

An easier route to individual liability for cartel conduct?

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On 1 December 2016, the UK Competition and Markets Authority ("CMA") obtained a novel "disqualification undertaking" from Daniel Aston, the managing director of online poster supplier Trod Limited, whereby Mr Aston agreed not to act as a director of a UK company for five years. Trod had previously been fined £163,371 for agreeing with a competitor that they would not undercut each other's prices for posters and frames sold on Amazon's UK website. The competitor had escaped censure by making a successful application for leniency to the CMA.

Pursuant to the Company Directors Disqualification Act 1986 ("CDDA"), the CMA may seek the disqualification of an individual from holding company directorships where that individual has been director of a company which has breached competition law. Importantly, this is separate from the power of the Crown Court to consider a disqualification order as part of the sentencing of a criminal defendant (whether for the cartel offence, or otherwise).

Whilst using CDDA proceedings as a means to hold individuals to account for anti-competitive activity has been recently mooted by the CMA, the use of the civil jurisdiction would appear at odds with the stated position of the CMA that pursuing cartelists in the criminal courts represents a key priority for the regulator. This is particularly so given that the alleged conduct in Mr Aston's case spanned 24 March 2011 to 1 July 2015, meaning that it might have been possible to have framed a charge against Mr Aston without the need to show dishonesty on his part - the dishonesty requirement having been abolished from 1 April 2014 onwards.

Mr Aston, for obvious reasons, will favour the CMA pursuing a civil rather than a criminal remedy, and commenting on the extent to which he could have faced criminal proceedings without the full facts is necessarily speculative - it is possible that Mr Aston was sanctioned for his failure to prevent anti-competitive conduct taking place, rather than active connivance in it. Nonetheless, and somewhat ironically, the CMA's success in his individual case yet again throws into sharp relief the difficulties that the regulator has had in building a steady caseload of criminal cartel matters: as is well known, in the 13 years the criminal cartel offence has been on the statute books there have been only four prosecutions, and despite the CMA and its predecessor securing guilty pleas in a number of cases, not one defendant has been convicted by a jury.

There are obvious advantages to the CMA of pursuing individuals through the civil courts - matters have to be proved to a lower standard, the test for disqualification arguably extends beyond those personally responsible for the alleged anti-competitive conduct, and cases will be heard before professional judges who may present less so-called litigation risk than juries. That said, the use of CDDA proceedings in Mr Aston's case arguably represents tacit acceptance by CMA of the challenges it faces in using criminal prosecutions to hold individuals to account for engaging in cartel conduct.