

Competition Act 1998

Decision of the Office of Fair Trading

No. CA98/02/2005

Collusive tendering for felt and single ply flat-roofing contracts
in the North East of England

16 March 2005

(Case CE/1777-02)

SUMMARY

The Office of Fair Trading ('the OFT') has concluded that a number of roofing contractors, as listed in paragraph 1 of the Decision ('the Parties'), colluded in relation to the making of tender bids in felt and single ply flat roofing contracts in the North East of England thereby infringing the Chapter I prohibition contained in section 2(1) of the Competition Act 1998 ('the Act').

The Parties were involved in individual agreements and/or concerted practices each of which had as its object the fixing of prices, and in some cases sharing markets, in the market for the supply of installation, repair, maintenance and improvement services for felt and single ply flat roof coverings in the North East of England. When a purchaser wished to purchase such services for a flat roof, it typically invited a number of suitably qualified roofing contractors to submit tender bids detailing the price at which they could undertake the work specified in order to have competition for the individual contract between contractors and obtain a competitive price. The Parties' co-operation and co-ordination with each other in relation to the setting of tender prices and, in some cases, allocating contracts to particular Parties, had the object of preventing, restricting or distorting this competition. Different Parties were involved in different numbers of infringements. Certain infringements relate to collusion on individual contracts, whereas others relate to collusion on a number of contracts for a single customer.

The OFT considers that agreements and/or concerted practices between undertakings that fix prices or share markets by way of collusive tendering or otherwise are among the most serious infringements of the Act. Financial penalties are therefore being imposed on six Parties, subject to the operation of the policy to give lenient treatment for undertakings coming forward with information in cartel cases. In line with this policy Briggs Roofing and Cladding

Limited has been granted 100 per cent leniency. In addition, Mitrepoint Limited (trading as Roofclad) has been granted a reduction of fines by 50 per cent and Hylton Roofing Limited by 35 per cent. No financial penalty can be imposed on one further Party, Single Ply Roofing Systems Limited, as it had no turnover in the year prior to this Decision (2004), having previously become subject to an administration order. The table in paragraph 379 below sets out the penalty for each Party.

Confidential information in the original version of this Decision has been redacted from the published version on the public register. Redacted confidential information in the text of the published version of the Decision is denoted by [...] **[C]** or by italic text in square brackets, e.g. *[more than 5 per cent]*.

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I. THE FACTS

A. The Parties

1. Information received by the OFT (see paragraph 36 below) indicated that the following companies (together, the "Parties" and each individually, "a Party"), described in more detail in paragraphs 2 to 20 below, were engaged in price fixing and/or price fixing and market sharing in relation to the supply of installation, repair, maintenance and improvement services for felt and single ply flat roof coverings in the North East of England:
 - Briggs Roofing and Cladding Limited ('Briggs')
 - Dufell Roofing Company Limited ('Dufell')
 - Hodgson & Allon Limited ('Hodgson')
 - Hylton Roofing Limited ('Hylton')
 - Kelsey Roofing Industries Limited ('Kelsey')
 - Mitrepoint Limited trading as Roofclad Systems ('Roofclad')
 - Single Ply Roofing Systems Limited ('Single Ply').

Briggs Roofing and Cladding Limited ('Briggs')

2. Briggs is a private limited company registered in England and Wales, that specialises in the provision of roofing services. Its immediate owners are UK companies Houseplan Limited, an intermediate holding company, and Ruberoid Public Limited Company ('Ruberoid'), an intermediate parent company. Briggs' ultimate parent company is IKO Sales Limited ('IKO'), a Canadian company.¹ Although Briggs forms part of the economic entity ultimately controlled by Ruberoid, the infringements have been committed by Briggs and, therefore, the OFT considers that Briggs is the undertaking to which this Decision is directed and which the OFT considers to be a Party to the infringements. Briggs' registered address is Hawthorne House, Halfords Lane, Smethwick, West Midlands B66 1BJ. Ruberoid's registered address is Appley Lane North, Appley Bridge, Wigan, Lancashire, WN6 9AB. Prior to 16 December 2004 both companies were registered at 14 Tewin Road, Welwyn Garden City, Hertfordshire AL7 1BP. Two senior Briggs' employees are referred to in this Decision as Mr P and Mr Q.²

¹ Directors' report and financial statements for Briggs for the year ended 31 December 2001. See also chart that Briggs provided to the OFT, showing the organisation of Ruberoid and related companies in the UK. This chart shows that Ruberoid owns Briggs and a number of other companies that form part of a group of roofing and cladding companies owned, ultimately, by IKO.

² Briggs' legal representatives made representations regarding the need for the identity of certain individuals to be anonymised. The OFT duly considered these representations and in the light of them - and having regard to the confidentiality provisions of sections 237, 238 and 241 of the Enterprise Act 2002 and to the particular circumstances of this case - the OFT has withheld the names of individuals within Briggs who provided direct evidence to the OFT in the form of interviews or witness statements.

3. Ruberoid applied for, and was granted, conditional leniency in accordance with the OFT's leniency programme on behalf of itself and all its subsidiaries including Briggs.³ As part of Ruberoid's application for leniency, Briggs provided the OFT with a list of contracts ('the Briggs Memorandum'), compiled as part of an internal company review, in relation to which Briggs said there had been collusion between Briggs and one or more competitors.⁴ The Briggs Memorandum is divided, by region, into a number of tables. The top table in each case is the quotation that Briggs was asked to cover and the contractor's name who asked for the cover. The second table in each case is the contract where Briggs asked another undertaking for a cover price and who it was that Briggs asked. A number of the contracts detailed in the Briggs Memorandum concerned roofing works in the North East of England and this Decision deals with those contracts in relation to which the OFT considers there is sufficient evidence of infringement of the Chapter I prohibition.

4. Briggs' turnover for the calendar years 1999 and 2004 was as follows:⁵

- 1999	£33,530,000
- 2004	£29,607,000.

Dufell Roofing Company Limited ('Dufell')

5. Dufell is a private limited company registered in England and Wales. Its principal activity, as described in documents obtained from Companies House, is that of a flat roofing contractor. Dufell's registered address is Alexander House, Unit 28, Faverdale Industrial Estate, Darlington, County Durham DL3 0QQ. Neil Riddell, a Director of Dufell, is referred to in this Decision.

6. Dufell's turnover for the calendar years 1999 and 2003 was as follows:⁶

- 1999	£[...] [C]
- 2003	£[...] [C]

Hodgson & Allon Limited ('Hodgson')

7. Hodgson is a private limited company registered in England and Wales. Its principal activities, as described in documents obtained from Companies

³ See OFT Guideline 423, 'Director General of Fair Trading's Guidance as to the Appropriate Amount of a Penalty', March 2000, paragraph 3.1 onwards, which was in force at the time of the leniency applications in this case. This has since been replaced by OFT Guideline 423, 'OFT's guidance as to the appropriate amount of a penalty', December 2004, paragraph 3.1 onwards.

⁴ Briggs' internal memorandum entitled 'Competition Law Issues', dated 1 February 2002, prepared as part of Briggs' internal review and provided to the OFT by Briggs.

⁵ 1999 figure from Financial Analysis Made Easy ('FAME') Report for Briggs. 2004 figure supplied by Ruberoid by letter dated 2 March 2005.

⁶ Dufell's response dated 6 January 2005 to the Statement of Objections. Figures for the financial year ending 31 December 2004 are not available. Dufell's turnover figures are confidential information, not available from public company information sources. Consequently, the figures are not disclosed in this Decision.

House, are those of general construction, civil engineering and the erection of roof coverings and frames. Its registered address is Sandy View Buildings, Front Street, Burnopfield, Newcastle upon Tyne, Tyne & Wear NE16 6PU. Colin Howey, an estimator employed by Hodgson, is referred to in this Decision.

8. Hodgson's turnover for the calendar years 1999 and 2004 was as follows:⁷

- 1999	£[...][C]
- 2004	£[...][C].

Hylton Roofing Limited ('Hylton')

9. Hylton is a private limited company registered in England and Wales. Its principal activity, as described in documents obtained from Companies House, is that of roofing contractor. Hylton's registered address is 8 Harvey Close, Crowther Industrial Estate, District 3, Washington, Tyne & Wear NE38 0AB.
10. Hylton applied for, and was granted, conditional leniency in accordance with the OFT's leniency programme. David Murray, Managing Director of Hylton, made a witness statement in relation to Hylton's application for leniency.⁸
11. Hylton's turnover for the financial years ending 31 May 1999 and 31 May 2004 was as follows:⁹

- 1999	£[...][C]
- 2004	£[...][C]

12. Hylton's turnover for the calendar year 2004 was £[...][C].¹⁰

Kelsey Roofing Industries Limited ('Kelsey')

13. Kelsey is a private limited company registered in England and Wales. Although Kelsey is a wholly owned subsidiary of, and ultimately controlled by, Kelsey Roofing Holdings Limited, the infringements have been committed by Kelsey Roofing Industries Limited and, therefore, the OFT considers that Kelsey is the undertaking to which this Decision is

⁷ Turnover figures were provided by Sintons, Solicitors on behalf of Hodgson & Allon by letter dated 8 February 2005 and are confidential information, not available from public company information sources. Consequently, the figure is not disclosed in this Decision.

⁸ First witness statement of David Murray, dated 11 July 2003. Mr Murray also prepared a second witness statement, dated 23 February 2005, which was submitted as part of Hylton's response to the Statement of Objections.

⁹ Second Witness statement of David Murray, dated 23 February 2005. Hylton's turnover figures are confidential information, not available from public company information sources. Consequently, the figures are not disclosed in this Decision.

¹⁰ Letter from RMT, accountants, to Hylton dated 21 February 2005. Hylton's turnover figures are confidential information, not available from public company information sources. Consequently, the figures are not disclosed in this Decision.

addressed and which the OFT considers to be a Party to the infringement. Its principal activities, as described in documents obtained from Companies House, are those of refurbishment and construction of industrial and commercial roofs. Its registered address is Kelsey House, Paper Mill Drive, Redditch, Worcestershire B98 8QJ. Kelsey is currently the subject of an administration order.

14. Kelsey's turnover for the financial years¹¹ 1999 and 2003 was as follows:¹²

- 1999	£34,897,000
- 2003	[...][C].

Mitrepoint Limited trading as Roofclad Systems ('Roofclad')

15. Mitrepoint Limited is a private limited company, registered in England and Wales, which trades as Roofclad Systems. Its principal activity, as described in documents obtained from Companies House, is that of roofing contractor. Stewart Openshaw is the sole Director and shareholder of Roofclad. Mitrepoint Limited's registered address is Penshaw Way, Portobello Trading Estate, Birtley, Chester-le-Street, County Durham DH3 2SA.
16. Roofclad applied for, and was granted, conditional leniency in accordance with the OFT's leniency programme. As part of its application for leniency, Roofclad provided the OFT with a witness statement made by Stewart Openshaw on 11 February 2003.
17. Roofclad's turnover for the financial years ending 31 December 2001 and 31 March 2004 was as follows:¹³

- 2001	£[...][C]
- 2003/4	£[...][C].

Single Ply Roofing Systems Limited ('Single Ply')

18. Single Ply is a private limited company registered in England and Wales. Its registered address is 109 Swan Street, Sileby, Loughborough LE12 7NN. Its principal activity, as described in documents obtained from Companies House, is that of the erection of roof coverings and frames.

¹¹ Figures for 1999 are 12 months to 30/09/1999 and for 2003 are for 12 months to 31/12/2003 due to a change in accounting reference date.

¹² 1999 figure from FAME Report for Kelsey. 2003 figure is from Management Accounts and is confidential information, not available from public company information sources. Consequently, the figure is not disclosed in this Decision. Figures for the financial year ending 31 December 2004 are not available.

¹³ E-mail from Dickinson Dees, 27 January 2005. Due to a change in accounting reference date, figures for the financial year ending 31 March 2004 are for a 15 month period. Apportioned pro-rata, this amounts to turnover of £[...][C] for a 12 month period. Roofclad's turnover figures are confidential information, not available from public company information sources. Consequently, the figures are not disclosed in this Decision.

19. Single Ply's turnover for the calendar years 1999 and 2004 was as follows:¹⁴

- 1999	£2,871,528
- 2004	£nil.

20. Single Ply is currently the subject of an administration order.

B. The roofing services industry in the UK – Overview

21. The Parties supply installation, repair, maintenance and improvement services in relation to flat roofs. In practice, this may mean the provision and management of personnel, equipment and material to facilitate the installation, repair, maintenance and improvement of flat roofs. In addition, flat roofing contractors typically fit rooflights, insulation and vapour control materials and carry out building and timber repairs as part of the job specifications for the flat roofing work they carry out. Therefore, for the purposes of this Decision, references to the installation, repair, maintenance and improvement services in relation to flat roofs includes work of this nature and other work that is reasonably incidental to this main flat roofing work.

22. There are three general types of roofs: flat, metal and pitched. Flat roofs are used in the industrial and commercial property sectors; metal roofs are also used in these sectors; pitched roofs are common in the domestic property sector and in some segments of the commercial property sector.¹⁵

23. Flat roofing may be characterised in terms of the materials normally employed as coverings. The materials used for flat roof coverings fall into four broad categories:¹⁶

- bituminous felt (referred to in this Decision as felt);
- single ply PVC membranes (referred to in this Decision as ply or single ply);
- mastic asphalt; and
- liquid applied roofing systems.¹⁷

¹⁴ FAME Report for Single Ply Roofing.

¹⁵ A 2002 Market and Business Development ('MBD') report, 'Roofing Materials and Contracting (Industrial Report)', October 2002, paragraph 3.3

¹⁶ Statement by Ivan Jerram, Chartered Quantity Surveyor, dated 30 April 2003 ('the 2003 Statement'), at paragraph 12. Ivan Jerram was initially engaged by the OFT in the context of an earlier investigation by the OFT into collusive practices (in the flat roofing sector in the West Midlands) to provide a technical overview of the flat roof coverings contracting market and to review the technical details of the relevant contracts: see Decision No CA98/1/2003 - Collusive tendering in relation to contracts for flat-roofing services in the West Midlands, March 2004 (Case CP/0001-02).

¹⁷ Deck proofing, metal, and hot melt are less commonly used types of flat roofing products, which have been referred to in the context of this investigation (see further paragraphs 129 and 136 below). None of the infringements particularised in this Decision have involved tenders for the provision of such services.

24. Bituminous felt flat roof coverings are designed to be fixed on to the surface deckings of flat roofs to protect them from the elements. They are supplied in a wide variety and combination of materials with effective lives of up to approximately 20 years. Single ply PVC membrane flat roof coverings accomplish the same basic function as felt coverings, but have several advantages over felt, such as simple installation, the ability of the covering to move more freely and a low installation cost.
25. Mastic asphalt, whether of the "traditional" or the polymer modified specification, has a variety of applications in the construction industry. These specifications include roofing, flooring and paving. Liquid applied roofing systems form a further category of flat roof waterproofing coverings. These normally consist of fluid plastic materials that are typically applied by spray or brush to the receiving surface and which provide a seamless waterproof covering when they solidify. None of the contracts that have come to the attention of the OFT in the context of this investigation have involved tenders for the provision of such services.
26. The differences between felt and single ply flat roof coverings and mastic asphalt coverings are discussed further in the section dealing with product market definition at paragraphs 125 to 139 below.
27. While bituminous felts, single ply membranes and mastic asphalt are used in the construction of flat roofs, felt products dominate the flat roofing industry and accounted for approximately 80 per cent of the flat roofing industry from 1999 until 2003.
28. Industrial and commercial construction, where flat roofs and metal roofs are used, accounted for 74 per cent of the total roofing industry in the UK in 1999; in 2003, it accounted for 79 per cent of the total roofing industry. It is believed that this growth is due to increased construction of supermarkets, out-of-town retail parks and warehouses. Because of its significant role within the industrial and commercial sectors, the felt flat roofing segment is significant.¹⁸
29. There has been strong growth in the roofing contracting industry in the UK over the past few years with nominal growth between 1999 and 2003 taking the value of the industry to £1625.6 million in 2003. New construction accounted for an estimated 50 per cent of the total roofing contracting industry in 2003, with a value of £807.9 million in that year. Repair and maintenance of public buildings (non-residential) accounted for 9 per cent of the roofing contracting industry in 2003, with a value of £144.8 million. The repair and maintenance of private buildings (non-residential) was valued at £326 million in 2003.
30. There is a high degree of fragmentation in the roofing contracting industry with approximately 74 per cent of companies having a turnover of less than £250,000 in 2003. Only eight per cent of the industry (470 companies) had turnovers of more than £1 million in 2002 and 2003,

¹⁸ The information in paragraphs 28 and 29 was obtained from a report produced by Market Business Development Limited - 'Roofing Materials and Contracting (Industrial Report) – UK', April 2004.

although 50 companies had turnovers of more than £5 million in 2002 and 60 companies had turnovers of more than £5 million in 2003.¹⁹

31. In 2002, some 69 per cent of contractors in the roofing contracting services industry employed three people at most, whilst only 13 contractors employed more than 80 people.²⁰

C. Procurement process for flat-roofing services

32. The services of contractors who specialise in the installation, repair, maintenance and improvement of flat roofs are usually procured through a competitive tendering process whereby local authorities and private managing agents, architects and surveyors invite a number of contractors to submit sealed competitive bids. An essential feature of the tendering system is that prospective suppliers prepare and submit tenders or bids independently and tendering procedures are designed to provide competition in areas where it might otherwise be absent. Public authority tendering is subject to European Community²¹ and UK public procurement rules.
33. The Competition Appeal Tribunal ('CAT') recently made the following observations concerning the procurement process for flat-roofing services²²:

'The essential feature of a tendering process conducted by a local authority is the expectation on the part of the authority that it will receive, as a response to its tender, a number of independently articulated bids formulated by contractors wholly independent of each other. A tendering process is designed to produce competition in a very structured way.

The importance of the independent preparation of bids is sometimes recognised in tender documentation by imposing a requirement on the tenderers to certify that they have not had any contact with each other in the preparation of their bids. [...] The competitive tendering process may be interfered with if tenders submitted are not the result of individual economic calculation but of knowledge of the tenders by other participants or concertation between participants.'

¹⁹ Statistics in this paragraph from MBD report, 'Roofing Materials and Contracting (Industrial Report)', October 2002, paragraph 7.3.

²⁰ *Ibid.*, at paragraph 7.3.

²¹ The Public Services Contracts Regulations 1993 SI 1993/3228 implements Council Directive 92/50/EEC of 18 June 1992 relating to the co-ordination of procedures for the award of public service contracts, Official Journal L 209, 24/07/1992 ('the Public Services Directive 92/50'). The Public Services Directive 92/50, as amended by Council Directive (97/52/EC) of 13 December 2004, Official Journal L 323, 28/11/1997 p.1-59, which is implemented by The Public Contracts (Work, Services and Supply) (Amendment) Regulations 2000 SI 2000/2009. A new Council Directive 2004/18/EC on the co-ordination of procedures for the award of public works contracts, public supply contracts and public service contracts, aimed at simplifying the present rules regarding the award of various types of public contracts, Official Journal L 134, 30/04/2004. Member States have until 31 January 2006 to implement it into their national legislation.

²² *Apex Asphalt and Paving Co Limited v OFT* [2005] CAT 4 ("*WM Roofing I*"), at paragraphs 208 to 209.

34. Collusive tendering or bid-rigging eliminates competition amongst suppliers by fixing prices and/or sharing markets and infringes the Chapter I prohibition. There are generally four types of anti-competitive arrangements that can result in a pre-selected supplier winning a contract:
- Cover bidding (or cover pricing) occurs when a supplier submits a tender price for a contract that is not intended to win the contract but has been arrived at by arrangement with another supplier who wishes to win the contract. Cover bidding gives the impression of competitive bidding, but in reality, suppliers agree to submit token bids that are usually too high;
 - Bid suppression takes place when suppliers agree amongst themselves either to abstain from bidding or to withdraw bids;
 - Bid rotation is a process whereby the pre-selected supplier submits the lowest bid on a systematic or rotating basis; and
 - Market division or sharing occurs when suppliers agree amongst themselves not to compete in designated geographic regions or for specific customers or contracts.
35. The OFT notes that in the absence of a formal sub-contracting relationship, there is no legitimate reason why undertakings invited to participate in a single stage (or any other) competitively tendered process would need to communicate with one another in relation to the tender before returning their bids to those managing the tendering process.²³

D. Investigation and proceedings

36. In December 2001 it appeared to the OFT, from information received from Briggs in relation to another case concerning collusion amongst roofing contractors in the West Midlands,²⁴ that roofing contractors were involved in collusive tendering in relation to contracts for flat-roofing services in the North East of England. Information subsequently received indicated that Briggs, Hylton, Roofclad, Hodgson, Kelsey, Dufell and Single Ply were engaged in various price-fixing and, in the case of the BT Telephone Exchange contracts and the George Stephenson and Willington Quay Schools contracts, price-fixing and market-sharing arrangements whereby the tender prices submitted to local authorities and others for flat roofing works were communicated and fixed amongst the Parties bidding, prior to the return of their tenders. Briggs, Hylton and Roofclad have been granted leniency in accordance with the OFT's leniency programme (see, respectively, paragraphs 3, 10 and 16 above).
37. Price-fixing and market-sharing agreements or concerted practices infringe the Chapter I prohibition contained in section 2(1) of the Act. The

²³ See statement of Ivan Jerram, dated 30 April 2003.

²⁴ The West Midlands case referred to is Competition Act 1998 Decision number CA98/1/2004 in case CP/0001-02, "Collusive tendering in relation to contracts for flat-roofing services in the West Midlands", dated 16 March 2004 ('the West Midlands Roofing Decision').

prohibition imposed by section 2(1) of the Act is referred to in the Act and in this Decision as 'the Chapter I prohibition'. Price fixing may involve fixing either the price itself or the components of a price, and may also take the form of an agreement or concerted practice to restrict price competition. An agreement may therefore constitute a price-fixing agreement or concerted practice where it restricts price competition even if it does not entirely eliminate it.²⁵

Section 28 inspections

38. On 31 July 2002, the OFT decided that there were reasonable grounds for suspecting that a group of flat roofing contractors in the North East of England had been engaged in collusive tendering with the object of price-fixing and/or market sharing, thereby infringing the Chapter I prohibition. The OFT then began a formal investigation under the Act.²⁶ The OFT obtained warrants from the High Court on 16 January 2003 to enter and search the premises of the Parties listed below under section 28 of the Act.²⁷
- Hylton, searched on 23 January 2003;
 - Roofclad, searched on 23 January 2003;
 - Hodgson, searched on 23 January 2003;
 - Dufell, searched on 23 January 2003;
 - Single Ply, searched on 28 January 2003; and
 - Kelsey (Redditch)²⁸, searched on 28 January 2003.
39. The OFT also searched the premises of Europa Roofing Services Limited ('Europa') under section 28 of the Act on 23 January 2003.

Section 27 inspections

40. In addition, the OFT visited the following Parties' premises under section 27 of the Act,²⁹ as detailed below:
- Kelsey (Newcastle)³⁰, visited on 6 March 2003;
 - Hylton, visited on 7 March 2003;
 - Hodgson, visited on 3 April 2003; and
 - Single Ply, visited on 15 April 2003.

²⁵ See OFT Guideline 401 'Agreements and Concerted Practices', December 2004, paragraphs 3.5 and 3.6.

²⁶ At that time, section 25 of the Act empowered the OFT to conduct an investigation where it has reasonable grounds to suspect that the Chapter I prohibition has been infringed. The Act has been amended recently by The Competition Act 1998 and Other Enactments (Amendment) Regulations 2004, SI 2004/1261.

²⁷ Under section 28 of the Act, having obtained a warrant from a High Court judge, the OFT may enter and search an undertaking's premises.

²⁸ The OFT searched Kelsey's Head Office in Redditch under section 28 and visited its office in Wallsend, Newcastle under section 27 (see paragraph 40).

²⁹ Section 27 of the Act empowers the OFT to, among other things, enter an undertaking's premises without a warrant, with or without notice to the undertaking.

³⁰ See note 28 above.

41. The OFT also visited a number of third parties under section 27 of the Act, as detailed below:

- Telereal³¹, visited on 27 May 2003;
- Stockton on Tees Council, visited on 28 May 2003; and
- North Yorkshire County Council, visited on 28 May 2003.

