



## COMPETITION APPEAL TRIBUNAL

### SUMMARY OF APPLICATION UNDER SECTION 179 OF THE ENTERPRISE ACT 2002

CASE No: 1052/6/1/05

Pursuant to rule 15 of the Competition Appeal Tribunal Rules 2003 (“the Rules”), the Registrar of the Competition Appeal Tribunal (“the Tribunal”) gives notice of the receipt of a notice of application, on 3 October 2005, under section 179 of the Enterprise Act 2002 (“the Act”), by the Association of Convenience Stores (“ACS”) of Federation House, 17 Farnborough Street, Farnborough, Hampshire, GU14 8AG, challenging a decision (“the Contested Decision”), by the Office of Fair Trading (“the OFT”), made on 3 August 2005 contained in a report entitled “*Supermarkets: the code of practice and other competition issues, conclusions* (OFT 807), not to make a market investigation reference to the Competition Commission under section 131 of the Act in respect of competition issues arising in connection with certain features of the market for grocery retailing in the United Kingdom.<sup>1</sup>

In summary, the principal grounds of review on which ACS relies are that:

1. in the Contested Decision the OFT mis-directed itself as to the test of reasonable suspicion in section 131 of the Act for making a market investigation reference to the Competition Commission;
2. insofar as the test of reasonable suspicion was met and the OFT was exercising its discretion not to make a reference on the basis of inadequate evidence, the Contested Decision was flawed by the OFT’s failure:
  - (a) to take reasonable steps to inform itself regarding the extent of the suspected problems in relation to, for example, below cost pricing and price-flexing; and
  - (b) properly to address the question of under which powers it would be appropriate to take action in respect of the suspected problems relating to structural issues in the market;
3. in assessing the features of the market complained of, the OFT mis-directed itself as to the relevance of the absence of any apparent consumer detriment in the context of the question posed by section 131 of the Act, namely whether those features prevented, restricted or distorted competition in the convenience sector of the grocery market in the United Kingdom;
4. without prejudice to the errors of law identified at (1), (2) and (3) above, the reasons given for the Contested Decision do not clearly address the basis on which the OFT:
  - (a) approached its decision under section 131 of the Act; and
  - (b) rejected the substance of the evidence and arguments put forward by ACS and others on matters of widespread concern in a market of national importance.

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<sup>1</sup> The report may be found at <http://www.offt.gov.uk/NR/rdonlyres/5C58328C-8A2F-4C45-AD02-0AA4567DF3F2/0/offt807.pdf>

ACS submits that the application is made against the background of ACS's belief that there is an urgent need for the Competition Commission to undertake an in-depth investigation of:

1. the extent to which the upstream buyer power of large supermarket chains creates distortions of competition vis-à-vis their competitors when the low price of supplies they thereby obtain are reflected in the prices they offer in the downstream market – although competitors may be just as efficient, their inability to buy on such favourable terms means that competition on price between the large supermarkets and smaller retailers is distorted; and
2. the extent to which pricing practices carried on by many large supermarkets (and found to be against the public interest by the Competition Commission in 2000) are continuing with greater effects on smaller retailers now that the large supermarkets are increasingly competing head-to-head with smaller retailers through their smaller format stores.

ACS seeks the following relief from the Tribunal:

1. an order setting aside the Contested Decision;
2. guidance in the Tribunal's ruling as to the correct legal interpretation of section 131 of the Act; and
3. the costs of the application.

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 date of this 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*  
Registrar

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