

## ANNEX

### **PART A**

#### **EXTRACTS FROM THE OFT'S GUIDANCE AS TO THE APPROPRIATE AMOUNT OF A PENALTY**

(Paragraph 30 of the Judgment)

##### **“Policy objectives**

1.4 The twin objectives of the OFT's policy on financial penalties are:

- to impose penalties on infringing undertakings which reflect the seriousness of the infringement, and
- to ensure that the threat of penalties will deter undertakings from engaging in anti-competitive practices.

The OFT has a discretion to impose financial penalties and intends, where appropriate, to impose financial penalties which are severe, in particular in respect of agreements between undertakings which fix prices or share markets and other cartel activities, and serious abuses of a dominant position. The OFT considers that these are among the most serious infringements of competition law. The deterrent is aimed at other undertakings which might be considering activities contrary to Article 81, Article 82, the Chapter I and/or Chapter II prohibition, as well as at the undertakings which are subject to the decision.

1.5 The OFT also wishes to encourage undertakings to come forward with information relating to any cartel activities in which they are involved. The OFT therefore sets out in part 3 of this guidance when lenient treatment will be given to such undertakings.

##### **Statutory background**

1.6 Section 36 of the Act provides that the OFT may impose a financial penalty on an undertaking which has intentionally or negligently committed an infringement of Article 81, Article 82, the Chapter I and/or Chapter II prohibition. It is therefore for the OFT to determine whether a financial penalty should be imposed.

1.7 Sections 38(1) and 38(1A) of the Act require the OFT to prepare and publish guidance as to the appropriate amount of a penalty, including guidance as to the circumstances in which, in determining a penalty, the OFT may take into account the effects of an infringement in another Member State. Section 38(2) of the Act provides that the OFT may alter the guidance on penalties at any time. Section 38(3) of the Act provides that, if altered, the OFT must publish the guidance as altered. Under section 38(4) the Secretary of State must approve any guidance on penalties before it can be published. When preparing or altering guidance or penalties, sections 38(6) and (7)

require the OFT to consult such persons as it considers appropriate. These particular provisions apply to the OFT alone and not also to the Regulators.

1.8 This revised guidance was approved by the Secretary of State as required under section 38(4) of the Act for publication on 21 December 2004. When preparing this revised guidance the OFT conducted a consultation in accordance with sections 38(6) and (7) of the Act.

1.9 By virtue of section 38(8) of the Act, the OFT must have regard to the guidance for the time being in force when setting the amount of any financial penalty to be imposed.

1.10 The financial penalty may not in any event exceed the maximum penalty of 10 per cent of the worldwide turnover of the undertaking.

1.11 This guidance on penalties will continue to be kept under review in the light of experience in its application.

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## **2 Steps for determining the level of a penalty**

### **Method of calculation**

2.1 A financial penalty imposed by the OFT under section 36 of the Act will be calculated following a five step approach:

- calculation of the starting point having regard to the seriousness of the infringement and the relevant turnover of the undertaking
- adjustment for duration
- adjustment for other factors
- adjustment for further aggravating or mitigating factors, and
- adjustment if the maximum penalty of 10 per cent of the worldwide turnover of the undertaking is exceeded and to avoid double jeopardy.

Details on each of these steps are set out in paragraphs 2.3 to 2.20 below.

2.2 An undertaking participating in cartel activity may benefit from total immunity from, or a significant reduction in the level of, a financial penalty, if the requirements for lenient treatment set out in part 3 of this guidance are satisfied.

### **Step 1 – Starting point**

2.3 The starting point for determining the level of financial penalty which will be imposed on an undertaking is calculated having regard to:

- the seriousness of the infringement, and
- the relevant turnover of the undertaking.

2.4 The starting point will depend in particular upon the nature of the infringement. The more serious and widespread the infringement, the higher the starting point is likely to be. Price-fixing or market-sharing agreements and other cartel activities are among the most serious infringements of Article 81 and/or the Chapter I prohibition. Conduct which infringes Article 82 and/or the Chapter II prohibition and which by virtue of the undertaking's dominant position and the nature of the conduct has, or is likely to have a particularly serious effect on competition, for example, predatory pricing, is also one of the most serious infringements.

2.5 It is the OFT's assessment of the seriousness of the infringement which will be taken into account in determining the starting point for the financial penalty. When making its assessment, the OFT will consider a number of factors, including the nature of the product, the structure of the market, the market share(s) of the undertaking(s) involved in the infringement, entry conditions and the effect on competitors and third parties. The damage caused to consumers whether directly or indirectly will also be an important consideration.

The assessment will be made on a case by case basis for all types of infringement, taking account of all the circumstances of the case.

2.6 In cases concerning infringements of Article 81 and/or Article 82, the OFT may, in determining the starting point, take into account effects in another Member State of the agreement or conduct concerned.

The OFT will take into account effects in another Member State through its assessment of relevant turnover; the OFT may consider turnover generated in another Member State if the relevant geographic market for the relevant product is wider than the United Kingdom and the express consent of the relevant Member State or NCA, as appropriate, is given in each particular case.

2.7 The **relevant turnover** is the turnover of the undertaking in the relevant product market and relevant geographic market affected by the infringement in the undertaking's last business year.

