Neutral citation [2004] CAT 10

IN THE COMPETITION APPEAL TRIBUNAL

Case: 1017/2/1/03

Victoria House
Bloomsbury Place
London WC1A 2EB

10 June 2004

Before:

Sir Christopher Bellamy (President)
Professor Paul Stoneman
Mr David Summers

BETWEEN:

(1) PERNOD RICARD SA
(2) CAMPBELL DISTILLERS LIMITED

Appellants

-v-

OFFICE OF FAIR TRADING
(formerly the Director General of Fair Trading)

Respondent

supported by

BACARDI-MARTINI LIMITED

Intervener

Mr Nicholas Green QC and Mr Aidan Robertson (instructed by DLA) appeared for the appellants.

Miss Kassie Smith (instructed by the Director of Legal Services, Office of Fair Trading) appeared for the respondent.

Mr James Flynn QC (instructed by Simmons & Simmons) appeared for the intervener

Heard at New Court, Carey Street, London, on 27 January 2004.

JUDGMENT

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I INTRODUCTION

1. By a notice of appeal dated 15 July 2003, Pernod-Ricard SA ("Pernod") seeks to challenge:

   (a) the decision of the respondent, the Office of Fair Trading ("OFT"), notified to Pernod on 30 January 2003 to close its file following a complaint made by Pernod on 26 September 2000 regarding an alleged abuse of a dominant position, in breach of the Chapter II prohibition imposed by section 18 of the Competition Act 1998 ("the 1998 Act")[1], by the intervener, Bacardi-Martini Limited ("Bacardi") in relation to the supply of light rum for on-sale in the United Kingdom,

   (b) the decision of the OFT of 15 May 2003 refusing to withdraw or vary the decision of 30 January 2003 under section 47(4) of the 1998 Act.

2. The OFT contends that by deciding to terminate its investigation and accept voluntary assurances from Bacardi it has not made an appealable decision as to whether the Chapter II prohibition has been infringed within the meaning of section 46(3)(b) of the 1998 Act, and that, accordingly, the Tribunal has no jurisdiction to entertain this appeal.

3. Following a case management conference on 16 January 2004 the Tribunal indicated that at the hearing of 27 January 2004 it wished to focus on the issues of (i) whether the OFT had made an appealable decision; (ii) what procedure the OFT should follow in cases such as the present; and (iii) what, if any, is the legal basis for the acceptance by the OFT of the assurances that were offered by Bacardi. This judgment deals only with the first two of those issues, it being conceded that there is nothing to prevent the OFT from accepting the voluntary assurances in question.

4. Prior to 20 June 2003, the investigation and decisions which form the subject matter of this action were undertaken by the Director General of Fair Trading ("the Director"), whose office was abolished by the entry into force on that date of the Enterprise Act 2002 ("the

[1] Except where otherwise stated, references in this judgment to the 1998 Act are references to that Act prior to its amendment by the Competition Act 1998 and other enactments (Amendment) Regulations 2004 S.I.2004 no. 1261 ("the 2004 Amendment Order"), which came into force on 1 May 2004.

2002 Act"). In this judgment "the OFT" includes the Director, where relevant, and vice versa.

II BACKGROUND

5. We set out the background only to the extent necessary to explain the context and determine the issues identified above. The Tribunal is not at this stage concerned with making any findings on the underlying merits of the case.

The parties

6. The appeal was originally brought in the name of Campbell Distillers Limited ("Campbell"). Pernod was added as an appellant by Order of the Tribunal of 18 September 2003. Campbell is a wholly owned subsidiary of Pernod. Pernod is a French producer and distributor of spirits whose brand portfolio includes such names as Aberlour, Dubonnet, Pernod and Jamesons. Campbell is Pernod's United Kingdom distributor.

7. Pernod is a party to a joint venture, Havana Club Holding SA ("Havana Club") set up in 1993 between Pernod and Havana Rum and Liquors, an entity owned by the Cuban state. Havana Club is the worldwide distributor of a white Cuban rum called Havana Club. Pernod and Havana Club trade in the United Kingdom through Campbell, trading as PR Brands UK.

