

Powers for investigating criminal cartels

A consultation paper

April 2003

**Part of a series of consultation papers about how the provisions of
the Enterprise Act 2002 will work in practice**

OFT 505

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Phone: (020) 7211 8943
Fax: (020) 7211 8505
Email: sean.mcnabb@oft.gov.uk

ENTERPRISE ACT 2002: Guidance on powers for investigating criminal cartels

The Enterprise Act makes it a criminal offence for individuals dishonestly to agree with one or more other persons that two or more undertakings will engage in certain prohibited cartel arrangements, namely those that involve price-fixing, market-sharing, limitation of production or supply and bid-rigging. The offence applies in respect of dishonest agreements both to make or implement such arrangements and also to cause such arrangements to be made or implemented. The criminal offence will be committed irrespective of whether the agreement reached is actually implemented by the undertakings¹.

The criminal cartel offences will operate alongside the existing regime that imposes civil sanctions on undertakings that breach the prohibition on anti-competitive agreements in the Competition Act 1998 (the 'CA98')².

The Enterprise Act gives the Office of Fair Trading (the 'OFT') powers to investigate individuals suspected of having committed the criminal cartel offence³. The powers are restricted to investigating the criminal offence only and they differ to some extent from the powers of investigation available to the OFT under the CA98 in that they are aimed at individuals. The powers set out in the CA98 are civil powers of investigation and are directed against undertakings⁴.

The Government published a consultation document in March 2003 in which it is proposed to give the OFT certain powers under the Regulation of Investigatory Powers Act 2000 ('RIPA') relating to Communications Data⁵, for use solely in investigating the criminal cartel offence. The Government has told OFT that it expects to bring forward orders under Part II of RIPA to give the OFT powers to carry out Directed Surveillance and use Covert Human Intelligence Sources (for example, informants). At the time of writing it is not yet known when the respective orders would be laid before parliament.

Attached is a draft of guidance OFT has prepared to explain how it will use the powers of investigation it has received and the powers of investigation that it is proposed it will

¹ Enterprise Act sections 188-89

² Further information on the CA98 prohibition can be found in the guidance '*The Chapter I Prohibition*', OFT401, published in March 1999

³ Enterprise Act section 192

⁴ Further information on the CA98 powers of investigation can be found in the guidance '*Powers of Investigation*', OFT404, published in March 1999

⁵ <http://www.homeoffice.gov.uk/ripa/part1/consult.htm>



receive in respect of criminal cartels. Final guidance will be published following the close of the consultation period and the coming into force of the new powers of investigation.

The introduction to the consultation draft will be available in Welsh from the OFT.

How to respond

Law firms representing business and other representatives of business as well as consumer bodies are invited to comment on the proposed guidance in order to improve its clarity. Consultees responding to this consultation are asked to supply a brief summary of the people and organisations they represent, where appropriate. We welcome suggestions of other individuals or organisations about who should be consulted.

We will be taking queries by phone, but any suggested changes or comments should be submitted in writing (by letter or e-mail as indicated below). We will reply to all written submissions or queries. The OFT can only consider suggested changes to the guidance, not the underpinning legislation, as the latter is a matter for Parliament and not covered by the consultation exercise. Responses may be made public unless confidentiality is specifically requested.

This consultation exercise will last for 12 weeks. The OFT therefore asks that your comments on the proposed guidance are submitted to it no later than Tuesday **1 July 2003**. It may not be possible to take into account any suggested changes or comments after the deadline for receipt.

Enterprise Act Consultation Team

MP13/C

Office of Fair Trading

Fleetbank House

2-6 Salisbury square

London EC3Y 8JX

Fax 020 7211 8505

E-mail Ebillguidance@oft.gsi.gov.uk

If you have any questions about the guidance please contact Sean McNabb on 020 7211 8943 or sean.mcnabb@oft.gov.uk

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SUMMARY

This consultation document introduces the Office of Fair Trading's (the 'OFT') guidance explaining how it will exercise its powers for investigating the criminal cartel offence introduced by the Enterprise Act 2002 which is due to come into force on 20 June 2003.

