

Competition Act 1998

Decision of the Director General of Fair Trading
No. CA98/8/2001*

Memorandum of Understanding on the supply of oil fuels in an
emergency

25 October 2001
(Case CP/1730-00/S)

SUMMARY

The Director General of Fair Trading has concluded that a Memorandum of Understanding, which was drawn up by the Government following the September 2000 fuel crisis, has the object and effect of preventing, restricting or distorting competition within the United Kingdom but that it merits an individual exemption from the Chapter I prohibition, subject to certain conditions and obligations. The Director has also concluded that since there is no evidence that any of the actions under the MoU have resulted in an abuse, the Chapter II prohibition has not been infringed.

The MoU was signed by the Government, major oil companies, oil independents, road hauliers, the police and trade unions following the September 2000 fuel crisis in order to preserve the supply of oil fuels and, in the event of unavoidable supply disruption, to protect supplies to essential users. It was notified by the major oil companies.

The Director has concluded that an individual exemption from the Chapter I prohibition is merited because: the MoU improves the distribution of oil fuels during an oil fuel emergency; consumers in the form of essential users would benefit directly and consumers in general would benefit from the priority given to these users, who for example, provide emergency services, maintain public safety or supply food; the

* Certain information has been excluded from this document in order to comply with the provisions of section 56 of the Competition Act 1998 (confidentiality and disclosure of information). Excisions are denoted by [...].

restrictions upon competition arising from the MoU are no more than necessary; and, as the MoU does not affect competition for a substantial amount of oil fuel that is surplus to the Government's allocation requirements, the MoU does not eliminate competition in respect of a substantial part of the products in question.

The public were consulted about the Director's proposal to issue an individual exemption. A notice was issued on 12 July 2001. No substantive responses to the public consultation were received.

I THE FACTS

A Background

- 1 On 7 November 2000 the Memorandum of Understanding (MoU) was notified by BP Oil UK Limited, Conoco Limited, Esso Petroleum Company Limited, Shell U.K. Limited, Texaco Limited, TotalFina Oil GB Limited and Elf Oil UK Limited (the Applicants) to the Director General of Fair Trading (the Director) for a decision under sections 14 and 22 of the Competition Act 1998 (the Act). The Applicants requested a decision that the MoU does not infringe the prohibition imposed by section 2 of the Act (the Chapter I prohibition) or that in the alternative, the Director grant an individual exemption under section 4 of the Act and also requested a decision that the MoU does not infringe the prohibition imposed by section 18 of the Act (the Chapter II prohibition). In reaching this decision the Director has taken into account agreements, concerted practices and conduct which have arisen out of the implementation of the MoU and about which he has been informed. He has not considered agreements, concerted practices or conduct which occurred during the September 2000 fuel crisis and before the MoU had been signed.

- 2 A summary of the notification was placed on the public register of the Office of Fair Trading (the Office) on 6 December 2000. It was also published in the Office's Weekly Gazette.¹ An invitation to comment was placed in *Forecourt Trader* magazine requesting third parties' views on the MoU.² Letters inviting comment were also sent to certain third parties identified as having an interest in the MoU.

¹ Issue 01/2001, 30 December 2000 – 05 January 2001.

² 'Forecourt Trader', William Reed Publishing Ltd, Issue January 2001, p 36.

3 A notice was issued in accordance with rule 12 of the Director's procedural rules (the Director's rules) on 12 July 2001.³ The Director's rules provide that if, on an application under section 14 of the Act for an agreement to be examined, the Director proposes to grant an individual exemption from the Chapter I prohibition, whether or not subject to conditions or obligations, he must consult the public.⁴ On an application under section 22 for conduct to be considered, the Director may consult the public if he proposes to make a decision that the Chapter II prohibition has not been infringed.⁵ The notice set out the Director's proposal to grant an individual exemption from the Chapter I prohibition to the MoU subject to certain conditions and obligations and the reasons for this proposed action. It also indicated the Director's view that the Chapter II prohibition had not been infringed. The notice set out the time within which written representations could be made to the Director on these matters. No substantive written representations were received in response to the consultation.

