Neutral Citation Number: [2014] EWHC 3515 (Admin)

Case No: CO/2971/2014 & CO/2929/2014

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24/10/2014

Before :
MR JUSTICE TURNER
- -

Between :
R (on the application of)
BRITISH AMERICAN TOBACCO UK LTD — **Claimant**
- and -
SECRETARY OF STATE FOR HEALTH — **Defendant**
- and –
(1) IMPERIAL TOBACCO LTD
(2) GALLAHER LTD
(3) PHILIP MORRIS LTD and
PHILIP MORRIS BRANDS SARL — **Interested Parties**
- -

R (on the application of)
(1) PHILIP MORRIS BRANDS SARL
(2) PHILIP MORRIS LTD — **Claimant**
- and –
(1) IMPERIAL TOBACCO LTD
(2) BRITISH AMERICAN TOBACCO LTD
(3) GALLAHER LTD — **Interested Parties**
- -

Mrs Sarah Ford (instructed by **Herbert Smith Freehills**) for **B.A.T UK Ltd**
Ms Sarah Abram (instructed by **Treasury Solicitors**) for **Secretary of State for Health**
Mr Tim Ward QC (instructed by **Hogan Lovells**) for **KZPT**

Hearing date: 21st October 2014
- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

MR JUSTICE TURNER

Mr Justice Turner:

INTRODUCTION

1. Directive 2014/40/EU ("the Directive") of 3 April 2014 purports to impose prescriptive regulation upon the manufacture, presentation and sale of tobacco products upon member states of the European Union. British American Tobacco UK Limited ("BAT"), Philip Morris Brands Sarl and Philip Morris Limited now bring claims by way of judicial review the object of which is to prevent the transposition of the Directive into the national law of the United Kingdom.

2. The basis of the challenge is that the Directive is invalid. This is a contention upon which only the Court of Justice of the European Union ("CJEU") can adjudicate.

3. This court has power under Article 267 of the Treaty on the Functioning of the European Union to request the CJEU to give a ruling on any question relating to the validity of a Directive where a decision on that question is necessary to enable it to give judgment.

4. The Secretary of State for Health contends that the Directive is valid but concedes that the grounds raised by the claimants are, at least, arguable. He agrees therefore that it would be appropriate for this Court to seek a preliminary ruling from the CJEU on the validity of the Directive. Accordingly, on 30 July 2014 Supperstone J. granted permission to the Claimants to bring judicial review proceedings and relieved the Secretary of State from the procedural burden of submitting detailed grounds and evidence. The parties are presently cooperating in the preparation of a joint draft order, schedule and proposed questions for reference to the CJEU which it is intended will be considered by this Court on 3 November 2014.

KRAJOWY ZWIAZEK PLANTATOROW TYTONIU

5. In the meantime, the Polish National Association of Tobacco Growers, Krajowy Zwiazek Plantatorow Tytoniu ("KZPT") has applied for the permission of this to Court to intervene in the claim. It is that application which falls to be determined today.

6. KZPT represents the interests of nearly 6,000 Polish tobacco growers. On their behalf, it takes issue with the validity of the Directive and, in particular, the operation of Article 7 thereof the implementation of which would ban menthol cigarettes from the EU market.

7. Poland is the biggest producer of tobacco products in the European Union providing employment for over half a million people. About one fifth of the cigarettes produced are flavoured with menthol. KZPT asserts that a vigorous black market trade in tobacco products is being carried on involving products from countries outside the EU which may already account for up to a quarter of the domestic market in Poland. The Polish government is concerned that any prohibition on the manufacture, presentation and sale of menthol products will result in a significant expansion of this black market to the detriment of the state. It has already issued proceedings in the CJEU challenging the validity of a number of provisions of the Directive.

8. KZPT now applies to this Court for permission to be heard in the judicial review proceedings pursuant to CPR 54.17. Unsurprisingly, BAT enthusiastically consents to the proposed intervention. The defendant does not.

