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I. INTRODUCTION

The Competition Appeal Tribunal ("the CAT") gave judgment in the *NAPP* case, the first ever appeal, which included an appeal on penalty, under the Competition Act 1998 ("the Competition Act") back in January 2002. In the intervening seven and a half years, the CAT has delivered a number of important judgments which reveal the way in which the CAT will exercise its jurisdiction to review penalties imposed by the Office of Fair Trading ("the OFT") and other regulators. This article focuses on two particular aspects of this line of case law: the status accorded to the OFT's Guidance on penalties and the principle of equal treatment, and then considers the implications of the CAT's approach for parties seeking to appeal penalties.

II. THE OFT GUIDANCE

In setting the level of fines to be imposed on infringing undertakings under the Competition Act, the OFT is bound by statute to "have regard" to its own Guidance as to the appropriate amount of a penalty.² The Guidance currently in force³ explains that the OFT's twin objectives are to impose penalties which reflect the seriousness of the infringement and to deter other undertakings from engaging in anticompetitive practices.⁴ To achieve these aims, the Guidance lays down a 5 step method of calculation. A "starting point," which is no more than 10 percent of the undertaking's "relevant turnover,"⁵ is first identified and then adjusted, where necessary, to take account of the following 4 factors: duration; other relevant factors (*e.g.* financial benefit accruing to the infringing undertaking); aggravating/mitigating factors; and avoiding double jeopardy and/or a penalty exceeding the statutory maximum of 10 percent of the undertaking's worldwide turnover.

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² § 38(8)

³ Guidance of December 2004

⁴ ¶ 1.4

⁵ Relevant turnover is defined as the turnover of the undertaking in the relevant product market and relevant geographic market affected by the infringement in the undertaking's last business year: ¶ 2.7 of the Guidance.

III. RELEVANCE OF THE GUIDANCE ON APPEAL

It is notable that, although not formally binding on the OFT, the Guidance is prepared by the OFT pursuant to statutory obligation⁶ and must be approved by the Secretary of State prior to publication. One might, in those circumstances, have expected the CAT to show a certain deference to the methodology set out in the Guidance in reviewing the regulator's penalties. Indeed, to do so would mirror the approach of the Court of First Instance ("CFI") whose jurisdiction to reduce fines has, in recent years, been successfully invoked in cases where the Commission has been shown to have infringed either a general principle of Community law such as equal treatment (on which, more later) or its own Guidelines on the imposition of fines, notwithstanding that the Commission is not under any parallel statutory obligation to pay heed to those Guidelines.⁷ The CFI has thus shown itself generally unwilling to reduce a fine on the basis that the overall level is excessive or inappropriate in view of the gravity of the infringement.

The CAT, by contrast, took a different and perhaps surprising turn in making clear in a series of judgments that its assessment of penalties would not be constrained by the approach laid down in the OFT's Guidance.

IV. THE NAPP APPROACH: REVIEWING FINES IN THE ROUND

The first appeal to the CAT involved a challenge by the pharmaceutical company, NAPP to the OFT's finding that it had engaged in abusive pricing practices and the resultant fine of £3.21 million.⁸ The CAT began its assessment of the amount of the fine by noting that, under the Competition Act, it is neither bound by nor required to have regard to the OFT Guidance.⁹ The CAT then went on to make the following critical finding:

"It follows, in our judgment, that the Tribunal has a full jurisdiction itself to assess the penalty to be imposed, if necessary regardless of the way the Director has approached the matter in application of the Director's Guidance. Indeed, it seems to us that, in view of Article 6(1) of the ECHR, an undertaking penalised by the Director is entitled to have that penalty reviewed *ab initio* by an impartial and independent tribunal able to take its own decision, unconstrained by the Guidance. Moreover, it seems to us that, in fixing a penalty, this Tribunal is bound to base itself on its own

⁶ § 38(1) of the Competition Act

⁷ Art 23(3) of Commission Regulation 1/2003/EC requires only that in fixing the amount of the fine, regard shall be had both to the gravity and to the duration of the infringement.

