IN THE COMPETITION APPEAL TRIBUNAL **Case 1017/2/1/03**

(1) PERNOD-RICARD SA
(2) CAMPBELL DISTILLERIES LIMITED

Applicants

v.

OFFICE OF FAIR TRADING

Respondent

BACARDI MARTINI LIMITED

Intervener

OUTLINE SUBMISSIONS OF APPLICANTS FOR HEARING ON 27TH JANUARY 2004

Key: references to the Defence are to the OFT's draft defence, and references to sections are, unless otherwise stated, to the Competition Act 1998. AB = the Authorities Bundle for the hearing on 16th January 2004.

Introduction

1. There are three issues before the Tribunal for this hearing:

   (1) was there an appealable "decision" within the meaning of section 46(3)(b)?

   (2) what procedure should the OFT have followed in relation to (a) the rule 14 Notice and (b) the assurances?

   (3) what, if any is the legal basis, upon which the OFT may accept assurances?

Issue (1) – was there an appealable "decision" within the meaning of section 46(3)(b)?

2. Section 46(3)(b) defines a "decision" as a decision of the OFT "as to whether the Chapter II prohibition has been infringed".

3. The OFT does not dispute that it took a decision: Defence, paragraph 51. The OFT's case is that its decision to close its investigation against Bacardi on the basis of the assurances was not a decision falling within the meaning of section 46(3)(b).

4. The OFT's position is that it did not decide that the Chapter II prohibition had been infringed by Bacardi, although it continued to have reasonable suspicion that the Chapter II prohibition had been infringed. The OFT decided that the assurances would remedy any abuse if the Chapter II prohibition had been infringed.

5. Correctly analysed, the OFT's decision is in substance that, despite its reasonable suspicion that the Chapter II prohibition was being infringed by Bacardi prior to its assurances, the Chapter II prohibition has ceased to be infringed on the implementation by Bacardi of the assurances. This is confirmed by the decision letter and the then Director General's Press Release.

6. That is plainly a decision "as to whether the Chapter II prohibition has been infringed", because it is a decision that the suspected infringement of the Chapter II prohibition has ceased from the implementation of the assurances.[1]

7. The OFT has given no good reason why such a decision should not be subject to appeal, and should only be challengeable by way of an application for judicial review.[2] To make such a distinction would be the triumph of form over substance.[3] The consequence would be as explained by the Tribunal in *Claymore* at [159] **AB/7/50**:

> that a wholly unsuccessful complainant has a right of appeal to the Tribunal, whereas a complainant who gets nearer to establishing an infringement but on the Director's analysis still fails to do so, has no such right of appeal. That does not seem to us to be a sensible result.

8. The interpretation contended for by the Applicants is supported by the principles as to whether there is an appealable decision, which are set out in *Claymore* at [122] **AB/7/41**:

   (i) The question whether the Director has "made a decision as to whether the Chapter II prohibition [has been] infringed" is primarily a question of fact to be decided in accordance with the particular circumstances of each case (*Bettercare*, [24]).

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1 See the Tribunal's judgment in *Freeserve.com plc v Director General of Telecommunications* [2003] CAT 5 at [131]: "We emphasise, however, that the Director is not required to decide issues which it is unnecessary for him to decide in order to reach a concluded view on a complaint."

2 See *Claymore* at [161]-[165] **AB/7/51-52**.

3 The Court of Justice held in Case C-119/97P *UFEX* [1999] ECR I-1341 at [86] that "complainants are entitled to have the fate of their complaint settled by a decision of the Commission against which an action may be brought."

(ii) Whether such a decision has been taken is a question of substance, not form, to be determined objectively, taking into account all the circumstances (*Bettercare*, [62], [84] to [87], and [93]). The issue is: has the Director made a decision as to whether the Chapter II prohibition has been infringed, either expressly or by necessary implication, on the material before him? (*Freeserve*, [96]).