9. The evidence which I have summarised above relating to the potential impact of the directive upon the Polish tobacco market and, specifically, upon members of KZPT is contained in a witness statement in Polish of Lech Ostrowski the vice chairman of the proposed intervener. KZPT seeks to file this statement, together with an English translation, for consideration in these proceedings and to be permitted to participate in the hearing to determine whether a reference to the CJEU should be ordered and, if so, the terms thereof.

10. In support of its application, KZPT relies upon five main contentions:

    i) The contribution of KZPT is important.

    ii) It is well positioned to assist in the litigation.

    iii) Its intervention would be targeted and modest in scope.

    iv) There would be no disproportionate costs.

    v) KZPT are unable effectively to participate in the challenge to the Directive from within its own country by the operation of Polish law.

INTERVENERS

11. In addition to KZPT, the following four groups of parties indicated to the Secretary of State that they intended to apply to intervene in the proceedings:

    i) Tann UK and Tannpapier GmbH, who make two components in the manufacture and packaging of cigarettes, namely tipping paper and tear tape;

    ii) Deutsche Benkert GmbH & Co KG and Benkert UK Ltd, who manufacture tipping paper for cigarettes;

    iii) Joh. Wilh. Von Eicken GmbH, who produce, distribute and sell tobacco products; and

    iv) V. Mane Fils, who manufacture and supply flavourings to the tobacco industry, including a range based on menthol.

12. The products manufactured by each of the above interveners are available on the UK tobacco market whether for individual sale or as part of transformed products. In each of the above cases, the Secretary of State indicated that he would not oppose the proposed intervention, provided that it did not delay the conduct of the proceedings and subject to the condition that the proposed interveners should bear their own costs of participating.

13. On 7 October 2014, Leggatt J. made a series of Orders granting permission to each of these parties to file evidence and make written submissions in the proceedings. He ordered that each of these interveners should bear its own costs and directed that they

should be allowed to make oral representations at the 3 November hearing (or any further hearing) in the judicial review only if and to the extent that the Judge presiding over the hearing gives permission to do so.

PARTIES AND INTERVENERS

14. CPR Part 54.17 provides:

> "(1) Any person may apply for permission –
>
> (a) to file evidence; or
>
> (b) make representations at the hearing of the judicial review.
>
> (2) An application under paragraph (1) should be made promptly."

15. The notes in the White Book refer to no authorities relevant to the exercise of the court's discretion under this provision and give no guidance as to when it should be exercised. Indeed, recent case law is relatively sparse.

16. I have been referred by counsel acting on behalf of KZPT to the case of R (Air Transport Association of America Inc) v Secretary of State for Energy and Climate Change [2010] EWHC 1554 in which Ouseley J. observed at para 8:

> "It has been the practice of this court for a number of years, well established and beneficial, to allow interventions by groups or bodies, or individuals who have particular knowledge and expertise in the area, whether in terms of the effect which the action at issue may have upon them and their interests, or by virtue of the work which they carry out or through close study of the law, practice and problems in an area, or because of the campaigning experience and knowledge which their activities have brought."

17. In R. v Re: Northern Ireland Human Rights Commission [2002] UKHL 25 Lord Oliver held:

> "32 The practice of allowing third persons to intervene in proceedings brought by and against other persons which do not directly involve the person seeking to intervene has become more common in recent years but it is still a relatively a rare event. The intervention is always subject to the control of the court and whether the third person is allowed by the court to intervene is usually dependent upon the court's judgment as to whether the interests of justice will be promoted by allowing the intervention. Frequently the answer will depend upon whether the intervention will assist the court itself to perform the role upon which it is engaged. The court has always to balance the benefits which are to be derived from the

> intervention as against the inconvenience, delay and expense which an intervention by a third person can cause to the existing parties."

18. Furthermore, by the operation of CPR 1.2, I am mandated to give effect to the overriding objective in exercising any power given to the court by the Rules. I must, therefore, take into account the need to deal with this application justly and with proportionate cost with specific reference to the factors listed in CPR 1.1(2).

