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UK charge towards more cartel prosecutions – but is the price too high?

David Went (Sidley Austin LLP) · Thursday, December 13th, 2012

On 19 November 2012, the OFT appointed Lee Craddock, a former police officer and case manager at the Serious Fraud Office, as Director of Investigations and Criminal Enforcement. His appointment follows the disastrous handling of the criminal price fixing case against British Airways (BA) executives in 2010, one of only two prosecutions of the cartel offence since its introduction in 2003. Further relevant context is that the UK Government is now seeking to make prosecution of the offence easier through removal of the dishonesty element in the cartel offence.

The prosecution of the BA executives, which was initiated in 2006 after an immunity application from Virgin Atlantic Airways (VAA), was the OFT's first major criminal investigation. The OFT was forced not to offer evidence because of defects in its procedures, leading to the case's collapse. In particular, VAA provided a substantial volume of electronic material to the OFT only after the trial had started and which should have been disclosed to the defendants earlier. The new material included emails sent or received by a former VAA employee and one of the prosecution witnesses. The OFT acknowledged responsibility for its part in the oversight.

Save the British Airways case, the marine hose cartel is the only other case in which the OFT has brought a criminal prosecution. This case, however, involved first a plea bargain in the US in which the defendants agreed to spend part of their jail time in the UK. The UK court in effect merely rubber stamped – and it must be said with some annoyance – a bargain struck in the US. This case cannot really therefore be seen as a successful prosecution on the OFT's part.

When initially proposing to remove dishonesty from the cartel offence in its March 2011 public consultation, the Government pointed to this poor track record as evidence that dishonesty was making it too hard to bring prosecutions and the cartel offence was not having its intended deterrent effect. However, it may be doubted whether these two cases are themselves evidence of this. As mentioned, the BA case collapsed because of procedural irregularities. The OFT nevertheless asserted after the case's collapse that it had been right to bring the prosecution and there was a realistic prospect of conviction. This case arguably therefore provides evidence that inclusion of dishonesty is not an insurmountable barrier to bringing such prosecutions. Had this case resulted in a successful prosecution, it would have been a significant coup for the OFT and would likely have had the desired deterrent effect of a first major prosecution.

The Government nevertheless concluded in its May 2012 public consultation document that it is more likely than not that inclusion of dishonesty was in fact inhibiting the OFT in prosecuting

cases. One argument was that it may be hard to persuade a jury of dishonesty where an individual engages in conduct that will ultimately benefit his or her employer and may at most indirectly benefit the individual in question. It is nevertheless worth noting that dishonesty is part of the offence of fraud and that offence can be committed where an individual intends to procure gain for another. Another argument raised was the general difficulty of prosecuting in the white collar crime environment. Naturally, difficulties in prosecuting in such an environment would have been apparent when originally choosing to include dishonesty in the cartel offence and so it is hard to see this as sufficient justification now to remove it. Lingering doubts therefore remain as to whether it is premature for the Government to be tabling such a radical change to the offence.

In its March 2011 consultation, the UK Government laid out four main alternatives to the dishonesty element. The first involved introducing guidance for prosecutors, the second excluding white-listed agreements from the offence, the third replacing dishonesty with a secrecy element, and the fourth defining the offence so as not to include agreements made openly. The Government has chosen a combination of the first and fourth options. According to the draft bill brought before the Commons on 18 October 2012, an individual will not commit the offence where customers are given details of the arrangements between competitors before entering into a supply agreement or details of the arrangements have been published before their implementation (with the details sufficient to show that the arrangements might fall within the offence). It will also be a defence for the individual to show that he did not intend the arrangements to be concealed from customers or the UK competition authority, or that he took reasonable steps to ensure that the nature of the arrangements would be disclosed to professional legal advisers to obtain advice before their implementation.

The requirement to publish or to inform customers about arrangements with competitors so as to avoid falling within the scope of the offence is frankly odd. It seems to re-introduce an element of the old notification regime through the back door, although notifying parties would be protected only against criminal sanctions but not civil sanctions or private damages actions (including potential exemplary damages). The requirement to make what may be commercially sensitive arrangements public to guarantee immunity from prosecution might even deter competitors from entering into arguably pro-competitive arrangements. Where a defendant relied on the defence of having first sought legal advice, would it matter if the advice was negative and might there be a need to waive privilege? Moreover, it is not clear whether the re-crafted offence incorporates a sufficient mental element to withstand the test of legal certainty or whether it will in fact be susceptible to challenge on human rights grounds. These and other points will no doubt surface and be debated as the bill works its way through the legislative process.

Irrespective of the question marks over the proposed new offence, bolstering the OFT's criminal enforcement division and relaxing the test for the offence may well give rise to a larger number of criminal prosecutions. This will probably achieve the desired effect of deterring cartel activity but at what cost? The current economic climate may be not be the best time to be introducing uncertainty into the UK's competition law regime with the potential to dull legitimate pro-competitive activity. It also must be wondered whether recent cases such as price manipulation in the banking sector have shifted public opinion to an extent that dishonesty may not be such a stumbling block to bringing prosecutions of the cartel offence after all.

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