

ENTERPRISE ACT 2002

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 6: Cartel Offence

Criminal investigations by OFT

416. **Sections 192-202** make provisions for appropriate powers of investigations in respect of the criminal offence. They provide the OFT with powers modelled broadly on those already available to the SFO under Section 2 of the Criminal Justice Act 1987 ('CJA87'). The OFT will investigate the criminal offence under the powers provided in these sections, working closely with the SFO, who may draw on their CJA87 powers.

Section 192: Investigation of offences under section 188

417. This section provides that the OFT is only to exercise the powers in sections 193 and 194 in relation to the criminal offence. The OFT will continue to conduct investigations in relation to infringement of Chapter I civil prohibitions of CA 1998 by using investigatory powers set out in Part I, Chapter III of CA 1998. The OFT can only exercise the powers if there are reasonable grounds for suspecting an offence under section 188.

Section 193: Powers when conducting an investigation

418. **Subsection (1)** provides powers for the OFT to require in writing the person under investigation, or any other person, to answer questions or provide information that the OFT considers relates to any matter relevant to the investigation.
419. **Subsection (2)** provides that the OFT may require the production of documents that appear to the OFT to relate to the investigation. The documents required must be specified or described in a written notice or must fall within a category specified or described in the notice.

Section 194: Power to enter premises under a warrant

420. This section makes provision for the OFT to make an application to a judge of the High Court, or in Scotland for the procurators fiscal to apply to the sheriff court, for a warrant authorising a named officer of the OFT to enter premises. The warrant may also cover any other person whom the OFT has authorised in writing to accompany the named officer. This section parallels section 28 CA 1998, which requires the OFT to seek a warrant from the High Court or the Court of Session in order to investigate infringements of the civil prohibitions in Chapter I of CA 1998.
421. **Subsection (1)** grants a judge of the High Court or a sheriff the power to issue a warrant if he or she is satisfied that there are reasonable grounds for believing there are documents on any premises that the OFT has the right to require under section 193. The judge or the sheriff must be satisfied that one of the following circumstances applies before he or she may issue a warrant: (i) that a person has failed to comply with a requirement

under section 193 to produce documents; (ii) that it is not practicable to serve a notice under section 193; or (iii) that the service of such a notice might seriously prejudice the investigation (i.e. there are reasonable grounds to believe that information might be destroyed or tampered with).

422. *Subsection (4)* allows people who are not employees of the OFT to accompany and assist OFT officers who are exercising powers under this section. It is anticipated that such people will have expertise that is not available within the OFT but is required to exploit fully the terms of the warrant (e.g. IT experts).
423. *Subsection (6)* amends Part I of Schedule 1 of the Criminal Justice and Police Act 2001 ('CJPA 2001') to add to it the powers of seizure conferred by subsection (2). This will have the effect of incorporating the amendments to statutory powers of seizure introduced by section 50 CJPA 2001.
424. These amendments enable an officer to seize material if it is not reasonably practicable to determine on the premises whether the material is seizeable or not, or, in the case of property some of which is seizeable, which items he or she would be entitled to seize. The exercise of the powers is subject to strict safeguards, which include a requirement to give written notice (section 52 CJPA 2001) and a duty to return legally privileged material (section 55).
425. The OFT's existing civil powers of seizure under section 28(2) CA 1998 are already contained in Part I of Schedule 1 of the CJPA 2001.

Section 195: Exercise of powers by authorised person

426. This section grants the OFT the power to authorise any competent investigator who is not an officer of the OFT to exercise the powers conferred on the OFT under sections 193 and 194. However, no person under investigation is bound to comply unless such authorised person produces evidence of his or her authority.

Section 196: Privileged information etc.

427. This section requires legal professional privilege - i.e. the principle that legal advice is confidential to the client to whom it is given - to be respected in the exercise of powers under sections 193 and 194 and reproduces the requirements in respect of banking professional privilege in section 2(10) CJA 1987.

Section 197: Restriction on use of statements in court

428. This section provides that statements made under compulsion in response to powers exercised under sections 193 and 194 may only be used in court in respect of a prosecution of the person who made them: (i) for making false or misleading statements under subsection 201(2); or (ii) for making an inconsistent statement in respect of a prosecution for another offence.

Section 198: Use of statements obtained under Competition Act 1998

429. The Chairman of the OFT ("the Chairman") will continue to have the powers of the former DGFT to require the provision of information by an individual on behalf of an undertaking under Part I, Chapter III of CA 1998 as part of a civil investigation. This section amends CA 1998 to provide a safeguard with regard to the use of any such oral information obtained under CA 1998 by compulsion, for the purpose of the criminal offence under section 188. This is intended to provide protection against self-incrimination.

Section 199 & Schedule 26: Surveillance powers & Repeals and revocations

430. *Section 199* and *Schedule 26* amend the Regulation of Investigatory Powers Act 2000 ('RIPA 2000') to grant the OFT access to intrusive surveillance powers for the United

Kingdom. With these powers the Chairman may issue an authorisation for the planting of surveillance devices in residential premises (including hotel accommodation) and private vehicles. (A designated officer may grant an authorisation in an urgent case if the Chairman is not available.) Acting on information received from an informant, the OFT could, for example, use these powers to record a meeting of cartelists in a hotel room.

431. Under section 32(3)(b) RIPA 2000, one of the criteria for which an authorisation may be granted is for 'the purpose of preventing or detecting serious crime'. All applications for authorisations are subject to the scrutiny and approval of the surveillance commissioners in line with the existing procedural safeguards in RIPA 2000. When an authorisation is granted, the OFT intends to outsource the technical deployment of the intrusive surveillance activity to other public authorities which already have access to these powers and practical experience of exercising them.
432. The OFT has applied separately to the Home Office for an Order to grant authorised officers access to directed surveillance (essentially monitoring the movement of people and vehicles) and covert human intelligence sources (essentially the use of informants) under sections 28 & 29 RIPA 2000. OFT has also applied to the Home Office for an Order to grant authorised officers access to communication data (primarily postal and telephone records) under section 22 RIPA 2000. These powers will be available for both civil and criminal investigations.

Section 200: Authorisation of action in respect of property

433. This section amends Part III of the Police Act 1997 to grant the Chairman and a designated officer the powers to issue authorisations to interfere with private property. Such authorisations are required to gain access to premises in order to undertake intrusive surveillance.

Section 201: Offences

434. This section makes it an offence for a person to fail to comply with any requirement imposed on him or her in an investigation by the OFT under sections 193 and 194. It is an offence for a person knowingly or recklessly to provide false or misleading information to the OFT or for a person to destroy or falsify documents that he or she has been required to produce. It is also an offence for a person to obstruct a person exercising powers under a warrant issued under section 194.