

CA98/03/2013 (CE/9284-10):
Investigation into Collusive Tendering in relation to the Supply and Installation
of certain access control and alarm systems

The Office of Fair Trading (OFT) has received a number of queries about its investigation and decision into collusive tendering in relation to the supply and installation of certain access control and alarm systems (the Infringement Decision). The public version of the Infringement Decision, with further information about the investigation, can be found at:

www.offt.gov.uk/OFTwork/competition-act-and-cartels/ca98/closure/access-control-alarms.

This document is intended to set out the OFT's response to the key questions that have been raised in connection with the investigation.

This document addresses:

1. likely future action by the OFT
2. the OFT's Infringement Decision
3. the OFT's investigation
4. the OFT's decision to grant leniency in this investigation
5. the OFT's powers.

Please note: As part of the Government's reforms to the arrangements for competition, consumer protection and consumer credit regulation, the OFT closes on 31 March 2014, and its work and responsibilities pass to a number of different bodies. The Competition and Markets Authority (CMA) will bring together the Competition Commission (CC) and the competition and certain consumer functions of the OFT in a single body. The CMA will promote competition, within and outside the UK, for the benefit of consumers. The CMA was established under the Enterprise and Regulatory Reform Act 2013 and came into being in October 2013. It takes on its full powers and responsibilities, such as competition law enforcement, market studies and investigations, and merger control, on 1 April 2014. Visit the CMA's pages on www.gov.uk/cma for more information.

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1) LIKELY FUTURE ACTION BY THE OFT

In respect of allegations of collusive tendering

Complaints of alleged anti-competitive conduct from members of the public can be provided to the OFT's Enquiries and Reporting Centre at:

Enquiries and Reporting Centre
Office of Fair Trading
Fleetbank House
2-6 Salisbury Square
London
EC4Y 8JX

enquiries@oft.gsi.gov.uk

Complaints of alleged anti-competitive conduct received in this way will be assessed in accordance with the OFT's standard procedures: for more information, please see www.oft.gov.uk/about-the-oft/legal-powers/legal/competition-act-1998/complaints .

After receiving a complaint of alleged anti-competitive conduct, the OFT will apply its published Prioritisation Principles to decide whether to take the complaint forward
(www.oft.gov.uk/shared_oft/about_oft/oft953.pdf).

It is likely that a complaint of alleged anti-competitive conduct which is similar to the conduct about which the OFT has made infringement findings in the Infringement Decision would be considered in the following context:

As set out in paragraph 5.8 of the Infringement Decision, during the course of the investigation the OFT carefully considered a lot of evidence in relation to a number of tenders that involved variously Cirrus Communication Systems Limited (Cirrus), Peter O'Rourke Electrical Limited (O'Rourke), Owens Installations Limited (Owens) and Glyn Jackson Communications Limited (Jackson) in respect of certain access

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control and alarm systems during the period November 2005 to November 2009 (the relevant period).

After the OFT had reviewed this evidence, the OFT prioritised the tenders for which it considered the evidence was sufficient to demonstrate an infringement of the law. This resulted in a total of 65 tenders being included initially in a Statement of Objections and then in the Infringement Decision.

The OFT also considered that the evidence in its possession in relation to a number of other such tenders which occurred during the relevant period was not sufficient to meet the required standard to demonstrate an infringement. Given the number of infringing tenders the OFT had found, the substantial investigative work that had been carried out, and the further work that would be required in order to have a clearer picture of whether there were further infringements, the OFT decided not to prioritise investigating these tenders further.

The OFT does retain reasonable grounds to suspect that further such tenders conducted during the relevant period may also have involved collusive tendering. However no assumption can be made that Cirrus and either of O'Rourke, Owens or Jackson also committed an infringement when they were involved in other such tenders (in addition to the 65 included in the Infringement Decision) during the relevant period or at any other time.

At this stage, it is unlikely that the OFT would decide to prioritise the investigation of any further such tenders which took place during the relevant period (in addition to the 65 already included in the Infringement Decision). In making any prioritisation assessment, the OFT would take account of its published Prioritisation Principles. Among the factors to be considered would be included:

- That the OFT has recently taken enforcement action in respect of similar tenders during the relevant period.

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- The extent to which any additional deterrent impact or other benefits might be achieved from further enforcement action in this area, taking into account, among other things, the identity of the companies involved.
- The extent of further investigation and resources which would be required (and the prospect that such further investigation would lead to a finding of infringement).

It is worth noting that, if the OFT did investigate other such tenders which took place during the relevant period, this would be unlikely to undermine the OFT's decision to grant leniency to Cirrus in this investigation and therefore it would be very unlikely to result in a fine being imposed on Cirrus.