8. Bacardi carries out the United Kingdom operations of the Bacardi group whose ultimate parent company is Bacardi Limited, a private company registered in Bermuda. Bacardi Carta Blanca, Bacardi's white rum brand, is produced by Bacardi and Co Limited, a company incorporated in the Bahamas. Carta Blanca is packaged, supplied and distributed by Bacardi in the United Kingdom through a wholly owned subsidiary.

9. It is not disputed that Bacardi supplies some 90 per cent of white rum supplied to the on-trade in the United Kingdom. Bacardi's other products include Bacardi Breezer and Bacardi Spice. In certain jurisidictions, although not in the United Kingdom, Bacardi asserts ownership of the same trade marks as Havana Club. According to Bacardi, the factory in Cuba now run by Havana Club originally belonged to Bacardi, but was appropriated under the Castro regime.

The investigation

10. On 27 April 2000 the OFT received a complaint from a private individual concerning an exclusive supply agreement for white rum concluded between Bacardi and the National Union of Students Services Limited ("NUSSL"). The complaint alleged that Barcardi had entered a number of similar agreements in the United Kingdom. On 13 June 2000 the OFT decided to open an investigation under the 1998 Act.

11. On 29 June 2000 representatives of Pernod met OFT officials. According to a note of the meeting made by Pernod, the representatives of Pernod outlined their concerns about Bacardi's conduct. The OFT officials apparently indicated that they were taking the complaint seriously and according to a definite timetable. A final decision would be arrived at by 13 December 2000. Pernod's representatives provided certain information to the OFT, and indicated that they too were formulating a complaint that would be submitted to the OFT as soon as possible.

12. On 5 July 2000 the OFT sent notices under section 26 of the 1998 Act requesting information and documents from Bacardi, the NUSSL and 16 on-trade retailers regarding the supply of light rum to the on-trade in the United Kingdom. Pernod provided further information to the OFT on 11 and 20 July 2000.

13. On 7 August 2000 the OFT informally sought views and information on market definition from the competing suppliers of white rum identified by Bacardi in response to the OFT's section 26 request of 5 July 2000.

14. On 9 August 2000 the OFT issued further section 26 requests to various leading United Kingdom operators of licensed premises seeking details of their dealings with Barcardi regarding the supply of white rum to their retail on-trade outlets. A further section 26 request was sent to Bacardi by the OFT on 15 September 2000 seeking further value, volume and cost of sales data.

15. On 28 September 2000 Campbell submitted a written complaint to the OFT. The complaint alleged that, since 1998, Bacardi had "engaged in a campaign to maximise the number of

exclusive supply agreements which it can achieve, particularly in the on-trade". In Campbell's view, that activity was designed to exclude Havana Club from the United Kingdom market. The practice mainly complained of was that Bacardi sought "exclusive supply agreements" including "pouring exclusivity". But Campbell complained also of the targeted exclusion of Havana Club by Bacardi, "restriction on facings" for Havana Club, up-front payments to secure exclusive deals, retrospective loyalty discounts or rebates, and stock uplift (2 for 1 exchanges etc). The complaint identified some 25 specific deals after 1 March 2000 to which objection was taken, including the NUSSL agreement that apparently had been subject to the earlier complaint of 27 April 2000 made by a third party.

16. On 31 October 2000 a further section 26 request was sent to Bacardi by the OFT seeking details of the production costs of white rum. On 11 November 2000, the OFT sought similar cost information from Pernod in relation to the production costs of Havana Club. Pernod's solicitors replied on 6 December 2000.

17. Bacardi made written submissions to the OFT on 15 November 2000 regarding the worldwide context of its rivalry with Pernod, and again on 24 November 2000 comparing the effects on each other of Bacardi white rum and Smirnoff vodka promotions.

18. It appears from file notes kept by Pernod's solicitors at this time (e.g. note of 21 November 2000) that the OFT was concerned about an argument put forward by Bacardi to the effect that vodka and white rum were in the same relevant market.

19. On 6 December 2000 the OFT surveyed leading on trade brewery retailers to ascertain further views on market definition.

20. On 21 December 2000 Pernod's solicitors sent submissions to the OFT on the issue of market definition. The last paragraph of that letter stated:

> "Campbell Distillers had a meeting with the Office in June. Since then the complaint has been conducted in writing or by telephone. Whilst these are satisfactory methods of setting out information, they do not always resolve all the issues which need to be taken into account by a competition authority entertaining a complaint, particularly where interpretation of the information is involved. Campbell Distillers is very willing to attend a further meeting if

> the Office considers that a meeting would be helpful in order to remove any remaining doubts about market definition or any other matter."