2.8 The starting point may not in any event exceed 10 per cent of the **relevant turnover** of the undertaking.

2.9 Where an infringement involves several undertakings, an assessment of the appropriate starting point will be carried out for each of the undertakings concerned, in order to take account of the real impact of the infringing activity of each undertaking on competition.

## **Step 2 – Adjustment for duration**

2.10 The starting point may be increased or, in exceptional circumstances, decreased to take into account the duration of the infringement. Penalties for infringements which last for more than one year may be multiplied by not more than the number of years of the infringement.

Part years may be treated as full years for the purpose of calculating the number of years of the infringement.

### **Step 3 – Adjustment for other factors**

2.11 The penalty figure reached after the calculations in steps 1 and 2 may be adjusted as appropriate to achieve the policy objectives outlined in paragraph 1.4 above, in particular, of imposing penalties on infringing undertakings in order to deter undertakings from engaging in anticompetitive practices. The deterrent is not aimed solely at the undertakings which are subject to the decision, but also at other undertakings which might be considering activities which are contrary to Article 81, Article 82, the Chapter I and/or Chapter II prohibition.

Considerations at this stage may include, for example, the OFT's objective estimate of any economic or financial benefit made or likely to be made by the infringing undertaking from the infringement and the special characteristics, including the size and financial position of the undertaking in question. Where relevant, the OFT's estimate would account for any gains which might accrue to the undertaking in other product or geographic markets as well as the 'relevant' market under consideration.

2.12 The assessment of the need to adjust the penalty will be made on a case by case basis for each individual infringing undertaking. This step may result in either an increase or reduction of the financial penalty calculated at the earlier step.

2.13 In exceptional circumstances, where the relevant turnover of an undertaking is zero (for example, in the case of buying cartels) and the penalty figure reached after the calculation in Steps 1 and 2 is therefore zero, the OFT may adjust the amount of this penalty at this step.

### **Step 4 – Adjustment for aggravating and mitigating factors**

2.14 The basic amount of the financial penalty, adjusted as appropriate at steps 2 and 3, may be increased where there are other aggravating factors, or decreased where there are mitigating factors.

2.15 Aggravating factors include:

- role of the undertaking as a leader in, or an instigator of, the infringement
- involvement of directors or senior management (notwithstanding paragraph 1.14 above)
- retaliatory or other coercive measures taken against other undertakings aimed at ensuring the continuation of the infringement
- continuing the infringement after the start of the OFT's investigation
- repeated infringements by the same undertaking or other undertakings in the same group
- infringements which are committed intentionally rather than negligently, and
- retaliatory measures taken or commercial reprisal sought by the undertaking against a leniency applicant.

## 2.16 Mitigating factors include:

- role of the undertaking, for example, where the undertaking is acting under severe duress or pressure
- genuine uncertainty on the part of the undertaking as to whether the agreement or conduct constituted an infringement
- adequate steps having been taken with a view to ensuring compliance with Articles 81 and 82 and the Chapter I and Chapter II prohibitions
- termination of the infringement as soon as the OFT intervenes, and
- co-operation which enables the enforcement process to be concluded more effectively and/or speedily.

**Note that** in cases of cartel activity an undertaking which co-operates fully with the investigation may benefit from total immunity from, or a significant reduction in the level of, a financial penalty, if it satisfies the requirements for lenient treatment set out in part 3 of this guidance.

### **Step 5 – Adjustment to prevent the maximum penalty being exceeded and to avoid double jeopardy**

2.17 The final amount of the penalty calculated according to the method set out above may not in any event exceed 10 per cent of the worldwide turnover of the undertaking in its last business year. The business year on the basis of which worldwide turnover is determined will be the one preceding the date on which the decision of the OFT is taken or, if figures are not available for that business year, the one immediately preceding it. The penalty will be adjusted if necessary to ensure that it does not exceed this maximum.

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## **3 Lenient treatment for undertakings coming forward with information in cartel activity cases**

### **Immunity from or reduction in financial penalty for undertakings coming forward with information in cartel activity cases**

3.1 Undertakings participating in cartel activities might wish to terminate their involvement and inform the OFT of the existence of the cartel activity, but be deterred from doing so by the risk of incurring large financial penalties. To encourage such undertakings to come forward, the OFT **will** grant total immunity from financial penalties for an infringement of Article 81 and/or the Chapter I prohibition to a participant in cartel activity who is the first to come forward and who satisfies the requirements set out in paragraph 3.9. Alternatively, the OFT **may** offer a reduction of up to 100 per cent from financial penalties to a participant who is the first to come forward and who satisfies the requirements set out in paragraphs 3.11 and 3.12. An undertaking which is not the first to come forward, or does not satisfy these requirements may benefit from a reduction of up to 50 per cent in the amount of the

financial penalty imposed if it satisfies the requirements set out in paragraphs 3.13 to 3.15.

3.2 The OFT considers that it is in the interest of the economy of the United Kingdom, and the European Community more generally, to have a policy of granting lenient treatment to undertakings which inform it of cartel activities and which then co-operate with it in the circumstances set out below. It is the often secret nature of cartel activities which justifies such a policy. The interests of customers and consumers in ensuring that such activities are detected and prohibited outweigh the policy objectives of imposing financial penalties on those undertakings which participate in cartel activities but which co-operate to a significant degree with the OFT as set out below.