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1 INTRODUCTION

- 1.1 The Enterprise Act 2002 (the 'Enterprise Act') makes it a criminal offence for individuals dishonestly to agree with one or more other persons that two or more undertakings will engage in certain prohibited cartel arrangements, namely those that involve price-fixing, market-sharing, limitation of production or supply and bid-rigging. The offence applies in respect of dishonest agreements both to make or implement such arrangements and also to cause such arrangements to be made or implemented. The criminal offence will be committed irrespective of whether the agreement reached is actually implemented by the undertakings¹.
- 1.2 The criminal cartel offence will operate alongside the existing regime that imposes civil sanctions on undertakings that breach the prohibition on anti-competitive agreements in the Competition Act 1998 ('CA98')².
- 1.3 The criminal cartel offence only applies in respect of agreements between undertakings operating at the same level of the supply chain, known as horizontal agreements. Vertical agreements which are intended to operate between undertakings at different levels in the supply chain, for example between a manufacturer and a distributor, or between a distributor and a retailer, are not covered by the offence.
- 1.4 The Enterprise Act gives the Office of Fair Trading (the 'OFT') powers to investigate individuals suspected of having committed the criminal cartel offence³. These powers are described in part 3 of this guidance. They are restricted to investigating the criminal offence only and they differ to some extent from the powers of investigation available to the OFT under the CA98 in that they are aimed at individuals. The powers set out in the CA98 are civil powers of investigation and are directed against undertakings⁴. The way that the OFT intends to use its parallel criminal and civil powers of investigation is described in part 4 of this guidance.
- 1.5 The Enterprise Act also gives the OFT the power of intrusive surveillance⁵ along with the related power to interfere with property⁶ and these are described in part 5 of the guidance.

¹ Enterprise Act sections 188-89

² Further information on the CA98 prohibition can be found in the guidance 'The Chapter I Prohibition', OFT 401, published in March 1999

³ Enterprise Act sections 193-194

⁴ Further information on the CA98 powers of investigation can be found in the guidance '*Powers of Investigation*', OFT 404, published in March 1999

⁵ Enterprise Act section 199

⁶ Enterprise Act section 200

- 1.6 The limitations on the use of the OFT's powers of investigation under the Enterprise Act are described in part 6 and the offences committed by a person who fails to comply when these powers are exercised are described in part 7.

2 TRIGGER FOR THE USE OF THE POWERS OF INVESTIGATION

- 2.1 The OFT can carry out an investigation exercising its powers under the Enterprise Act if there are '**reasonable grounds for suspecting**' that a criminal cartel offence has been committed⁷. The OFT's powers of investigation under the Enterprise Act cannot be used unless this requirement is met. Whether there are reasonable grounds for suspicion is an objective test and will depend upon the information available to the OFT.
- 2.2 Examples of sources of information that may lead to reasonable grounds for suspicion that the criminal offence has been committed include statements provided by employees or ex-employees or disaffected members of a cartel, correspondence evidencing the existence of a secret cartel agreement or information provided in an application made by an undertaking or an individual under the OFT's leniency programmes⁸.
- 2.3 The OFT may obtain information about individuals, undertakings, agreements and markets at any time through informal enquiries. Such enquiries, which may be made at a meeting, by correspondence, in a telephone conversation or during the course of a voluntary interview may be made in addition to, or instead of, using the formal investigation powers set out in the Enterprise Act. The OFT cannot compel any individual or undertaking to respond to an informal enquiry which is not backed by statutory powers. Undertakings and individuals are encouraged to co-operate with the OFT enquiries.

⁷ Enterprise Act section 192

⁸ OFT's CA98 Guidance as to the 'Appropriate Amount of a Penalty' and the Enterprise Act Guidance '*The cartel offence: no-action letters for individuals*'

3 POWERS OF INVESTIGATION

3.1 The Enterprise Act gives the OFT the power:

- to require persons to answer questions, provide information or produce documents⁹
- to enter and search premises under a warrant¹⁰.

These powers can only be exercised in respect of an investigation where the OFT has reasonable grounds for suspecting that a criminal cartel offence has been committed.

Powers to require information and documents

3.2 For the purposes of an investigation, the OFT has the power to require a person under investigation or any other person to answer questions, or provide information, and to produce specified documents relevant to the investigation. This power must be exercised by serving a written notice. The notice must indicate the subject matter and purpose of the investigation and the nature of the offences which may be committed by failing to co-operate with an investigation, which are set out in paragraph 7.1 below. The notice will state the time and place at which information or documents must be produced. The notice may also require a person to attend an interview to answer questions on any matter relevant to the investigation. This is referred to as a compulsory interview (paragraph 4.3 below).

3.3 Where documents are produced, the OFT may take copies or extracts from them and require the person producing the documents to provide an explanation of any of them. Where documents are not produced, the OFT may require the person who was required to produce them to state, to the best of his knowledge and belief, where they are.

3.4 The power to require information and specified documents to be produced may be used at any time during the investigation of a suspected criminal offence, including during the execution of a search warrant. A person may also receive more than one notice during the course of an investigation. The OFT is not limited to using the power against persons under investigation - it can be used against any person whom the OFT has reason to believe may have information that is relevant to the investigation. In setting an appropriate time limit for

⁹ Enterprise Act section 193

¹⁰ Enterprise Act section 194

complying with a written notice, the OFT will consider the amount and complexity of the information required. However, the OFT can require information and documents to be provided immediately if appropriate.