Section 26 notices

42. Notices requiring information under section 26 of the Act³² and letters requesting information without the use of formal powers under the Act were sent to a number of third parties (including local authorities) as follows:

- North Tyneside Council, first notice sent 12 August 2003, response not received; second notice sent 14 July 2004, response dated 16 August 2004;
- William C Harvey Limited,³³ notice sent 12 August 2003, response dated 18 August 2003;
- Telereal, first notice sent 12 August 2003, response dated 26 August 2003 and second notice sent 14 July 2004, response dated 27 July 2004;
- City of Sunderland College, notice sent 12 August 2002, response dated 1 September 2003;
- South Tyneside Council, first notice sent 12 August 2003, response dated 28 October 2003 and second notice sent 14 July 2004, response dated 27 July 2004;
- Syncro Limited (roofing contractors), first notice sent 19 February 2003, responses dated 19 February 2003 and 20 February 2003 and second notice sent 14 July 2004, responses dated 20 July and 5 August 2004;
- Interserve Project Services Limited (roofing contractors), sent 24 February 2003, response dated 11 March 2003; and
- AEDAS, notice sent 14 July 2004, response dated 22 July 2004.

Information obtained not using formal powers

- North Tyneside Council, letter sent 8 September 2004, response dated 10 September 2004;
- Syncro Limited, letter sent 8 September 2004, response dated 8 September 2004;
- Chesterton PLC, letter sent 9 September 2004, response dated 9 September 2004;

³¹ It should be noted that Telereal was not in existence at any time to which the alleged infringing contracts relate. Telereal was created via a 50/50 Joint Venture between Land Securities Trillium and William Pears Holdings on 13th December 2001. A number of British Telecommunications plc employees transferred to Telereal shortly afterwards.

³² Section 26 of the Act empowers the OFT, for the purposes of an investigation under section 25 of the Act, to require any person to produce to it a specified document, or to provide it with specified information, which it considers relates to any matter relevant to the investigation.

³³ See paragraph 53 below.

- South Tyneside Council, visited on 21 September 2004 and 1 October 2004; and
- Derwentside District Council, visited on 21 September 2004.

43. The OFT carried out a number of interviews during its investigation, as detailed below:

- Mr P,³⁴ Briggs, 28 August 2002
- Mr Q,³⁵ Briggs, 16 October 2002 and 26 November 2002
- Neil Riddell, Dufell, 5 March 2003
- Stewart Openshaw, Roofclad, 6 March 2003
- William Hodgson, Hodgson, 6 March 2003

44. On 2 November 2004 a Statement of Objections under rule 14(1) of the OFT's procedural rules³⁶ ('the Statement') was issued to Briggs, Dufell, Europa, Hylton, Hodgson, Kelsey, Roofclad and Single Ply. Briggs, Dufell, Europa, Hylton, Hodgson, and Roofclad chose to make written representations to the OFT in response to the Statement in relation to the facts and conclusions set out in the Statement and/or in relation to the level of penalty that the OFT might impose for the infringements alleged. Europa also made oral representations to the OFT on 20 January 2005.

E. The contracts

45. The table below sets out, for each of the infringements specified by the OFT in paragraphs 46 to 114 below, the contract(s) in question, who required the work to be done, the participants in the infringement and the date that the contract in question was put out to tender.

Contract(s)	Customer	Participants	Date contract put out to tender
Chester Building (Bede Centre)	City of Sunderland College	Hylton Hodgson	September 2002
Thomas Percy RC Middle School	Reverend Father McGivern	Hylton Hodgson	4 October 2001
All Saints Church of England Primary School & Laygate School	South Tyneside Council	Hodgson Dufell	Summer 2002

³⁴ See note 2 above.

³⁵ See note 2 above.

³⁶ Competition Act 1998 (Director's Rules) Order 2000 SI 2000/293 (replaced on 17 November 2004 by Competition Act 1998 (Office of Fair Trading's Rules) Order 2004 SI 2004/2751).

Telephone Exchanges at Eston Grange, Burnopfield, Whickham, Newcastle East and Chester-le-Street	BT	Briggs Dufell Hylton Hodgson	6 June 2000 (Eston Grange) 19 May 2000 (4 others)
George Stephenson School & Willington Quay School	North Tyneside Council	Briggs Roofclad	Autumn 2000
Storeys	Prudential Portfolio Managers Limited	Briggs Single Ply Kelsey	Summer 2000

F. Evidence relied on by the OFT in relation to individual infringements

i. Chester Building, City of Sunderland College ('Chester Building')

Facts

46. In September 2002, City of Sunderland College invited a number of contractors to tender for a contract to replace the roof at one of its properties, Chester Building.³⁷ A roofing materials manufacturer called Tremco offered to carry out a free survey of the property and offered a 'clerk of works' service when work on the property began. In addition, Tremco offered a guarantee of twenty years for materials and workmanship. Tremco recommended three approved local contractors to carry out the work and the College sought competitive tenders from the contractors on 12 September 2002, using Tremco's specifications, with a return date of 20 September 2002. The winning contractor was to carry out the works under Tremco's supervision, whilst employed directly by the College.
47. The tender bids obtained by the College were as follows:
- Hylton £21,294.85 excluding VAT
 - J Ferguson Roofing £27,670.00 excluding VAT
 - Hodgson £35,270.00 excluding VAT.
48. Hylton won the contract and was informed of this by telephone during the week commencing 23 September 2002. Hylton's final bill for the replacement of the roof, including additional works identified during the course of the contract, was £26,662.37 excluding VAT.

³⁷ The facts in paragraphs 46 to 48 are taken from a letter from City of Sunderland College, dated 1 September 2003, in response to OFT's section 26 Notice, dated 12 August 2003.

Evidence of agreement and/or concerted practice

49. Fax from Hylton to Hodgson, dated 17 September 2002³⁸ This fax was transmitted from Hylton to Hodgson on 18 September 2002. The fax states as follows:

"Hodgson & Allen

FAO: Colin

17th September 2002

Q3274

Ref. Replacement Roof for Chester Building – Bede Centre

In response to your recent enquiry I now submit our tender for your consideration.

Schedule

1. Roof No 1

Provision for edge protection, chutes, hoists, skips etc.

...

All for the sum of £12,709.00 exc. Vat

2. Tank Room (Roof No 2)	=	£886.00 exc. Vat
3. Middle Level (Roof No 3)	=	£1880.00 exc. Vat
4. Lower Level (Roof No 4)	=	£5819.85 exc. Vat

Total price for roofing work to 4 nr roofs = £21,294.85 exc. Vat

NB Extra over cost you may wish to consider

1. Roof 3 – Optional quote for over cladding with UPVC

The existing vertical timber cladding = £681.60 exc. Vat

2. Roof 4 – Removal of roof light and board over = £227.00 exc. Vat

...

Yours faithfully

Mr D Murray"

50. Hodgson tender analysis sheet³⁹ The tender analysis sheet is handwritten and states:

"CLIENT:- City of Sunderland College
DATE DOCUMENTS RECEIVED:- 13/9/02
CONTRACT TITLE:- Replacement roof for Chester Building, Bede Centre, City of Sunderland College
TIME/SUBMISSION DATE:- 20/9/02, 4pm
TENDER TOTAL £35,270.00
ESTIMATOR:- C. Howey

³⁸ EA22 – found at Hodgson's premises by the OFT on 23 January 2003.

³⁹ EA22 – found at Hodgson's premises by the OFT on 23 January 2003.

DATE:- 19.8.02
CHECKED BY:- C. Howey "

51. There is no financial analysis or breakdown of the tender figure noted. A further handwritten notation across the sheet states:

"Prices given as per instructed
Therefore no analysis."

52. Evidence from Leniency Applicant - Hylton David Murray, Managing Director of Hylton, made a witness statement pursuant to Hylton's application for leniency.⁴⁰ Mr Murray's explanation of the fax from Hylton to Hodgson, detailed at paragraph 49 above, was as follows:

"I had been contacted on the telephone by Colin (I do not know his surname, however the officers from the OFT told me that it is Howie [sic]), Hodgson & Allon's estimator stating that they were too busy to tender... Colin asked me if as a favour I would give them a cover price so that they were not removed from the relevant tender list for submitting a nil tender return when we were both asked to tender for the Bede College and Thomas Percy School. This is not something I would normally do, but I did so on this occasion against my better judgment. My understanding about what is meant by a 'cover price' is that in situations where Competitor A does not want a job but does not feel able to say so, he asked Tenderer B to indicate their price so that Competitor A will bid higher to avoid winning the tender."

- ii. Thomas Percy RC Middle School ('Thomas Percy School')

Facts

53. On 4 October 2001, William C. Harvey Limited ('WC Harvey'), a firm of quantity and building surveyors and design consultants, sent invitations to tender for works on Thomas Percy School to four main contractors, with the tenders to be returned by 18 October 2001. The contractors were: Interserve Project Services Limited, Hastie D Burton Limited, Harry Kindred (Newcastle) Limited and J&W Simpson (Builders) Limited. These contractors were chosen on the basis of recommendations and their reputations over a number of years. WC Harvey was acting on behalf of Reverend Father McGivern of Thomas Percy School.
54. The works to be carried out on the school included roof deck replacement, rooflight replacement, work to gutters, decoration and various other works.
55. On 4 October 2001, WC Harvey also sent invitations to tender to a number of sub-contractors for the supply and installation of felt roof coverings, with the tenders to be returned by 17 October 2001. The sub-contractors were: Hodgson, Hylton, M&C Roofing Limited and Gosforth Roofing Services. WC Harvey sent the invitations directly to the sub-contractors because its experience suggested that main contractors had insufficient project management skills to effectively organise sub-

⁴⁰ First witness statement of David Murray, dated 11 July 2003.

contractors.⁴¹ However, the sub-contractors' tender bids were to be returned to the main contractors, to enable the main contractors to submit their tender bids for the overall contract of works to WC Harvey. Hodgson returned a bid of £68,735.00.⁴²

56. The main contractors then submitted their tender bids for the overall contract of works to WC Harvey. However, these bids exceeded the budget available for the works and WC Harvey, acting under instructions from their client, Reverend Father McGivern, amended the works specification to reduce costs. New invitations to tender were issued to the four main contractors listed above on 20 December 2001, with the tenders to be returned by 18 January 2002.
57. WC Harvey also issued new invitations to four sub-contractors, including Hylton and M&C Roofing Limited, as before. However, Hodgson and Gosforth Roofing Services were not invited to tender this time as Hodgson's initial bid was very high in comparison to the other bids and Gosforth Roofing Services were too busy to provide another bid. Instead, two new sub-contractors were invited to tender – Crisp & Dougall Ltd and WH Hillerby & Sons Limited - both of whom had been used by WC Harvey on previous occasions. Again, the sub-contractors' bids were to be returned to the main contractors, to enable the main contractors to submit their tender bids for the overall contract of works to WC Harvey.
58. The tender bids submitted to each main contractor by the four sub-contractors were as follows:⁴³

• M&C Roofing Limited	£30,411.00
• Crisp & Dougall Limited	£33,903.40
• Hylton	£34,849.00
• WH Hillerby & Sons Limited	£38,640.00.

59. As before, the main contractors then submitted their tender bids for the overall contract of works to WC Harvey, as follows:⁴⁴

• Interserve Project Services Limited	£49,863.28
• Hastie D Burton Limited	£60,997.00
• Harry Kindred (Newcastle) Limited	£63,398.00
• J&W Simpson (Builders) Limited	£64,016.00.

60. Interserve Project Services Limited won the contract and was informed of this in a letter from WC Harvey, dated 22 February 2002.⁴⁵ Crisp &

⁴¹ All the facts in paragraphs 53 to 57 are taken from a letter and enclosures from WC Harvey, dated 18 August 2003, in response to the OFT's section 26 Notice, dated 12 August 2003.

⁴² EA20 – found at Hodgson's premises by the OFT on 23 January 2003.

⁴³ Letter and enclosures from Interserve Building (part of Interserve Project Services Limited), dated 11 March 2004, in response to OFT's section 26 Notice, dated 24 February 2004.

⁴⁴ Letter from Interserve Building (part of Interserve Project Services Limited), dated 11 March 2004, in response to OFT's section 26 Notice, dated 24 February 2004.

⁴⁵ Letter from WC Harvey, dated 18 August 2003, in response to OFT's section 26 Notice, dated 12 August 2003.

Dougall Ltd was appointed as sub-contractor for the roofing works and an order for its services was sent to it by Interserve Project Services Limited on 1 March 2002.⁴⁶

Evidence of agreement and/or concerted practice

61. Entry in Colin Howey's (Hodgson) diary for 16 October 2001⁴⁷ The entry states:

"Hylton – Cover".

The same diary page also notes:

"Thomas Percy School – Tender"

62. Fax from Hylton to Hodgson, dated 17 October 2001⁴⁸ The fax was transmitted from Hylton to Hodgson on 17 October 2001. It states as follows:

"To Name: Colin
Co. Name: Hodgson & Allon
FAX: 01207/270920
Reference: THOMAS PERCY RC SCHOOL ALNWICK
FROM Dave Murray
No. of Pages (inc. front sheet) 7

Our quote exclusive of Provisional Price Cost Service
is £57,175.74 excl VAT

Preliminary £6225.00 excl VAT
£63,400 ...

Regards
Dave Murray"

63. A further handwritten notation on the same fax cover sheet states as follows:

"Hodgson & Allon Ltd

£68,735.00

Price as per specification and schedule of work. "

64. Hodgson tender analysis sheet⁴⁹ This document is handwritten and states:

"CLIENT:- Wm C Harvey Ltd

⁴⁶ Letter from Interserve Building (part of Interserve Project Services Limited), dated 11 March 2004, in response to OFT's section 26 Notice, dated 24 February 2004.

⁴⁷ FH7 – found at Hodgson's premises by the OFT on 23 January 2003.

⁴⁸ EA20 - found at Hodgson's premises by the OFT on 23 January 2003.

⁴⁹ EA20 – found at Hodgson's premises by the OFT on 23 January 2003.

CONTRACT TITLE:- Thomas Percy RC school
TIME/SUBMISSION DATE:- 17.10.01
TENDER TOTAL £68,735.00
ESTIMATOR:- C Howey
DATE:- 17.10.01
CHECKED BY:- C Howey"

65. There is no financial analysis or breakdown of the tender figure noted. A further handwritten notation across the tender analysis sheet states:

"price submitted as per instructions therefore no analysis required".

66. Fax from Hodgson to Interserve Project Services Limited, dated 17 October 2001⁵⁰ The fax cover sheet states:

"TIME: 4.15 DATE: 17.10.01
FOR THE ATTENTION OF: Nick Gutherson
COMPANY NAME: Interserve
SENDER: C Howey
MESSAGE: Alnwick – Thomas Percy RC Middle School Roof Repairs

To supply all necessary plant, labour and materials to carry out works as per your specification a schedule of work.

For the sum of £68,735.00.

We have not allowed for the effects of value added tax which will be charged at the current rate.

Assuring you of our best attention at all times.

C Howey"

67. Letter from C Howey, Hodgson, to WC Harvey, dated 17 October 2001⁵¹
There is a handwritten note on the letter, apparently to 'Glenys', requesting that she fax the quotation to three main contractors: Hastie D Burton Limited, Interserve Project Services Limited and Harry Kindred (Newcastle) Limited. The letter states as follows:

"Dear Sirs

Alnwick – Thomas Percy RC Middle School
Roof Repairs

We thank you for your recent enquiry and have pleasure in detailing below our quotation for works at the above:-

To supply all necessary plant, labour and materials to carry out works as per your specification and schedule of work.

For the Sum of: £68,735.00

⁵⁰ EA20 – found at Hodgson's premises by the OFT on 23 January 2003.

⁵¹ EA20 – found at Hodgson's premises by the OFT on 23 January 2003.

We have not allowed for the effects of Value Added Tax...
Yours faithfully

C Howey"

68. Evidence from Leniency Applicant - Hylton David Murray, Managing Director of Hylton, made a witness statement pursuant to Hylton's application for leniency.⁵² Mr Murray's explanation of the fax from Hylton to Hodgson detailed at paragraph 62 above was as follows:

"I had been contacted on the telephone by Colin (I do not know his surname, however the officers from the OFT told me that it is Howie [sic]), Hodgson & Allon's estimator stating that they were too busy to tender... Colin asked me if as a favour I would give them a cover price so that they were not removed from the relevant tender list for submitting a nil tender return when we were both asked to tender for the Bede College and Thomas Percy School. This is not something I would normally do, but I did so on this occasion against my better judgment. My understanding about what is meant by a 'cover price' is that in situations where Competitor A does not want a job but does not feel able to say so, he asked Tenderer B to indicate their price so that Competitor A will bid higher to avoid winning the tender."

- iii. All Saints Church of England Primary School & Laygate Primary School

Facts

69. In the summer of 2002, South Tyneside Council ('STC') placed an advertisement in local newspapers in relation to works at All Saints Church of England Primary School ('All Saints') and Laygate Primary School ('Laygate').⁵³ The works included some roofing works and consisted of single storey accommodation extensions to both schools, the provision of two new multipurpose halls, alterations to the existing building and some external works. STC viewed the works as one package with a total value of approximately £1.1million. It was STC's practice to advertise for invitations to tender for works valued at more than £500,000. Invitations to tender for works valued at less than this amount would be sent to contractors named on a standing list maintained by STC. The advertisement in relation to All Saints and Laygate invited main contractors to apply for inclusion on a select list from which a number would be chosen and invited to tender for works on the schools. Those wishing to apply were required to complete a questionnaire provided by STC on request and to return it to STC by 19 July 2002.
70. Applications for inclusion on the select list were received from a number of main contractors, and five were chosen by STC for inclusion on the select list.⁵⁴ On 6 September 2002 STC invited the five main contractors

⁵² First witness statement of David Murray, dated 11 July 2003.

⁵³ Letter and enclosures from STC, dated 28 October 2003, in response to OFT's section 26 Notice, dated 12 August 2003.

⁵⁴ Letter and enclosures from STC, dated 28 October 2003, in response to OFT's section 26 Notice, dated 12 August 2003.

to tender for the works at All Saints and Laygate. The return date stipulated for the tenders was 4 October 2002. The main contractors invited to tender by STC were:

- Bowey Construction Limited
- Dorin Construction
- Holly Construction Limited
- Kier North East Limited
- Syncro Limited.

71. Kier North East Limited withdrew from the tender process due to estimating commitments, but the other four main contractors submitted bids to STC, as follows:⁵⁵

- | | |
|------------------------------|----------------|
| • Bowey Construction Limited | £1,408,667.00 |
| • Dorin Construction | £1,319,363.00 |
| • Holly Construction Limited | £1,257,501.00 |
| • Syncro Limited | £1,199,743.00. |

72. Syncro Limited won the contract and was informed of this in a letter from STC, dated 18 November 2002.⁵⁶

73. As part of the works consisted of roofing works, STC provided the above main contractors with a list of roofing sub-contractors to invite to tender for the roofing element of the contract. Among the roofing sub-contractors specified by STC to be invited to tender were Hodgson, Dufell, Hylton, Byron Roofing (Hull) Limited ('Byron'), Teams Roofing Ltd ('Teams') and Roofclad. Their bids, as submitted to Syncro Limited, were as follows:⁵⁷

- | | |
|------------|---|
| • Hodgson | All Saints: £18,832; Laygate: £576 |
| • Dufell | All Saints: £21,444; Laygate: £736 |
| • Hylton | All Saints: £11,364; Laygate: £333 |
| • Byron | All Saints only: £12,321.24 |
| • Teams | All Saints: £22,162.36; Laygate: £63,709.26 |
| • Roofclad | All Saints: £100,729.02; Laygate: £75. |

74. The individual tenders all vary in which specific sites and works they cover. In particular the bids submitted by Hodgson, Dufell, Hylton and Byron do not cover substantial cladding works at both sites. Teams' bid is almost exclusively for such cladding works. The large variation between the contractors' bids is due to differences in the work that was tendered for.

⁵⁵ Letter and enclosures from STC, dated 28 October 2003, in response to OFT's section 26 Notice, dated 12 August 2003.

⁵⁶ Letter and enclosures from STC, dated 28 October 2003, in response to OFT's section 26 Notice, dated 12 August 2003.

⁵⁷ Fax from Syncro Limited, dated 20 February 2004, in response to OFT's section 26 Notice of 19 February 2004.

75. As regards the tender submissions for All Saints it should be noted that Hodgson's quote covered certain works which Dufell's quote did not.⁵⁸ Hylton's tender submission for All Saints covered significantly less works than the bids by both Hodgson and Dufell.⁵⁹ As regards Laygate, Hodgson, Dufell and Hylton quoted for the same works.
76. Byron's tender submission for All Saints covered considerably less works than the bids by Hodgson and Dufell.
77. Roofclad was appointed as the roofing sub-contractor on the contract and was informed of this by Syncro Limited by written order on 26 November 2002.

Evidence of agreement and/or concerted practice

78. Hodgson tender analysis sheet⁶⁰ The tender analysis sheet is handwritten. There is no financial analysis or breakdown of the tender figures noted for the works at All Saints and Laygate. The sheet states as follows:

"CLIENT:- Syncro Projects
 DATE DOCUMENTS RECEIVED:- 16/9/02
 CONTRACT TITLE:- All Saints C of E School and Laygate JMI School...
 TIME/SUBMISSION DATE:- 30/9/02
 ...
 All Saints £18,832.00
 Laygate £576.00
 ESTIMATOR:- CH
 DATE:- 30/9/02
 CHECKED BY:- WH "

79. Fax from Hodgson to Dufell, dated 1 October 2002⁶¹ This fax consisted of two pages and was transmitted from Hodgson, from 'Glenys/Colin', to Dufell, for the attention of Neil Riddell, on 1 October 2002. The message on the fax cover sheet states as follows:

"As per telephone conversation.
 See attached for you to alter."

80. The second page of the fax is what appears to be a letter in draft, unsigned and on unheaded paper, setting out quotations for works at All Saints and Laygate as follows:

⁵⁸ Hodgson's tender submission covers works specified under Contract E3341B Bill No. 4, page 14, A to D (inclusive). Hodgson's quote for these works amounted to £3,855. Dufell provided no quote for these works.

⁵⁹ For example, Hylton's tender submission did not cover the following items included in Hodgson's bid: Contract E3341B Bill No. 3, page 4, A; Contract E3341B Bill No. 4, page 32, G, Contract E3341B Bill No. 4, page 33, A; Contract E3341B Bill No. 5, page 19, D to J; Contract E3341B Bill No. 5, page 20, A; and Contract E3341B Bill No. 5, page 30, A. Hodgson's quote for these items amounted to a total of £11,772.

⁶⁰ EA24 - found at Hodgson's premises by the OFT on 23 January 2003.

⁶¹ PH/01 - found at Dufell's premises by the OFT on 23 January 2003.

"Dear Sirs,

We thank you for your recent enquiry and have pleasure in detailing below our quotation for the following works:-

Supply all necessary plant, labour and materials to carry out works as per you specification and bill of quantities:-

Re: All Saints C of E School

...

For the sum of : £18,832.00

Re: Laygate J.M.I. School

...

For the sum of: £576.00

We have not allowed for the effects of Value Added Tax which will be charged at the current rate.

...

Yours faithfully"

81. Letter from Hodgson to Syncro Limited, dated 1 October 2002⁶² This letter sets out Hodgson's quotations for works at All Saints and Laygate, as follows:

"Dear Sirs,

We thank you for your recent enquiry and have pleasure in detailing below our quotation for the following works:-

Supply all necessary plant, labour and materials to carry out works as per you specification and bill of quantities:-

Re: All Saints C of E School

...

For the sum of : £18,832.00

Re: Laygate J.M.I. School

...

For the sum of: £576.00

We have not allowed for the effects of Value Added Tax which will be charged at the current rate.

...

Yours faithfully

C. HOWEY"

⁶² EA23 - found at Hodgson's premises by the OFT on 23 January 2003.

82. Transcript of interview of Neil Riddell, Dufell⁶³ In response to a request from the OFT for an explanation of the fax from Hodgson to Dufell, dated 1 October 2002, Mr Riddell stated:

"I can recall very little of this job, other than we got three enquiries...Certainly, I wasn't interested in the job whatsoever, so I rang Hodgson and Allen and asked them "Do you know anything about this job?" and they said "Yes, we are quoting for it." I said "Well, I'm not interested. I don't know anything about it and I'm certainly not travelling up there." Then as far as I was concerned "Could you supply me with some information regarding the pricing of this because I haven't got a lot of time. I'm very busy. I don't want to exclude myself from receiving other enquiries at other times, but on this occasion I don't want anything to do with this."

