

## Legal Updates & News

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#### Cigarette Cartel, Pharma Pricing- Recent UK Antitrust Rulings

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In the United Kingdom there have been two recent significant developments in respect of cartel activity. On Friday 11 July, Mr Justice Pitchford quashed an indictment alleging price fixing against five pharmaceutical companies and nine executives. On the same date, Gallaher and five retailers agreed to pay £132 million to settle charges brought by the Office of Fair Trading ("OFT"). By any measure, the developments represent a spectacular defeat for Britain's Serious Fraud Office ("SFO") and a significant achievement for the increasingly aggressive OFT.

#### Serious Fraud Office Prosecution

The SFO began investigating allegations of price fixing in the pharmaceutical industry in 2000. In April 2002 more than 30 premises were raided including the offices of pharmaceutical companies and the homes of a number of executives. Civil proceedings began in October 2002 against the pharmaceutical companies. It has been suggested that the cost of the investigation amounted to £25 million and was the largest prosecution ever brought by the SFO. The companies Goldshield Group, Norton Health Care, Generics UK, Ranbaxy and Kent Pharmaceuticals were all indicted in April 2006 together with nine executives. The allegation was simply that the companies, through the indicted executives, had fixed the price of pharmaceuticals supplied to the UK's National Health Service and orchestrated planned price rises.

The charges brought against the companies and the individuals were under the common law offence of conspiracy to defraud. The decision by the trial judge to quash the Indictment followed the decision by the House of Lords in April 2008 that price fixing in the absence of other aggravating features was not a criminal offence in the UK prior to the introduction of the Enterprise Act in 2002.

The SFO does have the right of appeal to the Court of Appeal in this matter but most commentators think it is unlikely to succeed. The question remains as to whether the SFO was wise in bringing this prosecution when a civil settlement with the defendant companies had already been reached.

In stark contrast to this very public failure on behalf of the criminal prosecutors is the OFT's record £132 million settlement with six companies for fixing the price of cigarettes.

The OFT identified Imperial Tobacco as the company at the centre of the scheme. Imperial Tobacco owns brands such as Embassy and Gallaher. These two companies control about 85% of the UK's cigarette market. UK cigarette prices are among the highest in Europe. It is alleged that the companies shared details of future price rises with the effect that competing grounds were kept at a comparable level across supermarkets and certain petrol stations.

On 11 July, Gallaher agreed to pay £93 million to settle the charges with the OFT. Retailers ASDA, First Quench, One Stop Stores, Somerfield and TM Retail also signed early resolution agreements with the OFT in exchange for a significant reduction in fines. These companies will pay the balance of the £132 million agreement. The discounts given for the co-operation will reduce the maximum

<http://www.jdsupra.com/post/documentViewer.aspx?fid=155ab5af-ec6c-458d-a8e9-d3a090693e25>  
fine of £173 million down to £132 million. This reduction is dependant upon continued assistance with the investigations.

J Sainsbury has received complete immunity from any financial penalty as it was the first company to apply for leniency. This position, again, rests upon continued co-operation. Six further companies continue to contest the allegations.

Under UK legislation, businesses involved in price fixing can face fines of up to 10% of annual turnover, and reductions are already given for co-operation. Settlement in return for leniency was a key feature of the tobacco case and there have been other signs that indicate both UK and European regulators wish to further encourage such behaviour. Richard Alderman, newly appointed head of the SFO, said in a statement to the press last week that he was looking for US style plea bargaining and sentence reductions as a way forward for the SFO; and last month the European Commission adopted a new settlement procedure for cartel cases whereby a defendant acknowledging its participation in a cartel will receive a 10% reduction in its fine. (See our earlier alert: [European Commission Adopts Cartel Settlement Procedure](#))

It remains to be seen whether the SFO will now renew its efforts to prosecute cartels under the Enterprise Act, or whether the OFT will now become top dog in the prosecution of price fixing.