4 This decision is issued under the Act in accordance with rule 15 of the Director's rules. It states the facts on which the Director relies and his reasons for the decision.⁶

B The parties

5 The parties to the MoU, when it was notified, comprised the Applicants and the Association of United Kingdom Oil Independents (AUKOI), P & O Trans European (Holdings) Limited, Hoyer UK Limited, Excel Tankfreight plc, the UK Government, the Scottish Executive, the National Assembly for Wales, the Association of Chief Police Officers, the Association of Chief Police Officers (Scotland) and the Trades Union Congress. The Applicants have informed the Office that to their knowledge Wincanton Limited and Kuwait Petroleum (G. B.) Limited have also become signatories to the MoU. The Office has also become aware that Murco Petroleum Limited has become a signatory.

THE APPLICANTS

6 The seven Applicants are all active in the downstream market for petroleum products (that is in the post exploration and production phase in the supply of raw petroleum (crude oil)) and refine, distribute and market (that is retail) oil fuels. They are vertically integrated oil companies having operations worldwide.

³ The Competition Act 1998 (Director's rules) Order 2000 SI 2000/293. This is available on the Office of Fair Trading's web site www.of.gov.uk/html/comp-act/technical_guidelines/index.html.

⁴ Rule 12(1)(a) of the Director's rules.

⁵ Rule 12(2) of the Director's rules.

OIL INDEPENDENTS

- 7 The member companies of AUKOI are engaged in petrol wholesaling and retailing. They were Bayford & Co Ltd, BWOC Ltd, Emir 8 Petroleum plc, Flare (1980) Ltd, Futura Petroleum Limited, Greenergy UK Limited, Mabanafit limited, Maxol Oil Ltd, Wm Morrison Supermarkets plc, Sainsbury's Supermarkets plc, Tesco Stores Ltd, Safeway Stores plc and Save Group plc.
- 8 Kuwait Petroleum (G. B.) Limited and Murco Petroleum Limited are also oil independents.

ROAD HAULIERS

- 9 Road hauliers who independently transport oil fuel and are parties to the agreement are Excel Tankfreight plc, Hoyer UK Limited, P & O Trans European (Holdings) Limited and Wincanton Limited.

GOVERNMENT, POLICE AND TRADE UNIONS

- 10 Other signatories to the agreement include: the UK Government, the Scottish Executive, the National Assembly for Wales; the police, namely – the Association of Chief Police Officers and the Association of Chief Police Officers (Scotland); and, the Trades Union Congress.

C The agreement notified

- 11 The MoU is dated 29 September 2000. It was drawn up by the UK Government following the establishment of a Fuel Supply Task Force in response to the fuel crisis which took place in September 2000. It sets out a series of practical arrangements aimed at maintaining continuity of supply.
- 12 No agreements were notified by the Applicants other than the MoU. The Director has however been informed about certain agreements, concerted practices and conduct which have arisen out of the implementation of the MoU and these have been taken into account in reaching this decision.
- 13 The MoU states that 'the companies ... are engaged in joint planning and processes with the aim of preserving supply and, in the event of unavoidable supply disruption, of protecting supplies to defined essential users'. The main elements of the planning, information and management system will include

⁶ Rule 15(1) of the Director's rules.

(amongst other things) 'reviewing the level, location and role of oil fuel stocks in the event of disruption', 'facilitating the movement of oil fuels to users, and, in particular to defined essential users', and 'controlling the delivery of oil fuels to customers in the event of disruption to supplies'.

14 In the event of 'a significant disruption, or the threat of significant disruption, to normal supply' (oil fuel emergency), the MoU states that 'the UK Government will request that a jointly managed approach to the distribution of oil fuels be implemented, with priority for defined essential users'.

15 Since the UK fuel crisis in September 2000 the parties have been engaged in confidential joint planning and processes and joint working to refine the arrangements that will be implemented in an oil fuel emergency.

16 [...].

17 [...].

18 [...].

[...]

19 [...].

D Public concerns about the MoU

20 During the course of its consideration of the notification, the Office received complaints suggesting that the MoU was anti-competitive. These were received both in response to its invitation to comment in *Forecourt Trader* and independently.