21. According to Pernod's solicitors' internal file notes, by early February 2001 several drafts of a "decision" were "going backwards and forwards" within the OFT (note of 2 February 2001).

22. On 7 February 2001 the OFT asked Pernod to supply sales data for Havana Club going back to 1997, which were supplied on 9 February 2001 and 12 February 2001. Further information was requested from Pernod by the OFT on 20 February 2001, which was supplied on 27 February 2001.

23. On 13 March 2001, according to a note by Pernod's solicitors, it was indicated by the OFT that this case had been delayed by another case, but that a "decision" was still "at the draft stage".

24. Little further progress had been made by 4 April 2001 when Pernod's solicitors telephoned to enquire about the matter. Similarly no progress had been made by 11 May 2001, apparently because of difficulties over market definition.

25. A request to Pernod for a further breakdown of the figures previously supplied was made by the OFT on 25 May 2001. Pernod supplied the information requested on 17 July 2001. Further information about supplies by smaller wholesalers was requested by the OFT on 2 August 2001. Pernod replied on 10 August 2001 to the effect that in its view the independent wholesaling sector was small.

26. On 19 September 2001 the OFT requested details from about 40 on-trade retailers of differing size and type as to how they would respond to wholesale price changes for Bacardi's white rum, and their views on the extent of arbitrage between the on and off-trade channels of distribution.

27. In September 2001 the OFT also instructed external economic consultants to conduct an analysis of market definition in the spirits drinks sector using econometric methods and a SSNIP test.

28. A copy of the questions being asked by the OFT of retailers and wholesalers was sent to Pernod on 14 October 2001, together with a request to Pernod to supply further views on market definition. At that time Pernod's solicitors expressed their disappointment to the OFT at the delays occurring, and urged them to let Pernod know if the OFT "were going to take any further step which conflicted radically with what they had led us to believe would happen."

29. In December 2001 the OFT visited a number of retailers to discuss their replies to the OFT's questions.

30. When contacted again by Pernod's solicitors on 7 March and 18 April 2002, the OFT was not able to report as much progress as hoped. On 26 April 2002 the OFT asked for certain updated information which was supplied by Pernod on 22 May 2002.

31. In an email of 26 June 2002 the OFT sought permission to disclose to Bacardi certain financial figures supplied by Pernod, as such information "is extremely valuable to the case". The information was apparently later disclosed in a graph without identifying Campbell as the source.

32. We are told that for most of the investigation the OFT's team consisted of three Principal Case Officers, a Case Officer and an Assistant Economist.

The Rule 14 notice

33. On 28 June 2002 the OFT announced in a press release that it had on that day sent to Bacardi a notice under rule 14 of the Competition Act 1998 (Director's Rules) Order 2000, SI 2000 No. 293 ("the Director's Rules") proposing to find that Bacardi, the main supplier of white rum in the United Kingdom, had since 1 March 2000 abused a dominant position, contrary to the Chapter II prohibition, by entering into a number of agreements requiring pubs and bars, among other things, to sell only white rum produced by Bacardi.

34. On 3 July 2002 the OFT intimated that Pernod would not see a copy of the Rule 14 notice.

35. According to its defence in these proceedings served in draft, which for convenience we refer to as "the OFT's defence", the OFT in the Rule 14 notice proposed to find that the relevant product and geographical markets were the "wholesale supply of white rum to the on-trade" in the United Kingdom. In that market the OFT calculated Bacardi had a market share of about 90 per cent.

36. In support of its proposed conclusion that Bacardi was dominant on the relevant market, the OFT indicated in the Rule 14 Notice that its investigation suggested that there was little substitutability between white rum supplied to the off-trade and that supplied to the on-trade. In particular, it would be costly and inefficient for on-trade retailers to source their requirements from the off-trade. Further, the OFT held the view that Bacardi was able to price discriminate between the on and off-trade sectors, because the price correlation data available to the OFT suggested that arbitrage between the two was negligible. Supplies to the on-trade were therefore capable of being distinguished from supplies to the off-trade for the purposes of market definition. The report produced by the OFT's externally appointed experts was cited by the OFT in support of these issues.