- 3.5 The **'specified documents'** which the OFT can require to be produced in a written notice include both specified individual documents, for example a particular agreement, or documents of a specified description, such as price lists or sales invoices over a certain period. The term **'documents'** includes information recorded in any form and includes information that may be held electronically¹¹.

Power to enter premises under a warrant

- 3.6 For the purposes of a criminal investigation and on specified grounds, the OFT may apply to the High Court or, in Scotland, the procurator fiscal may apply to the sheriff, for a warrant authorising a named officer of the OFT, and any other OFT officers and specified persons authorised to accompany the named officer, to enter and search premises and to take possession of relevant documents, or to take necessary steps for preserving them or preventing interference with them.
- 3.7 The Enterprise Act sets out the circumstances in which a judge in the High Court or the sheriff may issue a warrant to enter and search premises specified in the warrant. The judge or the sheriff must be satisfied that there are reasonable grounds for believing that there are on the premises documents which the OFT has the power to require to be produced in a written notice (paragraph 3.2 above) and that:
- a person has failed to comply with the requirement to produce them, or
 - it is not practicable to serve a written notice, or
 - the service of such a notice might seriously prejudice the investigation (for example, relevant documents are likely to be destroyed or tampered with).
- 3.8 A warrant issued by a judge in the High Court or by the sheriff shall authorise the named officer and OFT officers authorised in writing to accompany him to:
- enter the premises, using such force as is reasonably necessary for the purpose of gaining entry

¹¹ Enterprise Act section 202

- search the premises and take possession of documents appearing to be of the kind in respect of which the warrant was granted. **Original documents will be taken**, as is the usual practice under search warrants issued in respect of suspected criminal offences
- require any person to provide an explanation of any document appearing to be of a kind in respect of which the warrant was granted or to state to the best of his knowledge and belief where it may be found
- require information which is held electronically and is accessible from the premises and which the named officer considers relates to any matter relevant to the investigation to be produced in a readable form (or in a form in which it can be readily produced in a readable form) and taken away.

3.9 A warrant can authorise persons who are not employees of the OFT to accompany and assist the named officer in the search. Such persons may be needed to provide expertise which is not available within the OFT but is necessary to exploit fully the terms of the warrant. For example, an IT expert who would assist OFT officers to retrieve information from computers located on premises for which the warrant was issued.

3.10 A warrant will indicate the subject matter and purpose of the investigation. Upon entry to the premises the named officer will produce the warrant and all officers will also produce evidence of their identity. If the occupier is present, copies of the warrant shall, if practicable, be given to them before the search begins along with copies of a notice that summarises the extent of the powers being used and explains the rights of the occupier unless the named officer believes this would frustrate the object of the search or endanger officers or other people¹². Where possible, the person in charge at the premises should designate an appropriate person to be a point of contact for the officer during his investigation.

3.11 The named officer shall first attempt to communicate with the occupier, or any other person entitled to grant access to the premises, explain the authority under which entry is sought to the premises and ask the occupier to allow entry unless:

- the premises to be searched are unoccupied, or
- the occupier and any other person entitled to grant access are absent, or

¹² in accordance with PACE Codes of Practice – revised Code B 6.7 and 6.8

- there are reasonable grounds for believing that alerting the occupier or any other person entitled to grant access would frustrate the object of the search or endanger officers or other people¹³.

3.12 If any of the above circumstances apply, reasonable and proportionate force may be used if necessary to enter premises if the named officer is satisfied that the premises are those specified in the warrant. Reasonable and proportionate force may also be used where the occupier or any other person entitled to grant access has refused entry to the premises or it is impossible to communicate with the occupier or any other person entitled to grant access¹⁴. If the occupier is not present, copies of the warrant and of the notice of powers and rights shall be left in a prominent place on the premises and endorsed with the date and time of the search and the name of the named officer unless the named officer reasonably believes that recording or disclosing his name might place him in danger¹⁵. On leaving premises which have been entered by force, the named officer must make sure that they are secure either by arranging for the occupier or the occupier's representative to be present or by any other appropriate means¹⁶. If the occupier is informed, he, or one of his representatives, must be given a reasonable opportunity to be present when the warrant is executed.

