



SFO | serious
fraud
office

**MEMORANDUM OF
UNDERSTANDING BETWEEN

THE COMPETITION AND
MARKETS AUTHORITY

AND

THE SERIOUS FRAUD OFFICE**

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1 INTRODUCTORY

- 1.1 This Memorandum of Understanding (MoU) records the basis on which the Competition and Markets Authority (CMA) and the Serious Fraud Office (SFO) (the Parties) will co-operate to investigate and/or prosecute individuals in respect of the criminal cartel offence, established by section 188 of the Enterprise Act 2002 (EA02), where serious or complex fraud is suspected.
- 1.2 Proceedings for the criminal cartel offence may only be instituted by the Director of the Serious Fraud Office (the Director) or by or with the consent of the CMA.
- 1.3 The Parties recognise that this MoU may require amendment in the light of future experience.

2 THE ROLE OF THE CMA

- 2.1 The CMA is the UK's economy wide competition authority established by the Enterprise and Regulatory Reform Act 2013 (ERRA13). It will become fully operational on 1 April 2014. The CMA brings together the existing competition and certain consumer protection functions of the Office of Fair Trading (OFT) and the responsibilities of the Competition Commission. Its mission is to make markets work well for consumers, businesses and the economy. The CMA will do this by promoting competition for the benefit of consumers both within and outside the UK. The CMA is a non-ministerial government department.
- 2.2 The CMA has a range of statutory powers to address problems in markets including the ability under the Competition Act 1998 (CA98) to investigate individual undertakings or groups of undertakings to determine whether they may be in breach of the UK or EU prohibitions against anti-competitive agreements and abuse of a dominant position. The CMA is also able to investigate and institute criminal proceedings against individuals who commit the criminal cartel offence. All the investigations and cases previously conducted by the OFT under these provisions will transfer to the CMA on 1 April 2014.

3 THE ROLE OF THE SFO

- 3.1 The SFO was set up in April 1988 following the Roskill report. It has operated continuously under the same name, and with essentially the same remit, ever since. It is an independent government department

responsible for investigating and prosecuting serious or complex fraud, bribery and corruption.

- 3.2 The statutory existence and powers of the SFO derive from the Criminal Justice Act 1987 (CJA 87). The principal power is contained in Section 2 of CJA 87, which gives the Director or a designated member of staff the power to require a person or entity to provide information to the SFO for the purpose of an investigation. In practice this takes the form of interviewing people, requiring them to produce material, or searching premises. The SFO can only use this power if the Director finds reasonable grounds to suspect that an offence has been committed involving serious or complex fraud, bribery or corruption.

4 INTELLIGENCE AND EXCHANGE OF INFORMATION

- 4.1 The Parties both have statutory gateways by which they can supply and share information with each other. The CMA's gateway is contained in Part 9 of EA02 and the SFO's in s.3 (5) of the CJA. In addition, both Parties must comply with the provisions of the Data Protection Act 1998 (DPA).

Part 9 of EA02

- 4.2 Part 9 of the EA02 prohibits the disclosure of "specified information" except in certain circumstances. Specified information is defined in s.237 EA02 as information which relates to the affairs of an individual or the business of an undertaking which has come to the public authority in connection with listed functions or by virtue of listed enactments and specified subordinate legislation. Information which falls within this definition must not be disclosed unless disclosure is permitted under Part 9.
- 4.3 The CMA is empowered by s.242 of EA02 to disclose specified information to the SFO in the following three circumstances:
- I. In connection with the investigation of any criminal offence in any part of the United Kingdom;
 - II. for the purposes of any criminal proceedings there;
 - III. for the purpose of any decision whether to start or bring to an end such an investigation or proceedings.

- 4.4 The CMA also needs to ensure that the considerations relevant to disclosure of specified information (s.244 EA02) have been considered and that the making of the disclosure is proportionate to what is sought to be achieved by it (s.242(3)).

