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# JUDICIAL REVIEW OF THE REGULATORS

## JUDICIAL REVIEW TRENDS AND FORECASTS 2016

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# INTRODUCTION: STRUCTURE OF SESSION

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Discussion of notable cases from the past 12 months in the following areas:

- a. Legality;
- b. Irrationality;
- c. Legitimate expectations;
- d. Margin of discretion;
- e. Human rights; and
- f. Competition Appeal Tribunal cases.

# (1) LEGALITY

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***R (on the application of DHL International (UK) Ltd) v Office of Communications*** [2016] EWHC 938 (Admin) (Soole J)

- Statutory interpretation: The court followed OFCOM's understanding of statutory powers to request information: DHL (which predominantly carried parcels by air) could be said to be a "postal operator" under the Postal Services Act 2011.
- Proportionality: Responding to the request would absorb management time (on an ongoing basis, as the requests were to be made regularly), but this inconvenience was outweighed by OFCOM's reasons for needing the information (i.e. to assist it with its statutory duty in relation to the financial sustainability of the universal postal service).

## (2) IRRATIONALITY

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***R (on the application of McMorn) v Natural England* [2015] EWHC 3297 (Admin) (Ouseley J)**

- **Application of policy**: It was unlawful for Natural England to reach a decision on the basis of an undisclosed policy (which required more evidence) while purporting to do so on the basis of its public policy.
- **Irrelevant considerations**: Natural England took into account the irrelevant consideration of public opinion (and in particular pressure from the RSPB). Natural England were entitled to approach decision with care (including taking decision at a higher level), but public pressure should not have been allowed to affect content of the decision.

***R (on the application of Blue Bio Pharmaceuticals Limited) v Secretary of State for Health (acting by his executive agency Medicines and Healthcare Products Regulatory Authority)* [2016] EWCA Civ 554 (Lewison LJ)**

- **Irrationality**: Court of Appeal found MHPRA had "closed its mind to the cogent body of evidence suggesting that self-medication by the use of glucosamine sulphate was widespread".
- **Consistency of treatment**: Medicinal products with the same pharmacological properties at the same dosage ingested in the same way to be treated in a similar fashion (particularly within the same Member State)

## (3) LEGITIMATE EXPECTATIONS

***Solar Century Holdings Ltd v Secretary of State for Energy and Climate Change*** [2016] EWCA Civ 117 (Floyd LJ, Treacy LJ, Tomlinson LJ)

- **Legitimate expectation:** Even where an end date is given, there can be no “immutable presumption” that a policy will continue without change until that date, whatever changes in circumstance may arise. Government is “entitled to formulate and re-formulate policy when rational grounds exist for doing so”.
- **Fairness:** It was relevant that the government’s action altered the “rules of the game” after the investors had started playing it, but this was only a factor in the overall assessment of fairness.

***R (Drax and Infinis) v (1) H M Treasury (2) Revenue and Customs Commissioners*** [2016] EWHC 228 (Admin) (Jay J)

- **Legitimate expectation:** In the absence of either an express assurance from the government that withdrawal of the exemption would be accompanied by a specific lead time, or an assurance that could be inferred “irresistibly” from what had been said or done, there was no legitimate expectation that a policy would only be changed with a particular lead time.

# LEGITIMATE EXPECTATIONS (CONTINUED)

***R (on the application of London Borough of Enfield) (Appellant) v Secretary of State for Transport (Respondent) & (1) Abellio East Anglia Ltd (2) First Group East Anglia Ltd (3) National Express East Anglia Trains Ltd (Interested Parties)*** [2016] EWCA Civ 480 (Gross LJ, Lindblom LJ, Master of the Rolls)

- **Reliance:** It was “simply unreal” that the two emails relied on by the council had generated expectations. Here the council would have invested in the regeneration in any case, and had simply taken a calculated risk in doing so.
- **Irrationality:** The failure to take account of Meridian Water regeneration project in its methodology did not amount to irrationality. Government commitment to local regeneration amounted to “broad aspirational words”, rather than specific criteria for franchise specification.

***R (Biffa Waste Management Services Ltd) v the Commissioners for Her Majesty’s Revenue and Customs*** [2016] EWHC 1444 (Admin) (Sir Kenneth Parker, sitting as judge of High Court)

- **Quality of representations:** A response to a query relating to a particular Biffa site amounted to general statement by HMRC as to meaning and effect of legislation on all landfill sites.