83. Mr Riddell went on to say that his quotation for the work was higher than Hodgson's because he did not want the work but did not want the main contractor who had invited him to tender to think that Dufell would not be interested in further invitations in future by making some effort to respond to the invitation in this instance.

iv. BT telephone exchanges

Facts

84. British Telecom plc ('BT') required roof renewals, repairs and associated works to be carried out at a number of its telephone exchanges in the North East of England. In the context of these works, BT Facilities Management Solutions or FM Solutions (a BT division now known as BT Property) acted as the interface between BT and the contractors dealing with contractor selection and tender receipt. Abbey Holford Rowe (now known as Aedas), a building surveying company, acted as BT/FM Solutions' consultant building surveyors on these works. They produced the relevant specifications and tender documents (but all tenders were returned to FM Solutions). Abbey Holford Rowe also carried out tender adjudication and made recommendations to BT regarding the contractors that should be employed on the various roofing projects.⁶⁴ The BT telephone exchanges where works were required were:

- Eston Grange
- Burnopfield
- Whickham
- Newcastle East
- Chester-le-Street
- Haltwhistle⁶⁵.

⁶³ Transcript of interview of Neil Riddell by OFT, 5 March 2003

⁶⁴ Section 26 response by Telereal of 27 July 2004 in response to the OFT's section 26 Notice of 14 July 2004.

⁶⁵ The Haltwhistle contract was not the subject of collusive tendering, see paragraph 88 below.

85. The roofing contractors invited to tender for each exchange and the bids they submitted are detailed in the following table. The contractor that was awarded each contract is highlighted in bold:⁶⁶

Telephone exchange	Contractors invited to tender	Bids submitted by contractors	Contract awarded
Eston Grange	Dufell	£105,806.00	3 August 2000
	Hylton	£114,345.00	
	Hodgson	£116,606.00	
	Briggs ⁶⁷	£119,247.66	
Burnopfield	Hodgson	£21,850.00	3 August 2000
	Hylton	£23,378.00	
	Briggs	£23,916.24	
	Dufell	£24,180.00	
Whickham	Hodgson	£57,775.00	9 August 2000
	Hylton	£61,941.00	
	Dufell	£62,124.00	
	Briggs	£64,342.88	
Newcastle East	Briggs	£81,501.62	11 August 2000
	Hylton	£86,212.00	
	Hodgson	£88,418.00	
	Dufell	£91,305.24	
Chester-le-Street	Hylton	£68,974.00	9 August 2000
	Briggs	£73,466.90	
	Hodgson	£74,285.00	
	Dufell	£78,110.00	

86. In each case the tender invitations were sent out on 19 May 2000 (except for the tender for Eston Grange which was sent out on 6 June 2000). The closing date for the return of tender was 2 June 2000 for Burnopfield, Whickham and Newcastle East and 16 June 2000 for Eston Grange and Chester-le-Street. In each case the contract was awarded to the lowest bidder as being the best value for money.⁶⁸

⁶⁶ This table was prepared from information in documents RA1- RA6 and from letters produced to the OFT by Telereal on 27 May 2003, from FM Solutions to Abbey Holford Rowe, dated 5 June 2000 and 19 June 2000. In a letter of 27 July 2004 in response to a section 26 request by the OFT of 14 July 2004, Telereal noted that initially Ruberoid had mixed up its tender returns for Eston Grange and Chester-le-Street but this was later adjusted (as reported in Abbey Holford Rowe's tender reports).

⁶⁷ Ruberoid is a parent company of Briggs - see paragraph 2 above. Mr Q - an employee of Briggs rather than a direct employee of Briggs' parent company Ruberoid - was involved in collusion in the BT Telephone Exchange contracts (see paragraph 88 below). The OFT therefore considers that although Abbey Holford Rowe referred to Ruberoid in its documentation in relation to these telephone contracts, the contracting entity was in fact Briggs and that Briggs is the entity to which Abbey Holford Rowe should have referred.

⁶⁸ Telereal response of 27 July 2004 in response to a section 26 request by the OFT of 14 July 2004.

Evidence of agreement and/or concerted practice

87. Evidence from Leniency Applicant – Briggs. All of the contracts listed in the table at paragraph 85 above were identified in the Briggs Memorandum (see paragraph 3 above) as contracts in relation to which Briggs had colluded with competitors. The contracts were also stated to involve collusion in a report made by Mr Q that Briggs' solicitors sent to the OFT on 23 October 2002.
88. Mr Q⁶⁹ of Briggs, when interviewed by the OFT on 26 November 2002, stated that Neil Riddell of Duffell contacted Briggs in relation to the contracts for work at the BT telephone exchanges and suggested that Briggs and Duffell colluded to ensure that they, and two other competitors, Hodgson and Hylton, were each awarded contracts for works on telephone exchanges. Mr Q stated:⁷⁰

"...Haltwhistle...is a bit of separate entity but it's still within this group, there's Burnopfield, Wickham, Chester-le-Street, Eston Grange and Byker – all telephone exchanges, now on those Neil Riddell of Duffell Roofing contacted Briggs. Neil Riddell had a list of all the telephone exchanges that were coming out, we were aware of some of them we didn't have a complete list. He proposed that the contractors who were on the list...There were four on the list so Duffell proposed that the telephone exchanges be shared between the four. Briggs agreed to do that...Hodgson & Allon did Burnopfield and Wickham, Hylton Roofing did Chester-le-Street, Duffell did Eston Grange, and Briggs did Byker...These were all in June 2000, that's the date they were due in...What then happened was the enquiries came out and each contractor knew which one they had to cover other people on, and knew which one people would cover them on... **This leaves Haltwhistle... From my point of view it was open to competition... I know it wasn't part of that overall agreement.**"

(Emphasis added).

89. Award of the BT Telephone Exchange contracts. The OFT notes that the actual award of the telephone contracts was in accordance with the allocation of contracts specified by Mr Q in his interview of 26 November 2002.

v. George Stephenson School and Willington Quay School

Facts

90. North Tyneside Council commissioned Ballast PLC ('Ballast') – which is now in administration - to carry out repair and maintenance work at George Stephenson and Willington Quay Schools. The projects comprised

⁶⁹ See note 2 above.

⁷⁰ Transcript of OFT's interview with Mr Q (see note 2 above) on 26 November 2002, page 3. The OFT considers that the reference to 'Byker' in this extract in fact refers to the Newcastle East telephone exchange. The timing and parties correspond to the Newcastle East telephone exchange and Telereal's table of tender results in its section 26 response to the OFT (see note 66 above) that lists the telephone exchanges gives "Byker TE" as an alternative name to Newcastle East telephone exchange.

combined building and roofing works. Ballast invited a number of contractors to tender for the roofing work on a sub-contract basis. The roofing contractors that Ballast invited to tender included Briggs and Roofclad. The roofing element of the George Stephenson contract was awarded to Roofclad as sub-contractor in early 2000⁷¹ and the roofing element of the Willington Quay contract was awarded to Briggs as sub-contractor in August 2000.

Evidence of agreement and/or concerted practice

91. Invoice from Roofclad to Briggs, dated 15 January 2001⁷² The invoice states as follows:

"FAO: [Mr Q]⁷³

WILLINGTON QUAY COMPREHENSIVE SCHOOL
SUPPLY ONLY MATERIALS
SALES INVOICE NO. C5000/1

1) Supply on materials at agreed price	7995.00
2) Less contra charge against our contract George Stephenson School	4000.00
	<u>3995.00</u>
Plus 17 ½ % VAT	699.13
	<u>£4694.13 "</u>

92. Evidence from Leniency Applicant – Briggs. This contract was identified in the Briggs Memorandum (see paragraph 3 above) as one in relation to which collusion had taken place.⁷⁴ Briggs identified the other party to the collusion as Roofclad, another leniency applicant. The Willington Quay School contract was also mentioned later on in the Briggs Memorandum on a page headed "COMPENSATION "PAID" BY BRC FOR DEALS COMPLETED". The contracts were also stated to involve collusion in a report made by Mr Q that Briggs' solicitors sent to the OFT on 23 October 2002.

⁷¹ The OFT was unable to obtain invitation to tender or tender result and award documents from North Tyneside Council, Ballast, Briggs or Roofclad. The precise date that the tender was awarded to Roofclad is therefore unknown. However, the written records of meetings on 1 December 1999 and 4 February 2000 between, respectively, Roofclad, North Tyneside Council and Ballast and between Roofclad and Ballast show that Ballast had decided to award Roofclad the contract for roofing works at George Stephenson School on or before 4 February 2000.

⁷² NWC/8 - found at Roofclad's premises by the OFT on 23 January 2003. The invoice was also later produced to the OFT as an exhibit to the witness statement of Stewart Openshaw of Roofclad, dated 11 February 2003.

⁷³ See note 2 above.

⁷⁴ The Briggs Memorandum refers to collusion in relation to a contract for 'Williamson School' where Briggs colluded with Roofclad in or around July 2000. The date cited, and the fact that Briggs noted Roofclad as the other party involved, leads the OFT to believe that this is a typographical error and that it is, in fact, a reference to Willington Quay School, which is mentioned later in the Memorandum in relation to the payment of compensation by Briggs to Roofclad.

93. Mr Q of Briggs, when interviewed by the OFT on 26 November 2002, stated that Roofclad approached Briggs to share the work on George Stephenson and Willington Quay Schools which, from the local authority's point of view, was one project. He stated:⁷⁵

"...Willington School was Roof Clad Systems and the contact was Stuart Openshaw... Willington School followed George Stephenson School which from the local authority's point of view was one project. So what happened there was Roof Clad Systems approached Briggs to share the work on this school George Stephenson and Willington. Roof Clad were allowed to secure the George Stephenson School and Briggs were paid £4K...I believe the original agreement was in 1999 and payment in 2000 I don't have a record of the value of the George Stephenson school, but I believe it was about £450,000 but it was reduced I don't know by how much. Following that Briggs were allowed to secure the Willington School... Roofclad were paid a total of £4,694 in 2001, the original tender was for £385,339 and I think that's July 2000... The order was received in September 2000 but was only for £113, 638 they just had it in one phase. Then a further order was received in February 2001 for £136, 816."

94. Evidence from Leniency Applicant – Roofclad. Stewart Openshaw (see paragraph 15 above) of Roofclad made a witness statement in which he detailed an agreement between Briggs and Roofclad in relation to the George Stephenson and Willington Quay Schools contracts. Mr Openshaw stated that some days after receiving an invitation to tender for roofing works at Willington Quay School from North Tyneside Council, he received a telephone call from Briggs. He believed that the call was from Mr Q.⁷⁶ Mr Openshaw stated that he understood from Briggs that Briggs and Roofclad were the only two companies tendering for the contracts and that Briggs wanted to win the Willington Quay contract.⁷⁷ Mr Openshaw stated:⁷⁸

" I cannot remember the exact words of the conversation but the gist was that Briggs wanted to win the Willington Quay contract. It was therefore suggested that Roofclad submit a cover price to North Tyneside Council. Essentially this meant that Briggs would tell me what their tender price was and Roofclad would ensure its tender price exceeded this sum. This would result in Briggs winning the contract. In return for allowing Briggs to win the Willington Quay contract it was also suggested by Briggs that the reverse happened on another roofing contract that was being put out to tender by North Tyneside Council at the George Stephenson High School i.e. that Briggs would submit their tender at a figure that they knew was in excess of Roofclad's tender. This would mean that Roofclad and Briggs would get one contract. This would remove any risk of both Roofclad and Briggs losing both contracts."

⁷⁵ Transcript of OFT's interview with Mr Q (see note 2 above) on 26 November 2002, page 13.

⁷⁶ See note 2 above.

⁷⁷ Witness statement of Stewart Erwin Openshaw, dated 11 February 2003, at paragraph 10.

⁷⁸ *Ibid.*, at paragraph 11.

95. Mr Openshaw said that subsequent to that contact with Briggs he discussed Briggs' proposal with a colleague who was of the opinion that Roofclad should not consider giving up the Willington Quay School contract, which was valued in excess of £400,000.00, unless Roofclad benefited from some additional 'compensation'. Mr Openshaw then spoke to Briggs again and they reached agreement as to additional compensation.⁷⁹

"In addition it was also agreed that a payment of £8,000.00 would be made by Briggs to Roofclad as compensation for losing the Willington Quay contract. Similarly, Roofclad would pay £8,000.00 to Briggs as compensation. These sums would have been included in the tender price that was submitted to North Tyneside Council by both Briggs and Roofclad on the two contracts. It was not therefore costing either Roofclad or Briggs any money in making these payments but provided compensation for agreeing not to win the contract by submitting a tender that was known to be above that submitted by the other."

vi. Storeys, Washington

Facts

96. Chesterton PLC, a building and development services company, was appointed by Prudential Portfolio Managers Limited to manage the tendering process and produce a tender report in relation to a refurbishment project on a unit, 'UOL7', at Bentall Business Park, Washington, County Durham. The project consisted of the refurbishment of an existing terraced industrial unit, including, amongst other things, recovering of the roofs, repairs and renewal of wall cladding and repair works to the internal dividing walls with neighbouring units.
97. Chesterton PLC invited three contractors to tender for the works, with a return date of 14 April 2000. The contractors and their tender bids, after checking by Chesterton PLC, were as follows:⁸⁰
- Briggs £630,830.01
 - Kelsey £694,860.22
 - Single Ply £726,719.21.
98. The OFT notes that the tender bid submitted by Briggs, which won the contract, was lower than the bids submitted by both Single Ply and Kelsey.
99. Chesterton PLC advised Prudential Portfolio Managers Limited that Briggs' tender was fair and competitive and recommended Briggs' appointment to undertake the contract of works.

⁷⁹ *Ibid.*, at paragraph 15.

⁸⁰ Tender Report produced by Chesterton PLC for Prudential Portfolio Managers Limited, dated May 1999. The OFT notes that although the Tender Report is on its face dated May 1999, this is clearly a mistake because the report states that it summarises tenders that had a return date of 14 April 2000 and because the interviews of both Mr Q and Mr P and the Briggs Memorandum mention dates in April 2000.

Evidence of agreement and/or concerted practice

100. The evidence in relation to this contract consists of documents found at Single Ply's premises (paragraphs 101 to 104 below), documents found at Kelsey's premises (paragraphs 105 to 111 below) and evidence from the leniency applicant, Briggs (paragraphs 112 to 114 below).

Evidence found at Single Ply's premises:

101. Letter from Single Ply to Briggs, dated 5 September 2000⁸¹ The letter is marked for the attention of Mr Q⁸² and states:

"Dear Sirs,

Re: UOL7, Bentall Business Park, Washington, Tyne and Wear.

We thank you for your valued enquiry for Sarnafil roofing work at the above contract and have pleasure in submitting our quotation for this work, all as follows.

Supply all labour and plant necessary to install the Sarnafil roofing to the Office Roof area at the above project all as discussed on site

Total of Labour and Plant £5,605.00 ..."

102. Letter from Briggs to Single Ply, dated 12 September 2000⁸³ The letter, found at Single Ply's premises, states:

"For the attention of Mr. S. F. Jones

Dear Sirs,

RE: STOREYS – WASHINGTON

Please find enclosed our Official Order Number 74/32765 for works to be carried out at the above premises. All terms and conditions for this contract are as per this order.

Yours faithfully
FOR: BRIGGS ROOFING AND CLADDING (NORTH)

M. FRASER
QUANTITY SURVEYOR "

103. Purchase order from Briggs to Single Ply, dated 26 September 2000⁸⁴
The order, found at Single Ply, states:

"PURCHASE ORDER NO.: 3074/032765

⁸¹ EFL3- found at Single Ply's premises by the OFT on 23 January 2003.

⁸² See note 2 above.

⁸³ EFL3 - found at Single Ply's premises by the OFT on 23 January 2003.

⁸⁴ EFL3 - found at Single Ply's premises by the OFT on 23 January 2003.

...

CARRY OUT WORKS AS PER YOUR QUOTE DATED 5 SEPTEMBER 2000.	PRICE 5605.00"
--	-------------------

104. Invoice from Single Ply to Briggs, dated 31 December 2000⁸⁵ The invoice, found at Single Ply, states:

"Storeys – Washington

Work in accordance with your order No 74/32765	5 605 . 00
VAT	980 . 88
TOTAL	6 585 . 88"

Evidence found at Kelsey's premises:

105. Letter from Kelsey to Briggs, dated 14 September 2000⁸⁶ This letter, found at Kelsey, is from R G Hann, Managing Director of Kelsey, to Mr P⁸⁷ of Briggs. It states as follows:

"Dear Sirs

Work at Various Sites

We refer to your recent enquiry and have pleasure in submitting our estimate in accordance with your requirements.

To provide consultancy services	£4,440.00
...	
To provide materials, labour and plant	£5,560.00
...	

Yours faithfully
KELSEY ROOFING INDUSTRIES LIMITED

R G Hann
Managing Director "

106. Letter from Briggs to Kelsey, dated 21 September 2000⁸⁸ This letter, found at Kelsey, is from M Fraser, Quantity Surveyor at Briggs, to R G Hann, Kelsey. It states as follows:

"Dear Sirs

⁸⁵ EFL3 - found at Single Ply's premises by the OFT on 23 January 2003.

⁸⁶ JA2 - found at Kelsey's premises by the OFT on 28 January 2003.

⁸⁷ See note 2 above.

⁸⁸ JA2 - found at Kelsey's premises by the OFT on 28 January 2003.

RE: STOREYS – WASHINGTON

Please find enclosed our Official Order Number 74/32764 for works to be carried out at the above premises. All terms and conditions are as per this order.

Yours faithfully
FOR: BRIGGS ROOFING AND CLADDING (NORTH)

M. FRASER
QUANTITY SURVEYOR"

107. Purchase order from Briggs to Kelsey, dated 26 September 2000⁸⁹ This order, found at Kelsey, states:

"Please supply the following goods in accordance with the conditions set out on the reverse.

...
CARRY OUT WORKS AS PER YOUR LETTER ... 10000.00
DATE 14 SEPTEMBER 2000 "

108. Invoice from Kelsey to Briggs, dated 11 December 2000⁹⁰ This invoice, found at Kelsey, is marked for the attention of Mr P⁹¹ and states:

"Works at various sites as agreed	5560.00

NETT CLAIM	5560.00
VAT	<u>973.00</u>
INVOICE TOTAL	6533.00 "

109. Invoice from Kelsey to Briggs, dated 11 December 2000⁹² This invoice, found at Kelsey, is marked for the attention of Mr P⁹³ and states:

"CONTRACT NO: 349915
VALUATION(V)/INVOICE(I) NUMBER: (V) 343962
PAYMENT DATE: 19.1.01
GROSS VALUATION/INVOICE TO DATE 10,000
...
This valuation to Contract Ledger 10 000.00
VAT Received 1 750.00
Total Invoice to Sales Ledger 11 750.00 "

110. Remittance advice from Briggs to Kelsey, for period ending 18 January 2001, stamped 'received' by Kelsey on 19 January 2001⁹⁴ This document, found at Kelsey, states:

⁸⁹ JA2 - found at Kelsey's premises by the OFT on 28 January 2003.

⁹⁰ JA2- found at Kelsey's premises by the OFT on 28 January 2003.

⁹¹ See note 2 above.

⁹² JA2 - found at Kelsey's premises by the OFT on 28 January 2003.

⁹³ See note 2 above.

⁹⁴ JA2 - found at Kelsey's premises by the OFT on 28 January 2003.

were issued to Kelsey...total £11,750. And that was on 18 January 2001. A cheque was issued to Single Ply Roofing Services of £6,588 on 22 February 2001...I dealt with Single Ply Roofing Systems and [Mr P]⁹⁸ dealt with Kelsey Roofing..."

114. Additionally, as alluded to in Mr Q's interview, Mr P was in contact with Kelsey in relation to the Storeys contract. In his interview of 28 August 2002 Mr P notes:

"Storeys in Washington where again same time as 2000. I spoke to the MD Mr Hann of Kelsey and asked if he would back off as we had been working on it for two years. We learned of their involvement through our Hebburn Branch... The deal with Mr Hann was arranged directly over the telephone."

II. LEGAL AND ECONOMIC ASSESSMENT

A. Structure of this section

115. The background to the contracts and the evidence in relation to them on which the OFT relies have already been set out at paragraphs 46 to 114 above. This section begins by introducing the economic and legal framework against which the OFT has considered the evidence. The section then sets out, in relation to each infringement, the OFT's initial analysis of the evidence it relies on, the Parties' representations on that evidence and analysis (if any) and finally the OFT's conclusions in relation to the infringements having considered the Parties' representations.

116. It should be noted in relation to the evidence for all the infringements analysed below that, unless specifically stated, documents quoted and analysed in this section of the Decision in relation to the individual infringements were not created in relation to a leniency application.

B. Introduction

117. Section 2(1) of the Act prohibits any agreements between undertakings, decisions by associations of undertakings or concerted practices which may affect trade within the UK⁹⁹ and which have as their object or effect the prevention, restriction or distortion of competition within the UK, unless they are excluded or exempt in accordance with the provisions of Part I of the Act. The prohibition applies in particular to agreements, decisions or practices which directly or indirectly fix selling prices or share markets.¹⁰⁰

118. Tendering procedures are designed to provide competition in areas where it might otherwise be absent. An essential feature of this system is that

⁹⁸ See note 2 above.

⁹⁹ Under section 2(3) of the Act, subsection (1) applies only if the agreement, decision or practice is, or is intended to be, implemented in the United Kingdom and under section 2(7), 'United Kingdom' means, in relation to an agreement which operates or is intended to operate only in a part of the United Kingdom, that part.

¹⁰⁰ Section 2(2) of the Act.

prospective suppliers prepare and submit tenders or bids independently. The OFT considers that any tenders submitted as the result of collusive activities which reduce the uncertainty of the outcome of the tender process are likely to have an appreciable effect on competition.¹⁰¹

119. As noted by the CAT in *WM Roofing I*,

"We accept the submission of the OFT that submitting a cover-bid in these circumstances has an anti-competitive object or effect:

- (a) it reduces the number of competitive bids submitted in respect of that particular tender;
- (b) it deprives the tenderee of the opportunity of seeking a replacement (competitive) bid;
- (c) it prevents other contractors wishing to place competitive bids in respect of that particular tender from doing so;
- (d) it gives the tenderee a false impression of the nature of competition in the market, leading at least potentially to future tender processes being similarly impaired."¹⁰²

C. Application of Article 81 – effect on interstate trade

120. Following the entry into application of Council Regulation (EC) No 1/2003¹⁰³ on 1 May 2004, the OFT is required when applying national competition law to agreements and/or concerted practices between undertakings which may affect trade between Member States also to apply Article 81 of the EC Treaty.¹⁰⁴ Since the infringing agreements and/or concerted practices particularised in this Decision were all terminated before 1 May 2004, however, the OFT does not consider it is under a duty to apply Article 81 to the particular circumstances of this case. Accordingly, the OFT has not considered whether trade between Member States may have been appreciably affected, and this Decision relates solely to whether the Chapter I prohibition has been infringed.

D. Application of section 60

121. Section 60(1) of the Act sets out the principle that, so far as it is possible (having regard to any relevant differences between the provisions concerned), questions arising in relation to competition within the UK are dealt with in a manner which is consistent with the treatment of corresponding questions arising in European Community law in relation to competition within the Community. In particular, under section 60(2) of the Act, the OFT must act (so far as it is compatible with the provisions of the Act) with a view to ensuring that there is no inconsistency with the principles laid down by the EC Treaty and the European Court and any relevant decision of the European Court. Under section 60(3) of the Act,

¹⁰¹ See OFT Guideline 401 'Agreements and Concerted Practices', December 2004, paragraph 3.14.

¹⁰² *WM Roofing I* judgment, at paragraph 251.

¹⁰³ OJ L 1, page 1

¹⁰⁴ Article 3, Regulation 1/2003

the OFT must, in addition, have regard to any relevant decision or statement of the European Commission.

E. The relevant market

i. Introduction

122. The OFT is only obliged to define the market where it is impossible, without such a definition, to determine whether the agreement and/or concerted practice is liable to affect trade in the UK and has as its object or effect the prevention, restriction or distortion of competition.¹⁰⁵ No such obligation arises in this case because it involves agreements and/or concerted practices that had as their object the prevention, restriction or distortion of competition by way of price fixing and, in the case of the BT Telephone Exchange contracts and George Stephenson and Willington Quay Schools contracts, by way of price fixing and market sharing. Nevertheless, the OFT does define the market for the purposes of assessing the appropriate level of penalties.¹⁰⁶

123. In order to define the market one must consider the competitive pressures faced by companies active in that market. A market definition is established by analysing the closest substitutes to the product that is the focus of the investigation. These products are usually the most immediate competitive constraints on the behaviour of the undertaking controlling the product in question.¹⁰⁷

124. The OFT is not bound by market definitions adopted in previous cases, either by itself or by other competition authorities. Sometimes earlier definitions can be informative when considering the appropriate market definition. However, although previous cases can provide useful information, the relevant market must be identified according to the particular facts of the case in hand.¹⁰⁸

ii. The relevant product market

125. The process of defining the relevant market starts with the product that is the subject of the investigation. In this case, this is the supply of

¹⁰⁵ Case T-62/98 *Volkswagen AG v European Commission* [2000] ECR II-2707, paragraph 230 and Case T-29/92 *SPO and Others v Commission* [1995] ECR II-289, paragraph 74. These cases refined the CFI's earlier position adopted in Case T-68/89 etc, *Societa Italiana Vetro SpA etc v Commission (Italian Flat Glass)* [1992] ECR II 1403, paragraph 159, drawing a distinction between cases involving abuse of dominance, where market definition is always a prerequisite to a finding of an infringement, and cases involving anti-competitive agreements, where the market need only be defined where it is impossible, without such a definition, to determine whether the agreement, the decision by an association of undertakings or the concerted practice at issue is liable to affect trade between Member States and has as its object or effect the prevention, restriction or distortion of competition within the common market.

