



COMPETITION APPEAL TRIBUNAL

NOTICE OF APPEAL UNDER SECTION 46 OF THE COMPETITION ACT 1998

CASE No. 1165/1/10

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 dated 16 June 2010 under section 46 of the Competition Act 1998 (“the Act”), by Shell U.K. Limited, Shell U.K. Oil Products Limited and Shell Holdings (U.K.) Limited, all of Shell Centre, London SE1 7NA (together, “Shell”) in respect of a decision in Case CE/2596/03 dated 15 April 2010 (“the Decision”) taken by the Office of Fair Trading (“OFT”). Shell is represented by Baker & McKenzie LLP, 100 New Bridge Street, London EC4V 9BW (reference: HMB/JYM/SWW).

According to the Decision, the OFT fined Shell £3,354,615. 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.

In summary the principal grounds of appeal on which Shell relies are that:

- (a) The OFT’s decision to proceed against Shell was discriminatory, contrary to the OFT’s own declared policy, unjustified and unfair. All of Shell’s close competitors (other petrol companies) were excluded from the scope of the investigation, notwithstanding the fact that their circumstances were materially similar to those of Shell.
- (b) The OFT misunderstood the nature of Shell’s business, and made serious errors of fact which vitiate the Decision. While the OFT treated Shell as if it were a retailer of tobacco products able to fix the prices of those products in its petrol stations, in fact for all save a very short part of the period of time over which an infringement was found, tobacco was sold in Shell’s petrol stations by independent contractors. The OFT ought properly to have found that without the ability to set any tobacco retail prices, Shell could not have intended to contribute by its own conduct to a common objective of fixing price parities and differentials. Moreover, the agreement or practices between Shell and each of the Manufacturers (as defined in the Decision) were not amenable to a “by object” infringement decision under the Chapter I prohibition.
- (c) No penalty should have been imposed on Shell, alternatively the penalty imposed was grossly excessive. Even if an infringement did occur, which is denied, such infringement was neither intentional nor negligent. Moreover, the penalty imposed was excessive, in particular because:
 - a. The 5 per cent starting point breached the principle of equal treatment and was disproportionate;
 - b. The adjustment for duration was not consistent with the OFT Guidance;
 - c. The adjustments for deterrence at step 3 are disproportionate, are inconsistent with the OFT Guidance and breach the principle of equal treatment;

- d. The fine should be reduced to reflect mitigating circumstances, namely that the existence of an infringement was far from clear.

Shell seeks the following relief from the Tribunal:

- (a) An order that the Decision be quashed in its entirety; or
- (b) An order that the Decision be quashed insofar as it relates to the findings of infringement against Shell; or
- (c) An order that the Decision be quashed insofar as it relates to the fine imposed on Shell; or
- (d) An order that the fine imposed on Shell be varied so that a proportionate and non-discriminatory fine is imposed; or
- (e) An order that, alternatively, the matter be referred back to the OFT with directions to reconsider and make a new decision in accordance with the Tribunal's ruling; and
- (f) An order that the OFT pay Shell's costs; and/or
- (g) Such other order or relief as the Tribunal considers appropriate.

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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