



Briefing 09/35 July 2009

# Confessing to cartels in Scotland

To: All Chief Executives, Main Contacts and Email Contacts (Scotland)  
CC: All Chief Executives, Main Contacts (England, Northern Ireland and Wales)

## Key issues

Updated MoU provides greater certainty for those confessing to cartels in Scotland  
Involvement in a cartel can lead to fines of up to 10% of turnover and for individuals five years in jail and /or unlimited fines  
Companies can be granted immunity from civil fines and individuals can be granted immunity from criminal prosecution

### 1. Introduction

The Office of Fair Trading (OFT) and Crown Office have updated a Memorandum of Understanding (MOU) to give greater certainty for businesses and individuals confessing to involvement in cartel activity in Scotland.

The revised MOU provides greater clarity and predictability on the process of gaining criminal immunity ('leniency') in Scotland, where the procedures are different from those in the rest of the UK. The changes mean that:

- a would-be leniency applicant approaching the OFT about involvement in a Scottish cartel can seek, on a 'no-names' basis, an indication from the Crown Office as to whether criminal immunity is available in principle or whether a criminal investigation is likely to be initiated at all
- an OFT recommendation that particular individuals should be granted criminal immunity will be given 'serious weight' by the Crown Office which will have regard to the terms of the OFT's published guidance on leniency and the

self-certification by the individual in relation to previous involvement with criminality

- any information given in good faith by a leniency applicant to the Crown Office via the OFT to enable a criminal immunity decision to be made will not be used as evidence or intelligence against the applicant if immunity is refused.

The memorandum of understanding can be found at [http://www.oft.gov.uk/shared\\_oft/reports/comp\\_policy/MOU.pdf](http://www.oft.gov.uk/shared_oft/reports/comp_policy/MOU.pdf)

## **2. Arrangements in Scotland**

In Scotland, the Lord Advocate is solely responsible for the investigation and prosecution of crime. Her local representatives are Procurators Fiscal. The National Casework Division (NCD) operates under her direction and control and is responsible inter alia for the investigation and prosecution of serious or complex fraud.

The OFT operates a leniency programme for those involved in cartels who come forward with information. In the context of the CA98, an undertaking may receive total or partial immunity from financial penalties if it comes forward with information about its role in a cartel. In the context of the cartel offence, whilst guarantees of immunity from prosecution cannot be given by the OFT in relation to Scotland (unlike in England, Wales and Northern Ireland), the Crown Office and OFT have agreed to pilot certain arrangements aimed at achieving a high degree of consistency of outcome with respect to criminal cartel immunity as between Scotland and the rest of the UK, while recognising the particular features of the Scottish criminal justice system and the constitutional position of the Lord Advocate.

## **3. What is a cartel?**

A cartel is an agreement between businesses not to compete with each other. The agreement is usually secret, verbal and often informal. Typically, cartel members may agree on prices, output levels, discounts, credit term, which customers they will supply, which areas they will supply and who should win a contract (bid rigging).

Under the Competition Act 1998 and Article 81 of the EC Treaty, cartels are prohibited. Any business found to be a member of a cartel could be fined up to 10 per cent of its worldwide turnover. In addition, the Enterprise Act 2002 makes it a criminal offence for individuals to dishonestly take part in the most serious types of cartels. Anyone convicted of the offence could receive a maximum of five years imprisonment and/or an unlimited fine.

## **4. Memorandum of Understanding**

The MOU records the basis on which the OFT and the National Casework Division of the Crown Office in Scotland will co-operate to investigate and/or

prosecute individuals in respect of the cartel offences established by the Enterprise Act 2002 (EA02) where such offences may have been committed within the jurisdiction of the Scottish Courts.

Where the OFT receives information, through use of Competition Act 1998 (CA98) powers or otherwise, that criminal cartel activity may have occurred, the Cartels and Criminal Enforcement Group (CCEG) of the OFT will undertake any necessary initial criminal enquiries. Therefore, if the NCD receive information suggestive of criminal cartel activity, prior to any related referral from the OFT, the NCD will, in the first instance, refer that information to CCEG.

