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IN THE COMPETITION
APPEAL TRIBUNAL

Case Nos: 1117/1/1/09
1123/1/1/09
1134/1/1/09
1135/1/1/09
1138/1/1/09
1139/1/1/09

Victoria House
Bloomsbury Place
London WC1A 2EB

24 March 2011

Before:

VIVIEN ROSE
(Chairman)
SHEILA HEWITT
GRAHAM MATHER

Sitting as a Tribunal in England and Wales

BETWEEN:

(1) GF TOMLINSON GROUP LIMITED
(2) GF TOMLINSON BUILDING LIMITED

Appellants

-v-

OFFICE OF FAIR TRADING

Respondent

(1) SOL CONSTRUCTION LIMITED
(2) BARKBURY CONSTRUCTION LIMITED

Appellants

-v-

OFFICE OF FAIR TRADING

Respondent

(1) G&J SEDDON LIMITED
(2) SEDDON GROUP LIMITED

Appellants

-v-

OFFICE OF FAIR TRADING

Respondent

**(1) INTERCLASS HOLDINGS LIMITED
(2) INTERCLASS PLC**

Appellants

-v-

OFFICE OF FAIR TRADING

Respondent

APOLLO PROPERTY SERVICES GROUP LTD

Appellant

-v-

OFFICE OF FAIR TRADING

Respondent

GALLIFORD TRY PLC

Appellant

-v-

OFFICE OF FAIR TRADING

Respondent

Hearing dates: 2, 5 and 6 July 2010

JUDGMENT

APPEARANCES

Mr. John Swift Q.C. and Ms Kassie Smith (instructed by Pinsent Masons LLP) appeared on behalf of the Galliford Try Plc.

Mr. Thomas de la Mare (instructed by Pinsent Masons LLP) appeared for Apollo Property Services Group Ltd.

Mr. Aidan Robertson Q.C. (instructed by Watson Burton) appeared for G&J Seddon Limited and Seddon Group Limited and for Interclass Holdings Limited and Interclass plc.

Mr. Aidan Robertson Q.C. and Ms Sarah Abram (instructed by JH Powell & Co.) appeared for G F Tomlinson Building Limited and G F Tomlinson Group Limited.

Mr. Rhodri Thompson Q.C. (instructed by Browne Jacobson LLP) appeared for Sol Construction Limited and Barkbury Ltd.

Mr. David Unterhalter S.C. and Ms Sarah Ford (instructed by the General Counsel, Office of Fair Trading) appeared on behalf of the Respondent in Case Nos 1117/1/1/09, 1123/1/1/09, 1138/1/1/09 and 1139/1/1/09.

Mr. David Unterhalter S.C. and Mr. Philip Woolfe (instructed by the General Counsel, Office of Fair Trading) appeared on behalf of the Respondent in Case Nos 1134/1/1/09 and 1135/1/1/09.

I. BACKGROUND

1. This is the Tribunal's judgment in six appeals brought by the Appellants challenging the decision adopted by the Respondent ("the OFT") on 21 September 2009 called "Bid rigging in the construction industry in England" ("the Decision"). In all there were 25 admissible appeals to the Tribunal from the Decision. The six appeals covered in this judgment were heard by the same tribunal panel over the course of three days and all of them relate solely to the penalties imposed. We refer to the six Appellants whose appeals are disposed of in this judgment as "the Present Appellants". For the purposes of this judgment, references to the Decision are in the following form: "II.10-16/36", where the first reference is to the relevant paragraph numbers and the reference after the stroke is to the page number(s).
2. The Present Appellants are all construction firms engaged in the construction industry in England. Their business involves responding to invitations from potential clients to submit tenders for a particular building project. In April 2004 the OFT began investigating possible collusive tendering in this industry. The investigation ran for a number of years, over the course of which the OFT conducted inspections at the premises of several construction companies. The evidence gathered by the OFT disclosed bid rigging by construction companies in relation to some 4,000 tenders (with a value of about £3 billion) and involving over 1,000 companies (Decision, II.1460/253). This was the largest investigation ever undertaken by the OFT under the Competition Act 1998 ("the 1998 Act"). In April 2008 the OFT issued a Statement of Objections to 112 undertakings. In the Decision the OFT imposed fines totalling £129.2 million on 103 undertakings which had engaged in unlawful cover pricing and other bid rigging activities.
3. The Decision primarily concerns the practice of cover pricing. This is described in paragraph III.74/357 of the Decision as occurring:

“when a supplier/bidder (Bidder A) submits a price for a contract that is not intended to win the contract; rather it is a price that has been decided upon in conjunction with another supplier/bidder (Bidder B) that wishes to win the contract.” (See also Decision, IV.7/396.)

4. The mischief in such conduct, according to the OFT, is that it gives the tenderee the false impression that a competitive bidding process is taking place. Moreover, the uncompetitive bid submitted by Bidder A is set using commercially sensitive price information obtained from Bidder B, namely what price Bidder A would need to charge in order to be sure of putting in a tender above that of Bidder B. Another aspect of bid rigging described in the Decision is where a party makes a payment to another bidder to compensate that other bidder for the costs incurred in submitting a tender when it has no prospect of winning the contract. This conduct was considered by the OFT to be more serious than “simple” cover pricing, therefore meriting a higher starting point for the calculation of the appropriate penalty.
5. During its investigation, the OFT was told by many industry participants that the practice of cover pricing, also referred to as “taking help” or “giving assistance”, was long-standing and widespread. Many of the companies investigated said that no one in the industry regarded cover pricing as improper. Some companies engaged in cover pricing in order to avoid the time and expense incurred in calculating genuine figures for every tender. Another commonly expressed reason was described at paragraph IV.30/401 of the Decision:

“... the practice of cover pricing ... enabled them to remain on the tender lists of those involved in arranging contracts for the provision of building services. In response to the [Statement of Objections], many other Parties also cited this motive.”

6. In other words, companies were concerned that if they did not respond to a prospective client’s invitation to tender, they would be regarded as being either unable to carry out the work or uninterested in doing so. Such a perception could lead to their removal from future invitations to tender for work for that client. According to the OFT, the majority of employees interviewed in the course of the investigation could not recall any particular instance of a client removing them from a tender list as a result of their not tendering for a particular contract. The OFT has accepted however, that in certain cases such exclusion had taken place and has also accepted that the fear expressed was genuine (Decision, IV.44/405).

7. It is not disputed by any of the Present Appellants that the practice of cover pricing constitutes an infringement of the prohibition in section 2(1) of the 1998 Act (“the Chapter I prohibition”). That section provides:

“2 Agreements etc preventing, restricting or distorting competition

(1) Subject to section 3, agreements between undertakings, decisions by associations of undertakings or concerted practices which--

(a) may affect trade within the United Kingdom, and

(b) have as their object or effect the prevention, restriction or distortion of competition within the United Kingdom,

are prohibited unless they are exempt in accordance with the provisions of this Part.”

8. Moreover, the Present Appellants accept that the conduct they engaged in was an infringement of that prohibition because it had as its *object* the prevention, restriction or distortion of competition within the United Kingdom.

9. Section 2(1) of the 1998 Act mirrors what is now Article 101(1) of the Treaty on the Functioning of the European Union (“TFEU”) (formerly Article 81(1) of the EC Treaty), though the domestic provision is limited to effects on trade within the United Kingdom. Section 60 of the 1998 Act aims to ensure that, so far as possible, the provisions of the Chapter I prohibition are interpreted and applied in line with the European Courts’ jurisprudence on the application of Article 101(1):

“60 Principles to be applied in determining questions

(1) The purpose of this section is to ensure that so far as is possible (having regard to any relevant differences between the provisions concerned), questions arising under this Part in relation to competition within the United Kingdom are dealt with in a manner which is consistent with the treatment of corresponding questions arising in Community law in relation to competition within the Community.

(2) At any time when the court determines a question arising under this Part, it must act (so far as is compatible with the provisions of this Part and whether or not it would otherwise be required to do so) with a view to securing that there is no inconsistency between—

(a) the principles applied, and decision reached, by the court in determining that question; and

(b) the principles laid down by the Treaty and the European Court, and any relevant decision of that Court, as applicable at that time in determining any corresponding question arising in Community law.

(3) The court must, in addition, have regard to any relevant decision or statement of the Commission.”

10. Section 60 thus directs the Tribunal to apply the Chapter I prohibition consistently with the case law on Article 101 TFEU, but makes clear that this is subject to the requirement to have regard “to any relevant differences” between the provisions concerned.

II. THE PENALTIES IMPOSED BY THE OFT

11. The OFT has a power to impose fines conferred by section 36 of the 1998 Act. Section 36 (as amended) provides, so far as relevant to the present appeals:

“36 Penalties

(1) On making a decision that an agreement has infringed the Chapter I prohibition ... the OFT may require an undertaking which is party to the agreement to pay the OFT a penalty in respect of the infringement.

...

(3) The OFT may impose a penalty on an undertaking ... only if the OFT is satisfied that the infringement has been committed intentionally or negligently by the undertaking.

...

(8) No penalty fixed by the OFT under this section may exceed 10% of the turnover of the undertaking (determined in accordance with such provisions as may be specified in an order made by the Secretary of State).”

(a) The Turnover Order

12. The Secretary of State made an order for the purposes of section 36(8) of the 1998 Act in the Competition Act 1998 (Determination of Turnover for Penalties) Order 2000 (SI 309/2000) (“the Original Turnover Order”). It was amended by the Competition Act 1998 (Determination of Turnover for Penalties) Order 2004 (SI 1259/2004) which inserted a new Article 3 into the Original Turnover Order and came into force on 1 May 2004. We refer to the Order as amended in 2004 as “the Amended Turnover Order”.
13. Article 3 of the Original Turnover Order provided that the turnover to which the 10 per cent maximum set in section 36(8) applied was “the applicable turnover for the

business year preceding the date when the infringement ended”. “Applicable turnover” was defined in Article 2 of the Order as “the turnover of an undertaking for a business year determined in accordance with the Schedule to this Order”. The Schedule to the Order in turn defined the applicable turnover as follows:

“3. The applicable turnover of an undertaking ... shall be limited to the amounts derived by the undertaking from the sale of products and the provision of services falling within the undertaking’s ordinary activities to undertakings or consumers in the United Kingdom after deduction of sales rebates, value added tax and other taxes directly related to turnover.

4. Where an undertaking consists of two or more undertakings that each prepare accounts then the applicable turnover shall be calculated by adding together the respective applicable turnover of each, save that no account shall be taken of any turnover resulting from the sale of products or the provision of services between them.”

14. The amendment made in 2004 substituted a new Article 3 which provided:

“The turnover of an undertaking for the purposes of section 36(8) is the applicable turnover for the business year preceding the date on which the decision of the OFT is taken or, if figures are not available for that business year, the one immediately preceding it.”

15. The Amended Turnover Order also amended the Schedule to the Original Turnover Order by, among other things, providing that the words “to undertakings or consumers in the United Kingdom” in paragraph 3 should cease to have effect.

16. Thus two important changes were made in 2004 to the way that the OFT calculates the turnover of an undertaking when ensuring that the penalty imposed does not exceed the 10 per cent maximum set by section 36(8) of the 1998 Act:

- The turnover to which the 10 per cent maximum applied was expanded to encompass the world wide turnover of the undertaking rather than just its turnover in the United Kingdom; and
- The 10 per cent cap was applied to turnover in the business year preceding the date on which the OFT’s decision is taken rather than the business year preceding the date when the infringement ended.

Because of the importance of the second of these changes – the change in the relevant business year – to certain grounds of appeal by the Present Appellants we shall refer in this judgment to the “business year preceding the date on which the OFT’s decision is taken” as the “Decision Year” and to the “business year preceding the date when the infringement ended” as the “Infringement Year”.

(b) The OFT’s Guidance as to the appropriate amount of a penalty and the application of the five steps in the Decision

17. Section 38(1) of the 1998 Act requires the OFT to publish guidance as to the appropriate amount of the penalty. That guidance must be approved by the Secretary of State and, pursuant to section 38(8), the OFT must have regard to that guidance when setting the amount of a penalty. In *Argos Ltd and Littlewoods Ltd and JJB Sports plc v Office of Fair Trading* [2006] EWCA Civ 1318, at [161] the Court of Appeal stated that the language of section 38(8) does not bind the OFT to follow the published guidance in all respects in every case. However, in accordance with general public law principles, the OFT must give reasons for any significant departure from its guidance. The guidance used by the OFT for the penalty calculations set out in the Decision is that which was published in December 2004 (OFT 423) (“the Guidance”).

18. The Guidance sets out a five-step process for calculating the level of the penalty. Step 1 is the calculation of the starting point set by applying a percentage reflecting the nature and seriousness of the infringement to the “relevant turnover” of the undertaking concerned (paragraph 2.3). The “relevant turnover” is the turnover of the undertaking in the relevant product market and relevant geographical market affected by the infringement in the last financial year (paragraph 2.7). The Guidance states that the starting point will not exceed 10 per cent of the relevant turnover of the undertaking (paragraph 2.8).

19. For the reasons set out in paragraphs VI.102/1649 to VI.180/1668 of the Decision, the OFT decided that in this case the percentage starting point should be 5 per cent of an undertaking’s relevant turnover for infringements involving only cover pricing and 7 per cent for those involving compensation payments (Decision, VI.168 to VI.169/1666). The OFT applied the starting percentage to the relevant

turnover of the undertaking in the Decision Year rather than the Infringement Year. Whether it was right to do so or whether it should have used the Infringement Year or some other year closer to when the infringement took place was an issue raised by the Present Appellants and many of the other appellants challenging the Decision.

20. Step 2 provides for an adjustment for the duration of the infringement, where the infringement lasts for more or less than one year. In this case, the OFT made no adjustment for duration of the infringement so that the penalty after Step 2 was in all cases the same as after Step 1.
21. Step 3 allows for adjustment for other factors and is described in paragraphs 2.11 to 2.13 of the Guidance as follows:

“2.11 The penalty figure reached after the calculations in steps 1 and 2 may be adjusted as appropriate to achieve the policy objectives outlined in paragraph 1.4 above, in particular, of imposing penalties on infringing undertakings in order to deter undertakings from engaging in anticompetitive practices. The deterrent is not aimed solely at the undertakings which are subject to the decision, but also at other undertakings which might be considering activities which are contrary to Article [101], Article [102], the Chapter I and/or Chapter II prohibition. Considerations at this stage may include, for example, the OFT's objective estimate of any economic or financial benefit made or likely to be made by the infringing undertaking from the infringement and the special characteristics, including the size and financial position of the undertaking in question. Where relevant, the OFT's estimate would account for any gains which might accrue to the undertaking in other product or geographic markets as well as the 'relevant' market under consideration.

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

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

22. The policy objectives in paragraph 1.4 of the Guidance are to impose penalties on infringing undertakings which reflect the seriousness of the infringement and to ensure that the threat of penalties will deter undertakings from engaging in anti-competitive practices.

23. There were a number of adjustments made by the OFT at Step 3 in relation to the Present Appellants and some of these are subject to challenge in the appeals. The contentious adjustments for our purposes were the imposition of a minimum deterrence threshold; the use of a proxy where an undertaking had no relevant turnover; the “4 per cent cap” applied to the fines and the criteria for granting a reduction in fine in cases of financial hardship.

(i) Minimum Deterrence Threshold

24. In some cases the penalty figure reached after the calculations in Steps 1 and 2 represented a very small proportion of the infringing undertaking’s total turnover in the Decision Year. This arose where that party’s relevant turnover (to which the starting point was applied) was a small proportion of its total turnover because the undertaking had significant activities in other markets. The OFT was concerned that this penalty figure was unlikely to represent a significant sum for the undertaking concerned. In order to ensure deterrence in those cases, the OFT stated that it would increase the penalty at Step 3 (Decision, VI.209/1675).

25. The OFT decided that it would increase the penalty for one of the undertaking’s infringements to a level equivalent to a fixed proportion of the undertaking’s total turnover in the Decision Year. For those infringing undertakings who did not have any infringements involving compensation payments, the fixed proportion was set at 0.75 per cent of the undertaking’s total turnover in the Decision Year. That would have been the starting point for the penalty if the undertaking’s relevant turnover had constituted 15 per cent of its total turnover (0.75 being 5 per cent of 15). The figure of 15 per cent had been used in previous OFT decisions as constituting a material proportion of the undertaking’s overall business. For those infringing undertakings who had an infringement involving a compensation payment, the fixed proportion was set at 1.05 per cent of total turnover in the Decision Year¹ (1.05 being 7 per cent of 15). The sum arrived at by applying the appropriate fixed proportion to the undertaking’s total turnover in the Decision Year was regarded as the minimum figure necessary in the OFT’s view to deter the

¹ The MDT was specific to each infringing undertaking so that it applied at 1.05 per cent, irrespective of whether the infringement to which the MDT applied itself involved the making of a compensation payment.

undertaking concerned and other undertakings from engaging in similar unlawful behaviour (Decision, VI.272/1688). It was referred to as the “minimum deterrence threshold” or “MDT”.

26. When deciding the level of adjustment at Step 3 the OFT stated in the Decision that it took into account the fact that there was general widespread ignorance about the illegality of cover pricing. It decided to maintain the MDT at the same level as had been used in earlier OFT decisions relating to bid rigging in the roofing industry (Decision, VI.249/1683).
27. The MDT was only applied once to each offending undertaking. The OFT determined which of the infringements committed by that undertaking gave rise to the highest level of penalty after Steps 1 and 2 and applied the MDT to that penalty at Step 3 of the Guidance.² Thus, undertakings who received two or more penalties did not have the MDT applied at Step 3 for the second and/or third penalties (Decision, VI.215/1676). Where the highest penalty for the undertaking’s infringements at the end of Step 2 already exceeded the MDT it was not increased at Step 3 because, in the OFT’s view, the penalty arrived at was already a sufficient deterrent (Decision, VI.214/1676).
28. It may assist to take two examples of how this worked for undertakings which were fined in the Decision but are not among the 25 appellants. Undertaking A was found to have committed three infringements (none of which involved compensation payments). After Step 2 the fines were as follows:

	Infringement X	Infringement Y	Infringement Z
Penalty after Step 2	£338,621	£37,602	£196,382
Penalty as % of total turnover	1.95%	0.08%	1.13%

29. Because the highest fine at Step 2, that for Infringement X, was already more than 0.75 per cent of Undertaking A’s total turnover there was no need for an uplift for

² Where two or three penalties were joint highest at the end of Step 2, due to identical relevant turnover figures at Step 1, the OFT applied the MDT to the latest of the two or three infringements.

deterrence at Step 3. The OFT then simply added together the three penalties, after making various adjustments for other factors, to arrive at the total gross (pre-leniency) fine.

