

Memorandum of Understanding between the Office of Fair Trading (OFT) and the National Casework Division (NCD), Crown Office, Scotland¹

June 2009

OFT546

Introduction

1. This MOU records the basis on which the OFT and the NCD (the Parties) will co-operate to investigate and/or prosecute individuals in respect of the cartel offences established by the Enterprise Act 2002 (EA02)² where such offences may have been committed within the jurisdiction of the Scottish Courts.
2. The Parties recognise that this MOU may require amendment in the light of future experience.

Initial enquiries and references to NCD

3. Where the OFT receives information, through use of Competition Act 1998 (CA98) powers or otherwise, that criminal cartel activity may have occurred, the Cartels and Criminal Enforcement Group (CCEG) of the OFT will undertake any necessary initial criminal enquiries. Therefore, if the NCD receive information suggestive of criminal cartel activity, prior to

¹ The NCD has since been absorbed by the Serious and Organised Crime Division (SOCD), Crown Office, Scotland. Any references to the NCD in this MOU and in the background note should be read as a reference to the SOCD.

² The Enterprise and Regulatory Reform Act 2013 (ERRA13) amended the EA02 and created the CMA. The powers of the OFT under the EA02 in respect of competition and criminal cartel enforcement were transferred to the Competition and Markets Authority ('CMA') on 1 April 2014. In this MOU references to EA02 mean references to the EA02 as amended by the ERRA13 and references to the OFT should be read as references to the CMA.

any related referral from the OFT, the NCD will, in the first instance, refer that information to CCEG.

4. If, after any necessary initial enquiries (and informal discussions with the NCD), the OFT identifies a cartel case as one that might involve criminality wholly or partly within the Scottish jurisdiction, the case will be referred to the Head of the NCD (or her representative). The referral will provide such background information as is necessary to enable the NCD to make an informed decision as to whether or not the matter should be accepted for investigation by the NCD or alternatively, whether the OFT should undertake further enquiries.
5. If the NCD considers that the OFT 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). Once the further enquiries have been completed, the NCD will reconsider its decision in the light of any additional evidence so obtained.
6. Where the OFT identifies a criminal cartel case as potentially falling within the remit of the Serious Fraud Office (SFO) or the NCD, it will ensure that there is suitable liaison amongst the three organisations with a view to determining the most appropriate way to deal with the case.

The NCD criminal investigation

7. If the NCD accept an OFT referral, the way in which the investigation will proceed, including whether it would be appropriate to second any OFT staff to the NCD for the purpose and duration of the investigation will be agreed with the CCEG.

Use of powers during an NCD criminal investigation

8. The presumption will operate that once the NCD has accepted a criminal cartel investigation, powers under the Criminal Law (Consolidation) (Scotland) Act 1995 will be used rather than those under the EA02 where the two sets of powers would achieve essentially the same objectives. However, depending upon the precise circumstances it may be decided that EA02 powers could and should be used to pursue particular objectives.

OFT investigation costs

9. Where OFT staff are working on a case which has been accepted by the NCD for investigation, the OFT will bear its own staff costs, including all case-related travel and subsistence.

Training of CCEG staff

10. The Crown Office will provide the OFT with appropriate training in Scottish law and procedure so as to enable CCEG staff to conduct criminal investigations in Scotland.

Competition Act 1998 (CA98) investigations and EC cases

11. In certain cases, the CCEG will progress an investigation using CA98 powers (which may or may not have commenced prior to any NCD referral), while the NCD 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 or any resulting prosecution.
12. Subject to any applicable restrictions under EC law, where the OFT becomes aware of an investigation by the Directorate General for Competition of the European Commission (DG Comp) which might involve a potential cartel offence in Scotland, it will draw the investigation to the attention of NCD and, if the NCD accept such a case for investigation, the OFT will seek to coordinate the progress of both investigations.

Leniency and immunity from prosecution

13. Decisions about whether to grant leniency to undertakings rest with the OFT. However, if any such decision could have an impact on the outcome of an existing NCD cartel investigation or prosecution, the OFT will consult the NCD.
14. Where the OFT has received an application for immunity from prosecution in respect of a cartel that falls to be prosecuted in Scotland, the Head of the CCEG will report the level of co-operation of relevant individual(s) to the Lord Advocate, and where the OFT recommends that conditional criminal immunity should be granted, the Lord Advocate will

accord such a recommendation serious weight in exercising her discretion in the grant of criminal immunity in Scotland.

