

MEMORANDUM OF UNDERSTANDING IN RELATION TO BRIBERY AND
CORRUPTION CASES

BETWEEN

THE SERIOUS FRAUD OFFICE ("SFO")

AND

CROWN OFFICE AND PROCURATOR FISCAL SERVICE

Introduction

This Memorandum is a bilateral agreement between the Crown Office and Procurator Fiscal Service ("COPFS") and the Serious Fraud Office ("SFO"). It is not a legally enforceable instrument, but these two organisations ("the organisations") nevertheless consider themselves to be bound by its terms.

The SFO was established by the Criminal Justice Act 1987 to investigate and prosecute cases of serious or complex fraud in England, Wales and Northern Ireland. The SFO is also the lead organisation in England, Wales and Northern Ireland for investigating and prosecuting cases of bribery or corruption. COPFS, under the direction of the Lord Advocate, is responsible for the investigation and prosecution of crime in Scotland, including cases involving bribery and corruption. Either the SFO or COPFS may prosecute cases of overseas bribery or corruption over which United Kingdom courts have jurisdiction.

The principal purpose of this Memorandum is to provide a framework for co-operation between the SFO and COPFS for cases of fraud and bribery and corruption (or indeed any other offence) in which both organisations have an interest, including cases involving offences abolished by the Bribery Act 2010 (but which still apply in relation to conduct occurring wholly or partly before 1 July 2011).

This Memorandum therefore applies to any relevant case:–

- which was (or may have been) committed partly in Scotland and partly in England, Wales or Northern Ireland and, for that reason, falls or seems to fall within the jurisdiction of each organisation;
- which was (or may have been) committed overseas but within or seemingly within the jurisdiction of each organisation on account of the applicable law on extraterritoriality; or
- which is of interest to both organisations for some other reason, for example because there are victims/complainants in each jurisdiction or there are suspects from (or with interests in) each jurisdiction.

Issues covered by this Memorandum include:–

(i) whether the SFO or COPFS should take forward a particular case which both organisations have (or may have) jurisdiction to prosecute (*the issue of primacy*);

(ii) the undertakings to be given by the SFO or COPFS when primacy is ceded (*the issue of assurances*);

(iii) the approach to be taken by the SFO and COPFS to bodies which self-report wrongdoing (*the issue of self-reporting*);

(iv) a framework for general collaboration, communication and information sharing in relation to issues which are likely to be of mutual interest (*the issues of collaboration and information sharing*).

To the extent that there is any conflict with the Memorandum of Understanding on Tackling Foreign Bribery revised in 2014, this Memorandum takes precedence as between the SFO and COPFS.

Part 1 – Primacy

1. This Part applies to any case (“relevant case”) which appears to involve an offence for which a prosecution could be brought by either organisation. A reference in this Part to a “person” is a reference to an individual or body in a relevant case that could be prosecuted for such an offence in any part of the United Kingdom; and a reference to an “address” is a reference (a) in the case of an individual to his or her last home address and (b) in the case of a corporate body or partnership, its registered office or headquarters.

2. For any relevant case, the organisation responsible for determining what (if any) action should be taken against a person, including a decision on whether to pursue an investigation or prosecute or recover the proceeds of crime, and for taking any such action, is “the responsible organisation”.

3. The organisations will always endeavour to co-operate fully with each other with a view to reaching early agreement on the responsible organisation in accordance with this Part. To this end, the organisations will apply the principle that there should be early sharing of information.

4. Where a relevant case comes to the attention of one organisation and that organisation comes to the preliminary view in accordance with this Part that it should be the responsible organisation in respect of a person, that organisation will inform the other organisation of this preliminary view, with reasons, as soon as possible and seek its opinion.

(i) If the other organisation agrees, it will cede primacy in this respect and immediately communicate its decision to the responsible organisation.

(ii) If the other organisation is of the view that it has insufficient information to come to an informed position on primacy in this respect, it will immediately respond with that view and the organisations will then endeavour to reach agreement on the issue as soon as they reasonably can. To this end, the organisations will keep each other informed of relevant developments as they arise.

(iii) Where more than one person or corporate body is involved in the case, the process is repeated for each

5. Where a relevant case comes to the attention of one organisation and that organisation comes to the preliminary view that the other organisation should be the responsible organisation in respect of a person, the organisation holding that preliminary view should inform the other organisation as soon as it reasonably can and seek the other organisation's opinion. If the other organisation accepts that it should be the responsible organisation, the case (or relevant part of it) should be referred to it as soon as this can reasonably be done. As at 4 (iii) above, the process is repeated if necessary.

6. Where agreement is needed on which organisation should be the responsible organisation for a given case, designated representatives from the two organisations will meet and work towards a mutually acceptable agreement on primacy in accordance with the rest of this Part.

7. The “principal rule” when determining primacy in respect of a person’s alleged criminal conduct is that:–

(i) the SFO is the responsible organisation if all or most of the alleged criminal conduct, or all or most of the alleged financial loss, occurred in England, Wales or Northern Ireland;

(ii) COPFS is the responsible organisation if all or most of the alleged criminal conduct, or all or most of the alleged financial loss, occurred in Scotland.

8. The principal rule is inapplicable if all or most of the alleged criminal conduct occurred in the territorial jurisdiction of one organisation (e.g., England) but all or most of the financial loss occurred in the territorial jurisdiction of the other (e.g., Scotland).