19. Notwithstanding the submissions made by KZPT, I am not satisfied that in the circumstances of this case that it would assist this Court if it were permitted to intervene. I rely in particular on the following factors:

    i) It is very unlikely that the formal intervention of KZPT would have any significant impact on the drafting of the proposed reference. There is no discernable conflict between the interests of BAT and those of KZPT. The information contained in the KZPT witness statements does no more than supplement, albeit with a greater level of potentially relevant detail, the evidence already relied upon by BAT in its Statement of Facts and Grounds.

    ii) There is no reason why BAT could not seek to deploy the evidence set out in the KZPT witness statements by way of attachment to the reference. It already seeks to rely upon expert evidence which is necessarily based on primary data already gathered from other sources and I do permit BAT to deploy the witness statements in the context of the reference.

    iii) The contents of Mr Ostrowski's witness statement are simple and (when translated into English) easy to understand. They are likely to be uncontroversial. I am not persuaded that the intervention of KZPT at any level is likely to add anything of further proportionate value.

    iv) The refusal of the application to intervene does not, of course, preclude KZPT from liaising with BAT and assisting it in the preparation of its case and its observations to the CJEU.

    v) Subject only to any order made on this application, the parties have agreed the draft terms of reference and schedule for my early consideration. It already provides, as one would expect, for a consideration of the broad issues referred to in the KZPT witness statements relating to menthol cigarettes and, in particular, the likely growth of illegal trading.

    vi) KZPT realistically agreed that it is very unlikely that there will be any further proceedings in the national court in which they would be expected to participate following upon the adjudication of the CJEU. In reality, the likely value of their fleeting intervention in these proceedings is de minimis.

20. It may well be the case that KZPT has a very lively interest in the outcome of any reference to the CJEU but, as the cases to which I refer later in this judgment demonstrate, this is not sufficient.

21. The court in Air Transport Association of America was able to conclude that, in the circumstances of that particular case, the proposed interveners had a useful contribution to make in the national litigation. However, for the reasons given above I am unable to reach the same conclusion on the facts of this case. The involvement of KZPT would be wholly disproportionate to the practical value (if any) of its contribution as an intervener.

22. It is not disputed that KZPT cannot bring a challenge to the Directive in the Polish Courts, at least until it has been transposed into Polish law and there is a final administrative decision, valid court judgment or other final resolution against KZPT pursuant to the Directive. The Directive must be transposed by 20 May 2016. Realistically, therefore, the issues of concern to KZPT are likely to have been determined long before it would have any opportunity to bring such a challenge in Poland.

23. This is a factor which does not tip the balance in favour of allowing intervention. The connection between the legitimate interests of KZPT and the UK is very tenuous and, in the material before me, substantially unparticularised. In these circumstances, care must be taken not to encourage those from other member states with little connection with this jurisdiction to use UK procedural machinery as a way of circumventing the adverse consequences to them of more restrictive rules of review within the jurisdiction of their own national court.

ARE INTERVENERS PARTIES?

24. However, even if I were wrong to conclude that KZPT should not be permitted to intervene, I do not accept that, as an intervener, it would automatically be entitled to engage in the CJEU reference procedure. During the course of oral submissions, counsel for KZPT accepted that the central ambition of his client was to achieve the status of "party" to the national litigation which would then, he contended, equip it to play a part in the proceedings before the CJEU.

25. In Football Association Premier League v QC Leisure (2009) C-403/08 and C-429/08 the CJEU refused to allow a number of companies to participate in a preliminary reference even though they had been joined as parties by the High Court in England and Wales. Kitchin J. had held that:

> "... it is desirable to add each of the applicants to the proceedings as claimants because it will assist the court to resolve the fundamental law and policy questions to which the reference gives rise. Each of the applicants does, I believe, offer a perspective on those questions which is different from that of the other applicants and the existing parties."

26. It is to be noted that, in that case, the companies anxious to participate in the reference had been joined specifically as "parties" under CPR 19.2 and not as interveners.

