

## The English Court of Appeal's reminds of how novel points in a case should impact on the penalty imposed (National Grid)

**United Kingdom, Procedures, Abuse of dominant position, Sanctions/Fines/Penalties, Judicial review, Energy**

Businesses and their advisors are often confronted by situations where the law in relation to their behaviour is either unclear or uncertain. This raises an underlying concern that if their conduct is later deemed illegal, what impact should the uncertainty have on the illegality and/or any penalty imposed. These issues arose in the English Court of Appeal in *National Grid v Gas & Electricity Markets Authority* (and others). The Court explored the application of the OFT's fining policy and the effect of uncertainty of the legal issues has on the assessment of a financial penalty. The Court found that for there to be "uncertainty", there must be novel issues at stake, and comparisons from existing case-law should be difficult. If these circumstances are established, fines should not be imposed or should be reduced. Ultimately therefore, whilst uncertainty is not a defence to anti-competitive behaviour, this case is authority for the considerable impact it can have on mitigating any penalty imposed.

### Background to the Case

This comment focuses on the effect of legal uncertainty on the level of penalties imposed by UK competition authorities. The other aspects of the judgment are addressed by other comments [1].

This case arose out of the opening up of competition in the gas metering market in the latter half of the last decade. By the decision of the Gas and Electricity Markets Authority (the "Authority") in February 2008, National Grid was found to have breached Section 18 of the Competition Act 1998 (the "Act") and its equivalent, Article 102 TFEU. The Authority considered National Grid to have abused its dominance on the market for installation of domestic sized gas meters by entering into long term contracts with meter installation companies and thus restricting the rate at which gas suppliers could replace National Grid's meters. Despite the Authority being involved in the process of opening-up of the market to National Grid's competitors, National Grid was fined £ 41.6 M [2].

National Grid appealed the Authority's decision to the Competition Appeal Tribunal in April 2008. The CAT in its judgment of April 2009 dismissed the majority of the appeal - except for (1) limiting the precise scope of the abuse, (2) reducing the level of the fine to £ 30 M and (3) granting National Grid additional time to comply with the Authority's decision.

### The OFT's Guidance

Before considering the Court's judgment, it is important to highlight the basis of the Authority's original decision as regards the level of the fine. The Authority stated that it had regard to the Office of Fair Trading's fining policy. Section 36 of the Act grants the OFT a broad discretion on deciding whether to impose a fine and the level of any such a fine. The OFT issued in December 2004 "Guidance as to the appropriate amount of a penalty" ("Guidance") to which it is bound to have regard when reaching a fining decision. In its Guidance, the OFT notably states that a mitigating factor in the level of a fine is "genuine uncertainty on the part of the undertaking as to whether the agreement or infringement constituted an infringement".

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Whilst the Authority (and the OFT/other sectoral regulators) have a margin of appreciation regarding the application of the Guidance, and neither the CAT nor the Court of Appeal are bound by the Guidance, it does form a crucial framework for administrative decision making and judicial review of such decisions.

#### The Court of Appeal's judgment

The leading judgment was handed down by Richards LJ - whose clarity of reasoning and style of judgment is to be welcomed. He made clear that the CAT had not made a legal error and was entitled to adopt a 'broad brush' approach. This included the correct determination that the Authority's involvement in the process that ultimately led to the abusive behaviour merited a reduction in the fine.

However, in exercising its role (under Section 49(1)(b) of the Act) in reviewing the Authority's decision, the Court of Appeal's assessment was not limited to points of law. The question was thus whether the CAT had appropriately assessed the seriousness of the infringement and the consequent level of the fine. The Court acknowledged that the Authority's history of involvement was a considerable mitigating factor - but nonetheless, National Grid still deserved some penalty as Section 36(3) of the Act covers such cases of so called "negligent" illegal behaviour.

But of particular interest is the way in which the Court approached the 'novelty' of the legal issues and the consequent impact on the level of the fine. Whilst recognising that the principle of tying of contracts is not a new one under Chapter 2 of the Act/Article 102 TFEU, its application to the type of conduct by National Grid was. The Court agreed with National Grid's counsel that there was genuine uncertainty as to the legality of National Grid's conduct.

The Court's reasons for doing so were threefold. First, the Authority's case changed substantially during the course of the investigation to the extent that Counsel for National Grid stated that "if the regulator cannot say with certainty where the vice lies, a finding of abuse should not attract a financial penalty". Second, an important aspect of the case was novel that prevented National Grid from being certain as to the legality of their conduct. Third, no previous case on this type of arrangement had been found to be illegal.

The Court consequently reduced the fine to £ 15 M - rejecting as "untenable" National Grid's submission that there should be no fine at all or merely a nominal fine.

#### Significance

The Court of Appeal's judgment serves as a useful reminder of the potential far reaching role of the Court of Appeal in competition law cases. The Court is not limited to appeals on points of law and can (and as shown by this judgment) review the factual basis for an authority's/CAT's decisions. However, despite the potential, the judgment is nonetheless peppered with references to the deference the Court of Appeal current shows to the CAT (mainly on the basis of the Court of Appeal judgment in *Argos Limited v Office of Fair Trading* [2006] EWCA Civ 1318) [3]. For example Richards LJ references the Court of Appeal's "little familiarity with penalties in the field of competition law".

This case thus provides some comfort to businesses and their advisors that where there is genuine uncertainty as to the legality of a particular course of conduct, the uncertainty can form a significant base for mitigation of any fine imposed on a company for anticompetitive behaviour. Yet the case is also a clear indication from the Court that if an authority such as the OFT or a sectoral regulator sets out a policy (such as in the Guidance) the margin of appreciation does not mean such policy can be ignored in practice.

[1] See Simon Barnes, *The UK Court of Appeal upholds abuse of dominance finding against National Grid but reduces*

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the size of the fine imposed (National Grid/Gas and Electricity Markets Authority, Capital Meters, Siemens, Meter Fit), 23 February 2010, e-Competitions, n° 31020 and Yasmin Arshed, A UK Court of Appeal supports OFGEM's decision against national grid's metering case (National Grid), 23 February 2010, e-Competitions, n° 30708.

[2] See Vitaly Pruzhansky, The UK OFGEM imposed a financial penalty of £ 41.6 million for abuse of dominant position in the market for the provision of domestic-sized gas meters (National Grid), 21 February 2008, e-Competitions, n° 23363 and Yasmin Arshed, The UK Gas and Electricity Markets Authority finds that the network operator has abused its dominant position in the market for the provision and maintenance of domestic-sized gas meters (National Grid), 21 February 2008, e-Competitions, n° 16065.

[3] Regarding this case, see Bruce Kilpatrick, The Court of Appeal of England and Wales dismisses appeals from two decisions of the CAT which had dismissed appeals from two decisions of the OFT finding resale price maintenance and price fixing in respect of replica football kit, toy and games (Argos, Littlewoods, JJB Sports), 19 October 2006, e-Competitions, n° 32229 and Liza Lovdahl Gormsen, The UK Court of Appeal rules on discussions on vertical basis and restricts the CAT's test (Argos and Littlewood - JBB Sports), 19 October 2006, e-Competitions, n° 12451.

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