



Neutral citation [2012] CAT 9

IN THE COMPETITION
APPEAL TRIBUNAL

Case No: 1188/1/1/11

B E T W E E N:

(1) TESCO STORES LTD
(2) TESCO HOLDINGS LTD
(3) TESCO PLC

Appellants

-v-

OFFICE OF FAIR TRADING

Respondent

ORDER

UPON reading the Respondent's ("OFT") application, dated 16 March 2012, for a direction in relation to the order of oral opening submissions at the main hearing listed to commence on 26 April 2012

AND UPON reading the written submissions filed by the Appellants ("Tesco") on 16 March, the OFT on 19 March, and Tesco on 21 March 2012

AND HAVING REGARD TO the Tribunal's powers under rules 19(1), 19(2)(a) and 21(c) of the Competition Appeal Tribunal Rules (S.I. 1372 of 2003)

IT IS ORDERED THAT:

1. Counsel for Tesco open the appeal at the main hearing, followed by the opening oral submissions of counsel for the OFT.
2. The OFT have a period of up to, but no more than, seven days in which to complete its cross-examination of the witnesses of fact called by Tesco.
3. There be liberty to apply.

REASONS

In my judgment, the just, expeditious and economic conduct of this appeal will best be secured by Tesco opening the appeal, followed by the presentation of the OFT's case. It is, of course, true that the legal burden of proof rests on the OFT to prove the infringements alleged in its decision. Paragraph 3(1) of Schedule 8 to the Competition Act 1998 makes clear, however, that the duty of this Tribunal is to consider the merits of an infringement decision by reference to the grounds of appeal set out in the notice of appeal. The onus is on an appellant to persuade the Tribunal that the decision being challenged should be set aside. That being so I am satisfied that Tesco, as appellant, should open this appeal.

There should, of course, be a fair opportunity for a respondent to present its case. While in some cases the sensible course may be for a respondent to elaborate its case first – and this has happened once or twice in previous cases – each appeal must be assessed on its own particular facts. In my judgment, the OFT will have an adequate opportunity to present its case and draw the Tribunal's attention to the documents supporting its case, after Tesco has made its opening submissions but before the cross-examination of witnesses of fact begins. In the event that Tesco has already referred to documents during its opening, it should be possible for the OFT to give its own account of those documents (without needing to repeat any points that are common ground between the parties).

Taking account of the number of relevant documents, the length of the various witness statements and the nature and extent of the factual disputes between the parties, my judgement is that a maximum of seven days (as opposed to the cap of four days proposed by Tesco) should be a fair and adequate period for any evidence-in-chief, cross-examination and re-examination of witnesses of fact. This should enable counsel and witnesses to make appropriate arrangements. However, I expect witnesses, if at all possible, to be available the day before and the day after their allotted days so as to incorporate a degree of flexibility during the hearing so that there will not be any gaps or delays if things fall short or over-run. I hope and expect that the parties will now be able to agree the remaining details of the hearing timetable.

Lord Carlile of Berriew Q.C.
Chairman of the Competition Appeal Tribunal

Made: 23 March 2012
Drawn: 23 March 2012