Additionally, please note that a decision by the OFT not to investigate alleged anti-competitive behaviour does not prevent anyone who considers that they may have suffered loss from such behaviour from seeking legal redress through other channels, including through the courts.

In respect of other allegations

We are aware that there are concerns about certain practices on the part of managing agents.

Please note that the OFT has recently launched a market study into residential property management services for private dwellings in England and Wales, following allegations raising concerns that some providers may be over-charging customers, providing poor quality services or spending money on unnecessary projects. For more information, please see: www.offt.gov.uk/OFTwork/markets-work/residential-property-management/.

2) THE OFT'S INFRINGEMENT DECISION

In its Infringement Decision, the OFT has found that, between 2005 and 2009, Cirrus, O'Rourke, Owens and Jackson engaged in a number of collusive tendering arrangements in relation to the supply and installation

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of certain access control and alarm systems to retirement properties in the UK.¹

The infringements span different periods for different parties between 2005 and 2009.

The OFT has found that the collusive tendering arrangements involved three separate bilateral arrangements between Cirrus and each of O'Rourke, Owens and Jackson. The OFT has found that 65 tenders with a combined value of approximately £1.4m were affected by the collusive tendering arrangements.

It should be noted that the OFT has not found that Cirrus won the final contract in respect of all of the 65 infringing tenders, but rather that Cirrus colluded with the other companies with the aim of winning the tenders. There are a number of tenders where the evidence is unclear as to whether Cirrus did win the relevant contract and a small number of occasions where Cirrus was definitely not awarded the contract.

The investigation was carried out solely under the OFT's civil investigation powers under the Competition Act 1998. Accordingly, the addressees of the OFT's Infringement Decision are companies, not individuals.

In accordance with its policy, the OFT has not publicly identified the individuals found to have been involved with collusive tendering.

The OFT retains reasonable grounds to suspect a breach of competition law in respect of a number of tenders involving Cirrus and either

¹ The Infringement Decision is addressed to the following companies which the OFT has found were either directly involved in the infringements of competition law and/or (as parent companies) exercised decisive influence over the companies directly involved, in relation to the following infringements:

- Cirrus, Careline UK Monitoring Limited (formerly Cirrus Careline Limited), and Peverel Building Technologies Limited (formerly Cirrus Building Technologies Limited): In relation to infringements of the Chapter I prohibition between 2005 and 2009.
- Peter O'Rourke Electrical Limited: In relation to an infringement of the Chapter I prohibition between 2005 and 2007.
- Owens Installations Limited: In relation to an infringement of the Chapter I prohibition between 2007 and 2009.
- Glyn Jackson Communications Limited: In relation to an infringement of the Chapter I prohibition during 2009.

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O'Rourke, Jackson or Owens between 2005 and 2009 which fall outside of the findings in the Infringement Decision. However, the OFT considered that there was insufficient evidence to make infringement findings to that effect. For more information, please see paragraphs 5.8-5.9 of the OFT's Infringement Decision (www.offt.gov.uk/OFTwork/competition-act-and-cartels/ca98/closure/access-control-alarms/). Further, no assumption can be made that Cirrus and either O'Rourke, Jackson or Owens also committed an infringement when they were involved in other such tenders (in addition to the 65 included in the Infringement Decision) during the relevant period or at any other time. The OFT has not made public the identity of the other contracts it has considered. It is likely that a request for disclosure of the identity of those other contracts would be refused.

The OFT has not made any findings about whether prices were increased as a result of the conduct set out in the Infringement Decision. In order to reach infringement findings in this case, it has not been necessary for the OFT to demonstrate any effect on prices and/or harm to consumers. However, the OFT has found that the aim of the collusive tendering in this case was to eliminate competition from the tendering process and to mislead a potentially vulnerable consumer group (residents of retirement homes) as to the nature of the tendering process.

For more information about the OFT's findings, please see the public version of the Infringement Decision, which is available on the OFT's website (www.offt.gov.uk/OFTwork/competition-act-and-cartels/ca98/closure/access-control-alarms/).

3) THE OFT'S INVESTIGATION

The collusive tendering arrangements which are the subject of the Infringement Decision were first brought to the OFT's attention in December 2009 by one of Cirrus' then parent companies, Peverel Group Limited. Under the OFT's leniency policy Cirrus (and its parent companies Careline UK Monitoring Limited and Peverel Building Technologies Limited) benefit from immunity from financial penalties. For more information on the OFT's decision to grant leniency in this case, please see 4) below.

