

SUPREME COURT RULING IN THE TOBACCO RETAIL PRICING CASE: OFT DECISION NOT TO REIMBURSE FINES IMPOSED ON GALLAHER AND SOMERFIELD WAS NOT IRRATIONAL

22 May 2018 | London

Legal Briefings - By **Kristien Geurickx**

The Supreme Court has [found](#) that the OFT (the CMA's predecessor) did not act unlawfully in failing to repay fines imposed on Gallaher and Somerfield as part of their settlement of the OFT's tobacco retail pricing investigation. This was the case despite there being:

a successful appeal against the infringement decision by other parties; and

the OFT honouring an assurance to one of the other settling parties, TMR, that it would benefit from a successful appeal by others

The Supreme Court held that the OFT's assurance to TMR was given in error but this did not affect the position of Gallaher and Somerfield. The OFT's decision in 2012 to repay the fines imposed on TMR in light of the assurance it received in 2008, but not to extend this to Gallaher and Somerfield, was objectively justified and not irrational.

In an important development for public law, the Supreme Court clarified that unequal treatment and substantive unfairness are not freestanding grounds of judicial review or legal criteria and will not give rise to invalidity unless the test for irrationality or procedural unfairness are met.

The case also acts as a useful reminder that each of the parties subject to an investigation is free to make choices such as whether to settle in an investigation and whether or not to appeal an infringement decision against them. Based on the principles of finality and certainty that choice becomes final. Parties cannot free-ride on the outcome obtained by other parties in the same case who make different choices with potentially very different outcomes.

1. THE INFRINGEMENT DECISION AND THE EARLY RESOLUTION PROCEDURE

In April 2010 the OFT adopted an infringement decision which concluded that two tobacco manufacturers, Imperial Tobacco and Gallaher, and ten retailers had engaged in anti-competitive conduct in relation to retail prices for tobacco products, in breach of the Chapter I prohibition. Total fines of £225 million were imposed.

Earlier on in the proceedings, the OFT had reached early resolution agreements (**ERA**) (similar to the EU Commission's settlement procedure) with several parties including Gallaher and TMR.

Under the ERA the settling parties were required to admit involvement in the infringements and cooperate during the investigation, in exchange for a reduction in the fine imposed of up to 20%. A settling party was entitled to appeal against an infringement decision, despite its admission of guilt, but in that case the OFT reserved the right to make an application to the CAT to increase the fine and require that party to pay the OFT's full costs of the appeal.

TMR questioned what would happen in the event of a successful appeal by one of the other parties to the investigation. TMR was assured by the OFT that, to the extent that the principles determined in the appeal decision undermined the OFT's decision against TMR, the OFT would apply the same principles to TMR.

At the time the early resolution process was not contained in any statutory rules or published document. Its key principles were set out in an internal OFT document of January 2008.

Six parties successfully appealed the OFT's decision before the Competition Appeal Tribunal (**CAT**). The CAT held that the OFT had failed to identify any applicable theory of harm adequately or to provide evidence to support its conclusion. The OFT decision was quashed in relation to the appellants. It remained in effect against those parties who did not appeal.

In August 2012 the OFT agreed to pay TMR an amount equal to the penalty it had paid, together with a contribution to interest and legal costs, based on the earlier assurance it had given TMR.

2. JUDICIAL REVIEW PROCEEDINGS

High Court

Gallaher and Somerfield asked OFT to have their fines reimbursed in the same way as TMR. The OFT refused to extend similar treatment to Gallaher and Somerfield and they launched judicial review proceedings against the OFT on grounds of fairness and equal treatment. The High Court dismissed the claims on the basis that the OFT's assurance to TMR had been given in error and was contrary to the principles of finality and legal certainty in competition cases.

Court of Appeal

Gallaher and Somerfield successfully appealed to the Court of Appeal and the Court of Appeal concluded that the OFT must comply with the principle of equal treatment in all steps leading to the imposition of a penalty. The Court of Appeal agreed that the assurance given to TMR was a mistake, in breach of the finality and legal certainty principles. However, it found in favour of the appellant as there was no objective justification for the unequal treatment of the parties to the early resolution process. This was particularly so as the settling parties had been told that they would all be treated equally.

The Supreme Court's ruling

In its appeal before the Supreme Court, the CMA accepted that the principles of equal treatment and fairness applied to the OFT, but argued that these principles did not require it to replicate its earlier mistake, at least in the absence of "conspicuous unfairness". Gallaher and Somerfield claimed that the OFT's refusal to afford them the same treatment as TMR was in breach of public law requirements of equal treatment and fairness.

Key principles

Lord Carnwath, in the lead judgment with which the other justices agreed, made the following observations of principle:

- **Unequal treatment:** Lord Carnwath held that, "whatever the position in European law

or under other constitutions or jurisdictions, the domestic law of this country does not recognise equal treatment as a distinct principle of administrative law". While the OFT owed a general duty to offer equal treatment to the parties under investigation, and the parties had a legitimate expectation that they would be treated equally, this reveals nothing about the legal consequences of such an expectation in terms of rights and remedies in public law. Unequal treatment generally only gives rise to invalidity if the requirements of irrationality are met.

- **Unfairness:** Lord Carnwath confirmed that "simple" or "substantive" unfairness (as opposed to procedural unfairness) is not a ground for judicial review. Nor is it made so by the addition of terms such as "conspicuous" or "abuse of power", which add nothing to the ordinary principles of judicial review and are misleading.

The respondents have grounds to complain of the administrative failure to inform them of the assurance given to TMR in 2008, but grounds for administrative complaint do not necessarily add up to a cause of action in law.

Findings

Lord Carnwath concluded that the OFT's decision to honour its assurances to TMR but not to repay fines for the respondents was not irrational and was objectively justified. That was because the positions of TMR and that of the respondents were very different. The respondents entered into early resolution agreements fully aware of the possibility that other parties might successfully appeal. TMR on the other hand sought an assurance, on which they claim to have relied, that they would themselves benefit from such a successful appeal. The OFT could therefore reasonably assume in 2012 that, if that assurance were not honoured, TMR would have had a strong case for permission to appeal out of time, unlike the respondents.

Lord Sumption agreed with Lord Carnwath's analysis of the relevant legal principles and the importance of not unnecessarily multiplying categories in public law. Had the OFT refused to repay TMR, TMR would have received permission to appeal out of time and its appeal would have been bound to succeed as the ground on which the other appeals succeeded also applied to them. The OFT therefore settled with TMR on the only realistic basis and it was not irrational for the OFT to have done so.

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



STEPHEN WISKING
MANAGING PARTNER,
COMPETITION,
REGULATION AND
TRADE, LONDON
+44 20 7466 2825
stephen.wisking@hsf.com



**ANDREW
LIDBETTER**
PARTNER, LONDON

+44 20 7466 2066
Andrew.Lidbetter@hsf.com



**KRISTIEN
GEEURICKX**
PROFESSIONAL
SUPPORT
CONSULTANT,
LONDON
+44 20 7466 2544
Kristien.Geeurickx@hsf.com

LEGAL NOTICE

The contents of this publication are for reference purposes only and may not be current as at the date of accessing this publication. They do not constitute legal advice and should not be relied upon as such. Specific legal advice about your specific circumstances should always be sought separately before taking any action based on this publication.

© Herbert Smith Freehills 2021

SUBSCRIBE TO STAY UP-TO-DATE WITH INSIGHTS, LEGAL UPDATES, EVENTS, AND MORE

Close

© HERBERT SMITH FREEHILLS LLP 2021