If, after any necessary initial enquiries (and informal discussions with the NCD), the OFT identifies a cartel case as one that might involve criminality wholly or partly within the Scottish jurisdiction, the case will be referred to the Head of the NCD (or her representative). The referral will provide such background information as is necessary to enable the NCD to make an informed decision as to whether or not the matter should be accepted for investigation by the NCD or alternatively, whether the OFT should undertake further enquiries.

The presumption will operate that once the NCD has accepted a criminal cartel investigation, powers under the Criminal Law (Consolidation) (Scotland) Act 1995 will be used rather than those under the EA02 where the two sets of powers would achieve essentially the same objectives. However, depending upon the precise circumstances it may be decided that EA02 powers could and should be used to pursue particular objectives.

### **Leniency and immunity from prosecution**

Decisions about whether to grant leniency to undertakings rest with the OFT. However, if any such decision could have an impact on the outcome of an existing NCD cartel investigation or prosecution, the OFT will consult the NCD. Where the OFT has received an application for immunity from prosecution in respect of a cartel that falls to be prosecuted in Scotland, the Head of the CCEG will report the level of co-operation of relevant individual(s) to the Lord Advocate, and where the OFT recommends that conditional criminal immunity should be granted, the Lord Advocate will accord such a recommendation serious weight in exercising her discretion in the grant of criminal immunity in Scotland.

In determining whether to grant conditional criminal immunity, the Lord Advocate will take cognisance of the OFT's own rules on leniency as set out in the OFT's guidance note on the handling of leniency and no-action applications (OFT803) and in particular whether the applicant has fully co-operated with the relevant authorities. The Lord Advocate will also require the applicant to disclose and self-certify the completeness and accuracy of any criminal convictions or associations.

Where possible, the Lord Advocate will give an early indication at the commencement of a leniency application and before the applicant's identity (or

that of any related economic undertaking) has been revealed to the authorities by their advisors of whether criminal immunity is likely to be granted, assuming full ongoing co-operation with the authorities were to be maintained and on the basis that there are no criminal convictions or associations to be disclosed.

### **Decision in relation to criminal investigation**

Where the OFT considers in respect of a cartel case falling within Scottish jurisdiction that it should be dealt with solely by the OFT using CA98 powers, the OFT will report to the Lord Advocate the circumstances in relation to the operation of the particular cartel and seek an indication from the Lord Advocate at the commencement of a leniency application and before the applicant's identity (and that of any related economic undertaking) is revealed to the authorities by their advisors of whether a criminal investigation is likely to be initiated at all.

Where the Lord Advocate declines to grant or to give a favourable early indication of immunity, or declines to give a favourable early indication as to whether a criminal investigation will be initiated, any information from an applicant which was provided to enable the Lord Advocate to reach her decision will not be used in evidence (or as intelligence for that or any other investigation) against the applicant, provided the information was not false or misleading in a material particular or materially incomplete.

### **Pilot exercise**

The procedures outlined in paragraphs 13 to 19 of the Memorandum of Understanding will be subject to a trial period of 12 months, commencing 1 June 2009. The parties will then review the procedures in the light of experience.

## **5. Recent developments**

An investigation by the Office of Fair Trading (OFT) into alleged collusion by construction companies has been ongoing since 2005. A 'Statement of Objections' has been issued formally alleging that construction firms have been engaged in bid rigging. 112 construction companies have been named with details of over 240 alleged infringements to competition. The OFT has said that the work involved includes housing, commercial and industrial construction in the private and public sector, including tenders for schools, universities and hospitals. Some of the UK's largest construction firms have been named such as Balfour Beatty Plc., Carillion Plc., Connaught Plc., Interserve Plc., Kier Group Plc., Rok Plc., Morgan Sindall Plc., Galliford Try Plc and Henry Boot Plc. A full list of all those named in the Statement of Objections is given in Appendix 1 below.