(iii) There is a distinction between a situation where the Director has merely exercised an administrative discretion without proceeding to a decision on the question of infringement (for example, where the Director decides not to investigate a complaint pending the conclusion of a parallel investigation by the European Commission), and a situation where the Director has, in fact, reached a decision on the question of infringement, (*Bettercare*, [80], [87], [88], [93]; *Freeserve*, [101] to [105]). The test, as formulated by the Tribunal in *Freeserve*, is whether the Director has genuinely abstained from expressing a view, one way or the other, even by implication, on the question whether there has been an infringement of the Chapter II prohibition (*Freeserve*, [101] and [102]).

9. The Tribunal drew a comparison at [151] between that appealable decision and other non-appealable decisions:

> such as where the Director, without going into the merits, decides not to open an investigation because he has other cases to pursue in priority (the situation dealt with by the Court of First Instance in *Automec* ...); because he has decided to make a market investigation reference to the Competition Commission under the Enterprise Act 2002; because another competition authority is investigating the matter; because of the possible effect on criminal proceedings under section 188 of the Enterprise Act 2002; or <u>for some other reason which does not involve him taking a considered position on the merits of the case</u>.
>
> [Emphasis added]

10. Here, the OFT after an investigation lasting over two and a half years did take a considered position on the merits of the case, concluding that if there was dominance (as the OFT suspected) then the concerns it had as to abusive conduct would be terminated by the assurances. Accordingly, it concluded its investigation. That cannot be characterised as an unappealable exercise of administrative discretion. It is the adoption of a considered and final position on the merits of the case, that as to the future (at the very least) there was no infringement of the Chapter II prohibition. There was as such an appealable decision.

Issue (2) – what procedure should the OFT have followed in relation to (a) the rule 14 Notice and (b) the assurances?

(a) the rule 14 Notice

11. The OFT has a discretion to show third parties a non-confidential version of the rule 14 Notice.

12. For example, the OFT exercised its discretion to do so in its investigation into *BSkyB: alleged infringement of the Chapter II prohibition*:

> "A redacted version of the Rule 14 Notice was disclosed to ITV Digital, NTL and Telewest ...".[4]

The undertakings shown the non-confidential version of the rule 14 Notice in that case are (or in the case of ITV Digital were) BSkyB's three retail competitors, who were also its wholesale customers.

13. The OFT has given no reason to the Tribunal why it did not exercise its discretion to give the Applicants the opportunity to make observations on a non-confidential version of the rule 14 Notice in this case.

14. Were these proceedings before the European Commission, the Applicants would have been given the opportunity to make observations on a non-confidential version of the rule 14 Notice (see below).

15. In the absence of any reason, the OFT's failure to do so is arbitrary and unreasonable. The OFT has failed to follow a fair procedure.

16. There is obvious common sense in a relevant third party complainant seeing a non-confidential version the rule 14 Notice. It provides the opportunity for the complainant to make submissions:

    (a) counterbalancing the submissions of the party under investigation;

    (b) correcting factual inaccuracies;

    (c) supplementing the evidence before the OFT.

17. Naturally, the party under investigation should have an opportunity to submit its observations on the complainant's submissions. This is what happens before the European Commission and it is a tried and tested formula.

18. If the reason the OFT did not disclose a non-confidential version of the Rule 14 Notice was because Bacardi had threatened to apply for judicial review to

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[4] [2003] UKCLR 240, [13].

curb disclosure or otherwise objected to disclosure (Bacardi threatened to apply for judicial review of the OFT's section 26 Notice of 10th December 2002[5]), that would clearly not have been a valid basis upon which to refuse to disclose a non-confidential version.

(b) the draft assurances

19. The OFT accepts at paragraph 150 of the Defence that it had a discretion to consult on the draft assurances. Its purported justification for not doing so advanced at paragraph 151 is that:

> In the circumstances of the present case, the OFT decided it was not necessary to consult the Applicants given that the assurances addressed the concerns raised by the Applicants in the original complaint concerning the conclusion by Bacardi of exclusivity agreements with on-trade retailers.