30. In contrast Undertaking B's position after Step 2 was as follows:

	Infringement X	Infringement Y	Infringement Z
Penalty after Step 2	£313,964	£33,894	£5,615
Penalty as % of total turnover	0.36%	0.04%	0.01%

31. Because the highest penalty was only 0.36 per cent of Undertaking B's total worldwide turnover in the Decision Year, that penalty was increased to £652,492, that sum being 0.75 per cent of that turnover. The other penalties for the other two infringements at Step 2 were then added, after adjustments for other factors, to that higher figure to arrive at the overall gross penalty.

(ii) Relevant turnover proxy figure

32. Paragraph 2.13 of the Guidance provides that, in exceptional circumstances, the OFT may adjust the penalty at Step 3 where the relevant turnover of an undertaking is zero and the penalty figure reached at the end of Step 2 is therefore zero. The relevant turnover in the Decision Year may be zero where the undertaking has exited the relevant product or geographic market since the infringements took place.
33. The OFT did not consider it appropriate that a company should avoid a penalty for an infringement by virtue of having no turnover in the relevant market at the date of the Decision. The OFT therefore used a proxy figure of 0.14 per cent of the undertaking's total turnover in the Decision year for any infringements in respect of which the penalty was zero at the end of Step 2 of the Guidance (Decision, VI.270/1688). The proxy figure was based on an average percentage of total turnover represented by the penalty reached at the end of Step 2 for all infringements (regardless of the market in which they occurred).

34. Thus, for example, Undertaking C (which was an addressee of the Decision, but is not one of the 25 appellants) was in the following position after Step 2:

	Infringement X	Infringement Y	Infringement Z
Penalty after Step 2	£0	£776,776	£646,028
Penalty as % of total turnover	0	1.63%	1.35%

35. The penalty for Infringement X was adjusted to £66,844 that being 0.14 per cent of Undertaking C's total turnover in the Decision Year. Since the highest penalty (for Infringement Y) was more than 0.75 per cent of total turnover, there was no additional uplift for deterrence.

(iii) Reduction where two or more of the infringements were committed in the same relevant market

36. The OFT was concerned to ensure that aggregate penalties imposed on all the undertakings fined in the Decision were within a reasonable range when expressed as a percentage of total turnover. Among the 103 undertakings fined in the Decision there were some outliers whose penalty represented a much higher percentage of total turnover than for the generality of infringing undertakings. Because of the method used by the OFT in this Decision, this was likely to occur where an undertaking was found to have participated in more than one infringement in the same relevant market and a large proportion of its total turnover in the relevant business year was achieved in that market. For each undertaking the OFT looked at the individual penalty for each of the infringements expressed as a percentage of total turnover in the Decision Year and added them together³. If the figure arrived at was higher than 4.5, a downward adjustment was made at Step 3 to each of the infringements in that market in order to bring the overall penalty for that undertaking to a level which the OFT considered was sufficient to ensure

³ This sum is not necessarily the same as simply taking 4.5 per cent of global turnover because the global turnover used for the different infringements might not be the same, in particular where the company directly involved in the infringing conduct has been acquired by another group since the infringement took place.

deterrence but which was within the range of penalties imposed on the other undertakings (Decision, VI.273/1688).

37. The position after Step 2 for Undertaking D, for example, was as follows:

	Infringement X	Infringement Y	Infringement Z
Penalty after Step 2	£109,404	£850,140	£850,140
Penalty as % of total turnover	0.4%	3.08%	3.08%

38. Because the aggregate of the percentage fines (0.4 plus 3.08 plus 3.08) comes to more than 4.5, an adjustment was made by reducing the fines for Infringements Y and Z (which occurred in the same relevant market) by 45 per cent. We discuss in more detail how this adjustment was arrived at below: see paragraphs 265 onwards.

(iv) Financial hardship

39. The OFT did not concede that it is required as a matter of law to ensure that a penalty for an infringement of the 1998 Act does not push a company into insolvency. But it stated that the financial position of the undertakings could be relevant when determining whether the sum reached at the end of Step 2 is an appropriate amount for achieving deterrence. Further, as regards the appeals against the Decision, the OFT accepted that since it had, in this particular investigation, given substantial reductions in fines to some companies because of financial hardship then it had to choose reasonable criteria and apply them consistently to all addressees. In this regard we note that the OFT decided that all the addressees of the Decision who were liable to pay a fine could choose to pay the penalty by instalments over a three year period, subject to payment of interest and other conditions (Decision, VI.286/1692).
40. We describe the criteria used by the OFT when assessing claims of financial hardship below in relation to the relevant ground of appeal in the *Interclass* and *Tomlinson* appeals (see respectively paragraphs 222 to 237 and 261 to 262).

41. Step 4 of the penalty calculation dealt with further aggravating and mitigating factors. Paragraphs 2.15 and 2.16 of the Guidance contain a non-exhaustive list of aggravating and mitigating factors. None of the Present Appellants challenges the factors applied in its case.
42. Step 5 dealt with ensuring that the statutory maximum of 10 per cent of the undertaking's worldwide turnover is not exceeded. The OFT also checked that where the infringement occurred before the Amended Turnover Order came into force (that is before 1 May 2004) the penalty did not exceed the maximum allowed under the Original Turnover Order (Decision, VI.370/1711). The application of the cap at Step 5 does not give rise to any issue in the Present Appeals.

(c) The Leniency programme and the OFT's Fast Track Offer

43. Part 3 of the Guidance describes the OFT's leniency programme whereby undertakings can cooperate with the OFT, in particular by providing evidence of infringement, in return for complete or partial immunity from penalty. The degree of immunity granted will depend on the usefulness of the information provided and the fulfilment of the other criteria set out in the Guidance.
44. As a result of inspections carried out by the OFT at the premises of some of the major building contractors, the OFT received a number of applications for leniency. In total, by the end of 2006 the OFT had received 37 such applications. At that stage, the OFT took the view that any further applications would make the investigation unmanageable and it therefore suspended the leniency programme for this investigation. This decision was announced in two press releases on 22 March 2007.
45. The OFT still wished, however, to provide an incentive to companies to admit the unlawful activities in which the OFT suspected they had been involved. In March 2007 the OFT wrote to 85 companies that had not applied for leniency, making what is referred to in the Decision as the "Fast Track Offer". The OFT set out for each company a list of a minimum of five and a maximum of twenty tenders in respect of which they were suspected of engaging in bid rigging activities. The company was told that it would receive a 25 per cent reduction in any penalty

ultimately imposed if it admitted participation in the suspect tender. Of the 85 recipients of the Fast Track Offer, 45 admitted engaging in bid rigging activities in respect of some or all of the suspect tenders. In each case the Fast Track Offer deduction was made by applying the percentage reduction to the penalty as it stood after all five steps of the Guidance had been taken.

III. THE PRESENT APPELLANTS

46. The Decision describes 199 infringements found by the OFT to have been proved to the requisite legal standard. The Decision records that the investigation revealed many more suspected infringements than those for which findings were ultimately made. Some undertakings were suspected of having given or received cover prices on hundreds of occasions. To keep the investigation within manageable bounds, the OFT focused on establishing the existence of no more than three infringements for each undertaking. We now describe the Appellants, summarising the infringements they committed. A more detailed description of the infringements is set out in the Annex to this judgment. A more detailed description of how the Appellant's fine was calculated by the OFT is set out in the paragraphs dealing with the individual appeals in Section X of this judgment. We describe the Present Appellants in the order in which the hearings took place before us. We have broadly used the corporate names used by the OFT in the Decision although the companies concerned may have changed names one or more times between the date of the infringements and the date of this judgment.

The Galliford Try Appeal

47. Galliford Try plc is the single appellant in Case 1139/1/1/09. The Decision was also addressed to Galliford Try Construction Ltd and to Try Accord Ltd. At the time of the issue of the Statement of Objections, Try Accord Ltd's main business was providing building infrastructure and maintenance services in Southern England. It was wholly owned by Galliford Try Construction Ltd which operated from regional centres in the north, central and southern England. At the time of the Statement of Objections, Galliford Try Construction Ltd operated via divisions undertaking work in building, infrastructure, house building, affordable housing

and regeneration projects. Galliford Try Construction Ltd was in turn wholly owned by Galliford Try plc, a public company with a large number of subsidiaries. Galliford Try plc's worldwide consolidated turnover for the financial year ending 30 June 2009 was £1,462 million.

48. Galliford Try plc was held jointly and severally liable for the infringements of Galliford Try Construction Ltd and Try Accord Ltd because it was respectively the direct or indirect owner of 100 per cent of their share capital. We refer to the undertaking including all three companies as "Galliford Try".
49. Galliford Try was found to have committed three infringements:
 - Infringement 42 (page 663 of the Decision) was committed in January 2001 and incurred a penalty of £7,812,562;
 - Infringement 142 (page 1111 of the Decision) was committed in March 2003 and incurred a penalty of £466,154;
 - Infringement 186 (page 1317 of the Decision) was committed in March 2004 and incurred a penalty of £54,613.
50. The total fine imposed on Galliford Try was thus £8,333,329.

The Apollo Appeal

51. Apollo Property Services Group Limited is the single appellant in Case 1138/1/1/09. The Decision was also addressed to its parent company Apollo Holdco Ltd. At the time of the issue of the Statement of Objections, Apollo Property Services Group Ltd's main business activities were the refurbishment of social housing and educational establishments. At the time of the infringements, Apollo Property Services Group Ltd was wholly owned by Apollo Holdco Ltd. Apollo Holdco Ltd's consolidated turnover for the financial year ending 31 March 2008 was £254.3 million.

52. Apollo Holdco Ltd was held jointly and severally liable for the infringements of Apollo Property Services Group Ltd. We refer to the undertaking that includes both companies as “Apollo”.
53. Apollo was found to have committed three infringements:
- Infringement 154 (page 1155 of the Decision) was committed in July 2003 and incurred a fine of £338,268;
 - Infringement 199 (page 1378 of the Decision) was committed in July 2004 and incurred a fine of £1,812,148;
 - Infringement 203 (page 1400 of the Decision) was committed in September 2004 and incurred a fine of £121.
54. The total fine imposed on Apollo was thus £2,150,536.

The Seddon Appeal

55. G&J Seddon Ltd and Seddon Group Ltd are the appellants in Case 1134/1/1/09. At the time of the issue of the Statement of Objections, G&J Seddon Ltd undertook work as a building contractor operating in a broad range of sectors including public and private sector housing, commercial and industrial construction. Seddon Group Ltd is the ultimate parent company of G&J Seddon Ltd and its consolidated group turnover for the financial year ending 31 December 2008 was £246.4 million. Both companies were addressees of the Decision and were held jointly and severally liable for the fine imposed for G&J Seddon Ltd’s participation in the infringing conduct. We refer to the undertaking that includes these Appellants as “Seddon”.
56. Seddon was found to have committed three infringements:
- Infringement 23 (page 601 of the Decision) was committed in September 2000 and incurred a fine of £1,316,893;

- Infringement 39 (page 649 of the Decision) was committed in December 2000 and incurred a fine of £99,877;
- Infringement 176 (page 1275 of the Decision) was committed in January 2004 and incurred a fine of £99,877.

57. The overall fine imposed on Seddon was thus £1,516,646.

The Interclass Appeal

58. Interclass Holdings Ltd and Interclass plc are the Appellants in Case 1135/1/1/09. Interclass Holdings Ltd is the ultimate parent company of Interclass plc and both were addressees of the Decision. At the time of the issue of the Statement of Objections, Interclass plc undertook construction projects throughout central England in sectors such as education, industrial construction, health, housing, public buildings and the retail sector. Interclass Holdings Ltd's consolidated turnover for the financial year ending 31 October 2008 was £24.5 million. Both companies were held liable for the fine imposed for Interclass plc's participation in the infringing conduct. We refer to the undertaking that includes these Appellants as "Interclass".

59. Interclass was found to have committed two infringements:

- Infringement 75 (page 807 of the Decision) was committed in September 2001 and incurred a fine of £232,203;
- Infringement 150 (page 1145 of the Decision) was committed in June 2003 and incurred a fine of £232,203.

60. The total fine imposed on Interclass was thus £464,406.

The Tomlinson Appeal

61. G F Tomlinson Building Ltd and G F Tomlinson Group Ltd are the Appellants in Case 1117/1/1/09. At the time of the issue of the Statement of Objections, G F Tomlinson Building Ltd carried out a wide range of construction services including

new build and refurbishment of commercial and industrial buildings and refurbishment of private sector housing. G F Tomlinson Group Ltd is the ultimate parent company of GF Tomlinson Building Ltd and its consolidated turnover for the financial year ending 31 December 2008 was £125.8 million. Both companies were held liable for the fine imposed for GF Tomlinson Building Ltd's participation in the infringing conduct. We refer to the undertaking that includes these Appellants as "Tomlinson".

62. Tomlinson was found to have committed three infringements:

- Infringement 46 (page 678 of the Decision) was committed in January 2001 and incurred a fine of £31,508;
- Infringement 187 (page 1321 of the Decision) was committed in April 2004 and incurred a fine of £1,154,120;
- Infringement 201 (page 1384 of the Decision) was committed in July 2004 and incurred a fine of £83,642.

63. The total fine imposed on Tomlinson was therefore £1,269,270.

The Sol Appeal

64. Sol Construction Ltd and Barkbury Ltd are the Appellants in Case 1123/1/109. At the time of the issue of the Statement of Objections Sol Construction Ltd undertook new build and refurbishment projects over a wide range of contract types, size and complexity. Sol had also undertaken work in sectors such as commercial, industrial, retail, residential, health, education, leisure and public building for both public and private sector clients. Barkbury Ltd was the ultimate parent of Sol Construction Ltd and was held liable for the latter's infringements. Sol Construction Ltd's turnover for the financial year ending 31 March 2009 was £87.7 million⁴. We refer to the undertaking that includes these Appellants as "Sol".

⁴ The fine was based on the turnover of Sol Construction Ltd not of Barkbury Ltd: see Decision, II.1224/217 and VI.616/1814. The reference in II.1224/217 to 31 March 2008 (rather than 2009) appears to be in error.

65. Sol was found to have committed three infringements:
- Infringement 142 (page 1111 of the Decision) was committed in March 2003 and incurred a fine of £101,750;
 - Infringement 156 (page 1167 of the Decision) was committed in July 2003 and incurred a fine of £866,976;
 - Infringement 187 (page 1321 of the Decision) was committed in April 2004 and incurred a fine of £866,976.
66. The total penalty imposed on Sol was therefore £1,835,702.

IV. THE TRIBUNAL'S JURISDICTION

67. The Tribunal's jurisdiction to hear penalty appeals is conferred by section 46(3)(i) of the 1998 Act. This provides that a person in respect of whose conduct the OFT has made a decision may appeal to this Tribunal. The class of appealable decisions includes a decision as to the imposition of any penalty or as to the amount of any such penalty. Paragraph 3(2) of Schedule 8 to the 1998 Act sets out the remedies that the Tribunal is empowered to grant. These powers include the power to impose, revoke or vary the amount of any penalty.
68. In *Napp Pharmaceutical Holdings Ltd v Director General of Fair Trading* [2002] CAT 1 ("*Napp*"), the Tribunal described the proper approach to the exercise of this jurisdiction, in particular as regards the relevance of the OFT's Guidance to the Tribunal's deliberations:

"499. It follows, in our judgment, that the Tribunal has a full jurisdiction itself to assess the penalty to be imposed, if necessary regardless of the way the Director has approached the matter in application of the Director's Guidance. Indeed, it seems to us that, in view of Article 6(1) of the ECHR, an undertaking penalised by the Director is entitled to have that penalty reviewed *ab initio* by an impartial and independent tribunal able to take its own decision unconstrained by the Guidance. Moreover, it seems to us that, in fixing a penalty, this Tribunal is bound to base itself on its own assessment of the infringement in the light of the facts and matters before the Tribunal at the stage of its judgment.

500. That said, it does not seem to us appropriate to disregard the Director's Guidance, or the Director's own approach in the Decision under challenge, when reaching our own conclusion as to what the penalty should be. The Director's Guidance will no doubt over time take account of the various indications given by this Tribunal in appeals against penalties.

501. We emphasise, however, that the only constraint on the amount of the penalty binding on this Tribunal is that which flows from the Maximum Penalties Order..."

69. This passage in the *Napp* judgment was cited with approval by the Court of Appeal as being the appropriate approach for the Tribunal: see *Argos Ltd and Littlewoods Ltd and JJB Sports plc v Office of Fair Trading* [2006] EWCA Civ 1318, at [163] and [182].
70. The OFT argued in the present appeals that although the Tribunal is not bound by the Guidance, it would not be right for us to ignore it. Rather we should take the Guidance into account and recognise that the OFT must be afforded a margin of appreciation in its application. The OFT also emphasised that we should not analyse each step of the Guidance in isolation from the other steps but look at the final figure in the round to see whether it is proportionate to the infringements involved. The OFT submitted that provided the OFT has remained within its margin of discretion, the Tribunal should assess the justice of the overall penalty: "It is only if the Tribunal considers that a penalty is wrong after it has taken account of all these factors that it should impose a different penalty": see paragraph 28 of the Consolidated Defence.
71. Some of the Present Appellants complained that this formulation of the test sought to erode the Tribunal's important role as the independent and impartial tribunal upon which the 1998 Act confers a full merits jurisdiction in relation to fines.
72. We have had the advantage of seeing the judgment of the Tribunal in the case of *Kier Group plc and others v Office of Fair Trading* [2011] CAT 3 ("*Kier*"). That judgment disposes of six of the appeals against penalty brought by other addressees of the Decision. We agree with what the Tribunal said there on this point: see *Kier*, at paragraphs 74 to 77. In our judgment, the Tribunal's task is two-fold. The grounds of appeal pleaded by the Present Appellants raise a number of specific complaints about particular steps taken by the OFT in computing the fines imposed

in the Decision. Part of our task is therefore to adjudicate on those specific complaints since it is important for the OFT and the parties to know where, if anywhere, we judge that the OFT has gone wrong in applying the Guidance in this case. But the other part of our task is, as the OFT accepts, to look at the matter in the round and form our own view about the appropriateness of the penalties imposed. We do not accept that the substitution of such a penalty would amount to reaching a decision “that a penalty should have been imposed which would be contrary to the Penalty Guidance” as the OFT sought to characterise it (see paragraph 30(1) of the Consolidated Defence).