15. In determining whether to grant conditional criminal immunity, the Lord Advocate will take cognisance of the OFT's own rules on leniency as set out in the OFT's detailed guidance on the principles and process of applications for leniency and no-action in cartel cases (OFT1495) and in particular whether the applicant has fully co-operated with the relevant authorities. The Lord Advocate will also require the applicant to disclose and self-certify the completeness and accuracy of any criminal convictions or associations.
16. Where possible, the Lord Advocate will give an early indication at the commencement of a leniency application and before the applicant's identity (or that of any related economic undertaking) has been revealed to the authorities by their advisors of whether criminal immunity is likely to be granted, assuming full ongoing co-operation with the authorities were to be maintained and on the basis that there are no criminal convictions or associations to be disclosed.

Decision in relation to criminal investigation

17. Where the OFT considers in respect of a cartel case falling within Scottish jurisdiction that it should be dealt with solely by the OFT using CA98 powers, the OFT will report to the Lord Advocate the circumstances in relation to the operation of the particular cartel and seek an indication from the Lord Advocate at the commencement of a leniency application and before the applicant's identity (and that of any related economic undertaking) is revealed to the authorities by their advisors of whether a criminal investigation is likely to be initiated at all.

Use of information

18. Where the Lord Advocate declines to grant or to give a favourable early indication of immunity, or declines to give a favourable early indication as to whether a criminal investigation will be initiated, any information from an applicant which was provided to enable the Lord Advocate to reach her decision will not be used in evidence (or as intelligence for that or any other investigation) against the applicant, provided the information was not false or misleading in a material particular or materially incomplete.

19. In the event that disclosed and self-certified details of any criminal convictions or criminal associations are false or misleading in a material particular, or materially incomplete, any grant of or favourable early indication of immunity will be withdrawn and any information from the applicant may be used in evidence (or as intelligence) in any investigation against the applicant.

Duration

20. The procedures outlined in paragraphs 13 to 19 of this Memorandum of Understanding will be subject to a trial period of 12 months, commencing 1 June 2009. The parties will then review the procedures in the light of experience.³

³ The procedures outlined in paragraphs 13 to 19 of the MOU have been extended four times, initially until 1 June 2011, then until 1 June 2012, again until 30 June 2013, and then again until 30 June 2014, after which the procedures will be reviewed again by the parties.

Background note to the Memorandum of Understanding between the Office of Fair Trading and the National Casework Division, Crown Office, Scotland

The Enterprise Act 2002 (EA02) makes it a criminal offence, including in Scotland, for an individual dishonestly⁴ 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 Competition Act 1998 (CA98) regime under which anti-competitive agreements between undertakings are prohibited.

In order to investigate the criminal cartel offence, the EA02 provides the OFT 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, members of the Cartels and Criminal Enforcement Group (CCEG) exercise the OFT's powers of investigation under the CA98, including in Scotland to determine whether undertakings have engaged in cartel agreements. If the OFT decides that a cartel has been formed in breach of the CA98, the OFT can impose a financial penalty against the undertakings involved of up to 10 per cent of their worldwide turnover.

In Scotland, the Lord Advocate is solely responsible for the investigation and prosecution of crime. Her local representatives are Procurators Fiscal. The National Casework Division (NCD) operates under her direction and control and is responsible inter alia for the investigation and prosecution of serious or complex fraud.

⁴ 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 on or after that date. The unamended offence will still apply to agreements made before 1 April 2014 or which relate to arrangements made or to be made before that date.

The Criminal Law (Consolidation) (Scotland) Act 1995 provides that the Lord Advocate may nominate a person to exercise her powers to require persons to answer questions, provide information or produce documents for the purposes of an investigation into serious or complex fraud. The Act also makes provision for the obtaining of search warrants, with the assistance of police officers.

The OFT operates a leniency programme for 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. In the context of the cartel offence, whilst guarantees of immunity from prosecution cannot be given by the OFT in relation to Scotland (unlike in England, Wales and Northern Ireland), the Crown Office and OFT have agreed to pilot certain arrangements aimed at achieving a high degree of consistency of outcome with respect to criminal cartel immunity as between Scotland and the rest of the UK, while recognising the particular features of the Scottish criminal justice system and the constitutional position of the Lord Advocate.

For further information on the European Commission's Directorate General for Competition (DG Comp), which investigates cartels that may affect interstate trade between the members of the EU, visit their website http://ec.europa.eu/competition/index_en.html.