S.3 (5) CJA

- 4.5 S.3 (5) of the CJA allows for information obtained by any person in their capacity as an SFO member to be disclosed by any SFO member designated by the Director to any government department, Northern Ireland department, other authority, body discharging its functions on behalf of the Crown (including the Crown in right of her Majesty's Government in Northern Ireland), or any competent authority, for the purposes of:

- I. any prosecution in England, Wales, Northern Ireland or elsewhere; and
- II. assisting any public or other authority to discharge any functions specified in an order made by the Secretary of State in the time designated by that order.

- 4.6 S.3 (5) is subject to the following provisions of the CJA:

- I. S.3 (1) which states that where any information that is subject to an obligation of secrecy under the Taxes Management Act 1970 has been disclosed by the Commissioners of Inland Revenue or an officer of those Commissioners to any SFO member for the purposes of any prosecution of an inland revenue offence, that information may be disclosed by any SFO member for the purposes of any prosecution conducted by the SFO; or to any member of the CPS or the DPP for Northern Ireland for the purposes of any prosecution of an inland revenue offence; and
- II. S.3 (3) which states that where any information that is subject to an obligation of secrecy that is not under an enactment contained in the Taxes Management Act 1970, the obligation will not prohibit the disclosure of that information to any person in their capacity as a SFO member. However, any information disclosed may only be done by a SFO member who is designated by the Director for the purposes of any prosecution in England, Wales, Northern Ireland or elsewhere pursuant to this subsection.

4.7 S.3 (5) is also subject to any provision of an agreement for the supply of information which restricts the disclosure of the information supplied.

DPA

4.8 The Parties will share personal and sensitive information in compliance with the requirements of the DPA98, i.e. where it is in the vital interest of the data subject or in the public interest. There must be no unauthorised access, loss, misuse, modification or disclosure of this information.

4.9 The Parties will share information under the specific purposes set out in Section 29 (1) of the DPA98, namely:

- The prevention or detection of crime,
- The apprehension or prosecution of offenders

4.10 The processing and exchange of personal data will in each case be proportionate to these legitimate aims.

Single Points of Contact (SPOCs)

4.11 The CMA and SFO have Intelligence Units whose staff have specific responsibility for developing channels of communication with a wide range of external organisations including financial institutions, enforcement authorities, regulators and other bodies charged with detecting and preventing fraud, criminal cartels and other criminal offences.

4.12 In order to facilitate the flow of information with both confidence and confidentiality, CMA will appoint a nominated senior officer and deputy as SPOC to liaise with the SFO. This Officer or deputy will act as a filter and with authority in order to ensure that information/intelligence passing between CMA and the SFO is screened and processed with an appropriate degree of uniformity and speed and in compliance with the provisions of Part 9 of the EA02. Some information will be of a sensitive nature and source protection may therefore be essential. Care will need to be taken that the parties are not burdened with trivial or speculative matters.

4.13 Contact between CMA and the SFO will normally be through the respective SPOC and the SFO's Intelligence Unit. However, contact on investigations and/or prosecutions and may be directly with

nominated investigative officers and/or prosecutors subject to oversight by senior managers.

- 4.14 When the SFO receives evidence of an allegation of fraud or other criminal activity which could involve criminal cartel activity, an authorised person will in appropriate cases communicate with CMA's nominated SPOC as soon as practicable, and where appropriate, before any overt action is taken. The parties can then consider the proper course of action having regard to their respective priorities and any requirement for confidentiality.
- 4.15 In order to ensure effective working relationships, the nominated liaison officers of the SFO and the CMA will meet periodically in order to discuss cases of mutual interest and to discuss the progress of cases.