V. OVERVIEW OF THE GROUNDS OF APPEAL

73. There is a substantial overlap between the challenges made by the Present Appellants and also between the points raised by the Present Appellants and the appellants in the appeals disposed of in *Kier*. This enables us to shorten this judgment somewhat since we find ourselves in agreement with the reasoning of the Tribunal panel in *Kier* on certain issues which also fall to us to determine.

74. As regards the challenges raised by the Present Appellants, we consider first submissions which were made by more than one of the Present Appellants and which it is therefore convenient to address at a general level. We have grouped these submissions into four categories:

- A challenge to the overall level of the fines in absolute terms, on the grounds that they are disproportionate and excessive having regard to the nature of the infringements and other particular aspects of the Present Appellants’ conduct.
- Challenges to the methodology adopted by the OFT. Within this category we include:
 - i. The decision by the OFT to use Decision Year turnover at Step 1;
 - ii. The application of the MDT;
 - iii. The imposition of a separate fine for each infringement.

- Challenges based on characteristics of the construction industry which it is alleged the OFT failed to take into account adequately or at all. Within this category we include:
 - i. The inclusion of both tendered and non-tendered work in the relevant product market definition;
 - ii. The fact that this is a high turnover but low margin industry.

- Challenges alleging that the fines imposed were excessive, relying on comparisons with fines imposed either in other cases or on other addressees of this Decision. Within this category we include:
 - i. Comparison with fines imposed in health and safety or corporate manslaughter cases;
 - ii. Comparison with fines imposed in other recent “object” infringement cases;
 - iii. Alleged discrimination against small and medium sized enterprises;
 - iv. Alleged discrimination in comparison with other undertakings fined in this Decision, particularly those involved in compensation payments.

- Other points were raised by only one of the Present Appellants or are specific to the circumstances of an individual undertaking. We have dealt with these in the context of our consideration of the recalculation of the penalty for the particular undertaking raising the point:
 - i. The use of a proxy for the turnover in the Decision Year when a company’s turnover in that year was in fact zero (a point raised by Apollo);

- ii. The alleged arbitrariness of the cap applied to undertakings with two or more infringements in the same relevant market (a point raised by Sol);
 - iii. Mistakes made in the calculation of turnover in one relevant market (a point raised by Tomlinson);
 - iv. The alleged error by the OFT in imposing a fine for an infringement outside the implied limitation period (a point raised by Galliford Try);
 - v. The alleged failure to grant a discount for financial hardship (a point raised by Interclass and Tomlinson).
75. Within these different challenges, different arguments were adduced in support. We will consider all the arguments that have been raised by any of the Present Appellants in relation to each challenge. We note in this regard that the Tribunal directed that, in lieu of the appellants being granted formal permission to intervene in each others' appeals, they were invited to lodge brief written submissions in respect of the other appeals once they had had an opportunity to read the transcript of the hearings in the other appeals: see point 3f of the Order of 25 January 2010. All of the Present Appellants availed themselves of this opportunity.
76. This raises the question of what should be the position as regards an appellant "Appellant A" who has challenged a particular aspect of the fine imposed but has relied in support of that challenge on arguments which we do not accept. If another appellant "Appellant B", challenging the same aspect, has adduced a successful argument, should the Appellant A's appeal also be allowed to that extent? We have decided that it should. It would, in such circumstances, be inequitable not to give an appellant the benefit of a point which has been argued before us and persuaded us, even though made by a different party.

VI. THE EXCESSIVE AND DISPROPORTIONATE NATURE OF THE FINES IMPOSED

77. Several of the Present Appellants raised a general challenge to the appropriateness of the penalties imposed before setting out their specific criticisms of the OFT's application of the Guidance in their individual case. The fines were described as disproportionate, arbitrary, unjust and excessive having regard to the nature of the conduct identified in the Decision. As Tomlinson put it in its Notice of Appeal, by choosing a starting point of 5 per cent at Step 1 of the penalty calculation, the OFT had found that the infringement was of a medium degree of seriousness. But the penalty ultimately imposed on Tomlinson was, they say, extremely harsh. Interclass also complained that cover pricing "does not share any of the hallmarks of serious hardcore cartel activity" and yet very high fines were imposed: see paragraph 103 of their Notice of Appeal.
78. The Present Appellants rely on a number of arguments which they say mitigate the seriousness of cover pricing and which should therefore be taken into account by the Tribunal. Tomlinson, Seddon, Interclass and Galliford Try all point to the fact that the OFT did not establish that there had been any actual effect on prices. Some of the Present Appellants also point to the endemic nature of the practice in the construction industry, citing text books which were readily available and which appeared to recommend the practice without suggesting that it is unlawful. Interclass states that cover pricing was motivated by a desire to save unnecessary overheads in an intensely competitive industry.
79. The nature of cover pricing was considered by the Tribunal in *Kier*: see paragraphs 92 to 107. We agree with that Tribunal's analysis of the anti-competitive effects of cover pricing. As the Tribunal notes in that judgment, the practice of 'simple' cover pricing is less serious than a more conventional, multi-lateral bid-rigging arrangement in which the group of bidders agree amongst themselves who will win the contract and at what price. But cover pricing does provide illegitimate protection to a bidder who has decided that it does not want to perform a particular contract but who wants nonetheless to put in an apparently credible bid. The practice therefore deceives the customer about the source and extent of the competition which exists for the work in question. This may prevent that customer

from approaching a substitute tenderer who might be interested in obtaining the work and would therefore submit a competitive bid. We also agree that there is a risk that cover pricing might affect the price ultimately paid by the customer (particularly if a large number of covers are given in respect of a particular tender) and might create a culture of collusion that spills over into other anti-competitive conduct.

80. The Tribunal in *Kier* referred to the fact that the OFT accepted in the Decision that cover pricing was widely regarded as legitimate and was endemic throughout the industry. We agree with the Tribunal's conclusion, at paragraph 106 of *Kier*, that the OFT did not give sufficient credit to the addressees for this mitigating point. Refraining from raising the Step 1 percentage from the 5 per cent used in earlier OFT decisions was not sufficient. The OFT applied the same starting point to all "simple" cover pricing infringements covered by this Decision. Some of those infringements date back to before the earlier OFT decisions were published. We therefore agree with the Tribunal in paragraph 106 of *Kier* that the OFT would have been on rather shaky ground if it had increased the starting percentage from 5 per cent even without this mitigating point.

81. None of the Present Appellants has challenged the use by the OFT of the 5 per cent starting point and indeed, Tomlinson, Seddon and Interclass expressly state that they do not challenge that as being the correct percentage to be applied at Step 1. We have not therefore come to any conclusion as to whether, if we had heard argument from the parties on the point, we would have concluded that 5 per cent was too high in these cases. However, we consider that the point raised by the Present Appellants about the endemic nature of cover pricing can be taken into account adequately when we come to consider the question of deterrence. In future, no undertaking can claim before this Tribunal to have thought that cover pricing was an innocuous practice and we hope that the practice has now died out. Those factors are relevant to the question of whether an increase in the fine is still necessary to ensure that the Present Appellants and other undertakings are deterred from engaging in conduct which they now know to be a serious infringement of the competition rules. We will come back to this point in that context.

VII. CHALLENGES TO THE METHOD ADOPTED BY THE OFT FOR IMPOSING THE PENALTIES

The use of turnover in the last business year

82. As explained in paragraphs 18 and 42 of this judgment, the Guidance to which the OFT has regard when setting a fine uses the turnover of an undertaking at both Step 1 and Step 5. The OFT obtained from the undertakings under investigation detailed information about their turnover for a number of years. The turnover year used by the OFT in its calculation of the fine was the Decision Year. For Step 1 this was the turnover in the relevant product market. For the Present Appellants, the use of the Decision Year rather than the Infringement Year made a very substantial difference in the amount of the fine arrived at by Step 1.
83. The use of the Decision Year in Step 1 of the penalty calculation was challenged by all the Present Appellants. A number of arguments were adduced:
- **Misinterpretation of Step 1 of the Guidance.** Galliford Try argued that the OFT had misconstrued its own Guidance concerning how Step 1 should operate. They argued that properly interpreted, the Guidance points the OFT towards the Infringement Year and not the Decision Year. The OFT therefore erred in law, they say, by using the relevant turnover in the Decision Year to arrive at the starting figure for the penalty.
 - **Need for consistency with Council Regulation 1/2003** (OJ 2003 L1/1). Apollo argued that the turnover year for these infringements should be the year used by the European Commission in setting fines for breaches of Article 101(1) TFEU. Those fines are set in accordance with Regulation 1/2003 and with the European Commission's Guidelines on the method of setting fines, (OJ 2006 C 210/2) ("the 2006 EU Guidelines"). Those Guidelines provide that when setting the penalty for breaches of the EU competition rules, the relevant year is the last full business year of the undertaking's participation in the infringement.

- **Article 7 of the European Convention on Human Rights and retrospective application of the Amended Turnover Order and the OFT’s Guidance.** Seddon, Tomlinson and Interclass argued that penalties should be calculated in accordance with the Guidance in force at the time the infringement was committed and not at the time the Decision was adopted. They submitted that the OFT retroactively raised the level of penalty applied to their conduct and that this was an infringement of their rights under Article 7 ECHR.
- **The OFT’s failure to make an exception where particular circumstances made the use of the Decision Year unfair.** The Present Appellants, in particular Galliford Try and Sol, argued that the OFT should have used turnover from a year other than the Decision Year in their cases because their Decision Year turnover was atypical of their performance over the years and hence was not an appropriate indicator of their economic strength.

(i) *The meaning of Step 1 of the Guidance*

84. In the original OFT’s Guidance on penalties published in March 2000 (“the 2000 Guidance”), the turnover to be used at Step 1 of the penalty calculation was described in the following terms:

“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 financial year.”

85. So far as Step 5 is concerned, the 2000 Guidance said (paragraph 2.13) that the final amount of the penalty may not in any event exceed 10 per cent of the “section 36(8) turnover” of the undertaking. The term “section 36(8) turnover” was defined in footnote 6 which read:

“In this Guidance, the expression “turnover” is used in two separate contexts: “relevant turnover” used to calculate the starting point and “section 36(8) turnover” (calculated in accordance with the [Original Turnover Order] which is used in Step 5 in the adjustment of the penalty figure to prevent the maximum amount for the penalty being exceeded. The “section 36(8) turnover” of the undertaking is not restricted to the turnover in the relevant product and relevant geographic market”.

86. The 2000 Guidance did not therefore expressly say what year was relevant for Step 5 but simply referred the reader to the Original Turnover Order which, as we have described, adopted the Infringement Year (see paragraph 13 of this judgment).
87. In April 2004, the OFT published a series of documents containing draft revised Guidance and procedural rules, following on from Council Regulation 1/2003 which came into effect in May 2004. These documents, including draft revised guidance on penalties, were made available for consultation. The explanatory documents we have seen did not draw attention to any of the changes proposed to be made to the Guidance on penalties.
88. In the draft revised Guidance itself, the description of turnover to be used in Step 1 was:

“The ‘relevant turnover’ is the turnover of the undertaking in the relevant product market and relevant geographic market affected by the infringement in the undertaking’s last business year.”

89. In relation to Step 5, the draft revised Guidance said that:

“The final amount of the penalty calculated according to the method set out above may not in any event exceed 10 per cent of the worldwide turnover of the undertaking in its last business year²⁰. The business year on the basis of which worldwide turnover is determined must, as far as possible be the one preceding the date on which the decision of the OFT is taken or, if figures are not available for that business year, the one immediately preceding it.”

90. Footnote 20 in the above passage referred the reader to the Amended Turnover Order. Thus, although the 2000 Guidance had not expressly stated which was the relevant year for the purposes of Step 5, the draft revised Guidance did spell this out, thereby highlighting that a change was being made.
91. In the final version of the Guidance as published in December 2004, the description of the turnover used at Step 1 was as follows:

“The **relevant turnover** is the turnover of the undertaking in the relevant product market and relevant geographic market¹³ affected by the infringement in the undertaking’s last business year¹⁴.” (emphasis in the original)

92. Footnote 13 in the above passage referred the reader to the OFT's guidelines on market definition and footnote 14 stated that relevant turnover would be calculated after deduction of sales rebates, VAT and other taxes directly related to turnover.

93. So far as Step 5 was concerned, the language of the Guidance ultimately published in December 2004 is almost identical to that which had appeared in the draft and reads:

“The final amount of the penalty calculated according to the method set out above may not in any event exceed 10 per cent of the worldwide turnover of the undertaking in its last business year²⁰. The business year on the basis of which worldwide turnover is determined must, as far as possible be the one preceding the date on which the decision of the OFT is taken or, if figures are not available for that business year, the one immediately preceding it. The penalty will be adjusted if necessary to ensure that it does not exceed this maximum.”

94. As with the draft revised Guidance, footnote 20 in the above extract referred the reader to the Amended Turnover Order.

95. In the final version of the Guidance, with which we are concerned, there was then an important provision which had not appeared in the draft published for consultation:

“2.18 In addition, where an infringement ended prior to 1 May 2004 any penalty imposed in respect of the Chapter I or the Chapter II prohibition (but not any penalty imposed in respect of the infringement of Article [101] or Article [102]) will, if necessary, be adjusted further to ensure that it does not exceed the maximum penalty applicable in respect of an infringement of the Chapter I prohibition or the Chapter II prohibition prior to 1 May 2004, i.e. 10 per cent of turnover in the United Kingdom of the undertaking in the financial year preceding the date when the infringement ended.”

96. The Guidance thus made clear that the changes made in the Amended Turnover Order to the way the 10 per cent cap was calculated should not result in a penalty for an infringement committed before 1 May 2004 being larger than would have been possible under the maximum applicable then. As we have said (see paragraph 42 of this judgment), the OFT carried out this cross-check in respect of the relevant infringements in the Decision.

97. We have considered the analysis of this issue set out by the Tribunal in paragraphs 130 to 138 of the *Kier* judgment and we agree with the conclusions expressed there.

In our view, the reference to the “last business year” in the OFT’s Guidance has a single meaning, objectively ascertained. The OFT’s Guidance issued in 2004 did not make any material change to the meaning of the term in the 2000 Guidance and hence to the way Step 1 should be applied. The Guidance did not justify the use of the Decision Year turnover rather than the Infringement Year turnover in these penalty calculations. As we have described above, the OFT did not flag up that the amendments to the Original Turnover Order meant that the year on which the relevant turnover for Step 1 was based was going to change. This would have been a significant change which undertakings responding to the consultation would readily have appreciated might make a substantial difference to the level of fines imposed in future cases. We also agree that the use of the Infringement Year at Step 1 is more consistent with the purpose of Step 1, namely to produce a provisional penalty that reflects the harmful effects of the unlawful conduct on the product and geographic market affected by the infringement. This purpose is relevant even for “object” infringements such as cover pricing and the Guidance does not indicate that a different year should be used for Step 1 depending on whether the infringement is by object or by effect.

98. We also reject the OFT’s argument that the change to Step 1 flows naturally from the change to Step 5 which is properly spelled out in the 2004 Guidance. There is no obvious need for symmetry between the year used for assessing the starting point for the penalty and the year used for identifying the overall statutory limit. The two categories of turnover (relevant turnover and total worldwide turnover) have different functions and are in most cases likely to be entirely different in any event. The OFT’s point that data for the Infringement Year may be harder to find is unpersuasive, particularly in this case where the parties were asked to, and did, provide those data.
99. We are unanimous in concluding that on its true interpretation, the 2004 Guidance did not change the way that Step 1 should be performed and did not introduce the Decision Year at that Step. We therefore find that the OFT erred in basing the calculation of the starting point on relevant turnover in the Decision Year rather than the Infringement Year.

(ii) *Application of the year used for Step 1 in penalties imposed under Regulation 1/2003*

100. Apollo argued that section 60 of the 1998 Act imposes an obligation on the OFT and the Tribunal to deal with questions of competition consistently with EU competition law. This includes the obligation imposed by section 60(3) to have regard to any relevant decision or statement of the European Commission (quoted at paragraph 9 above). Paragraph 13 of the 2006 EU Guidelines provides that in determining the basic amount of the fine to be imposed, the Commission will use the relevant turnover and:

“will normally take sales made by the undertaking during the last full business year of its participation in the infringement.”

101. That business year will be different from the Infringement Year as we have defined it because the Infringement Year is the business year **preceding** the date when the infringement ended not the year **during** which the infringement ended.

102. On this point we agree with the OFT that section 60 does not require the OFT to bring its fining policy into line with that of the European Commission or to prefer the approach of the 2006 EU Guidelines to its own Guidance. At the time the Guidance was adopted in 2004, the fining practice of the European Commission pursuant to the former 1998 Guidelines (OJ 1998 C 9/3) was very different in structure from that set up in the OFT’s Guidance. It did not, for example, base the basic fine or starting point on a percentage of any particular turnover. There were therefore “relevant differences between the provisions concerned” for the purposes of section 60(1) of the 1998 Act. Even though the 2006 EU Guidelines create a framework for assessing fines that is closer in some ways to the OFT’s Guidance, there are still significant differences between the two instruments: for example, the range for the starting percentages is much broader and there is express provision in the EU framework for including in the basic amount a sum of between 15 and 25 per cent of the value of sales in cases of ‘hard-core’ cartels. We do not therefore accept that section 60 of the 1998 Act supplants the OFT’s statutory duty under section 38(8) of the 1998 Act to have regard to its own Guidance as approved by the Secretary of State and published. We therefore reject Apollo’s challenge on this point.