AUKOI

21 AUKOI was concerned that the direction of supplies or the allocation of supplies under the MoU posed many commercial problems. It argued that there was a need for clarity of commercial law, such as the taking of emergency powers by Government, before any form of allocation or direction of supplies.

- 22 The association requested that commercially sensitive information not otherwise in the public domain, such as on stocks and tanker deliveries, should not be exchanged and should be kept isolated from undertakings that are parties to the MoU.
- 23 It suggested that an abuse of a dominant position could occur during an oil fuel emergency if the Applicants as refiners, wholesalers and retailers of oil fuels, whilst competing with the oil independents at the retail pump and in the distribution market (to supply hauliers, agriculture, commercial users and home heating customers) did not make surplus supplies available to their regular customers in an equitable manner based on the supply pattern in the same month(s) as an oil fuel emergency but in the preceding year.

SECOND RESPONDENT

- 24 A second respondent was concerned about the legal position of oil distributors – in relation to their business commitments and obligations to their customers who may (or may not) be 'essential users' - in circumstances under the MoU where restrictions are progressively put into place but where no state of emergency has been declared. It claimed that the MoU was weak and potentially unworkable in the mechanism of defining essential users (other than those who can access retail service station forecourts), how such essential users identify themselves, what requirement exists on the part of their suppliers (oil distributors) to provide supply, and how – in turn – bulk suppliers (such as the Applicants) to oil distributors are required to provide supply. The second respondent argued that, without a Government declared state of emergency, any actions taken by the parties to the MoU could be regarded as protected by it irrespective of whether they were designed to damage competition, or the interests of competitors, or businesses which are not dependent on supplying retail service stations.

THIRD RESPONDENT

- 25 A third respondent, one of the largest independent suppliers, was concerned that the MoU would provide a platform for the legal destruction of independent retailers on a greater scale than ever seen before. It argued that so long as a situation exists whereby the Applicants supply the retail market through their own outlets they could not be trusted to trade fairly with their competitors during an oil fuel emergency.

FOURTH RESPONDENT

- 26 A fourth respondent was concerned that, under the MoU, the Applicants should not refuse to supply independent distributors who purchase ex-rack (collect fuel direct from oil depots), in anticipation of short supply, where there are no restrictions on a particular terminal as this prevents the distributors from trading.
- 27 The fourth respondent was also concerned that the Applicants would release very little product to distributors during an oil fuel emergency so that the distributors would not be in a position to compete with the Applicants as suppliers to retailers and other commercial customers and that, possibly, there would be a lack of pro-rata apportionment to distributors of any surplus supply of product that would be released. It was especially concerned about distributors who would be unable to collect supplies from the Applicants' terminals.

II LEGAL AND ECONOMIC ASSESSMENT

A Introduction

- 28 Section 2(1) of the Act sets out the Chapter I prohibition of agreements between undertakings, decisions by associations of undertakings or concerted practices which may affect trade within the UK and have as their object or effect the prevention, restriction or distortion of competition within the UK. An agreement which falls within the scope of the Chapter I prohibition may be exempted if it satisfies the criteria set out in section 9 of the Act. An individual exemption may be granted to a particular agreement if a request for exemption is made by a party to the agreement and the agreement is one to which section 9 applies.
- 29 Section 18 of the Act sets out the Chapter II prohibition of conduct on the part of one or more undertakings which amounts to the abuse of a dominant position in a market if it may affect trade within the UK.

B The relevant markets

THE RELEVANT PRODUCT MARKET(S)

