



COMPETITION APPEAL TRIBUNAL

NOTICE OF APPEAL UNDER SECTION 46 OF THE COMPETITION ACT 1998

CASE No: 1163/1/1/10

Pursuant to rule 15 of the Competition Appeal Tribunal Rules 2003 (S.I. No. 1372 of 2003) (“the Rules”), the Registrar gives notice of the receipt of an appeal on 16 June 2010 under section 46 of the Competition Act 1998 (“the Act”) by Safeway Stores Limited and Safeway Limited (together “Safeway”) of Gain Lane, Bradford, West Yorkshire, BD3 7DL in respect of a decision in Case CE/2596-03 dated 15 April 2010 (“the Decision”) taken by the Office of Fair Trading (“OFT”). Morrisons is represented by Wilmer Cutler Pickering Hale and Dorr LLP, 10 Noble Street, London EC2V 7QJ.

According to the Decision, the OFT fined Safeway £10,909,366. In the Decision the OFT concluded that two manufacturers and ten retailers had infringed the Chapter I prohibition, contained in section 2 of the Act, by participating in agreements and/or concerted practices which had as their object the prevention, restriction or distortion of competition in the supply of tobacco products in the UK (“the Infringing Agreements”). As mentioned in the Decision, the Infringing Agreements comprised in each case an agreement and/or concerted practice between each manufacturer and each retailer whereby the manufacturer coordinated with the retailer the setting of the retailer’s retail prices for tobacco products, in order to achieve the parity and differential requirements between competing tobacco brands that were set by the manufacturer, in pursuit of the manufacturer’s retail pricing strategy.

Safeway submits that the OFT erred in law and/or fact in finding that it infringed the Act. In particular, Safeway advance the following grounds of appeal:

- (a) The OFT erred in finding that Safeway entered into an agreement and/or concerted practice to achieve parity and differential requirements with Imperial Tobacco Limited and Gallaher Limited.
- (b) Whatever the true factual position, the OFT has erred in finding that there were agreements that had as their object the prevention, restriction or distortion of competition.
- (c) The OFT has erred in finding that the Competition Act 1998 (Land and Vertical Agreements Exclusion) Order 2000 (S.I. No. 310 of 2000) did not apply in this case.

If the Tribunal were to conclude that Safeway has infringed the Chapter I prohibition, Safeway advances the following grounds of appeal in respect of the penalty imposed by the OFT:

- (a) There is no basis for imposing a fine on Safeway.
- (b) If a penalty is appropriate, the OFT has misapplied its Guidance as to the appropriate amount of penalty (OFT 423).

Safeway seek the following relief from the Tribunal:

- (a) set aside the Decision pursuant to paragraph 3(2) of Schedule 8 to the Act; alternatively
- (b) order that there be no penalty, or alternatively vary the amount of the penalty, pursuant to paragraph 3(2)(b) of Schedule 8 to the Act;

- (c) direct that the OFT pay Safeway its costs of the appeal; and/or
- (d) grant such further or other relief as may be required.

Further Safeway asks that the Tribunal by way of directions:

- (a) order that the OFT disclose all documents recording the reasons taken into account by the case team and/or OFT executive in deciding not to make a finding of infringement against Tesco plc (“Tesco”), including any communications from Tesco which led to that decision; and/or
- (b) grant such other directions as may be required.

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

Published 24 June 2010