



## COMPETITION APPEAL TRIBUNAL

### NOTICE OF APPEAL UNDER SECTION 46 OF THE COMPETITION ACT 1998

#### CASE No. 1208/1/13

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 on 24 April 2013 of an appeal under section 46 of the Competition Act 1998 (“the Act”), by (1) Somerfield Stores Limited and (2) Co-operative Group Food Limited, both of 1 Angel Square, Manchester, M60 0AG (together, “Somerfield”) against a decision in Case CE/2596-03: Tobacco dated 15 April 2010 (“the Decision”) taken by the Office of Fair Trading (“OFT”). Somerfield is represented by Burges Salmon LLP of One Glass Wharf, Bristol, BS2 0ZX (ref: Laura Claydon and Marc Shrimpling).

In the Decision, the OFT concluded that two manufacturers and ten retailers had entered into a series of bilateral vertical agreements involving a restriction of competition by object contrary to section 2 of the Act. The OFT found that, in each agreement, the retailer had agreed to set its shelf prices for cigarettes and other tobacco products in accordance with set parity and differential requirements in relation to named competing brands.

Prior to the Decision, on 10 July 2008, Somerfield entered into an Early Resolution Agreement (“the ERA”) with the OFT in respect of which Somerfield made a payment of £3,987,950 (“the Penalty”).

The Tribunal’s judgment of 12 December 2011 ([2011] CAT 41) (“the Judgment”), set aside the Decision in respect of six other addressees: Imperial Tobacco, Asda, the Co-operative Group, Morrisons, Safeway and Shell (“the Earlier Appellants”). Somerfield was not a party to those appeals.

In a Ruling made on 27 March 2013 ([2013] CAT 5) (“the Extension of Time Ruling”), the Tribunal granted Somerfield an extension of time to appeal the Decision on the basis of what were found to be the exceptional circumstances surrounding this case. Pursuant to the Extension of Time Ruling, Somerfield now appeals against the Decision.

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

1. Overall, there are no legal or factual findings in the Decision in respect of the “Infringing Agreements” to which Somerfield was party that are independent of the findings which have been abandoned by the OFT. The OFT’s concessions before the Tribunal and the findings in the Judgment applied equally to the Decision insofar as it applied to Somerfield. The OFT has conceded, expressly or by necessary implication, that there is no evidential basis for the legal and economic case advanced by it as against Somerfield in the Decision.
2. In the alternative, the Penalty imposed on Somerfield should be revoked or substantially reduced to reflect: (a) the fact that the OFT has conceded that its theory of harm stated in the Decision cannot be proved; (b) the setting aside of the Decision in respect of the agreement between Somerfield and Imperial Tobacco; (c) the less serious nature of any infringement given that the findings of the OFT in respect of 15 of the 20 Infringing Agreements to which the Decision relates have already been set aside; and (d) the obligation of the OFT and the Tribunal to treat addressees of the Decision equally.

As regards the relief sought, Somerfield asks that the Tribunal:

- (a) set aside the Decision, insofar as it relates to the Appellants;

- (b) revoke the Penalty imposed on the Appellants; alternatively,
- (c) substantially reduce the Penalty;
- (d) order the OFT:
  - a. to repay the Penalty in accordance with the above;
  - b. to pay interest to reflect the loss of use of money since payment of the Penalty;
  - c. to pay the Appellants' costs of the appeal; and
- (e) grant such other relief as it considers appropriate.

If and insofar as the ERA between Somerfield and the OFT remains valid and in force, by its Notice of Appeal, Somerfield has terminated the ERA and withdrawn its admission.

Subject to the proviso below, 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.

On 29 April 2013, the President of the Tribunal made an Order staying the appeal (and the related appeal in Case No. 1209/1/1/13) pending final determination of an application made by the OFT for permission to appeal the Extension of Time Ruling (and the determination of the subsequent appeal in the event permission is granted). Pursuant to Rule 15(2)(f) of the Tribunal Rules, the President has directed that no requests for permission to intervene should be filed until that stay has lifted. Accordingly, 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 date upon which that stay lifts (of which the Tribunal will give notice).

Further details concerning the procedures of the Competition Appeal Tribunal can be found on its website at [www.catribunal.org.uk](http://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, QC (Hon)*  
Registrar

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