(iii) Article 7 ECHR

103. Tomlinson, Seddon and Interclass argued that they had a right to receive a penalty calculated in accordance with the Guidance in force at the time the infringement was committed, that is, on the basis of the earlier guidance which used turnover in the Infringement Year and not in the Decision Year (see, for example, paragraph 146 of Tomlinson’s skeleton argument). It is alleged that this “retrospective” application of the Guidance is contrary to article 7 ECHR, as scheduled to the Human Rights Act 1998 (see article 7(1) of Part I of Schedule 1 to that Act).

104. Article 7(1) provides:

“No punishment without law

“(1) No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.”

105. The Present Appellants argue that the application of the Decision Year approach greatly increased the amount of the fine imposed as compared with the fine which would have been imposed under the Guidance extant at the date of the infringements. This is, they argue, contrary to the injunction in article 7 that no heavier penalty shall be imposed than the one that was applicable at the time the offence was committed.

106. The leading case on the application of article 7 to revisions of sentencing legislation is *R (Uttley) v Secretary of State for the Home Department* [2004] UKHL 38, [2004] 1 WLR 2278. That case concerned a prisoner who had been sentenced in October 1995 to 12 years imprisonment for crimes that he had committed before 1983. If he had been sentenced at the date he committed the crimes, he would have served two-thirds of his sentence in prison and then been released without being subject to any further conditions. The effect of legislation coming into force before his sentence was imposed was that his release after serving two thirds of the 12 year sentence was subject to licence conditions and left him at risk of being recalled to

prison if he committed a further imprisonable offence before the licence period expired.

107. The House of Lords held that this did not constitute an infringement of his article 7 rights. Their Lordships focused on the word “applicable” in article 7 and held that article 7(1) will be infringed only if the sentence imposed constitutes a heavier penalty than that which *could* have been imposed on the defendant under the law in force at the time the offence was committed. The “applicable” penalty for the offences of which Mr. Uttley had been convicted was life imprisonment both before and after the changes to the prison release regime. Since a sentence of 12 years imprisonment, even under the new regime, could not be regarded as a heavier penalty than life imprisonment, there was no breach of article 7.
108. Seddon and Tomlinson sought to distinguish *Uttley* by arguing that the maximum applicable penalty with which the fines imposed on them had to be compared was not the statutory cap under the Original Turnover Order but rather the maximum fine that could have properly been imposed under the earlier Guidance for this particular infringement. We do not consider that is a correct reading of *Uttley*. The question whether the offences committed by Uttley could at the date of his conviction properly have resulted in a sentence of life imprisonment was not considered by their Lordships as relevant to the question whether life imprisonment should be treated as the maximum “applicable” in that case. This was also clear from the judgment of the European Court of Human Rights to which Baroness Hale and Lord Rodger referred: *Coëme v Belgium* Application nos. 32492/96, 32547/96, 32548/96, 33209/96 and 33210/96, at paragraph 145:

“The court must therefore verify that at the time when an accused person performed the act which led to his being prosecuted and convicted there was in force a legal provision which made that act punishable, and that the punishment imposed did not exceed the limits fixed by that provision.”

109. For this purpose, therefore, the maximum “applicable” fine for infringements occurring before 1 May 2004 was the statutory cap imposed by the Original Turnover Order and not the maximum that could properly have been imposed by the OFT in accordance with the Guidance in force at the time. This is the case even

though the OFT was under a statutory obligation to have regard to the Guidance extant at the time of imposing the penalty.

110. In the Decision the OFT made clear that in respect of infringements committed before 1 May 2004, it accepted that the penalty it proposed to impose must not exceed the maximum penalty applicable prior to that date, namely 10 per cent of the turnover in the United Kingdom of the undertaking in the Infringement Year (Decision, VI.370/1711). That was the correct approach and we reject the challenge based on article 7 ECHR.

(iv) The OFT's failure to take account of exceptional circumstances

111. A number of the Present Appellants submitted that the use of their Decision Year turnover as the basis for calculating their fine was unfair and excessive in their particular circumstances. Apollo expressed this in terms of the OFT having erred by unlawfully fettering its discretion by refusing to depart from the use of Decision Year turnover even where exceptional circumstances existed. Sol argued that the use of Decision Year turnover in its case was inconsistent with the principle laid down by the General Court in Cases T-142/89 *Boël v Commission* [1995] ECR II-867 and Case T-319/94 *Fiskeby v Commission* [1998] ECR II-1331. They argued that they had presented cogent and undisputed evidence to the OFT that the relevant market and global turnover figures that the OFT proposed to use did not give an indication of Sol's true size and economic power and of the scale of the infringement it had committed.

112. Since we have decided that, as a matter of law, the OFT ought to have based its Step 1 calculation on the Infringement Year turnover, it is neither necessary nor helpful for us to analyse whether the OFT should have treated any particular case as justifying a departure from its interpretation of the Guidance.

(v) The Tribunal's conclusion on the turnover year

113. We therefore uphold the challenge to the use of the Decision Year on the grounds put forward by Galliford Try and we reject the other arguments made on this point. Since all the Present Appellants raised this point in some form, we allow all of their appeals to this extent.

The OFT's application of the MDT in the Decision

114. We have explained earlier how the Minimum Deterrent Threshold was applied by the OFT in these cases: see paragraphs 24 to 31 of this judgment. So far as the Present Appellants are concerned, the MDT was applied to Seddon (raising the fine for Infringement 23 from £147,795 to £1,848,270 at Step 3), to Apollo (raising the fine for Infringement 199 from £9,353 to £1,907,524 at Step 3) and to Galliford Try (raising the fine for Infringement 42 from £1,068,450 to £10,965,000 at Step 3).
115. Seddon, Apollo and Galliford Try have all challenged the use of the MDT. Seddon took issue with the use by the OFT of the worldwide turnover of the group across all its activities. They argued that the OFT should have calculated any MDT on the basis of the Seddon group's turnover in the particular kind of construction activity in which cover pricing was prevalent, namely tendered construction activity. They pointed out that on average over the eight years preceding Seddon's response to the statement of objections, some 23 per cent of Seddon group turnover derived from non-construction related activities. They argued that the OFT's approach in this case was inconsistent with that taken in *Makers UK Ltd v Office of Fair Trading* [2007] CAT 11 where the MDT uplift had been calculated on the turnover of the company that had been directly involved in the infringement and not of the turnover of the larger undertaking of which Makers was a part.
116. Galliford Try criticised the OFT for adopting a "formulaic" approach to the application of the MDT without taking into account individual circumstances. They also complained that the use of global turnover in the Decision Year in the calculation of the MDT uplift was particularly unfair for Galliford Try because of the tenfold increase in Galliford Try's turnover between 2001 (the year when the infringement to which the MDT was applied was committed) and 2009. On their calculation, the application of the MDT had resulted in a fine which was up to £7 million more than a fine which would have more accurately reflected the circumstances of Galliford Try. Apollo's challenge to the MDT was bound up with its challenge to the use of a proxy for relevant turnover where there was none in the Decision Year. We consider this further below in relation to Apollo's penalty calculation in Section X.

117. A number of the other appellants challenging the Decision also complained about the way that the MDT had been devised and applied by the OFT in this case. We have considered the conclusions that the Tribunal arrived at in *Kier* as regards the application of the MDT in the Decision: see paragraphs 164 onwards of that judgment.
118. We agree with the Tribunal panel in *Kier* that the application of the MDT by the OFT in this Decision led to disproportionate and excessive fines. This has been the result for the fines imposed on Seddon, Apollo and Galliford Try. The automatic substitution for the Step 2 fine in those cases of a figure arrived at by applying 5 per cent to 15 per cent of worldwide total turnover was not a suitable mechanism for ensuring deterrence. There was no consideration of whether other factors relating to the individual addressee or in relation to the construction industry more generally might be relevant to the question whether an uplift in fine was necessary. We note the statement of the Court of Justice in Joined Cases 100-103/80 *Musique Diffusion Française SA & Ors v Commission* [1983] ECR 1825 that one must not confer on any individual measure an importance disproportionate in relation to other factors. It was not appropriate, in our judgment, for the OFT to adopt the 15 per cent proportion without considering whether it was suitable in the specific circumstances of these cases, having regard to the way the markets have been defined and the other characteristics of the industry relied on by the addressees.
119. We agree with *Kier* that the Tribunal's decision in *Makers* (cited above) does not support the reliance that the OFT tried to place on it. It is certainly not authority for the proposition that this kind of MDT is permissible regardless of the final fine it produces.
120. We therefore find that the application of the MDT in the cases of Seddon, Apollo and Galliford Try was flawed and that their appeals should be allowed to that extent.

The imposition of a separate fine for each infringement found

121. Some of the Present Appellants argued that the OFT had erred by adding the fines for the other two infringements to the fine arrived at by the application of the MDT.

Thus, in Apollo's case the OFT applied the MDT to the penalty for Infringement 199, increasing the fine for that infringement from £9,353 to £1,907,524. The OFT then added to that figure the Step 2 fines for Infringements 154 and 203 (£356,071 and £127 respectively). Apollo argued that once the OFT had determined what fine was necessary for deterrence, there was no need to increase that amount by the addition of the other fines. Seddon also argued that the use of multiple penalties was unjust and went beyond any legitimate deterrent objective. Tomlinson submitted that by regarding the infringements as separate and discrete rather than as evidence of infringing behaviour from time to time, the OFT automatically multiplied the penalty imposed.

122. We do not accept these criticisms. The MDT is a minimum amount, not a maximum amount and deterrence is only one of the purposes achieved by the imposition of the fines. The policy objectives set out in paragraph 1.4 of the Guidance include imposing penalties on infringing undertakings which reflect the seriousness of the infringement as well as deterrence. The OFT was entitled to impose a fine for each infringement that the undertaking was found to have committed even if the overall total was more than the minimum necessary to achieve deterrence. The fact that the OFT chose quite properly to punish each of these infringements in a single Decision does not affect this.

123. This does not, as Seddon, Tomlinson and Interclass argued, take the overall fine outside the scheme of the 1998 Act. The statutory maximum in the Amended Turnover Order applies to each individual infringement not to each individual undertaking regardless of the number of infringements. In fact, as we have described, the OFT applied a maximum considerably below the 10 per cent set by that provision when granting a discount to the "outliers". We have not been shown an instance where the aggregate of the three fines imposed on an undertaking exceeded 10 per cent of its worldwide turnover.

124. Seddon also argued that the choice of infringements was arbitrary and that if the OFT had focused on other alleged infringements and made other findings, the fines would have been different. Given that Seddon has admitted committing the infringements for which it has been punished, we do not see that this forms a proper

ground of complaint for Seddon or for the other Present Appellants who raised the point. The OFT was not under any obligation to try to foresee, when choosing on which infringements to concentrate its investigation, which of them was likely, if proven, to result in the lowest fines for the undertaking.

VIII. CHALLENGES BASED ON THE CHARACTERISTICS OF THE CONSTRUCTION INDUSTRY

The inclusion of turnover from both tendered and non-tendered work in the penalty calculation

125. Seddon, Interclass and Tomlinson argued that the OFT had erred because the turnover used to calculate the penalty should only be that turnover derived from contracts awarded after a single-tender contract procedure. This was because it was only in relation to tenders adopting that procedure that cover pricing was possible. Thus, they submitted, the OFT should have excluded from the relevant turnover used for the calculation of the MDT at Step 3 of the Guidance any turnover derived from non-tendered work such as turnover from framework agreements⁵. Secondly, they argued that it was unfair that the total turnover figure included turnover from activities of the group that had nothing to do with the construction industry and took place outside the United Kingdom.

126. We do not accept either of these criticisms. In the Decision, the OFT undertook a lengthy and entirely conventional examination of the relevant market considering both demand and supply side substitutability (Decision, II.1597/288 onwards). The correct question was as the OFT described it at paragraph II.1686/315:

“... whether there exists sufficient demand and supply side switching from traditional methods of procurement, such that a hypothetical monopolist controlling all traditionally procured contracts, could not profitably raise the price of these contracts by 10 per cent.”

127. The OFT found that customers experienced no significant barriers to switching methods of procurement and that switching did in fact take place. There were similarly no barriers preventing construction firms from freely supplying under a

⁵ Framework agreements were described by the OFT in the Decision at II.1674/311.

range of different procurement methods. The OFT concluded that tendered and non-tendered methods of procurement belonged in the same relevant market.

128. The decision to exclude complex projects such as the larger PPP projects and PFI projects from the relevant turnover was not, as Seddon assert, a recognition by the OFT that only turnover from activities subject to cover pricing should be included. Rather it followed the finding that a much narrower range of construction companies were able to bid for that kind of project than for the general kinds of building projects (Decision, II.1693/319).
129. The OFT was therefore correct to include in the relevant turnover at Step 1 turnover derived from building work where the method of procurement used was not the traditional tender mechanism. We do not need to resolve therefore, the factual dispute between the parties and the OFT about whether the OFT did find instances of cover pricing even in non-tendered work.
130. We also reject the submission that total turnover of the undertaking used at Step 5 should have excluded turnover from activities other than construction. There would be obvious difficulties in choosing a dividing line between activities sufficiently close to construction and those not. As a matter of principle, for those aspects of the calculation of penalty where it is otherwise appropriate to use the total turnover of the group, we can see no justification for excluding parts of that turnover on the basis suggested.

Construction is a high turnover but low margin industry

131. Another characteristic of the construction industry on which some of the Present Appellants relied was the fact that profit margins are very low as a percentage of turnover. This is in part because the turnover reported by a construction company includes the total payment received from the client for the performance of the contract, although a proportion of that may simply be passed on by the main contractor to the various subcontractors who have worked on the site. Turnover in this sector is therefore not, it is said, as good an indicator of an undertaking's economic strength as it may be in other sectors. Seddon argued that if turnover is used without due allowance for the specific characteristics of the industry in

question it can lead, and here has led, to disproportionate and unjust penalties. Tomlinson said that the penalty imposed on it represents about 75 per cent of the Tomlinson Group's 2008 pre-tax profit and therefore has a disproportionate impact on Tomlinson. Interclass also submitted that they are struggling to break even in terms of profitability so that the penalty imposed has a disproportionate impact on it.

132. The OFT dismissed this argument in paragraph VI.75/1644 of the Decision stating simply that there was little to distinguish the construction industry from many other industries where work is passed on to subcontractors. The OFT referred to cartels, for example, at the retail level of the distribution chain where the parties' turnover figures reflect the cost of the price of goods purchased from the manufacturer or wholesaler. The OFT drew our attention to the judgment in Case T-122/04 *Outokumpu and Luvata v Commission* [2009] ECR II-1135. In that case the General Court rejected an argument from the makers of industrial copper tubes that turnover was an unfair basis for calculating their fines because a very large proportion of the proceeds of sale was accounted for by the commodity price of copper over which they had no control.
133. In our judgment, there is more merit in this point than the OFT conceded. The analogy with a retailer whose turnover must cover the cost of acquiring its stock is not a good one. The fact that a significant proportion of a construction undertaking's turnover comprises monies paid over to the subcontractor is a factor which affects the extent to which turnover can be regarded as a useful indicator of economic presence in this market. It goes too far to say, as Seddon said, that its turnover is unrelated to its financial strength. But it is a factor that is relevant when considering the overall impact of the penalties on these undertakings.
134. Although a number of the Present Appellants raised this same point, they were less clear about how the OFT could or should have taken this factor into account in its calculation of the penalties in these cases. Some of them eschewed any suggestion that profit should have been used as a measure instead of turnover. We agree that individual group profit is an unsatisfactory alternative, for the reasons set out by the OFT in paragraphs VI.72 to VI.74/1643 of the Decision. We also reject the

suggestion made by Tomlinson, Interclass and Seddon that the OFT should simply have relied on turnover net of subcontractor fees in its calculations. This would have had a very uneven effect on the undertakings, depending on how far they rely on subcontractors. It would also mean that a company that chooses to employ its own workforce would be disadvantaged.

135. We do however consider that this aspect of the way the construction industry operates should have been reflected at some point in the OFT's calculation. It is an important factor when considering the likely impact of the fines on these undertakings and in particular whether the fines arrived at after applying Steps 1 and 2 of the Guidance are an adequate deterrent. We have therefore taken this factor into account in that context when we recalculate the fines.

IX. CHALLENGES BASED ON COMPARATORS

Comparison with fines in health and safety or corporate manslaughter cases

136. Some of the Present Appellants drew comparisons with fines set for other kinds of statutory infringements which had led to consequences much more serious than those being considered in the current case. Sol in particular referred to the Court of Appeal's judgment in *R v Balfour Beatty Rail Infrastructure Services* [2006] EWCA Crim 1586, [2007] 1 Cr App R (S) 65. That case arose from the Hatfield rail disaster in 2000 in which 102 passengers were injured and four lost their lives. Balfour Beatty was convicted of serious breaches of section 3 of the Health and Safety at Work Act 1974 and fined £7.5 million. Its group turnover in the year in which it was prosecuted was just under £5 billion and its pre-tax profit was £141 million. Seddon says that this is "an appropriate cross-check" for the Tribunal in considering the justice of the penalties imposed in this Decision.
137. Seddon also referred to the *Definitive Guideline published by the Sentencing Guidelines Council for Corporate Manslaughter & Health and Safety Offences Causing Death*. Those Guidelines indicate that fines are likely to range between £500,000 and "millions of pounds" for corporate manslaughter and between £100,000 and "hundreds of thousands of pounds or more" for health and safety

offences resulting in death. Seddon argue that the fine imposed on it of £1,516,646 appears to be much higher than the fines contemplated by the Guideline.