3.13 ¹⁷In addition, OFT officers also have the power to remove material where it is not reasonably practicable to determine on the premises the extent to which it may be seized, if at all¹⁸. This may be the case, for example, where there is a large bulk of material or where special technical equipment is needed to separate out material the OFT would be entitled to take from material which it is not (for example, material held on a computer). The factors that the OFT will take into account in deciding whether to exercise these seize and sift powers include how long the determination or separation of material would take if carried out on the premises and whether carrying out the determination or separation on the premises would prejudice the use of the material to be taken. OFT officers must always give careful consideration to whether removing copies or images of relevant material or data would be a satisfactory alternative to removing the originals.

3.14 The exercise of seize and sift powers is subject to strict safeguards, which include a requirement by the OFT to provide a written notice to the occupier of

¹³ In accordance with PACE Codes of Practice – revised Code B 6.4

¹⁴ In accordance with PACE Codes of Practice – revised Code B 6.6

¹⁵ In accordance with PACE Codes of Practice – revised Code B 6.8

¹⁶ in accordance with PACE Codes of Practice – revised Code B 6.13

¹⁷ Paragraphs 3.13-3.14 are drafted in accordance with Part 2 of the Criminal Justice and Police Act 2001

¹⁸ Enterprise Act section 194(5)

the premises or the person from whom the material has been seized specifying what has been seized and the grounds for seizure. The notice must also set out the grounds for a person with a relevant interest in the seized property to apply to a judicial authority for the return of seized material and the duty of officers to secure property in certain circumstances when an application is made. The notice must also specify the name and address of the person to whom notice of such an application must be given, and to whom an application may be made to allow the attendance at the initial examination of the property. If it appears that legally privileged material has been seized, the OFT has a duty to return this material as soon as practicable.

Access to legal advice during criminal investigations

- 3.15 When executing a warrant obtained under the Enterprise Act in respect of a suspected criminal offence the OFT officers will not wait for an individual's or undertaking's legal advisers to arrive before commencing the search. However, a friend, neighbour or other person must be allowed to witness the search unless the named officer in charge of the search has reasonable grounds for believing that the presence of the person asked for would seriously hinder the investigation or endanger officers or other people. A search need not be unreasonably delayed for this purpose. A record of the action taken, including the grounds for refusing a request from the occupier, should be made on the premises search record¹⁹.
- 3.16 During the course of a search under a warrant, the OFT officers may be prepared to wait a reasonable amount of time for an undertaking's or an individual's legal advisers to arrive if it is the OFT's intention to remove material from the premises where it is not reasonably practicable to examine it properly on the premises (paragraphs 3.13 and 3.14 above), although the rest of the search will proceed without delay. A person suspected of having committed a criminal cartel offence will be reminded of his entitlement to legal advice before being interviewed under caution (paragraph 4.2 below). A person being interviewed under the powers of investigation in the Enterprise Act (paragraph 3.2 above) will also be entitled to seek legal advice. OFT officers will not generally conduct interviews under caution or using the compulsory powers of investigation in the Enterprise Act during the course of a search under warrant. An interview under caution may be conducted during the course of a search under warrant if a person voluntarily decides to provide information to OFT officers in which case he will be cautioned and advised of his entitlement to legal advice. The power under the Enterprise Act to require a person to provide

¹⁹ in accordance with PACE Codes of Practice – revised Code B 6.11

an explanation of documents during the course of a search under warrant (paragraph 3.8 above) is not regarded as an interview. Nor is a person required to be cautioned prior to being asked questions that are solely necessary for the purpose of furthering the proper and effective conduct of a search²⁰.

- 3.17 The Police and Criminal Evidence Act 1984 ('PACE') does not apply in Scotland nor do PACE Codes of Practice. Accordingly, the procedures set out in paragraphs 3.10 to 3.12 inclusive and 3.14 to 3.16 inclusive insofar as these relate to PACE Codes of Practice, do not constitute legal requirements for the execution of search warrants in Scotland. Nevertheless, the OFT officers may follow these procedures in Scotland, if appropriate.

Role of the Director of the Serious Fraud Office in criminal investigations

- 3.18 The OFT will exercise its powers under the Enterprise Act to investigate individuals suspected of having committed the criminal cartel offence in close co-operation with the Director of the Serious Fraud Office ('the SFO'). The SFO is the intended prosecutor for this criminal offence²¹ in England, Wales and Northern Ireland. The OFT has agreed a **Memorandum of Understanding**²² with the SFO which records the basis on which they will co-operate to investigate and/or prosecute individuals in respect of the cartel offence where serious or complex fraud is suspected. The factors that the SFO take into account in defining a serious or complex fraud include cases where the sum at risk is estimated to be at least £1 million, cases that are likely to give rise to national publicity and widespread public concern (for example, those involving public bodies) and cases where legal, accountancy and investigative skills need to be brought together.
- 3.19 Where a case is identified by the OFT as one that may involve a criminal offence and which is likely to fall within the SFO's definition of a serious or complex fraud, the OFT will inform the SFO who will decide whether the case may be one that is suitable for criminal prosecution. Where further enquiries need to be carried out to determine the extent of a suspected criminal offence, the OFT and SFO will agree the scope of and responsibilities for the further enquiries. The enquiries made at this time are likely to involve the use by the OFT of the powers of investigation in the Enterprise Act. Once these enquiries have been completed, the SFO will decide, following consultation with the OFT, whether the case is one that should be taken forward for criminal prosecution.