27. The CJEU, however, was distinctly unappreciative of Kitchen J.'s efforts to help it and refused to allow the new "parties" to participate in its proceedings.[1] It held:

> "…it is apparent... that the applications have been made only with a view to participating in the proceedings before the Court and that the applicants do not intend to play an active part in the proceedings before the national court after delivery of the judgment giving a preliminary ruling.
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> Although the five legal persons in question have a definite interest in the answers to be given by the Court to the questions referred by the national court, that does not mean that they are to be accorded the status of parties for the purposes of Article 23 of the Statute of the Court. Such a provision would moreover be pointless if any party having an interest were recognised as having the right to participate in the proceedings provided for under Article 267 TFEU".

28. The Court found that the procedure under Article 267 is available so that the CJEU can "assist... in the administration of justice in the Member States by meeting objective requirements inherent in the resolution of genuine disputes".

29. The Court also held that when determining whether persons should be joined as parties in cases involving preliminary references, national courts should do so in "the spirit of cooperation which must prevail in the exercise of the functions assigned by Article 267 TFEU to the national courts, on the one hand, and the Community judicature, on the other".

30. The Secretary of State suggests that it would fly in the face of this decision if KZPT were accorded the status of "party" within this litigation.

31. In R v Monopolies and Mergers commission ex parte Milk Marque Limited Moses J. (as he then was) observed:

> "9. There has been a dispute in this application as to what the European Court of Justice will do once a party has been categorised as one which ought properly to be heard under order 53, rule 9. The courts, it is said, will only hear parties, in the strict sense, to litigation. There has been a dispute about that. In some cases it appears that the court has heard those who intervene pursuant to order 53, rule 9 and yet it is asserted that in the case of De Cicco v Landesversicherungsanstalt Schwaben [1968] ECR 473 at 479 the court referred to the statute of the court which entitles only parties to the main action to be heard. Precisely what the court meant by "parties"

[1] One basis for its conclusion was that the applicants had only been joined as parties after the court had made its order for reference which had the effect of staying further proceedings before it. That point, however, does not arise in this case and, indeed, the European Rules have been recently amended so as to allow for the participation of parties joined to the domestic litigation in defined circumstances after the referral has taken place.

> in that context is not clear and has led to the difference of view by way of submission in this case.
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> 10. Suffice it to say that this court, the domestic court, in referring the questions to be heard by the court, regards DIF as a party which ought properly to be heard. Whether that comes within the rules of the European Court of Justice and their statute ought properly to be a matter for the European Court of Justice and not for the domestic court. I need only say that for the reasons I have given it seems to me that DIF are peculiarly well placed to assist any court that has to consider the legal arguments in the context of the milk production legislation and the milk production trade."

I note, however, that order 53 rule 9 is very differently worded to CPR 54.17 and, in particular, refers to a right to be heard without specific reference to any power of the court to limit such right to the filing of written evidence as is to be found in CPR 54.17.

32. In Air Transport Association of America Ouseley J. held:

> "16 There is, as I understand it, a long-standing practice on the part of the European Court to Justice to accept as parties before it those whom the national courts have ordered to be parties before the national court, which extends to those who are permitted to join as interveners under provisions as broad as the CPR 54.17 . There has been some doubt cast over precisely how far that goes, by the sequence of decisions in Football Association Premier League Limited and QC Leisure & Ors [2008] EWHC 2897 Ch, in which in the course of a private international property litigation, a reference became necessary on what the domestic court thought were issues of interpretation of a Directive.
>
> 17 Simply for the purposes of the Reference, rather than for any role which they might play in the domestic litigation, Kitchin J added five people as claimants and made in addition various observations about their role and the procedure the ECJ should adopt in relation to that. In certain respects it can have come as no huge surprise that the President of the court made an order on 16th December 2009, in what had by then become joint cases C403 and 429 of 08, to the effect that although the persons joined had a definite interest in the answers to be given by the court to the referred questions, that did not mean they were to be accorded the status of parties for the purpose of Article 23 of the statute of the court. There appear to be two reasons for that. The first is that they were made parties to the litigation after the order for the reference had been made. So they were not parties to the domestic court proceedings before the reference was made and in effect that was seen as making