⁸ *Napp Pharmaceutical Holdings Ltd v DGFT* Case No. 1000/1/1/01 [2002] CAT 1

⁹ ¶ 497

assessment of the infringement in the light of the facts and matters before the Tribunal at the stage of its judgment."¹⁰

The CAT nonetheless confirmed that, at the same time, it would not be appropriate to "disregard" the Guidance in reaching its own conclusion as to what the penalty should be.¹¹ It then proceeded to set out its own views as to the seriousness of NAPP's infringement and to make its own assessment of the overall penalty on the basis of what it described as a "broad brush" approach, taking the case as a whole. It concluded that, in view of a number of mitigating factors in that case (which included the absence of any Community law precedent for a finding of excessive pricing in comparable circumstances and the fact that NAPP had been involved in a price regulation scheme¹²), the overall penalty should be reduced to £2.2 million. The CAT then performed a "cross-check," applying the methodology set out in the Guidance which, it concluded, could lead to the same result.

The CAT's approach to the assessment of penalties in *Napp* (and in particular, the passage cited above) was vigorously endorsed by the Court of Appeal in the joint *Football Kit/Toys* judgment.¹³ That judgment also emphasized that, in reviewing the CAT's ruling on penalties, the Court of Appeal should recognize that the CAT is an expert and specialized body and so hesitate before interfering with the Tribunal's own assessment of the appropriate overall amount of the penalty.¹⁴ Clearly, the cards will be stacked against any undertaking seeking to appeal penalties once assessed by the CAT.

The *Toys* appeal¹⁵ itself provides a good illustration of the way in which the CAT exercises its jurisdiction to make its own "broad" assessment of penalty. The CAT found that some of the turnover, relating to certain categories of toys, included in step 1 of the OFT's calculation may have been unaffected by the infringements giving rise to a risk that the fines had "inadvertently become inflated above the level necessary for deterrence."¹⁶ The CAT thus made an overall reassessment of the penalties "on the basis of assumptions which seem to us both realistic and conservative,"¹⁷ reducing the fines on Littlewoods from £5.37 to £4.5 million and on Argos from £17.28 million to £15 million. The CAT described those fines as the lowest "that could reasonably be justified in the circumstances, to meet the gravity of the case and to have an appropriate deterrent effect."¹⁸ As in *NAPP*, the CAT also had regard to the Guidance but only by virtue of a cross-check of its own assessment.

¹⁰ ¶ 499

¹¹ ¶ 500

¹² ¶ 533

¹³ *Argos Limited & Littlewoods Limited v OFT/JJB Sports PLC v OFT* [2006] EWCA Civ 1318

¹⁴ ¶ 165

¹⁵ *Argos/Littlewoods v OFT* [2005] CAT 13

¹⁶ ¶ 243

¹⁷ ¶ 244

¹⁸ ¶ 248

V. MAKERS: OFT'S LATITUDE TO DEVELOP NEW RULES

Notably, the CAT has also adopted a liberal approach as regards the OFT's discretion to take account of factors not featuring in the Guidance. Thus in *Makers*,¹⁹ a case concerning collusive tendering amongst roofing contractors, it emerged before the CAT that the OFT had applied, at step 3 of the calculation, what it termed a "minimum deterrence threshold" (MDT), a concept on which the Guidance is silent.

The OFT explained that this reflected its view that a penalty will not act as a sufficient deterrent where the undertaking's turnover in the relevant market is less than 15 per cent of its total turnover. The OFT therefore applied an uplift to Makers' fine by calculating what the figure arrived at by steps 1 and 2 would have been had the undertaking derived 15 percent of its total turnover on the relevant market.²⁰ Applying the MDT had a rather dramatic effect in Makers' case, adding £520,000 to a step 1 figure of only £6,500. Notwithstanding the novelty of the MDT tool, the CAT concluded that its adoption was "an appropriate way in which to ensure that the overall figure of the penalty meets the objective of deterrence referred to in the Guidance."²¹