¹⁰⁶ See OFT Guideline 423, 'OFT's guidance as to the appropriate amount of a penalty', December 2004, paragraph 2.7.

¹⁰⁷ OFT Guideline 403 'Market Definition', December 2004.

¹⁰⁸ *Ibid.*, at paragraph 5.7.

installation, repair, maintenance and improvement services for a variety of flat roof weatherproofing coverings.¹⁰⁹

126. In an earlier decision in the roofing sector,¹¹⁰ the OFT considered, based on the information then available to it, that the appropriate market definition was the supply of repair, maintenance and improvement services for flat roofs. As the OFT has obtained further information relating to flat roofing products and services since making that decision, it is appropriate for the OFT to reconsider the relevant market definition.

127. As noted in the industry overview section at paragraph 23 above, flat roof coverings fall into four broad categories: bituminous felt; single ply PVC membranes; mastic asphalt; and liquid applied roofing systems.

128. The contracts referred to in this Decision all relate to felt or single ply coverings. The OFT considers that the prices, characteristics and usages of felt and single ply coverings are very similar, and these types of covering are substitutable. On the supply side, the skills and equipment involved in supplying felt and single ply flat roof coverings overlap to a significant extent and many builders are able to install both felt and single ply flat roofs. It was noted in one Party's representations that '*a small but significant change in the price of ply will shift demand to felt*'.¹¹¹ The OFT considers that felt and single ply flat roof coverings form part of a single product market and has received no representations to the contrary.

129. Representations were received from one Party¹¹² asserting that the relevant product market should cover all flat roofing coverings, including metal, single ply, felt, mastic asphalt and liquid applied roofing. For the reasons set out below, the OFT considers that these products are not all substitutable for one another, whether from a supply- or demand-side perspective.

130. The OFT is of the view that there are significant differences between the characteristics and usages of mastic asphalt on the one hand and felt and single ply coverings on the other. Felt and single ply flat roof coverings differ from mastic asphalt coverings in a number of ways:¹¹³

- Felt and single ply materials are pre-formed sheets and no specialist skills are required to install them whereas mastic asphalt involves the spreading of hot molten material and specialist training is required.
- Felt and single ply coverings are considerably lighter per square metre of roof covered than mastic asphalt coverings. For example

¹⁰⁹ Ivan Jerram (see note 16 above) made a second statement to the OFT on 5 October 2004 ('Ivan Jerram's 2004 statement'): see paragraph 9 of Ivan Jerram's 2004 Statement.

¹¹⁰ The West Midlands Roofing Decision, see footnote 24.

¹¹¹ Representations of Briggs in response to the Statement of Objections, dated 21 December 2004.

¹¹² *Ibid.*

¹¹³ See Ivan Jerram's 2004 Statement.

a self-finished high performance roof is likely to weigh approximately 25 per cent less than a 20mm thickness of mastic asphalt.

- The average service life of a felt or single ply roof is approximately half that of a mastic asphalt roof.
- Felt and single ply roofs are not sufficiently durable to allow for more than occasional maintenance work or emergency exit routes whereas mastic asphalt is frequently installed to allow vehicular and pedestrian traffic.

131. Therefore, when considering demand-side substitutability, it appears that the characteristics and usage of mastic asphalt installations for flat roof coverings are sufficiently different from those of felt and single ply coverings, to consider that (for the purposes of this Decision) neither felt nor single ply coverings provide a competitive constraint on mastic asphalt. Clear differences exist in relation to the weight, service life and durability of felt/single ply and mastic asphalt.

132. The OFT has considered representations¹¹⁴ that these products are substitutable from a demand side perspective because an architect is at liberty to design a flat roof with the full range of coverings at his disposal and at the point of design no roofing material is considered to be too expensive. Competition between suppliers of flat-roofing services takes place not at the point of design but at a much later stage of the process, when tenders are sought for implementation of a particular part of that design. Competition is even further removed from the point of design in the case of maintenance and replacement, which accounted for around 50% of the total roofing contract industry in 2003.¹¹⁵

133. Moreover, the OFT understands that the skills required to install mastic asphalt installations require extensive training over several years which would not allow installers of felt and single ply flat roof waterproof coverings to switch to offering mastic asphalt installation services (to the extent that they do not yet offer such services) at relatively short notice. Although training and qualifications may also be obtained in relation to felt and single ply roofing, the qualifications for felt/ply and mastic asphalt are different, so that a roofer qualified in one type of covering would not be readily able to switch to the other without further training.

134. From a pricing perspective, Briggs' representations note that '*a small but significant change in the price of ply will shift demand to felt and so on*'.¹¹⁶ As noted above, the OFT agrees with this analysis with respect to felt and single ply forming part of the same market. However, no evidence has been provided in relation to the relative prices of felt/single

¹¹⁴ Representations of Briggs in response to the Statement of Objections, dated 21 December 2004.

¹¹⁵ See paragraph 29.

¹¹⁶ Representations of Briggs in response to the Statement of Objections, dated 21 December 2004.

ply on the one hand and mastic asphalt and other roofing materials on the other hand.

135. The OFT therefore remains of the view that felt and single ply form part of a separate product market from mastic asphalt.
136. In relation to other types of alternative flat roofing materials, in particular deck proofing, metal, hot melt and liquid applied roofing products, the OFT has insufficient facts available to it to determine whether these products form part of the same market as felt/single ply or mastic asphalt, or whether they form one or more separate product markets. The OFT has therefore reached no firm conclusion as to the extent of the felt/single ply market, and it is not necessary for the OFT to do so in order to determine whether there has been an infringement of the Chapter I prohibition.¹¹⁷ For the purpose of calculating penalties, in order to avoid any detriment to the Parties due to the insufficiency of information available to the OFT, relevant turnover will be calculated on the basis of the narrowest possible market definition, namely felt and single ply flat roof coverings. Turnover in respect of other flat roof covering types will not be included when calculating penalties.
137. Representations were received from Dufell¹¹⁸ arguing that new construction work should be excluded from the product market definition, as none of the contracts referred to at paragraph 45 related to new construction. The reason given in support of this submission is that the relevant contracts included in this Decision did not include new construction. However, the OFT does not analyse the market in terms of those contracts in which the parties are implicated, but in relation to competitive pressures, as discussed in paragraph 123 above. The OFT considers that the skills and materials required to supply roofing installation for new construction are the same as those required for maintenance and replacement works. No evidence or reasoning has been provided that would lead the OFT to alter its conclusion that based on supply-side substitutability, new construction works form part of the same market as maintenance and replacement installation of felt and single ply flat roof coverings.
138. Representations were received from Hylton¹¹⁹ asserting that the relevant market should only include work allocated on a competitive price negotiation and in particular should exclude works performed under a fixed term contract under which pre-determined rates were set in [...]C]. Competition in a market may take place in a number of forms, including competitive tender processes involving a number of suppliers and other means of selection of a particular supplier by the purchaser. Prices may be determined by submission of tenders, individual contract negotiations or according to a supplier's pre-determined price list. Supply resulting

¹¹⁷ See paragraph 122.

¹¹⁸ Representations of Dufell in response to the Statement of Objections, dated 6 January 2005.

¹¹⁹ Representations of Hylton, dated 31 December 2004, to the Statement of Objections, supplemented by letter dated 2 February 2005; See also second witness statement of David Murray, dated 23 February 2005.

from all of these forms of competition can form part of a single product market. In the present case, the OFT does not accept that works carried out under a long-term contract at pre-negotiated prices form a separate market from works carried out pursuant to tender processes.

139. In summary, for the purposes of this Decision, the OFT therefore remains of the view that on balance the relevant product market is the supply of installation, repair maintenance and improvement services for felt and single ply flat roof coverings.

iii. The relevant geographic market

140. When defining the relevant geographic market, the OFT uses a similar approach to defining the relevant product market.¹²⁰ The investigation in this case relates to a series of individual agreements and/or concerted practices in relation to contracts for felt and single ply flat roof covering installations in the North East of England, including Alnwick, Burnopfield, Byker, Chester-le-Street, Eston Grange, Haltwhistle, South Shields, Sunderland, Washington, Whickham and Willington Quay.

141. The OFT notes that there are many variables which influence a roofing contractor's decision as to how far to travel to work on any given project:

- a. The amount of work a contractor has in its immediate locality at any one time, more particularly the level of definite future work in its order book and the level of prospective work gauged by the level of incoming tender invitations.
- b. The nature, monetary value, duration or prestige of a prospective contract is likely to encourage travel over long distances.
- c. A roofing contractor may have longstanding business relationships as a sub-contractor to certain firms of main contractors. For example, a roofing contractor may be engaged to provide the supply of installation, repair, maintenance and improvement services for mastic asphalt coverings for an employer who has several buildings spread over a wide geographical area.
- d. Work in large geographic or rural areas with relatively few concentrated centres of population may necessitate lengthier travel.¹²¹

142. The OFT considers that a customer in the North East of England would typically invite tenders from suppliers in the same area for the majority of contracts, although it recognises that in certain circumstances customers may request and contractors may provide roofing services from outside their immediate locality. Buyers such as local authorities, colleges and main contractors seeking sub-contractors to carry out flat roofing works typically maintain lists of approved contractors ('standing lists') to which

¹²⁰ See OFT Guideline 403 'Market Definition', December 2004, paragraph 4.3.

¹²¹ See footnote 16 Ivan Jerram's 2004 Statement, paragraph 10

invitations to tender may be sent. Before a contractor is added to a standing list, a series of checks is usually carried out. These checks include reviewing the contractor's accounts, health and safety policy and records and ensuring that the contractor is properly insured. A contractor is also usually required to provide product and workmanship guarantees. It may take a contractor up to six months to be added to a local authority's standing list.¹²²

143. A contractor from outside the area seeking inclusion on a standing list would face delays resulting from the carrying out of the checks detailed above. In addition, such a contractor would be further from the work site than local contractors and, therefore, would have to establish a local base or travel from further away and absorb additional transport costs. This factor has often led to regional market definitions in relation to various building products. Further, contractors from outside the area may have more difficulty securing local labour resources, particularly on a temporary basis, than firms already established in the area because of the shortage of labour generally available in the UK.¹²³

144. For these reasons, the OFT considers that a buyer in the North East of England would usually choose a supplier with a presence in the same area and, accordingly, the OFT finds that the relevant geographic market is the North East of England.

145. Although the OFT recognises that competition does not take place according to administrative boundaries, for the purposes of calculating "relevant turnover" and determining penalties, it is necessary to adopt a precise definition of the "North East of England". For the purposes of calculating turnover, the OFT considers that it is appropriate to adopt existing administrative boundaries and therefore considers that the North East of England comprises Northumberland, County Durham, Tyne & Wear and the Tees Valley Region (including the unitary authorities of Hartlepool, Stockton on Tees, Middlesbrough and Redcar & Cleveland).

iv. The relevant market - conclusion

146. The OFT considers that the relevant market for the purposes of this Decision is the supply of installation, repair, maintenance and improvement services for felt and single ply flat roof coverings in the North East of England.

¹²² Letter from City of Sunderland College, dated 1 September 2003, in response to section 26 Notice from the OFT, dated 12 August 2003; letter from South Tyneside Council, dated 28 October 2003, in response to section 26 Notice from the OFT, dated 12 August 2003; letter from Syncro Limited, dated 19 February 2004, in response to section 26 Notice from the OFT dated 19 February 2004.

¹²³ According to the Construction Industry Training Board's (CITB) Skills Needs Survey, published 30 April 2003, 79 percent of construction employers nationally said that they had experienced difficulties recruiting skilled staff in the previous few months. The problem appeared to be particularly acute in relation to recruitment on a 'project by project' basis, which is common throughout the construction industry and is where most skills shortages occur. See www.citb.org.uk.

F. Undertakings

147. The word 'undertaking' is not defined in the Act or the EC Treaty. It is a wide term that the European Court of Justice ('the ECJ') has held to cover 'any entity engaged in an economic activity, regardless of the legal status of the entity or the way in which it is financed.'¹²⁴
148. The OFT therefore considers that each of the Parties referred to at paragraph 1 above constitutes an undertaking for the purposes of the Act.¹²⁵

G. Relevant case law in relation to agreements or concerted practices between undertakings

149. An 'agreement' does not have to be a formal written agreement to be covered by the Chapter I prohibition. The prohibition is intended to catch a wide range of agreements and concerted practices, including oral agreements and 'gentlemen's agreements' as, by their nature, anti-competitive agreements are rarely in written form.¹²⁶ This is irrespective of the manner in which the parties' intention to behave on the market in accordance with the terms of that agreement is expressed.¹²⁷
150. A finding of an agreement and/or concerted practice does not require a finding that all the parties have given their express or implied consent to each and every aspect of the agreement,¹²⁸ the parties may show varying degrees of commitment to the common plan and there may well be internal conflict. The mere fact that a party does not abide fully by an agreement which is manifestly anti-competitive does not relieve that party of responsibility for it.¹²⁹
151. The OFT considers that the individual infringements covered by this Decision each took the form of an agreement and/or concerted practice to fix prices and, in the case of the BT Telephone Exchange contracts and

¹²⁴ Case C-41/90 *Hofner and Elser v Macroton* [1991] 'ECR I-1979, at paragraph 21.

¹²⁵ Case 22/71 *Beguelin Import v GL Import Export* [1972] CMLR 81, [1971] ECR 949. An agreement between a parent and its subsidiary company or between two companies under the control of a third will not be agreements between undertakings if the subsidiary has no real freedom to determine its course of action on the market and although having a separate legal personality, enjoys no economic independence.

¹²⁶ See the OFT Guideline 401 'Agreements and Concerted Practices', December 2004 at paragraph 2.7. See also the judgment of the ECJ regarding gentlemen's agreements in Case C-42/69 *ACF Chemiefarma NV v European Commission* [1970] ECR 661 (in particular, paragraphs 106-114). Also the European Commission in, for example, its decision in *Citric Acid Cartel* [2002] OJ L239/18, 6 September 2002, paragraph 137.

¹²⁷ Joined cases T-305/94 etc. *Limburgse Vinyl Maatschappij NV and others v Commission ('PVC II')* [1999] ECR II-931 at paragraph 715.

¹²⁸ Case C-49/92P *European Commission v Anic Partecipazioni* [1999] ECR I-4125, paragraph 80; Case T-28/99 *Sigma Technologie di Rivestimento v European Commission* [2002] ECR II-1845, paragraph 40.

¹²⁹ Case T-305/94 etc. *Limburgse Vinyl Maatschappij v European Commission* [1999] ECR II-931, paragraph 773; Case T-141/89 *Trefileurope v European Commission* [1995] ECR II-791, paragraphs 60 and 85.

the George Stephenson and Willington Quay Schools contracts, to fix prices and share markets, thereby infringing the Chapter I prohibition.

v. Agreements

152. An agreement within the meaning of the Chapter I prohibition exists in circumstances where there is a concurrence of wills in that a group of undertakings adhere to a common plan that limits or is likely to limit their individual commercial freedom by determining lines of mutual action or abstention from action.¹³⁰

153. There is no requirement for the agreements to be legally binding or formal, nor for them to contain any enforcement mechanisms.¹³¹ An agreement may be express or implied from the conduct of the parties.¹³² As held by the European Court of First Instance ('the CFI'), for an agreement to exist:

"[I]t is sufficient if the undertakings in question have expressed their joint intention to conduct themselves on the market in a specific way."¹³³

154. An agreement may consist not only of an isolated act, but also of a series of acts or a course of conduct.¹³⁴

vi. Concerted practices

155. The Chapter I prohibition also applies in respect of concerted practices. A concerted practice does not require an actual agreement (whether express or implied) to have been reached. A concerted practice has been defined by the ECJ as:

"...a form of co-ordination between undertakings which, without having reached the stage where an agreement properly so called has been concluded, knowingly substitutes practical co-operation between them for the risks of competition."¹³⁵

156. Economic operators are required to maintain independence. This requirement of independence strictly precludes:

¹³⁰ Case T-41/96 *Bayer v European Commission* [2000] ECR II-3383, paragraph 69. See also the judgment of the CAT in *JJB Sports plc v OFT* and *AllSports Ltd v OFT* [2004] CAT 17 ('*Replica Kit*'), at paragraphs 156 and 637.

¹³¹ *Soda-ash/Solvay, CFK* OJ [1991] L 152/16, [1994] 4 CMLR 645, paragraph 11; *PVC* [1994] OJ L 239/14, paragraph 30.

¹³² Case 41/69 *ACF Chemiefarma v European Commission* [1970] ECR 661 at, for example, paragraphs 110-114; Case T-7/89 *Hercules Chemicals v European Commission* [1991] ECR II-1711, paragraphs 256-258.

¹³³ Case T-7/89 *Hercules v European Commission* [1991] ECR II-1711, paragraph 256; Case T-41/96 *Bayer v European Commission* [2000] ECR II-3383, paragraph 69. See also the *Replica Kit* judgment [2004] CAT 17 at paragraph 156.

¹³⁴ Case C-49/92P *European Commission v Anic Participazioni* [1999] ECR I-4125, paragraph 81.

¹³⁵ Case 48/69 *ICI Ltd. v European Commission* [1972] ECR 1969, paragraph 64. See also the *Replica Kit* judgment [2004] CAT 17 at paragraph 151.

"any direct or indirect contact between such operators, the object or effect whereof is either to influence the conduct on the market of an actual or potential competitor or to disclose to such a competitor the course of conduct which they themselves have decided to adopt or contemplate adopting on the market."¹³⁶

157. Whilst the concept of a concerted practice implies the existence of reciprocal contracts, the CFI has held that:

"that condition is met where one competitor discloses its future intentions or conduct on the market to another when the latter requests it, or at the very least, accepts it."¹³⁷

158. The concept of a concerted practice must be understood in light of the principle that each economic operator must determine independently the policy it intends to adopt on the market¹³⁸. The ECJ has stated that there is a presumption (which it is for the parties to rebut) that an undertaking which remains active on the market has taken into account information exchanged with their competitors in determining their conduct on that market¹³⁹.

159. The Commission clearly stated in the case of *British Sugar*¹⁴⁰ that, there can be a concerted practice in the absence of an actual effect on the market. In *Hüls*¹⁴¹ the ECJ held that a concerted practice which has as its object the prevention, restriction or distortion of competition will infringe competition law even where there is no effect on the market.¹⁴²

160. All of the principles set out in paragraphs 155 to 159 above were cited with approval by the CAT in *WM Roofing I*.¹⁴³ In addition, the OFT has taken into account the CAT's summary of the law relating to the notion

¹³⁶ Cases 40/73 etc *Suiker Unie and others v European Commission* [1975] ECR 1663, paragraph 174.

¹³⁷ Cases T-25/95 etc *Cimenteries CBR v European Commission* [2000] ECR II-491, paragraph 1849.

¹³⁸ Case C-199/92 *P etc. Hüls AG v. Commission* [1999] ECR I-4287.

¹³⁹ Case C-199/92 *P etc. Hüls AG v. Commission* [1999] ECR I-4287 at paragraph 161 *et seq*, and Case T-25/95 etc *Cimenteries CBR v. Commission* [2000] ECR-II 491, paragraph 1910.

¹⁴⁰ *British Sugar plc, Tate & Lyle plc, Napier Brown & Co Ltd James Budgett Sugars Ltd* OJ [1999] L 76/1, [1999] 4 CMLR 1316, paras 95ff, substantially upheld on appeal Cases T-202/98 etc, *Tate & Lyle v Commission* [1975] ECR II-2035, [2001] 5 CMLR 859.

¹⁴¹ Case C-199/92 *P ETC Hüls AG v Commission* [1999] ECR I-4287, [1999] 5 CMLR 1016, paragraph 193; see similarly the CFI in Cases T-141/94 etc *Thyssen Stahl v Commission* [1999] ECR II-347. [1999] 4 CMLR 810, paras 269-272, dealing in this case with former Article 65(1) ECSC.

¹⁴² For example, where a concerted practice to fix prices in relation to the tenders submitted for a contract has been implemented but where the contract is never actually awarded.

¹⁴³ *WM Roofing I* judgment, at paragraph 206.

of agreements and concerted practices set out in *Replica Kits*¹⁴⁴ and *Toys*.¹⁴⁵

vii. Agreement 'and/or' concerted practice

161. The ECJ has also confirmed that it is not necessary, for the purposes of finding an infringement, to characterise conduct as exclusively an agreement or a concerted practice.¹⁴⁶ The concepts of agreement and concerted practice are not mutually exclusive and there is no rigid dividing line between the two, they are intended:

"to catch forms of collusion having the same nature and only distinguishable from each other by their intensity and the forms in which they manifest themselves."¹⁴⁷

162. This is particularly the case in complex infringements involving a series of measures by several undertakings over a period of time which manifests itself both in agreements and concerted practices with a common objective. It is therefore not necessary for the OFT to come to a conclusion as to whether the behaviour of the Parties specifically constitutes an agreement or a concerted practice in order to demonstrate an infringement of the Chapter I prohibition in the present case.

163. The CAT has confirmed most recently in its judgments in both *Replica Kit*¹⁴⁸ and *Toys*¹⁴⁹ that it is indeed a general principle that such a characterisation is unnecessary:

"665. It is trite law that it is not necessary for the OFT to characterise an infringement as either an agreement or a concerted practice: it is sufficient that the conduct in question amounts to one or the other."

164. It is therefore not necessary for the OFT to come to a conclusion as to whether the behaviour of the Parties specifically constitutes an agreement or a concerted practice in order to demonstrate an infringement of the Chapter I prohibition in the present case.

viii. Burden and standard of proof

165. The burden of proving an infringement of the Chapter I prohibition lies upon the OFT. The CAT held in *Napp*¹⁵⁰ that,

¹⁴⁴ *JJB Sports and AllSports Ltd v OFT* [2004] CAT 17 ('*Replica Kits*'), paragraphs 150-163.

¹⁴⁵ *Argos Limited and Littlewoods Limited v OFT* [2004] CAT 24 ("*Toys*"), paragraphs 145-156.

¹⁴⁶ Case T-7/89 *Hercules Chemicals v European Commission* [1991] ECR II-1711, paragraph 264; Case T-1/89 *Rhone Poulenc v European Commission* [1991] ECR II-867, paragraph 127; Case T-305/94 *Limburgse Vinyl Maatschappij v European Commission* [1999] ECR II 931, paragraph 697.

¹⁴⁷ Case C-49/92P *European Commission v Anic Partecipazioni SpA* [1999] ECR I-4125, paragraph 131.

¹⁴⁸ *JJB Sports PLC v Office of Fair Trading* [2004] CAT 17, paragraph 644.

¹⁴⁹ *Argos Limited and Littlewoods Limited v Office of Fair Trading* [2004] CAT 24, paragraph 665.

"95...As regards the burden of proof, the Director¹⁵¹ accepts that it is incumbent upon him to establish the infringement, and that the persuasive burden of proof remains on him throughout. However, that does not necessarily prevent the operation of certain evidential presumptions...

100. In our view it follows from Article 6(2) [of the European Convention on Human Rights] that the burden of proof rests throughout on the Director to prove the infringements alleged."

166. In considering the standard of proof required to establish the infringements outlined in this Decision, the OFT has taken note of the recent ruling by the CAT in the *Replica Kit* appeals.¹⁵² The CAT stated that,

"204. It also follows that the reference by the Tribunal to "strong and compelling" evidence at [109] of *Napp* should not be interpreted as meaning that something akin to the criminal standard is applicable to these proceedings. The standard remains the civil standard. The evidence must however be sufficient to convince the Tribunal in the circumstances of the particular case, and to overcome the presumption of innocence to which the undertaking concerned is entitled."

167. The CAT also notes in the same judgment,

"206. As regards price fixing cases under the Chapter I prohibition, the Tribunal pointed out in *Claymore Dairies*¹⁵³ that cartels are by their nature hidden and secret; little or nothing may be committed to writing. **In our view even a single item of evidence, or wholly circumstantial evidence,** depending on the particular context and the particular circumstances, may be sufficient to meet the required standard: see *Claymore Dairies* at [3] to [10]...¹⁵⁴ As the Court of Justice said in Cases 204/00P etc. *Aalborg Portland v European Commission*, judgment of 17 January 2004, not yet reported, at paragraphs 55 to 57:

"55. Since the prohibition on participating in anti-competitive agreements and the penalties which offenders may incur are well known, it is normal for the activities which those practices and those agreements entail to take place in a clandestine fashion, for meetings to be held in secret, most frequently in a non-member country, and for the associated documentation to be reduced to a minimum.

