

**MEMORANDUM OF
UNDERSTANDING BETWEEN
THE COMPETITION AND MARKETS
AUTHORITY
AND
THE SERIOUS FRAUD OFFICE**

CONTENTS

	Page No.
1. Introductory	2
2. Role of the CMA	2
3. Role of the SFO	2
4. Cooperation	3
5. Intelligence and exchange of information	3
6. Initial enquiries and reference to the SFO	5
7. The criminal case team	6
8. Use of powers during a criminal investigation	7
9. Costs of the investigation	7
10. CA98 investigations	7
11. Leniency and no action letters	7
12. Decisions to cease investigation and whether to prosecute	8
13. Conclusion	8
Signatories	9

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) (referred to jointly as 'the Parties' or 'a Party' in the singular) 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).
- 1.2 The criminal cartel offence may be investigated by the CMA, by the SFO, or by way of a joint investigation between the Parties.
- 1.3 In accordance with section 190(2) EA02, 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.
- 1.4 The Parties envisage collaborating in this area to ensure effective and efficient investigation or prosecution of the criminal cartel offence in appropriate cases.
- 1.5 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). Its statutory duty is to promote 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 to investigate individual undertakings or groups of undertakings to determine whether they may be in breach of the prohibitions against anti-competitive agreements and the abuse of a dominant position under the Competition Act 1998 ('CA98'). As outlined above, the CMA is also able to investigate and institute criminal proceedings against individuals in respect of the criminal cartel offence.

3 THE ROLE OF THE SFO

- 3.1 The SFO was created in 1988 by the Criminal Justice Act 1987 (CJA87) following recommendations in the Fraud Trials Committee Report (known as the Roskill Report). It is a non-ministerial government department with power to investigate and prosecute serious or complex fraud, bribery and

corruption. In cases of sufficient seriousness or complexity this remit encompasses the criminal cartel offence.

- 3.2 Section 1(1) CJA87 provides that the Director may investigate any suspected offence which appears to her on reasonable grounds to involve serious or complex fraud. Under section 1(4) of the same Act it is also open to her to conduct a joint investigation in conjunction with any other person who is in her opinion a proper person to be concerned in it and this can include other agencies such as the CMA.
- 3.3 In considering whether to accept a case for investigation the Director applies the SFO Statement of Principle and will take into account the actual or intended harm that may be caused to:
- the public, or
 - the reputation and integrity of the UK as an international financial centre; or
 - the economy and prosperity of the UK

and whether the complexity and nature of the suspected offence warrants the application of the SFO's specialist skills, powers and capabilities to investigate and prosecute.

- 3.4 The principal investigative tools of the SFO are contained in section 2 CJA87 and include powers to require persons to answer questions, furnish information and produce documents.

4 COOPERATION

- 4.1 The Parties will cooperate and support each other in cases of mutual interest to enhance sharing of know-how and wider cooperation including, but not limited to:
- their respective technical expertise;
 - relevant know-how and training;
 - targeted secondments between the Parties; and
 - regular update meetings and information sharing.

5 INTELLIGENCE AND EXCHANGE OF INFORMATION

- 5.1 Each of the Parties is subject to restrictions on the disclosure of confidential information, but these are qualified by statutory 'gateways' by which they

may share information with each other. The CMA's gateway is contained in Part 9 of the EA02 and the SFO's in section 3(5) CJA87. In addition, both Parties must comply with the law relating to data protection including the provisions of the Data Protection Act 2018, the General Data Protection Regulation (Regulation (EU) 2016/679) and any successor legislation.

Part 9 of the EA02

- 5.2 Part 9 of the EA02 prohibits the disclosure of 'specified information' except in certain circumstances. Specified information is defined in section 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.
- 5.3 The CMA is empowered by section 242 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.
- 5.4 The CMA also needs to ensure that the considerations relevant to disclosure of specified information (section 244 EA02) have been considered and that the making of the disclosure is proportionate to what is sought to be achieved by it (section 242(3) EA02).

Section 3(5) CJA87

- 5.5 Section 3(5) CJA87 allows for information obtained by any person in their capacity as a member of the SFO to be disclosed to the CMA on the basis that it is a government department; on the basis that it is a competent authority having regulatory functions in relation to commercial activity; or for the purposes of a criminal investigation or criminal proceedings (see section 3(5)(a) to (c) and (6)(I)). This is subject to the caveat that there must be no statutory prohibition on disclosure.

Single Points of Contact (SPOCs)

- 5.6 The CMA has an Intelligence Unit and the SFO has an Intelligence Division 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.

- 5.7 In order to facilitate the flow of information with both confidence and confidentiality, the Parties will appoint a nominated senior officer and deputy as SPOCs to liaise with each other. This officer or deputy will act as a filter and with authority in order to ensure that information and intelligence passing between the Parties 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.
- 5.8 Contact between the Parties will normally be through the respective SPOCs. However, contact on investigations and/or prosecutions may be directly with nominated investigative officers and/or prosecutors subject to oversight by senior managers.
- 5.9 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.
- 5.10 In order to ensure effective working relationships, the nominated SPOCs will meet periodically in order to discuss cases of mutual interest and to discuss the progress of cases. The Parties agree that such meetings will take place at least once every six months.