# LEGITIMATE EXPECTATIONS (CONTINUED)

***R (on the application of Veolia Es Landfill Ltd (2) Veolia Es Cleanaway (UK) Ltd) v Revenue & Customs Commissioner: R (on the application of Viridor Waste Management Ltd & 5 Ors v Revenue & Customs Commissioners*** [2016] EWHC 1880 (Admin) (Nugee J)

- **Representation:** Repayment of a particular sum amounted to representation that sum was due.
- **Legitimate aim:** HMRC resisting “boundary-pushing” behaviour by a number of landfill operators (assisted by professional advisors) amounted to a legitimate aim.
- **Fairness:** Unfairness lessened by the fact that both claimants would have to forgo expected refunds, as opposed to having to pay tax that they had not believed to be due.

## (4) MARGIN OF DISCRETION

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### ***EE v Office of Communications* [2016] EWCA 2134 (Admin) (Cranston J)**

- **Choice of methodology:** This decision was a decision on methodology on a complex issue by an expert regulator. When adopting “appropriate restraint” and according the regulator the margin of discretion mandated by the authorities, it was not possible to conclude that Ofcom had erred when deciding that the potential benefits from cost modelling did not justify using that rather than auction benchmark data.
- **Interpretation:** The court agreed with OFCOM’s interpretation of the statutory instrument (Wireless Telegraphy Act 2006 (Directions to OFCOM) Order 2010, SI 3024); licence fees had to “reflect” the full market value of the frequencies, which excluded consideration of factors other than market value.



## (5) HUMAN RIGHTS

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***Bank Mellat v HM Treasury* [2016] EWCA Civ 452 (Longmore LJ, Lewison LJ)**

- [Losses attracting compensation for breach of A1P1](#): Flaux J had found that recoverability of damages was “not constrained by whether what is claimed by way of loss is itself a “possession”, but only by whether the loss claimed was caused by the unlawful interference with the relevant “possessions” which the court has found. Court of Appeal did not endorse this, but found all points made by HM Treasury and Bank Mellat were fully arguable.
- [Status of shareholder](#): The correct person to bring the claim for the loss of the subsidiary’s profits was the subsidiary.

***See also R (on the application of British American Tobacco and others) v Secretary of State for Health* [2016] EWHC 1169 (Admin) (Green J)**

## (6) COMPETITION

***British Telecommunications Plc (Appellant) v Office of Communications (Respondent) & (1) Sky UK Ltd (2) TalkTalk Telecom Group Plc (Interveners)*** [2016] CAT 3 (Andrew Lenon QC, William Allan, Professor Colin Mayer)

- [Interpretation of legislative provisions](#): The legislative provisions surrounding OFCOM's SMP (significant market power) powers should not be interpreted narrowly. OFCOM was entitled to conclude that BT's FRAND obligation would not effectively address risks of price distortion.

***Gallaher Group and Somerfield Stores v Competition & Markets Authority*** [2016] EWCA Civ 719 (Longmore LJ, Lloyd Jones LJ, Master of the Rolls)

- [Principle of equal treatment](#): The refusal to extend same assurances to all claimants, in the absence of an objective justification for the difference in treatment, was a breach of the principle of equal treatment and was unfair, particularly where OFT had expressly committed itself to affording equal treatment to the parties during negotiations.
- [Principle that mistakes should not be replicated](#): The High Court had followed Jacob J in *Customs and Excise Commissioners v National Westminster Bank plc* [2003] STC 1072, that mistakes should not be replicated where public funds are involved. The Court of Appeal disagreed.

# COMPETITION (CONTINUED)

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***Coopérative de Production SeaFrance SA v The Competition and Markets Authority and another*** [2015] UKSC 75 (Lord Neuberger, President, Lord Clarke, Lord Sumption, Lord Reed, Lord Hodge)

- CMA's assessment not irrational: Caution was required in overturning economic judgments of an expert tribunal, particularly where legal proceedings create uncertainty and delay which could damage the prospects of the business in question. Court of Appeal had been led to “discount the depth of economic analysis which underlay the Authority’s original conclusion”.



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