56. Even if the Commission discovers evidence explicitly showing

¹⁵⁰ *Napp Pharmaceutical Holdings Ltd v DGFT*, [2002] CAT 1 paras 95 and 100. The CAT confirmed this approach in the recent *Replica Kit* judgment *JJB Sports PLC v Office of Fair Trading* [2004] CAT 17, at paragraph 164. See also paragraphs 928 and 931.

¹⁵¹ References to the 'Director' are to the Director General of Fair Trading. As from 1 April 2003, the Enterprise Act 2002 transferred the functions of the Director General of Fair Trading to the OFT.

¹⁵² *Replica Kit* judgment, at paragraph 204. See also *Toys* judgment, at paragraphs 164 and 165.

¹⁵³ *Claymore Dairies v. OFT* [2003] CAT 18.

¹⁵⁴ See also, for example, the opinion of Judge Vesterdorf, acting as Advocate General, in *Rhône-Poulenc v European Commission* [1991] ECR-II at p. 867; and *Cimenteries* (see note 137 above).

unlawful conduct between traders, such as the minutes of a meeting, it will normally be only fragmentary and sparse, so that **it is often necessary to reconstitute certain details by deduction...**

57. In most cases, the existence of an anti-competitive practice or agreement must be inferred from a number of coincidences and indicia which, taken together, may, in the absence of another plausible explanation, constitute evidence of an infringement of the competition rules."

207. We note also that since the coming into force of the Regulation 1/2003 on 1 May 2004 the Act as amended envisages the possibility of the OFT imposing penalties for breaches of Articles 81 or 82 of the EC Treaty, as part of the European system established by that Regulation. That reinforces our view that the standard of proof we apply should not be out of line with that applied by the Court of First Instance and Court of Justice when considering an appeal against a decision of the European Commission: see *Napp* at [112]. In our view *Aalborg Portland*, cited above, confirms the approach we have adopted."

(Emphasis added).

168. In using the term 'strong and compelling' to describe its evidence in paragraph 241 below, the OFT has followed the same principle. The OFT considers that the evidence analysed below is sufficient to overcome the presumption of innocence to which the Parties are entitled.

H. Analysis of evidence relied on by the OFT

169. This section sets out the OFT's conclusions on the evidence relating to each contract (see paragraphs 46 to 114 above), having considered the views of the undertakings involved in each contract.

i. Chester Building, City of Sunderland College ('Chester Building')

Analysis of evidence

170. David Murray (Hylton) admitted that he provided cover prices to Hodgson. One such cover price was in relation to the Chester Building contract, at the request of an employee of Hodgson named 'Colin', as Hodgson was too busy to tender. The OFT considers that 'Colin' is Colin Howey, an estimator employed by Hodgson, as the tender analysis sheet detailed at paragraph 50 above shows that he dealt with the tender for the Chester Building on behalf of Hodgson. The fax from Hylton to Hodgson was sent on 18 September 2002, two days before the closing date for the return of tenders for the works on the Chester Building. It sets out the tender later submitted by Hylton to City of Sunderland College for the works. Hodgson submitted its tender bid to City of Sunderland College a day after it had received the fax with a price from Hylton.

171. The OFT considers that, for whatever reason, Colin Howey was not prepared to calculate and submit a competitive tender; nor was he prepared to inform City of Sunderland College that Hodgson was too busy to prepare a tender, if that was the case. Instead, with Hylton's co-operation, Colin Howey used Hylton's tender figures as a basis for

preparing and submitting a false and inflated bid on behalf of Hodgson for the works on the Chester Building. The OFT considers that, in the light of David Murray's admission, the lack of detail on Hodgson's tender analysis sheet prepared by Colin Howey (in terms of costings for labour, materials, transport or otherwise) is consistent with, though not in itself determinate of, the finding that Colin Howey did not prepare a competitive tender for the Chester Building contract.

172. The OFT can see no legitimate reason for two contractors such as Hylton and Hodgson, independently invited to tender for this contract, to have contact with each other before submitting their respective bids.

The participants' representations

Hodgson's representations

173. Hodgson made no representations regarding the OFT's analysis of the evidence (set out at paragraphs 170 to 172 above) in relation to its participation in an agreement and/or concerted practice to fix prices in relation to the Chester Building contract.

Hylton's representations

174. Hylton has accepted that Mr Murray's actions in relation to this contract were "naïve". Hylton emphasised that the actions were not carried out for financial gain, either by Hylton or by Mr Murray personally. Hylton states that each approach for a cover price was made on a one off basis and was not part of a pattern or standing agreement. Hylton also states that the request for a cover price came from Hodgson.¹⁵⁵

The OFT's conclusions

175. In the absence of any contradictory statements from the participants, the OFT concludes that the totality of the evidence¹⁵⁶ as analysed at paragraphs 170 to 172 above establishes that an agreement and/or concerted practice with the object of fixing tender prices in breach of the Chapter I prohibition was in place between Hodgson and Hylton in relation to the tenders submitted by each undertaking for the Chester Building contract.

- ii. Thomas Percy RC Middle School ('Thomas Percy School')

Analysis of evidence

176. David Murray (Hylton) admitted that he provided a cover price to Hodgson in relation to the Thomas Percy School contract, at the request of an employee of Hodgson named 'Colin' as Hodgson was too busy to tender. The OFT considers that 'Colin' is Colin Howey, Hodgson's estimator, as the tender analysis sheet detailed at paragraph 64 above shows that he

¹⁵⁵ Hylton's written response dated 31 December 2004 to the Statement of Objections.

¹⁵⁶ See *Replica Kits* judgment, paragraph 206 and *Toys* judgment paragraphs 164-165.

dealt with the tender for Thomas Percy School on behalf of Hodgson. The fax sent from Hylton to Hodgson at 15:08 on 17 October 2001 sets out the amount of Hylton's tender bid for works on Thomas Percy School and was sent the day after the note in Colin Howey's diary which read "Hylton – cover." The same fax also sets out a figure of £68,735 for Hodgson to quote for the same job. The figure of £68,735 is the same figure that Hodgson submitted to Interserve as its figure for the Thomas Percy School at 4.15 on 17 October 2001, little over an hour after it had received the fax with figures from Hylton. The same figure was intended to be sent to WC Harvey and the three main contractors.

177. The OFT considers that, for whatever reason, Colin Howey was not prepared to calculate and submit a competitive tender; nor was he prepared to inform WC Harvey that Hodgson was too busy to prepare a tender, if that was the case. Instead, with Hylton's co-operation, Colin Howey used Hylton's tender figures as a basis for preparing and submitting a false and inflated bid on behalf of Hodgson for the works on Thomas Percy School. The lack of detail on Hodgson's tender analysis sheet prepared by Colin Howey (in terms of costings for labour, materials, transport or otherwise), in the light of David Murray's admission, is consistent with, though not in itself determinative of, the finding that Colin Howey did not prepare a competitive tender for the Thomas Percy School contract. The OFT also notes that the diary entry at paragraph 61 above suggests that Hodgson and Hylton engaged in cover pricing in relation to this contract.

The participants' representations

Hodgson's representations

178. Hodgson made no representations regarding the OFT's analysis of the evidence (set out at paragraphs 176 to 177 above) in relation to its participation in an agreement and/or concerted practice to fix prices in relation to the Thomas Percy School contract.

Hylton's representations

179. Hylton has accepted that Mr Murray's actions in relation to the Thomas Percy School contract were "naïve". Hylton emphasised that the actions were not carried out for financial gain, either by Hylton or by Mr Murray personally. Hylton states that each approach for a cover price was made on a one off basis and was not part of a pattern or standing agreement. Hylton also states that the request for a cover price came from Hodgson.

The OFT's conclusions

180. In the absence of any contradictory statements from the participants, the OFT concludes that the totality of the evidence¹⁵⁷ as analysed at paragraphs 176 to 177 above establishes that an agreement and/or concerted practice with the object of fixing tender prices in breach of the Chapter I prohibition was in place between Hodgson and Hylton in

¹⁵⁷ See *Replica Kits* judgment, paragraph 206 and *Toys* judgment paragraphs 164-165

relation to the tenders submitted by each undertaking for the Thomas Percy School Contract.

iii. All Saints Church of England Primary School & Laygate Primary School

Analysis of evidence

181. Neil Riddell of Dufell admitted that he did not want to win the contracts for works at All Saints and Laygate but did not want to exclude himself from receiving future enquiries. He therefore did not want to calculate and submit a competitive tender; nor was he prepared to inform the main contractors involved that Dufell was too busy to prepare a tender, if that was the case. Mr Riddell decided to submit a false bid for the works and, to this end, requested pricing information from Hodgson. Hodgson provided him with this pricing information by fax on 1 October 2002.
182. The figure Hodgson provided to Neil Riddell on 1 October 2002 was the exact amount of the tender it submitted to the main contractor, Syncro Limited, by letter on the same date. The OFT considers that Neil Riddell, with Hodgson's co-operation, used Hodgson's tender figures to prepare and submit a false and inflated bid on behalf of Dufell for the works on All Saints and Laygate.

The participants' representations

Dufell's representations

183. Dufell "admits that it was a party to an anti-competitive agreement to fix prices" in respect of the All Saints and Laygate contracts.¹⁵⁸ However, Dufell "does not admit that it was a party to a concerted practice to fix prices and/or share the market in relation to works at All Saints and Laygate as alleged in the Statement of Objections in breach of the Chapter 1 prohibition or at all".¹⁵⁹ Dufell therefore admits that it was party to an agreement, but not a concerted practice, and admits that it engaged in price fixing, but not market sharing.
184. Dufell stated that its purpose in submitting a tender bid was to re-establish connections with Holly Construction Limited ("Holly")¹⁶⁰ and in the hope that Dufell would receive further enquiries from Holly and the other two prime contractors should they later seek roofing sub-contractors for any future projects in North Yorkshire/South Durham, which is Dufell's main business area.

Hodgson's representations

185. Hodgson made no representations regarding the OFT's analysis of the evidence (set out at paragraph 181 to 182 above) in relation to its

¹⁵⁸ Dufell's written response dated 6 January 2005 to the Statement of Objections

¹⁵⁹ *Ibid.*

¹⁶⁰ See paragraphs 70 and 71 above.

participation in an agreement and/or concerted practice to fix prices and/or share markets in relation to the All Saints and Laygate contracts.

The OFT's conclusions

186. None of the parties has denied participating in an agreement to fix prices in respect of the All Saints and Laygate contracts. With regard to Dufell's denial that it was party to a concerted practice to fix prices, the OFT notes that it is not necessary for the OFT to come to a conclusion as to whether behaviour specifically constitutes an agreement or a concerted practice in order to demonstrate an infringement of the Chapter I prohibition.¹⁶¹
187. Having reconsidered the evidence, and in light of Dufell's denial of market sharing, the OFT does not consider that there is sufficient evidence available to it to find that such agreement and/or concerted practice also extended to market sharing in relation to these contracts.
188. The OFT therefore concludes that the totality of the evidence¹⁶² as analysed at paragraphs 181 to 182 above establishes that an agreement and/or concerted practice with the object of fixing tender prices in breach of the Chapter I prohibition was in place between Hodgson and Dufell in relation to the tenders submitted by each undertaking for the All Saints and Laygate contracts.

iv. BT telephone exchanges

Analysis of evidence

189. The evidence concerning the contracts for works at the BT telephone exchanges arises from information provided to the OFT by the leniency applicant, Briggs. The OFT notes that this information first came to light during an internal review at Briggs and that the Briggs Memorandum,¹⁶³ produced as a result of the review, stated that Briggs had been involved in collusion in relation to these contracts with the other Parties identified in the table at paragraph 85 above. This is supported by the report made by Mr Q that Briggs' solicitors sent to the OFT on 23 October 2002. The OFT can see no reason why Briggs, or Mr Q, would invent or exaggerate this information, especially for the purposes of an internal review. In the OFT's view, Mr Q's evidence is credible.
190. The OFT has considered the evidence provided by Briggs - by Mr Q in particular - and the corroboration provided by the fact that the winners of the BT Telephone Exchange contracts match the way in which Mr Q stated that the contracts were allocated. The OFT also notes Mr Q's statement (at paragraph 88 above) that Haltwhistle Telephone Exchange was not part of the collusive arrangements for the BT Telephone Exchange contracts.

¹⁶¹ See paragraphs 161 to 164 above.

¹⁶² See *Replica Kits* judgment, paragraph 206 and *Toys* judgment paragraphs 164-165.

¹⁶³ See paragraph 3 above.

The participants' representations

Briggs' representations

191. Briggs made no representations regarding the OFT's analysis of the evidence (set out at paragraphs 189 and 190 above) in relation to their participation in an agreement and/or concerted practice to fix prices and share markets in relation to the BT telephone exchange contracts.

Hodgson's representations

192. Hodgson made no representations regarding the OFT's analysis of the evidence (set out at paragraphs 189 and 190 above) in relation to their participation in an agreement and/or concerted practice to fix prices and share markets in relation to the BT telephone exchange contracts.

Hylton's representations

193. Hylton was "surprised and alarmed to note ... the allegation that Hylton and three others colluded to ensure that they were each awarded one contract for works on telephone exchanges".¹⁶⁴
194. Hylton found no reference suggesting that any director of Hylton was involved in relation to this contract. The BT telephone exchange contracts were managed for Hylton by an ex-employee, Mr Beavers, who has since left Hylton and who had not been contacted by Hylton.¹⁶⁵ Hylton stated that Mr Beavers would have been aware of Hylton's company position on autonomy from competitors and would have had no prospect of any financial gain as a result of collusion.
195. Hylton submitted that "such an agreement is entirely unknown to its Directors and senior management, that it would be completely contrary to its policy and attitude to its work, and that therefore any such involvement is very strongly denied".¹⁶⁶
196. Hylton noted that the evidence presented in the Statement of Objections (and set out at paragraphs 87 to 89 above) came exclusively from Briggs and was not previously put to Hylton during the investigation. Hylton asked the OFT to regard the evidence of Hylton's involvement "as highly unreliable" and submitted that it should be discounted altogether.

Dufell's representations

197. Dufell "admits that it was a party to an anti-competitive agreement and/or concerted practice whereby Dufell colluded in relation to the submission of cover prices for the other mentioned Parties and in relation to the

¹⁶⁴ Hylton's written response dated 31 December 2004 to the Statement of Objections.

¹⁶⁵ The reasons why Hylton did not contact Mr Beavers in connection with the OFT's investigation were set out in the Witness Statement of Jim Davison, dated 17 February 2005, supplied as part of Hylton's written response to the Statement of Objections.

¹⁶⁶ *Ibid.*

sharing of the contracts between them with the object of price fixing and market sharing in relation to the contract for the BT telephone exchanges at Eston Grange, Burnopfield, Whickham, Newcastle East and Chester-le-Street in breach of the Chapter I prohibition."¹⁶⁷

198. Dufell objects to the evidence which suggests that Mr Neil Riddell of Dufell played a leading role in relation to the infringement (see paragraph 88 above).
199. Dufell notes that when Mr Riddell was interviewed by the OFT on 5 March 2003 he was not asked to explain Dufell's position with regard to the BT telephone exchange contracts.
200. Dufell submits that BT would have been aware that none of the contractors had the resources to complete all the contracts at the same time, as required in the contract specifications and that the contractors would in reality be interested in the exchange in their respective areas of business. As such, Dufell asserts that BT entered into the tendering process for the BT telephone exchanges knowing that the likely outcome would be that each contractor would bid most competitively for its local telephone exchange.

The OFT's conclusions

201. The OFT does not consider that the Briggs evidence should be discounted as highly unreliable, as submitted by Hylton. In this context the OFT notes that Hylton's denial of any anti-competitive behaviour on its part is made in the absence of any communications with the relevant ex-employee, Mr Beavers, and as such is purely speculative in its nature.
202. The OFT has considered Hylton's representations stating that relevant employees were made aware of its company policy regarding lack of contact with competitors, and is of the view that this does not affect Hylton's liability. As noted by the CAT in *Toys II*¹⁶⁸:

"[i]t is trite law that the fact that an employee of an undertaking is not authorised to make an infringing agreement does not relieve the undertaking of its liability: e.g. Cases 100/80 etc. *Musique Diffusion Française v Commission* [1983] ECR 1825".
203. The OFT notes that, in relation to Dufell's participation¹⁶⁹, Dufell's representations corroborate the evidence provided by Briggs and the OFT's allegations put to Dufell in the Statement of Objections.
204. The OFT has considered Dufell's submissions relating to the state of knowledge of BT, as purchaser of the services, and the impracticability of

¹⁶⁷ Dufell's written response dated 6 January 2005 to the Statement of Objections.

¹⁶⁸ *Argos Ltd & Littlewoods v Office of Fair Trading* [2004] CAT 24 ("*Toys II*"), paragraph 771.

¹⁶⁹ The OFT does not rely on the admission or other statements made by Dufell in reaching its conclusions as against any of the other three Parties to this infringement, as those Parties have not had the opportunity of reviewing or commenting on Dufell's representations submitted in response to the Statement of Objections.

any one contractor performing the services required under each of the BT telephone exchange tenders.

205. In its representations, Dufell asserts that BT "would have been aware" of various factors which could lead it to infer that it would not receive a competitive bid from each tenderer for every contract and "to that extent BT entered into the tendering process for the BT telephone exchange contracts knowing of this likely outcome". However, Dufell has not provided any evidence concerning the state of knowledge of BT in this regard, and the OFT is not aware of any evidence to suggest that BT had any direct knowledge that the bids it received resulted from collusion between the tenderers.

206. The fact that a purchaser could potentially infer or guess that collusive tendering was a possibility, either as a result of multiple simultaneous tender processes, demanding specifications, or from looking at the levels of bids submitted, does not absolve a party of liability for collusive tendering. In particular, the fact that a firm invited to tender for a particular contract is unable, for whatever reason, to perform the services required, does not legitimise any agreement or concerted practice between that firm and any other undertaking to engage in collusive tendering.

207. As noted by the CAT in *WM Roofing I*¹⁷⁰:

"[T]he tendering process provides for the tenderee to receive independent bids following the acceptance of an invitation to tender, alternatively for the invited tenderer to decline the invitation to bid so that the tenderee has the opportunity to replace that undertaking with another competitor. [...] The effect of the conduct of [two parties to cover bidding arrangements] was to deprive the tenderee of a similar opportunity. In this respect also the concerted practice has as its object or effect the prevention, restriction or distortion of competition".

208. The OFT therefore considers that the representations made by Dufell as described in paragraph 200 above do not give rise to any grounds on which Dufell (or any other Party) is absolved from liability for this infringement.

209. On the issue raised in both Hylton and Dufell's representations concerning the fact that neither Party was invited to explain their position regarding the BT telephone exchange contracts at any time prior to receipt of the Statement of Objections, the OFT is not obliged to put every allegation of anti-competitive behaviour to the Parties before the issuing of a Statement of Objections where the OFT is satisfied that the evidence available to it at that stage is sufficient for a finding of an infringement of the Chapter I prohibition, if uncontested. In any event the allegations and the evidence on which the allegations are based were put to the Parties in the Statement of Objections dated 2 November 2004 and the Parties were afforded the opportunity to make representations on the evidence and the OFT's analysis of that evidence.

¹⁷⁰ *WM Roofing I*, paragraph 247.

210. Therefore, having considered fully the representations from the participants, the OFT concludes that the totality of the evidence¹⁷¹ as analysed at paragraphs 189 to 190 above (and in respect of Dufell only, the evidence set out at paragraph 197 above) establishes that an agreement and/or concerted practice with the object of fixing tender prices, and sharing markets by the allocation of the 5 BT telephone exchange contracts listed at paragraph 85 above, in breach of the Chapter I prohibition, was in place between Briggs, Dufell, Hodgson and Hylton in relation to the tenders submitted by each undertaking for the BT telephone exchange contracts.

v. George Stephenson School and Willington Quay School

Analysis of evidence

211. Both Briggs and Roofclad made admissions in interview that they colluded in relation to the tenders they submitted for works on George Stephenson and Willington Quay Schools. Collusion in relation to these contracts was also recorded in the Briggs Memorandum, supported by the report made by Mr Q that Briggs' solicitors sent to the OFT on 23 October 2002. They did this so that Briggs would win the contract for Willington Quay School and Roofclad would win the contract for George Stephenson School. Briggs and Roofclad both made admissions that they agreed to pay 'compensation' to each other and Mr Openshaw produced an invoice to the OFT from Roofclad to Briggs, dated 15 January 2001, which he stated was, in fact, an invoice seeking payment of this compensation and setting off the payment due to Briggs as compensation against the payment due to Roofclad as compensation. The OFT considers that the two admissions and associated documents are strong evidence of collusion between Briggs and Roofclad.

212. The OFT notes that there is an additional point in relation to the timing of the collusion in relation to this infringement. Mr Openshaw of Roofclad stated that the agreement in relation to the two schools was made in July 2000. Mr Q initially stated that the agreement was in 1999 but he also notes that the agreement in relation to Willington Quay School was in July 2000 and that the two schools were viewed as one project by the local authority. However, as noted at paragraph 90 and footnote 71 above, the OFT has documents in its possession that demonstrate that the contract for roofing work at George Stephenson School was awarded before 1 March 2000, which suggests that the agreement in relation to the allocation of the two schools was commenced before 1 March 2000, that is, before the Act came into force.

213. Notwithstanding that the agreement and/or concerted practice appears to have been commenced before the Act came into force, the OFT considers that the agreement and/or concerted practice into which Briggs and Roofclad had entered was a continuing agreement and/or concerted practice that continued **after** 1 March 2000. The agreement was for Briggs not to compete with Roofclad in relation to the George Stephenson

¹⁷¹ See *Replica Kits* judgment, paragraph 206 and *Toys* judgment paragraphs 164-165.

contract and for Roofclad, in return, not to compete with Briggs in relation to the Willington Quay School contract. The part of the agreement in which Briggs did not compete with Roofclad for the George Stephenson School took place before the Act came into force but the agreement continued after that date and pursuant to that agreement Roofclad did not compete with Briggs in relation to the Willington Quay contract which was awarded in August 2000, when the Act was in force.

The participants' representations

214. Neither Briggs nor Roofclad made representations regarding the OFT's analysis of the evidence (set out at paragraphs 211 to 213 above) in relation to their participation in an agreement and/or concerted practice to fix prices and share markets in relation to the George Stephenson and Willington Quay Schools contract.

The OFT's conclusions

215. In the absence of any contradictory statements from the participants, the OFT concludes that the totality of the evidence¹⁷² as analysed at paragraphs 211 to 213 above establishes that an anti-competitive agreement and/or concerted practice was in place between Briggs and Roofclad with the object of fixing prices and sharing the market in relation to works at George Stephenson and Willington Quay Schools, in consideration for monetary compensation, in breach of the Chapter I prohibition.

vi. Storeys, Washington

Analysis of evidence

216. Both the Briggs Memorandum, supported by the report made by Mr Q that Briggs' solicitors sent to the OFT on 23 October 2002, and Mr Q¹⁷³ identified the Storeys contract as an instance where Briggs initiated collusion so that it could win the contract and identified Single Ply and Kelsey as the other parties involved in the collusion (see paragraphs 112 to 114 above). The OFT considers that the evidence set out above at paragraphs 101 to 111 supports this.
217. The OFT considers that the letter from Single Ply to Briggs, dated 5 September 2000 (paragraph 101 above), with a quotation for work at Storeys was actually a request by Single Ply for payment from Briggs for Single Ply's role in the collusion. Briggs confirmed the amount of the payment in a purchase order to Single Ply on 26 September 2000 (paragraph 103 above) and Single Ply submitted another invoice for payment on 31 December 2000 in the amount of £6585.88 (paragraph 104 above). Mr Q stated that a cheque in the amount of £6588 was issued to Single Ply on 22 February 2001. The OFT does not consider the difference between the two figures - £6585.88 and £6588 - to be

¹⁷² See *Replica Kits* judgment, paragraph 206 and *Toys* judgment paragraphs 164-165.

¹⁷³ See note 2 above.

significant nor does it consider that the difference undermines Mr Q's evidence.