5 INITIAL ENQUIRIES AND REFERENCES TO THE SFO

- 5.1 Where the CMA receives information, through use of CA98 powers or otherwise, that criminal cartel activity may have occurred, Cartels and Criminal Enforcement Group (CCEG) of CMA will undertake any necessary initial criminal enquiries, if appropriate. Therefore, if the SFO receive information suggestive of criminal cartel activity, prior to any related referral from the CMA, the SFO will, in the first instance, refer that information to CCEG.
- 5.2 If, after any necessary initial enquiries (and informal discussions with the SFO), the CMA identify a criminal cartel case as being likely to fall within the SFO acceptance criteria, the case may be referred to the Director if the CMA consider that the investigation of the case would be more appropriately dealt with by the SFO. The referral will provide such background information as is necessary to enable the Director to make an informed decision as to whether or not the matter should be accepted for investigation or, alternatively, whether the CMA should undertake further enquiries. The Director will endeavour to make such a decision within 28 days of referral unless the complexity of the case requires a longer period.
- 5.3 If the Director considers that the CMA should make further enquiries, the Parties will discuss and agree the nature and scope of such enquiries (which are likely to be conducted by CCEG under EA02 powers.) If the CMA agrees to undertake further enquiries and once they have been completed, the Director will reconsider his decision in the light of any additional evidence so obtained.

6 THE CRIMINAL CASE TEAM

- 6.1 If the SFO accepts a CMA referral, a criminal case team will be formed. The SFO may request assistance from the CMA by the provision of CMA staff to assist with the investigation working under the leadership and direction of an SFO case controller. The provision of CMA staff to assist the SFO will depend on the circumstances of the case and the availability of appropriate resource at the relevant time. Where appropriate, one or more officers from a relevant police force will also work on the criminal case team. A first case conference will be convened as soon as reasonably practicable to discuss preliminary matters.
- 6.2 Throughout the case, the presumption will operate that any CMA team members and their management will have access to all case-related documentation including records of decisions, advices and submission papers.

7 USE OF POWERS DURING A CRIMINAL INVESTIGATION

- 7.1 The presumption will operate that once the SFO has accepted a criminal cartel investigation; powers under the CJA87 will be used rather than those under the EA02 where the two sets of powers would achieve essentially the same objective. However, depending upon the precise circumstances of the case, a criminal case team may determine that EA02 powers could and should be used to pursue particular objectives.

8 COSTS OF THE INVESTIGATION

- 8.1 The SFO case controller will set a budget for the case. The SFO will be responsible for all of the costs of the investigation, save that all CMA staff costs on the case, including all case-related travel and subsistence, will be borne by the CMA.

9 CA98 INVESTIGATIONS AND EC CASES

- 9.1 In certain cases, CCEG will progress an investigation using CA98 powers (which may or may not have commenced prior to any SFO referral), while an SFO-led case team will progress a related criminal investigation. Suitable procedures will be adopted to ensure that the two investigation teams maintain an ongoing dialogue. Both case teams will thereby seek to ensure that the CA98 investigation does not

prejudice the parallel criminal investigation. Where there are issues in dispute between the two case teams which they cannot resolve, the Parties will attempt to resolve matters at a more senior level.

- 9.2 Where the CMA becomes aware of an investigation by the EC competition authority (“DG Comp”) which might involve a potential cartel offence in the United Kingdom involving serious or complex fraud, it may where appropriate, seek to facilitate co-ordination of the progress of both investigations.

10 LENIENCY AND NO-ACTION LETTERS

- 10.1 All decisions in respect of leniency or the issue or withdrawal of no-action letters rest with the CMA. However, if any such decision could have an impact on the outcome of an existing SFO-led cartel investigation or prosecution, the CMA will consult the SFO.
- 10.2 In circumstances where the SFO decides (in a SFO-led cartel investigation or prosecution) that an individual fails or has failed to cooperate with an investigation/prosecution, the SFO will consult with the CMA before any SOCPA agreement that the SFO have granted is revoked.
- 10.3 The grant of a no-action letter by the CMA cannot prevent prosecution for conduct, which, though related to the cartel activity, amounts to a separate and distinct offence such as corruption or a Fraud Act offence.
- 10.4 The SFO agrees that if a person has been given a no-action letter in relation to particular cartel activity – and provided that letter is not subsequently revoked for any reasons set out in the CMA’s no-action guidance – the SFO will not attempt to prosecute that individual for the cartel behaviour with another offence (such as Conspiracy to Defraud) as a device for circumventing the effects of the no-action letter.¹

11 DECISIONS TO CEASE INVESTIGATION AND WHETHER TO PROSECUTE

- 11.1 Decisions about whether to cease an SFO-led criminal cartel investigation, or whether to charge or prosecute in such a case, rest with the SFO. However, in all cases, the SFO will consult the CMA.

