



Neutral citation [2019] CAT 8

IN THE COMPETITION
APPEAL TRIBUNAL

Case No: 1301/6/12/18

Victoria House
Bloomsbury Place
London WC1A 2EB

28 March 2019

Before:

THE HONOURABLE MR JUSTICE MORRIS
(Chairman)
MICHAEL CUTTING
PAUL DOLLMAN

Sitting as a Tribunal in England and Wales

BETWEEN:

B&M EUROPEAN VALUE RETAIL S.A.

Applicant

- v -

COMPETITION AND MARKETS AUTHORITY

Respondent

Heard at Victoria House on 25 March 2019

RULING (PERMISSION TO INTERVENE)

APPEARANCES

Mr Richard Moules (instructed by Gordons LLP) appeared on behalf of the Applicant.

Mr Ben Lask (instructed by CMA Legal) appeared on behalf of the Respondent.

Mr Michael Armitage (instructed by Freshfields Bruckhaus Deringer LLP) appeared on behalf of the proposed Intervener, Tesco PLC.

A. INTRODUCTION

1. The Competition Commission (“CC”) investigated the supply of groceries, following a reference from the Office of Fair Trading (“OFT”) in May 2006. The CC found adverse effects on competition arising in several areas including the potential exercise of buyer power in relation to suppliers of grocery retailers, and concerns regarding the use of restrictive covenants in concentrated local markets. To address these concerns, the CC decided on a package of remedies which included the Groceries (Supply Chain Practices) Market Investigation Order 2009 (the “2009 Order”) which addressed buyer power among grocery retailers.
2. The Competition and Markets Authority (“CMA”), the successor body to both the CC and OFT, actively monitors and enforces the remedies within its remit, including the 2009 Order. From the date of the 2009 Order, ten retailers, including Tesco PLC (“Tesco”), were designated, as described in Schedule 2 of the 2009 Order. Part 2, Article 4 of the 2009 Order also provided for additional retailers to be designated once the Order was in place. The test for designation is set out in Article 4(1)(b) of the 2009 Order, namely:

“any retailer with a turnover exceeding £1 billion with respect to the retail supply of groceries in the United Kingdom, and which is designated in writing as a Designated Retailer by the [CMA].”
3. The 2009 Order imposes a series of obligations on ‘Designated Retailers’. These include a duty to ensure that their supply agreements incorporate and comply with the Groceries Supply Code of Practice (“GSCOP”). The Groceries Code Adjudicator Act 2013 established the Groceries Code Adjudicator (“GCA”) whose functions include resolving disputes between retailers and suppliers, and enforcing compliance with the GSCOP.
4. The CMA has a discretion as to whether to appoint additional retailers as Designated Retailers under Article 4(1)(b). Having established that B&M European Value Retail S.A. (“B&M”) had a turnover that exceeded the £1 billion threshold, on 1 November 2018 the CMA issued a Notice of Designation, designating B&M with immediate effect (the “Designation Decision”).

5. By a notice of application dated 18 December 2018, B&M challenges the Designation Decision. It also challenges the CMA’s refusal on 11 December 2018 to de-designate B&M.
6. On 8 March 2019, Tesco applied (the “Application”) for permission to intervene in these proceedings, pursuant to Rule 16 of the Competition Appeal Tribunal Rules 2015 (S.I. 2015 No. 1648) (the “Tribunal Rules”). Tesco intends to support the CMA’s case that it appropriately exercised its discretion in designating B&M under the 2009 Order. Both the CMA and B&M indicated in inter-party correspondence that they remained neutral on whether or not Tesco should be permitted to intervene, although the CMA submitted that its neutrality was conditional on any intervention which the Tribunal decides to allow not interfering with the speedy resolution of the case.
7. Having heard the parties and Tesco at a case management conference which took place on 25 March 2019, the Application was refused by the Tribunal. This ruling sets out the Tribunal’s reasons for refusing the Application.

B. THE TRIBUNAL RULES

8. Rule 16 of the Tribunal Rules provides for intervention in the following terms:

“(1) Any person with sufficient interest in the outcome may make a request to the Tribunal for permission to intervene in the proceedings.

[...]

(6) If the Tribunal is satisfied, having taken into account the observations of the parties, that the intervening party has a sufficient interest, it may permit the intervention on such terms and conditions as it thinks fit.”
9. In order to be granted permission to intervene, an applicant must show a “sufficient interest in the outcome” of the proceedings. As explained by the Tribunal in *Flynn Pharma Limited and others v CMA* [2017] CAT 7, this is the “threshold question” which must be satisfied before the Tribunal may exercise its discretion to permit an intervention (see *Barclays Bank Plc v Competition Commission* [2009] CAT 15). The exercise of this discretion will be carried out in accordance with the Tribunal’s governing principles set out in Rule 4 of the Tribunal Rules, in particular so as to ensure that the case is dealt with “justly

and at proportionate cost”. In our judgment, such an application of the principles in Rule 4 does not differ in substance from the approach taken by the Tribunal in *British Sky Broadcasting Ltd v Ofcom* [2012] CAT 18 at §5, namely “whether allowing the intervention would be consistent with the just, expeditious and economical conduct of the proceedings”, thereby reflecting the wording of Rule 19 of the Tribunal’s earlier 2003 rules. In that case the Tribunal emphasised that this approach to discretion is to be taken “even if the other parties do not object” to the intervention.