218. The OFT considers that Kelsey similarly submitted requests to Briggs for payment for its part in the collusion, as evidenced by Kelsey's letter to Briggs on 14 September 2000 (see paragraph 105 above) and its invoices to Briggs on 11 December 2000 (see paragraphs 108 and 109 above). The amount stated on the first invoice of 11 December 2000 (£6,533.00) is the same as one of the amounts that appeared in the remittance advice from Briggs to Kelsey for the period ending 18 January 2001 (see paragraph 110 above), the date when Briggs issued cheques to Kelsey according to Mr Q. The total amount stated on the remittance advice was £11,750.00, which is also the total amount that Mr Q said was paid to Kelsey by Briggs. The print out from Kelsey's computer (see paragraph 111 above) states that a payment from Briggs was received on 19 January 2001 in the amount of £11,750. The OFT considers that, while not itself determinative of the point, the fact that the tender bids submitted by both Single Ply and Kelsey were significantly more than the bid submitted by Briggs, which won the contract, is consistent with a finding of collusion.

The participants' representations

219. None of Briggs, Single Ply or Kelsey made representations regarding the OFT's analysis of the evidence (set out at paragraphs 216 to 218 above) in relation to their participation in an agreement and/or concerted practice to fix prices in relation to the Storeys, Washington contract.

The OFT's conclusions

220. In the absence of any contradictory statements from the participants, the OFT concludes that the totality of the evidence¹⁷⁴ as analysed at paragraphs 216 to 218 above establishes the existence of an anti-competitive agreement and/or concerted practice between each of Briggs and Single Ply, on the one hand, and between Briggs and Kelsey, on the other, with the object of fixing prices in relation to works on Storeys, Washington, in consideration for monetary compensation, in breach of the Chapter I prohibition.

I. The OFT's conclusions on the individual agreements and/or concerted practices

221. On the basis of the facts, evidence and representations set out at paragraphs 46 to 114 and analysed at paragraphs 169 to 220 above, the OFT finds that the Parties entered into certain individual agreements and/or concerted practices having the object of fixing prices, in some cases also having the object of sharing markets, in some cases in return for monetary compensation, through collusive tendering in relation to individual contracts as set out above.

¹⁷⁴ See *Replica Kits* judgment, paragraph 206 and *Toys* judgment paragraphs 164-165.

J. Prevention, restriction or distortion of competition

i. Introduction: the effect of the procurement process on competition in the relevant market

222. The OFT has considered the important issue of the procurement process in the roofing contracting sector and how this affects competition within the relevant market.

223. The OFT notes that services in this market are procured through a tendering process, which involves local authorities and private managing agents, architects or surveyors inviting contractors to submit bids. Any undertaking with expertise in repairing flat roofs within a reasonable distance of the contract location might feasibly tender for a contract. However, buyers (local authorities or managing agents) will usually short-list a number of firms from their standing lists of suitable contractors.

224. Where the original tendering process fails to identify a suitable contractor on the short list, customers may consider alternative contractors. In such circumstances, different undertakings can be approached, but only if they are already included on the appropriate standing lists. Often local authorities do not look beyond their short list, (i.e. they do not consider other suppliers on the relevant standing list), even if all the original bids are deemed unaffordable or unsuitable. This is because procedures typically allow for negotiation where the buyer gets its budgeted price but compromises are made on the specification for the job.

225. Furthermore, the ability of different contractors to be included on standing lists is restricted by a number of different factors. In particular, firms would need to demonstrate:

- i. Specialist roofing skills;
- ii. Adequate insurance coverage;
- iii. A good health and safety record; and
- iv. Relevant product/manufacture guarantees.

226. This suggests that, in the absence of collusion, the most effective competition in the product market would be those suppliers on the relevant standing list, and in particular those on the relevant short lists for the supply of repair, maintenance, installation and improvement services for felt and single ply flat roof coverings.

ii. Consideration of whether the agreements and/or concerted practices in this case had the object or effect of preventing, restricting or distorting competition

227. Section 2(1) of the Act prohibits, *inter alia*,

"agreements between undertakings...or concerted practices which...have as their object or effect the prevention, restriction or distortion of competition within the United Kingdom."

228. Accordingly, in light of the specific wording of section 2(1), the OFT is not, as a matter of law, obliged to establish that an agreement or concerted practice has an anti-competitive **effect** where it is found to have as its **object** the prevention, restriction or distortion of competition.¹⁷⁵
229. In considering whether an agreement and/or concerted practice has as its object the prevention, restriction or distortion of competition, the OFT will consider the aims of the agreement and/or concerted practice in the economic context in which it operates. The OFT's assessment of the aims of the agreement and/or concerted practice is determined by an objective assessment of the meaning and purpose of the agreement, rather than by any consideration of the subjective intention of the Parties when entering into the agreement and/or concerted practice. In this respect the OFT takes the view that, if the obvious consequence of an agreement is to prevent, restrict or distort competition, that will be its object notwithstanding that it may have other aims as well.
230. Section 2(2) of the Act states that the Chapter I prohibition applies, in particular, to agreements and/or concerted practices which:
- "...directly or indirectly fix...selling prices... [and]...share markets or sources of supply."
231. Accordingly, any provision in an agreement and/or concerted practice which, directly or indirectly, in isolation or in combination with other factors under the control of the parties, fixes the prices at which goods or services are sold, or shares markets or sources of supply, will amount to an infringement of the Chapter I prohibition.¹⁷⁶ As discussed above at paragraph 150, the fact that a party attended a meeting reluctantly, or had no intention of putting into practice any agreement (without distancing itself from the agreement), or did not, in fact, implement the agreement, is not relevant to the finding of an infringement.
232. Moreover, the CAT held in *Toys II*¹⁷⁷ that:

"It is trite law that once it is shown that such agreements or practices had the object of preventing restricting, or distorting competition, there is no need for the OFT to show what the actual effect was: see Cases 56 and 58/64 *Consten and Grundig v Commission* [1966] ECR 299, 342 and many subsequent cases"; and

"[i]f an agreement or concerted practice is established on the facts, the question of what the pricing position might have been in the absence of that agreement or concerted practice is irrelevant to the issue of liability."

¹⁷⁵ The ECJ has acknowledged this principle on many occasions in relation to the interpretation of Article 81(1). In *Consten & Grundig v European Commission* [1996] ECR 299 it stated that 'there is no need to take account of the concrete effects of an agreement once it has as its object the prevention, distortion or restriction of competition.'

¹⁷⁶ See also the section in this Decision on appreciability at paragraphs 236 to 238 below.

¹⁷⁷ *Toys II* judgment, at paragraphs 357 and 708.

233. The conduct of parties in providing, receiving and considering information as to (a) whether or not they intended to bid, (b) whether they were amenable to submitting a cover price and/or (c) the prices at or above which a cover bid should be set, amounts to a concerted practice which has as its object the prevention, restriction or distortion of competition. The CAT stated in *WM Roofing I*¹⁷⁸:

"[T]he concerted practice is made out at a stage prior to consideration of whether the person receiving the price actually puts in a tender."

234. During the course of the OFT's investigation certain Parties asserted that the desire to stay on standing lists (as described at paragraph 223) was a primary consideration when submitting a cover bid. This explanation was considered and found to be immaterial by the CAT in *WM Roofing I*¹⁷⁹:

"The Tribunal does not accept that this explanation for Apex's conduct [*i.e. to stay on tender lists*] absolves Apex of liability. Concertation the object of which is to deceive the tenderee into thinking that a bid is genuine when it is not, plainly forms part of the mischief which section 2 of the Act is seeking to prevent. The subjective intentions of a party to a concerted practice are immaterial where the obvious consequence of the conduct is to prevent, restrict or distort competition."

235. The OFT therefore takes the view that the agreements and/or concerted practices referred to in this Decision had as their obvious and intended consequence the fixing of prices or, in the case of the BT Telephone Exchange contracts and the George Stephenson and Willington Quay Schools contracts fixing of prices and market sharing, and, therefore, had as their object the prevention, restriction or distortion of competition.

K. Appreciability

236. An agreement and/or concerted practice will infringe the Chapter I prohibition if it has as its object or effect the appreciable prevention, restriction or distortion of competition in the UK. The OFT takes the view that an agreement and/or concerted practice will generally have no appreciable effect on competition if the aggregate market share of the parties to the agreement or concerted practice does not exceed 10 per cent of the relevant market affected by the agreement where the agreement is made between competing undertakings (*i.e.* undertakings which are actual or potential competitors on any of the markets concerned).¹⁸⁰

237. However, there will be circumstances where this is not the case. The OFT will generally regard any agreement and/or concerted practice which directly or indirectly fixes prices or shares markets as being capable of

¹⁷⁸ *WM Roofing I* judgment, at paragraph 236.

¹⁷⁹ *WM Roofing I* judgment, at paragraph 250.

¹⁸⁰ From 1 May 2004, the OFT has regard to the EC thresholds on appreciability in determining whether there is an appreciable effect on competition. See European Commission Notice on Agreements of Minor Importance (OJ C368, 22.12.01, p13) and the OFT Guideline 401 'Agreements and Concerted Practices', December 2004 at paragraphs 2.16 to 2.19.

having an appreciable effect even where the parties' combined market share falls below the 10 per cent threshold.¹⁸¹

238. The agreements and/or concerted practices between the Parties were price-fixing and, in the case of the BT Telephone Exchange contracts and the George Stephenson and Willington Quay Schools contracts, price-fixing and market-sharing, arrangements and are therefore considered by the OFT to have an appreciable effect on competition whether or not the Parties' combined market share in the relevant market falls below 10 per cent. The OFT therefore takes the view that the agreements and/or concerted practices specified in this Decision prevent, restrict or distort competition to an appreciable extent.¹⁸²

L. Effect on trade within the UK

239. For the purposes of the Chapter I prohibition, the UK includes any part of the UK where an agreement and/or concerted practice operates or is intended to operate. By their very nature, agreements and/or concerted practices to fix prices and/or share markets restrict competition and are likely to affect trade. It should be noted that, to infringe the Chapter I prohibition, an agreement and/or concerted practice does not actually have to affect trade as long as it is capable of affecting trade. Moreover, effect on trade within the UK is a purely jurisdictional test to demarcate the boundary line between the application of Community competition law and national competition law. The test is not read as importing a requirement that the effect on trade should be appreciable.¹⁸³

240. The agreements and/or concerted practices referred to in this Decision operated in a part of the UK - the North East of England - and the Parties' conduct is therefore considered by the OFT to have affected trade within the UK. The Parties' price-fixing and, in some cases market-sharing agreements and/or concerted practices were capable of altering the structure of competition in a part of the UK by reducing and, in some instances, removing competition from the competitive tendering process.¹⁸⁴

M. Conclusion on application of the Chapter I prohibition

241. The OFT concludes on the basis of the strong and compelling evidence set out at paragraphs 46 to 114 above that the Parties infringed the Chapter I prohibition by forming a series of individual agreements and/or concerted practices each of which had as its object the fixing of prices and, in the case of the BT Telephone Exchange contracts and the George Stephenson and Willington Quay Schools contracts, fixing prices and

¹⁸¹ See OFT Guideline 401 'Agreements and Concerted Practices', December 2004, paragraph 2.17.

¹⁸² The OFT does not consider the agreements and/or concerted practices produce only insignificant effects in the sense outlined in Case 5/69 *Volk v Vervaeke* [1979] ECR 295.

¹⁸³ See the final judgment of the CAT in *Aberdeen Journals* [2003] CAT 11, at paragraphs 459 and 460.

¹⁸⁴ Section 2(7) of the Act catches agreements or concerted practices which "may affect trade".

sharing markets, in the market for the supply of installation, repair, maintenance and improvement services for felt and single ply flat roof coverings in the North East of England.

III. **DECISION**

A. **Agreements and/or concerted practices**

242. The evidence set out at Part I of this Decision formed the basis of the Statement of Objections sent to the Parties. The OFT's assessment of the views set out in the Parties' representations to the OFT is set out in Part II of this Decision. Having considered carefully the evidence and analysed the views set out in the Parties' representations, the OFT finds that there were agreements and/or concerted practices between the participants in each tender or group of tenders particularised in Part II¹⁸⁵ above to fix the prices of the supply of certain flat-roofing services, and, in the case of the BT Telephone Exchange contracts and the George Stephenson and Willington Quay Schools contracts to fix prices and to share markets by way of contract allocation, by collusive tendering in relation to the contracts particularised in Part II above.

243. On the basis of the evidence available, set out at paragraphs 46 to 114 above, the OFT has considered the relevant duration for each of the infringements for the Parties. The OFT considers that the duration of infringements of this nature is at least from the date of initial contact between parties, alerting one another that they had been invited to tender and were either interested in winning the tender or in making bids that would ensure they would not win the tender, to the date when bids were submitted. In cases involving allocation of multiple contracts between different parties, where the dates for submission of those tenders varied, the relevant date is that for submission of the latest tender.

244. The nature of the initial contacts, which are often oral, coupled with the fact that tender documentation is not always retained beyond the end of the tender process mean that the OFT does not always have precise information as to either or both of the dates in respect of each infringement. In the cases where such information is available, the dates in question are usually separated by a matter of days or weeks. On the basis of the evidence set out at paragraphs 46 to 114 above, the OFT is aware of no evidence to suggest that the period between initial contact and submission of tender bids was, in relation to any of the infringements particularised in Part II of this Decision, greater than one year in length.

245. In any event, the OFT considers that the concept of duration is generally speaking of less significance in bidding markets compared to fixed-price markets. As the CAT stated in *WM Roofing I*¹⁸⁶:

'[I]n the present case, the effect of the infringement is not restricted to the short period referred to above but has a potential continuing impact on future tendering

¹⁸⁵ See paragraphs 169 to 220 above.

¹⁸⁶ *WM Roofing I* judgement, at paragraph 278.

processes by the same tenderees. Moreover, in relation to tenders we bear in mind the specific nature of a tender process: once a contract has been awarded following an anti-competitive tender, the anti-competitive effect is irreversible in relation to that tender. The contract has been awarded; the contract works will in all likelihood have commenced. It is readily apparent that this is not a case where ongoing conduct may simply be rectified.'

246. Certain of the Parties have made representations to the effect that the infringements were made on a 'one off' basis and were not in any way part of a pattern or standing agreement.¹⁸⁷ The OFT notes that whilst certain of the Parties have been found to have participated in more than one of the infringements particularised in Part II above, the OFT has no evidence that these incidents of collusive tendering formed part of an overall scheme whereby contracts were allocated between members of a cartel on an ongoing basis.

247. The OFT therefore considers that each of the infringements particularised in Part II above lasted for less than one year.

B. Action

248. This section sets out the action that the OFT has decided to take and its reasons for it.

i. Directions

249. Section 32(1) of the Act provides that if the OFT has made a Decision that an agreement infringes the Chapter I prohibition, it may give to such person or persons as it considers appropriate such directions as it considers appropriate to bring the infringement to an end. As the OFT is satisfied that the infringements particularised in Part II of this Decision have come to an end, the OFT does not issue any directions in this case.

ii. Financial penalties – general points

250. Section 36(1) of the Act provides that, on making a Decision that an agreement has infringed the Chapter I prohibition, the OFT may require a party to the agreement¹⁸⁸ to pay it a penalty in respect of the infringement. No penalty which has been fixed by the OFT may exceed 10 per cent of the turnover of the undertaking calculated in accordance with the provisions of the Competition Act 1998 (Determination of Turnover for Penalties Order) 2000 as amended ('the Penalties Order').¹⁸⁹

¹⁸⁷ For example, Hylton's written response, dated 31 December 2004, to the Statement of Objections and Roofclad's written response, dated 2 December 2004, to the Statement of Objections.

¹⁸⁸ Section 2(5) of the Act states: "a provision of this Part which is expressed to apply to, or in relation to, an agreement is to be read as applying equally to, or in relation to, ... a concerted practice (but with any necessary modifications)." As such, where this section of the Decision includes references to agreements taken from the Act or associated statutory instruments, those references should be taken to refer also to concerted practices.

¹⁸⁹ Section 36(8) of the Act and Competition Act 1998 (Determination of Turnover for Penalties Order 2000 (SI 2000/309), as amended by the Competition Act 1998 (Determination of Turnover for Penalties) (Amendment) Order 2004 (SI 2004/1259).

The OFT considers that the Parties to each infringing agreement and/or concerted practice are as set out in the OFT's conclusions in relation to each infringement, set out in the OFT's analysis at paragraphs 169 to 220 above.

251. The OFT may impose a penalty on an undertaking that has infringed the Chapter I prohibition only if it is satisfied that the infringement has been committed intentionally or negligently but is under no obligation to determine specifically whether there was intention or negligence.¹⁹⁰
252. In the present case, the OFT considers that the Parties would in all likelihood have made tender applications before and either would have, or ought to have been, aware that the purpose of conducting tenders is to ensure competition in the award of contracts. The OFT further notes that it is not uncommon for a purchaser organising a tender procedure to require the parties invited to tender to complete a non-collusion statement confirming that the tender submitted is a competitive offer and that there have been no undue contacts with any competing company in connection with the tender offer.¹⁹¹ The OFT considers that, in the light of these facts, and the very nature of the agreements and/or concerted practices, the Parties could not have been unaware that the agreements and/or concerted practices in which they participated had the object of preventing, restricting or distorting competition. The OFT is therefore satisfied that the Parties intentionally or negligently infringed the Chapter I prohibition.

IMMUNITY FROM PENALTIES

253. Section 39(3) of the Act provides that a party to a small agreement¹⁹² is immune from the effect of section 36(1). This is defined, pursuant to section 39(1) and the Competition Act 1998 (Small Agreements and Conduct of Minor Significance) Regulations 2000,¹⁹³ as an agreement between undertakings the combined applicable turnover of which for the business year ending in the calendar year preceding the one during which the infringement occurred does not exceed £20 million.
254. However, by virtue of section 39(1)(b), a price-fixing agreement may not constitute a 'small agreement' for the purposes of the Act. Although some of the infringements set out in this Decision also related to market sharing, all are considered by the OFT to constitute price-fixing agreements. Accordingly, none of the Parties will benefit from immunity from penalties under section 39(3).

¹⁹⁰ Section 36(3) of the Act: see *Napp Pharmaceutical Holdings Limited and subsidiaries v Director General of Fair Trading* [2002] CAT 1, at paragraph 455.

¹⁹¹ However, the OFT does not consider that it is necessary for the OFT to show that a party completed such a non-collusion statement for the OFT to find that the party in question infringed the Chapter I prohibition intentionally or negligently.

¹⁹² See footnote 188 above.

¹⁹³ SI 2000/262.

CALCULATION OF PENALTIES – GENERAL POINTS

255. In accordance with section 38(8) of the Act, the OFT must have regard to the guidance on penalties issued under section 38(1) of the Act, for the time being in force, when setting the amount of the penalty.¹⁹⁴

Step 1 – starting point

256. The starting point for determining the level of penalty is calculated having regard to the seriousness of the infringement and the relevant turnover of the undertaking.¹⁹⁵ The 'relevant turnover' is the turnover of the undertaking in the relevant product market and relevant geographic market affected by the infringement in the last business year.¹⁹⁶ The last business year is the business year preceding the date of the decision.¹⁹⁷ The starting point may be any amount up to a maximum of 10 per cent of each undertaking's relevant turnover.¹⁹⁸ Whilst the OFT is not required to formulate the starting point as a percentage rate of each undertaking's relevant turnover, in this case a percentage rate, reflecting the seriousness of the offence and applied to each undertaking's relevant turnover, is considered to be an appropriate way of having regard both to seriousness and the relevant turnover of each undertaking.

257. The actual percentage rate which is applied to the relevant turnover depends upon the nature of the infringement. The more serious and widespread the infringement, the higher the likely percentage rate.¹⁹⁹ 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 and the effect on competitors and third parties. The damage caused to consumers whether directly or indirectly will also be an important consideration.²⁰⁰

Nature of infringement

258. The OFT has imposed a penalty on the Parties. The starting point for each penalty is based on the fact that the agreements and/or concerted practices in this case are related to collusive tendering. Collusive tendering is a form of price fixing, and may also give effect to market sharing, and is one of the most serious infringements of the Chapter I prohibition. The usual starting point for each penalty in such a case is likely to be at or near 10% of relevant turnover.²⁰¹

¹⁹⁴ The OFT's guidance as to the appropriate amount of a penalty, OFT 423, December 2004.

¹⁹⁵ *Ibid.*, at paragraph 2.3.

¹⁹⁶ *Ibid.*, at paragraph 2.7.

¹⁹⁷ Penalties Order, Article 3

¹⁹⁸ The OFT's guidance as to the appropriate amount of a penalty, OFT 423, December 2004, paragraph 2.8.

¹⁹⁹ *Ibid.*, at paragraph 2.4.

²⁰⁰ *Ibid.*, at paragraph 2.5.

²⁰¹ *Ibid.*, at paragraph 2.4.

259. The OFT considers that a very serious example of collusive tendering would be a cartel where collusion in relation to individual contracts was part of an overall scheme that was centrally controlled and orchestrated by the participants with contracts allocated between members of the cartel. The OFT does not have evidence of such an overall arrangement in this case.
260. The OFT notes that certain of the instances of cover pricing dealt with in this Decision are individual, discrete infringements, whereby collusive tendering results in the submission of uncompetitive tender bids. The contracts for Chester Building, Thomas Percy School and All Saints and Laygate schools would fall into this category and are considered to be less serious forms of collusive tendering.
261. However the OFT considers that cartels where collusive tendering results not only in uncompetitive prices being submitted but also in market sharing in the form of allocation of more than one contract between cartel members are a more serious form of collusive tendering. Because such infringements remove or distort competition in relation to more than one contract, they are closer in nature to the very serious 'overall schemes' described in paragraph 259 above. The infringements relating to the BT telephone exchange contracts and the George Stephenson and Willington Quay Schools contracts fall within this category.
262. Equally, the OFT considers that cartels where participants made inducements to other cartel participants to persuade them to submit uncompetitive bids (for example by making compensation payments) are more serious than those infringements where no such inducement is offered. In such cases, customers may face additional loss as a result of the collusive tendering as tender bids are further inflated to include the sums paid by way of inducement, rather than the successful contractor absorbing these sums by way of a reduced profit margin. Compensation payments were a feature of the infringements relating to the George Stephenson and Willington Quay Schools contracts and also the Storeys contract.

Nature of product

263. Felt and single ply flat roofs are among a number of available types of roof but because of a basic difference in materials and technology, purchasers that need services carried out on flat roofs will have only a limited ability (or none at all) to substitute to employing the services of a contractor that can carry out that kind of work in relation to other types of flat roofs.²⁰²
264. The values of the contracts covered by this Decision ranged from approximately £20,000 to over £700,000. The relatively small size of many of the contracts in question is a relevant factor when assessing the seriousness of the infringement for the purposes of determining the starting point.

²⁰² See paragraphs 125 to 138 above.

Structure of market

265. The market consists of contractors able to supply installation, repair, maintenance and improvement services for felt and single ply flat roof coverings in the North East of England. As noted at paragraph 30 above, there is a high degree of fragmentation in the roofing contracting industry as a whole with some 74 per cent of companies commanding a turnover of less than £250,000 in 2002. The felt/single ply roofing market in the North East of England is therefore likely to be fragmented.
266. Local authorities are significant purchasers of installation, repair, maintenance and improvement services for felt and single ply flat roof coverings that the Parties supply. Some of the Parties told the OFT that there was perceived pressure in the industry for suppliers to put in tender bids even when they did not wish to win the contract because otherwise there was a risk of not being invited to tender in the future.²⁰³ However, a desire to maintain relationships with customers (or their agents) does not diminish each supplier's obligations to maintain independence from its competitors as a separate economic operator.²⁰⁴ All undertakings are independently free to adopt a business strategy which involves submitting bids at prices which they would not expect to win the contract. However, the Chapter I prohibition provides that contacts between competitors are prohibited where they have the object or effect of ensuring that bids submitted do not genuinely compete. In the OFT's view, the fact that the Parties may have had motives such as staying on tender lists²⁰⁵, which led to their contact with competitors, does not in any way affect the OFT's assessment of the seriousness of the infringements.

Market share of undertakings involved

267. Although detailed statistical data about the market for the supply of installation, repair, maintenance and improvement services for felt and single ply flat roofs is unavailable, the OFT considers the fact that the roofing industry as a whole²⁰⁶ is so fragmented (see paragraph 30 above) suggests that none of the Parties has a major market share in the market for the supply of installation, repair, maintenance and improvement services for felt and single ply flat roof coverings in the North East of England (although it should be noted that Briggs is, in the roofing market as a whole across the UK, a leading player²⁰⁷).

²⁰³ See for example, First Witness Statement of David Murray, dated, 11 July 2003 as set out at paragraph 52 above; Hodgson's written response dated 4 January 2005 to the Statement of Objections.

²⁰⁴ See paragraph 156 above.

²⁰⁵ See paragraph 233 above.

²⁰⁶ See Part paragraphs 21 onwards above for an overview of the UK contracting services market.