- 30 The relevant product market comprises all those products, which are regarded as reasonably interchangeable by reason of the product's characteristics, price or intended purpose.⁷
- 31 The Applicants have suggested that the relevant product market be defined as that for the supply of (oil) fuel. 'Oil fuel' is a generic term covering categories of fuel labelled white oils, fuel oils and liquid petroleum gas (LPG). The term 'white oils' includes gasoline (petrol) and gas oil (diesel) for automotive use and kerosene for aircraft and heating. The term 'fuel oil' covers heavy furnace oils for power station and marine use. LPG is used for heating and petrochemical feedstocks. Few of these products are interchangeable – for example, motor cars are not designed to run on kerosene.
- 32 There are three levels of oil fuel supply: the supply of oil fuels in bulk from refineries; the supply of oil fuels in bulk via wholesale operations; and, the supply of oil fuels for retail. There is some overlap between the supply of oil fuels from refineries and the supply via wholesalers because some commercial end users obtain their supplies direct from refinery depots. The refiners are also active as wholesalers and retailers and some independent wholesalers also retail. Thus, whilst there is considerable supply side substitution at the various levels of supply, on the demand side private consumers are largely limited to obtaining their supplies from retail outlets whereas commercial customers have greater choice.
- 33 The MoU applies to the supply of all oil fuels at all levels of supply and does not distinguish between different types of oil fuel or the level of supply. The Director does not consider it necessary to identify each relevant product market in this case given the insensitivity of his analysis to strictly defined product markets. This decision is therefore based on the Director's analysis of the impact of the MoU on the entire down-stream supply chain for oil fuels.

⁷ Case 27/76 United Brands v Commission [1978] ECR 207 [1978] 1 CMLR 429. In the application of the Chapter I prohibition and the Chapter II prohibition the Director is required to ensure that there is no inconsistency with either the principles laid down by the EC Treaty and the European Court or any relevant decision of the European Court. The Director must also have regard to any relevant decision or statement of the European Commission.

THE RELEVANT GEOGRAPHIC MARKET(S)

- 34 The relevant geographic market comprises the area in which the undertakings concerned are involved in the supply and demand of products or services in which the conditions of competition are sufficiently homogenous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those areas.⁷
- 35 The Applicants have suggested that the relevant geographic market is the UK. This is not affected by the fact that there is international trade in oil fuels and that isolated markets can exist (for example in the Highlands and Islands in Scotland) because it is unlikely that there will be any market entry or any viable alternative sources of supply from outside the UK and there is, in general, a chain of supply substitution for oil fuels throughout the UK. The Director has therefore accepted that for the purposes of the analysis in this decision the relevant geographic market is the UK.

C The Chapter I prohibition

AGREEMENTS BETWEEN UNDERTAKINGS, DECISIONS BY ASSOCIATIONS OF UNDERTAKINGS AND CONCERTED PRACTICES

- 36 The Applicants, oil independents and road hauliers are undertakings for the purposes of section 2 of the Act. The MoU is an agreement.

EFFECT ON TRADE WITHIN THE UK

- 37 The MoU has an effect on competition in the UK during an oil fuel emergency. It may therefore affect trade within the UK within the meaning of section 2 of the Act.

THE OBJECT OR EFFECT OF PREVENTING, RESTRICTING OR DISTORTING COMPETITION IN THE UK

- 38 The Director has considered whether the MoU as a whole or any part of it has as its object or effect the prevention, restriction or distortion of competition within the UK for the purposes of the Chapter I prohibition.

- 39 The object of an agreement for the purposes of this analysis is to be found by the objective assessment of aims of the agreement.⁸ If the nature or obvious consequence of the agreement is to prevent, restrict or distort competition that is its object for the purposes of section 2 of the Act. This is so even if the parties claim that this was not their intention, or if the agreement has other objects.⁹ The subjective intentions of the parties are therefore not important in the analysis of the object of the MoU.
- 40 Thus, although the MoU states that its purpose is to 'achieve the twin aims of planning for a fuel emergency and putting those plans into action in the event of a fuel crisis', the stated aim 'of protecting supplies to defined users' is a restriction of competition. The object is to limit or control markets and also to share markets or sources of supply (by a 'jointly managed approach to the distribution of oil fuels') as set out in the illustrative list of agreements to which the prohibition may apply in section 2(2)(b) and (c) of the Act. The requirement in the MoU to facilitate 'the movement of oil fuels to users, and in particular defined users' and to participate in 'controlling the delivery of oil fuels to customers' reinforces this anti-competitive object of the agreement.
- 41 The Director's view is that if an anti-competitive object has been shown, there is no need to consider its effects. This follows the European Court which has stated '... there is no need to take account of the concrete effects of an agreement once it has as its object the prevention, restriction or distortion of competition'.¹⁰
- 42 In this case, however, the Director has decided also to consider the actual or potential effect of the MoU. This is because, in addition to the anti-competitive object considered above, other aspects of the MoU also have a bearing on competition. In particular the involvement of the parties in 'joint planning and processes' and in 'reviewing, the level, location and role of oil fuel stocks' indicates that the MoU results in the exchange of information. This has the potential effect of preventing, restricting or distorting competition, both during and after an oil fuel emergency.