138. We consider that these comparators are too far removed from the competition regime with which we are dealing to be helpful in assessing the reasonableness of the fines imposed in this or in any other infringement decision under the 1998 Act. The 1998 Act does not require the OFT to consider fines in other statutory contexts when deciding how to exercise its discretion under section 36. The statutory maximum fine for a competition infringement is set in section 36(8), apparently without regard to fines in those other contexts. The Guidance which the OFT is required to publish, and which has been approved by the Secretary of State, does not suggest that the OFT must or should have regard to fines for corporate manslaughter or for breaches of the Health and Safety at Work Act 1974 as relevant pointers when setting the fines for cartel infringements. We accept the OFT's submissions that those other regimes are subject to different policy imperatives from those which apply here.

139. We also agree with the OFT that any search for some overarching principles of fairness or reasonableness across all regimes which impose financial penalties would be an unproductive search. As the OFT put it, there is no scheme of rationality which is able to bring the fining regime under the 1998 Act into line with the universe of criminal penalties and imperatives for justice in diverse fields of criminal application. It is true that certain factors, such as the relative culpability of the behaviour may be relevant in all such contexts. But that does not suggest to us that the corporate manslaughter fines should operate in some way as a ceiling or benchmark for the fines that are imposed under the 1998 Act.

Comparison with fines imposed in other recent Chapter I object infringement cases

140. Seddon argued that the fines imposed in this Decision were disproportionate when compared with those imposed in recent infringement cases under the 1998 Act. They referred to the case pursued by the OFT against J Sainsbury plc in 2007 when Sainsbury admitted collusion over the price of milk and cheese and reached an "early resolution agreement" with the OFT. The penalty imposed there was £27 million which Seddon calculates represented only 5.5 per cent of Sainsbury's

pre-tax annual profit of £488 million or 0.15 per cent of its £17.8 billion turnover. Sol also argued that its fine was excessive when compared with the fines imposed in the *Replica football kit case (Umbro Holdings Ltd, Manchester United plc, JJB Sports plc and Allsports Ltd v Office of Fair Trading [2005] CAT 22)*.

141. Seddon referred to the recent decision of the OFT in April 2010 on the penalties imposed in the tobacco retail pricing case. There the heaviest individual penalty imposed was £112,332,495 on Imperial Tobacco plc, representing 5 per cent of Imperial Tobacco's pre-tax annual profits and 0.4 per cent of their annual turnover. These figures compare with a fine which represents 120 per cent of Seddon's pre-tax profit and 0.62 per cent of its worldwide turnover. Seddon argues that it cannot be just to treat Seddon more harshly for less serious infringements.
142. In our view, one must be cautious about picking one or two parameters by which to compare fines imposed in different cases when those parameters are not the only ones which were used to calculate the fine. For example, there is nothing to suggest that the fine in the Sainsbury's case was set as a particular proportion of Sainsbury's pre-tax profit or that that calculation is an appropriate cross check generally for the reasonableness of fines. On the contrary, the OFT expressly rejected profits as a suitable basis for calculating fines (other than in relation to claims of financial hardship). The fine imposed on Sainsbury's was affected by the terms of the early resolution agreement which are not in the public domain and which may have been concluded in different circumstances from the Fast Track Offer made available to the undertakings in this investigation⁶.
143. We have considered the fines in the *Tobacco Pricing* case⁷. The method adopted by the OFT followed the Guidance in applying a starting percentage to the undertakings' turnover in the relevant market at Step 1; making an adjustment for the duration of the infringement at Step 2; applying a deterrence uplift for those undertakings where the resulting penalty was a very small proportion of total turnover and giving a reduction to those undertakings where the resulting penalty

⁶ The OFT has not yet adopted a final decision in the *Dairy* investigation involving Sainsbury's.

⁷ We note here that some of the addressees of the *Tobacco Pricing* decision have lodged appeals with the Tribunal challenging, among other matters, the level of fines imposed. Our discussion of that case here is, of course, no indication as to whether those challenges are likely to be upheld or not.

was a relatively large proportion of total turnover. Where an uplift was required at Step 3 for deterrence, this was achieved by using a multiplier to bring the penalty up to the level the OFT considered adequate rather than by applying a particular percentage to the overall group turnover. Further adjustments were made at Step 4 to take account of factors such as steps taken to ensure future compliance and reductions made after Step 5 to reflect the length of time taken by the investigation, the grant of leniency reductions and the conclusion of early resolution agreements.

144. Thus, although broadly speaking the same steps were applied in the *Tobacco Pricing* case as were applied in the Present Appeals, the details of the OFT's approach were somewhat different in the two investigations. In neither investigation, however, did the OFT set the fine as a percentage of pre-tax profits or as a simple percentage of the group's annual turnover. The reason why the ultimate fines imposed on the undertakings in *Tobacco Pricing* are a lower percentage of their total turnover or pre-tax profits than the fine imposed on Seddon is the result of other factors such as reductions for mitigating circumstances (including the length of the investigation), leniency and early resolution arrangements. They do not indicate that the fines imposed in this Decision were excessive by comparison.

145. The Present Appellants have understandably focused their comparisons on comparators where they calculate that the fines imposed on infringers were lower as a percentage of turnover or profit than their own fines. The OFT, in its Consolidated Defence, countered with examples of fines upheld by the Tribunal which were higher, on those measures, than the fines imposed on the addressees of this Decision. This highlights how difficult it is to make any useful comparison from one case to another. We do not consider that it is incumbent on the Tribunal to undertake any such comparative exercise when considering an appeal against a penalty.

Alleged discrimination against SMEs

146. It is common ground between the OFT and the Present Appellants that the OFT must not discriminate against undertakings. This means both that the OFT must not treat similar situations differently and that it must not treat different situations the same, unless in either case the treatment is justified.

147. Tomlinson and Interclass argued that the method used by the OFT to calculate the fines in this case discriminated against small and medium sized enterprises which earned a large proportion of their total turnover in the relevant markets where their infringements were found to have taken place. For the large national firms, the MDT only brought their fines up to 0.75 per cent of their total turnover (or 1.05 per cent for those involved in compensation payments). For an undertaking like Interclass, its fine represented a higher proportion of its total turnover because it earned more of its turnover in the relevant markets.

148. We do not accept this criticism of the OFT's methodology. We agree with the OFT that applying an appropriate percentage to the undertaking's turnover in the relevant market produces a reasonable starting point which reflects the seriousness of the infringement of that undertaking in that market. This is the step that is envisaged as the first step in the Guidance. The MDT is intended to operate as a minimum not a maximum for those larger or national undertakings whose fine would otherwise not have a sufficient deterrent effect. The OFT did reduce the fines in the case of undertakings whose fines were manifestly out of line with the others, as we have explained above: see paragraphs 36 and 37 above. We do not regard the method used by the OFT as being discriminatory.

Alleged discrimination in comparison with other companies fined in this Decision, particularly those involved in compensation payments

149. Some of the Present Appellants picked out other addressees that had been subject to fines, inviting us to draw the conclusion that the comparison of their fines showed that the fines were "arbitrary" or "discriminatory" or that they offended against the principle of equal treatment.

150. Such comparisons must be approached with caution. The final figure for the fine imposed on each addressee is the result of many different choices made by the OFT as to what factors should or should not be taken into account when setting the penalty in accordance with the framework set out in the Guidelines. The fact that the application of these choices results in two different companies being subject to widely varying fines is not a matter for complaint or criticism by itself. This is illustrated by the exercise that Galliford Try has carried out in comparing its overall

final gross penalty (before reductions granted for leniency or accepting the Fast Track Offer) of £11,111,105 with that imposed on another addressee of the Decision, Balfour Beatty/Mansell, of £10,394,008. Galliford Try describes this comparison as perverse, because the consolidated global turnover of Balfour Beatty in 2008 was many times that of Galliford Try and because Balfour Beatty had been involved in compensation payments as well as cover pricing. Galliford Try complains in its skeleton argument: “There is no evidence in the Decision (or the Defence) that the OFT ever stood back and considered whether the individual circumstances of [Galliford Try] and of Balfour Beatty/Mansell merited them being treated in the way in which they were” (paragraph 83).

151. We do not see, however, how the OFT could sensibly have at some point in the procedure compared each individual undertaking’s fine with that imposed on one or more of the other 102 undertakings subject to fines to see whether the differential was merited by the “individual circumstances” of the two companies. The reason why Balfour Beatty’s consolidated turnover in the year ending 31 December 2008 was not taken into account was that the infringements for which its subsidiary Mansell was being fined took place before Balfour Beatty had acquired Mansell. That difference in treatment is entirely justified and appropriate. Although Mansell was subject to the 7 per cent starting point for the fine because of their involvement in compensation payments, this did not ultimately result in the overall fine being larger than Galliford Try’s fine because of the many other factors that properly go towards the computation of the overall penalty.

152. We do not accept the premise underlying Galliford Try’s submissions that it is possible simply to compare its fine with that of the two undertakings it has picked for the purposes of the appeal and conclude that its fine was perverse, arbitrary, unfair or discriminatory. Rather we must look at all the factors that fed into the final amount and determine whether there was a particular flaw in the choice of that factor or the way it was dealt with. The Tribunal must then go on to consider in the round whether the penalty is too high of itself (rather than in relation to other fines), having regard to the nature of the infringement and other factors. Our assessment of the overall proportionality of the fine imposed on a particular undertaking is not

an attempt to even up the fines as between the undertakings with which the Appellant has compared itself.

153. Similarly, the comparison with Morgan Sindall which was fined £286,593 does not of itself say anything about the reasonableness or fairness of Galliford Try's fine. The comparatively low level of Morgan Sindall's fine arose in part from the fact that it was granted 100 per cent leniency in respect of the infringement to which the MDT had been applied. The fact that in Morgan Sindall's case this led to a relatively low fine does not, in our judgment, give Galliford Try any cause for complaint and nor would it justify the OFT applying different rules to Morgan Sindall in order to bring its fine more in line with that of Galliford Try.
154. Similar points were raised by Sol in its Notice of Appeal. Sol argued that four addressees of the Decision which are of a comparable size to Sol (that is with global turnover of between £50 million and £100 million) have all been fined substantially less than Sol, both in terms of the absolute sum and in terms of the fine expressed as a percentage of world wide turnover. In each case, examining the relevant table in the Decision, one can see how the calculation has led to this result. For the other undertakings, the proportion of global turnover that fell within the relevant markets was extremely small – in some cases negligible. Even with the application of the MDT to the highest penalty (which in the case of one of the comparators resulted in the highest fine being increased over 200 fold), the overall penalty was relatively low compared to a company in Sol's position where a high proportion of its global turnover was earned in the relevant markets. One company was also awarded 100 per cent leniency for one of its fines and another comparator was fined for two not three infringements.
155. The potential for an apparent disparity to arise for companies of broadly the same overall size where one earns much of its turnover from the relevant market and another earns the bulk of its income from other activities is inherent in the method set out in the Guidance. Step 1 undoubtedly links the calculation of the penalty to turnover in the relevant market. That link between the starting point of the fine and the relevant turnover is clearly set out in the Guidance and has not been challenged (putting on one side the question of the last business year discussed above). The

effect of Step 1 has been mitigated by the OFT by applying the MDT to increase the fine for some companies and applying the 4 per cent cap (of which Sol was a beneficiary) to reduce the fine for others. It may be further mitigated by the use of the Infringement Year rather than the Decision Year. We do not consider that Sol's comparison with the other companies demonstrates that the link operates unfairly or in a discriminatory manner.

156. Sol also compared themselves with the 33 other undertakings active in the East Midlands – the companies which Sol says are its competitors for business in that area. Only one of those received a higher fine than Sol expressed as a percentage of global turnover. They compared themselves with the 60 other addresses who received fines for infringements in the education sector, the product sector in respect of which Sol was fined. Again Sol argued that an analysis of the 84 individual fines imposed for infringements in the education sector, showed “the same discriminatory picture”. In our judgment, this analysis proves too much. It shows how invidious any attempt to even out the fines as between undertakings in the manner suggested by Sol would have been. Any adjustment to bring the fines more closely into line measured by one parameter would inevitably lead to a wider divergence between the fines measured by another parameter. An attempt to level the fines imposed on undertakings in the East Midlands area might well result in those fines being more divergent from fines imposed on undertakings in the West Midlands. An adjustment to another company's fine to bring it more into line with Sol's fines in the education sector might make that company's fine diverge more markedly from another company with which it has some other factors in common. There would be no end to such adjustments.

157. The question whether the OFT has acted in a discriminatory manner cannot be addressed simply by looking at the outcome of the fining process. It can only be addressed by looking at the parameters the OFT chose to include in its computation. The OFT did not consider that it was important that all undertakings in the East Midlands area should be subject to the same level of fine, either in absolute terms or in terms of the percentage of their total turnover. Unless Sol can put forward a good reason why the OFT was wrong in that regard, we do not see there is any value in trying to compare companies on the basis of that parameter.

The fact that other parameters, not used in the fine calculation, show widely divergent fines is not, of itself, a cause for criticism.

158. A number of Appellants complained that, although they were not involved in compensation payments, their fine was higher than those imposed on the six undertakings which were, whether as expressed in absolute terms or as a percentage of total turnover. We agree with the OFT that the fact that compensation payments were regarded as more serious than “simple” cover pricing was properly reflected in the calculation by adopting a higher starting percentage and a higher MDT. The fact that this does not result in the overall final fine being in all cases higher for those six undertakings is the result of other factors coming into play. It is not a breach of the principle of equal treatment and nor does that fact evidence any discrimination against companies not involved in compensation payments. We therefore reject the challenges based on comparators with other addressees of the Decision.

X. THE INDIVIDUAL APPEALS

159. We now turn to our assessment of the individual appeals and the recalculation of the penalties. In the light of our finding that the OFT erred in using the Decision Year turnover at Step 1, we start our reassessment of the fine in each case by applying the seriousness percentage to the appropriate Infringement Year turnover figures. To facilitate this exercise, the Tribunal wrote to the OFT on 21 December 2010 asking them to forward to us the relevant data. The data requested were those that had been provided to the OFT in response to the OFT’s information request in April 2008 and included turnover figures in the financial years ending 2000 to 2006 for the relevant markets in which the particular party was alleged, in the statement of objections, to have committed an infringement. The OFT provided those data to the Tribunal in January 2011 (“the OFT data”). We have used those data for those of the Present Appellants who did not include the data for relevant turnover in the appropriate years in their own pleading.
160. Since none of the Present Appellants challenged the starting percentage of 5 per cent applied to them, we have applied that percentage to the relevant market

turnover in the Infringement Year for each infringement. There is no adjustment made for duration at Step 2.

161. Having arrived at a provisional figure for each fine we have considered whether the aggregate figure for all infringements is sufficient to punish the undertaking and to deter that undertaking and other undertakings from committing infringements in the future. We mentioned earlier (at paragraph 74) that submissions raised by other appellants arguing for a lower Step 1 starting percentage were also raised by the Present Appellants in more general mitigation. We have therefore had regard to a number of factors in assessing the need for an adjustment at Step 3 for each of the Present Appellants.
162. First, the relevant turnover used at Step 1 above comes from several years ago. We have borne in mind, when considering the need for an adjustment at Step 3, the importance of ensuring that the fine we set acts as a deterrent in terms of today's money values.
163. Secondly, we note that many of the addressees of the Decision submitted to the OFT that one of the reasons why the practice was so endemic in the industry was a perception that if they did not respond to a prospective client's invitation to tender, this could lead to their removal from future invitations to tender for work for that client. The OFT has accepted that in certain cases such exclusion had taken place and has also accepted that the fear expressed was genuine. We hope that one result of this investigation is that clients recognise that it is in their interests to remove any such perception. Companies invited to bid should be confident that they will not be disadvantaged in future competitions if they decline the invitation on that one occasion. If this motive for unlawful conduct is removed, it is less likely that companies will be tempted to revert to this unlawful activity. Any misapprehension that construction companies may have had about the legality of cover pricing must have been dispelled by this investigation and these appeals. These factors are relevant to the question whether an increase in the penalty at Step 3 is nonetheless needed to ensure adequate deterrence.

164. We also take into account that this is a high turnover and low margin industry so that a penalty representing a particular percentage of turnover is likely to have a greater impact on the undertaking than it would have on an undertaking operating in an industry where margins were typically higher. In deciding in each case what adjustment to make at Step 3 we have had regard to the global turnover of the undertaking in the Decision Year as a broad indication of its financial position. We have not applied any particular percentage to that turnover in order to arrive at a minimum level. Instead, in those cases where we consider that an uplift at Step 3 is necessary for deterrence we have applied a multiplier to the provisional aggregate fine to arrive at a figure we consider appropriate.
165. We have then applied the Step 4 adjustments made by the OFT in the Decision since these were not challenged by the Present Appellants. Finally we have applied any reduction granted for leniency or as a result of accepting the Fast Track Offer. We have divided the resulting aggregate figure equally among the infringements for which a penalty is imposed. Finally, we have rounded down the figure for each infringement to the nearest £1000: this avoids the appearance of a degree of precision which is inconsistent with the way in which we have in fact approached this exercise.

The Galliford Try Appeal

166. The fine imposed on Galliford Try was set out in a table on page 1824 of the Decision and was calculated in the following manner. For each of the three infringements committed by Galliford Try, the OFT applied a starting percentage of 5 per cent to the undertaking's turnover in the relevant market in the year ending 30 June 2009. The highest fine after Steps 1 and 2 was that for Infringement 42. That fine was less than 0.75 per cent of Galliford Try's total worldwide turnover for the year ending 30 June 2009 so the OFT applied the MDT uplift, substantially increasing the amount of the fine for that infringement. At Step 4, a reduction of 5 per cent was granted for each infringement to reflect the introduction of a compliance programme. No adjustment was needed at Step 5. The total gross fine was £11,111,105. A reduction of 25 per cent was granted for each of the infringements because Galliford Try had accepted the OFT's Fast Track Offer bringing the total net fine to £8,333,329.