9. In any relevant case where the principal rule is inapplicable, or cannot be shown to be applicable, or the organisations expressly agree to disapply it given the special circumstances of the case, the responsible organisation will be determined by agreement in accordance with paragraphs 10 to 13 below (which are not otherwise relevant).

10. If all the alleged criminal conduct and all the financial loss occurred outside the United Kingdom:–

(i) the SFO is the responsible organisation if the alleged offender’s address is in England, Wales or Northern Ireland;

(ii) COPFS is the responsible organisation if the alleged offender’s address is in Scotland;

but the organisations may expressly agree to disapply this test (and so apply the test in paragraph 11) if they conclude that this is warranted by the special circumstances of the case (e.g. because the alleged offender’s business activities in the United Kingdom are or were predominantly carried out in the territorial jurisdiction of the other organisation).

11. In any relevant case where paragraph 9 applies, and the test in paragraph 10 is not (or is no longer) applicable, the organisations will reach agreement on primacy by taking into consideration, and attaching due weight to, all relevant factors including (where relevant) the following:–

(i) the territorial jurisdiction within the United Kingdom where the criminal conduct allegedly occurred;

(ii) the territorial jurisdiction in the United Kingdom where the alleged offender’s address is located;

(iii) whether the alleged offender’s business activities are or were predominantly carried out in Scotland or in England, Wales or Northern Ireland;

(iv) the location and interests of victims / complainants;

(v) the location and likely attendance of witnesses;

(vi) available resources.

12. Although the principal rule is inapplicable if all or most of the alleged criminal conduct occurred in the territorial jurisdiction of one organisation but all or most of the financial loss occurred in the territorial jurisdiction of the other, in such cases significant weight will be attached to where within the United Kingdom the criminal conduct allegedly occurred.

13. The factors set out in paragraph 11 have been listed in no particular order, and this list is not exhaustive.

14. Nothing in this Part is to be construed to prevent the organisations from:–

(i) concluding an agreement to divide a relevant case, with each organisation being a responsible organisation in a limited respect;

(ii) establishing a joint investigation team with a view to dividing a relevant case;

(iii) concluding a further agreement during the course of an investigation which has the effect of amending or altering the respective roles of the two organisations in relation to a given case.

15. The organisations recognise there will be some cases where one organisation will be the responsible organisation for the investigation of a partnership or corporate body with the other organisation being the responsible organisation for the investigation of individuals (such as employees of the partnership or corporate body). The procedure set out at paragraph 4 above will apply to each person or corporate body being considered.

16. Part 1 applies to any relevant case regardless of how or in what circumstances an organisation or the organisations first became aware of it.

17. Both organisations will aim to meet the following time-scales: (i) two weeks from receipt of a (written) report (in acceptable form) to advise the other organisation of its receipt and its initial view as to how it should be dealt with (ii) two weeks for second organisation to reply, with intimation of its initial view and (iii) four weeks for agreement to be reached if there is no initial consensus. During said periods of time the organisations will agree what level of investigation each will carry out pending a decision as to primacy.

Part 2 – Assurances

18. Where for a relevant case there is agreement under Part 1 on the responsible organisation, the other organisation will recognise this fact for the purposes of the case (or the relevant parts of a divided case).

19. In any such case the other organisation will, upon request, provide a written undertaking or assurance to the responsible organisation that it will take no action in relation to the specific matters for which the responsible organisation has responsibility.

20. The other organisation may decide on the form of any such written undertaking or assurance.

Part 3 – Reporting and self-reporting

21. Without prejudice to the obligation to determine primacy in accordance with Part 1, the organisations acknowledge:–

(i) that the SFO is the focal point for receiving all overseas bribery and corruption allegations involving United Kingdom nationals, partnerships or corporate bodies;

(ii) that any United Kingdom law enforcement body or government department wishing to pass on a case which seems to fall within the jurisdiction of each organisation will, in the first instance, notify both organisations about the case and its cross-jurisdictional features;

22. Any individual, partnership or corporate body which self-reports wrongdoing to one of the organisations will be notified at the earliest opportunity of the organisations' obligation to determine primacy in accordance with Part 1.

23. Primacy will be determined by the organisations, taking into account all relevant factors. The fact that an individual, partnership or corporate body has reported itself to one organisation rather than the other will not solely determine primacy; but all relevant information provided by the individual, partnership or corporate body in question will be taken into consideration when primacy is determined under Part 1.

Part 4 – Information and intelligence sharing

24. This Part concerns the sharing of intelligence and any other information which is likely to be of interest to the other organisation ("relevant information"), where such sharing is legally permissible.

25. The organisations will provide relevant information to each other in line with relevant statutory legal gateways and protect such information against unauthorised access or disclosure.

26. The organisations will not release or disclose any relevant information obtained from the other organisation to any third party without the prior written consent of the other organisation, unless compelled to do so by law.

27. The organisations will comply with their obligations relating to early information sharing under paragraphs 3 to 5 regardless of how the information comes to their attention. If an individual, partnership or corporate body identifies a relevant case to one organisation, that organisation will bring this to the attention of the other organisation promptly and endeavour in good faith to supply further information if the other organisation reasonably requires it.

Part 5 – Collaboration and consistency

28. The organisations fully recognise the importance of collaboration and constructive communication.

29. The organisations will therefore:–

(i) liaise in relation to any cases in which they are both likely to have an interest; and