

Insight

Dispute Resolution

Court of Appeal judgment may affect UK/US cooperation in criminal cartel enforcement

On Friday 14 November, judgment was handed down by the English Court of Appeal (Criminal Division) in an appeal arising in relation to one of the numerous ongoing actions being taken against participants in the so-called "Marine Hose" cartel.

The Court of Appeal's judgment demonstrates – once again – the extraterritorial reach of US antitrust laws and could have important ramifications for future cooperation between the US Department of Justice, Antitrust Division ("DOJ") and the UK's Office of Fair Trading ("OFT") in the field of criminal enforcement of cartels.

Background

In May 2007, three UK nationals were arrested in the United States following undercover surveillance by the DOJ of an illegal meeting in Houston, Texas between members of the Marine Hose cartel. Following short periods of detention in the US, the three entered into plea bargains with the US authorities, in which they pleaded guilty to price-fixing offences and were conditionally sentenced to serve periods of detention of between two and a half years and 20 months in the US. The conditional sentences were imposed on the grounds that the three also agreed to return to the UK to face charges under s.188 of the Enterprise Act 2003 (the "Cartel Offence").

Crucially, it was an express term of the plea bargains that the three would not seek prison sentences from the UK authorities shorter than those which they had agreed to serve in the US. They also agreed that, if the eventual UK sentences were shorter than those agreed to in the US, they would return to the US to serve out the balance of their sentences there.

Upon their return to the UK, the three pleaded guilty to the Cartel Offence and were convicted, in June 2008, with the sentences imposed by Southwark Crown Court ranging from three years (in two cases) to 30 months (in the other). There is no doubt that these convictions represented a major cooperation milestone between the DOJ and the OFT. They were, after all, the first criminal convictions in the UK for the Cartel Offence, and came some five years after the Cartel Offence first came into force. However, as explained below, the Court of Appeal roundly criticised the approach taken by the DOJ in the plea agreements concluded with the three individuals.



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The Court of Appeal's Decision

Following their UK convictions, the three appealed, looking to reduce the term of the sentences imposed. However, given the strong incentive not to return to the US which was created by the plea bargains, each of the individuals instructed their counsel not to seek a reduction in their sentences below that which they had already agreed to in the US.

As the Court of Appeal observed, counsel were: "acting upon their instructions and their instructions were imposed upon them by the terms of the plea agreements. We have our doubts as to the propriety of a US prosecutor seeking to inhibit the way in which counsel represent their clients in a UK court, but having heard no argument on the subject we shall express no concluded view."

The Court recognised that, ordinarily, substantial discounts to the sentences imposed at first instance could have been available given, amongst other things, the individuals' good character and willing cooperation with the authorities. However, the Court was not in a position to judge this fully, constrained as it was, by the partial submissions which had been advanced on behalf of the defendants. Therefore, while expressing its "considerable misgivings" in doing so, the Court felt it had no alternative other than to reduce the sentences imposed to precisely the duration which the defendants had agreed to in their plea bargains concluded with the DOJ.

Comment

The Court of Appeal's judgment demonstrates – yet again – the extraterritorial application of US antitrust laws.

Clearly, there was no requirement in this case for the defendants to be given the opportunity to return to the UK to face criminal charges here. Having admitted their guilt to price-fixing offences in the US, it would have been possible for the US authorities simply to insist that the defendants should serve out their sentences in the US. However, the terms on which the defendants were permitted to return to the UK were structured in such a way that they would only ever have sentences imposed which were at least as harsh as those imposed in the US. There seems little doubt that, had the terms of the plea bargains not been a consideration for the defendants, they could have sought and obtained substantial reductions to the sentences originally imposed by Southwark Crown Court.

The approach adopted by the DOJ is almost certainly intended to emphasise the harsh penalties which individuals face should they violate US antitrust laws. Not only do such individuals already face the risk of extradition to the US and the imposition of lengthy prison sentences there, they now also face the risk that (where they are also guilty of criminal anti-competitive conduct in their home country) they may be permitted to return home but, in effect, obliged to serve a "US-length" prison sentence there.

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