VI. THE PRINCIPLE OF EQUAL TREATMENT

In view of the CAT's approach to the exercise of its jurisdiction to reassess penalties, arguments based on the OFT's failure to properly apply its own Guidance will have limited prospects of success where the CAT takes the view that the overall level of the penalty is nonetheless appropriate in view of the gravity of the infringement and the need for deterrence. Thus another tool in the appellant's armory, oft-relied on before the European Courts, is the argument that the penalty being challenged infringes the right of equal treatment because parties in comparable situations have been treated differently or parties in different situations are treated in the same way. A question which has arisen in such cases is whether the Court will *reduce* the appellant's fine where it is not open to it to *increase* the fine on the favored undertaking. In *JFE Engineering*,²² the CFI held that, although the unequal treatment resulted from fines on the favored undertakings which were too low and therefore ought properly to be remedied by an increase in those fines, such an increase was, in that case, inappropriate because those undertakings had not been put on notice that their fines may be increased. The CFI therefore remedied the unequal treatment by *reducing* the fines on the undertakings which had suffered prejudice as a result.

¹⁹ *Makers UK Limited v OFT* [2007] CAT 11

²⁰ ¶ 132

²¹ ¶ 134

²² Cases T-67,68,71 & 78/00 *JFE Engineering v Commission* [2004] ECR II-2501

The Court of Appeal confirmed in the *Toys* case that, contrary to the CFI's finding that there would need to be *manifest injustice* before the Tribunal would interfere with a penalty on the basis of unequal treatment,

"the principle of equal treatment requires that, if two undertakings in comparable circumstances have been dealt with in unlike ways, the difference of treatment is wrong in law unless, and except to the extent that, it is objectively justified. If it is wrong in law, then the less favoured undertaking is entitled to appeal and to have its penalty reduced to the extent necessary to eliminate the inequality of treatment. We do not think that it is necessary to show manifest injustice in addition to such an unjustified difference of treatment."²³

That ruling did not, however, assist Argos and Littlewoods on the facts of that case. Hasbro had escaped any fine having been granted complete immunity as a leniency applicant. Argos and Littlewoods argued that, as the instigator of the cartel, Hasbro should have received no more than a 50 percent reduction in fine according to the OFT's Leniency Guidelines. Although the CAT did, in fact, consider the justification for the OFT's grant of immunity to Hasbro, it held that it should not have strictly done so as this would involve being drawn into an investigation of both the circumstances of an undertaking not before it and whether the size of that undertaking's penalty was appropriate. While the Court of Appeal agreed that this might present a problem in some cases, such as might justify remittal back to the OFT, it was not an issue on the facts of *Toys* since it was quite clear that Hasbro would have been awarded a 50 percent reduction of fine if it were not eligible for full immunity.

The Court of Appeal then proceeded to consider the OFT's decision to award Hasbro full immunity, on the basis of the facts which were before the OFT, concluding that "it is impossible to say that the OFT could not rationally conclude that it was appropriate to confirm the immunity in these circumstances."²⁴ The court also recognized that a challenge based on unequal treatment compared to a successful leniency applicant, as in *Toys*, will rarely be successful "where the favoured undertaking chooses the path of discretion and does not appeal."²⁵

The judgment therefore highlights the difficulty an applicant will face where it complains of unequal treatment by reference to a fine imposed on an undertaking which is not before the CAT, in particular where that undertaking has been granted leniency. It also underlines the perils of appealing, in particular by parties which have benefited from a reduction in fine under the leniency regime, given the risk of an increase in fine in the event of a co-appellant's challenge alleging unequal treatment. While the CAT has

²³ ¶ 280

²⁴ ¶ 288

²⁵ ¶ 290

not yet increased any fines on the ground of unequal treatment, it confirmed in *Football Kit* that it has jurisdiction to increase as well as decrease penalties although exceptional circumstances would normally need to be shown.²⁶ Interestingly, by way of an aside, the CAT upheld, in that case, the OFT's submission that the reduction of 5 percent in Allsports' fine for cooperation should be revoked on the ground that facts which emerged before the CAT (in particular as a result of Allsports' disclosure of a diary which had not been produced in the administrative procedure) meant that its conduct could no longer be reasonably regarded as co-operation.²⁷

It should also be mentioned that in *Makers*, the CAT refused to reduce Makers' fine on the ground of unequal treatment where the favored undertaking had received a lower fine as a consequence of an arithmetical mistake by the OFT in calculating another party's penalty.²⁸ Nonetheless, the Court of Appeal's confirmation that, where unequal treatment can be established, it must be remedied by a reduction in the fine of the party suffering prejudice (even where that prejudice arises because the favored party's fine was too low) is to be welcomed and should give succor to undertakings seeking to appeal fines on that basis.