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### **Total immunity for the first to come forward BEFORE an investigation has commenced in cartel activity cases**

3.9 An undertaking **will** benefit from total immunity from financial penalties if the undertaking is the first to provide the OFT with evidence of cartel activity in a market before the OFT has commenced an investigation<sup>29</sup> of the cartel activity, provided that the OFT does not already have sufficient information to establish the existence of the alleged cartel activity, and conditions (a) to (d) below are satisfied.

The undertaking must:

- a) provide the OFT with all the information, documents and evidence available to it regarding the cartel activity
- b) maintain continuous and complete co-operation throughout the investigation and until the conclusion of any action by the OFT arising as a result of the investigation
- c) refrain from further participation in the cartel activity from the time of disclosure of the cartel activity to the OFT (except as may be directed by the OFT), and
- d) not have taken steps to coerce another undertaking to take part in the cartel activity.

3.10 If an undertaking does not qualify for total immunity under paragraph 3.9 above, it may still benefit from a reduction of financial penalties of up to 100 per cent under paragraphs 3.11 and 3.12 below.

### **Reduction in the level of financial penalties of up to 100 per cent for the first to come forward AFTER an investigation has commenced in cartel activity cases**

3.11 An undertaking may benefit from a reduction in the level of the financial penalty of up to 100 per cent if the following conditions are satisfied:

- the undertaking seeking immunity under this paragraph is the **first** to provide the OFT with evidence of cartel activity in a market **before** the OFT has issued a statement of objections, and
- conditions (a) to (d) in paragraph 3.9 above are satisfied.

3.12 The reduction in the level of the financial penalty of up to 100 per cent by the OFT in these circumstances is **discretionary**. In order for the OFT to exercise this discretion it must be satisfied that the undertaking should benefit from a reduction in the level of the financial penalty taking into account the stage at which the undertaking comes forward, the evidence in the OFT's possession and the evidence provided by the undertaking.

### **Reduction in the level of financial penalties of up to 50 per cent in cartel activity cases**

3.13 Undertakings which provide evidence of cartel activity before a statement of objections is issued, but are not the first to come forward, or do not qualify for total immunity under paragraphs 3.9 or 3.11 and 3.12 above, **may** be granted a reduction of up to 50 per cent in the amount of a financial penalty which would otherwise be imposed, if conditions (a) to (c) in paragraph 3.9 above are met.

3.14 Any reduction in financial penalty will be calculated taking into account the stage at which the undertaking comes forward, the evidence in the OFT's possession and the evidence provided by the undertaking.

3.15 The grant of a reduction by the OFT in these circumstances is, however, **discretionary**. In order for the OFT to exercise this discretion it must be satisfied that the undertaking should benefit from a reduction, taking into account the factors described in paragraph 3.14 above.

### **Additional reduction in financial penalties**

3.16 An undertaking co-operating with an investigation by the OFT under the Act in relation to cartel activity in one market (the first market) may also be involved in a completely separate cartel activity in another market (the second market) which also infringes Article 81 and/or the Chapter I prohibition.

3.17 If the undertaking obtains total immunity from financial penalties under paragraph 3.9 or a reduction of up to 100 per cent in the amount of the financial penalty under paragraphs 3.11 and 3.12 above in relation to its activities in the second market, it will also receive a reduction in the financial penalties imposed on it which is additional to the reduction which it would have received for its co-operation in the first market alone. For example, as a result of an investigation by the OFT of producers, including ABC Ltd, in the widgets market, ABC Ltd carries out an internal investigation and discovers that, as well as having participated in cartel activity in the widgets market, one of its divisions has participated in separate cartel activity in the sprockets market. ABC Ltd has been co-operating with the OFT's widgets investigation and is interested in seeking lenient treatment by disclosing its participation in the sprockets cartel activity. Assuming ABC Ltd qualifies for total immunity in relation to the sprockets market, it can also obtain a reduction in financial penalty in relation to the widgets market in addition to the reduction it would have received for co-operation in the widgets investigation alone, i.e. an additional reduction in respect of the widgets market (the first market) as a result of its co-operation in the investigation into the sprockets market (the second market).”