[...]

- 43 [...].

⁸ Cases 29 & 30/83 CRAM & Rheinzink v Commission [1984] ECR 1679 [1985] 1 CMLR 688.

⁹ Case 96/82 IAZ v Commission [1983] ECR 3369 [1984] 3 CMLR 276.

¹⁰ Cases 56 & 58/64 Consten and Grundig v Commission [1966] ECR 299, 342 [1966] CMLR 418, 473.

44 [...].

45 [...].

46 [...].

Conclusions

47 For the reasons set out above the Director has concluded that the MoU has both the object and effect of preventing, restricting or distorting competition.

EXCLUSIONS

48 The MoU does not benefit from any exclusion from the Chapter I prohibition.

APPRECIABILITY

49 The Director has considered if the object of the MoU may be an appreciable prevention, restriction or distortion of competition. He has also considered if the MoU may have an appreciable effect on competition.

50 The Director takes the view that an agreement will generally have no appreciable effect on competition if the parties' combined share of the relevant market does not exceed 25 per cent although there will be circumstances in which this is not the case. The Director will, however, generally regard any agreement between undertakings which shares markets as being capable of having an appreciable effect even where the combined market share falls below 25 per cent. In assessing the effect on competition the Director will also take account of other factors such as the structure of the market and the nature of the agreement. In his analysis in this case, the Director has considered the parties' combined share of the relevant markets, the structure of the market and the nature of the agreement.¹¹

Market share and structure

- 51 In respect of market information the Applicants have referred to the Office's 1998 report 'Competition in the supply of petrol in the UK'¹² (the Office's Report) and the Monopolies and Mergers Commission's 1990 report 'The Supply of Petrol'¹³. The Office's Report is the most recent comprehensive study of a UK market for an oil fuel. This has formed the basis for the Director's analysis of the market for oil fuels where appropriate. The Department of Trade and Industry's 'Energy Report 2000' (the 'Energy Report') has also been taken into account.¹⁴
- 52 The Office's Report (Table 8.2) indicates that in 1996 the Applicants' (including Mobil's¹⁵) share of UK refined output for gasoline was 82 per cent. Their combined share of UK oil refining in 1996 (in respect of distillation, reforming and cracking capacity, Annex 8.2, the Office's Report) was 89 per cent. According to the Energy Report it was 95 per cent in 1999. Since the refinery output of gasoline is roughly proportional to other refined products the market shares of the Applicants in any relevant market for refined oil fuels will be fairly similar. Although this ignores some slight differences in yield due to the quality of oil used and the import and export of petroleum products it is reasonably representative of the market share of the Applicants in the oil fuel markets.
- 53 Table 8.5 of the Office's Report, indicates that in 1997 the Applicants (including Gulf¹⁶) had 89 per cent of the wholesale market for petrol.
- 54 In terms of retail sales volumes the Office's data (on which Table 8.13 in the Office's Report was based) shows that the Applicants had 71.8 per cent of the market for petrol in 1996 and the supermarkets (that is Somerfield and Asda as well as Tesco, Sainsbury's, Safeway and Morrisons) had 23 per cent of sales. The Energy Report indicates that in 1999 the supermarkets had increased their market share by volume to 26 per cent for petrol and that their share of diesel sales was 19 per cent.

¹¹ See OFT Guideline 401 'The Chapter I Prohibition' (March 1999), paragraphs 2.19-21.

¹² Office of Fair Trading, 'Competition in the supply of petrol in the UK', OFT, May 1998.