VII. IMPLICATIONS FOR FUTURE APPEALS ON PENALTY

The CAT's refusal to be straitjacketed by the Guidance in reviewing penalties plainly gives rise to potential uncertainty for parties seeking to appeal the magnitude of their fines given the ambiguity as to the principles which the CAT will apply in deciding whether the overall level of the fine is excessive. Thus, in theory, a successful appeal may not be guaranteed even where the CAT accepts that the OFT has misapplied its own Guidance.

But it is not all doom and gloom for appellants. First, the statistics on penalty appeals under the Competition Act should give appellants some comfort: the CAT has so far ordered that penalties be reduced in eight cases,²⁹ increased in one case (*Allsports*) and has refused to make any change to the level of penalty in three cases. It is also notable that in the three unsuccessful appeals, the CAT rejected any allegation that the OFT had misapplied its own Guidelines so there is as yet no precedent for a refusal to reduce a fine, notwithstanding a failure by the OFT's properly to apply its own Guidance, because the overall size of penalty is deemed appropriate.³⁰ On a less positive

²⁶ *Umbro Holdings & Ors v OFT* [2005] CAT 22 at ¶¶ 218-9.

²⁷ ¶ 234

²⁸ ¶ 167, Sir Michael Blair dissenting at ¶¶ 171-173

²⁹ In addition to cases mentioned elsewhere in this article, these include *Aberdeen Journals Ltd v OFT* [2003] CAT 11; *Genzyme Ltd v OFT* [2004] CAT 4; *Richard Price v OFT* [2005] CAT 5; *Double Quick Supplyline Ltd v OFT*, consent order of 19 May 2005

³⁰ *Sepia Logistics Limited (formerly Double Quick Supplyline Ltd) v OFT* [2007] CAT 13; *Achilles Paper Group v OFT* [2006] CAT 24 (although the CAT disagreed with one aspect of the OFT's analysis, it found that would have made no difference to the OFT's calculation of the penalty); *Apex Asphalt and Paving Co Limited v OFT* [2005] CAT 4

note for appellants in the current climate, in two of those cases, the CAT rejected submissions based on financial hardship and potential insolvency.³¹

Second, the CAT's refusal to pay slavish heed to the Guidance also creates a certain latitude as to the types of arguments which may be deployed by parties seeking a reduction in fine. For example, in the recent *National Grid*³² appeal, the CAT reduced the fine from £41.6 million to £30 million on the ground (unsurprisingly, not one which features in the Guidance) that Ofgem had been monitoring and was closely involved in National Grid's development of the gas metering agreements which were ultimately held abusive.

On a final note, the recent scarcity of fines imposed by the OFT means that we are yet to see the full implications of these judgments on both the OFT's fining practice and the approach to be taken in subsequent appeals. For example, in 2008, the OFT issued a single infringement decision only, in which it found that Cardiff Bus Company had engaged in predatory pricing in breach of Chapter II. Indeed, no fine was imposed as the bus company benefited from the exemption for "conduct of minor significance" under the Competition Act.³³ Looking ahead, however, there are a number of significant OFT cartel decisions in the pipeline, such as the Chapter I investigations into construction industry recruitment companies and construction companies, which can be expected to produce some interesting results. In deciding whether to appeal future fines, parties may therefore reflect, in the light of the case law to date, that despite the uncertainty inherent in the CAT's exercise of its jurisdiction to reassess penalty, the statistics on penalty appeals give grounds for a degree of optimism as regards their prospects of success.

³¹ *Sepia Logistics and Achilles*

³² *National Grid PLC v Gas and Electricity Markets Authority* [2009] CAT 14

³³ § 40