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Memorandum of understanding between the  
Office of Fair Trading and the International and Financial Crime  
Unit, Crown Office, Scotland

October 2003

OFT 546

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**Introduction**

- 1 This MOU records the basis on which the OFT and the IFCU (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 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 IFCU**

- 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 IFCU receive information suggestive of criminal cartel activity, prior to any related referral from the OFT, the IFCU will, in the first instance, refer that information to CIB.
- 4 If, after any necessary initial enquiries (and informal discussions with the IFCU), the OFT identify 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 IFCU (or her representative). The referral will provide such background information as is necessary to enable the IFCU 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.

- 5 If the IFCU 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 IFCU will reconsider its decision in the light of any additional evidence so obtained.
- 6 Where the OFT identify a criminal cartel case as potentially falling within the remit of the SFO or the IFCU, it will ensure that there is suitable liaison between the three organisations with a view to determining the most appropriate way to deal with the case.

#### **The IFCU criminal investigation**

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

#### **Use of powers during an IFCU criminal investigation**

- 8 The presumption will operate that once the IFCU 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 IFCU for investigation, the OFT will bear its own staff costs, including all case-related travel and subsistence.

### **Training of CIB**

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

### **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 IFCU referral), while the IFCU 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.
- 12 Where the OFT becomes aware of an investigation by the EC competition authority (DG Comp) which might involve a potential cartel offence in Scotland, it will draw the investigation to the attention of IFCU and, if IFCU accept such a case for investigation, the OFT will seek to co-ordinate 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 IFCU cartel investigation or prosecution, the OFT will consult the IFCU.
- 14 Where the OFT has received a request for immunity from prosecution from an individual in respect of a cartel that might be prosecuted in Scotland, the Director of Cartel Investigations will report that individual's level of co-operation to the Lord Advocate who will take such co-operation into account. In suitable cases, the Lord Advocate may make an early decision as to whether or not the particular individual remains liable to be prosecuted.

### **Decisions to cease investigation and whether to prosecute**

- 15 In all cases in which a decision is sought to prosecute or not, the IFCU will consult with the Lord Advocate or the Advocate Depute who will decide whether or not a criminal prosecution should be brought. However, in all cases, the IFCU will first consult the OFT.

## **Background note to the Memorandum of Understanding between the Office of Fair Trading and the International and Finance Crime Unit, Crown Office, Scotland**

The Enterprise Act 2002 (EA02) makes it a criminal offence, including in Scotland, 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, members of the CIB 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 UK turnover for up to a maximum of three years.

In Scotland, the Lord Advocate is solely responsible for the investigation and prosecution of crime. His local representatives are Procurators Fiscal. The IFCU 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.

For further information about the way in which the criminal cartel offence established by the EA02 will be investigated, see the OFT 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. In the context of the cartel offence, whilst guarantees of immunity from prosecution cannot be given in relation to Scotland (unlike in England, Wales and Northern Ireland), co-operation by an individual will be reported to the Lord Advocate who will take such co-operation into account in deciding whether or not to prosecute the individual. For more information on the OFT's leniency programmes, see [www.offt.gov.uk/Business/Cartels/confess.htm](http://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](http://europa.eu.int/comm/dgs/competition/index_en.htm)