

Kluwer Competition Law Blog

UK flexes its criminal enforcement muscle

Christopher Hutton (Hogan Lovells) · Friday, January 31st, 2014



In a move that signals that UK criminal cartel enforcement is set to increase, Peter Nigel Snee appeared on 27 January 2014 at Westminster Magistrates' Court to face charges under the UK's criminal cartel offence. Mr Snee has been charged under section 188 of the Enterprise Act 2002 with "*dishonestly agreeing with others to divide customers, fix prices and rig bids between 2004 and 2012 in respect of the supply in the UK of galvanised steel tanks for water storage*". His next court appearance will be at Southwark Crown Court on 4 February 2014 for a preliminary hearing.

In addition to the charges against Mr Snee, the UK's Office of Fair Trading ("OFT") is also conducting a related civil investigation into whether businesses have infringed the provisions of the UK's Competition Act 1998.

This case is an important reminder that the UK competition authorities are determined to pursue criminal cases where appropriate. The charges against Mr Snee come a few months before new legislation will enter into force in the UK, which is designed to make it easier for criminal charges to be brought for competition law infringements. It also follows the announcement in December 2013 that Lee Craddock will take on the role of Director of Criminal Enforcement at the new Competition and Markets Authority (the "CMA", which will assume the powers of the OFT and the Competition Commission on 1 April 2014). This new legislation, and the general drive to increase prosecutions in the UK, creates increased compliance risks for companies and individuals active in the UK.

The current UK cartel offence

Cartel activity was criminalised for the first time in the UK in 2003 with the introduction of the cartel offence by section 188 of the Enterprise Act 2002 ("EA02"). As it currently stands, the offence is committed only when an individual *dishonestly* agrees with one or more other individuals to make or implement, or cause to be made or implemented, one or more of the prescribed "hard-core" activities, which comprise price fixing, limiting production or supply, market sharing, and bid rigging. Individuals convicted of this offence face up to five years imprisonment and/or an unlimited fine.

There has yet to be a successful criminal cartel prosecution brought in the UK. Three convictions were secured in the *Marine Hoses* case, with jail terms of between 20 months and 2.5 years being imposed along with confiscation and director disqualification orders. However, the OFT had a

limited role in bringing those prosecutions, and the convictions (secured after guilty pleas had been entered by the accused) piggy-backed on the US criminal case. A second high profile criminal cartel prosecution brought by the OFT in the British Airways/Virgin Atlantic passenger fuel surcharge case collapsed in the early stages of trial.

The revised UK cartel offence

As a result of this poor enforcement record, the UK government has taken steps to make it easier for prosecutions to be brought under the cartel offence. With the introduction of the Enterprise and Regulatory Reform Act 2013 (the “ERRA”), the newly created CMA will be the primary enforcer of both civil and criminal UK competition law. Significantly, the ERRA also amends EA02 to remove the requirement to prove dishonesty when prosecuting the cartel offence, with a view to making prosecutions easier – this change will come into effect on 1 April 2014.

The removal of the requirement to prove dishonesty was controversial, and various exclusions and defences to the offence have been introduced.

- Section 188A EA02 provides that an individual will not have committed an offence:
 - where arrangements affect the supply of a product or service, customers are given the relevant information about those arrangements before entering into agreements for the supply to them of those products or services;
 - in relation to bid-rigging arrangements, where the person requesting the bids is provided with relevant information about the arrangement; or
 - if details of arrangements are published in a specified manner (precise details of which will be set out in secondary legislation) before they are implemented.
- Section 188A(3) EA02 provides that an individual will not commit an offence if the agreement is made in order to comply with a legal requirement.
- Section 188B EA02 creates three new defences to the cartel offence, which are:
 - where, at the time of making the agreement, there is no intention to conceal the nature of the arrangements from customers;
 - where, at the time of the making of the agreement, there is no intention to conceal the nature of the arrangements from the CMA; and
 - where the defendant, before the making of the agreement, took reasonable steps to ensure that the nature of the arrangements would be disclosed to professional legal advisers for the purposes of obtaining advice about them before their making or their implementation (the “Legal Advice Defence”).

In September 2013, the CMA published for consultation prosecution guidance explaining the principles to be applied in determining, in any case, whether proceedings for the cartel offence should be instituted. Although this draft guidance (which is expected to be finalised soon) provides some clarification, there still remains minimal guidance on the types of cases likely to be prosecuted under the widened offence. The scope of the exclusions and defences also remains unclear. For example, while the guidance clarifies that the Legal Advice Defence is intended to cover in-house and external lawyers qualified in the UK as well as lawyers qualified in foreign jurisdictions with an “equivalent legal qualification”, no guidance is provided on the meaning of “equivalent qualification” or what information needs to be provided to the adviser in order to satisfy the defence.

The revised cartel offence will come into force on 1 April 2014, and applies only to conduct

occurring after that date. As a result, it could be some time before the full impact of the revised cartel offence becomes clear. However, it is clear that increased prosecution activity can be expected in the UK

Criminal cartel enforcement outlook

Individuals now face a more aggressive criminal cartel enforcement landscape in the UK. This is a global trend. For example, Belgium and Denmark have recently adopted enhanced penalties for individuals involved in collusion. In 2013, in South Korea as many as 22 individuals were indicted in a single bid rigging investigation. In the US, the Antitrust Division had another big year of criminal enforcement with 28 individuals sentenced to prison for antitrust violations in 2013.

The consequences of this tougher criminal enforcement landscape for business are significant. This is not limited to potentially greater exposure for individuals working for a company. For companies themselves, there is a heightened risk of whistleblowing by individuals on their corporate boards, and of criminal cases running parallel with civil investigations which will impact on the way in which evidence is gathered and the way in which proceedings are dealt with.

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