¹³ Monopolies and Mergers Commission, 'The Supply of Petrol: A report on the supply in the United Kingdom of petrol by wholesale', Cm 972, HMSO, February 1990.

¹⁴ Department of Trade and Industry, 'The Energy Report: Market reforms and innovation 2000', The Stationery Office, 2000.

¹⁵ Mobil has been included because since 1996 there has been a joint refining and marketing venture in Europe between BP Amoco and Exxon-Mobil although this was terminated in 2000 following the European Commission's 1999 approval of the Exxon-Mobil merger.

¹⁶ Gulf Oil (Great Britain) Ltd (wholesaling and retailing) was acquired by Shell in 1997.

Nature of the agreement

- 55 The Director has considered the unique situation of an oil fuel emergency. During an oil fuel emergency, where little or no fuel may reach the market, there will be no competition to be distorted.¹⁷ Nevertheless, the MoU may be used to deal with oil fuel emergencies which are not so extreme as to result in a nearly complete failure of supply and it therefore may have an appreciable effect upon competition.
- 56 The Director has considered the nature of the agreement and the exchange of information for which it provides. The exchange of information between businesses may have an effect upon competition where it serves to remove any uncertainties in the market and thereby eliminates any competition between the parties. In general, the Director considers that there is more likely to be an appreciable effect upon competition the smaller the number of undertakings operating in the market, the more frequent the exchange and the more sensitive and confidential the nature of the information which is exchanged.¹⁸
- 57 The exchange of information relating to the level and location of oil fuel stocks, as envisaged by the MoU, is commercially very sensitive since it could enable competitors to target each other's customers in times of shortage. The exchange of information may also affect the subsequent market conduct of the companies concerned. Uncertainty about storage capacity at refineries and fuel depots may be removed. It is therefore possible that, in view of the market structure, the behaviour of the Applicants in particular could alter the market conditions after an oil fuel emergency from what they would have been without an exchange of information. Even if the exchange of information was limited to an oil fuel emergency, there is likely to be an appreciable effect upon competition because of the concentrated nature of the market and the very large combined market share of the parties concerned, particularly the Applicants. In reaching this conclusion, the Director has taken into account the approach of the European Commission in *International Energy Agency*.¹⁹ It considered that the oil companies' behaviour when exchanging information within the framework of the International Energy Agency programme might alter the market conditions from what they might have been without such an exchange.

¹⁷ Case 26/76 *Metro v Commission* [1977] ECR 1875 [1978] 2 CMLR 1 in which the European Court noted that 'the requirement ... that competition shall not be distorted implies the existence of workable competition'.

¹⁸ See OFT Guideline 401 'The Chapter I Prohibition' (March 1999) paragraph 3.19.

¹⁹ *International Energy Agency* OJ 1994 L68/35.

Conclusions

- 58 For the reasons set out above, the Director has concluded that the MoU has both the object and effect of appreciably preventing, restricting or distorting competition.

D Individual exemption

GROUNDINGS FOR EXEMPTION

- 59 Section 4 of the Act provides that the Director may grant an individual exemption from the Chapter I prohibition to any agreement, where a request for an exemption has been made to him under section 14 by a party to the agreement and the agreement is one to which section 9 applies.
- 60 Section 9 applies to any agreement which contributes to improving production or distribution, or promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, but does not impose on the undertakings concerned restrictions which are not indispensable to the attainment of those objectives or afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the products in question.
- 61 In assessing the MoU against these exemption criteria the Director has not taken account of agreements or conduct that occurred before the MoU was signed or that are outside the scope of the MoU. This includes the supply of oil fuels surplus to the Government's requirements in an oil fuel emergency.

EXEMPTION CRITERIA

Contributes to improving production or distribution or to promoting technical or economic progress

- 62 The parties' overall aim is to preserve the supply of oil fuels and, in the event of unavoidable supply disruption, of protecting supplies to defined essential users. This would not necessarily happen as a result of free and competitive market forces during the period surrounding an oil fuel emergency since supplies would be delivered to the highest bidder. Also, in some situations, it might be impossible to get any oil fuel out of refineries or depots without special security measures to protect supplies to the essential users. In such situations, only some kind of Government intervention in the market could secure the redirection

of oil fuels, as far as is necessary, to destinations where they might not otherwise have gone. Thus, in an oil fuel emergency, the restrictions upon competition in the MoU contribute to the improvement of distribution, namely, by protecting supplies to essential users.

