



Net tightens around anti-competitive behaviour

Anti-cartel enforcement is being stepped up in the UK and Ireland, particularly against individuals. This briefing looks at three recent developments that show this: the criminal proceedings launched by the Serious Fraud Office; the fact that individuals can now be extradited from the UK on the basis of the 'reciprocal' individual criminal offences of the cartel offence and common law offence of conspiracy to defraud; and the Irish courts' imposition of criminal fines and a custodial sentence for participation in cartel activity.

Three recent developments, discussed below, show how anti-cartel enforcement, particularly against individuals, is being stepped up in the UK and Ireland. A stronger culture of competition law compliance means that companies and their individual officers and employees face a more immediate risk of being on the receiving end of enforcement action.

Serious Fraud Office launches criminal proceedings

On 5 April 2006 the Serious Fraud Office (SFO) announced it was charging nine executives and five pharmaceutical companies with criminal offences involving conspiracy to defraud the Secretary of State for Health and others by fixing the prices of generic drugs sold to the National Health Service (NHS). This is the first time individuals in the UK have faced criminal charges for engaging in cartel activity.

Due to the timing of the alleged infringements, proceedings against the individuals were not brought under the new criminal cartel offence provisions of the Enterprise Act 2002 (20 June 2003). Similarly, proceedings against the companies were not commenced under the provisions of the Competition Act 1998, which prohibit anti-competitive conduct (including price-fixing), because most of the conduct occurred before the Act came into force.

The charges show that individuals engaging in cartel activity may be exposed to criminal charges even where the conduct pre-dates the Enterprise Act. They also

demonstrate that companies engaging in cartel activity may be exposed to criminal charges for conspiracy to defraud as an alternative (or conceivably as a supplement) to proceedings under the Competition Act.

Assistant director of the SFO, Philip Lewis, said: 'This important case involving an allegation of dishonest price-fixing by companies is likely to have a significant impact upon the business culture of this country.'

Background

The SFO began an investigation into price-fixing and market sharing by suppliers of generic drugs following dawn raids in April 2002. It is alleged that between January 1996 and December 2000 prices were fixed for Warfarin, Marevan and various penicillin-based antibiotics by six drug companies: Ranbaxy UK, Goldshield, Kent Pharmaceuticals, Norton Healthcare, Generics UK and Regent. Criminal proceedings are being brought against all of these companies except Regent, which is now in liquidation, and against individuals either currently or formerly working for the six companies.

Due to the timing of the alleged conduct and its serious nature, proceedings are being brought on the criminal basis of conspiracy to defraud. Separate civil damages actions are also being commenced following an inquiry by NHS investigators. Three companies have already settled the civil actions brought against them for around £30m in total.

The criminal proceedings were started on 3 April 2006 and the individuals will be bailed until 27 April 2006.

Enterprise Act 2002: cartel offence

The basis of these proceedings is distinct from the parallel legislative provisions in the Enterprise Act 2002, in force since 20 June 2003, which created a criminal offence for individuals (but not companies) dishonestly engaging in cartel activity. Penalties for the cartel offence in the Enterprise Act are up to five years' imprisonment and/or an unlimited fine. A leniency regime is in place for individuals who have committed the cartel offence, whereby if they co-operate with the SFO or Office of Fair Trading they may be granted immunity from prosecution, in certain circumstances.

Companies involved in anti-competitive behaviour are exposed to heavy financial penalties under the Competition Act and directors of companies involved in competition law breaches may be disqualified from being involved in the management of a company for up to 15 years.

The UK regulators see criminal sanctions as playing a vital role in competition law enforcement and they are clearly gearing up to use their new powers.

Cartel offence and extradition

Individuals charged with cartel activity in certain other jurisdictions may now be extradited from the UK on the basis that the UK recognises 'reciprocal' individual criminal offences either in the form of the cartel offence or the common law offence of conspiracy to defraud. In a recent case, US authorities sought the extradition of Mr Ian Norris, ex-chief executive of engineering company Morgan Crucible, to face criminal price-fixing charges in the US. In 2005 a UK court accepted that extradition could be sought against individuals charged with price-fixing in another jurisdiction, even where that conduct pre-dated the enactment of the cartel offence. The court in that case relied on the existence of the criminal law offence of conspiracy to defraud. The matter is now on appeal.

Irish cartel prosecutions

Other jurisdictions have also taken steps to criminalise cartel behaviour. Criminal offences for competition law breaches were introduced in Ireland in 1996 and in February and March 2006 the Irish courts imposed,

for the first time, criminal fines and a custodial sentence for participation in cartel activity. These penalties were imposed in a case involving 24 individual and corporate defendants following an investigation into alleged price-fixing between distributors of gas-oil and kerosene products.

Further reading

For more information see our *Guide to the Enterprise Act 2002* at www.freshfields.com/practice/finance/publications/pdfs/enterpriseact.pdf.

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