



COMPETITION APPEAL TRIBUNAL

SUMMARY OF APPLICATION UNDER SECTION 179 OF THE ENTERPRISE ACT 2002

CASE No: 1104/6/8/08

Pursuant to rules 15 and 25 of the Competition Appeal Tribunal Rules 2003 (S.I. No. 1372 of 2003) (“the Rules”), the Registrar of the Competition Appeal Tribunal gives notice of the receipt of a notice of application, on 30 June 2008, under section 179 of the Enterprise Act 2002 (“the Act”), by Tesco Plc (“Tesco”) of Tesco House, Delamare Road, Cheshunt, Herts EN8 9SL, challenging the legality of certain findings made by the Competition Commission (“the Commission”) contained in a report, published on 30 April 2008, entitled “The supply of groceries in the United Kingdom: market investigation” (“the Report”)¹.

In the Report the Commission found, *inter alia*, that, in many important respects, competition in the UK groceries industry is effective and delivers good outcomes for consumers. However, the Commission also found that a combination of one or more of certain features of certain local markets for the supply of groceries by larger grocery stores (i.e. grocery stores with a full range offer and a net sales area in the range of, or larger than, 1,000-2,000 sq metres) prevent, restrict or distort competition in connection with the supply of groceries by larger grocery stores in those markets. In relation to Tesco’s notice of application, the particular features concerned are: (a) a significant number of local markets have high levels of concentration, and these high levels of concentration have in many cases persisted over a number of years; and (b) the planning regime (in particular, PPS6 in England, SPP8 in Scotland, PPS5 in Northern Ireland and MIPPS 02/2005 in Wales) and its application by Local Planning Authorities in accordance with the policy objectives of the planning regime necessarily act as a barrier to entry or expansion in a significant number of local markets: (i) by limiting construction of new larger grocery stores; and (ii) by imposing costs and risks on smaller retailers and entrants without pre-existing grocery retail operations in the UK that are not borne to the same extent by existing large grocery retailers. The Commission found that the planning regime acted as a barrier to entry because it contained ‘a series of tests that constrain retail development for the purposes of meeting broader planning system objectives’. Separately, the Commission also found an ‘adverse effect on competition’, within the meaning of section 134(2) of the Act, in relation to supply chain practices.

To address the ‘adverse effect on competition’ that the Commission found in relation to local market concentration, the Commission decided to recommend that the Department of Communities and Local Government should take the necessary steps to establish a competition test within the planning system. In particular, the Commission recommended that the Office of Fair Trading (“the OFT”) be made a statutory consultee to Local Planning Authorities on all planning applications for grocery stores which after implementation of the scheme would have a net sales area of more than 1,000 sq metres. The OFT would advise the Local Planning Authorities on whether a particular retailer passed or failed a competition test. Broadly summarised, the intended effect of the test is to prevent local planning authorities from granting planning permission for the construction or expansion of a grocery store if there is a high level of concentration in the local market for larger grocery stores, and the firm applying for permission has (or will have) a substantial part of that market.

¹ The Report may be found at: http://www.competition-commission.org.uk/rep_pub/reports/2008/538grocery.htm

Tesco submits that the Commission's recommendation of the competition test is unlawful for the following reasons, which are closely inter-related:

- (a) It is not sufficiently related to any adverse effect on competition identified in the Report, and is therefore beyond the Commission's powers relating to remedies conferred by section 134(4) of the Act;
- (b) It is insufficiently supported by the facts and reasoning contained in the Report;
- (c) It is wholly disproportionate to the object sought to be achieved; and
- (d) For the reasons set out in paragraphs (a)-(c) above, it is also irrational.

The adverse effect on competition, to which the competition test is addressed, is the combined effect of high local concentrations and barriers to entry arising out of the planning system. Tesco submits that the mere existence of high local concentrations could not have been regarded as the relevant adverse effect on its own.

Tesco also submits that the competition test does not remove or mitigate any of the constraining effects of the planning regime identified by the Commission. It cannot itself produce new entry or expansion; rather it merely adds an additional barrier to entry.

Further, Tesco submits that the proposition that it is anti-competitive for a firm to extend its capacity to meet demand for its output is wrong in principle. Tesco submits that the competition test, if adopted, would represent a severe intervention in market forces, placing an artificial market share cap on the organic growth of the most successful firms.

Accordingly, Tesco seeks the following relief from the Tribunal:

1. an order that those aspects of the Report relating to the competition test remedy be quashed; and
2. an order that the Commission pay Tesco the costs of these proceedings.

Tesco submits that it may be appropriate for the Tribunal to hear further submissions on the nature and scope of the Tribunal's order once the issues raised in the application have been determined.

Any person who considers that he has sufficient interest in the outcome of the proceedings may make a request for permission to intervene in the proceedings, in accordance with rule 16 of the Rules.

A request for permission to intervene should be sent to the Registrar, The Competition Appeal Tribunal, Victoria House, Bloomsbury Place, London WC1A 2EB, so that it is received within **three weeks** of the publication of this notice.

Further details concerning the procedures of the Competition Appeal Tribunal can be found on its website at www.catribunal.org.uk. Alternatively the Tribunal Registry can be contacted by post at the above address or by telephone (020 7979 7979) or fax (020 7979 7978). Please quote the case number mentioned above in all communications.

Charles Dhanowa OBE
Registrar

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