## **PART B**

### **DETAILS OF INFRINGEMENTS AND PENALTIES**

#### **Kier Group plc and Kier Regional Limited**

1. Infringement 77 related to a tender process initiated by Peterborough City Council on 29 August 2001 for a new primary school. Kier (trading as Marriott) was one of seven companies to submit a tender. The contract was awarded to the company that submitted the second lowest bid. Another company, Jackson, sought and received a cover price from Kier. Jackson's actual bid of £1,839,493 was above Kier's bid of £1,693,849. Jackson's parent company, Propensity, subsequently received a reduction of 100% for leniency from the OFT. As part of its leniency application, Propensity supplied a tender book which was confirmed to contain an entry detailing a cover price obtained from Marriott (Kier). The OFT concluded that contact took place between Marriott and Jackson which lead to Marriott supplying a figure to Jackson for a cover bid, contrary to the Chapter I prohibition. The MDT was applied to this infringement, resulting in a fine of £16,618,350.
2. Infringement 162 concerned a tender process for a proposed nursery unit at Westfield Primary School, York. Tenders were sought from seven companies on 9 July 2003 by City of York Council. Six companies responded to the tender and it was subsequently awarded to the lowest bidder, Medlock Construction Ltd. Kier Northern (a trading division of Kier) sought and received a cover price from another tender participant, Hobson & Porter. Kier submitted a bid of £1,261,115 whereas Hobson & Porter submitted a bid of £1,167,052. During its investigation, a search by the OFT of Hobson & Porter's premises uncovered a tender sheet which was later confirmed by Hobson & Porter, during the course of its application for leniency, to contain details of cover pricing. On the basis of the evidence it had obtained, the OFT concluded that three of the companies invited to tender, Lemmeleg, Kier Northern and P Casey, were unable to submit a competitive tender by the return date and/or did not want to win the contract. It also concluded that figures for a cover bid were provided from Strata to P Casey and from Hobson &

Porter to each of Kier Northern and Lemmeleg, in contravention of the Chapter I prohibition. The fine imposed was £1,146,413.

3. In relation to Infringement 235, on 25 May and 25 July 2005 Adnams plc sought tenders for the Adnams Distribution Centre, Reydon, Southwold. Of the seven companies invited to tender, six responded, including Kier Eastern (a trading division of Kier). The contract was awarded to the lowest bidder, Haymills. As in relation to Infringement 77, Jackson sought and received a cover price from Kier. Those companies subsequently submitted bids of £7,256,430 and £6,377,463 respectively. Jackson's parent company, Propensity, received a reduction of 100% for leniency from the OFT, and as part of its application confirmed to the OFT that it had received a cover price from Kier Eastern. On this basis the OFT concluded that as Jackson was unable to submit a tender by the return date and/or did not want to win the tender, it obtained a cover price from Kier Eastern, in breach of the Chapter I prohibition. The fine imposed was £129,675.
4. At Decision, VI.556 is a table which sets out the precise penalty calculation for each of the three infringements:

<b>Penalty step</b>		<b>Infringement 77</b>	<b>Infringement 162</b>	<b>Infringement 235</b>
Infringement date		01/10/2001	08/08/2003	19/09/2005
Product market		Education	Education	Distribution
Geographic market		East of England	Yorkshire & Humberside	East of England
Total turnover yr end		30/06/2008	30/06/2008	30/06/2008
Total worldwide turnover		£2,332,400,000	£2,332,400,000	£2,332,400,000
Relevant turnover yr end		30/06/2008	30/06/2008	30/06/2008
Relevant turnover		£26,490,000	£24,135,000	£2,730,000
Step 1 starting point		5%	5%	5%
<b>Penalty after step 1</b>		<b>£1,324,500</b>	<b>£1,206,750</b>	<b>£136,500</b>
Duration multiplier		1	1	1
<b>Penalty after step 2</b>		<b>£1,324,500</b>	<b>£1,206,750</b>	<b>£136,500</b>
Penalty as % of total t/o		0.06%	0.05%	0.01%
MDT to apply		0.75%	-	-
<b>Penalty after step 3</b>		<b>£17,493,000</b>	<b>£1,206,750</b>	<b>£136,500</b>
Step 4 Aggravating/ Mitigating	Instigator	-	-	-
	Directors	-	-	-
	Compliance	-5%	-5%	-5%

Penalty step		Infringement 77	Infringement 162	Infringement 235
Factors	Cooperation	-	-	-
Total step 4 adjustment		-5%	-5%	-5%
<b>Penalty after step 4</b>		<b>£16,618,350</b>	<b>£1,146,413</b>	<b>£129,675</b>
% of total turnover		0.7%	0.0%	0.0%
% of pre 1/5/04 turnover		1.35%	0.08%	n/a
<b>Penalty after step 5</b>		<b>£16,618,350</b>	<b>£1,146,413</b>	<b>£129,675</b>
Leniency/fast track		0%	0%	0%
<b>Final gross penalty</b>			<b>£17,894,438</b>	
<b>Final penalty after leniency/fast track</b>			<b>£17,894,438</b>	

### **Ballast Nedam N.V.**

5. Infringement 41 concerned tenders sought on 20 November 2000 by the East Midlands Reserve Forces and Cadet Association for the construction of garages and a workshop in Chilwell. All six companies that were invited to tender submitted bids. Ballast submitted the lowest bid (£617,667) and was subsequently awarded the tender. As part of its leniency application, Sol Construction Limited (“Sol”) confirmed that it had taken a cover price from Ballast in respect of the tender. Ballast Nedam accepted the terms of the OFT’s FTO and admitted that Ballast had engaged in bid rigging. The OFT concluded that: (i) the provision of a cover bid from Ballast to Sol was not unilateral and contravened the principle against direct or indirect contact between competitors; (ii) Sol could be presumed to have taken account of the information received from Ballast when determining its own bid; and (iii) Ballast could be presumed to have taken account of the information received from Sol when determining its conduct in the tendering process. The fine imposed before taking account of leniency was £1,510,209.
  