²⁰ In accordance with PACE Codes of Practice – revised Code B 6.12

²¹ Enterprise Act section 190

²² To be published on the OFT website at www.offt.gov.uk

- 3.20 The SFO may decide at a later stage of any investigation of a suspected criminal offence to carry out additional enquiries using its powers under section 2 of the Criminal Justice Act 1987 (the '**CJA 1987**'). These powers are broadly the same as the OFT's powers of investigation under the Enterprise Act.
- 3.21 Under section 2 of the CJA 1987, the SFO has powers to require a person to answer questions, provide information or produce documents for the purposes of an investigation. Written notice is given when the SFO exercises these powers. In urgent cases the SFO may require immediate compliance with a notice. The majority of section 2 notices are issued to third parties that may, in the ordinary course of their business, have information or hold documents relevant to a suspected offence. Anyone issued with a section 2 notice is obliged to provide the information and documents required except that there is no obligation to disclose documents subject to legal professional privilege. There is also no obligation to disclose documents protected by a banking obligation of confidence subject to certain exceptions²³. The Enterprise Act contains similar provisions to the CJA 1987 in respect of the disclosure of documents subject to legal professional privilege and confidential banking information (paragraphs 6.1 and 6.2). A person who refuses to answer questions or provide information or documents in response to a section 2 notice without a reasonable excuse commits an offence.
- 3.22 Section 2 of the CJA 1987 also permits the SFO, on specified grounds, to obtain search warrants from a justice of the peace in respect of an investigation which the SFO is conducting. However, search warrants sought during the course of an investigation into a suspected criminal cartel offence will normally be obtained and exercised by the OFT using its powers under the Enterprise Act. The SFO would not seek a search warrant from a justice of the peace if the OFT had already been refused a search warrant by the High Court in respect of the same premises unless new evidence had come to light during the course of the investigation that would justify the application for such a warrant.
- 3.23 Where the SFO and the OFT are exercising their formal powers of investigation under either the CJA 1987 or the Enterprise Act to compel documents and/or information, the SFO or the OFT will make it clear in writing to the persons concerned the specific power that is being used.
- 3.24 In **Scotland**, the Lord Advocate is responsible for all prosecutions and exercises the same powers as the SFO, under the Criminal Law (Consolidation) (Scotland) Act 1995, through the Fraud and Specialist Services Unit in Crown Office. The

²³ CJA 1987 section 2(10)(a)&(b)

OFT has also agreed a **Memorandum of Understanding**²⁴ with the Head of the Fraud and Specialist Services Unit that records the basis on which they will co-operate to investigate and/or prosecute individuals in respect of the cartel offence, where such offences may have been committed within the jurisdiction of the Scottish courts.

²⁴ To be published on the OFT website at www.offt.gov.uk

4 PARALLEL OFT CRIMINAL AND CIVIL INVESTIGATIONS

- 4.1 When the OFT first receives information about alleged cartel activity, it will often not be in a position to know whether to investigate using its formal powers under the Enterprise Act or the CA98. In making its enquiries, however, the possibility that the criminal cartel offence may have been committed will be borne in mind by the OFT. This means that, where appropriate, OFT officers will act in accordance with the PACE, all the relevant Codes of Practice and the Criminal Procedures and Investigations Act 1996, or in Scotland, the applicable Scottish criminal law and procedure²⁵.
- 4.2 During their enquiries, if OFT officers suspect that an individual may have committed the criminal offence, that person will be given the standard criminal caution²⁶ before being questioned about his involvement or suspected involvement in the offence if his answers or failure or refusal to answer may be given in evidence in court. The OFT officers will also remind the person that the interview is voluntary and that he is not under arrest and that he is free to leave at anytime. The person will further be advised of his entitlement to legal advice and, if he decides to exercise this entitlement, the interview will not take place until his legal adviser is present unless it would cause an unreasonable delay to the investigation. The person will be told that his answers during the interview may be used in a CA98 investigation against undertakings.
- 4.3 The OFT officers may also decide to conduct a follow-up compulsory interview with the suspect using its powers under the Enterprise Act (paragraph 3.2 above). The difference between a voluntary interview and a compulsory interview will be explained to the person by the OFT officers: the difference being that in a compulsory interview the person will be required to answer all the questions whereas in a voluntary interview the person may refuse to answer some or all of the questions. It will also be explained that the information obtained under a compulsory interview cannot be used as evidence against that person in a criminal prosecution except in certain limited circumstances (paragraph 6.3 below) and that it would not be used as evidence in a CA98 investigation against the undertaking which employs him.
- 4.4 Following the execution of a search warrant obtained under the Enterprise Act