167. Galliford Try challenged the application of the MDT to its fine. For the reasons we have set out in the earlier part of this judgment, we agree that the way the OFT applied the MDT in this case was flawed. In our judgment, this is an instance where the application of the 0.75 per cent threshold to the worldwide turnover of the whole group in the Decision Year has resulted in a fine which is disproportionate and excessive (see paragraphs 114 to 120 above).
168. Galliford Try also challenged the use of the relevant turnover from the Decision Year rather than the Infringement Year at Step 1 of the OFT's calculation. We have upheld that challenge (see paragraphs 84 to 99 above).
169. We have rejected the arguments raised by Galliford Try in attempting to compare its penalty with penalties imposed on other addressees of the Decision in particular Balfour Beatty and Morgan Sindall (see paragraphs 149 to 153 above).
170. Galliford Try raised a further argument which was not relied on by the other Present Appellants. They submitted that the fine imposed for Infringement 42 (amounting to £1,068,450) was unlawful because the limitation period for prosecuting that infringement had passed. The infringement took place on 12 January 2001. Galliford Try submit that the Tribunal should apply a limitation period of five years, that being the period within which they assert the OFT must take the first step in investigating the infringement. They identify that first step as being the OFT's inspection of Mansell, the other undertaking which had participated in Infringement 42. That inspection took place on 21 February 2006, more than five years after the infringement.
171. We accept the OFT's submission that there is no limitation period in the statutory regime for imposing penalties on infringements. Section 36 confers a power to fine which is not limited in time. This does not mean that there is a lacuna in the law. It means rather that Parliament decided that there should be no limitation period.
172. That being the case, neither section 60 of the 1998 Act nor references to the Tribunal's decision in *Pernod Ricard SA and Campbell Distillers Ltd v Office of Fair Trading* [2004] CAT 10, assists Galliford Try. Section 60 aims at ensuring so

far as possible that courts interpret the provisions of the 1998 Act in line with the corresponding provisions of European Union law. However, it is expressly subject to the need to have regard “to any relevant differences between the provisions concerned” (see paragraph 9 above). The reference in the *Pernod* judgment to the desirability of resolving issues before the Tribunal in the same way as they would be resolved under EU law in an equivalent situation must be subject to the same proviso.

173. We do not accept that the absence of any limitation period offends against the principle of legal certainty which, the OFT accepts, is a fundamental principle applicable in this case. Galliford Try referred us to Council Regulation 2988/74 (OJ 1974 L 319/1) which set an express limitation period for the imposition of fines by the European Commission. A recital to that Regulation refers to a limitation period being “necessary in the interests of legal certainty”. This is not enough, in our judgment, to establish that EU law requires a limitation period to be set for the imposition of fines in the domestic context⁸. We therefore reject this ground of appeal raised by Galliford Try.

174. The OFT’s skeleton argument referred to one of the arguments put forward by Quarmby Ltd in its appeal to the effect that the Limitation Act 1980 applies. The OFT submitted that if the Tribunal upheld that argument, then that would rule out the application of a limitation period by virtue of EU law. We have seen in draft the judgment of the panel of the Tribunal which heard the *Quarmby* appeal and note that they hold that the Limitation Act 1980 does not apply. That does not affect our findings in relation to section 60 of the 1998 Act and Regulation 2988/74.

The Tribunal’s assessment of penalty for Galliford Try

175. We now turn to our reassessment of the penalties imposed on Galliford Try for Infringements 42, 142 and 186. For the purpose of Step 1 we will adopt the relevant turnover data which Galliford Try provided with their notice of appeal. For

⁸ See now Article 25 of Regulation 1/2003 (OJ 2003 L 1/1) which superseded Regulation 2988/74, and sets the five year limitation period; the corresponding recital (31) of Regulation 1/2003 does not mention the principle of legal certainty.

infringement 42 which was committed in January 2001, the Infringement Year was the financial year ending 30 June 2000 and the relevant market turnover in that year was £5,109,000. For Infringement 142 which was committed in March 2003, the Infringement Year was the financial year ending 30 June 2002 and the relevant market turnover in that year was £4,144,000. For Infringement 186 which was committed in March 2004 the Infringement Year was the financial year ending 30 June 2003 and the relevant market turnover in that year was zero.

176. We apply the starting percentage of 5 per cent to these figures. There being no adjustment at Step 2 for duration, this results in the following provisional fines:

	Infringement 42	Infringement 142	Infringement 186	Total
Penalty after Step 2	£255,450	£207,200	0	£462,650

177. The zero figure for Infringement 186 arises because Galliford Try did not have any turnover in the relevant market in the Infringement Year. Indeed, according to their figures, they did not have any turnover in that market until the year ended June 2006. We have considered what proportion of their total turnover was derived from this relevant market in the years in which they were active in that market and for which we have the necessary information:

- In the year ending 30 June 2006 their turnover in the relevant market was 0.3 per cent of their total turnover (£2,747,000 expressed as a percentage of £851,499,000). If that percentage were applied to their total turnover in the Infringement Year, namely £637,825,000, the proxy for relevant market turnover would be £1,913,475 and the penalty at Step 2 would be £95,673.
- In the year ending 30 June 2007, their turnover in the relevant market was roughly 1.4 per cent of their total turnover (£20,603,000 expressed as a percentage of £1,409,700,000). If that percentage were applied to their total turnover in the Infringement year, namely £637,825,000, the proxy for relevant market turnover would be £8,929,550 and the penalty at Step 2 would be £446,477.

- In the year ending 30 June 2009, their turnover in the relevant market was roughly 0.1 per cent (£1,533,000 expressed as a percentage of £1,462,000,000). If that percentage were applied to their total turnover in the Infringement Year, namely £637,825,000, the proxy for relevant market turnover would be £637,825 and the penalty at Step 2 would be £31,891.

178. An average of those three penalties is £191,347. We propose to use that as the Step 1 proxy for this infringement. The table therefore looks like this:

	Infringement 42	Infringement 142	Infringement 186	Total
Penalty after Step 2	£225,450	£207,200	£191,347	£653,997

179. The next step is for us to consider whether any adjustment is needed to ensure that the level of penalty is sufficient to punish and deter Galliford Try and others from further infringements of this kind. We have had regard to the fact that Galliford Try is a substantial undertaking with worldwide group turnover of £1.4 billion in the year end June 2009.

180. In the light of these factors we consider that a penalty substantially in excess of £653,997 is needed. We have applied a multiplier of three to arrive at a fine of £1,961,991.

181. To this fine we apply a 5 per cent reduction since such a reduction was granted by the OFT in respect of each of the three infringements to reflect Galliford Try's efforts to ensure future compliance. We reduce the penalty by a further 25 per cent because Galliford Try accepted the OFT's Fast Track Offer in respect of each of its infringements.

182. This results in a global penalty for the three infringements of £1,397,918. After rounding down, the penalties imposed on Galliford Try for Infringements 42, 142 and 186 should be varied to £465,000 each.

The Apollo Appeal

183. The fine imposed on Apollo was set out in a table on page 1727 of the Decision and was calculated as follows. For each of the three infringements, a starting percentage of 5 per cent was applied to Apollo's turnover in the relevant market in the year ending 31 March 2008. The highest fine after Steps 1 and 2 was that for Infringement 199. That fine was less than 0.75 per cent of Apollo's total worldwide turnover for the year ending 31 March 2008 and the MDT uplift was applied, resulting in a substantial increase in the fine for that infringement. For Infringement 154, there was no turnover in the relevant market (offices in the South East) for that year so the figure at the end of Step 2 was zero. A proxy figure for this relevant turnover was therefore adopted at Step 3 of the calculation.
184. At Step 4, a reduction of 5 per cent was granted for each infringement to reflect the introduction of a compliance programme. No adjustment was needed at Step 5. The total gross fine was £2,150,536. There was no reduction for leniency or the Fast Track Offer so the total fine was £2,150,536.
185. Apollo challenged the use of the Decision Year for the relevant turnover at Step 1. They submitted that it was not clear whether the Guidance in fact adopted the Decision Year but also pressed the point that Apollo's exceptional circumstances would merit a departure from the Guidance in its case. As we have determined that the Guidance did not in fact stipulate the use of the Decision Year relevant turnover at Step 1 we have not considered whether Apollo's circumstances would have justified the OFT's departing from the wording of the Guidance (see paragraphs 111 to 112 above).
186. We have already explained why we rejected Apollo's argument that the OFT could or should have used the year used in the corresponding EU Regulation in its calculation (see paragraphs 101 to 102 above).
187. Apollo's challenge to the application of the MDT in its case was bound up with its complaints about the use of proxy for relevant turnover in respect of Infringement 154. The OFT did not consider it was appropriate for an undertaking to escape having a penalty imposed for an infringement by virtue of having no

turnover in the relevant market (Decision, VI.254/1684 *et seq.*). An adjustment was therefore needed at Step 3 in those cases where the penalty arrived at by Step 2 was nil. The OFT applied a proxy figure of 0.14 per cent to the undertaking's most recent total turnover. That percentage was described as "a figure based broadly on the median percentage of total turnover represented by the penalty reached at the end of step 2 for all infringements" (Decision, VI.269/1688). In other words, the OFT looked the penalty arrived at by Step 2 for each infringement for each undertaking fined in the Decision and calculated what percentage of that undertaking's total turnover that penalty was. Then they calculated the median figure from those percentages (including those cases where the percentage was zero) and found that this was 0.14 per cent. They then applied that percentage to the total turnover in the Decision Year in the case of undertakings like Apollo who had a nil penalty at Step 2 for one of their infringements.

188. The need for a proxy only arose in Apollo's case because of the use of the Decision Year rather than the Infringement Year. As we shall see later, once the Infringement Year is adopted, the need for a proxy disappears. But in deference to the arguments we heard from the parties, we consider briefly Apollo's criticism of the way the proxy operated, particularly in conjunction with the MDT.
189. Apollo argued that the language used in the Decision indicates that the purpose of the proxy was deterrence (see, for example, paragraph VI.257/1685). This was illegitimate because the MDT was the mechanism that the OFT had devised to deal with deterrence. The proxy was therefore "a form of double punishment by means of the double-counting of the need for deterrence" (see paragraph 30.6 of their Notice of Appeal). We do not accept that the proxy was performing the same function as the MDT: the two aspects of the calculation were aimed at different situations. It is clear to us that the point being made was that the OFT considered it important that a fine should be imposed in respect of each infringement. This policy should not be frustrated by the fact that an undertaking did not have any turnover in the relevant market. We agree with that policy.
190. Apollo also complained that the proxy only applied where there was zero turnover in the relevant market, not where there was a very small amount of turnover. This

led to “striking arbitrariness” as was illustrated by Apollo’s own case. For Infringement 154 the penalty was raised from nil to £356,071 by use of the proxy whereas for Infringement 203 the penalty at Step 3 was £127 because Apollo had £2,541 turnover in the relevant market in the Decision Year. No proxy was applied in that case so that the final fine for Infringement 203 (after a deduction at Step 4) was £121.

191. This is the inevitable result of having to choose a level of turnover which will trigger the use of the proxy. Because the level was set by the OFT at zero, undertakings with a small amount of turnover benefited by having low penalties for that particular infringement. If the level had been set at, say, £3,000 a proxy would have been used for both of Apollo’s infringements but an undertaking with turnover of £3,020 would have had a low fine. That does not make the figures “arbitrary”. However, we agree with Apollo that it is undesirable for there to be such disparity between the fines imposed for three instances of the same conduct. This is why we have ensured that each similar infringement committed by a particular undertaking ultimately attracts the same penalty.
192. In their Notice of Appeal Apollo did not challenge the way in which the proxy had been calculated so we have not considered whether the application of the median percentage was a reasonable way to resolve the problem identified. There is one aspect of the use of the proxy, however, where we agree with Apollo. Because the proxy adjustment was made by the OFT at Step 3 after the adjustment for the MDT uplift, the proxy figure was not used by the OFT when considering which of the infringements had incurred the highest penalty and should therefore be subject to the MDT uplift. We agree with Apollo that, given that the point of the proxy is to generate a figure because the figure at Step 1 is zero, it would have made more sense to treat that proxy as being the figure generated at Step 1, and to consider the need for any further adjustment at Step 3 on that basis.

The Tribunal’s assessment of penalty for Apollo

193. In view of our conclusions on Apollo’s grounds of appeal, we propose to reassess the penalties for Infringements 154, 199 and 203.

194. For the purpose of Step 1 we will adopt the relevant turnover date that Apollo provided in an exhibit to Mr. Couch’s witness statement served with the Notice of Appeal. For Infringement 154 which was committed in July 2003, the Infringement Year was the financial year ending 31 March 2003 and the relevant market turnover in that year was £142,736. For Infringement 199 which was committed in July 2004, the Infringement Year was the financial year ending 31 March 2004 and the relevant market turnover was £307,830. For Infringement 203, the Infringement Year was also the year ending 31 March 2004 and the relevant market turnover for that Infringement was £394,407.

195. We apply the starting percentage of 5 per cent to these figures. There being no adjustment at Step 2 for duration, this results in the following provisional fines:

	Infringement 154	Infringement 199	Infringement 203	Total
Penalty after Step 2	£7,137	£15,392	£19,720	£42,249

196. The next step is for us to consider whether any adjustment is needed to ensure that the level of penalty is sufficient to punish and deter Apollo and others from further infringements of this kind. We have had regard to the fact that Apollo’s worldwide group turnover was about £250 million in the year 31 March 2008.

197. In the light of these factors we consider that a penalty substantially in excess of £42,249 is needed. We have applied a multiplier of 10 giving an overall penalty of £422,490. This may appear on the low side but that is a result of the fact that Apollo had very little turnover in the relevant market. Since the Guidance states that this is an indication of the effect of this undertaking’s infringement on the market, it is right that this should be reflected in the ultimate figure.

198. To this fine we apply a 5 per cent reduction since such a reduction was granted by the OFT in respect of each of the three infringements to reflect Apollo’s efforts to ensure future compliance.

199. This results in a global penalty for the three infringements of £401,365. The penalties for Infringements 154, 199 and 203 should be varied to £133,000 each.

The Seddon Appeal

200. The fine imposed on Seddon was set out in a table on page 1760 of the Decision. For each of the three infringements, a starting percentage of 5 per cent was applied to Seddon's turnover in the relevant market for the year ending 31 December 2008. The highest fine at this stage was that for Infringement 23. That fine was a very small percentage of the total turnover of Seddon in the year ending 31 December 2008 so an MDT uplift was imposed at Step 3, substantially increasing the fine for that infringement. A reduction of 5 per cent was granted for each infringement at Step 4 to reflect the introduction of a compliance programme by Seddon. The overall gross fine for the three infringements was £2,022,195. Seddon had accepted the OFT's Fast Track Offer for each of the Infringements and was granted a reduction of 25 per cent for each, bringing the overall fine to £1,516,646.

201. Seddon challenged the use of the Decision Year turnover in respect of all three infringements on the basis that they were committed before the OFT's revised Guidance was issued in 2004. They therefore argued that they had a right, under article 7 ECHR to have their penalty assessed on the basis of the Infringement Year. Seddon also argued that the use of the Decision Year approach was unfair and unjust in Seddon's case because their turnover in that year was "abnormally high" (see paragraph 95 of their Notice of Appeal).

202. We have explained earlier why we reject the argument based on article 7 ECHR (see paragraphs 103 to 110 above). However since a different argument has prevailed on this point, we have determined that Seddon should succeed in its challenge to the application of the Decision Year.

203. Seddon also challenged the application of the MDT which, it submitted, massively inflated the penalty that would otherwise have been imposed. We have rejected the suggestion that group turnover taken into account for the purpose of calculating any uplift for deterrence should be limited to tendered construction activity as Seddon suggests. But we agree with Seddon that the OFT's reliance on the *Makers*

decision as justifying its approach to the MDT in these cases was in large part misplaced.

204. Seddon also raised a number of issues which it said were relevant to the Tribunal's assessment of the penalty. We have explained why we reject the points raised about the inclusion of non-tendered work in the relevant market turnover (see paragraphs 125 to 130 above); about the imposition of a penalty for each of the infringements (see paragraphs 121 to 123 above); about the alleged arbitrary choice of infringements (see paragraph 124 above) and the alleged discrimination by comparison with undertakings involved in compensation payments (see paragraph 158 above).

205. As regards the points Seddon raises concerning the arrangements it has put in place to ensure future compliance and its cooperation with the OFT's investigation, we consider that these were appropriately considered by the OFT and taken into account to the extent merited in Step 4 of the OFT's calculation.

The Tribunal's assessment of penalty for Seddon

206. In view of our conclusions on Seddon's grounds of appeal, we propose to reassess the penalties for Infringements 23, 39 and 176.

207. For the purpose of Step 1 we have used the relevant turnover taken from the OFT data (see paragraph 158 above). As regards Infringements 23 and 39 this presented us with a difficulty in that Infringements 23 and 29 were committed in 2000 and the appropriate Infringement Year figures would be those for the financial year ending 31 December 1999. The figures provided by the OFT go back only to the calendar year 2000. We have therefore used the earliest figures available to us namely those for the calendar year 2000. Thus, for Infringement 23 which was committed in September 2000 we have used the relevant turnover in the financial year ending 31 December 2000, namely £3,928,748. For Infringement 39 which was committed in December 2000 we have used the relevant turnover in the financial year ending 31 December 2000, namely £372,124. For Infringement 176, the Infringement Year was the year ending 31 December 2003 and the relevant turnover in that year was £313,645.

208. We apply the starting percentage of 5 per cent to these figures. There being no adjustment at Step 2 for duration, this results in the following provisional fines:

	Infringement 23	Infringement 39	Infringement 176	Total
Penalty after Step 2	£196,437	£18,606	£15,682	£230,725

209. The next step is for us to consider whether any adjustment is needed to ensure that the level of penalty is sufficient to punish and deter Seddon and others from further infringements of this kind. We have had regard to the fact that Seddon's worldwide group turnover was £246,436,058 in the financial year ending 31 December 2008.

210. We consider that a penalty in excess of £230,725 is needed. We consider that a multiplier of three is appropriate in Seddon's case bringing the aggregate penalty to £692,175.