6. Infringement 47 related to tenders sought by Leeds City Council on 20 December 2000 for environmental works at Burley Lodge, Leeds. All seven companies invited to submit bids did so, and the bid was awarded to the lowest bidder, Frank Haslam Milan. In response to the FTO Ballast Nedam admitted that Ballast had engaged in bid rigging but could not recall the details. From the evidence it had gathered the OFT concluded, *inter alia*, that Strata Construction Limited had provided figures for a cover bid to Ballast. It also concluded that each party could

be presumed to have taken account of the information received when determining conduct in relation to the tender. The fine imposed before taking account of leniency was £1,510,209.

7. Infringement 48 related to tenders sought by Herschel Grammar School, Slough on 12 January 2001 for a music and drama block. Six companies were invited to tender, with the lowest bidder, Francis Construction Limited, winning the tender. As part of its leniency application Mansell Construction Services Limited (“Mansell”) provided a tender summary sheet and in interviews stated that the documentary evidence showed the cover price Mansell would have given to Ballast. Again, in relation to the FTO, Ballast admitted that it had engaged in bid rigging but could not recall the details. The OFT concluded that Ballast was unable to submit a tender by the return date and/or did not want to win the contract. It also concluded that contact had taken place between Ballast and Mansell and that Mansell had supplied a figure to Ballast for a cover bid. The MDT was applied to this infringement, resulting in a fine before leniency of £8,090,404.
8. The following table, set out at Decision, VI.427, provides details of the OFT’s penalty calculation in respect of each of the 3 infringements:

<b>Penalty step</b>		<b>Infringement 41</b>	<b>Infringement 47</b>	<b>Infringement 48</b>
Infringement date		11/01/2001	31/01/2001	09/02/2001
Product market		Defence	Public Housing	Education
Geographic market		East Midlands	Yorkshire & Humberside	South East
Total turnover yr end		31/12/2008	31/12/2008	31/12/2008
Total worldwide turnover		£1,135,495,280	£1,135,495,280	£1,135,495,280
Relevant turnover yr end		31/12/2008	31/12/2008	31/12/2008
Relevant turnover		£0	£0	£0
Step 1 starting point		5%	5%	5%
<b>Penalty after step 1</b>		<b>£0</b>	<b>£0</b>	<b>£0</b>
Duration multiplier		1	1	1
<b>Penalty after step 2</b>		<b>£0</b>	<b>£0</b>	<b>£0</b>
Penalty as % of total t/o		0.00%	0.00%	0.00%
MDT to apply		-	-	0.75%
Proxy % to apply		0.14%	0.14%	-
<b>Penalty after step 3</b>		<b>£1,589,693</b>	<b>£1,589,693</b>	<b>£8,516,215</b>
Step 4 Aggravating/ Mitigating Factors	Instigator	-	-	-
	Directors	-	-	-
	Compliance	-5%	-5%	-5%
	Cooperation	-	-	-
Total step 4 adjustment		-5%	-5%	-5%

Penalty step	Infringement 41	Infringement 47	Infringement 48
<b>Penalty after step 4</b>	<b>£1,510,209</b>	<b>£1,510,209</b>	<b>£8,090,404</b>
% of total turnover	0.13%	0.13%	0.71%
% of pre 1/5/04 turnover	0.39%	0.39%	2.07%
<b>Penalty after step 5</b>	<b>£1,510,209</b>	<b>£1,510,209</b>	<b>£8,090,404</b>
Leniency/fast track	-25%	-25%	-25%
<b>Final gross penalty</b>		<b>£11,110,821</b>	
<b>Final penalty after leniency/fast track</b>		<b>£8,333,116</b>	

### **Bowmer and Kirkland Limited and B&K Property Services Limited**

9. Infringement 18 concerned tenders sought by William Morrison Supermarkets plc on 14 July 2000 in relation to the construction of a superstore, retail units and a petrol filling station in Birmingham. Six companies were invited to tender and all six submitted bids by the closing date of 11 August 2000. The tender was awarded to Sol, which submitted the lowest bid of £8,545,179. The OFT inspected the business premises of Sol under section 27 of the 1998 Act and obtained a copy of its tender register. In addition, as part of its leniency application, Sol provided a general explanation of its participation in cover pricing and, in response to the Statement of Objections, confirmed that in relation to this tender it gave a cover price on request to Bowmer. This was confirmed by witness evidence provided by the Chief Estimator at Sol, and as seen admitted by Bowmer following the issue of the Statement of Objections. The fine imposed was £652,528.
  
10. Infringement 85 concerned a tender sought by Derby Daily Telegraph on 23 November 2001 in relation to the construction of new press foundations and associated alteration works. Only two companies were invited to tender, both of which submitted bids by the deadline of 3 December 2001. A third company, Britcon Limited, was subsequently also requested to submit a bid by 21 December 2001. The contract was awarded to Bowmer on the recommendation of the structural engineer appointed for the project. The OFT performed a search of the premises of the other bidder on the project, Herbert Baggaley. The OFT obtained a handwritten record of tenders received, with the words "Cover Price" recorded next to the entry for this tender. As part of its leniency application, Herbert Baggaley disclosed an invoice made out to Bowmer for the payment of £9,792 plus VAT at 17.5%, giving a total of £11,505.60. The invoice was stated to be in relation to

joinery works on the “New Press Foundations Derby Daily Telegraph” contract and was made out for the attention of “Paul Croft”. Also as part of its leniency application, Herbert Baggaley confirmed that it had received a cover price from Bowmer and had also made a compensation payment as detailed by the invoice. The OFT interviewed Paul Craft, an ex-commercial manager of the Civils Division at Bowmer. When asked about the invoice, Mr Craft stated that someone at Herbert Baggaley had contacted him about an outstanding payment, although he could not recall the individual’s details. Mr Craft recalled agreeing to deal with the payment. After reviewing the Statement of Objections, Bowmer accepted that one of its employees had given a cover price and compensation payment, however it stated that no one else within the company had any knowledge of the arrangement and that Mr Craft had acted on his own as a “rogue employee”. The fine imposed was £298,789.