²⁵ PACE has no legal status in Scotland although there is no prohibition to the OFT following its Codes of Practice when conducting its investigations in Scotland

²⁶ PACE Codes of Practice – revised Code C paragraph 10.5 (note: a different caution must be given in Scotland)

(paragraph 3.6 above), the OFT will take possession of original documents found during the search which are relevant to the investigation. The OFT may use copies of these documents during its administrative procedures under the CA98 against undertakings. The possibility of instituting an administrative procedure under the CA98 against the undertakings engaged in a cartel will be considered at the same time as individuals are being investigated for their involvement in the same cartel under the Enterprise Act.

- 4.5 Any documents obtained by the SFO using its powers under the CJA 1987 in respect of a suspected criminal offence (paragraphs 3.19 to 3.21 above) can also be disclosed to the OFT for the purpose of its administrative procedures under the CA98²⁷.
- 4.6 If the OFT decides to institute an administrative procedure under the CA98 against undertakings engaged in a cartel where criminal proceedings are also being considered against individuals in respect of the same cartel, the OFT and the SFO will consult on timing. The OFT will not institute its administrative procedure without prior consultation with the SFO. At any stage of the investigation of a suspected criminal offence, it may be decided to abandon the criminal investigation and to proceed only with the CA98 investigation. All the undertakings and individuals involved in the investigation to date will be informed of this decision.
- 4.7 In cases where the OFT begins a cartel investigation using its formal powers under the CA98, but the evidence obtained gives the OFT reasonable grounds to suspect that individuals have committed the criminal offence, the OFT will consult with the SFO as to the merits of commencing a criminal investigation.
- 4.8 Any **statement** obtained from an individual by the OFT using its compulsory powers of investigation under the CA98 cannot be used in a criminal prosecution against that person except in certain limited circumstances (paragraph 6.4 below). Where an individual has made a voluntary statement to the OFT pursuant to a CA98 investigation without a caution first having been administered, the OFT may repeat the interview under caution to allow the statements to be used as evidence in court (paragraph 4.2 above).
- 4.9 Any **documents** obtained by the OFT using its powers of investigation under the CA98 may be admissible in any subsequent criminal prosecution of the cartel offence under the Enterprise Act. The OFT will ensure that when conducting its CA98 investigations its procedures in relation to exhibit and property handling, and the storage, management and control of documents conform to the

²⁷ CJA 1987 section 3(5)(a)

standards of a criminal investigation. The OFT may also use its formal criminal powers of investigation under the Enterprise Act to obtain original versions of documents obtained under a CA98 investigation.

- 4.10 In cases where a European Commission cartel investigation involves a potential criminal cartel offence in the UK under the Enterprise Act, the OFT and the European Commission will cooperate to coordinate the progress of their investigations.
- 4.11 Where the OFT has independent knowledge of a potential criminal cartel offence (i.e. the relevant evidence was not provided by the European Commission), the execution of a warrant issued under the Enterprise Act could take place immediately after the conclusion of a visit made to further the European Commission's investigation. Any OFT officers who had participated in the European Commission's visit would not be named on the search warrant issued under the Enterprise Act (paragraph 3.6).