> them simply parties to the Reference, which was for the European Court of Justice to decide. The other and related point was that their role was confined to the Reference. It was confined expressly by the judge and that gave further emphasis to the point that the domestic courts had decided not who were to be parties to domestic litigation, but had decided who were to be parties only to ECJ litigation.
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> 18 I have considered carefully whether what was said in that case and the observations in particular in paragraphs 5 and 6 of the President's order mean that I should not permit the interveners to intervene in this case.
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> 19 The reason why it is a matter for caution is that in reality this case is wholly or very largely about the lawfulness of the Directive. The answers to the questions are very likely to solve the whole of the issues underlying this challenge to the domestic regulations. But I take the view that the differences which exist are crucial to the judgment which I have made.
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> 20 The first, as I emphasised, is that the Reference has not been made and the parties are joined under CPR 54.17 for the purposes of litigation before the Reference is made. I emphasise as well that they are not being joined simply because of a forecast of benefit to the European Court of Justice but because, for the purposes of domestic litigation about the lawfulness of this regulation, they meet the requirements of the CPR 54.17 .
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> 21 The second point that I make is this. Although it appears and it is very likely that, as I said, the answers to the questions given by the European Court will in essence dispose of all the litigation, were it not to do so, they would remain entitled to participate in the resolution of outstanding issues and, I have no doubt, would participate in the resolution of those outstanding issues. So although the difference may be a narrow one, it is an important one as a matter of principle. Accordingly, I give permission for those three bodies, joint bodies to be interveners in this litigation."

33. Both the Milk Marque and Air Transport Association of America decisions were, however, made with regard to European Rules of Procedure which have since been superseded. Ouseley J. was accurately referring to the position under the old Rules in which it had been the "long-standing practice on the part of the European Court to Justice to accept as parties before it those whom the national courts have ordered to be parties before the national court, which extends to those who are permitted to join as interveners under provisions as broad as the CPR 54.17."

34. The Rules now in force provide a definition of who is or is not a party to the main proceedings for the purpose of participation in the reference:

> "*Article 97 Parties to the main proceedings*
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> 1. The parties to the main proceedings are those who are determined as such by the referring court or tribunal in accordance with national rules of procedure.
>
> 2. Where the referring court or tribunal informs the Court that a new party has been admitted to the main proceedings, when the proceedings before the Court are already pending, that party must accept the case as he finds it at the time when the Court was so informed. That party shall receive a copy of every procedural document already served on the interested persons referred to in Article 23 of the Statute.42
>
> 3. As regards the representation and attendance of the parties to the main proceedings, the Court shall take account of the rules of procedure in force before the court or tribunal which made the reference. In the event of any doubt as to whether a person may under national law represent a party to the main proceedings, the Court may obtain information from the referring court or tribunal on the rules of procedure applicable."

35. In the explanatory remarks to the Court's proposal for the introduction of the new Rules relating to references for a preliminary ruling it is stated:

> "After a brief reminder of the scope of those proceedings and of the essential content of any request for a preliminary ruling, the draft reflects Article 23 of the Statute in listing the parties authorised to submit written or oral observations to the Court and circumscribing more clearly, by reference to national procedural rules, the concept of 'parties to the main proceedings' and the consequences for the proceedings before the Court of the admission of a new party by the referring court."

36. And with specific reference to Article 97:

> "The first two paragraphs, by contrast, are new. In the light of the applications to intervene sometimes made by third parties in the context of a reference for a preliminary ruling, these two paragraphs are intended to circumscribe, precisely, the concept of parties to the main proceedings.
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> Only parties recognised as such by the referring court or tribunal are thus allowed to submit observations to the Court …This rule reflects the Court's concern not to allow the progress of cases to be delayed by multiple interventions during the proceedings, as well as its desire to remain within the framework outlined by the court or tribunal which brought the matter before the Court."

37. These remarks reflect one of the key objectives of the new Rules identified in the general introduction which refers to the "Court's intention to continue the efforts already made over a number of years to maintain its capacity, in the face of an ever-increasing caseload, to dispose within a reasonable period of time of the cases brought before it."

