



COMPETITION APPEAL TRIBUNAL

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

CASE NO 1114/1/1/09

Pursuant to rule 15 of the Competition Appeal Tribunal Rules 2003 (SI 2003, No 1372) (“the Rules”), the Registrar gives notice of the receipt of an appeal dated 10 November 2009, under section 46 of the Competition Act 1998 (“the Act”), by Kier Group plc and Kier Regional Limited (together, “Kier”) in respect of a decision in Case CE/4327-04 dated 21 September 2009 (“the Decision”) taken by the Office of Fair Trading (“OFT”).

According to the Decision, the OFT fined Kier £17,894,438. The fine was in respect of three infringements relating to cover pricing with regard to tenders for a new school, a new nursery and a distribution centre. The OFT calculated a penalty for the three infringements by reference to OFT 423 “OFT’s Guidance as to the appropriate amount of a Penalty” (December 2004) (“the Penalty Guidance”). The OFT calculated a combined penalty for the three infringements after step 2 of the Penalty Guidance of £2,667,750. The OFT then at step 3 increased the sum by £16,168,500 for deterrence purposes by imposing a 0.75% Minimum Deterrence Threshold (“MDT”) on Kier’s worldwide group turnover. This is based on assuming that 15% of Kier’s worldwide turnover was relevant turnover (i.e. turnover in the relevant markets affected by the infringement). The overall fine (for the three infringements) calculated at step 3 was £18,836,259. This was reduced at step 4 by 5% as a result of Kier introducing a compliance programme. This resulted in an overall fine on Kier of £17,894,438.

Kier submits that in the circumstances of the case the fine’s impact on it is excessive and/or discriminatory. In summary the principal grounds of appeal on which Kier relies are that:

- (a) First, a blanket figure of 0.75% of turnover takes no account of the individual circumstances of each company’s situation and whether or not that company needs to be deterred and, if so, to what extent. On the facts of Kier’s case, Kier, within days of being informed of the alleged infringement, implemented a comprehensive compliance programme. Although Kier received a 5% reduction for compliance at step 4 the comprehensive compliance programme should have been factored in at step 3. Although deterrence aims to deter the relevant company and others in the market, the 0.75% MDT should be withdrawn or reduced in Kier’s case to reflect the fact that the 0.75% MDT so far as Kier is concerned is excessive.
- (b) Second, the imposition of a MDT based on 0.75% of turnover must also take account of the profit made by Kier. Whilst it is accepted that turnover is a benchmark adopted by the competition authorities to measure a company’s strength, the OFT must also have regard to Kier’s profits as a cross check to determine the actual financial impact of the fine on the company. In the present case Kier operates on low margins and a 0.75% MDT of worldwide turnover is disproportionate because it disproportionately impacts on Kier’s business (both worldwide and in the relevant market).
- (c) Third, there should be a 15% reduction, alternatively a 10% reduction, because Kier admitted the infringement (for which it should have received a discount of 15%) or at the very least did not contest the infringement (for which it should have received a discount of 10%). These reductions would have been consistent with the OFT’s stated approach in the Decision. The OFT has wrongly failed to afford Kier one of these reductions and such a failure is discriminatory.

Kier seeks the following relief from the Tribunal:

- (a) a reduction in the fine and the substitution of a more proportionate fine instead;
- (b) if the Tribunal considers that a MDT is necessary, a lower percentage of turnover should be adopted or a different approach be adopted altogether; and
- (c) the fine imposed should have a proportionate impact on Kier as a trading entity and also reflect the efforts that Kier went to to ensure that it would not re-offend. The fine should also be reduced to reflect the admissions made by Kier during the administrative procedure.

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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