C. THE APPLICATION

10. As set out in the Application, Tesco is a grocery retailer and was one of ten retailers designated at the time of making the 2009 Order. Tesco submits that complying with the provisions under the GSCOP places a burden on designated retailers. If a retailer meets the tests under the 2009 Order for governance by the GSCOP, not designating a retailer would lead to a distortion of competition in the market, and so Tesco is interested to ensure that a consistent approach applies to all retailers in the market, including B&M, to ensure that there is a level playing field amongst grocery retailers. Accordingly, Tesco contends that it has a sufficient interest in the outcome of these proceedings.
11. In relation to the exercise of the discretion whether to allow the intervention, Tesco argues that we should permit it to intervene for four reasons. First, this would not be disruptive to the proceedings (because the parties had agreed how intervention could be accommodated within the existing case timetable). Secondly, it would not be duplicative (because Tesco would ensure that it co-operated with the CMA to ensure there was no duplication). Thirdly, Tesco could ‘add value’ to the process due to its experience of having been regulated under the 2009 Order and its ability to comment on the factual question of the possibility of the exercise of buyer power; it could provide a commercial perspective in relation to how the provisions of the GSCOP apply in practice. Fourthly, this was the first application in relation to the designation of new retailers under the 2009 Order and raised issues of a wider public interest.

D. REASONS FOR REFUSING THE APPLICATION

12. As set out above, pursuant to Rule 16(6) of the Tribunal Rules, the Tribunal may permit a party to intervene where ‘it is satisfied, having taken into account the observations of the parties, that the intervening party has a sufficient interest in the outcome of the proceedings’.
13. This involves a two-stage process. So far as concerns the threshold question, we conclude that Tesco does have a sufficient interest in the outcome of the proceedings. It is true that it is suppliers to ‘grocers’ who are most directly affected by whether a grocer is designated under the 2009 Order or not. However, the issue of whether there should be a ‘level playing field’ in terms of the rules applying to grocers or grocers who could be designated under the 2009 Order is at least a potentially relevant consideration in this case and for that reason alone we would be prepared to find that Tesco meets the threshold test. That approach is consistent with the approach of the Tribunal to the treatment of the Association of Convenience Stores in the case of *Tesco Plc v Competition Commission* [2008] CAT 20.
14. A further relevant consideration is that the costs of the GCA are borne by retailers who are designated under the 2009 Order. There would be a direct cost implication for Tesco of B&M being designated and regulated by the GCA for part of a year but then falling out of the scheme of regulation under the 2009 Order in the event that B&M is successful in its application.
15. As regards the second stage, having heard the parties, and notwithstanding the ‘neutrality’ of B&M and the CMA to the issue of Tesco’s intervention, we are not persuaded that it would be right to exercise our discretion to permit Tesco to intervene in these proceedings.
16. In this regard, we refer to the Tribunal’s decision in *Umbro v OFT (Sportsworld’s intervention)* [2003] CAT 25 at §§8 to 10. In that case (albeit an appeal in a cartel context) the Tribunal held that, as a matter of discretion, there was no need for an interested party to intervene if the interests of that party are already adequately protected by the position taken by one of the principal

parties. There the Tribunal pointed to the fact that the proceedings were essentially between the appellants and the OFT. It was for the OFT to establish its case and to have the main carriage of the matter. It would complicate matters by introducing another party, and moreover Sports World could supply information to the OFT and assist with the presentation of the OFT's case.

17. Applying that approach to the present case, unlike Tesco, we have the benefit of already having seen the arguments and evidence so far produced in this case. It is clear from these that the matters on which Tesco has offered support are already within the scope of that material, and particularly the arguments and evidence put forward by the CMA, both for the hearing on jurisdiction and interim relief and in its Defence and supporting evidence. The proceedings are essentially between B&M and the CMA and it is for the CMA to defend its case and to have the main carriage of the matter.

18. We are not persuaded that Tesco will provide any, or any material, 'added value' to the issues in this case. Rather, it seems to us, that the essence of Tesco's application is that it wishes to be able to provide *evidence* which supports of the CMA's case. We see no objection to Tesco collaborating with the CMA and assisting with the presentation of the CMA's case, should the CMA find that helpful. We believe that that approach, and rather than intervention pursuant to Rule 16, will ensure that these proceedings are dealt with justly and at proportionate cost in accordance with the Tribunal's governing principles set out in Rule 4 (and is consistent with the approach indicated by the Tribunal in the earlier *British Sky Broadcasting* case). Accordingly, we exercise our discretion under Rule 16(6) not to permit the intervention of Tesco in these proceedings.

E. CONCLUSION

19. Accordingly, Tesco's application for permission to intervene is refused.

The Hon. Mr Justice Morris
Chairman

Michael Cutting

Paul Dollman

Charles Dhanowa O.B.E., Q.C. (*Hon*)
Registrar

Date: 28 March 2019