- 63 There is no need for a 'state of emergency' to be declared before the MoU may come into operation. It can apply at various lesser situations specified by the Government. Therefore, there are circumstances, albeit limited, in which the MoU can improve distribution irrespective of whether or not a state of emergency is declared.

Allowing consumers a fair share of the resulting benefit

- 64 As the MoU will ensure supply to defined essential users, these particular customers will directly benefit from the oil fuel allocation process. Furthermore, the public, and hence consumers generally, will benefit from the oil fuel allocation process during an oil fuel emergency because priority will be given to users who are concerned with providing emergency services, maintaining public safety and a safe environment, running public services, supplying food, running transport systems and providing fuel and power. The supplies to these defined essential users will also be protected by special security measures. In particular, the MoU ensures that fuel will get through to these users in situations where it might not do so in the absence of the special security measures or where supply would otherwise be small or unpredictable. Thus, although some consumers will not obtain their usual supplies of oil fuels, Government intervention can be expected to minimise the impact of a shortage on the overall economy of the UK with immediate benefit to the defined essential users and consumers generally. Under such circumstances, the requirement for suppliers to redistribute oil fuels to essential users, the definition of essential users, the level of protection afforded to supplies of different types of oil fuels are all policy matters for Government.

Restrictions which are indispensable to the attainment of the objectives

- 65 The actions which take place under the MoU involve limiting or controlling markets, sharing markets and sources of supply, and exchanging information by some or all of the undertakings who are parties to the MoU.
- 66 The extent to which it is necessary in the circumstances to control the market for oil fuel and share it by redirecting supplies from customers not on the essential user list to those who are on it, and for suppliers to share sources of

supply, will depend upon the degree of supply disruption and its characteristics. Each oil fuel emergency situation is likely to be different. However, the Government has limited the need to control and share the market and sources of supply only to the period surrounding an oil fuel emergency and it has also restricted action to what is required to fulfil the needs of essential users. If essential user stocks are high less fuel will need to be redirected. Under such circumstances the action taken can be regarded as the minimum necessary to fulfil the aims of the MoU and therefore indispensable if distribution is to be improved for consumers in general.

- 67 The Director has considered whether certain restrictions of competition, such as the exchange of commercially sensitive information, about which concerns have been raised, are indispensable. In particular, information on supplies at terminals, tanker movements and the number of retail sites open was examined. [...]. The Director has concluded that information exchanges under the MoU are indispensable for the efficient distribution of fuel in an oil fuel emergency.
- 68 In general, the Director considers that any exchange of information and co-operation between undertakings that are parties to the MoU and in accordance with the MoU should be restricted to and necessary for dealing with an oil fuel emergency and any information so obtained should be used only in order to deal with an oil fuel emergency, to the extent that the exchange or co-operation would involve agreements or concerted practices which prevent, restrict or distort competition within the meaning of the Chapter I prohibition. In order that the Director can be satisfied that this is the case, he will need to have access to all relevant documents setting out the arrangements for any exchange of information and co-operation between undertakings that are parties to the MoU which takes place in accordance with the MoU.
- 69 The reimbursement of each Applicant's own retailers who accept company cards from other oil companies during an oil fuel emergency has also been considered. [...]. Since there was no evidence that the oil companies concerned would fix the prices at which fuel bought by cards would be reimbursed, the Director is satisfied that the procedures were the minimum necessary to reimburse dealers efficiently.
- 70 The Director has, in addition, examined how the competitive position of independent distributors will be preserved during the implementation of the MoU, and in particular their concerns that very little product may be released to such distributors. In order that an oil fuel emergency could not be used to change or disrupt supplies to independent distributors unless such action was necessary to

protect security of supply he has concluded that: in the event of an oil fuel emergency, wherever reasonably practicable, oil fuels should be supplied to each defined essential user by the normal supplier of that defined essential user and any restrictions on the supply of oil fuels to all or any of these suppliers must be indispensable to the attainment of the aims of the MoU in protecting security of supply.

