

Kluwer Competition Law Blog

Dawn raids on the horizon

Bernardine Adkins (Gowling WLG) · Tuesday, March 1st, 2016

A recent report from the National Audit Office has recommended that the Competition and Markets Authority (“CMA”) increase the number of cartel investigations it carries out. A number of recent statements made by senior officials in the CMA’s Cartels and Criminal Group (“CCG”) suggest that the CMA is listening very carefully.

The case for more cartel investigations

A recent report from the National Audit Office (the “NAO”) has recommended that CMA “*take further action to step up the flow of successful enforcement cases.*”^[1]

The report recognises the CMA has already made important steps forward in its cartel detection capabilities – for example, by enhancing its expertise in digital forensics – but stresses the need for the regime to build up a steady flow of successful high-profile cases, decisions and fines.^[2]

The report highlights the need for more cartel investigations by contrasting the UK competition authorities’ aggregate fines of £65 million issued for cartel infringements between 2012 and 2014, with the almost £1.4 billion of fines imposed by its German equivalent (the Bundeskartellamt) over the same time period.

The CMA has responded positively to the report, specifically recognising the need for it to bring a greater number of competition enforcement cases.^[3] The unfavourable comparisons with the German enforcement regime will, no doubt, provide something of a benchmark for the CMA to target. In this regard, it is telling that the CMA’s Chief Executive, Alex Chisholm responded to the report by reiterating the authority’s “*aim to become one of the leading competition agencies in the world*”.

Cartelists beware

Senior offices at the CMA have expressly stated that a series of dawn raids are likely to take place in the very near future. For example, in a speech given last September, Stephen Blake – head of the CCG – warned that the CMA was “*working on a number of intelligence leads, with a view to opening further cartel cases in the coming months*” and that individuals found guilty of participating in a cartel could “*expect a prison sentence.*”^[4]

Companies and/or individuals who think that their conduct may fall foul of the law should take

these indications very seriously – the CMA’s annual report for the year ended 31 March 2015 shows that the CCG’s workforce doubled in size between 2014 and 2015.^[5] Further, the ‘dishonesty’ requirement previously required for a conviction under the criminal ‘cartel offence’ has been removed by the Enterprise and Regulatory Reform Act 2013. This is expected to result in the CMA securing far more criminal convictions in future.^[6]

Sanctions available

The CMA has a wide range of sanctions which it may impose on against companies and individuals found to have been involved in a cartel.

The *Competition Act 1998*^[7] allows the CMA to fine companies found to have been involved in cartels up to 10% of their annual worldwide group turnover.

In addition, individuals convicted under the cartel offence may face:

- up to five years imprisonment; and/or
- an unlimited fine; and/or
- director disqualification for up to fifteen years; and/or
- the confiscation of assets pursuant to the *Proceeds of Crime Act 2002*^[8]; and/or
- an order requiring that they pay all or some of the costs of the prosecution.

The judiciary’s willingness to make full use of these penalties is clear: in the *Marine Hose*^[9] case, three individuals who pleaded guilty to involvement in a cartel received custodial sentences ranging from 20 to 30 months (as reduced on appeal), director disqualifications of between five and seven years, and two of the three individuals were ordered to repay a total of more than £1 million under the *Proceeds of Crime Act 2002*. The remaining individual was ordered to pay £25,000 in respect of the costs of the prosecution.^[10]

Importantly, the CMA’s leniency programme provides clear incentives for individuals and companies to proactively report cartels to the CMA, including the possibility of immunity for both individuals and companies.

For example, the CMA’s leniency programme expressly provides that, in certain circumstances, individuals will receive guaranteed immunity from criminal prosecution (as well as director disqualification) where they provide information which, at a minimum, gives the CMA a sufficient basis on which to take forward a credible investigation.

Similarly, the programme also provides for the possibility that, in certain circumstances, a cooperating company will receive guaranteed immunity from financial penalties, with its employees or officers receiving guaranteed immunity from criminal prosecution (as well as director disqualification).

With the CMA publicising the possible launch of cartel investigations (and presumably keen to explore the boundaries of the newly reformed cartel offence),^[11] both individuals and companies that suspect they may be at risk of being implicated in allegations of wrongdoing are well-advised to consider their exposure, and to take appropriate action and advice at the earliest possible

opportunity.

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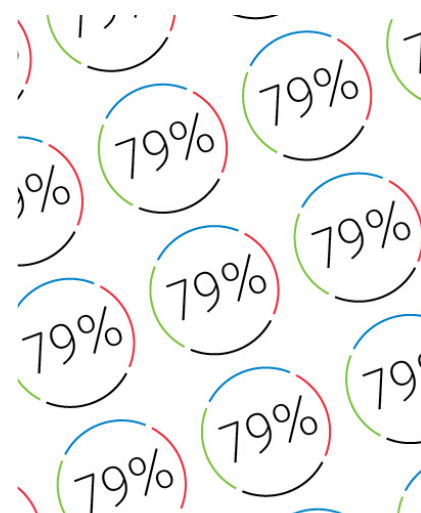
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