5 INTRUSIVE SURVEILLANCE AND ACTION IN RESPECT OF PROPERTY

- 5.1 The Enterprise Act introduces new powers of surveillance for the OFT for the sole purpose of investigating the criminal cartel offence. The Enterprise Act amends the Regulation of Investigatory Powers Act 2000 ('RIPA')²⁸ and the Police Act 1997²⁹ to grant the OFT the power of intrusive surveillance and the related power of property interference³⁰.
- 5.2 **Intrusive Surveillance** is defined as covert surveillance carried out in relation to anything taking place on any residential premises (including hotel accommodation) or in any private vehicle³¹ and involves the presence of an individual on the premises or in a vehicle or by means of a surveillance device(s) to either hear or see what is happening within the premises or vehicle. **Property Interference** allows for the covert installation of such a device(s) in property which would otherwise involve some element of trespass.
- 5.3 These forms of surveillance, which will only be used by the OFT in its investigations under the Enterprise Act, require the personal authority of the Chairman of the OFT and the prior approval of the Office of Surveillance Commissioners before deployment can take place. In cases of urgency, which are likely to be rare, if prior approval from a Surveillance Commissioner cannot be sought and granted in time, the Chairman of the OFT (or a designated officer of the OFT) will authorise the deployment of intrusive surveillance and give notice to a Surveillance Commissioner as soon as is reasonably practicable, explaining why it was necessary to use the urgency provisions. If the Surveillance Commissioner is at any time satisfied that there were no reasonable grounds for believing the case was urgent, he may quash the authorisation and the surveillance must cease immediately. The use of intrusive surveillance must be necessary to prevent or detect the cartel offence and must be proportionate to what is sought to be achieved by carrying it out.
- 5.4 Beyond the scope of the Enterprise Act, the OFT has applied to the Home Office to be added to the list of public authorities which can authorise the use of other methods of surveillance in accordance with RIPA. The OFT proposes that it should be allowed to authorise **directed surveillance**³² (for example, watching a

²⁸ RIPA section 32

²⁹ Police Act 1997 section 93

³⁰ Enterprise Act sections 199-200

³¹ Subject to RIPA sections 26(4) and (6)

³² RIPA section 28

person's office) and **covert human intelligence sources**³³ (i.e. informants) in its investigations under both the Enterprise Act and the CA98.

- 5.5 The OFT has also requested that it be authorised to obtain **access to communications data**³⁴ (for example, obtaining records of telephone numbers called). The OFT would only use the facility to access communications data in its investigations under the Enterprise Act.
- 5.6 This guidance will be updated if the proposals to permit the OFT to employ the methods of surveillance listed in paragraphs in 5.4 and 5.5 above become law. The OFT also intends to publish Codes of Practice in relation to its procedures for exercising the various methods of surveillance in its investigations.

³³ RIPA section 29

³⁴ RIPA section 22

6 LIMITATIONS ON THE USE OF THE POWERS OF INVESTIGATION

Privileged communications

- 6.1 The power of the OFT to obtain documents under the Enterprise Act, whether by written notice or during the execution of a search warrant, does not extend to privileged communications³⁵. A person may not be required to produce or disclose any information or document which he would be entitled to refuse to produce or disclose on grounds of legal professional privilege in proceedings in the High Court or in Scottish Courts on grounds of confidentiality of communications. However, a lawyer may be obliged to provide the name and address of his client as part of an investigation being conducted under the powers in the Enterprise Act.
- 6.2 The Enterprise Act also provides a safeguard in respect of confidential banking information, i.e. confidential communication between a bank and its client³⁶. A person may not be required under the powers of investigation in the Enterprise Act to disclose any information or produce any document if the information or document is protected by a banking obligation of confidence, unless the person to whom the obligation of confidence is owed consents to the disclosure or the OFT has authorised the disclosure as being necessary for the investigation.

Self-incrimination

- 6.3 The Enterprise Act provides safeguards in relation to the use of information gained by the OFT using its compulsory powers of investigation under the Enterprise Act³⁷. Statements made by a person in response to a requirement imposed by the OFT using its powers of investigation under the Enterprise Act, may only be used as evidence in criminal proceedings against that person in two circumstances:
- where that person has knowingly or recklessly made a false or misleading statement in response to that requirement and is then prosecuted for an offence of knowingly or recklessly making a false or misleading statement (part 7 below)

³⁵ Enterprise Act section 196

³⁶ Enterprise Act section 196(2)

³⁷ Enterprise Act section 197

- where that person is being prosecuted for an unrelated offence and he makes a statement that is inconsistent with it and if evidence relating to it is adduced or a question relating to it is asked by him or on his behalf.
- 6.4 Statements made by a person in response to a requirement imposed by the OFT using its compulsory powers of investigation under the CA98 may only be used as evidence in a cartel prosecution against the person who made it if, in giving evidence during a prosecution of the cartel offence under the Enterprise Act, he makes a statement inconsistent with it and if evidence relating to it is adduced or a question relating to it is asked by him or on his behalf.
- 6.5 A person's answers to questions required under section 2 of the CJA 1987 (paragraph 3.20 above) may only be used in evidence in criminal proceedings against the person under the same two circumstances outlined in paragraph 6.3 above. Similar restrictions apply to the use in evidence of answers given to questions required under section 28 of the Criminal Law (Consolidation) (Scotland) Act 1995.