20. That is not an adequate reason for not consulting the Applicants.

21. Bacardi admits that the assurances were to address "possible exclusionary effects of [its] various categories of agreement."[6] The Applicants' complaint was about exclusionary effects of Bacardi's agreements. The Applicants were plainly in the best position as the affected market participants to make representations to the OFT as to the adequacy of the assurances and whether the assurances really did address the concerns raised in the original complaint. The OFT thus failed to follow a fair procedure by failing to consult the Applicants on the draft assurances.

22. The OFT's failure to follow a fair procedure is all the more pronounced because of the prior failure to disclose the rule 14 Notice.

23. There is no reason why the OFT should have concluded an investigation which had taken over two and a half years by negotiating final assurances in a period of little more than two weeks[7], without making those assurances available for comment by the complainant Applicants.

24. If the OFT had proceeded formally to adopt a final decision imposing the assurances as directions, the OFT would have had to consult pursuant to

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5 Bacardi's "Factual account of the events that took pace between 13 December 2002 and 30 January 2003", paragraph 1.2.

6 *Ibid*, paragraph 5.2.

7 Bacardi submitted draft assurances on 13th January (*ibid* paragraph 7.1) which were settled on 29th January 2003 (*ibid* paragraph 11.1).

section 31(2).[8] The decision to accept the assurances should therefore have been the subject of equivalent consultation.

25. Finally, in relation to assurances, it should be noted that the Government plans to give the OFT power formally to accept commitments in both Article 81 and 82 cases and Chapter I and II cases.[9] This will include an obligation on the OFT to "consult third parties on commitments which it is proposing to accept" before publishing a final commitments decision. There thus is obviously no objection in principle to consultation on draft assurances.

(c) comparison with European Commission procedures

26. In relation to issue (2), the Tribunal asked at the hearing on 16th January 2004 if there was a comparison to be drawn with a complaint to the European Commission in relation both as to the position at the time of the events in question and as to the position as it will be on entry into force of Regulation 1/2003 on 1st May 2004.

Pre Regulation 1/2003

27. Article 19 of Regulation 17/62 provides the basic procedure to be followed for hearing undertakings under investigation and third parties. It provides:

> 1. Before taking decisions as provided for in Articles 2, 3, 6, 7, 8, 15 and 16, the Commission shall give the undertakings or associations of undertakings concerned the opportunity of being heard on the matters to which the Commission has taken objection.
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> 2. If the Commission or the competent authorities of the Member States consider it necessary, they may also hear other natural or legal persons. Applications to be heard on the part of such persons shall, where they show a sufficient interest, be granted.
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> 3. Where the Commission intends to give negative clearance pursuant to Article 2 or take a decision in application of Article [81(3)] of the Treaty, it shall publish a summary of the relevant application or notification and invite all interested third parties to submit their observations within a time limit which it shall fix being not less than one month. Publication shall have regard to the legitimate interest of undertakings in the protection of their business secrets.

28. Article 19 enshrines a general principle of fairness to third parties who have "sufficient interest" in the outcome of an investigation by the Commission.

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8 See also rule 12(1) of the Competition Act 1998 (Director's rules) Order 2000, SI 2000/293.

9 Government response to the consultations on giving effect to Regulation 1/2003 and aligning the Competition Act 1998 including exclusions and exemptions, published on 16th January 2004. See DTI Press Release 2004/023.