The scale of the investigation is one of the widest ever undertaken by the OFT but they were still unable to investigate every company against whom they have received allegations or evidence of collusion. The OFT has received leniency applications as the investigation has unfolded with a number of firms admitting

participation in some form of bid rigging following the offer of reduced penalties.

Cover pricing arrangements have previously been found by the OFT and the Competition Appeal Tribunal to be illegal and in breach of the Competition Act 1998 due to the restrictions on competition that arise. The OFT stated that a minority of the construction companies also entered into arrangements which involved an agreement where the successful tenderer would pay an agreed sum to an unsuccessful tenderer, a more serious form of bid rigging and known as a 'compensation payment'. These more serious forms of bid rigging are usually facilitated by false invoices noted the statement.

The 112 companies originally named have had the chance to make written and oral representations to the OFT prior to it making a final decision concerning whether there have been infringements to competition law. They will also take a decision on the amount of any penalties which may be imposed on firms.

The OFT stated that the maximum fines were unlikely to be imposed, but that penalties were likely to be large because of the size of many of the companies involved. They claim that anti-competitive practices could result in an increase in prices of around 10%. The evidence received by the OFT in the course of its investigation indicates that cover pricing was a widespread and endemic practice in the construction industry as a whole.

The OFT originally advised that their final decision on whether there has been a breach of competition law should be expected in 2009 but it has yet to be presented. In a statement the OFT made clear that no assumption should be made at this stage that there has been an infringement of competition law by any of the companies named.

The investigation uncovered evidence of bid rigging activities which include cover pricing, where companies obtain a price from a competitor in the tender process which is not designed to win the contract but is intended to give the appearance of competition. The Competition Appeal Tribunal has fully endorsed the OFT's decision in its investigations and confirmed that cover pricing is anti-competitive and contravenes legislation. In some instances the OFT has also found evidence in the current investigation of compensation payments or 'bungs' being passed between competitors in exchange for a cover price. Evidence of bid rigging in thousands of tenders has been found with a combined estimated value approaching £3billion. Although evidence of such activities exists it is expected that the OFT will not give rise to criminal prosecutions based on any evidence found in the investigation.

## **6. APSE Comment**

APSE welcomes the cooperation between the OFT and the Crown Office to both utilize local knowledge in Scotland and to share approaches to dealing with cartels. This kind of cooperation should help establish an effective response to dealing with illegal practices in Scotland.

APSE feel that there is a duty upon the OFT and the Crown Office to put all relevant information into the public domain regarding those organisations involved in the ongoing inquiry or in any specific investigations. Public sector clients have a duty to ensure they are spending council tax payer's money wisely and with reputable firms and they will be unable to do this without access to information from the investigation.

APSE recommended a number of points in 2008 which should be addressed as a result of the ongoing investigation and they are as follows:-

- the OFT to investigate a number of tenders/contracts each year as part of a programme of checks to ensure companies do their best to stick to the law
- all companies submitting tenders to public sector clients to sign an agreement stating they have not been investigated by the OFT or stating the extent to which they were investigated. This will ensure those responsible for spending public funds do so from an informed standpoint
- any company named in the report to make a public statement declaring the actions they are taking to tackle the points made in the OFT report
- industry bodies to work with the OFT and public clients to establish procedures to bring inappropriate practices into the public domain

The outcomes of the investigation should be simply enough – where there is sufficient evidence the OFT and Crown Office issue a fine which is large enough to encourage companies to rid themselves of practices which lead to collusion or cover-bidding; the OFT and Crown Office must publish adequate information to ensure public sector clients are able to protect the public's money; and public sector clients should bear in mind such information when appointing contractors without pressure to keep any company on a tender list.

It is incumbent upon the OFT and Crown Office to show where it stands both in terms of this investigation and as the enforcement body for competition law. Companies contemplating collusion should be in no doubt that the OFT and Crown Office will use their powers to the full if they uncover such activity.