211. To this fine we apply a 5 per cent reduction since such a reduction was granted by the OFT in respect of each of the three infringements to reflect Seddon's efforts to ensure future compliance. We apply a further 25 per cent reduction because Seddon accepted the OFT's Fast Track Offer in respect of all three infringements.

212. This results in a global penalty for the three infringements of £493,174. Having divided this by three and rounded down to the nearest £1000, the penalties for Infringements 23, 39 and 176 should be varied to £164,000 each.

The Interclass Appeal

213. The fine imposed on Interclass was set out on page 1775 of the Decision. For both the infringements, the OFT applied a starting percentage of 5 per cent to the turnover in the relevant market in the year ending 31 October 2008. No MDT uplift was applied in this case. At Step 4 a reduction of 5 per cent for each infringement was granted to reflect the introduction of a compliance programme by Interclass. The gross aggregate penalty was £619,207. Interclass had accepted the OFT's Fast Track Offer in respect of both infringements and so was granted a 25

per cent reduction for each infringement. The final net penalty imposed was £464,406.

214. Interclass did not challenge the starting point of 5 per cent used by the OFT at Step 1 in relation to its infringements. They argued nonetheless that the fine ultimately imposed did not reflect the fact that the OFT had apparently concluded that the infringement was of a medium level of seriousness. Interclass relied on the fact that the industry is characterised by high turnover and low margins, particularly because of the inclusion of subcontractors' fees in that reported turnover. The failure of the OFT to take this into account meant, Interclass argued, that the penalty imposed had a disproportionate impact on Interclass's business and was unjust. We have explained that we agree with Interclass that the OFT erred in not taking this factor into account sufficiently in its assessment of the penalties (see paragraphs 131 to 135 above).
215. Interclass also relied on the fact that there was no evidence that the infringements had any effect on prices charged. They argued that the finding that cover pricing was endemic in the industry should be treated as mitigating the seriousness of their infringements. These arguments were considered by the Tribunal in *Kier* and we have said earlier that we agree with the analysis of the seriousness of these infringements set out there (see paragraphs 79 to 81 above).
216. Interclass challenged the use of the Decision Year turnover at Step 1 relying on the argument that because their infringements were committed before the new Guidance was issued in May 2004, the OFT was required by article 7 ECHR to apply the earlier Guidance which stipulated the use of the Infringement Year. We have rejected this argument but we will recalculate Interclass's penalties on the basis of its Infringement Year income because other arguments supporting this ground of appeal have succeeded.
217. Interclass also challenged the fact that the OFT had declined to give Interclass a reduction in the amount of the fine because of financial hardship. It is convenient to come back to this point once we have recalculated the fine so that we can determine whether the fine so recalculated should be reduced for this reason,

having regard to the evidence of financial hardship that Interclass have placed before us.

218. The other points raised by Interclass in their Notice of Appeal, namely the alleged wrongful inclusion of turnover for non-tendered work at Step 1, the alleged arbitrary choice of infringements, the alleged discrimination against SMEs and against Interclass in comparison with other addressees of the Decision have been considered and rejected by us as explained earlier in this judgment.

Tribunal's assessment of penalty for Interclass

219. For the purpose of Step 1 we have used the OFT data as to the relevant turnover in the Infringement Years. For Infringement 75 which was committed in September 2001 the Infringement Year is the financial year ending 31 October 2000 and the relevant market turnover in that year was £3,872,814. For Infringement 150 which was committed in June 2003, the Infringement Year was the financial year ending 31 October 2002 and the relevant market turnover for that year was £1,837,870.

220. We apply the starting percentage of 5 per cent to these figures. There being no adjustment at Step 2 for duration, this results in the following provisional fines:

	Infringement 75	Infringement 176	Total
Penalty after Step 2	£193,640	£91,893	£285,533

221. The next step is to consider whether any adjustment is needed to ensure that the level of penalty is sufficient to punish and deter Interclass and others from further infringements of this kind. We have had regard to the fact that Interclass's worldwide group turnover was about £24.5 million in the year ending 31 October 2008. In the light of all the relevant factors we consider that a penalty in excess of £285,533 is needed. We consider that a multiplier of two is appropriate bringing Interclass's fine to £571,066. To this fine we apply a 5 per cent reduction at Step 4 and a further 25 per cent reduction because Interclass accepted the OFT's Fast

Track Offer in respect of both the infringements. This results in an aggregate penalty for the two infringements of £406,884.

222. One of Interclass's grounds of appeal was that the OFT had been wrong to reject their claim for financial hardship. This challenge was, of course, made in the context of the fine that the OFT proposed in the Decision, namely £464,406 (after taking into account Step 4 and FTO adjustments). Interclass submitted that they were struggling to break even and made a loss in the year preceding the appeal. Even though the OFT allowed companies to pay the fine by instalments over three years, Interclass asserted that the penalty imposed in the Decision would plunge Interclass's cash flow into the red, and might lead to Interclass going out of business. They argued that "effectively the penalty threatens to be capital punishment for Interclass" (see paragraph 86 of the Notice of Appeal). Interclass complained that the OFT's reasons for rejecting Interclass's request for a reduction on the grounds of financial hardship were completely opaque.

223. The OFT dealt with its approach to financial hardship claims in paragraphs VI.276/1689 onwards of the Decision. The OFT records that it rejected many requests for reductions on the grounds that inadequate information had been provided by the undertaking. The OFT referred to the Tribunal's judgment in *Sepia Logistics Limited (formerly known as Double Quick Supplyline Limited) and Precision Concepts Limited v Office of Fair Trading* [2007] CAT 13, at [100]-[101] where the applicable principles were summarised as follows:

"The financial position of the undertaking in question is not something that the OFT must consider in all cases, but rather is something that the OFT may consider, upon the application of the undertaking. In making such an application, it seems to us that the onus must be on the applicant to provide the regulator with all information and/or documentation it wishes to have taken into account

...

It is for the applicant to satisfy the OFT that they are eligible for a reduction in penalty, and not for the OFT to disprove that application. Given that in this case the OFT did not have at the time it took its Decision sufficient information to assess the financial position of the undertaking as a whole, we think it was reasonable for the OFT to conclude that a reduction in the level of penalty on the grounds of financial hardship was not justified."

224. The Decision did not set out in detail the criteria that the OFT had applied to assessing whether financial hardship had been established. It stated only that the OFT considered the following three factors (Decision, VI.285/1692):

- The level of net current assets relative to the size of penalty for the undertaking concerned;
- The level of net assets, adjusted to take account of dividend payments made by the undertaking in the last three years, relative to the size of penalty for the undertaking; and
- The level of profit (or loss) after tax averaged over the last three years for which accounts were available, relative to the size of penalty for the undertaking.

225. These factors reflected the fact that payment of a penalty might be financed either by a reduction in shareholder funds or from the future profits a firm might make during the period over which the penalty is payable. In paragraph 156 of its Consolidated Defence the OFT explained that it had applied two key indicators of financial hardship. First, it considered the fine as a percentage of “adjusted net assets” (adjusted, that is, to add back in dividend payments over the previous three years). The OFT adopted an initial threshold of 50 per cent of adjusted net assets at the last balance sheet date as the level above which financial hardship might arise from the penalty. The second key indicator was the penalty as a percentage of profit after tax. Here the threshold adopted was 150 per cent of profit after tax, either in the most recent financial year or as an average of the last three financial years. The 150 per cent figure was based on the assumption that the fine would be paid over three years. The OFT considered it reasonable that an undertaking should pay up to 50 per cent of its net profit in fines over three years.

226. If the amount of the penalty exceeded either of these threshold figures, the OFT proceeded to consider the undertaking’s circumstances in greater detail. If the amount of the penalty fell below the thresholds the OFT concluded that the party’s financial viability was unlikely to be threatened by the penalty in the absence of

compelling evidence to the contrary. For those undertakings where the OFT accepted a plea of financial hardship, the reduction was applied at Step 3 of the calculation though it appears that the fine to which the threshold tests was applied was the fine that would actually be payable by the undertaking in the absence of any such reduction, that is the fine after taking account of any Step 4 adjustment and of the adjustment for leniency or the acceptance of the Fast Track Offer.

227. As regards Interclass's claim of financial hardship, the OFT found in the Decision that an application of the criteria to Interclass's proposed penalty demonstrated that there might be initial concerns about its financial position. However, an assessment of the penalty against its net current assets showed that there was insufficient evidence that the penalty would seriously threaten Interclass's viability, particularly given the offer to accept payment by instalments over three years (Decision, VI.527/1775).

228. In its appeal before us, Interclass's assertion that it would suffer financial hardship was supported by the witness statement of Mr. David Jones, the Managing Director and Financial Director of Interclass plc. Mr. Jones recorded that earlier in 2009, the workforce took a 10 per cent pay cut and there were redundancies and short time working. He feared that the penalty might be "the final nail in our coffin". He described the difficulties that a construction company faces if it is unable to maintain a line of credit from its bank because of a reduced credit rating or if it loses its good reputation for paying subcontractors promptly.

229. His evidence covered the company's financial results for the year ending 31 October 2008. In that year, Interclass made a post-tax loss of £73,000. As a percentage of the previous three years' audited profits, the penalty represented over 500 per cent. He stated further that the proposed penalty represented 47.9 per cent of Interclass's net current assets for the year ended 31 October 2008. Net current assets for that year were, according to the group consolidated balance sheet, £968,714.

230. In its Consolidated Defence and skeleton argument the OFT appeared sympathetic initially to these claims, though it had certain concerns over the robustness of the

financial evidence submitted by Interclass with its appeal. At the hearing before us, the OFT confirmed that it was highly sceptical about Interclass's claims of financial hardship. The OFT drew our attention to evidence indicating that emoluments for the three directors of Interclass plc had been £212,000 in 2004 and £186,049 in 2007 but had risen to £481,451 in the year ended 31 October 2008, the year in which Interclass made a post tax loss of £73,000. Mr. Unterhalter commented that in a small company of this kind, it is a matter of choice to some degree whether the directors take their pay as dividend or emolument but that of course affects the apparent profitability of the company.

231. Mr. Unterhalter also pointed to the fact that in the published accounts for Interclass Holdings Ltd for the year ended 31 October 2008, the Director's Report (signed by Mr. Jones) states that the Group balance sheet shows a satisfactory position; that the bank is "currently satisfied with the company's financial performance" and that the director of Interclass Holdings Ltd did not think that there was any risk of facilities being withdrawn. This painted a different picture from Mr. Jones' more pessimistic predictions in his witness statements.
232. We agree with the OFT that when considering financial hardship it is appropriate to look at the group as a whole rather than at the companies within the group that are directly involved in the infringing conduct. The relevant question is whether the continued viability of the undertaking is threatened. We also agree that the substantial increase in directors' emoluments for the year ended 31 October 2008 casts doubt on Interclass's claim of hardship. The fact that pay and bonuses were contractually due under terms and conditions put in place in more prosperous times is not the end of the matter. If the directors are not prepared to forego or postpone substantial bonus or pension contribution entitlements even though this may jeopardise the existence of the company, they cannot at the same time argue that the Tribunal should substantially reduce the fine to enable the company to stay afloat.
233. In our judgment, Interclass has not established that they should have been granted a reduction in the fine for financial hardship on the basis of the figures for the year ended 31 October 2008.

234. Interclass also provided us with updated figures in the form of their draft accounts for the year ended 31 October 2009. The OFT accepted that we were entitled to take this material into account, even though it arose only after the adoption of the Decision. The OFT also accepted that the draft 2009 accounts record a loss for the year of £347,250 and that if the three year average were calculated on these unaudited accounts, the company would have shown a loss over three years. Further, shareholders funds amount to £883,936 that year and directors' emoluments appear to have fallen back to the previous more modest level. The OFT said in paragraph 171 of its Consolidated Defence that it considers that had such information been available at the time of the Decision, it might have led to a reduction in the level of penalty.
235. In their skeleton argument, Interclass raised two challenges to the OFT's response to claims of financial hardship. As to the profit threshold they submitted that setting the threshold at 150 per cent appeared to indicate that the appropriate penalty should be set at a year and a half's post tax profit. We agree with the OFT that this is not correct since it ignores the fact that the addressees were allowed to spread the payment of the penalty over three years. As to the net asset threshold, Interclass argue that a 50 per cent threshold cannot be right for an infringement which merits a 5 per cent starting percentage at Step 1 because that implies that where the infringement merited a 10 per cent starting point at Step 1, the threshold would be 100 per cent of net assets. We do not see that there is or should be any direct correlation between the thresholds set for financial hardship reductions and the starting percentage used in Step 1 for the particular infringement. The financial hardship thresholds, where these are applied by the OFT, are aimed at ensuring that the penalty does not render the undertaking unviable. They are not connected to the seriousness of the infringement.
236. Although we do not accept Interclass's specific criticisms of the OFT's treatment of financial hardship claims, we have nonetheless considered whether the revised fine that we would propose to set for Interclass should be reduced because of its poor financial performance in the year ending 31 October 2009, the most recent figures available to us. That fine would be £406,884 once the adjustment of 5 per cent at Step 4 and the reduction of 25 per cent under the Fast Track Offer are taken into

account. Looking at the matter broadly we consider that a reduction of 20 per cent should be granted to Interclass on grounds of financial hardship.

237. This results in a global penalty for Interclass's two infringements of £325,507. After allocating the fine between the two infringements and rounding down, the penalties imposed on Interclass are varied to £162,000 each.

Tomlinson

238. The calculation of the fine imposed on Tomlinson was set out on page 1758 of the Decision. For all three infringements, the OFT applied a starting percentage of 5 per cent to the turnover in the relevant market in the year ended 31 December 2008. The highest fine at that point was for Infringement 187. Because that fine was more than 0.75 per cent of Tomlinson's total turnover for the year ended 31 December 2008, no MDT uplift was applied. At Step 4 a 5 per cent reduction in each fine was given to reflect Tomlinson's compliance programme. The aggregate gross penalty was £1,692,359. Tomlinson had accepted the OFT's Fast Track Offer in respect of all three infringements and so was granted a 25 per cent reduction for all three. The final overall fine was therefore £1,269,270.

239. Tomlinson's appeal raised many of the points raised by the other Present Appellants. They submitted that the overall fine imposed was too harsh, given that the OFT's choice of a 5 per cent starting point for Step 1 indicated that it regarded the infringements as of medium gravity. They relied on the fact that this is a high turnover but low margin industry and that there is no evidence that the infringements affected the prices charged to customers as mitigating the seriousness of their conduct.

240. As regards the use of the Decision Year turnover at Step 1 rather than Infringement Year turnover, they relied on their alleged rights under article 7 ECHR to have the earlier Guidance applied. This was asserted only in respect of Infringements 46 and 187 which were committed before May 2004. Infringement 201 was committed in July 2004 so that their submissions in respect of article 7 do not apply (although it is not clear why, given that the current Guidance was only adopted in December 2004). However they also argued more generally in respect of all three

infringements that the use of the Decision Year approach was unfair and led to unjust and disproportionate fines in Tomlinson's case.

241. Although we have rejected Tomlinson's arguments based on article 7 ECHR, we uphold their challenge to the use of the Decision Year turnover at Step 1 in respect of all three of their infringements, for the reasons we have explained earlier.
242. Tomlinson raised two other grounds of appeal. First they criticised the OFT for failing to grant Tomlinson a discount on the basis of financial hardship. They submitted that the reasons why the OFT rejected their hardship claim were "opaque" (see paragraph 99 of the Notice of Appeal). Tomlinson did not go so far as to say that paying the penalty would threaten the viability of the Group, but they argued that if their working capital is reduced, their business will shrink and it may be more difficult for them to win new work. They also stated that the fine had already caused them to reject an investment plan which would have created new jobs and is likely to mean that Tomlinson employees will not receive any benefit from the profit sharing bonus scheme operated by the company over the coming years.
243. This submission regarding financial hardship was made in the context of the fine proposed in the Decision which was £1,269,270. We will consider Tomlinson's claim for a reduction for financial hardship when we come to the recalculation of the fine, below.
244. Tomlinson submitted that their fine should be reduced because they had made a mistake in the calculation of their turnover figures. Some of the projects which had been included in the market for 'education' in the East Midlands in 2008 did not in fact fall within that sector. In all, Tomlinson told us, 21 projects were misallocated to the education sector with the consequence that the true education sector turnover was £19,683,253 rather than the £32,396,337 which was the sum reported by them to the OFT. This resulted in a significant inflation of the ultimate fine.
245. The correction Tomlinson urged us to make relates to the turnover in the Decision Year. So the point, as pleaded, arises only if we are wrong that the fine should be

based on the Infringement Year rather than the Decision Year. However, since Tomlinson may find that the figures for the Infringement Year are also incorrect, it is useful for us to set out our findings on this point, to avoid a proliferation of such points being raised in the future. The OFT accepted that the Tribunal can admit evidence of a mistake made by the undertaking even though that evidence only came to light after the Decision was taken. It also accepted that we have power to adjust the penalty imposed to correct for any such mistake.

246. We have seen the evidence of Mr. Barry Swards who is the Chairman and Managing Director of G F Tomlinson Group Ltd and Mr. Roy Collis who is the Managing Director of G F Tomlinson Building Ltd. We sought further information about precisely how the original turnover allocation exercise was undertaken by Tomlinson and what action had been taken after the Decision to reveal the supposed misallocation of turnover.

247. The OFT's first request for turnover information was made in the letter it sent accompanying the Statement of Objections in April 2008. By that stage it was already clear to the undertakings, from the infringements alleged in the Statement of Objections, which relevant product and geographic markets were likely to be significant for the purpose of calculating any fine imposed. The OFT asked the companies under investigation to provide turnover figures for those relevant markets. Further requests for updated data were made later on in the investigation.

248. These requests were referred to Tomlinson's Group Chief Accountant. He went through all the projects undertaken in the East Midlands by the Tomlinson Group for the appropriate years. He based his allocation on a short description which is included in the management accounts for each project. There were several hundred individual projects examined in this way and he put each one into one of four categories: 'private housing', 'education', 'offices' and 'other'.

