such force as is reasonably necessary for the purpose;
 - (b) to search the premises and take copies of, or extracts from, any document appearing to be of a kind in respect of which the application under subsection (1) was granted (“the relevant kind”);
 - (c) to take possession of any documents appearing to be of the relevant kind if—
 - (i) such action appears to be necessary for preserving the documents or preventing interference with them; or
 - (ii) it is not reasonably practicable to take copies of the documents on the premises;
 - (d) to take any other steps which appear to be necessary for the purpose mentioned in paragraph (c)(i);
 - (e) to require any person to provide an explanation of any document appearing to be of the relevant kind or to state, to the best of his knowledge and belief, where it may be found;
 - (f) to require any information which is stored in any electronic form and is accessible from the premises and which the named officer considers relates to any matter relevant to the Article 22(1) 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.
- (3) If, in the case of a warrant under subsection (1)(b), the judge is satisfied that it is reasonable to suspect that there are also on the premises other documents relating to the Article 22(1) investigation concerned, the warrant shall also authorise action mentioned in subsection (2) to be taken in relation to any such document.
- (4) A warrant under this section may authorise persons specified in the warrant to accompany the named officer who is executing it.
- (5) Any person entering premises by virtue of a warrant under this section may take with him such equipment as appears to him to be necessary.

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

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

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

(9) In this section “business premises” has the same meaning as in section 65F.

65H Power to enter domestic premises under a warrant

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

(a) there are reasonable grounds for suspecting that there are on any domestic premises documents—

(i) the production of which has been required under section 65E; and

(ii) which have not been produced as required; or

(b) there are reasonable grounds for suspecting that—

(i) there are on any domestic premises documents which the OFT has power under section 65E to require to be produced; and

(ii) if the documents were required to be produced, they would not be produced but would be concealed, removed, tampered with or destroyed.

(2) A warrant under this section shall authorise a named officer of the OFT, and any other of its officers whom the OFT has authorised in writing to accompany the named officer—

(a) to enter the premises specified in the warrant, using such force as is reasonably necessary for the purpose;

(b) to search the premises and take copies of, or extracts from, any document appearing to be of a kind in respect of which the application under subsection (1) was granted (“the relevant kind”);

(c) to take possession of any documents appearing to be of the relevant kind if—

(i) such action appears to be necessary for preserving the documents or preventing interference with them; or

(ii) it is not reasonably practicable to take copies of the documents on the premises;

(d) to take any other steps which appear to be necessary for the purpose mentioned in paragraph (c)(i);

(e) to require any person to provide an explanation of any document appearing to be of the relevant kind or to state, to the best of his knowledge or 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.

(3) If, in the case of a warrant under subsection (1)(b), the judge is satisfied that it is reasonable to suspect that there are also on the premises other documents relating to the investigation

concerned, the warrant shall also authorise action mentioned in subsection (2) to be taken in relation to any such document.

(4) A warrant under this section may authorise persons specified in the warrant to accompany the named officer who is executing it.

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

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

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

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

(9) In this section, “domestic premises” means premises (or any part of premises) that are used as a dwelling and are—

- (a) premises also used in connection with the affairs of an undertaking or association of undertakings; or
- (b) premises where documents relating to the affairs of an undertaking or association of undertakings are kept.

65I Entry of premises under a warrant: supplementary

(1) A warrant issued under section 65G or 65H must indicate—

- (a) the subject matter of the Article 22(1) investigation;
- (b) the nature of the offences created by sections 65L to 65N.

(2) The powers conferred by section 65G or 65H are to be exercised on production of a warrant issued under that section.

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

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

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

(5) In this section—

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

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

65J Privileged communications

(1) A person shall not be required, under any provision of this Part, to produce or disclose a privileged communication.

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

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

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

65K Use of statements in prosecution

A statement made by a person in response to a requirement imposed by virtue of any of sections 65E to 65H may not be used in evidence against him on a prosecution for an offence under section 188 of the Enterprise Act 2002 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.

65L Offences

(1) A person is guilty of an offence if he fails to comply with a requirement imposed on him under section 65E, 65F, 65G or 65H.

(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.

(4) Failure to comply with a requirement imposed under section 65E or 65F is not an offence if the person imposing the requirement has failed to act in accordance with that section.

(5) A person is guilty of an offence if he intentionally obstructs an officer acting in the exercise of his powers under section 65F.

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

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

(7) A person who intentionally obstructs an officer in the exercise of his powers under a warrant issued under section 65G or 65H is guilty of an offence and liable—

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

Changes to legislation: *There are currently no known outstanding effects for the The Competition Act 1998 and Other Enactments (Amendment) Regulations 2004, Paragraph 44. (See end of Document for details)*

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

65M Destroying or falsifying documents

(1) A person is guilty of an offence if, having been required to produce a document under section 65E, 65F, 65G or 65H—

- (a) he intentionally or recklessly destroys or otherwise disposes of it, falsifies it or conceals it, or
 - (b) he causes or permits its destruction, disposal, falsification or concealment.
- (2) A person guilty of an offence under 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.

65N False or misleading information

(1) If information is provided by a person to the OFT in connection with any function of the OFT under this Part, 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 this Part, is guilty of an offence.

- (3) A person guilty of an offence under this section 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.”.

Changes to legislation:

There are currently no known outstanding effects for the The Competition Act 1998 and Other Enactments (Amendment) Regulations 2004, Paragraph 44.