11. The OFT concluded that Mr Craft formed part of the same economic unit as his employer, and therefore part of the same undertaking for the purpose of the OFT’s ability to enforce the provisions of the 1998 Act. Any question of Mr Craft exceeding his authority while in Bowmer’s employment would be a contractual matter to be resolved between Bowmer and Mr Craft. From the evidence available to it, the OFT concluded that contact between Bowmer and Herbert Baggaley resulted in a cover price and related compensation payment being given by the former to the latter, although the OFT states that the evidence was inconclusive as regards which of the two initiated the compensation payment arrangement. The OFT concluded that these facts amounted to a breach of the Chapter I prohibition set out in the 1998 Act.
  
12. Infringement 134 relates to tenders sought by Derbyshire County Council in December 2002 or early January 2003 for classroom extensions and interior alterations. Five companies were invited to submit tenders and did so. The contract was awarded to Derwent Valley which submitted the lowest bid of £96,093. During an inspection of Derwent Valley’s premises the OFT obtained a tender schedule and later, as part of its leniency application, Derwent Valley set out a summary of all tenders where it had given a cover price and confirmed that BKPS and another bidder, Milward, were given cover prices in relation to the tender. In

response to the FTO Bowmer supplied a completed suspect tender schedule in respect of this tender. It also confirmed that the Bowmer subsidiary involved in the infringement was BKPS. The MDT was applied to this infringement, resulting in a fine before leniency of £8,831,226.

13. The following table, taken from Decision, VI.434, sets out the detailed calculations in relation to the penalties:

<b>Penalty step</b>		<b>Infringement 18</b>	<b>Infringement 85</b>	<b>Infringement 134</b>
Infringement date		11/08/2000	03/12/2001	24/01/2003
Product market		Retail	Other Industrial Buildings	Education
Geographic market		West Midlands	East Midlands	East Midlands
Total turnover yr end		31/08/2008	31/08/2008	31/08/2008
Total worldwide turnover		£885,335,895	£885,335,895	£885,335,895
Relevant turnover yr end		31/08/2008	31/08/2008	31/08/2008
Relevant turnover		£16,313,206	£5,335,516	£16,904,578
Step 1 starting point		5%	7%	5%
<b>Penalty after step 1</b>		<b>£815,660</b>	<b>£373,486</b>	<b>£845,229</b>
Duration multiplier		1	1	1
<b>Penalty after step 2</b>		<b>£815,660</b>	<b>£373,486</b>	<b>£845,229</b>
Penalty as % of total t/o		0.09%	0.04%	0.10%
MDT to apply		-	-	1.05%
<b>Penalty after step 3</b>		<b>£815,660</b>	<b>£373,486</b>	<b>£9,296,027</b>
Step 4 Aggravating/ Mitigating Factors	Instigator	-	-	-
	Directors	-	-	-
	Compliance	-5%	-5%	-5%
	Cooperation	-15%	-15%	-
Total step 4 adjustment		-20%	-20%	-5%
<b>Penalty after step 4</b>		<b>£652,528</b>	<b>£298,789</b>	<b>£8,831,226</b>
% of total turnover		0.07%	0.03%	1.00%
% of pre 1/5/04 turnover		0.45%	0.11%	2.57%
<b>Penalty after step 5</b>		<b>£652,528</b>	<b>£298,789</b>	<b>£8,831,226</b>
Leniency/fast track		0%	0%	-25%
<b>Final gross penalty</b>			<b>£9,782,543</b>	
<b>Final penalty after leniency/fast track</b>			<b>£7,574,736</b>	

### Corringway Conclusions plc

14. Infringement 103 concerned a tender process initiated by Addenbrookes Hospital, Cambridge for the refurbishment of Psychiatric Services Wards S2 and S3. The return date for the tender was 16 April 2002 and six companies were invited to tender, each of which responded by the deadline. The tender was awarded to the company that submitted the lowest bid, RG Carter. The OFT received evidence from Propensity, the parent company of Jackson, that the latter had obtained a

cover price from HCL. This was later confirmed by HCL in response to the FTO sent to HCL on 22 March 2007. The fine imposed before leniency was £44,750.