- 71 In order that the Director can be satisfied that the restrictions identified are indispensable he should be informed at the earliest possible moment by all or any of the undertakings that are parties to the MoU of any material changes to the MoU and any activation of the oil fuel emergency arrangements. The Director should have access to all planning meetings concerning arrangements relating to an oil fuel emergency, any meetings concerning test runs of the arrangements relating to an oil fuel emergency and any meetings held during an oil fuel emergency.
- 72 The Director therefore concludes that, subject to the imposition of conditions considered above and on the basis of the information which has been supplied, the restrictions of competition by the MoU do not go beyond those necessary for the fulfilment of the aims of the MoU.

The possibility of eliminating competition in respect of a substantial part of the products in question

- 73 In a situation of oil shortage, the usual market situation will change. Competitors will make efforts to secure their own supply arrangements using all available possibilities. The actions the undertakings will be engaged in under the MoU affect a significant part of the market for oil fuels. [...]. However, a substantial amount of oil fuel will remain which could possibly be delivered to consumers. Since the MoU is not concerned with competition in oil fuels surplus to the Government's allocation requirements, competition is not eliminated in respect of a substantial part of the products over which competition can take place.

Conclusions

- 74 For the reasons set out above, the Director has decided that the MoU satisfies the exemption criteria set out in section 9, subject to the imposition of certain conditions and obligations.

E The Chapter II prohibition

75 There was no evidence that any actions under the MoU have resulted in an abuse. The Director has concluded that the MoU has not infringed the Chapter II prohibition imposed by section 18 of the Act.

III DECISION

A The Chapter I prohibition

76 The Director has decided that, subject to certain conditions and obligations set out below, the MoU notified by the Applicants fulfils the requirements set out in section 9 of the Act.

77 On the basis of the facts and for the reasons set out above the Director has decided, pursuant to section 14 of the Act, to grant an individual exemption from the Chapter I prohibition to the MoU in accordance with section 4 of the Act and subject to the conditions and obligations set out below. The exemption will last for a period of 10 years from 29 September 2000.

Conditions and obligations

- a) Any exchange of information and co-operation between undertakings that are parties to the MoU and in accordance with the MoU shall be restricted to and necessary for dealing with an oil fuel emergency and any information so obtained shall be used only in order to deal with an oil fuel emergency.
- b) In the event of an oil fuel emergency, wherever reasonably practicable, oil fuels shall be supplied to each defined essential user by the normal supplier of that defined essential user and any restrictions on the supply of oil fuels to all or any of these suppliers must be indispensable to the attainment of the aims of the MoU in protecting security of supply.
- c) The Director shall be informed at the earliest possible moment by all or any of the undertakings that are parties to the MoU of:
 - any material changes to the MoU; and,
 - activation of the oil fuel emergency arrangements under the MoU.

- d) The Director shall have access to all planning meetings concerning arrangements relating to an oil fuel emergency, any meetings concerning test runs of the arrangements relating to an oil fuel emergency and any meetings held during an oil fuel emergency.
- e) The Director shall have access to all relevant documents setting out the arrangements for any exchange of information and co-operation between undertakings that are parties to the MoU which takes place in accordance with the MoU.

78 Terms used in these conditions and obligations have the same meaning as in the MoU except as stated below:

- ‘oil fuel emergency’ means a significant disruption or threat of significant disruption to the normal supply of oil fuels.
- ‘normal supplier’ means the supplier in the period immediately prior to Government activation of any oil fuel emergency arrangements.

B The Chapter II prohibition

79 The Director has also decided that there was no evidence that any actions under the MoU have resulted in an abuse.

80 On the basis of the facts and for the reasons set out above, the Director has decided pursuant to section 14 that the MoU does not infringe the prohibition imposed by section 22 of the Act.*

Penny Boys
Deputy Director General of Fair Trading

* Correction 8 November 2001, Paragraph 80 should read ‘... pursuant to section 22 that the MoU does not infringe the prohibition imposed by section 18 of the Act’.