¹ See paragraph 8.20 of the CMA’s leniency guidance

12 CONCLUSION

12.1 The CMA and the SFO recognise and respect their differing statutory duties, operational priorities and constraints, and confidentiality requirements. However, in the public interest they commit themselves to improve professional co-operation and to the systematic exchange of information in preventing dishonesty, corruption or serious fraud.

SIGNATORIES

For and on behalf of the Competition and Markets Authority

Alex Chisholm

Chief Executive Officer

Signature ALEX CHISHOLM

Date 22nd April 2014

For and on behalf of Serious Fraud Office

David Green CB QC

Director

Signature DAVID GREEN

Date 3rd April 2014

Background note to the MoU between the Competition and Markets Authority and the Director of the Serious Fraud Office

The EA02 makes it a criminal offence for an individual dishonestly to agree with one or more other persons that two or more undertakings will engage in certain prohibited cartel agreements, including price-fixing, limitation of production or supply, market-sharing and bid-rigging. Any individual convicted of the offence may receive a maximum of five years' imprisonment and/or an unlimited fine. The criminal cartel offence will operate alongside the existing CA98 regime under which anti-competitive agreements between undertakings are prohibited.

The ERR13 amends the criminal cartel offence by removing dishonesty as an element of the offence and introducing statutory exclusions and defences. The amended offence applies to agreements made on or after 1 April 2014 and which relate to arrangements made or to be made before 1 April 2014 or which relate to arrangements made or to be made before that date.

In order to investigate the criminal cartel offence, the EA02 provides the CMA with a number of powers, including the power to compel persons to answer questions or otherwise provide information or documents relevant to the investigation; the power to enter premises under warrant and to take possession of relevant documents and, certain powers of surveillance exercised in accordance with the Regulation of Investigatory Powers Act 2000 and the Police Act 1997.

In addition to conducting criminal investigations under the EA02, members of the CMA's CCEG exercise the CMA's powers of investigation under the CA98 to determine whether undertakings have engaged in cartel agreements. If the CMA decides that a cartel has been formed in breach of the CA98, the CMA can impose a financial penalty against the undertakings involved of up to 10% of their UK turnover for up to a maximum of three years.

Under the Criminal Justice Act 1987 (CJA), the SFO may investigate any suspected criminal offence that appears on reasonable grounds to involve serious or complex fraud and may also conduct, or take over the conduct of, the prosecution of any such offence. Section 2 of the CJA provides the SFO with powers to require persons to answer questions, or otherwise furnish information, and produce specified documents for the purposes of a criminal investigation. It also permits the SFO to obtain search warrants.

The key criterion that the SFO takes into account in deciding whether to investigate a suspected offence is that the suspected fraud appears to be so

serious and complex that its investigation should be in the hands of those responsible for its prosecution. The SFO regards the criminal cartel offence as potentially falling within this criterion.

The CMA operates programmes giving lenient treatment to those involved in cartels who come forward with information. In the context of the CA98, an undertaking may receive total or partial immunity from financial penalties if it comes forward with information about its role in a cartel and in England, Wales and Northern Ireland, individuals who come forward with information about their involvement in a criminal cartel offence may be granted immunity from prosecution. For more information on the CMA's leniency programmes, go to OFT1495.

The ERRA13 required the CMA to prepare and publish prosecution guidance on the principles to be applied in determining, in any case, whether proceedings for an offence under the Act should be instituted. The SFO and other interested parties were consulted during the preparation of the guidance a copy of which can be found at CMA9.

For further information on DG Comp, who investigate cartels that may affect interstate trade between the members of the EU, visit their website www.europa.eu.int/comm/dgs/competition/index_en.htm