Neutral citation: [2005] CAT 36

IN THE COMPETITION APPEAL TRIBUNAL

Case No 1052/6/1/05

Victoria House,
Bloomsbury Place,
London WC1A 2EB

1st November, 2005

Before:
SIR CHRISTOPHER BELLAMY
(President)
MR. MICHAEL BLAIR QC
MS. ANN KELLY

Sitting as a Tribunal in England and Wales

BETWEEN:

THE ASSOCIATION OF CONVENIENCE STORES Applicant

Supported by

FRIENDS OF THE EARTH Intervener

and

OFFICE OF FAIR TRADING Respondent

Ben Rayment (instructed by Edwin Coe) appeared for the Applicant.

Kassie Smith and Alan Bates (instructed by the Solicitor, Office of Fair Trading) appeared for the Respondent.

Jennifer Skilbeck (instructed by Friends of the Earth) appeared for the Intervener

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RULING (SETTING ASIDE OF DECISION)

THE PRESIDENT:

1 In this matter the Association of Convenience Stores applies for a review under s.179 of the Enterprise Act, 2002 against a decision of the OFT reached in August 2005 not to make a market investigation reference to the Competition Commission under s.131 of that Act.

2 Essentially what has happened is that following the lodging of the application on 3rd October 2005 the OFT wrote to the Tribunal on 27th October indicating its intention to withdraw the Decision "on the ground of insufficient reasoning" and indicating that it would "consider the Decision afresh taking into account all relevant circumstances." The OFT elaborated that position in a letter dated 31st October 2005 in which it indicated notably that it would reconsider the matter in the light of all relevant circumstances available to it at the time of taking the new Decision. What is now proposed by the OFT is that the Tribunal should make an order quashing the existing Decision and remitting the matter to the OFT under s.179(5) of the Act.

3 We gather from what has been said in open court that what is intended is that the OFT intends to reconsider and, at least to some extent, reinvestigate the matters in question. According to the OFT that will involve seeking further information, meetings, consultation and so forth with interested parties. However, the OFT has indicated today that it envisages a period of some eight months from today until June 2006, in order to take a decision on whether or not to make a reference under s.131.

4 Section 131(1) provides that:

> "The OFT may, subject to subsection (4) [not relevant for present purposes] make a reference to the Commission if the OFT has reasonable grounds for suspecting that any feature, or combination of features, of a market in the United Kingdom for goods or services prevents, restricts or distorts competition in connection with the supply or acquisition of any goods or services in the United Kingdom or a part of the United Kingdom."

Without going into detail at this stage the section appears to proceed in two stages. First, the OFT has to ask itself whether it has "reasonable grounds for suspecting" that there is/are relevant features that prevent, restrict or distort competition; and secondly, there is then a

discretion as to whether or not to make a reference. We are not today considering the exact ambit of that discretion which, like all discretions, would of course have to be exercised according to law.

5 The scheme of the Act is that once a reference has been made to the Competition Commission there is then an investigation by that Commission which under s.137 has to be completed within a period of two years with, as far as we can see, some possibility of the period being extended in relation to remedies under s.138. What concerns us in the present case is the envisaged timescale indicated provisionally by the OFT, in a non-binding way, admittedly, before it is able to reach a decision on whether or not it has "reasonable grounds for suspecting" a prevention, restriction or distortion of competition and, if so, whether or not to make reference.

6 The present matter has a long history. There has been a previous Report by what is now the Competition Commission in the year 2000 that found various practices to operate against the public interest, including below cost pricing and what is known as 'price flexing'. A code of practice was then introduced following lengthy negotiations with the OFT and Secretary of State, and the OFT has been monitoring that code. Various matters in the supermarket sector have come to public attention, for example, in the Safeway Report in 2003, and issues arising have been considered on a number of occasions in merger cases, including one case in front of the Tribunal – *The Federation of Wholesale Distributors* – which did not proceed to judgment. This is a market with which the OFT is therefore very familiar.