38. Against this background, it can be concluded that:

    i) The anxieties expressed by the President of the Court in the Football Association about any party having an interest being recognised as having a right to participate in the proceedings under Article 267 have now, at least in part, been reflected in the wording of Article 97; and

    ii) The assumption made by Ouseley J. in Air Transport that participation in the reference generally extends to those who are permitted to join as interveners may not have survived the introduction of the new Rules of Procedure.

39. In the case of Alcohol Focus Scotland v Scotch Whiskey Association [2014] CSIH Lord Eassie held:

> "3 …The present application appears to proceed on the erroneous view that granting the application would constitute the applicants as parties to the action. In our view, it would simply enable the lodging of a further written submission to this court – and of course that would be at a point after which the court had reached its decision.
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> 4 In the application – and indeed also this morning- Miss Poole was entirely frank in explaining that the objective was principally to secure some locus standi to make submissions by way of written observations and oral argument before the Court of Justice of the European Union. As we understood it, it was said that the status of an intervener under Rule 58.A would achieve that locus standi. If so, having already been granted leave to intervene, and having exercised that leave, the applicants already have such standing as is conferred on an intervener in the petition process.
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> 5 But in so far as that is the objective of this application it is, in our view, misconceived. Article 23 of the Statute of the Court of Justice of the European Union determines those entitled to participate in the proceedings before the Court of Justice in any reference under article 267 TFEU . Apart from the Member States and a number of the institutions of the European Union, the right so to participate is confined to "the parties to the main proceedings". Importantly, in that respect, article 97(1) of the current Rules of Procedure of the Court of Justice states:
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> > "1. The parties to the main proceedings are those who are determined as such by the referring court or tribunal in accordance with national rules of procedure."

> For what it may be worth, the rule that national law determines who is a party to the main proceedings is, in our view, entirely consonant with the nature of the reference procedure; proceedings before the Court of Justice in a reference under article 267 TFEU do not constitute a discrete, independent litigation but are simply a stage in the national proceedings. Since, as we have already observed, rule 58.8A does not constitute the intervener as a party to the main proceedings but limits the intervener's participation to a written submission before this court, granting the present application would not achieve its professed objective."

40. I recognise immediately that the Alcohol Focus case is of no more than persuasive authority and that the wording of Chapter 58 of the Court of Session Rules is drafted in distinctly narrower terms than CPR Part 54.17. Nevertheless, the reasoning deployed reinforces my view that acquiring the status of intervener under CPR 54.17 does not automatically provide the intervener with a passport to Luxembourg.

41. My reasons in summary are:

    i) the court's powers under CPR 54.17 cover a very wide range of circumstances including those in which the participation of the intervener may be specifically restricted to the filing of very limited evidence. Such a narrow involvement, should not, in my view lead mechanistically to an absolute entitlement to participate in the reference to the CJEU.

    ii) It is clear from the decision of the President in the Football Association case and the wording of and purposes behind the new Rules of Procedure of the CJEU that some level of proportionate restraint should be exercised and encouraged on the part of domestic courts in the categorisation of all those anxious to participate as "parties".

    iii) It must not be forgotten that nowhere do the CPR refer to the concept of "intervener".[2] The term is really no more than a convenient shorthand to identify someone to whom the court has given permission to be heard under CPR 54.17. In contrast, to become a party involves the acquisition of a status the consequences of which are set out in detail, particularly under CPR19.

42. It follows that, even if I had been persuaded to allow KZPT to intervene, I would not have recognised it, on the facts of this case, to be a "party" to the domestic litigation for the purposes of the reference to the CJEU.

CONCLUSION

43. Accordingly, for the reasons I have given, I decline to exercise my discretion under CPR 54.17 to permit KZPT to intervene in these proceedings and find that, even if I had been persuaded to exercise such discretion, I would have not have concluded that this afforded KZPT the status of a party within the scope of Articles 96 and 97 of the Rules of the CJEU.

[2] There is an isolated reference to "intervene" in the Practice Direction.