Disclosure of confidential information

- 6.6 The Enterprise Act imposes limits on the disclosure of information that relates to the affairs of any individual or to any business of an undertaking which has been obtained by the OFT as a result of using its powers of investigation under the Enterprise Act³⁸. The Enterprise Act requires that such information must not be disclosed during the lifetime of that individual or while the undertaking continues in existence unless consent has been obtained from the person that provided the information (if the information was lawfully obtained by the person and the person's identity is known) and the individual to whose affairs the information relates, or the person carrying on the business to which the information relates³⁹.
- 6.7 There are certain exceptions to this requirement under which the OFT may disclose such information:
- the disclosure is required in order to fulfil an EC obligation⁴⁰
 - the disclosure is made to facilitate the exercise of the disclosing authority's statutory functions. If information disclosed for this purpose is not made

³⁸ Enterprise Act section 237

³⁹ Enterprise Act section 239

⁴⁰ Enterprise Act section 240

available to the public, there are restrictions on the recipient making further disclosure⁴¹

- the disclosure is made to another person to facilitate the exercise of the recipient's functions under specified statutes or subordinate legislation. Information disclosed in this way must not be used for any purposes other than that for which it was disclosed⁴²
- the disclosure is made to any person in connection with the investigation of a criminal offence in the United Kingdom; for the purposes of criminal proceedings there, or for the purpose of deciding whether to start or end such an investigation or proceedings. The recipient must only use the information for the specific purpose of the disclosure⁴³
- disclosure is made to overseas authorities in certain limited circumstances⁴⁴.

6.8 Before disclosing such information in one of the permitted gateways, the disclosing authority must have regard to the following⁴⁵:

- the need to exclude from disclosure any information that would be contrary to the public interest
- whether disclosure would cause significant harm to the legitimate business interests of the undertaking to which it relates (for commercial information) or individual (for information relating to private affairs). If the disclosure could harm business or individual interests, the authority is required to consider the extent to which disclosure of that information is necessary.

⁴¹ Enterprise Act section 241

⁴² Enterprise Act section 241

⁴³ Enterprise Act section 242

⁴⁴ Enterprise Act section 243. Further information on the disclosure of information can be found in the OFT guidance 'Controls on overseas disclosure of information'

⁴⁵ Enterprise Act section 244

7 OFFENCES RELATING TO THE POWERS OF INVESTIGATION

Offences created by the Enterprise Act

- 7.1 The Enterprise Act sets out a number of criminal offences which may be committed where a person fails to co-operate when the investigation powers in the Enterprise Act are exercised⁴⁶. It is an offence for a person:
- to fail to comply with a requirement to answer questions or provide information or documents without reasonable excuse
 - to knowingly or recklessly make a statement which is false or misleading
 - to falsify, conceal, destroy or otherwise dispose of or cause or permit the falsification, concealment, destruction or disposal of documents which he knows or suspects to be relevant to an investigation
 - to intentionally obstruct a person in the exercise of his powers under a warrant.
- 7.2 A person who falsifies, conceals, destroys or disposes of documents (or causes or permits this) has a defence if he can prove that he had no intention of concealing from the investigators the facts disclosed by the documents.
- 7.3 Offences will be tried either summarily in the Magistrates' Court or, in the case of more serious offences, on indictment in the Crown Court. In Scotland, offences may be tried summarily in the Sheriff Court, on indictment before a Sheriff and Jury or, in the most serious cases, on indictment in the High Court of Justiciary.
- 7.4 The sanctions that may be imposed by the courts on a person found guilty of each offence described in paragraph 7.1 are set out in table 7.1 below. The sanctions that are available for each offence differ according to whether the person is found guilty on summary conviction or on indictment.

⁴⁶ Enterprise Act section 201

TABLE 1.7: THE SANCTIONS THAT MAY BE IMPOSED BY THE COURTS ON A PERSON FOUND GUILTY OF A CRIMINAL OFFENCE COMMITTED WHERE A PERSON FAILS TO CO-OPERATE WHEN THE INVESTIGATION POWERS IN THE ENTERPRISE ACT ARE EXERCISED.

Offence	Sanction on summary conviction	Sanction on conviction on indictment
Fail to comply with a requirement imposed under the investigation powers	Fine of up to level five on the standard scale and/or up to six months imprisonment	This offence will not be tried in this way
Intentionally or recklessly make a false or misleading statement	Fine of up to the statutory maximum and/or up to six months imprisonment	Unlimited fine and/or up to two years imprisonment
Intentionally destroy, dispose of, falsify or conceal documents.	Fine of up to the statutory maximum and/or up to six months imprisonment	Unlimited fine and/or up to five years' imprisonment
Intentionally obstruct a person carrying out an investigation with a warrant	Fine of up to the statutory maximum	Unlimited fine and/or up to two years' imprisonment