37. In the Rule 14 notice the OFT also concluded that white rum was in a separate product market from other white spirits, such as vodka. In this regard, the OFT relied (among other things) upon the econometric evidence produced by its external experts for on-trade retail price elasticity of demand for white rum and for other spirits.

38. As to the question of abuse, the OFT considered in the Rule 14 notice that Bacardi had infringed the Chapter II prohibition by concluding solus, de-listing, sole-pouring, must-stock and preferred status agreements which were intended to, and had, the effect of restricting retailers' possible sources of supply, and other manufacturers' access to the market.

39. The Rule 14 notice, according to the OFT, apparently identified a number of infringing agreements concluded by Bacardi, as follows:

    (a) That retailers de-list (i.e. stop selling) specified competing brands of white rum ("De-listing agreements").
    (b) That retailers do not sell competing brands of white rum ("Solus agreements").

(c) That retailers accept sole pouring status for Bacardi white rum ("Sole Pouring agreements"), i.e. where a customer does not specify a particular brand he will be served with Bacardi, although no restriction is imposed on the outlet as regards stocking other brands of white rum.

(d) That retailers accord a "Must Stock" status to Bacardi white rum ("Must Stock agreements").

(e) That retailers give Bacardi white rum "Preferred Status", i.e. the brand is to be recommended by the bar staff and given preferential (but not necessarily exclusive) display space ("Preferred Status Agreements"). The brand must be available in the outlet, but there is no restriction on the supply of other brands.

Bacardi's response to the Rule 14 notice

40. In the course of September 2002 the OFT disclosed to Bacardi, apparently on an anonymised basis, certain of the information supplied to the OFT by Pernod.

41. Bacardi submitted written representations on the Rule 14 notice on 20 September 2002 and made oral representations on 15 October 2002.

42. According to the OFT's defence, Bacardi attacked the OFT's conclusion that the relevant product market was the "wholesale supply of white rum to the on-trade" as unduly narrow. Bacardi also argued that it did not generally supply white rum directly to on-trade retailers and had only about 250 direct customers. It was accordingly unable to control the destination of its products. In addition, we are told, Bacardi provided evidence suggesting a significant tendency among on-trade retailers to source white rum from cash and carry outlets, other wholesalers and other multiple retailers such as supermarkets.

43. According to the OFT, Bacardi also produced evidence attacking the econometric analysis prepared by the OFT's external experts based on the quality of the data used and certain alleged methodological errors. According to Bacardi, cross price elasticities of demand for rum had been incorrectly assessed and in fact gin and vodka were both substitutes for rum. Bacardi also relied on a further expert's report which concluded that the relevant product market was on the balance of probabilities no narrower than white rum and vodka.

Subsequent events

44. According to the OFT, Bacardi's response to the Rule 14 notice potentially undermined the case the OFT had outlined against it, particularly as regards the question of whether or not Bacardi enjoyed a dominant position. However, we are told that the OFT continued to believe that the conclusion by Bacardi of the agreements it had identified, with the apparent exception of Must Stock and Preferred Status agreements, would amount to an abuse if a dominant position could be established.

45. On 7 November 2002 a new section 26 request was sent in draft to Bacardi by the OFT with a considerable number of further questions. At this stage the OFT still considered that there remained reasonable grounds for suspecting an infringement by Bacardi of the Chapter II prohibition. Bacardi still enjoyed high market shares in both the on and off trade. However, according to the OFT, the relationship between the on and the off trade, and the question of whether white rum was substitutable for other spirits, required further work.

46. The fact that Bacardi's response to the Rule 14 notice raised concerns about the OFT's analysis of the relevant product market and other unspecified aspects of the case was apparently communicated informally to Pernod's solicitors. On 15 November 2002 Pernod's solicitors recorded in an email to Campbell a conversation with the OFT case officer to the effect that the OFT had requested further information from Bacardi, after which the OFT expected to have a better idea of what else it needed. The OFT would then seek information from Pernod, although no time was given as to when the OFT expected to come back to Pernod. Pernod was also apparently told that the case was not closed but that Pernod should not expect a quick decision. The email of 15 November 2002 reports Pernod's solicitors as indicating that they were ready to assist at any stage.