²⁰⁷ Mintel Roofing Materials & Contracting (Industrial Report) - UK - January 2004, paragraph 5.3.7.

Effect on customers, competitors and third parties

268. The Parties identified in the Decision constitute a not insignificant part of suppliers of installation, repair, maintenance and improvement services for felt and single ply flat roof coverings in the North East of England. Also, certain Parties have made representations that cover pricing in the sense used in this Decision (see paragraph 34 above) "was then a widely-encountered phenomenon in the roofing industry"²⁰⁸.
269. Certain Parties have made representations that there was no suggestion that financial loss was caused to customers as a consequence of the infringements.²⁰⁹ The Parties' infringements gave purchasers of flat-roofing services the impression that there was more competition in the tender process relating to a specific contract than there actually was. As a result it was not possible for those customers to ascertain whether the tenders received were a competitive price or not. The OFT further notes that the foreseeable effect of the restriction or, in some cases, complete removal of competition from the tender process will lead on average to higher (i.e. more costly) winning bids giving rise to allocative inefficiencies in that market and more generally. It is not, however, possible for the OFT to quantify the amount of any loss caused to customers (and to the extent those customers are public bodies, ultimately tax payers) as a result of the collusive tendering.
270. The OFT has had regard to the nature of the product, the structure of the market, the market shares of the Parties, and the effect of the infringements on customers, competitors and third parties, as set out in paragraphs 263 to 269 above. On the basis that the size of the contracts was on average relatively small (see paragraph 264 above), the market is fragmented (see paragraph 265 above), and none of the Parties has a major market share (see paragraph 267 above), but taking into account the fact that every Party was a participant in one or more of the more serious categories of collusive tendering (see paragraphs 261 and 262), the OFT has fixed a starting point of [...] [C] per cent of relevant turnover for all the Parties.

Step 2 – adjustment for duration

271. The starting point may be adjusted to take into account the duration of the infringement.²¹⁰ As noted at paragraph 244 above, the duration of each of the infringements in this Decision is calculated by the OFT to be less than a year. Having regard to the specific nature of tender procedures discussed at paragraphs 243 to 245 above, the OFT does not believe that the fact that the bid-rigging arrangements lasted for significantly less than one year should lead to any downward adjustment in the penalties imposed.

²⁰⁸ Dufell's written response dated 6 January 2005 to the Statement of Objections.

²⁰⁹ For example, Hylton's written response dated 31 December 2004 to the Statement of Objections.

²¹⁰ The OFT's guidance as to the appropriate amount of a penalty, OFT 423, December 2004, at paragraph 2.10.

272. In its judgment in *WM Roofing I*,²¹¹ in considering the duration of collusive tendering practices similar in nature to those particularised in this Decision (see paragraph 245 above), the CAT stated:

'We consider, therefore, that the OFT's decision not to make any adjustment for duration in the circumstances of this case was appropriate and reasonable.'

273. Therefore, the OFT will not adjust any of the penalties either downwards or upwards in this case for duration.

Step 3 – adjustment for other factors

274. The penalty may be adjusted as appropriate to achieve policy objectives, particularly deterring undertakings (including non-infringing undertakings) from engaging in anti-competitive practices, such as collusive tendering. Considerations at this stage may include the OFT's estimate of any economic or financial benefit made by the infringing undertakings from the infringement(s), and the special characteristics, including the size and financial position of the undertakings in question.²¹²

275. A number of Parties have made representations asserting a lack of financial gain from the infringements²¹³, or that the Party in question made less financial gain than other Parties²¹⁴. However in this case, the OFT considers that it would be difficult to estimate any gain that the Parties have achieved through their collusive actions in relation to the contracts that formed the subject matter of the infringements. Potential gains may be derived not only from the contracts in question (through higher margins), but also from alterations to the ongoing relationships with customers. Moreover, the arithmetical calculation of gain should not form the sole or even the primary means of assessing the seriousness of an infringement except in the clearest cases.²¹⁵

276. As noted in paragraph 268 above, and in a previous decision of the OFT²¹⁶, collusive tendering has been widespread in the roofing industry. As will be clear from this Decision, the OFT considers that collusive tendering is one of the most serious infringements of the Act. The OFT therefore considers that it is necessary to deter undertakings in this area from engaging in collusive tendering.

277. The financial penalty calculated at the end of Step 2 of the calculation procedure may represent a relatively low proportion of an undertaking's

²¹¹ *WM Roofing I* judgement, at paragraph 278.

²¹² *Ibid.*, paragraph 2.11.

²¹³ For example, Dufell's written response, dated 6 January 2005, to the Statement of Objections; Roofclad's written response, dated 2 December 2004, to the Statement of Objections; and Hylton's written response, dated 31 December 2004, to the Statement of Objections.

²¹⁴ For example, Hodgson's written response, dated 4 January 2005, to the Statement of Objections.

²¹⁵ *Napp Pharmaceutical Holdings Limited and subsidiaries v Director General of Fair Trading* [2002] CAT 1, at paragraph 511.

²¹⁶ See *The West Midlands Roofing Decision*, referred to at footnote 24, at paragraph 394.

total turnover, for example where the undertaking in question has significant operations in other markets. In such a case, the OFT considers that the penalty figure reached at the end of Step 2 may not represent a significant sum for that party, and it will therefore be necessary to increase the party's penalty at Step 3 to arrive at a sum that represents, for that party, a significant amount that will act as a sufficient deterrent, having regard to the seriousness of the infringement(s) in this case and the party's total turnover. These points are considered in relation to each Party, below.

278. In exceptional circumstances, where the relevant turnover of an undertaking is zero 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.²¹⁷ This may be the case for a variety of reasons, for example, where the undertaking has ceased trading altogether, where the undertaking in question remains in business but has exited the relevant product or geographic market since the infringement(s) took place, or, in bidding markets, where the undertaking has been unsuccessful in winning tender procedures in the relevant year. In order to achieve the OFT's objectives of imposing penalties which reflect the seriousness of the offence and deterring undertakings from engaging in similar practices in future, the OFT considers that any such adjustment should ensure that the penalties paid by such undertakings are set at a similar level to penalties paid by other undertakings of a similar size and who have engaged in a similar number of infringements of a similar type. In setting penalties for an undertaking (Price) with nil relevant turnover in *WM Roofing II*,²¹⁸ the CAT stated:

'We take into account the penalties imposed on the other undertakings, the relationship between the turnover of those undertakings and the penalties imposed on them, that Price had no relevant turnover, that Price only committed one infringement but that there was involvement on the part of a director and also that the OFT's calculation of Price's penalty for deterrent effect was necessarily based on an arbitrary assessment since Price had no relevant turnover.'

279. The OFT notes that aggravating factors such as the involvement of directors and the number of infringements will be taken into account in Step 4 of the penalty calculation, so when adjusting penalties for undertakings with nil relevant turnover at this Step 3 the OFT will take into account the penalties imposed on the other undertakings, the relationship between the turnover of those undertakings and the penalties imposed on them, and the fact that such undertakings had no relevant turnover.

280. In relation to the size of the undertakings in question, Dufell has submitted representations stating that it is a small company compared to some of the Parties.²¹⁹ The OFT recognises that some Parties are larger

²¹⁷ The OFT's guidance as to the appropriate amount of a penalty, OFT 423, December 2004, at paragraph 2.13.

²¹⁸ *Richard W Price (Roofing Contractors) Limited v Office of Fair Trading*, [2005] CAT 5 at paragraph 63.

²¹⁹ Dufell's written response dated 6 January 2005 to the Statement of Objections.

than others but notes that this factor will be reflected when account is taken of relevant turnover applying a percentage rate starting point as described in paragraph 256 above. In addition, for large companies for whom relevant turnover constitutes a relatively small percentage of total turnover, adjustments may be made as described in paragraph 277 above to ensure that the financial penalties represent a significant sum for such Parties. As a result, and taking into consideration the seriousness of the infringements, the OFT considers that no downward adjustment for smaller parties would be appropriate at this stage.

281. In relation to the financial position of the undertakings, the OFT notes that financial position is a relevant consideration in the context of determining whether the sum reached at the end of Step 2 is an appropriate amount for deterrence, not only in relation to the party in question but also in relation to third parties who may consider engaging in anti-competitive activities. This point is considered further below in relation to one Party which made representations on this issue.

Step 4 – adjustment for aggravating and mitigating factors

282. The OFT has the power to increase the penalty where there are other aggravating factors, or decrease it where there are mitigating factors.²²⁰ The OFT considers these points in relation to each undertaking, below.

283. The OFT notes here that where parties have committed repeated infringements, it constitutes an aggravating factor under this Step of the penalty calculation procedure. The magnitude of the penalty is therefore adjusted to reflect the number of infringements each party has committed. In deciding on the appropriate amount of the increase for multiple infringements, the OFT will ensure that any adjustment is fair and proportionate between all parties. When assessing the appropriate amount of the increase, the OFT therefore has regard to the absolute frequency of infringements by each party and the relative frequency of such infringements as between the parties in relation to the relevant market. Moreover, the OFT will also have regard to whether, in its opinion, there are significant qualitative differences between discrete infringements that should be reflected in any fine set by the OFT. In the circumstances of the present case, the OFT has decided to increase the fines by multiples of 10 per cent where a Party has committed 2 or more infringements, as set out in the table below:

Number of Infringements	Increase
1	none
2	10%
3	20%
4	30%

284. The OFT also notes that the role of an undertaking as a leader in, or an instigator of, the infringement may be an aggravating factor.²²¹ The OFT

²²⁰ *Ibid.*, at paragraph 2.14.

²²¹ *Ibid.*, at paragraph 2.15.

considers that 'instigation' in this context is something more than mere initiation of collusion by being the first party to make contact with others or the first to suggest collusion in relation to a specific contract. The OFT has therefore made no findings in relation to any of the infringements in this decision that any Party had a role as a leader in or instigator of an infringement.

Step 5 – adjustment to prevent the maximum penalty from being exceeded and to avoid double jeopardy

285. The OFT may not fix a penalty that exceeds 10 per cent of the worldwide turnover of the undertaking in its last business year, calculated in accordance with the provisions of the Penalties Order.²²² The section 36(8) turnover is not restricted to the turnover in the relevant product market and relevant geographic market.²²³ The OFT considers below, in relation to each undertaking, whether any penalty would exceed 10 per cent of the section 36(8) turnover.

286. In addition, where an infringement of the Chapter I prohibition ended prior to 1 May 2004, any penalty must, if necessary, be further adjusted to ensure that it does not exceed the maximum penalty applicable prior to 1 May 2004, i.e. 10 per cent of turnover in the UK of the undertaking in the financial year preceding the date when the infringement ended.²²⁴

287. Also, the OFT must when setting the amount of its penalty for a particular agreement (or concerted practice) take into account any penalty or fine that has been imposed by the European Commission or by a court or other body in another Member State in respect of the same agreement (or concerted practice).²²⁵

iii. Penalty for Briggs

Step 1 – starting point

288. Briggs was involved in 3 infringements:

- collusive tendering in connection with the BT telephone exchange contracts, involving price fixing and market sharing in the form of allocating contracts between the participants, which the OFT considers came to an end in June 2000;
- collusive tendering in connection with the George Stephenson School and Willington Quay School contracts, involving price fixing and market sharing in the form of allocating contracts between the participants in return for the payment of

²²² Section 36(8) of the Act and Competition Act 1998 (Determination of Turnover for Penalties) Order 2000 (SI 2000/309), as amended by the Competition Act 1998 (Determination of Turnover for Penalties) (Amendment) Order 2004 (SI 2004/1259)..

²²³ The OFT's guidance as to the appropriate amount of a penalty, OFT 423, December 2004, at paragraph 2.17.

²²⁴ *Ibid.*, at paragraph 2.18.

²²⁵ *Ibid.*, at paragraph 2.20.

compensation, which the OFT considers came to an end in August 2000; and

- collusive tendering in connection with the Storeys, Washington contract, involving price fixing in return for the payment of compensation, which the OFT considers came to an end in summer 2000.

289. Briggs' financial year is 1 January to 31 December. Briggs' turnover in the relevant product and geographic markets in the business year preceding the date of this Decision (2004) was £[...]**[C]**.

290. The OFT has made an analysis of its findings regarding the seriousness of these infringement at paragraphs 263 to 270 above and fixed the starting point for all the Parties at [...]**[C]** per cent of relevant turnover. The starting point for Briggs is therefore £[...]**[C]**.

Step 2 – adjustment for duration

291. In accordance with paragraphs 271 to 273 above, the OFT does not make any adjustment for duration.

Step 3 – adjustment for other factors

292. As noted at paragraphs 274 to 276 above, the OFT considers that it is necessary to deter undertakings in this area from engaging in collusive tendering. The OFT's investigation in this case has already raised the profile of competition issues in the industry and the OFT intends this Decision to raise awareness of these issues within the industry further. In accordance with paragraph 277, the penalty for Briggs at the end of Step 2 does not represent a significant sum for Briggs because both that sum and the relevant turnover taken into account in Step 1 each represent a relatively low proportion of Briggs' total turnover in the year preceding this Decision. However, in an earlier decision relating to collusive tendering in the flat roofing sector,²²⁶ an additional sum was included in Briggs' penalty in order to deter Briggs and other undertakings from engaging in collusive tendering. In recognition of the fact that Briggs has already faced a deterrent in a similar market within the same sector, the OFT does not therefore propose to increase the amount of Briggs' penalty at this stage.

Step 4 – adjustment for aggravating and mitigating factors

Aggravation

293. As noted at paragraph 283 above, the OFT will treat repeated infringements as an aggravating factor under this Step. Briggs was involved in collusive tendering in connection with 3 infringements as set out in paragraph 288 above. As set out in paragraph 283 above, the OFT has decided to increase the fines for multiple infringements in this case by

²²⁶ The West Midlands Roofing Decision, referred to at footnote 24, at paragraph 411.

[...][C] per cent where a party has committed 3 infringements. The OFT therefore increases the penalty for Briggs by [...][C] per cent.

294. The OFT is aware that there was involvement in at least some of the infringements on the part of a director of Briggs.²²⁷ The OFT considers this an aggravating factor and increases the penalty by [...][C] per cent.

Mitigation

295. The OFT is aware of the internal investigation into anti-competitive activities undertaken by Briggs and the remedial action it has taken since its discovery of the infringement. Briggs has advised its staff, directors and senior managers in detail upon the provisions of the Act and has committed to following a competition law compliance programme.²²⁸ The OFT considers that in the light of all these factors it is appropriate to reduce the penalty by [...][C] per cent.

296. Although Briggs co-operated with the OFT during the course of the investigation, this was a condition of its being granted leniency and so no extra mitigation is given for these factors.²²⁹

297. The total percentage added to the penalty for aggravating circumstances is [...][C] per cent and the total percentage deducted for mitigating circumstances is [...][C] per cent. As a result of this Step, the total adjustment to be made to the penalty having considered aggravating and mitigating circumstances is [*a change*][C] of [...][C] per cent. The financial penalty will therefore be £88,956 subject to Step 5.

Step 5 – adjustment to prevent the maximum penalty from being exceeded and to avoid double jeopardy

298. Under section 36(8) of the Act, the maximum financial penalty that the OFT can impose is 10 per cent of the 'section 36(8) turnover' of the undertaking. The 'section 36(8) turnover' is determined in accordance with the Penalties Order and is the amounts derived by the undertaking from the sale of products and the provision of services falling within the undertaking's ordinary activities after deduction of sales rebates, VAT and other taxes directly related to turnover.²³⁰ The 'section 36(8) turnover' is taken from the applicable turnover during the business year preceding the date of the decision.²³¹ The applicable turnover for Briggs in the last business year (the year ending 31 December 2004) was £29,607,000. The statutory maximum financial penalty for Briggs is 10 per cent of this figure and is therefore £2,960,700.

²²⁷ See paragraphs 88, 93, 94 and 113 above.

²²⁸ Briggs internal Memorandum, dated 1st February 2002. Subject 'Competition Law Issues'.

²²⁹ The OFT's guidance as to the appropriate amount of a penalty, OFT 423, December 2004, at footnote 19.

²³⁰ Definition of 'applicable turnover' in Article 2 and paragraph 3 of the Schedule to the Penalties Order, as amended.

²³¹ Article 3 of the Penalties Order.

299. In addition, where an infringement of the Chapter I prohibition ended prior to 1 May 2004, any penalty must, if necessary, be further adjusted to ensure that it does not exceed the maximum penalty applicable prior to May 2004, i.e. 10 per cent of turnover in the UK of the undertaking in the financial year preceding the date when the infringement ended.²³² The applicable turnover for Briggs in the business year preceding the year in which the first of its infringements ended (the year ending 31 December 1999) was £33,530,000. The statutory maximum financial penalty for Briggs is 10 per cent of this figure and is therefore £3,353,000.
300. The financial penalty calculated at the end of Step 4 does not exceed either of these amounts. There is no double jeopardy because no penalty has been imposed by the European Commission or other relevant body in respect of the infringements.

Leniency

301. Briggs was granted total immunity from financial penalties as part of the OFT's leniency programme. Briggs financial penalty is therefore reduced to £nil.

iv. Penalty for Dufell

Step 1 – starting point

302. Dufell was involved in 2 infringements:
- collusive tendering in connection with the All Saints Church of England Primary School and Laygate School contracts, involving price fixing, which the OFT considers came to an end in summer 2002; and
 - collusive tendering in connection with the BT telephone exchange contracts, involving price fixing and market sharing in the form of allocating contracts between the participants, which the OFT considers came to an end in June 2000.
303. Dufell's financial year is 1 January to 31 December. Dufell's turnover in the relevant product and geographic markets in the last business year preceding the date of this Decision for which accounts were available (2003) was £[...]C].[†]
304. The OFT has made an analysis of its findings regarding the seriousness of this infringement at paragraphs 263 to 270 above and fixed the starting

²³² *Ibid.*, at paragraph 2.18.

[†] Since issuing this Decision, the OFT has been made aware that this figure does not represent the 2003 turnover as stated, but in fact represents Dufell's relevant turnover in 1999. Taking into consideration various factors including the fact that the error did not result from incorrect or misleading information provided by any Party and the fact that the OFT's attention was drawn to the mistake by the solicitors representing Dufell, the OFT has decided not to exercise its discretion to vary or withdraw this part of the Decision and re-issue a decision based on the correct sum.

point for all the Parties at [...] [C] per cent of relevant turnover. The starting point for Dufell is therefore £[...] [C].

Step 2 – adjustment for duration

305. In accordance with paragraphs 271 to 273 above, the OFT does not make any adjustment for duration.

Step 3 – adjustment for other factors

306. As noted at paragraphs 274 and 276 above, the OFT considers that it is necessary to deter undertakings in this area from engaging in collusive tendering. The OFT's investigation in this case has already raised the profile of competition issues in the industry and the OFT intends this Decision to raise awareness of these issues within the industry further. The OFT is of the view that the figure reached at the end of Step 2 above is a significant sum in relation to Dufell because both that sum and the relevant turnover taken into account in Step 1 each represent an adequate proportion of Dufell's total turnover for the year ending 31 December 2003 (see paragraph 6 above). In accordance with paragraph 277 above, the OFT therefore considers that, in this instance, the penalty figure of £[...] [C] is sufficient to act as an effective deterrent to Dufell and to other undertakings that might consider engaging in collusive tendering. The OFT does not therefore propose to increase the amount of the penalty at this stage.

Step 4 – adjustment for aggravating and mitigating factors

Aggravation

307. As noted at paragraph 283 above, the OFT will treat repeated infringements as an aggravating factor under this Step. Dufell was involved in collusive tendering in connection with 2 infringements, as set out in paragraph 302. As set out in paragraph 283 above, the OFT has decided to increase the fines for multiple infringements in this case by [...] [C] per cent where a party has committed 2 infringements. The OFT therefore increases the penalty for Dufell by [...] [C] per cent.

308. The OFT is aware that there was involvement on the part of a director of Dufell.²³³ The OFT considers this an aggravating factor and increases the penalty by [...] [C] per cent.

Mitigation

309. The OFT is aware of the remedial action taken by Dufell since its discovery of the infringements. Dufell has advised its directors and senior managers in detail upon the provisions of the Act.²³⁴ The OFT considers that in the light of all these factors it is appropriate to reduce the penalty by [...] [C] per cent.

²³³ Transcript of interview of Neil Riddell by OFT, 5 March 2003.

²³⁴ Dufell's written response dated 6 January 2005 to the Statement of Objections.

310. Dufell co-operated fully with the OFT during the course of the investigation and responded to all requests for information in a timely fashion. In these circumstances the OFT reduces Dufell's penalty by [...] [C] per cent for co-operation.
311. The total percentage added to the penalty for aggravating circumstances is [...] [C] per cent and the total percentage deducted for mitigating circumstances is [...] [C] per cent. As a result of this Step, the total adjustment to be made to the penalty having considered aggravating and mitigating circumstances is [...] [C] per cent. The financial penalty will therefore be £74,624 subject to Step 5.

Step 5 – adjustment to prevent the maximum penalty from being exceeded and to avoid double jeopardy

312. Under section 36(8) of the Act, the maximum financial penalty that the OFT can impose is 10 per cent of the 'section 36(8) turnover' of the undertaking. The 'section 36(8) turnover' is determined in accordance with the Penalties Order and is the amounts derived by the undertaking from the sale of products and the provision of services falling within the undertaking's ordinary activities after deduction of sales rebates, VAT and other taxes directly related to turnover.²³⁵ The 'section 36(8) turnover' is taken from the applicable turnover during the business year preceding the date of the decision.²³⁶ The applicable turnover for Dufell in the last business year for which accounts are available (the year ending 31 December 2003) was £[...] [C]. The statutory maximum financial penalty for Dufell is 10 per cent of this figure and is therefore £[...] [C].
313. In addition, where an infringement of the Chapter I prohibition ended prior to 1 May 2004, any penalty must, if necessary, be further adjusted to ensure that it does not exceed the maximum penalty applicable prior to May 2004, i.e. 10 per cent of turnover in the UK of the undertaking in the financial year preceding the date when the infringement ended.²³⁷ The applicable turnover for Dufell in the business year preceding the year in which the first of its infringements ended (the year ending 31 December 1999) was £[...] [C]. The statutory maximum financial penalty for Dufell is 10 per cent of this figure and is therefore £[...] [C].
314. The financial penalty calculated at the end of Step 4 does not exceed either of these amounts. There is no double jeopardy because no penalty has been imposed by the European Commission or other relevant body in respect of the infringements.

²³⁵ Definition of 'applicable turnover' in Article 2 and paragraph 3 of the Schedule to the Penalties Order, as amended.

²³⁶ Article 3 of the Penalties Order.

²³⁷ *Ibid.*, at paragraph 2.18.

v. Penalty for Hodgson

Step 1 – starting point

315. Hodgson was involved in 4 infringements:

- collusive tendering in connection with the Chester Building, City of Sunderland College contract, involving price fixing, which the OFT considers came to an end in September 2002;
- collusive tendering in connection with the Thomas Percy RC Middle School contract, involving price fixing, which the OFT considers came to an end in October 2001,
- collusive tendering in connection with the All Saints Church of England Primary School and Laygate School contracts, involving price fixing, which the OFT considers came to an end in summer 2002; and
- collusive tendering in connection with the BT telephone exchange contracts, involving price fixing and market sharing in the form of allocating contracts between the participants, which the OFT considers came to an end in June 2000.

316. Hodgson's financial year is 1 January to 31 December. Hodgson's turnover in the relevant product and geographic markets in the business year preceding the date of this Decision (2004) was £[...][C].

317. The OFT has made an analysis of its findings regarding the seriousness of this infringement at paragraphs 263 to 270 above and fixed the starting point for all the Parties at [...][C] per cent of relevant turnover. The starting point for Hodgson is therefore £[...][C].

Step 2 – adjustment for duration

318. In accordance with paragraphs 271 to 273 above, the OFT does not make any adjustment for duration.

Step 3 – adjustment for other factors

319. As noted at paragraphs 274 and 276 above, the OFT considers that it is necessary to deter undertakings in this area from engaging in collusive tendering. The OFT's investigation in this case has already raised the profile of competition issues in the industry and the OFT intends this Decision to raise awareness of these issues within the industry further. The OFT is of the view that the figure reached at the end of Step 2 above is a significant sum in relation to Hodgson because both that sum and the relevant turnover taken into account in Step 1 each represent an adequate proportion of Hodgson's total turnover for the year ending 31 December 2004 (see paragraph 8 above). In accordance with paragraph 277 above, the OFT therefore considers that, in this instance, the penalty figure of £[...][C] is sufficient to act as an effective deterrent to Hodgson and to other undertakings that might consider engaging in collusive tendering. The OFT does not therefore propose to increase the amount of the penalty at this stage.

