



COMPETITION APPEAL TRIBUNAL

SUMMARY OF APPLICATION UNDER SECTION 179 OF THE ENTERPRISE ACT 2002

CASE No. 1301/6/12/18

Pursuant to rules 14 and 26 of the Competition Appeal Tribunal Rules 2015 (S.I. No. 2015 No. 1648) (the “Rules”), the Registrar gives notice of the receipt on 21 December 2018 of an application for review under section 179(1) of the Enterprise Act 2002 (the “Act”). B&M European Value Retail S.A. (“B&M”) applies for review of a decision dated 1 November 2018 (the “Designation Decision”) by the Competition and Markets Authority (the “CMA”) to designate B&M as a Designated Retailer pursuant to Part 2, Article 4(1)(b) of The Groceries (Supply Chain Practices) Market Investigation Order 2009 (the “Order”). B&M also challenges the CMA’s refusal on 11 December 2018 to de-designate the Appellant (the “Refusal”). B&M is represented by Gordons LLP of Riverside West, 9 Whitehall Road, Leeds LS1 4AW (ref: Mark Jones).

B&M is a general merchandise retailer operating in the value sub-market/a limited assortment discounter. Under the B&M fascia B&M operates 600 stores in the UK.

The Competition Commission (now the CMA) made the Order under section 161 of the Act on 4 August 2009, and the Order came into force on 4 February 2010. Central to the operation of the Order is the status of “Designated Retailer”. A Designated Retailer: (i) must not enter into or perform any Supply Agreement unless that Supply Agreement incorporates the Groceries Supply Code of Practice set out in Schedule 1 to the Order (the “Code”) and does not contain any provisions that are inconsistent with the Code; (ii) must supply all suppliers with certain information; (iii) must keep records and provide information and documents to the CMA for the purpose of enabling the CMA to monitor and review the operation of the Code; (iv) must train staff with respect of the Code; (v) must appoint an in-house officer; (vi) must deliver an annual compliance report to the CMA, copied to the Grocery Supply Code of Practice Ombudsman (the “Ombudsman”); and (vii) is subject to arbitration by the Ombudsman in disputes with suppliers.

According to the notice of appeal, when the Order was made, the only Designated Retailers were the supermarkets listed in Schedule 2 to the Order. Article 4(1)(b) confers a discretionary power on the CMA to designate further Designated Retailers when a retailer’s turnover exceeds £1 billion with respect to the retail supply of groceries in the UK. The Designation Decision is the first time that power has been exercised. The Groceries Code Adjudicator is empowered to impose financial penalties on retailers found to have breached the Code. Designated Retailers are also required to pay an annual levy to the Groceries Code Adjudicator.

The CMA stated its reasons for designating B&M at paras 9-12 of the Designation Decision, namely: (i) B&M has a UK retail turnover of groceries that is greater than the £1 billion threshold specified in the Order; and (ii) B&M has the ability to exert buyer power over at least some of its suppliers.

In summary, B&M contends that the CMA:

- (1) misinterpreted the purposes of the Order;
- (2) failed to understand and consider the exercise of its discretionary power; and
- (3) failed to have regard to relevant considerations and its decisions are disproportionate.

As regards the relief sought¹, B&M seeks:

- (a) An order quashing the Designation Decision and Refusal;
- (b) A declaration that the Designation Decision and Refusal were unlawful;
- (c) An order that the CMA pay B&M's costs; and
- (d) Such other relief as the Tribunal see fit.

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.

Pursuant to the Order of the Tribunal abridging time for applying for permission to intervene (made on 1 March 2019), any 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 **no later than 5pm on 11 March 2019**.

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, QC (Hon)
Registrar

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¹ B&M sought directions that its application be listed for a preliminary hearing together with its judicial review claim (B&M has issued a claim for judicial review in the High Court of Justice Queen's Bench Division, Administrative Court in relation to the same decisions which are the subject of this application) to determine (a) the correct forum for challenging the Designation Decision and Refusal; and (b) B&M's application for interim relief. At a hearing on 6 February 2019, the Tribunal determined that it had jurisdiction to hear the application and it rejected B&M's application for interim relief.