The Applicants, in their complainant capacity, have sufficient interest within the meaning of Article 19(2).[10]

29. As the Tribunal noted when giving judgment on 11th September 2003, the OFT's refusal to show the Applicants a non-confidential version of the rule 14 Notice is inconsistent with the practice of the European Commission under Articles 7 and 8 of Commission Regulation 2842/98 on the hearing of parties in certain proceedings under Articles [81] and [82] of the EC Treaty.[11] Those articles provide:

> 7. Where the Commission raises objections relating to an issue in respect of which it has received an application on a complaint ... , it shall provide an applicant or a complainant with a copy of the non-confidential version of the objections and set a date by which the applicant or complainant may make known its views in writing.
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> 8. The Commission may, where appropriate, afford to applicants and complainants the opportunity of orally expressing their views, if they so request in their written comments.

30. Therefore, in accordance with the EC general principle of fairness as enshrined in Article 19 of Regulation 17 and Articles 7 and 8 of Regulation 2842/98, the Applicants would have had the right to be heard:

(a) at the equivalent of the rule 14 Notice stage; and

(b) in relation to undertakings/assurances that the Commission proposed to accept.

Post Regulation 1/2003

31. Article 27 of Regulation 1/2003 provides for even greater involvement of complainants in investigations and hearings than Article 19 of Regulation 17.

32. Article 27(1) provides that "Complainants shall be associated closely with the proceedings."

33. Article 27(4) provides that:

> Where the Commission intends to adopt a decision pursuant to Article 9 [commitments – i.e. assurances] or Article 10 [finding of inapplicability], it shall publish a concise summary of the case and the main content of the commitments or of the proposed course of action.

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10 Kerse *EC Antitrust Procedure*, 4th ed, 1998, paragraph 4.05. See in particular the Opinion of Advocate General Lenz in Case 53/85 *AKZO Chemie* [1986] ECR 1965, that a person will be able to show sufficient interest "if he has been affected by the conduct of the undertaking against which the competition proceedings have been initiated."

11 OJ 1998 L 354/18.

> Interested third parties may submit their observations within a time limit which is fixed by the Commission in its publication and which may not be less than a month. Publication shall have regard to the legitimate interest of undertakings in the protection of business secrets.

(d) conclusion

34. The Applicants submit that the procedures adopted by the European Commission pre-modernisation represent a fair procedure. The OFT should only depart from those procedures for good reason. Here none has been given.

35. Post-modernisation, the OFT cannot adopt a procedure giving less fair hearing rights than guaranteed before the Commission by Regulation 1/2003 in application of Articles 81 and 82. To do so would be in breach of the general principle of fairness under EC law, and Article 10 EC (the duty of sincere co-operation). It is impossible to see how the OFT could justify a different procedure for Chapter I and II cases, otherwise the procedural guarantees afforded to complainants would vary according to whether the OFT chose to investigate using its EC or UK powers.

Issue (3) – what, if any is the legal basis, upon which the OFT may accept assurances?

36. The Applicants do not dispute that the OFT may exercise a discretion not to proceed to a formal final decision and to accept assurances as a means of terminating a suspected infringement, provided that:

    (a) such discretion is fairly and reasonably exercised;

    (b) the decision to terminate an investigation on that basis is appealable.

37. The Applicants submit that the fact that the Government has announced that it plans to give the OFT power formally to accept commitments in both Article 81 and 82 cases and Chapter I and II cases[12] does not cast doubt on the OFT's existing informal discretionary powers to do so.

38. The power to accept assurances is a part of the inherent power of a decision maker such as the OFT. It is entitled, in the event for example, that a party under investigation volunteered to conduct its future business on a specific basis, to accept that assurance as to future good conduct and adjust its

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12 Government response to the consultations on giving effect to Regulation 1/2003 and aligning the Competition Act 1998 including exclusions and exemptions, published on 16th January 2004. See DTI Press Release 2004/023.

formal procedures accordingly. To conclude otherwise would create an unnecessary administrative burden for the OFT and discourage competition law compliance by undertakings.

39. However, and importantly, this is without prejudice to the fact that the closure of a file upon the basis of assurances does not mean that an appealable decision is not adopted.

NICHOLAS GREEN Q.C.

AIDAN ROBERTSON

Brick Court Chambers

23rd January 2004