## **7. Previous relevant briefings by APSE**

07/47 'Making competition work for you – a guide for public sector procurers of construction'

07/42 'Firms identified in OFT investigation'

07/22 'OFT details investigations into construction cartel'

06-41 'OFT report on waste competition'

06-18 'OFT cartel busters unit investigation into Mowlem'

03/59 'Action against cartels prepared by Eversheds'

Two OFT press releases also provide information on the investigation - "OFT closes door on cartel leniency in construction bid rigging cases in England" (50/07) and "OFT makes 'fast track' offer in biggest ever UK cartel investigation" (49/07).

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## Appendix 1

The firms listed by the OFT are:

- A. H. Willis & Sons
- ARG (Mansfield)
- Ackroyd & Abbott together with its subsidiary Ackroyd & Abbott Construction
- Adam Eastwood & Sons together with its controlling party the Sir John Eastwood Foundation
- Admiral Construction together with (for alleged infringements from 31 October 2003) its ultimate parent company A C Holdings
- Adonis Construction
- Allenbuild and Bullock Construction together with their ultimate parent company Renew Holdings plc
- Apollo Property Services Group formerly known as Apollo London together with its former ultimate parent company Apollo Holdco formerly known as Apollo Group Holdings
- Arthur M. Griffiths & Sons
- B & A Construction (Leicester)
- Baggaley & Jenkins
- Balfour Beatty Construction, Balfour Beatty Refurbishment, and Balfour Beatty Group (for alleged infringements from 2000 onwards) and Mansell Construction Services (for alleged infringements from 19 December 2003), together with their current ultimate parent company Balfour Beatty plc. For alleged infringements involving Mansell prior to 19 December 2003, Mansell and its former ultimate parent company Mansell plc
- Ballast Nedam N.V. as the ultimate parent company of its dissolved subsidiary Ballast plc
- Beaufort Construction (S-in-A) together with its ultimate parent company Beaufort Holdings U.K.
- Bodill & Sons (Contractors)
- Bowmer & Kirkland together with its subsidiaries B & K Building Services and B & K Property Services
- Bramall Construction and Frank Haslam Milan & Company together with their current ultimate parent company Keepmoat , formerly known as Keepmoat plc
- C. J. Ellmore & Company
- Caddick Construction together with its ultimate parent company Caddick Group plc
- Carillion
- Chase Norton Construction together with its ultimate parent company Chase Midland plc
- Clegg Construction together with its ultimate parent company Clegg Group formerly known as D E Clegg Holdings
- Connaught Partnerships together with its ultimate parent company Connaught plc
- Crown Point Maintenance Group as the ultimate parent company of its dissolved subsidiary Greenwood Building Contractors (Mansfield) , for Greenwood's alleged infringements after 11 June 2002
- Davlyn Construction
- Derwent Valley Construction together with its ultimate parent company Chevin Holdings
- Dukeries Building Company together with its ultimate parent company Gavco 159
- Durkan Pudelek together with its ultimate parent company Durkan Holdings
- E. G. Carter & Company
- E. Manton
- E. Taylor & Sons (Southwell) , trading as Carmalor Construction
- F. Parkinson together with its ultimate parent company Mowbray Holdings
- Francis Construction together with its ultimate parent company Barrett Estates Services
- Frank Galliers together with its former ultimate parent company Frank Galliers Holdings
- Frudd Construction
- GAJ Construction together with its current ultimate parent company GAJ (Holdings)
- G Carter Construction

