

Memorandum of Understanding between the Competition and Markets Authority and the Crown Office and Procurator Fiscal Service

July 2014

Introduction

1. This Memorandum of Understanding (MOU) records the basis on which the Competition and Markets Authority (CMA) and Crown Office and Procurator Fiscal Service (COPFS) (the Parties) will cooperate to investigate and/or prosecute individuals in respect of the cartel offence established by the Enterprise Act 2002 (EA02)¹ where such an offence 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 COPFS

3. Where the CMA receives information, through use of Competition Act 1998 (CA98) powers or otherwise, that criminal cartel activity may have occurred, the Cartels and Criminal Group (CCG) of the CMA will undertake any necessary initial criminal enquiries. Therefore, if COPFS receives information suggestive of criminal cartel activity, prior to any related referral from the CMA, COPFS, via its Serious and Organised Crime Division (SOCD) will, in the first instance, refer that information to CCG.
4. If, after any necessary initial enquiries (and informal discussions with COPFS), the CMA identifies a cartel case as one that might involve criminality wholly or partly within the Scottish jurisdiction, the case will be referred formally to the Procurator Fiscal, Organised Crime and Counter Terrorism at SOCD or their representative. The referral will provide such background information as is necessary to enable COPFS to make an informed decision

¹ The Enterprise and Regulatory Reform Act 2013 (ERRA13) amended the EA02 and created the CMA. The powers of the Office of Fair Trading (OFT) under the EA02 in respect of competition and criminal cartel enforcement were transferred to the CMA on 1 April 2014. In this MOU references to EA02 mean references to the EA02 as amended by the ERRA13.

as to whether or not the matter should be accepted for investigation or alternatively, whether the CMA should undertake further enquiries.

5. If COPFS 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 CCG under EA02 powers). Once the further enquiries have been completed, COPFS will reconsider its decision in the light of any additional evidence so obtained.
6. Where the CMA identifies a criminal cartel case as potentially falling within the remit of the Serious Fraud Office (SFO) or COPFS, it will ensure that there is suitable liaison among the three organisations with a view to determining the most appropriate way to deal with the case.

The COPFS criminal investigation

7. If COPFS accepts a CMA referral, the way in which the investigation will proceed, including whether it would be appropriate to second any CMA staff to the SOCD for the purpose and duration of the investigation, will be agreed with CCG.

Use of powers during a COPFS criminal investigation

8. The presumption will operate that once COPFS 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.

CMA investigation costs

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

Training of CCG staff

10. COPFS will provide the CMA with appropriate training in Scottish law and procedure, as needed, so as to enable CCG staff to conduct criminal investigations in Scotland.

CA98 investigations and EC cases

11. In certain cases, the CCG will progress an investigation using CA98 powers (which may or may not have commenced prior to any COPFS referral), while the SOCD 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 CMA 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 COPFS and, if COPFS accepts such a case for investigation, the CMA will seek to facilitate coordination of the progress of both investigations.

Leniency and immunity from prosecution

13. Decisions about whether to grant leniency to undertakings rest with the CMA. However, if any such decision could have an impact on the outcome of an existing COPFS cartel investigation or prosecution, the CMA will consult COPFS.
14. Where the CMA has received an application for immunity from prosecution in respect of a cartel that falls to be prosecuted in Scotland, the Senior Director of CCG will report the level of cooperation of relevant individual(s) to the Lord Advocate, via the Procurator Fiscal, Organised Crime and Counter Terrorism and where the CMA recommends that conditional criminal immunity should be granted, the Lord Advocate will accord such a recommendation serious weight in exercising his 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 CMA's own rules on leniency as set out in the CMA'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 cooperated 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 advisers of whether criminal immunity is likely to be granted, assuming full ongoing cooperation 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 CMA considers in respect of a cartel case falling within Scottish jurisdiction that it should be dealt with solely by the CMA using CA98 powers, the CMA will report to the Lord Advocate, via the Procurator Fiscal, Organised Crime and Counter Terrorism, 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 advisers 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 an early indication that a criminal investigation will not be initiated, any information from an applicant which was provided to enable the Lord Advocate to reach his 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.

Signatories

For and on behalf of the Competition and Markets Authority

Alex Chisholm

Chief Executive Officer

8th July 2014

For and on behalf of the Crown Office and Procurator Fiscal Service

Catherine Dyer

Crown Agent

3rd July 2014

Background note to the MOU between the CMA and COPFS

The EA02 makes it a criminal offence, including in Scotland, for an individual 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. This is subject to a number of exclusions and defences introduced by the ERA13 with effect from 1 April 2014.² 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.

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, members of the CCG exercise the CMA's powers of investigation under the CA98, including in Scotland 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 worldwide turnover.

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

The Criminal Law (Consolidation) (Scotland) Act 1995 provides that the Lord Advocate may nominate a person to exercise his 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 CMA 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 CMA in relation to Scotland

² For agreements made before 1 April 2014 or which relate to arrangements made before that date the offence will only have been committed where the individual making the agreement did so dishonestly.

(unlike in England, Wales and Northern Ireland), the Crown Office and CMA have put in place 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 DG Comp, which investigates cartels that may affect interstate trade between the members of the EU, visit its website http://ec.europa.eu/competition/index_en.html.