Step 4 – adjustment for aggravating and mitigating factors

Aggravation

320. As noted at paragraph 283 above, the OFT will treat multiple infringements as an aggravating factor under this Step. Hodgson was involved in collusive tendering in connection with 4 infringements as set out in paragraph 315 above. As set out in paragraph 283 above, the OFT has decided to increase the fines for multiple infringements in this case by [...] [C] per cent where a party has committed 4 infringements. The OFT therefore increases the penalty for Hodgson by [...] [C] per cent.

Mitigation

321. The OFT is aware of the remedial action taken by Hodgson since its discovery of the infringement. Hodgson has reviewed its policies in relation to tender processes and has installed stringent quality procedures for their staff to ensure that collusive tendering does not occur in future.²³⁸ The OFT considers that in the light of these factors it is appropriate to reduce the penalty by [...] [C] per cent.

322. Hodgson co-operated fully with the OFT during the course of the investigation and responded to all requests for information in a timely fashion. In these circumstances the OFT reduces Hodgson's penalty by [...] [C] per cent for co-operation.

323. The total percentage added to the penalty for aggravating circumstances is [...] [C] per cent and the total percentage deducted for mitigating circumstances is [...] [C] per cent. As a result of this Step, the total adjustment to be made to the penalty having considered aggravating and mitigating circumstances is [*a change*] [C] of [...] [C] per cent. The financial penalty will therefore be £74,151 subject to Step 5.

Step 5 – adjustment to prevent the maximum penalty from being exceeded and to avoid double jeopardy

324. Under section 36(8) of the Act, the maximum financial penalty that the OFT can impose is 10 per cent of the 'section 36(8) turnover' of the undertaking. The 'section 36(8) turnover' is determined in accordance with the Penalties Order and is the amounts derived by the undertaking from the sale of products and the provision of services falling within the undertaking's ordinary activities after deduction of sales rebates, VAT and other taxes directly related to turnover.²³⁹ The 'section 36(8) turnover' is taken from the applicable turnover during the business year preceding the date of the decision.²⁴⁰ The applicable turnover for Hodgson in the last business year (the year ending 31 December 2004 was £4,045,269. The

²³⁸ Hodgson's written response dated 4 January 2004 to the Statement of Objections.

²³⁹ Definition of 'applicable turnover' in Article 2 and paragraph 3 of the Schedule to the Penalties Order, as amended.

²⁴⁰ Article 3 of the Penalties Order.

statutory maximum financial penalty for Hodgson is 10 per cent of this figure and is therefore £404,526.

325. In addition, where an infringement of the Chapter I prohibition ended prior to 1 May 2004, any penalty must, if necessary, be further adjusted to ensure that it does not exceed the maximum penalty applicable prior to May 2004, i.e. 10 per cent of turnover in the UK of the undertaking in the financial year preceding the date when the infringement ended.²⁴¹ The applicable turnover for Hodgson in the business year preceding the year in which the first of its infringements ended (the year ending 31 December 1999) was £2,565,395. The statutory maximum financial penalty for Hodgson is 10 per cent of this figure and is therefore £256,539.

326. The financial penalty calculated at the end of Step 4 does not exceed either of these amounts. There is no double jeopardy because no penalty has been imposed by the European Commission or other relevant body in respect of the infringements.

vi. Penalty for Hylton

Step 1 – starting point

327. Hylton was involved in 3 infringements:

- collusive tendering in connection with the Chester Building, City of Sunderland College contract, involving price fixing, which the OFT considers came to an end in September 2002;
- collusive tendering in connection with the Thomas Percy RC Middle School contract, involving price fixing, which the OFT considers came to an end in October 2001; and
- collusive tendering in connection with the BT telephone exchange contracts, involving price fixing and market sharing in the form of allocating contracts between the participants, which the OFT considers came to an end in June 2000.

328. Hylton's financial year is 1 June to 31 May. Hylton's turnover in the relevant product and geographic markets in the year preceding the date of this Decision (2004) was £[...] [C].

329. The OFT has made an analysis of its findings regarding the seriousness of this infringement at paragraphs 263 to 270 above and fixed the starting point for all the Parties at [...] [C] per cent of relevant turnover. The starting point for Hylton is therefore £[...] [C].

Step 2 – adjustment for duration

330. In accordance with paragraphs 271 to 273 above, the OFT does not make any adjustment for duration.

²⁴¹ *Ibid.*, at paragraph 2.18.

Step 3 – adjustment for other factors

331. As noted at paragraphs 274 and 276 above, the OFT considers that it is necessary to deter undertakings in this area from engaging in collusive tendering. The OFT's investigation in this case has already raised the profile of competition issues in the industry and the OFT intends this Decision to raise awareness of these issues within the industry further. The OFT is of the view that the figure reached at the end of Step 2 above is a significant sum in relation to Hylton because both that sum and the relevant turnover taken into account in Step 1 each represent an adequate proportion of Hylton's total turnover for the year ending 31 May 2004 (see paragraph 11 above). In accordance with paragraph 277 above, the OFT therefore considers that, in this instance, the penalty figure of £[...] [C] is sufficient to act as an effective deterrent to Hylton and to other undertakings that might consider engaging in collusive tendering. The OFT does not therefore propose to increase the amount of the penalty at this stage.

332. [...] [C]

Step 4 – adjustment for aggravating and mitigating factors

Aggravation

333. As noted at paragraph 283 above, the OFT will treat multiple infringements as an aggravating factor under this Step. Hylton was involved in collusive tendering in connection with 3 infringements as set out in paragraph 327 above. As set out in paragraph 283 above, the OFT has decided to increase the fines for multiple infringements in this case by [...] [C] per cent where a party has committed 3 infringements. The OFT therefore increases the penalty for Hylton by [...] [C] per cent.

334. The OFT is aware that there was involvement on the part of a Mr Murray who became a director of Hylton prior to the collusion on the Thomas Percy School contract.²⁴² The OFT considers this an aggravating factor and increases the penalty by [...] [C] per cent.

Mitigation

335. The OFT is aware that Hylton has a clear policy of being independent contact with competitors. It has taken steps to ensure future compliance with the Act by ensuring that all members of staff who are involved in pricing processes have been made aware of conduct that is unlawful and regarded as unacceptable and of the Competition Act and have been informed that any actual or apparent collusion with other roofing companies could be regarded as a serious disciplinary matter.²⁴³ The OFT

²⁴² See, for example, paragraph 62 above and Second Witness statement of David Murray dated 23 February 2005, submitted as part of Hylton's written representations in response to the Statement of Objections.

²⁴³ Second Witness Statement of David Murray, dated 23 February 2005.

considers that in the light of all these factors it is appropriate to reduce the penalty by [...] [C] per cent.

336. Although Hylton co-operated with the OFT during the course of the investigation, this was a condition of its being granted leniency and so no extra mitigation is given for these factors.²⁴⁴

337. The total percentage added to the penalty for aggravating circumstances is [...] [C] per cent and the total percentage deducted for mitigating circumstances is [...] [C] per cent. As a result of this Step, the total adjustment to be made to the penalty having considered aggravating and mitigating circumstances is [*a change*] [C] of [...] [C] per cent. The financial penalty will therefore be £73,385 subject to Step 5.

Step 5 – adjustment to prevent the maximum penalty from being exceeded and to avoid double jeopardy

338. Under section 36(8) of the Act, the maximum financial penalty that the OFT can impose is 10 per cent of the 'section 36(8) turnover' of the undertaking. The 'section 36(8) turnover' is determined in accordance with the Penalties Order and is the amounts derived by the undertaking from the sale of products and the provision of services falling within the undertaking's ordinary activities after deduction of sales rebates, VAT and other taxes directly related to turnover.²⁴⁵ The 'section 36(8) turnover' is taken from the applicable turnover during the business year preceding the date of the decision.²⁴⁶ The applicable turnover for Hylton in the last business year (the year ending 31 May 2004) was £[...] [C]. The statutory maximum financial penalty for Hylton is 10 per cent of this figure and is therefore £[...] [C].

339. In addition, where an infringement of the Chapter I prohibition ended prior to 1 May 2004, any penalty must, if necessary, be further adjusted to ensure that it does not exceed the maximum penalty applicable prior to May 2004, i.e. 10 per cent of turnover in the UK of the undertaking in the financial year preceding the date when the infringement ended.²⁴⁷ The applicable turnover for Hylton in the business year preceding the year in which the first of its infringements ended (the year ending 31 December 1999) was £[...] [C]. The statutory maximum financial penalty for Hylton is 10 per cent of this figure and is therefore £[...] [C].

340. The financial penalty calculated at the end of Step 4 does not exceed either of these amounts. There is no double jeopardy because no penalty has been imposed by the European Commission or other relevant body in respect of the infringements.

²⁴⁴ The OFT's guidance as to the appropriate amount of a penalty, OFT 423, December 2004, at footnote 19.

²⁴⁵ Definition of 'applicable turnover' in Article 2 and paragraph 3 of the Schedule to the Penalties Order, as amended.

²⁴⁶ Article 3 of the Penalties Order.

²⁴⁷ *Ibid.*, at paragraph 2.18.

Leniency

341. Hylton was granted a 35 per cent reduction in financial penalties as part of the OFT's leniency programme. Hylton's financial penalty is therefore reduced to £47,700.

vii. Penalty for Kelsey

Step 1 – starting point

342. Kelsey was involved in one infringement: collusive tendering in connection with the Storeys, Washington contract, involving price fixing in return for the payment of compensation, which the OFT considers came to an end in summer 2000.

343. Kelsey's financial year is 1 January to 31 December. Kelsey's turnover in the relevant product and geographic markets in the business year preceding the date of this decision (2004) was £nil.²⁴⁸

344. The OFT has made an analysis of its findings regarding the seriousness of this infringement at paragraphs 263 to 270 above and fixed the starting point for all the Parties at [...] per cent of relevant turnover. The starting point for Kelsey is therefore £nil.

Step 2 – adjustment for duration

345. In accordance with paragraphs 271 to 273, the OFT does not make any adjustment for duration.

Step 3 – adjustment for other factors

346. Kelsey had no turnover in the relevant market in the relevant year and therefore its starting point, and the figure reached at the end of Step 2, is £nil. In accordance with paragraph 278 above, and in order to achieve the objectives described at paragraph 274 above, the OFT therefore considers that it is necessary to increase the penalty figure reached at the end of Step 2 above to give a figure that represents a significant sum for Kelsey. Taking into consideration the level of penalties which would have been imposed on undertakings of a similar size, and noting that increases for deterrence may be appropriate for companies for whom the penalty calculated at the end of Step 2 represented a relatively low proportion of turnover in accordance with paragraph 277, the OFT considers that an increase of £[...] is appropriate to act as an effective deterrent to Kelsey and to other undertakings that might consider engaging in collusive tendering. The financial penalty at the end of this Step is therefore £[...].

²⁴⁸ Kelsey went into administration on 17 January 2005.

Step 4 – adjustment for aggravating and mitigating factors

Aggravation

347. As Kelsey was involved in a single infringement, repeated infringements are not an aggravating factor for Kelsey.
348. The OFT is aware that there was involvement on the part of a director of Kelsey.²⁴⁹ The OFT considers this an aggravating factor and increases the penalty by [...] [C] per cent.

Mitigation

349. Kelsey co-operated fully with the OFT during the course of the investigation and responded to all requests for information in a timely fashion. In these circumstances the OFT reduces Kelsey's penalty by [...] [C] per cent for co-operation.
350. The total percentage added to the penalty for aggravating circumstances is [...] [C] per cent and the total percentage deducted for mitigating circumstances is [...] [C] per cent. As a result of this Step, the total adjustment to be made to the penalty having considered aggravating and mitigating circumstances is [...] [C] per cent. The financial penalty will therefore be £262,000 subject to Step 5.

Step 5 – adjustment to prevent the maximum penalty from being exceeded and to avoid double jeopardy

351. Under section 36(8) of the Act, the maximum financial penalty that the OFT can impose is 10 per cent of the 'section 36(8) turnover' of the undertaking. The 'section 36(8) turnover' is determined in accordance with the Penalties Order and is the amounts derived by the undertaking from the sale of products and the provision of services falling within the undertaking's ordinary activities after deduction of sales rebates, VAT and other taxes directly related to turnover.²⁵⁰ The 'section 36(8) turnover' is taken from the applicable turnover during the business year preceding the date of the decision.²⁵¹ The applicable turnover for Kelsey in the last business year for which accounts are available (the year ending 31 December 2003) was £[...] [C]. The statutory maximum financial penalty for Kelsey is 10 per cent of this figure and is therefore £[...] [C].
352. In addition, where an infringement of the Chapter I prohibition ended prior to 1 May 2004, any penalty must, if necessary, be further adjusted to ensure that it does not exceed the maximum penalty applicable prior to May 2004, i.e. 10 per cent of turnover in the UK of the undertaking in the financial year preceding the date when the infringement ended. 252

²⁴⁹ See letter from Kelsey to Briggs dated 14 September 2000, as set out at paragraph 105.

²⁵⁰ Definition of 'applicable turnover' in Article 2 and paragraph 3 of the Schedule to the Penalties Order, as amended.

²⁵¹ Article 3 of the Penalties Order.

²⁵² *Ibid.*, at paragraph 2.18.

The applicable turnover for Kelsey in the business year preceding the year in which its infringement ended (the year ending 31 December 1999) was £34,897,000. The statutory maximum financial penalty for Kelsey is 10 per cent of this figure and is therefore £3,489,700.

353. The financial penalty calculated at the end of Step 4 does not exceed either of these amounts. There is no double jeopardy because no penalty has been imposed by the European Commission or other relevant body in respect of the infringements.

viii. Penalty for Roofclad

Step 1 – starting point

354. Roofclad was involved in one infringement: collusive tendering in connection with the George Stephenson School and Willington Quay School contract, involving price fixing and market sharing in the form of allocating contracts between the participants in return for the payment of compensation, which the OFT considers came to an end in August 2000.
355. Roofclad's financial year was 1 January to 31 December, and changed to a year ending 31 March in 2003/4. Roofclad provided information on turnover in the relevant product and geographic markets for the year ended 31 December 2004, which was [...] [C].
356. The OFT has made an analysis of its findings regarding the seriousness of this infringement at paragraphs 263 to 270 above and fixed the starting point for all the Parties at [...] [C] per cent of relevant turnover. The starting point for Roofclad is therefore £[...] [C].

Step 2 – adjustment for duration

357. In accordance with paragraphs 271 to 273 above, the OFT does not make any adjustment for duration.

Step 3 – adjustment for other factors

358. As noted at paragraphs 274 and 276 above, the OFT considers that it is necessary to deter undertakings in this area from engaging in collusive tendering. The OFT's investigation in this case has already raised the profile of competition issues in the industry and the OFT intends this Decision to raise awareness of these issues within the industry further. In accordance with paragraph 278 above, and in order to achieve the objectives described at paragraph 274 above, the OFT therefore considers that it is necessary to increase the penalty figure reached at the end of Step 2 above to give a figure that represents a significant sum for Roofclad. Taking into consideration the level of penalties which would have been imposed on undertakings of a similar size, and noting that increases for deterrence may be appropriate for companies for whom the penalty calculated at the end of Step 2 represented a relatively low proportion of turnover in accordance with paragraph 277, the OFT considers that an increase of £[...] [C] is appropriate to act as an effective deterrent to Roofclad and to other undertakings that might consider

engaging in collusive tendering. The financial penalty at the end of this Step is therefore £[...]C].

Step 4 – adjustment for aggravating and mitigating factors

Aggravation

359. Although Roofclad has made representation that there are no aggravating factors to be taken into account when calculating its penalty, the OFT is aware that there was involvement on the part of the sole director of Roofclad.²⁵³ The OFT considers this an aggravating factor and increases the penalty by [...]C] per cent.
360. As Roofclad was involved in a single infringement, repeated infringements are not an aggravating factor for Roofclad.

Mitigation

361. Roofclad has made representations that its conduct in relation to the George Stephenson and Willington Quay Schools contract was a "one off" and that Roofclad had never undertaken such activity prior to that occasion nor have they undertaken such conduct subsequently. The OFT is aware of the remedial action taken by Roofclad since its discovery of the infringement. Roofclad has taken steps to ensure that no further infringements will be committed in future, by consultations with staff.²⁵⁴ The OFT considers that in the light of all these factors it is appropriate to reduce the penalty by [...]C] per cent.
362. Although Roofclad co-operated fully with the OFT during the course of the investigation, this was a condition of its being granted leniency and so no extra mitigation is given for these factors.²⁵⁵
363. The total percentage added to the penalty for aggravating circumstances is [...]C] per cent and the total percentage deducted for mitigating circumstances is [...]C] per cent. As a result of this Step, the total adjustment to be made to the penalty having considered aggravating and mitigating circumstances is [...]C] per cent. The financial penalty will therefore be £25,107 subject to Step 5.

Step 5 – adjustment to prevent the maximum penalty from being exceeded and to avoid double jeopardy

364. Under section 36(8) of the Act, the maximum financial penalty that the OFT can impose is 10 per cent of the 'section 36(8) turnover' of the undertaking. The 'section 36(8) turnover' is determined in accordance with the Penalties Order and is the amounts derived by the undertaking from the sale of products and the provision of services falling within the

²⁵³ Witness statement of Stewart Openshaw, dated 11 February 2003.

²⁵⁴ Roofclad's written response to the Statement of Objections, dated 2 December 2004.

²⁵⁵ The OFT's guidance as to the appropriate amount of a penalty, OFT 423, December 2004, at footnote 19.

undertaking's ordinary activities after deduction of sales rebates, VAT and other taxes directly related to turnover.²⁵⁶ The 'section 36(8) turnover' is taken from the applicable turnover during the business year preceding the date of the decision.²⁵⁷ The applicable turnover for Roofclad in the last business year (12 months apportioned pro rata from the 15 month period ending 31 March 2004) was £[...] [C]. The statutory maximum financial penalty for Roofclad is 10 per cent of this figure and is therefore £[...] [C].

365. In addition, where an infringement of the Chapter I prohibition ended prior to 1 May 2004, any penalty must, if necessary, be further adjusted to ensure that it does not exceed the maximum penalty applicable prior to May 2004, i.e. 10 per cent of turnover in the UK of the undertaking in the financial year preceding the date when the infringement ended.²⁵⁸

The applicable turnover for Roofclad in the business year preceding the year in which its infringement ended (the year ending 31 December 1999) was £[...] [C]. The statutory maximum financial penalty for Roofclad is 10 per cent of this figure and is therefore £[...] [C].

366. The financial penalty calculated at the end of Step 4 does not exceed either of these amounts. There is no double jeopardy because no penalty has been imposed by the European Commission or other relevant body in respect of the infringements.

Leniency

367. Roofclad was granted a 50 per cent reduction in financial penalties as part of the OFT's leniency programme. Roofclad's financial penalty is therefore reduced to £12,554.

ix. Penalty for Single Ply

Step 1 – starting point

368. Single Ply was involved in one infringement: collusive tendering in connection with the Storeys, Washington contract, involving price fixing in return for the payment of compensation, which the OFT considers came to an end in summer 2000.

369. Single Ply's financial year is 1 January to 31 December. Single Ply's turnover in the relevant product and geographic markets in the business year preceding the date of this Decision (2004) was £nil.

370. The OFT has made an analysis of its findings regarding the seriousness of this infringement at paragraphs 263 to 270 above and fixed the starting point for all the Parties at [...] [C] per cent of relevant turnover. The starting point for Single Ply is therefore £nil.

²⁵⁶ Definition of 'applicable turnover' in Article 2 and paragraph 3 of the Schedule to the Penalties Order, as amended.

²⁵⁷ Article 3 of the Penalties Order.

²⁵⁸ *Ibid.*, at paragraph 2.18.

Step 2 – adjustment for duration

371. In accordance with paragraphs 271 to 273 above, the OFT does not make any adjustment for duration.

Step 3 – adjustment for other factors

372. Single Ply had no turnover in the relevant market in the relevant year and therefore its starting point, and the figure reached at the end of Step 2, is £nil. In accordance with paragraph 278 above, and in order to achieve the objectives described at paragraph 274 above, the OFT therefore considers that it is necessary to increase the penalty figure reached at the end of Step 2 above to give a figure that represents a significant sum for Single Ply. Taking into consideration the level of penalties which would have been imposed on undertakings of a similar size²⁵⁹, and noting that increases for deterrence may be appropriate for companies for whom the penalty calculated at the end of Step 2 represented a relatively low proportion of turnover in accordance with paragraph 277, the OFT considers that an increase of £[...] [C] is appropriate to act as an effective deterrent to Single Ply and to other undertakings that might consider engaging in collusive tendering. The financial penalty at the end of this Step is therefore £[...] [C].

Step 4 – adjustment for aggravating and mitigating factors

Aggravation

373. As Single Ply was involved in a single infringement, repeated infringements are not an aggravating factor for Single Ply.

Mitigation

374. Single Ply co-operated fully with the OFT during the course of the investigation and responded to all requests for information in a timely fashion. In these circumstances the OFT reduces Single Ply's penalty by [...] [C] per cent for co-operation.

375. The total percentage added to the penalty for aggravating circumstances is [...] [C] per cent and the total percentage deducted for mitigating circumstances is [...] [C] per cent. As a result of this Step, the total adjustment to be made to the penalty having considered aggravating and mitigating circumstances is [a change] [C] of [...] [C] per cent. The financial penalty will therefore be £27,000 subject to Step 5.

²⁵⁹ Single Ply had £nil turnover in the year preceding the Decision. In assessing its size relative to other undertakings, the OFT has therefore had regard to Single Ply's 2001 turnover of £3,637,683 (Source: FAME Report for Single Ply), which was the latest publicly available turnover information for Single Ply prior to it going into administration.

Step 5 – adjustment to prevent the maximum penalty from being exceeded and to avoid double jeopardy

376. Under section 36(8) of the Act, the maximum financial penalty that the OFT can impose is 10 per cent of the 'section 36(8) turnover' of the undertaking. The 'section 36(8) turnover' is determined in accordance with the Penalties Order and is the amounts derived by the undertaking from the sale of products and the provision of services falling within the undertaking's ordinary activities after deduction of sales rebates, VAT and other taxes directly related to turnover.²⁶⁰ The 'section 36(8) turnover' is taken from the applicable turnover during the business year preceding the date of the decision.²⁶¹ The applicable turnover for Single Ply in the last business year (the year ending 31 December 2004) was £nil. The statutory maximum financial penalty for Single Ply is 10 per cent of this figure and is therefore £nil.
377. In addition, where an infringement of the Chapter I prohibition ended prior to 1 May 2004, any penalty must, if necessary, be further adjusted to ensure that it does not exceed the maximum penalty applicable prior to May 2004, i.e. 10 per cent of turnover in the UK of the undertaking in the financial year preceding the date when the infringement ended. Given that the statutory maximum for Single Play is £nil based on the section 36(8) maximum, there is no need to consider this second maximum in addition.
378. The financial penalty calculated at the end of Step 4 exceeds the statutory maximum. The financial penalty for Single Ply is therefore reduced to £nil. There is no double jeopardy because no penalty has been imposed by the European Commission or other relevant body in respect of the infringements.

x. Conclusion on penalties

379. In conclusion, the OFT has, pursuant to section 36(1) of the Act, imposed financial penalties on the Parties as summarised in the table below:

²⁶⁰ Definition of 'applicable turnover' in Article 2 and paragraph 3 of the Schedule to the Penalties Order, as amended.

²⁶¹ Article 3 of the Penalties Order.

Party	Penalty calculated at the end of Step 5	Penalty to be paid
Briggs	£88,956	£nil ²⁶²
Dufell	£74,624	£74,624
Hodgson & Allon	£74,151	£74,151
Hylton	£73,385	£47,700 ²⁶³
Kelsey	£262,000	£262,000
Roofclad	£25,107	£12,554 ²⁶⁴
Single Ply	£nil ²⁶⁵	£nil
Total	£598,223	£471,029

xi. Payment of penalty

380. All Parties must pay their respective penalties by close of banking business on 31 May 2005. If any of the Parties fails to pay the penalty within the deadline specified above, and has not brought an appeal against the imposition or amount of the penalty within the time allowed or such an appeal has been made and determined, the OFT can commence proceedings to recover the required amount as a civil debt.

²⁶² As noted at paragraph 301 above, Briggs' financial penalty was reduced to zero because it was granted total immunity.

²⁶³ As noted at paragraph 341 above, Hylton's financial penalty was reduced by 35 per cent because it was granted leniency.

²⁶⁴ As noted at paragraph 367 above, Roofclad's financial penalty was reduced by 50 per cent because it was granted leniency.

²⁶⁵ As noted at paragraph 376 above, Single Ply would have received a financial penalty of £19,800, but the maximum that could be imposed was £nil due to the company having no turnover in 2004, having previously become subject to an administration order.