7 The first OFT investigation that took place in this case lasted from November 2004 until August 2005, which is already a period of some nine months. The OFT goes into some detail about the market in its contested Decision, and in an earlier preliminary report that it issued in March 2005. Against that detailed background it seems to us less than satisfactory that a further nine eight or nine months is now required in order to allow the OFT to decide whether or not it has reasonable grounds to suspect and, if so, whether a reference should be made. There is, if we may say so, some risk that one may mistake the height of the hurdle which s.131(1) presents. It is a "reasonable ground to suspect" test. The scheme of the Act is that a full investigation is carried out at the stage of the Competition Commission not at the stage of the OFT, although admittedly the OFT has to address the matter sufficiently to decide whether there are reasonable grounds "to suspect", and sufficiently in order to consider the question of undertakings under s.154 of the Act in lieu of making a reference. Subject to that, it seems to

us that on the presently envisaged timetable it would have taken some 16 months to decide even whether to make a reference in this case and, if a reference was then made, that would be followed by an investigation by the Competition Commission lasting up to two years making a total period of three or four years altogether. That seems to us to be unsatisfactory to all parties on which ever side of this particular argument they happen to be and, from the point of view of parties such as the Applicants, to involve some risk (if the Applicants are right) of shutting the stable door after the horse has gone. Of course, at this stage of the proceedings we express absolutely no view as to the merits of this case, our concern is simply about the envisaged timescale.

8 In our judgment the timescale now envisaged for this essentially first stage investigation is at present unduly long – although we understand it is only an indicative timetable – particularly considering the background that we have just indicated and the general public interest in this sector which potentially affects every consumer in the country. If we may say so the competition authorities must equip themselves in a way that enables them to address the kinds of issues that arise in a case like this within a reasonable timescale. Our present view is that the indicative timescale we have been told of this afternoon is not a reasonable timescale in which to reach the preliminary decision envisaged by s.131. We note in particular in this case that the authorities are not starting from first base; there is the 2000 report, and the findings in that report. There are the developments that have happened since and there are the investigations that have already taken place over the past eight months. The question that now arises therefore is what should the Tribunal do in those circumstances and against that background.

9 It seems to us that there are three possible procedural routes which need to be considered in addressing problems of this kind. The first possibility for the Tribunal is to keep the present Appeal alive (procedurally speaking) so as to guard against the possibility that the Applicants' other points raised in the present case, may not have a chance to be aired and that, in the event of a new decision, the Applicants may have to go back to first base and, as it were, start again. However, in our view keeping the present Application alive would not be a wholly satisfactory solution at the moment. The OFT has undertaken to reinvestigate the matter; they do propose to withdraw the Decision and the Applicants have, in effect, achieved virtually all the relief they could have achieved in the Appeal. So our present view is not to favour finding some procedural mechanism for keeping the present Appeal alive.

10 The second possibility is whether or not the Tribunal should itself direct, or indicate, some kind of timetable which the OFT should now follow in order to reach the preliminary decision that we are discussing. That possibility takes us in particular to the Tribunal's powers under s.179(5) of the Enterprise Act 2002, which provides that the Tribunal may:

> "(a) dismiss the application or quash the whole or part of the decision to which it relates; and
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> (b) where it quashes the whole or part of that decision refer the matter back to the original decision maker [here the OFT] with a direction to reconsider and make a new decision in accordance with the ruling of the Competition Appeal Tribunal."

The question is whether the words "make a new decision in accordance with the ruling of the Competition Tribunal" include the possibility of the Tribunal to set, or at least indicate a timetable within which any such new Decision should be taken. Our present view is that in an appropriate case the Tribunal would have power under that provision to set – or at least indicate – a timetable in which the new Decision in question was to be taken in order to ensure justice between the parties. However, in the present case we do not consider that we have sufficient information before us upon which we can usefully indicate what an appropriate timetable would be.

11 We note however that there is a third procedural possibility which we have not had argued before us so our comments on it are provisional at this stage, that is to say that under s.179 which provides for aggrieved persons to apply to the Tribunal for a review in respect of decisions by the OFT or certain other parties, the relevant decision is defined under s.179(2) as including under subsection (b) "… a failure to take a decision permitted or required by this Part in connection with a reference or possible reference"; so one can come to the Tribunal in relation to a failure to take a decision permitted by this part of the Act.

12 Our present view is that the words "… failure to take a decision permitted by this part of the Act" include a failure to take a decision within a reasonable time permitted by this part of the Act in connection with a possible reference. It seems to us that we cannot exclude at this stage the possibility that if an aggrieved person felt that the OFT had not taken a decision permitted in connection with a possible reference within a reasonable time it is at least arguable that any such person is entitled to come to the Tribunal and to apply for a review of that failure. That

may be at least one potential procedural route in which undue delay at the administrative stage of these proceedings may be dealt with. However, be that as it may, we take the view in this case that it is in the interests of the supermarkets, the convenience stores, the consumers, suppliers and all who are active in this sector that this outstanding question of whether or not there should be a new investigation is resolved as quickly as is reasonably possible and we would exhort the OFT to act accordingly.

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