15. Infringement 119 related to tenders sought by Queen Elizabeth Hospital for the Critical Care Development, Queen Elizabeth Hospital, Gayton Road, Kings Lynn, Norfolk. Four companies were invited to tender, each of which submitted tenders by the due date of 16 September 2002. The tender was awarded to Bluestone, which submitted the lowest bid. As part of its leniency application, Propensity confirmed that it had received a cover price from HCL in respect of that tender. In response to the FTO, HCL accepted that it had engaged in cover pricing on this tender. It could not recall details of the other parties involved, but stated that it was likely to have been Jackson, a subsidiary of Propensity. The MDT was applied to this infringement, resulting in a fine before leniency of £981,373.
  
16. Infringement 232 concerned a tender process initiated by Church Manor Estates for a new build agricultural building. By the return date of 29 July 2005 five of the six companies invited to tender had submitted bids and the tender was awarded to the lowest bidder, Rose Builders. Again, evidence of cover pricing by HCL was submitted by Propensity in the course of its application for leniency. According to the OFT, the evidence demonstrated that Jackson had received a cover price from HCL and this was confirmed by HCL in its response to the FTO. The fine imposed before leniency was £15,797.
  
17. The table below (which is taken from Decision, VI.503) sets out the details of the OFT's penalty calculation in respect of each of these infringements, including the reductions for compliance, acceptance of the FTO and financial hardship:

<b>Penalty step</b>	<b>Infringement 103</b>	<b>Infringement 119</b>	<b>Infringement 232</b>
Infringement date	16/04/2002	16/09/2002	29/07/2005
Product market	Health	Health	Private Housing
Geographic market	East of England	East of England	East of England
Total turnover yr end	31/03/2008 + 2004	31/03/2008 + 2004	31/03/2008
Total worldwide turnover	£205,577,000	£205,577,000	£181,195,000
Relevant turnover yr end	31/03/2008	31/03/2008	31/03/2008
Relevant turnover	£1,406,131	£1,406,131	£496,380

Penalty step		Infringement 103	Infringement 119	Infringement 232
Step 1 starting point		5%	5%	5%
<b>Penalty after step 1</b>		<b>£70,307</b>	<b>£70,307</b>	<b>£24,819</b>
Duration multiplier		1	1	1
<b>Penalty after step 2</b>		<b>£70,307</b>	<b>£70,307</b>	<b>£24,819</b>
Penalty as % of total t/o		0.03%	0.03%	0.01%
MDT to apply		-	0.75%	-
<b>Penalty after step 3</b>		<b>£70,307</b>	<b>£1,541,828</b>	<b>£24,819</b>
Financial hardship adj.		-33%	-33%	-33%
<b>Revised pen. after step 3</b>		<b>£47,105</b>	<b>£1,033,024</b>	<b>£16,629</b>
Step 4 Aggravating/ Mitigating Factors	Instigator	-	-	-
	Directors	-	-	-
	Compliance	-5%	-5%	-5%
	Cooperation	-	-	-
Total step 4 adjustment		-5%	-5%	-5%
<b>Penalty after step 4</b>		<b>£44,750</b>	<b>£981,373</b>	<b>£15,797</b>
% of total turnover		0.02%	0.48%	0.01%
% of pre 1/5/04 turnover		0.04%	0.85%	n/a
<b>Penalty after step 5</b>		<b>£44,750</b>	<b>£981,373</b>	<b>£15,797</b>
Leniency/fast track		-25%	-25%	-25%
<b>Final gross penalty</b>			<b>£1,041,921</b>	
<b>Final penalty after leniency/fast track</b>			<b>£781,440</b>	

### Thomas Vale Holdings Limited and Thomas Vale Construction Limited

18. Infringement 30 concerned tenders sought by Nottingham City Council on 26 October 2000 for environmental improvements at Pearmain Drive, Nottingham. Six companies were invited to and did submit a tender by the deadline of 24 November 2000. The contract was awarded to the lowest bidder, Nottingham City Building Works. The OFT received documentary evidence from Bodill and Thomas Vale as part of their respective applications for leniency. The OFT also conducted interviews with employees of each of the companies. From this, and from evidence obtained from two other companies that had submitted tenders, Mansell and Thomas Long, the OFT concluded that Mansell, Thomas Vale Construction and Thomas Long were unable to submit a tender by the return date and/or did not want to win the contract. It found that Bodill supplied a cover price to each company, contrary to the Chapter I prohibition. As the OFT became aware of this infringement as a result of information supplied by Bodill as part of its leniency application, Thomas Vale did not receive total immunity from penalty, but instead received a reduction of 50 per cent. The fine imposed before leniency was £57,018.

19. Infringement 107 resulted from tenders sought by Evesham College on 6 March 2002 for a new Gas Training Centre. Four companies were invited to tender, with the contract being awarded to Speller-Metcalf which submitted the lowest bid. During its inspection of Thomas Vale in January 2006, the OFT obtained a spreadsheet in relation to this tender. As part of its leniency application Thomas Vale provided a contemporaneous Tender Status spreadsheet and also provided a general explanation of its participation in cover pricing. From this evidence, and other evidence provided by Speller-Metcalf, the OFT concluded that Thomas Vale Construction obtained a cover price from Speller-Metcalf in relation to this tender, in breach of the Chapter I prohibition. The OFT had become aware of this bid rigging following its inspection of Thomas Vale, and so once again Thomas Vale received a 50 per cent discount on penalty rather than 100 per cent immunity. The MDT was applied to this infringement, resulting in a fine before leniency of £1,539,586.
  
