

E-1863/08EN

Answer given by Mr McCreevy
on behalf of the Commission
(20.5.2008)

The Commission is aware of an informal complaint lodged on 28 January 2008 concerning the attribution of the M74 motorway extension project in Scotland. It was alleged, amongst other things, that the tendering process concerning the award of the M74 motorway extension project had been subjected to anticompetitive practices by four economic operators who, instead of bidding individually, decided to participate in the tendering process by forming a joint venture and submitting a single bid. It was also alleged that this behaviour constituted an infringement of the EC public procurement rules but also that it violated the competition rules enshrined in Articles 81 and 82 of the EC Treaty.

Directive 2007/66/EC¹ relating to the review procedures concerning the award of public contracts, aims, amongst other things, to combat the illegal direct awards of public contracts, that is, awards made without prior transparency and prior competitive tendering, as such awards constitute the most serious infringement of the EC procurement rules. In the present case, however, a contract notice was published in the Official Journal of the European Union, with reference number 2006/S 154-166301, relating to the award of a contract for the design, construction and five year defect maintenance liability of the M74 special road (Fullarton Road to M8 West of Kingston Bridge), which initiated the tendering procedure leading to the award of the contract. Therefore, no illegal direct award was made in the sense described above. In this case, four operators, instead of bidding individually for the works in question, decided to participate in the tendering process by coming together by means of a joint venture and thus submit a single bid. The EC public procurement rules do not prohibit economic operators to come together in a specific legal form and participate as a single entity in a tendering process leading to the award of a public contract. Therefore, the submission of a bid by the joint venture does not constitute an infringement of the EC public procurement rules. Consequently, the Commission does not intend to investigate the procurement aspects of the complaint.

The Commission monitors procurement by devolved administrations within Member States in the same way as it does in relation to any body governed by public law to which the EC procurement rules apply. The Commission monitors procurement within Member States in two ways. Firstly, by ensuring the correct transposition of the EC rules within the Member States. In the case that specific legal instruments relate to an administratively devolved area, the Commission will then assess those and ensure that they correctly transpose the EC rules. Secondly, by monitoring the effective application of the rules. Information which might indicate an infringement of the rules may be detected either by the Commission itself or following the submission of a complaint. This information is examined in the light of the EC rules in order to assess whether or not the Commission should initiate infringement proceedings pursuant to Article 226 of the EC Treaty.

As regards the alleged violation of EC Competition law, the Commission informed the informal complainant by letter of 5 February 2008 that the information submitted in its letter was not sufficient to conclude whether the business practices of Interlink M74 and/or its members could amount to an infringement in the sense of Articles 81 and 82 of the Treaty. Moreover, considering that the alleged anticompetitive practices seemed to have their effects primarily limited to national level, the Commission explained that the most appropriate channel through which to pursue the present matter would be through the authorities on the national level, i.e. the United Kingdom Competition Authority. Finally, the Commission also specified that the information submitted is considered to be market information and not a formal complaint that has to comply with the legal requirements set out in Article 7 of Council Regulation (EC) No 1/2003² and Article 5 of Commission Regulation (EC) No 773/2004³.

¹ Directive 2007/66/EC of Parliament and of the Council of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts, OJ L 335, 20.12.2007.

² Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (Text with EEA relevance), OJ L 1, 4.1.2003.

³ Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty (Text with EEA relevance), OJ L 123,

Market information submitted to the Commission is often not in itself sufficient to give rise to an investigation. That being said, information from various sources may form a pattern which might lead the Commission to initiate a full scale investigation at a later stage.

Considering the foregoing, and in absence of further evidence and information, the Commission does not intend to pursue the present matter on the grounds of Article 81 and/or 82 of the EC Treaty.