

U.K. Imposes First Criminal Sentences On Cartel Participants

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On June 11, 2008, three individuals were sentenced by the U.K. courts to imprisonment for periods of between two-and-a-half and three years after pleading guilty to dishonestly participating in an international cartel to rig bids, fix prices, restrict supplies, and allocate customers in respect of the worldwide supply of marine hose products. The three executives were also disqualified from acting as U.K. company directors for periods of between five and seven years.

This sentencing decision marks the first occasion on which the U.K. Office of Fair Trading (“OFT”) has secured criminal convictions against individuals found to have infringed domestic competition law. The imposition of prison sentences signals unambiguously the OFT’s intention to prosecute vigorously cartels and, in so doing, utilise the full range of civil and criminal sanctions available to it. While cartel participation has historically rendered companies vulnerable to the risk of significant corporate fines, it is now evident that, in appropriate circumstances, individual board members and senior managers may be exposed to criminal charges in the U.K.

It is also notable that the U.K. sentences are of substantial length, and longer than the sentences the same individuals received in the U.S. in this matter, which themselves were among the highest sentences ever imposed for cartel infringements in the U.S. Moreover, the U.K. courts have indicated that the U.K. sentences in this matter may well set the minimum term for individuals convicted in future of cartel participation. This case therefore provides a clear warning that U.K. criminal prosecution may bear consequences that are significantly more severe than those imposed in identical circumstances in other jurisdictions, including the U.S.

In addition, the successful prosecutions in this case are a product of intensive and sustained cooperation between the OFT, the U.S. Department of Justice (“DoJ”), and the European Commission, with all three agencies investigating, in parallel, the worldwide marine hose cartel. Responding to a multi-national infringement, this case demonstrates the ability and willingness of antitrust agencies in Europe and the U.S. to work together closely to obtain evidence and coordinate enforcement activities.

I. BACKGROUND TO THE SENTENCING DECISION

A. U.K. Enforcement Regime

On December 19, 2007, the OFT announced that three U.K. nationals had been arrested and charged with having dishonestly participated in a cartel. This marked the first instance on which individuals have been charged with the criminal cartel offence provided under section 188 of the Enterprise Act 2002, which came into force in June 2003.

Section 188 criminalises individual participation in certain types of “hardcore” cartel, including arrangements to fix prices, limit product supply, share markets, or rig bidding processes. Individuals found to have dishonestly engaged in prohibited cartel activities can be subject to unlimited fines, up to five years imprisonment, or both.

In addition to potential criminal liability, U.K. law provides that individuals implicated in cartels may be subject to civil sanctions. In particular, the OFT has the power to apply to court for disqualification orders against company directors implicated in cartels. A court order issued pursuant to the Company Directors Disqualification Act 1986 renders it a criminal offence for a disqualified person to act as a U.K. company director, or to participate directly or indirectly in the management of any U.K. company. A court disqualification order may operate for a period of up to fifteen years.

B. Marine Hose Cartel Investigations

The arrests announced by the OFT at the end of 2007 resulted from investigations conducted over a period of some twelve months by multiple antitrust agencies into the worldwide supply of marine hose products. Marine hose is used primarily by companies active in the defence and transport sectors to move oil from storage facilities to tankers.

In May 2007, the OFT had conducted searches of both business and domestic premises as part of its investigation into the international supply of marine hose. At the same time, raids were conducted by the European Commission in France and Italy, with the local antitrust agencies providing assistance.

The searches made by the various European authorities were prompted by actions taken by the DoJ. On May 8, 2007 the DoJ had arrested eight foreign executives for alleged violation of U.S. antitrust laws arising in connection with a suspected worldwide marine hose cartel. The arrests were made in Houston, Texas, and San Francisco following a cartel meeting that had been covertly recorded by the DoJ. In the course of the U.S. proceedings, the businesses involved in the marine hose cartel were identified as: Dunlop Oil and Marine Limited; Bridgestone Corporation; Yokohama Rubber Company Limited; Parker ITR S.r.l; Manuli Rubber Industries SPA; and Trelleborg Industrie S.A. The DoJ amassed evidence indicating that these companies, collectively responsible for substantially all worldwide marine hose supply, had, since 1999,

conspired to rig bids, fix prices, and allocate markets for the supply of marine hose and ancillary equipment.

