
Memorandum of understanding between the Office of Fair Trading and the Director of the Serious Fraud Office

October 2003

OFT 547

Introduction

- 1 This MOU records the basis on which the OFT and SFO (the Parties) will co-operate to investigate and/or prosecute individuals in respect of the cartel offence established by the Enterprise Act 2002 (EA02) where serious or complex fraud is suspected.
- 2 The Parties recognise that this MOU may require amendment in the light of future experience.

Initial enquiries and references to the SFO

- 3 Where the OFT receives information, through use of Competition Act 1998 (CA98) powers or otherwise, that criminal cartel activity may have occurred, Cartel Investigations Branch (CIB) of OFT will undertake any necessary initial criminal enquiries. Therefore, if the SFO receive information suggestive of criminal cartel activity, prior to any related referral from the OFT, the SFO will, in the first instance, refer that information to CIB.
- 4 If, after any necessary initial enquiries (and informal discussions with the SFO), the OFT identify a criminal cartel case as being likely to fall within the SFO acceptance criteria, the case will be referred to the Director of the SFO (the Director). 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 OFT 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 If the Director 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 CIB under EA02 powers.) Once the further enquiries have been completed, the Director will reconsider his decision in the light of any additional evidence so obtained.

The criminal case team

- 6 If the SFO accept an OFT referral, a criminal case team will be formed comprising of both SFO and OFT staff working under the leadership and direction of an SFO case controller. 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.
- 7 Throughout the case, the presumption will operate that OFT team members and their management will have access to all case-related documentation including records of decisions, advices and submission papers.

Use of powers during a criminal investigation

- 8 The presumption will operate that once the SFO has accepted a criminal cartel investigation, powers under the Criminal Justice Act 1987 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.

Costs of the investigation

- 9 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 OFT staff costs on the case, including all case-related travel and subsistence, will be borne by the OFT.

Dispute resolution within the criminal case team

- 10 The Parties accept that it will be the responsibility of the case controller to direct the investigation and that he or she should ordinarily have the final say on any issues of dispute between SFO and OFT criminal case team members. However,

the Parties recognise that it may, on occasion, be necessary for issues in dispute to be resolved at a more senior level.

CA98 investigations and EC cases

- 11 In certain cases, CIB 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.
- 12 Where the OFT 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 will draw the investigation to the attention of the SFO and, if the SFO accept such a case for investigation, the OFT will seek to co-ordinate the progress of both investigations.

Leniency and no-action letters

- 13 Decisions about whether to grant leniency or issue no-action letters rest with the OFT. However, if any such decision could have an impact on the outcome of an existing SFO-led cartel investigation or prosecution, the OFT will consult the SFO.

Decisions to cease investigation and whether to prosecute

- 14 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 OFT.

Background note to the Memorandum of Understanding between the Office of Fair Trading and the Director of the Serious Fraud Office

The Enterprise Act 2002 (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 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 under the EA02, members of the OFT's Cartel Investigations Branch exercise the OFT's powers of investigation under the CA98 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 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 factors taken into account by the SFO in deciding to investigate include:

- Does the value of the alleged fraud exceed £1million? (This is simply an objective and recognisable signpost of seriousness and likely public concern rather than the main indicator of suitability).
- Is the case likely to give rise to national publicity and widespread public concern? Such cases would include those involving Government Departments, public bodies, the Governments of other countries and commercial cases of public interest.
- Does the case require highly specialist knowledge of, for example, Stock Exchange practices or regulated markets?
- Is there a significant international dimension?
- Will legal, accountancy and investigative skills need to be brought together?
- Is there a need to use the SFO's special powers, such as Section 2 CJA powers?

For further information about the way in which the OFT and the SFO will co-operate to investigate the cartel offence established by the EA02, see the OFT's guidance booklet 'Powers for investigating criminal cartels'.

The OFT 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 OFT's leniency programmes, see www.offt.gov.uk/Business/Cartels/confess.htm

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