6 INITIAL ENQUIRIES AND REFERENCES TO THE SFO

- 6.1 Where the CMA receives information, through use of CA98 powers or otherwise, that criminal cartel activity may have occurred, it will undertake any necessary initial criminal enquiries, if appropriate. If the SFO receives 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 the CMA.
- 6.2 If, after any necessary initial enquiries (and informal discussions with the SFO), the CMA identifies 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 considers 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.

- 6.3 If the Director considers that the CMA should make further enquiries, the Parties will discuss and seek to agree the nature and scope of such enquiries. If the CMA agrees to undertake further enquiries, once they have been completed, the Director will reconsider the decision in the light of any additional evidence so obtained.

7 THE CRIMINAL CASE TEAM

- 7.1 Criminal cartel investigations may be led by either of the Parties. Where one Party leads an investigation it may request assistance by the provision of staff and support from the other Party
- 7.2 Any staff working on a criminal cartel investigation, regardless of which Party they are employed by, will work for the purpose of that investigation under the leadership and direction of the Party taking the lead (e.g. if the SFO takes the lead, the SFO may request that CMA staff assist the investigation – in such a case, the CMA staff would be working under the supervision of the relevant SFO case controller).
- 7.3 The provision of cross-Party staff to assist the relevant investigation will depend on the circumstances of the case and the availability of appropriate resource at the relevant time. A case conference will be convened as soon as reasonably practicable to discuss preliminary matters including the need for additional resource or collaboration from a police force or other agency.
- 7.4 Throughout the case, the presumption will operate that the relevant team members and management from both Parties will have access to all case-related documentation including records of decisions, advices and submission papers. It may be necessary to use the statutory gateways contained in Part 9 of the EA02 and section 3(5) CJA87 in order to share information with team members and management from the other Party.
- 7.5 It is also open to the Parties to conduct a joint investigation where the Director exercises her discretion under section 1(4) CJA87 to investigate in conjunction with the CMA. This would obviate the need for the SFO to rely on section 3(5) CJA87 in order to share confidential information concerning the case with the CMA as such sharing would constitute an internal transfer rather than a disclosure to an external third party.
- 7.6 Whether one Party leads an investigation or the Parties agree to a joint investigation it is best practice for their respective roles and responsibilities to be set out in an operational Memorandum of Understanding (MoU).

8 USE OF POWERS DURING A CRIMINAL INVESTIGATION

- 8.1 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.
- 8.2 In a joint investigation consideration will need to be given as to whether to use powers under the CJA87, the EA02 or both.

9 COSTS OF THE INVESTIGATION

- 9.1 Where one Party leads the investigation, it will be responsible for setting the budget for the case (even if the case came about through a referral from the other Party). Subject to [9.2] below, the Party taking the lead will be responsible for all the costs of the investigation.
- 9.2 Where a Party has agreed to support the Party taking the lead by making any of its staff available, it will bear the costs of those staff (including all case-related travel and subsistence).
- 9.3 In a joint investigation the distribution of costs between the Parties will be agreed in writing or set out in the operational MoU.

10 CA98 INVESTIGATIONS

- 10.1 In certain cases, the CMA will progress a civil investigation using CA98 powers, while an SFO-led case team will progress an overlapping criminal investigation. Suitable procedures will be adopted to ensure that the two investigation teams maintain an ongoing dialogue and consideration should be given to entering an operational MoU. 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.

11 LENIENCY AND NO-ACTION LETTERS

- 11.1 The power of the CMA to grant criminal immunity from prosecution to individuals (no-action letters) is established by section 190(4) EA02 and use of this power is governed by the detailed guidance in its leniency policy entitled 'Applications for leniency and no-action in cartel cases'. As a matter of law the SFO is bound by any no action letter issued by the CMA.

- 11.2 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.
- 11.3 Where the issue or withdrawal of a no-action letter concerning a suspect or defendant in an SFO-led case is under consideration the CMA will be reliant on the SFO's assessment as to the degree to which that individual has cooperated with the criminal case. The Parties will liaise closely in such scenarios to ensure consistency of approach in the operation of the leniency policy.
- 11.4 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.
- 11.5 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 a Bribery or Fraud Act offence.
- 11.6 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

12 DECISIONS TO CEASE INVESTIGATION AND WHETHER TO PROSECUTE

- 12.1 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.

13 CONCLUSION

- 13.1 The Parties recognise and respect their differing statutory remits, 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.

¹ See paragraph 8.20 of the CMA's leniency guidance

SIGNATORIES

For and on behalf of the Competition and Markets Authority

Andrea Coscelli

Chief Executive Officer

Signature

Date 21 October 2020

For and on behalf of Serious Fraud Office

Lisa Osofsky

Director

Signature

Date 21 October 2020