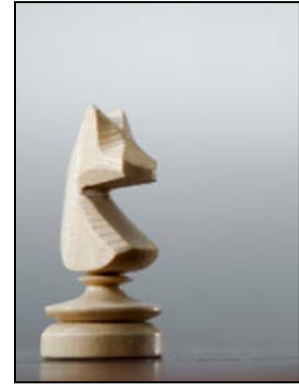


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Crown Court has jurisdiction to try the cartel offence: *IB v the Queen* [2009] EWCA Crim 2575

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Construing section 188 of the Enterprise Act 2002 (“the 2002 Act”) for the first time, the Court of Appeal has upheld the judgment of Mr Justice Owen, holding that the Crown Court has jurisdiction to try an indictment alleging the “cartel offence” created by section 188 and to impose punishment if the offence is proved to have been committed. The Court of Appeal rejected the argument advanced by the Defendant that the Council Regulation 1/2003/EC (“the Modernisation Regulation”) excludes such a jurisdiction of the Crown Court.

Legal background: the “cartel offence” and the Modernisation Regulation

Section 188 of the 2002 Act makes it a criminal offence for an individual dishonestly to agree with one or more other persons to make or implement arrangements relating to at least two undertakings which, if operating as the parties to the agreement intend, would result in horizontal price fixing, output or supply restrictions, horizontal market allocation or bid rigging in the United Kingdom (“the cartel offence”). Price fixing, output restriction, market allocation and bid rigging are all restrictions of competition “by object” and are prohibited at Community level by Article 101 of the Treaty on the Functioning of the European Union (“TFEU”) and at UK level by section 2, Competition Act 1998. In this case, the Defendant is alleged to have committed the cartel offence by dishonestly entering into a horizontal price fixing agreement. The parties did not dispute that, if proved, the alleged price fixing agreement had an EU dimension – i.e. it would be capable of affecting trade between Member States of the Community.

Pursuant to section 190(1) of the 2002 Act, the maximum penalty for a conviction on indictment in respect of the cartel offence is 5 years imprisonment and an unlimited fine. By **section 190(2)** of the 2002 Act, a prosecution for the cartel offence may be brought only either by the Director of the Serious Fraud Office or by or with the consent of the OFT.

The Modernisation Regulation is directly applicable in the UK and sets out the current system of Community competition law enforcement, which is characterised by parallel enforcement of Articles 101 and 102 TFEU by the Commission and European Courts at Community level and national courts and competition authorities at Member State level (see Article 5 and 6, Modernisation Regulation). Article 35 (1) of the Modernisation Regulation requires Member States to designate the national competition authorities that are responsible for the application

of Article 101 and 102 TFEU at Member State level. In the UK, the relevant national competition authority is the OFT.

Article 3(1) of the Modernisation Regulation provides that “where the competition authorities of the Member States or national courts apply national competition law to agreements, decisions by associations of undertakings or concerted practices within the meaning of [Article 101 TFEU] which may affect trade between Member States within the meaning of that provision, they shall also apply [Article 101 TFEU]”. Article 3(2) of the Modernisation Regulation provides that national competition law cannot operate so as to prohibit agreements et. al. that are capable of affecting trade between the Member States, but that fall outside of Article 101(1) TFEU or are exempt under Article 101(3) TFEU. Article 3(3) of the Modernisation Regulation makes clear that Articles 3(1) and (2) “do not preclude the application of provisions of national law that predominantly pursue an objective different from that pursued by [Articles 101 and 102 TFEU]”.

Pursuant to Article 11 of the Modernisation Regulation, the Commission has the power to call in and take over from a national competition authority any case involving the application and enforcement of Articles 101 or 102 TFEU.