249. The analysis of turnover for the financial year ultimately used by the OFT to calculate the fine – the calendar year 2008 – was supplied by Tomlinson to the OFT in May 2009. Those figures were accompanied by a letter from Cooper Parry, Tomlinson's auditors, confirming that they had taken a sample of 15 contracts

selected at random from the 2008 contracts making up Tomlinson's total turnover for that year. Cooper Parry reported that they had verified from supporting documentation that the contracts had been properly classified.

250. Following the adoption of the Decision, Mr. Collis examined all the contracts which had been allocated to the "education in the East Midlands" sector, this being the sector which resulted in the highest of the three fines imposed on Tomlinson. This time he looked at the supporting documentation for each contract in that sector. The supporting documentation revealed, Mr. Collis said, that in some cases the short description originally relied on had been "inaccurate" and the contract could not properly be described as relating to education. The problem was in part because the short description in the management accounts depended primarily on the location of the building rather than the nature of the work. Not all projects undertaken at the premises of a school or university were regarded by Tomlinson as 'educational' in nature.

251. In our judgment there are serious flaws in what Tomlinson has done here. As regards the original turnover attribution, the method chosen for sifting through the Group's potentially relevant contracts could fairly be described as "rough and ready". This is unobjectionable given the large number of contracts involved and the fact that the OFT was prepared in this case to grant the undertakings some latitude in arriving at their turnover figures. The method is also unobjectionable because any errors are just as likely to be to the disadvantage of the company (by including turnover in a relevant market when it ought to have been put in "other") as to its advantage (by putting turnover in the "other" category which should have been included in one of the relevant markets).

252. However, if the company then goes through **only** those contracts which have been included in one of the relevant turnover categories and weeds out the contracts which do not really fall into it, this unbalances the exercise unless the contracts initially allocated to the "other" category are similarly re-examined to identify those which should have been included in one of the relevant markets but were not. The partial re-examination of the turnover attribution undertaken by Tomlinson is therefore not legitimate.

253. Further, we agree with the OFT that the reclassification by Tomlinson of the 21 contracts concerned is most unsatisfactory. When Tomlinson first alerted the OFT to this supposed mistake after the Decision had been adopted, the OFT asked them to provide confirmation of the errors from Cooper Parry. It is clear from the ensuing correspondence that Cooper Parry was at this stage expressly instructed by Tomlinson not to express any opinion on whether individual contracts could properly be described as having been carried out in the education sector. We do not agree with Tomlinson that the opinion of Tomlinson's management as to whether, for example, a sports pavilion built on college premises is properly to be regarded within the "education" relevant market is to be preferred to the views of an independent auditor, properly instructed. If there are contracts which fall on the border line, clarification should have been sought from the OFT at the time. We understand that three of the 15 sample contracts certified in 2008 by Cooper Parry as falling within the "education" category are among the 21 contracts which Tomlinson now argue were included by "mistake". Cooper Parry has not been asked whether they agree that these contracts are not really "educational". As we read their letters, they are very far from admitting that they made any mistakes in May 2008.

254. We therefore reject Tomlinson's claim to revise the turnover figures on the basis of a mistake.

The Tribunal's assessment of penalty for Tomlinson

255. In view of our conclusions on Tomlinson's grounds of appeal, we propose to reassess the penalties for Infringements 46, 187 and 201 imposed on Tomlinson.

256. For the purpose of Step 1 we have used the OFT data for the relevant turnover figures for the Infringement Years. For Infringement 46 which was committed in January 2001, the Infringement Year is the financial year ending 31 December 2000 and the relevant market turnover was £102. For Infringement 187 which was committed in April 2004, the Infringement Year is the financial year ending 31 December 2003 and the relevant market turnover for that year was £4,226,288. For Infringement 201 which was committed in July 2004, the Infringement Year is the

financial year ending 31 December 2003 and the relevant market turnover for that year was £173,967.

257. We have considered whether the fact that the relevant turnover for one of these infringements is a negligible amount should cause us to substitute a proxy figure for the actual turnover figure. We have looked at the turnover figures for Tomlinson in that relevant market over a number of years and note that they vary greatly from year to year. We have also borne in mind the point we made at paragraph 191 above about the advantage conferred on addressees of the Decision who had a small amount of turnover rather than none in a relevant market during the year on which Step 1 is based. We do not therefore consider it would be appropriate to use a proxy figure in this instance. We therefore apply the starting percentage of 5 per cent to these figures. There being no adjustment at Step 2 for duration, this results in the following provisional fines:

	Infringement 46	Infringement 187	Infringement 201	Total
Penalty after Step 2	£5	£211,314	£8,698	£220,017

258. The next step is for us to consider whether any adjustment is needed to ensure that the level of penalty is sufficient to punish and deter Tomlinson and others from further infringements of this kind. We have had regard to the fact that Tomlinson's worldwide group turnover was about £126 million in the calendar year 2008. In the light of all the relevant factors we consider that a penalty in excess of £220,017 is needed. We consider that a multiplier of three is appropriate in Tomlinson's case bringing the aggregate fine up to £660,051.

259. To this fine we apply a 5 per cent reduction since such a reduction was granted by the OFT in respect of each of the three infringements to reflect Tomlinson's efforts to ensure future compliance. We apply a further 25 per cent reduction because Tomlinson accepted the OFT's Fast Track Offer in respect of all three infringements.

260. This results in a global penalty for the three infringements of £470,286. Having divided this by three and rounded down, the penalties for Tomlinson's infringements should be varied to £156,000 each.
261. At this point, we return to Tomlinson's assertion that the penalty proposed in the Decision would have caused it financial hardship. This ground of appeal was supported by evidence from Barry Sowards and Roy Collis. Tomlinson accept that the OFT was correct in calculating that the fine proposed in the Decision amounted to 14 per cent of the adjusted net assets of the Tomlinson Group: see paragraph 163 of the Consolidated Defence. They argued that the penalty represented 125 per cent of annual post-tax profits for the year 2008 and 92 per cent of average profit after tax between 2006 and 2008. Tomlinson argued that on the basis of these figures, they should have been granted a reduction for financial hardship. They submitted that the OFT's thresholds (described at paragraph 225 above) were too high and did not reflect reality. The thresholds, they argued, appeared to have been chosen on an entirely arbitrary basis and had no apparent relation to the conditions in the construction industry.
262. We agree with the OFT that a reduction for financial hardship should be an exceptional step and that a high threshold is appropriate. Companies which are found to have committed object infringements cannot expect to emerge from the process unscathed. The fine that we have proposed, even after the uplift to ensure deterrence, is substantially below the fine set in the Decision, namely £1,269,270. Using the figures provided to us by Tomlinson we calculate that the revised penalty is less than 10 per cent of adjusted net assets and less than 60 per cent of post-tax profit for the financial year 2008. We do not consider that Tomlinson's financial position merits a reduction for financial hardship.

The Sol Appeal

263. The table describing the fine imposed on Sol was set out on page 1814 of the Decision. For each of the three infringements, a starting percentage of 5 per cent was applied to the relevant turnover for the year ended 31 March 2009. Infringements 156 and 187 were in the same relevant market, so the amount of the fine at this stage was the same for both and was higher than that for Infringement

142. That fine was more than 0.75 per cent of Sol's total turnover for the year ended 31 March 1999 so no MDT uplift was applied. The OFT calculated in respect of each fine at Step 3 what percentage of total turnover that fine represented and added those percentages together. Because that aggregate percentage indicated that the total fine for Sol would be more than 4.5 per cent of total turnover, a reduction of 20 per cent was granted for each of those two fines. This adjustment is discussed in more detail below. At Step 4, an additional 5 per cent was added to each fine because one of Sol's directors had been involved in the infringements. However this was cancelled out by the grant of a 5 per cent reduction for each fine because of Sol's compliance programme. The aggregate gross fine imposed on Sol was therefore £3,337,640. Sol had successfully applied for leniency and had been granted a 45 per cent reduction in fine for each of its infringements. The overall fine imposed was therefore £1,835,702.

264. Sol's first ground of appeal was that the fine imposed on it was unfair and disproportionate in itself. The first point they raised in support of this was their comparison with fines imposed for corporate criminal activity. We have explained why we do not find that comparison useful in this context (see paragraphs 136 to 139 above).
265. Their second point concerned the fact that Sol was one of the undertakings which benefited from a reduction in the overall level of the fine imposed because two of its infringements were committed in the same relevant market. They complained that their fine was still too high because the reduction applied was unreasonable and unexplained, "apparently aimed at a pre-ordained and arbitrary conclusion that had no basis in any assessment of any differentiating factor between the individual cases" (see paragraph 34b of their skeleton argument).
266. We have explained in paragraphs 36 to 38 above that the trigger for the reduction was whether, if one expresses each of the fines for the three infringements at Step 2 as a percentage of the total turnover of the relevant undertaking in the Decision Year and then adds those percentages together, the figure arrived at was more than 4.5. Sol suggested that it was unfair that the cap was set at such a high level. They calculated that 90 of the 103 undertakings received fines that were less than 3 per

cent of their total global turnover and that Sol's fine was more than four times the size of the fine imposed on 30 of the other undertakings, expressing the fine as a proportion of total turnover.

267. The OFT indicated that the aim of the adjustment was to ensure that penalties for particular undertakings should not impose a significantly higher burden than the majority of penalties imposed on infringing undertakings. The method adopted to ensure this was to bring the aggregate of the percentages to a figure that is below 4. That threshold "was considered to be a level which is sufficient to ensure deterrence and which is within the range of penalties faced by the other Parties". The OFT was rather slow to explain in detail how it had arrived at the reduction in the cases of those undertakings who had more than one infringement in the same relevant market. It is apparent from the figures that the reduction was not intended to reduce the fines to a level where the ultimate fine, expressed as a percentage of total turnover, equalled 4.5 per cent. Looking at the eight undertakings which benefited from this adjustment, their ultimate fines, expressed as a percentage of total turnover ranged from 2.1 per cent to 3.8 per cent and the percentage reduction applied to the fine varied from 70 per cent to 20 per cent.

268. It was only after the Tribunal requested a written explanation of precisely how the adjustment had been made that this was clarified, in the OFT's letter dated 26 July 2010. The aim of the adjustment was to reduce the aggregate of the penalty percentages to below 4. This was achieved by applying the minimum percentage figure needed to reduce the penalty at Step 2 to below 4 but only using percentage figures which ended with either 0 or 5. For Sol, the aggregate of the penalty percentages at Step 2 was originally 4.7. To reduce the figure of 4.7 to a figure which is below 4, one must apply a discount of 20 per cent to 4.7. A discount of only 15 per cent would not be sufficient because this would result in a figure of 3.995 which, when rounded up, would not be **below** 4. For another of the eight companies, whose unadjusted percentages added up to 12.33, a reduction of 70 per cent was needed (bringing the aggregate down to 3.69) because a reduction of 65 per cent would only bring 12.33 down to 4.3. We emphasise here that the exercise undertaken by the OFT was not to reduce the final fine to a level which meant that the fine was below 4 per cent of total turnover in the Decision Year. Rather, it was

to calculate the percentage reduction which one must apply to the aggregate of the percentages at Step 2 in order to bring that aggregate figure down to below 4. That percentage reduction was then applied to the fines at Step 3. The one case where the final aggregate fine was 2.1 per cent of global turnover was the result of combining this reduction with a reduction for financial hardship.

269. Although this method of adjustment seems rather complicated, we can see that these eight companies posed a dilemma for the OFT. The schema for imposing fines created these “outliers” in the sense that the fines expressed as a proportion of turnover for these undertakings were much higher than the fines for the other companies being fined in the same Decision. The OFT was right to seek to reduce them.

270. We are not persuaded by Sol’s claim that it is unfair that the relationship between its fine and that of the seven other companies whose fines were adjusted was changed by the adjustment in that before the adjustment it had the lowest percentage fine of turnover and after the adjustment it had the highest. There is no particular reason why Sol’s penalty should be compared with the seven other companies who also benefited from the adjustment or why their fines should bear any particular relationship to each other. We therefore reject Sol’s criticism of this adjustment. It is not discriminatory or arbitrary or “purely mechanistic”. The method used did, however, lack transparency because it was not fully explained in the Decision or in the OFT’s skeleton argument how the figures had been arrived at, given that the adjustment did not result in all eight undertakings receiving a fine amounting to no more than 4 per cent of worldwide turnover in the Decision Year.

271. We accept that the method chosen by the OFT was one reasonable way of responding to the problem posed by the outliers, though there would have been other more transparent and less complicated ways. We dismiss Sol’s complaints about this aspect of the fining process.

272. Sol’s third argument in support of its contention that the overall fine imposed was too high was that the OFT had failed to take into account the fact that the level of turnover in the Decision Year in the relevant markets in which the Infringements

were committed was exceptional. They argue that had any year other than 2008/2009 been used, the maximum fine that could have been imposed would have been substantially smaller so that the choice of year had inflated the fine considerably. We have rejected this argument in so far as it suggests that the OFT should have picked different infringements for which to investigate Sol (see paragraph 124 above). But in so far as Sol has challenged the use of the Decision Year at Step 1, we have recalculated their fine on the basis of Infringement Year relevant turnover because other arguments on this point have succeeded.

273. Sol's second main ground of appeal was that its fine was unfair when compared with the fines imposed on other addressees. We reject this ground, for the reasons we explained in paragraphs 154 onwards, above.

The Tribunal's assessment of penalty for Sol

274. In view of our conclusions on Sol's grounds of appeal, we propose to reassess the penalties for Infringements 142, 156 and 187.

275. For the purpose of Step 1 we have used the relevant turnover data provided in the OFT data. For Infringement 142 which was committed in March 2003, the Infringement Year was the financial year ending 31 March 2002 when the relevant market turnover was £2,810,000. For Infringement 156 which was committed in July 2003, the Infringement Year was the financial year ending 31 March 2003 when the relevant market turnover was £9,958,000. For Infringement 187 which was committed in April 2004, the Infringement Year was the financial year ending 31 March 2004 when the relevant market turnover was £12,809,000.

276. We apply the starting percentage of 5 per cent to these figures. There being no adjustment at Step 2 for duration, this results in the following provisional fines:

	Infringement 142	Infringement 156	Infringement 187	Total
Penalty after Step 2	£140,500	£497,900	£640,450	£1,278,850

277. The next step is for us to consider whether any adjustment is needed to ensure that the level of penalty is sufficient to punish and deter Sol and others from further infringements of this kind. We have had regard to the fact that Sol's worldwide group turnover was about £87.7 million in the year ending 31 March 2009.
278. In our judgment the provisional fine is adequate to ensure punishment and deterrence. To this fine we apply a 45 per cent reduction because leniency was granted in respect of all three infringements.
279. We have considered whether it would be appropriate to apply a reduction similar to the 4 per cent cap applied by the OFT in Sol's case. It is not possible to determine whether Sol remains an "outlier" amongst the addressees of the Decision because some of the fines imposed have been adjusted as a result of the appeals to this Tribunal and some have not. It would not be appropriate to determine whether Sol's fine is an outlier in relation either to the other five appellants in the present appeals or in relation to the other appellants in appeals determined by other panels of this Tribunal. We have already made clear that we regard such comparisons as unhelpful. If Sol's fine appears on the high side, that is because it had substantial turnover in each of the relevant markets in which it committed infringements. The market definitions were not challenged by Sol and the application of Step 1 in the Guidance, even using the Infringement Year figures, generates a high figure. This does not need to be corrected at Step 3.
280. The global penalty for the three infringements is thus £703,367. Having divided the penalty among the three Infringements and rounded down, we will vary the fines imposed on Sol to £234,000 for each infringement.

XI. CONCLUSION

281. These appeals have inevitably focused attention on those parts of the Decision which were contentious. There were many other matters dealt with in the Decision that have not been challenged and there were, of course, many other addressees who did not lodge appeals. We fully appreciate the complexity of the challenge that faced the OFT in having to devise and apply principles to progress with its

investigation, balancing the need to be consistent, fair and pragmatic when dealing with so many markets, infringements and pleas for individual treatment.

282. For the reasons set out in this judgment, these appeals have resulted in substantial reductions in the level of fines imposed. That should certainly not be interpreted by these or other undertakings as indicating that the Tribunal considers cover pricing to be anything less than a serious infringement of the competition rules. Undertakings must recognise that any future instances of this kind of infringement will be dealt with very firmly by the Tribunal.
283. Finally, we would like to thank all the counsel who appeared at the hearings of the present appeals for enabling those hearings to take place so efficiently within the tight timetable set. David Unterhalter S.C. who led the team for the OFT in all these appeals was particularly helpful in clarifying and responding to many points raised by the parties and by the Tribunal in the course of argument. We are grateful to him for his measured and courteous submissions.
284. All the conclusions set out in this judgment were arrived at unanimously by the Tribunal. As a result, the Tribunal decides that the penalties imposed on each of the Present Appellants should be varied and the Decision is set aside to that extent. The Tribunal fixes the penalties as follows:
- (a) The penalty imposed on Galliford Try is fixed at £465,000 each for Infringements 42, 142 and 186 making a total penalty of £1,395,000.
 - (b) The penalty imposed on Apollo is fixed at £133,000 each for Infringements 154, 199 and 203, making a total penalty of £399,000.
 - (c) The penalty imposed on Seddon is fixed at £164,000 each for Infringements 23, 39 and 176, making a total penalty of £492,000.
 - (d) The penalty imposed on Interclass is £162,000 each for Infringements 75 and 150, making a total penalty of £324,000.

- (e) The penalty imposed on Tomlinson is £156,000 each for Infringements 46, 187 and 201, making a total penalty of £468,000.
- (f) The penalty imposed on Sol is £234,000 for each of Infringements 142, 156 and 187 making a total penalty of £702,000.

285. Subject to any representations by the parties, each of these penalties will be subject to interest at 1 per cent above Bank of England base rate from 24 November 2009 to the date of payment or the date of any relevant judgment obtained by the OFT under section 37(1) of the 1998 Act.

Vivien Rose

Sheila Hewitt

Graham Mather

Charles Dhanowa
Registrar

Date: 24 March 2011