Among those arrested were three U.K. nationals, Mr. Peter Whittle, the sole proprietor of PW Consulting (Oil & Marine), and Messrs. Bryan Allison and David Brammer, directors of Dunlop Oil & Marine Limited. On December 12, the DoJ announced that these three U.K. nationals had agreed to plead guilty to charges of participating in a conspiracy to rig bids, fix prices, and allocate markets. Under the terms of the plea agreements filed with the U.S. District Court in Houston, Mr. Whittle agreed to serve thirty months in jail, Mr. Allison agreed to serve twenty-four months in jail, and Mr. Brammar agreed to serve twenty months in jail. These constitute the longest prison sentences that foreign national defendants charged with antitrust offences have ever agreed to serve in the U.S. The defendants also agreed to pay fines ranging between US\$75,000 (some €48,000) and US\$100,000 (roughly €65,000).

In addition, the plea arrangements extended to include an unusual innovation. Having pleaded guilty to the U.S. charges, the defendants agreed to be escorted under custody back to the U.K. to face prosecution by the OFT. The OFT has made it clear that the defendants returned to the U.K. voluntarily, and were not threatened with extradition. (It has transpired that as part of the U.S. plea agreements, the U.S. courts agreed that the U.S. and U.K. sentences should be served concurrently, and that the U.S. sentences would be reduced in duration by a term equivalent to any U.K. sentences. For reasons noted below, this has led to the suspension of the U.S. sentences in their entirety.)

The three defendants returned to the U.K. on December 18, 2007, and were arrested on arrival at Heathrow Airport on suspicion of having committed the criminal cartel offence provided under section 188 of the Enterprise Act 2002.

C. U.K. Sentencing Decision

On June 11, 2008, Messrs. Whittle, Allison and Bramner pleaded guilty at Southwark Crown Court to having dishonestly participated in an illegal cartel relating to the supply of marine hose and ancillary equipment in the U.K. The following sentences were issued:

- Mr. Whittle was sentenced to three years imprisonment and disqualified from acting as a director for a period of seven years. The OFT has noted that while Mr. Whittle acted as an independent consultant, he had, in effect, been charged with the international coordination of cartel activities, and was paid US\$50,000 by each cartel member to process rigged bids.
- Mr. Allison, the ex-managing director of Dunlop Oil and Marine Limited, received a three year prison sentence, a seven year director

disqualification order, and was required to pay costs of £25,000 (roughly €30,000).

- Mr. Bramner, previously the sales director of Dunlop Oil and Marine Limited, received a two-and-a-half year sentence and was disqualified from acting as a director for some five years.

It is significant that the length of these sentences considerably exceeds that of the sentences negotiated under the U.S. plea agreements, which, as noted above, constituted the longest sentences ever imposed on foreign nationals. In issuing the U.K. sentences, the presiding judge made it clear that the defendants were being given comparatively lenient treatment, with the sentence lengths potentially providing a minimum standard for future convictions in the U.K. In this regard, it was noted that the marine hose cartel had commenced before June 2003. The cartel therefore predated the criminalisation in the U.K. of individual cartel participation. This circumstance was considered a mitigating factor in determining the length of the sentences. It is therefore to be expected that lengthier sentences might be imposed on individuals implicated in similarly egregious cartels found to have been instigated after June 2003.

II. IMPLICATIONS OF THE CASE

This case represent the culmination of a year of rigorous OFT cartel enforcement action. In August 2007, the OFT fined British Airways plc £121.5 million (roughly €175 million) as a result of its illegal fixing of the price of long-haul passenger fuel surcharges. This fine constitutes the largest corporate penalty imposed by the OFT for infringement of U.K. competition laws. The OFT has now successfully prosecuted its first criminal investigation and secured substantial prison sentences, significantly longer than those applied in the U.S. This landmark criminal case underlines the OFT's continued commitment to investigate and prosecute cartel activities using the full range of civil and criminal powers at its disposal.

The case also demonstrates the increased international cooperation between antitrust agencies in investigating and prosecuting worldwide cartels. The criminal investigation pursued by the OFT entailed an unprecedented level of coordination between U.S. and U.K. authorities. Valuable evidence was obtained by the OFT through the U.S. investigatory process, with convictions in the U.K. assured by the innovative plea arrangements secured by the DoJ.

The increased incidence and effectiveness of coordinated cartel enforcement by national antitrust agencies, and the severity of the individual prison sentences imposed by the U.K. courts, emphasize once more the need for robust internal antitrust compliance programs.

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