

## UK Watchdog Flexes Criminal Muscle With Cartel Arrests

By **Melissa Lipman**

*Law360, New York (March 22, 2013, 7:40 PM ET)* -- U.K. officials arrested seven individuals last week as part of a cartel probe into construction materials suppliers, the Office of Fair Trading confirmed Friday, demonstrating the antitrust watchdog's determination to pursue criminal cases despite its poor track record in past prosecutions.

The OFT has launched a probe into a possible cartel among companies that supply products to the construction industry, agency spokesman Elliott Ball said. In addition to the arrests, officials also carried out searches last week at several locations across the country.

The individuals arrested were not identified, but this marks the first time the OFT has confirmed cartel arrests since 2010, the year that the agency's high-profile prosecution of several British Airways PLC executives fell apart.

But these new arrests underscore the agency's continuing focus on making use of its criminal enforcement powers even before reforms come into play that are designed to make it easier for the OFT to pursue criminal cases after some high-profile failures.

"The arrests show that the OFT's resolve to pursue criminal investigations is unabated," said King & Spalding LLP partner Suzanne Rab. "This is despite the criticisms over its procedures and poor track record in obtaining watertight prosecutions even after a decade of the cartel offense being in operation."

The OFT's first confirmed criminal cartel arrests in more than two years come both as officials at the antitrust watchdog have been vocal about their determination to prosecute more cases and as Parliament debates a bill that, among other things, would change the standard the OFT has to meet to secure a criminal conviction.

There is little question that the OFT has had a difficult time making charges stick under current law, which requires the agency to meet the so-called dishonesty requirement for criminal cases. Under that measure, the watchdog must show that the defendant knew or should have known what he or she was doing was illegal.

In the decade since the OFT gained criminal enforcement authority, its only convictions have come from plea agreements. Meanwhile the only contested criminal case — against several British Airways executives — fell apart in May 2010.

While the proposal to eliminate the dishonesty requirement is still wending its way through the legislative process, the OFT has not been shy about its interest in bringing criminal cases.

In November, the agency appointed its assistant criminal enforcement director Lee Craddock, a former police detective and investigator at the U.K. Serious Fraud Office, to a newly created lead investigator and enforcer role.

The OFT's chief, Clive Maxwell, also highlighted the agency's criminal work in a recent speech, saying that the regulator has "a number" of ongoing criminal investigations.

"We have significantly improved our investigatory capabilities, increased senior legal resources, ensured our policies and procedures are fit for purpose, and built an intelligence function capable of undertaking covert activities to supplement our leniency program," Maxwell said earlier in March. "There is every prospect that the next 12 months will also see at least one prosecution for the cartel offense, and based on the current portfolio, more to follow in the next couple of years."

All of those steps, along with the new arrests, may point to an agency pressed to show results after its high-profile failure in the British Airways case, in which the OFT was forced to withdraw the charges after learning two weeks into the trial that the leniency application from Virgin Atlantic Airways Ltd. that had prompted the case was missing a "substantial volume" of emails.

"The OFT are bound to have been under a lot of political pressure to show that they are prepared to bring prosecutions, even under the 'old' law and they've been hinting for a while that something was coming down the track," said Edwards Wildman Palmer UK LLP antitrust co-chair Becket McGrath. "There's still a long way to go until they can get this one to trial, if it gets that far."

And the agency's push to pursue criminal charges may only get stronger if and when lawmakers pass the reforms to the U.K.'s competition law.

"If anything, the proposed changes in the law would make it easier — under the new law, when it comes into force, there would be no dishonesty requirement, which removes a requirement that has proved difficult for the OFT in the past," said Gillian Sproul, who heads Mayer Brown International LLP's London EU and U.K. antitrust group.

The arrests should also serve as a warning to small businesses that they are not exempt from antitrust scrutiny.

"What is quite striking about this news is that two of the companies seem to be small family-owned businesses," said Allen & Overy LLP partner Mark Friend, who heads the firm's London antitrust group. "Companies like this are probably less well-informed about the risks of competition law enforcement than their larger counterparts, and less likely to be taking advice from competition lawyers."

--Editing by Andrew Park and Katherine Rautenberg.