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In January 2010, the OFT also received two complaints with regard to the suspected infringing behaviour.

In April 2011, an investigation was opened into possible breaches of the Chapter I prohibition of the CA98.

In July 2013, a Statement of Objections was issued. In December 2013, an Infringement Decision was issued. The public version of the Infringement Decision was published in January 2014.

It is the OFT's standard practice to not proactively publish information about its investigation (including the existence of a leniency applicant) prior to the issue of a Statement of Objections. That approach was followed in this investigation.

The OFT has imposed fines on each of O'Rourke, Owens and Jackson, totaling £53,410. Owens has admitted its involvement in the collusive tendering with Cirrus and entered into a settlement agreement with the OFT in February 2013, thereby benefiting from a settlement discount. To date, the OFT has recovered £1,777 in fines in this investigation.

The investigation is now closed.

The cost of the investigation up to the issue of the Infringement Decision was approximately £487,600.

We acknowledge that ideally the investigation should have been progressed more quickly.

However investigations under the Competition Act 1998 tend to involve extensive analysis of evidence, which is often very time-consuming. Cartel investigations are generally characterised by fragmentary evidence chains and even where there is a leniency applicant the OFT needs to scrutinise evidence carefully to ensure the relevant evidential threshold for issuing a Statement of Objections and an Infringement Decision is met – particularly to ensure the rights of defence are protected for the parties who have not made a leniency application. In the context of this investigation, the OFT has thoroughly reviewed several thousand pieces

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of documentary evidence in relation to numerous suspect tenders and also conducted a significant number of witness interviews. All this evidence was then carefully evaluated to establish whether the evidence was sufficient to satisfy the relevant legal tests (taking into account possible counter-factual arguments). This process was necessarily conducted rigorously and therefore took time.

The investigation was also only formally launched in April 2011. The reason for this was that it took time for skilled resources to become available to start the investigation.

4) THE OFT'S DECISION TO GRANT LENIENCY/IMMUNITY

Cirrus (and its parent companies Careline UK Monitoring Limited and Peverel Building Technologies Limited) benefitted from immunity from financial penalty in this investigation as a result of the OFT's leniency policy. The policy is based on statutory guidance published by the OFT and approved by the Secretary of State for Business, Innovation and Skills (this is available at:

www.of.gov.uk/shared_of/business_leaflets/ca98_guidelines/oft423.pdf)

This policy is a vital tool for the detection of harmful cartel activity, which is often conducted in secret. By bringing such cartels – which are amongst the most harmful forms of anti-competitive activity – to an end and enabling the OFT to take enforcement action, thus deterring other cartels, the OFT's leniency policy directly benefits consumers, businesses and the UK economy.

In common with the leniency policies of other competition authorities worldwide, under the OFT's leniency policy, a company that is the first to come forward and reveal its involvement in cartel activity and cooperate fully with the OFT's investigation may be immune from financial penalties.

Where the OFT has not already commenced a formal investigation (through the exercise of its formal powers of investigation) into a reported cartel activity and where there is no pre-existing leniency applicant, the grant of immunity will be automatic provided certain conditions are met. This is without exception. This is because the decision to self-report

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cartel activity is a significant one for companies and incentives to come forward can often be finely balanced, particularly in the light of the increasing likelihood that they will face private damages actions, as well as enforcement action. Without this certainty of treatment, the incentives for companies to come forward and 'blow the whistle' would be considerably undermined.

We can confirm that the leniency application made by Peverel Group Limited in this case pre-dated any complaints that were made to the OFT and also that the press reporting sometimes brought to our attention did not in fact allege anti-competitive conduct.

In any event, it is important to note that, in order to provide sufficient certainty to potential whistleblowers, **the relevant test for whether automatic immunity is available is whether the OFT has commenced a formal investigation at the time the leniency application is submitted and whether there is a pre-existing leniency application, rather than whether, for example, the application is made before or after any complaint received or any press reporting.**

While immunity applicants must cease participation in the reported cartel, they are not required to demonstrate any particular motive for applying for immunity.

Cirrus has immunity because it was the first to report its participation in the cartel activity to the OFT and the OFT did not have a pre-existing formal investigation into the activity.

5) THE OFT'S POWERS

The OFT does not have any power to require infringing companies to pay compensation to the customers who may have suffered harm as a result of their anti-competitive conduct.

However, the OFT's Decision can form the basis for anyone who believes that they have suffered loss as a result of such conduct to seek redress through damages actions against any of the companies found to have infringed competition law in the Infringement Decision.

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The OFT does not have any powers to require infringing companies to pay a contribution to the costs of the OFT's investigations.

7 March 2014