Arguments of the parties

The Defendant argued that:

- (1) in cases with a European dimension (i.e. where an agreement et. al. may affect trade between Member States), a “national competition law”, as defined in the Modernisation Regulation, may only be enforced by a national competition authority designated under Article 35 of the Regulation – this proposition is derived from reading together Articles 3, 5 and 35 of the Modernisation Regulation,;
- (2) section 188 of the 2002 Act is a national competition law, because it pursues the same objectives as Article 101 TFEU,
- (3) therefore, section 188 may only be enforced in the UK by the OFT as the national competition authority and not by the Crown Court.

The Crown argued in reply that:

- (1) section 188 is not a “national competition law” within the meaning of the Modernisation Regulation, being aimed at dishonesty rather than infringement of Article 101 new acronym; and
- (2) even if section 188 is a national competition law, nothing prevents the Crown Court from applying it, even though the Crown Court is not a designated national competition authority.

The judgment: meaning of “national competition law”

The Court of Appeal had “not the slightest doubt that what motivated the framers of **section 188** was a desire to strengthen English law against anti-competitive behaviour” (paragraph 22). However, it found that the mere fact that a law is in some way targeted at preventing anti-competitive practices does not determine its status as a “national competition law” for the purposes of the Modernisation Regulation.

Instead, the Court of Appeal, reading the Modernisation Regulation as whole, held that the Regulation was plainly concerned to avoid “limping agreements” (agreements which are held to be enforceable pursuant to Article 101 TFEU in one Member State but not enforceable in others) by ensuring that Article 101 TFEU is applied consistently to the same agreement throughout the Member States of the Community. Accordingly, the Court of Appeal held (implicitly at paragraph 34) that “national competition law” within the meaning of the

Modernisation Regulation must mean a law of a Member State that bears directly on the validity of an agreement, decision by an association of undertakings or concerted practice.

The Court of Appeal went on to find that section 188 of the 2002 Act is not a “national competition law” for the purposes of the Modernisation Regulation because the question of the validity of agreements et. al. does not arise in the context of section 188 (paragraph 37).

The Court also opined that the risk of any inconsistency between a section 188 prosecution and a decision on the validity of an agreement under Articles 101/102 TFEU is likely to be small because:

- (1) in practice, a prosecution is unlikely to arise without parallel regulatory proceedings which will address the question of validity;
- (2) agreements envisaged by section 188 will very probably be “object infringements” of Article 101 TFEU and so be invalid under that Article;
- (3) Articles 101 and 102 TFEU are directly effective in the UK independent of the Modernisation Regulation, and the courts may be subject to a duty to interpret section 188 consistently with those Articles.

The judgment: jurisdiction to enforce “national competition law”

Further, in the event that section 188 of the 2002 Act is, in fact, a national competition law, the Court of Appeal could find nothing in the Modernisation Regulation that “makes the punishment of an offence which amounts to part of a national competition law the exclusive province of the designated national competition authority” (paragraph 38).

Accordingly, the Court of Appeal upheld the jurisdiction of the Crown Court in this case and, barring further appeal to the House of Lords, the UK’s first cartel offence prosecution may now proceed.

Comment

The Court of Appeal decision is welcome news for competition law enforcers, as the possibility of prosecution under section 188 of the 2002 Act, is potentially a very powerful deterrent of hard core anti-competitive conduct. The force of that deterrent will depend to a great extent on the likelihood of successful prosecution, which depends in turn on the ease or difficulty of establishing the constituent elements of the offence. The Court of Appeal has already raised, though it has not attempted to answer, some interesting questions concerning the scope of the cartel offence and, particularly, the meaning of “dishonesty” in this context (see paragraph 27) – for example, what is the effect of honest belief in the public benefit of anti-competitive conduct on a cartel offence prosecution? what is the effect of deliberate concealment and secrecy of a cartel? Therefore, we now await with great interest a judgment dealing with the substantive issues raised by section 188.

Jon Turner QC and Anneli Howard represented the OFT

For more information on **Jon Turner QC**, **Anneli Howard** and **Ligia Osepciu** please contact the Clerks on 020 7405 7211 or consult the ‘Find a Barrister’ section at www.monckton.com.