



Landmark criminal convictions for cartel activity

THREE SENTENCED TO PRISON IN FIRST UK CARTEL OFFENCE CONVICTIONS

The possibility of individuals serving prison time for cartel activity is now very much a reality in the UK following the sentencing this week of three UK nationals to terms of imprisonment.

On 11 June 2008, at Southwark Crown Court, Judge Rivlin entered the first convictions under section 188 of the Enterprise Act 2002, known as the 'cartel offence'. In a prosecution brought by the Office of Fair Trading (OFT), Bryan Allison, David Brammar and Peter Whittle, were each sentenced to terms of imprisonment of between two and half years and three years for their involvement in an alleged cartel in the marine hose industry. All three were also disqualified from serving as company directors for periods of between five to seven years. In addition, the OFT is seeking to confiscate certain assets of two of the individuals as proceeds of crime.

Background

Section 188 of the Enterprise Act 2002 makes it a criminal offence for an individual dishonestly to agree with one or more other persons to engage in certain 'hard core' types of cartel activity, namely price-fixing, market-sharing and/or bid-rigging, in relation to the production or supply of products or services in the UK. The offence carries a maximum penalty of five years imprisonment and/or unlimited fines.

The OFT prosecution follows the arrest of the three defendants (former employees of Dunlop Oil & Marine Ltd) in the US in May 2007. Pursuant to plea agreements entered into with the US Department of Justice, each of the men was sentenced on 12 December 2007 to prison terms in the US of between 20 and 30 months. Fines of between \$75,000 and \$100,000 were also imposed.

These sentences were suspended to allow the defendants to return to the UK to face charges under the UK cartel offence.

Substantial terms of imprisonment imposed

The three individuals each pleaded guilty to the cartel offence. In sentencing, Judge Rivlin referred to their complete co-operation, their early guilty pleas and their otherwise good character. Notwithstanding this, Messrs Allison and Whittle were each imprisoned for a period of 36 months (with a requirement that they serve a minimum of 18 months), whilst Mr Brammar was sentenced to 30 months (with a minimum term of 15 months).

Judge Rivlin made a Directors Disqualification Order against each of the Defendants, under the Companies Directors Disqualification Act 1986. Messrs Allison and Whittle were disqualified for a period of seven years, and Mr Brammar for a period of five years.

In return for the co-operation of the three individuals, the OFT did not seek fines and Judge Rivlin accepted that a fine was not required in the circumstances.

The OFT is also seeking confiscation orders against Mr Whittle and Mr Brammar for the personal financial benefit they allegedly obtained from their conduct. This issue will be dealt with at a further hearing scheduled for 1 July 2008. The OFT also sought its costs of the investigation.

Implications

After its entry into force nearly five years ago, these are the long-awaited first convictions under the cartel offence. They indicate that sentences imposed for the offence are likely to be substantial. Even with full co-operation and guilty pleas at the earliest possible opportunity, sentences towards the upper end of the statutory range were imposed. In sentencing, Judge Rivlin stated that he had taken into account by way of mitigation that this was the first prosecution under the cartel offence and that the conduct had commenced sometime prior to it becoming criminalised. His Honour expressly stated that these mitigating factors would not be available to future defendants and that future sentences for serious offences are likely to be higher.

The case highlights the very real risk of personal fines and imprisonment that individuals who participate in cartel activity now face in the UK. It also demonstrates the significant degree of co-operation that exists between the UK and US authorities in relation to the prosecution of individuals, as well as companies, for antitrust infringements.

In this new environment, the benefits potentially available in the UK to individuals and their employers under the OFT's leniency regime have never been higher, including, as they do, the possibility of obtaining immunity from individual criminal prosecution. The challenge for employers will be to ensure that the full benefit of any leniency is obtained for the company, as well as for its employees, in circumstances where there are now very significant incentives for individual employees to whistleblow. The convictions highlight the need not only for effective antitrust compliance measures, but also for confidential internal reporting channels to encourage employees to report any problematic behaviour directly to their employer.

For further information please contact Bea Tormey
T +44 20 7716 4081
E bea.tormey@freshfields.com

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