- G. F. Tomlinson Building together with its ultimate parent company G. F. Tomlinson Group
- G G Middleton and Sons
- G. & J. Seddon together with its ultimate parent company Seddon Group
- GMI Construction Group plc together with (for alleged infringements after 6 February 2005) its current ultimate parent company GMI Construction Holdings plc
- Geo Houlton & Sons together with its ultimate parent company Geo Houlton & Sons (Holdings)
- George Law together with its ultimate parent company Bosworth & Wakeford
- Greswolde Construction together with its ultimate parent company Mantisson
- Hall Construction Group
- Harlow & Milner
- Harold Adkin & Sons (Sutton-In-Ashfield)
- Harper Group Construction and J. Harper & Sons (Leominster) together with their ultimate parent company Harper Group plc
- Haymills (Contractors) together with (for alleged infringements prior to 26 May 2004) its former ultimate parent company Corringway Conclusions plc and (for alleged infringements after 26 May 2004) its current ultimate parent company Haymills Group
- Henry Boot Construction (UK) together with its ultimate parent company Henry Boot plc
- Herbert Baggaley Construction together with its ultimate parent company Baggaley Group
- Hill Bros. (Nottingham)
- Hobson & Porter
- Holroyd Construction together with (for alleged infringements prior to 30 March 2005) its former ultimate parent company Holderness Investments and (for alleged infringements after 30 March 2005) its current ultimate parent company Holroyd Construction Group
- Interclass Public Company together with its ultimate parent company Interclass Holdings
- Interserve Project Services together with its ultimate parent company Interserve plc
- Irwins and Jack Lunn (Construction) together with their ultimate parent company Jack Lunn (Holdings)
- J. Guest
- J H Hallam (Contracts) together with its ultimate parent company J H Hallam (R & J)
- J. J. & A. R. Jackson
- J. J. McGinley, together with its former ultimate parent company McGinley Holdings
- John Cawley
- John Sisk & Son together with its ultimate parent company Sicon
- K. J. Bryan (Builders)
- Kier Regional together with its ultimate parent company Kier Group plc
- Lemmeleg together with its ultimate parent company Rok plc
- Lindum Construction Co. and Lindum Homes together with their ultimate parent company Lindum Group
- Linford Group together with its ultimate parent company F. & E. V. Linford
- Loach Construction & Development
- Lotus Construction
- Milward Construction (Belper)
- Morgan Ashurt plc formerly known as Bluestone Plc together with its ultimate parent company Morgan Sindall plc
- North Midland Construction plc
- P D H Developments (formerly trading as G. Hurst & Sons (Contractors) ) together with its ultimate parent company G. Hurst & Sons
- P. Casey & Co. together with its current ultimate parent company The Casey Group
- P. Waller
- Pearce Construction (Midlands) together with its former ultimate parent company Crest Nicholson plc
- Peter Baines
- Phoenix Contracts (Leicester)

- Piper Construction Midlands together with its ultimate parent company Piper Securities Holdings
- Propensity Group together with its wholly owned subsidiary companies, ISG Jackson , ISG Regions formerly known as ISG Totty , ISG Totty Building and Propensity
- Quarmbly Construction Company together with its ultimate parent company St James Securities Holdings
- Quarmbly Construction (Special Projects) together with its ultimate parent company Justgrade
- R Durtnell & Sons together with its ultimate parent company R Durtnell & Sons (Holdings)
- R. G. Carter , R. G. Carter Building and R. G. Carter Construction together with their current ultimate parent company R. G. Carter Holdings
- Richardson Projects
- Robert Bruce Construction
- Robert Woodhead together with its ultimate parent company Robert Woodhead Holdings
- Robinson & Sawdon
- Shaylor Construction
- Simons Construction and Wrights Construction (Lincoln) together with their ultimate parent company Simons Group
- Sol Construction together with its ultimate parent company Barkbury
- Speller-Metcalf
- Spicers (Builders)
- Stainforth Construction
- Strata Construction (formerly trading as Weaver)
- T. & C. Williams (Builders)
- T. Denman & Sons (Melton Mowbray)
- Thomas Fish & Sons together with its ultimate parent company Fish Holdings
- Thomas Long & Sons together with its ultimate parent company Radford Holdings
- Thomas Vale Construction Plc together with its ultimate parent company Thomas Vale Holdings
- Thorndyke
- Try Accord and Galliford Try Construction together with their ultimate parent company Galliford Try plc
- W. R. Bloodworth & Sons
- Wiggett Bros & Co
- Wildgoose Construction
- William Sapcote and Sons together with its ultimate parent company Sapcote Holdings
- William Woodsend
- Willmott Dixon Construction together with its ultimate parent company Willmott Dixon
- Wright (Hull) together with its ultimate parent company T. Wright & Son (Holdings)
- Wygar Construction Co together with its ultimate parent company Wygar (Holdings)
- York House Construction