47. On 18 November 2002 Bacardi's legal representatives replied to the OFT's letter of 7 November 2002 contending that the OFT could no longer have any reasonable suspicion of an infringement, and complaining of the legal uncertainty of the situation created for Bacardi. They made a number of detailed comments on the questions raised in the OFT's draft section 26 notice, which Bacardi considered were "either irrelevant or extremely oppressive and disproportionate." Bacardi indicated its willingness to meet the OFT to consider the

questions it was prepared to answer, but reserved "all its rights, including that of seeking judicial review …".

48. An OFT file note of 5 December 2002 indicates that on 4 December 2002 Bacardi suggested that it might be possible to reach an informal resolution of the investigation. That suggestion was apparently made in the margins of a conference on competition law attended by one of Bacardi's legal representatives and an official from the OFT.

49. On 10 December 2002, the OFT sent a further extensive section 26 request to Bacardi based on the previous draft of 7 November. Bacardi apparently indicated to the OFT that it would seek a judicial review of the OFT's decision to serve that request.

50. On 13 December 2002 the OFT wrote to Bacardi, indicating that it was suspending the section 26 request of 10 December in order to permit informal discussions between Bacardi and the OFT to take place. By letter of 16 December 2002, Bacardi indicated that it was suspending its steps to commence judicial review.

51. It appears that a "without prejudice" meeting took place between the OFT and Bacardi on 18 December 2002. According to the information supplied to the Tribunal by Bacardi, at that meeting the OFT indicated the categories of agreement which would need to be prohibited if any voluntary assurances were to be accepted, and certain other categories of agreement which might in certain circumstances and subject to certain conditions be acceptable. Bacardi apparently agreed to prepare a first draft of proposed assurances, while the OFT agreed to draft the terms of a proposed press release announcing that the matter had been resolved.

52. On 10 January 2003 the OFT sent Bacardi a proposed draft press release.

53. On 13 January 2003 Bacardi sent the OFT draft assurances, together with a suggested amendment to the press release. An exchange of letters about the drafting of the assurances took place on 17 and 21 January 2003.

54. On 22 January 2003 a meeting took place between the OFT and Bacardi at which the text of the press release was agreed. We are told by Bacardi that the parties "discussed in some

depth" the scope and duration of certain exceptions to the proposed assurances, and that Bacardi provided the OFT with examples of the circumstances in which "it would be necessary and appropriate" for exceptions to apply. Apparently an agreed position was reached.

55. Minor drafting points regarding the assurances and the press release were dealt with in correspondence between the OFT and Bacardi's representatives between 23 and 28 January 2003.

56. Meanwhile, on 23 January 2003 Pernod, unaware of the negotiations by then virtually concluded between Bacardi and the OFT, wrote to the OFT drawing to its attention to decisions of the European Commission and the United States Federal Trade Commission regarding the approach to market definition in relation to spirits, arguing that these decisions showed that white rum should be considered to be in a separate market.

57. According to Pernod's solicitors' filenote, on 24 January 2003, in response to a telephone call from Pernod's solicitors, the relevant official of the OFT apparently said that the case was still a priority, that they had discussed matters with Bacardi, and that more news would be available soon. Pernod's solicitors again said that Pernod was very willing to cooperate.

58. Bacardi wrote to the OFT on 28 January 2003 formally offering the finally agreed assurances to the OFT. On 29 January 2003 the OFT confirmed that it was prepared to accept those assurances and was withdrawing its outstanding section 26 request and closing its investigation.

The OFT's letter and press release of 30 January 2003

59. On 30 January 2003, the OFT wrote to Pernod notifying it of its decision to close its investigation into Pernod's complaint. The letter was in the following terms:

> "Thank your for your letter of 23 January to Justin Woodward in which you provided views and information on market definition.
>
> I am writing to let you know that we have now obtained informal assurances from Bacardi-Martini Limited ('Bacardi') that it will not enter into agreements with on-trade retailers which have the effect of

excluding other makes of white rum from on-trade retailers in favour of Bacardi's 'Carta Blanca'. We believe that the assurances remove the competition problem that gave rise to the alleged breach of Chapter II of the Competition Act 1998. Accordingly we have closed our investigation into Bacardi.

I enclose a copy of a press release which we issued at 11 am this morning and which includes the text of the assurances."

