



## COMPETITION APPEAL TRIBUNAL

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

#### CASE No. 1209/1/13

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) Gallaher Group Limited and (2) Gallaher Limited, both of Members Hill, Brooklands Road, Weybridge, Surrey, KT13 0QU (together, “Gallaher”) against a decision in Case CE/2596-03: Tobacco dated 15 April 2010 (“the Decision”) taken by the Office of Fair Trading (“OFT”). Gallaher is represented by Slaughter and May, One Bunhill Row, London, EC1Y 8YY (ref: Bertrand Louveaux, Isabel Taylor and Michelle Rosswick).

In the Decision, the OFT concluded that two manufacturers and ten retailers had entered into a series of bilateral arrangements relating to the pricing of tobacco products in those retailers’ stores, contrary to section 2 of the Act. The OFT found that, in each agreement, the retailer was required to alter the prices not only of the contracting manufacturer’s brand but also of the linked competing brand, irrespective of changes by manufacturers of their wholesale prices.

Prior to the Decision, on 11 July 2008, Gallaher entered into an Early Resolution Agreement (“the ERA”) with the OFT pursuant to which Gallaher made a payment of £50,379,754 (“the Penalty”).

The Tribunal’s judgment of 12 December 2011 ([2011] CAT 41) (“the Tobacco I Judgment”), set aside the Decision in respect of six other addressees: Imperial Tobacco, Asda, the Co-operative Group, Morrisons, Safeway and Shell (“the Tobacco I Appellants”). Gallaher 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 Gallaher 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 that Ruling, Gallaher now appeals against the Decision.

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

1. The factual underpinning of the Decision as regards Gallaher, was materially the same as that underpinning the case against the Tobacco I Appellants. Since the Tobacco I Judgment concluded that the Decision was based on a theory of harm that was not supported by any, or any sufficient, factual evidence, it is indefensible against all of the addressees of the Decision, including Gallaher. Gallaher argues that it would be an abuse of process if the OFT were to seek to depart from the Tobacco I Judgment, or the concessions the OFT made in the proceedings leading to that Judgment.
2. In the alternative, Gallaher argues that the Penalty should be quashed in its entirety and/or is manifestly disproportionate since the OFT has not identified any evidence that the arrangements had any adverse effect on competition. Maintaining the Penalty would be unfair to, and/or amount to unlawful discrimination against, Gallaher if, following two appeals against the same Decision, Gallaher remained liable to pay the Penalty, whereas its close competitor, Imperial Tobacco, was not and nor were the other parties to the very same agreements to which Gallaher was a party. Furthermore, in assessing the seriousness of the infringing agreements, the OFT made factual findings that are no longer sustainable and, in their absence, the seriousness of any infringement is much reduced and the Tribunal should, accordingly, amend or significantly reduce the Penalty imposed on Gallaher.

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

- (a) annul the Decision as it applies to Gallaher;
- (b) alternatively, reduce or annul the Penalty;
- (c) require the repayment of the Penalty (or that part of the Penalty which the Tribunal determines must be returned to Gallaher) together with interest on that sum from the date of payment until its repayment to reflect the loss to Gallaher of being kept out of its money;
- (d) award Gallaher the costs of this appeal; and
- (e) grant any other relief as may be required.

If and insofar as the ERA between Gallaher and the OFT remains valid and in force, by its Notice of Appeal, Gallaher 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. 1208/1/1/13) 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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