20. Infringement 197 concerned tenders sought on 9 June 2004 by West Midlands Police Authority for an extension to Sutton Coldfield Police Station. The six companies invited to tender all submitted bids by the deadline of 7 July 2004, with the contract being awarded to the lowest bidder, Greswolde. During the OFT's inspection of Thomas Vale's head office in January 2006 it obtained a Tender Summary sheet which included information in relation to this bid. On the basis of this, together with other material including witness evidence from Thomas Vale and its employees during the course of its leniency application, and admissions by another bid participant, William Sapcote, the OFT concluded that Thomas Vale Construction had supplied William Sapcote with a cover price, in breach of the Chapter I prohibition. Again, as the OFT had learned of this bid rigging following its inspection of Thomas Vale, the latter received a 50 per cent discount rather than total immunity. The fine imposed before leniency was £344,341.
  
21. The following table, taken from Decision, VI.635, sets out the detailed calculations in relation to the penalty:

<b>Penalty step</b>	<b>Infringement 30</b>	<b>Infringement 107</b>	<b>Infringement 197</b>
Infringement date	24/11/2000	29/04/2002	07/07/2004
Product market	Public Housing	Education	Police/Fire & Rescue
Geographic market	East Midlands	West Midlands	West Midlands
Total turnover yr end	31/03/2009	31/03/2009	31/03/2009
Total worldwide turnover	£216,082,286	£216,082,286	£216,082,286
Relevant turnover yr end	31/03/2009	31/03/2009	31/03/2009
Relevant turnover	£3,305,633	£30,141,259	£7,249,288
Step 1 starting point	5%	5%	5%
<b>Penalty after step 1</b>	<b>£165,282</b>	<b>£1,507,063</b>	<b>£362,464</b>
Duration multiplier	1	1	1
<b>Penalty after step 2</b>	<b>£165,282</b>	<b>£1,507,063</b>	<b>£362,464</b>
Penalty as % of total t/o	0.08%	0.70%	0.17%
MDT to apply	-	0.75%	-
<b>Penalty after step 3</b>	<b>£165,282</b>	<b>£1,620,617</b>	<b>£362,464</b>
Step 4 Aggravating/ Mitigating Factors	Instigator	-	-
	Directors	-	-
	Compliance	-5%	-5%
	Cooperation	-	-
Total step 4 adjustment	-5%	-5%	-5%
<b>Penalty after step 4</b>	<b>£157,018</b>	<b>£1,539,586</b>	<b>£344,341</b>
% of total turnover	0.1%	0.7%	0.2%
% of pre 1/5/04 turnover	0.27%	2.59%	n/a
<b>Penalty after step 5</b>	<b>£157,018</b>	<b>£1,539,586</b>	<b>£344,341</b>
Leniency/fast track	-50%	-50%	-50%
<b>Final gross penalty</b>		<b>£2,040,945</b>	
<b>Final penalty after leniency/fast track</b>		<b>£1,020,473</b>	

### **John Sisk & Son Limited and Sicon Limited**

22. Infringement 166 related to a tender sought by Kingsyard Management Ltd on 18 August 2003 for the conversion of an industrial unit into office. Five companies were invited to tender, all of whom submitted a bid by the deadline of 1 October 2003. The contract was subsequently awarded to John Sisk, which submitted the lowest bid. Thomas Vale annexed a schedule to its leniency application setting out all tenders from 2003 to 2005 in respect of which it had either given or taken a cover price in the West Midlands region. According to this schedule it had received a cover price from John Sisk in relation to this tender. In response to the FTO sent on 22 March 2007, John Sisk admitted providing a cover price on this tender to Thomas Vale. It was not suggested that the other parties which submitted tenders

were involved in any anti-competitive agreements. The OFT concluded that Thomas Vale was unable to submit a tender by the return date and/or did not want to win the contract. The fine imposed before application of the FTO was £8,255,503.

23. The following table, taken from Decision, VI.551, sets out the detailed calculations in relation to the penalty:

<b>Penalty step</b>		<b>Infringement 166</b>
Infringement date		01/10/2003
Product market		Office
Geographic market		West Midlands
Total turnover yr end		31/12/2008
Total worldwide turnover		£1,158,667,028
Relevant turnover yr end		31/12/2008
Relevant turnover		£12,134,180
Step 1 starting point		5%
<b>Penalty after step 1</b>		<b>£606,709</b>
Duration multiplier		1
<b>Penalty after step 2</b>		<b>£606,709</b>
Penalty as % of total t/o		0.05%
MDT to apply		0.75%
<b>Penalty after step 3</b>		<b>£8,690,003</b>
Step 4 Aggravating/ Mitigating Factors	Instigator	-
	Directors	-
	Compliance	-5%
	Cooperator	-
Total step 4 adjustment		-5%
<b>Penalty after step 4</b>		<b>£8,255,503</b>
% of total turnover		0.7%
% of pre 1/5/04 turnover		5.87%
<b>Penalty after step 5</b>		<b>£8,255,503</b>
Leniency/fast track		-25%
<b>Final gross penalty</b>		<b>£8,255,503</b>
<b>Final penalty after leniency/fast track</b>		<b>£6,191,627</b>