60. The OFT's press release of 30 January 2003 was in the following terms:

"**BACARDI GIVES ASSURANCES ON EXCLUSIVITY**

Bacardi-Martini Limited has given the OFT assurances that it will not enter into or maintain certain types of agreement with on-trade retailers (licensed outlets selling drink for consumption on the premises, such as pubs and restaurants).

The agreements covered are those which, according to the OFT, have the effect of excluding other makes of white rum from on-trade outlets in favour of Bacardi's 'Carta Blanca'. These agreements have been the subject of an extensive investigation by the OFT under the Competition Act 1998. The OFT's decision to close its investigation into the agreements was taken in the light of Bacardi's change in behaviour and the OFT's other casework priorities.

John Vickers, Director General of Fair Trading said:

'The assurances remove the competition problem that prompted the investigation and should widen competition opportunities in the market. It would not be appropriate, in the circumstances of this case, to devote more resources to it.'"

Bacardi's voluntary assurances

61. The assurances given by Bacardi are in the following terms:

"Voluntary Assurances given by Bacardi-Martini Limited to the Director General of Fair Trading on 28/01/03

Definitions

In these assurances:

"Bacardi" means:	Bacardi-Martini Limited
The "Director" means:	the Director of Fair Trading
"Retailer" means:	a person that sells alcoholic spirit drinks to consumers in retail premises and is licensed to sell such drinks for consumption in or on those premises, other than the holder of an occasional licence

"Promotional support arrangements"	Agreements with retailers under which a brand owner provides assistance to the retailer in the promotion of the brand owner's product to customers in the retailer's premises
"Solus" status means:	where the retailer agrees that the producer's branded product will be the only brand within the relevant product type stocked or offered for sale in the retail premises
"Solus pouring" status means:	Where the retailer agrees that the producer's branded product will be the only brand that is served to customers who do not specify a brand within the relevant product type
"Solus Optic" status means:	Where the retailer agrees that the producer's branded product will be the only brand within the relevant product market displayed on optic in the retail premises without any other stipulations as to display or status
"White Rum Products" means	clear colourless, full strength rum made from sugar cane (molasses) or equivalent materials, distilled at under 96 degrees centigrade, aided by repeated charcoal filtration to remove impurities

De-listing

1. Bacardi will not conclude Promotional Support Arrangements with Retailers which contain terms that require any specified White Rum Products of competitors to be excluded from the retail premises in question.

Solus

2. Bacardi will not conclude Promotional Support Arrangements with Retailers which contain terms that require the Retailer to grant Solus status to Bacardi for its White Rum Products. Should Bacardi be asked to or wish to compete for relevant business on terms providing for solus status it will wish to discuss the issue with the Office with a view to seeing whether that is justified in the particular circumstances.

Solus Pouring

3. Subject to the exception set out in paragraph 6 below, Bacardi will not conclude Promotional Support Arrangements with Retailers which contain terms that require the Retailer to grant Solus Pouring status to Bacardi for its White Rum Products.

Solus Optic

4. Subject to the exception set out in paragraph 6 below, Bacardi will not conclude Promotional support Arrangements with Retailers which contain terms that require the Retailer to grant Solus Optic status to Bacardi for its White Rum Products.

Duration

5. Any contractual commitment covered by paragraphs 3 and 4 above will normally not exceed one year in duration or will provide for termination after one year or less; no Promotional Support Arrangement will be made for a term exceeding two years.

Exception

6. Subject to the limitations on duration set out in paragraph 5 above, Bacardi may conclude Promotional Support Arrangements with Retailers including Solus Pouring or Solus Optic status for its White Rum Products where a Retailer

    (a) includes an express requirement for suppliers to offer Promotional Support Arrangements including Solus Pouring or Solus Optic status in the context of a tender process involving other spirits suppliers; and

    (b) Bacardi would, on a reasonable and objective assessment, risk having its White Rum Products excluded from the retail premises in question if it failed to comply with the Retailer's requirements.

Duration of Assurances

7. These assurances shall apply from the date on which they are signed by Bacardi. Bacardi will notify the Director in writing if it intends to withdraw the assurances in whole or in part."

The section 47 procedure

62. On 28 February 2003 Pernod's solicitors wrote to the OFT requesting it to withdraw or vary its decision closing the investigation into Pernod's complaint, under section 47 of the 1998 Act. Pernod contended that the OFT's announcement and/or letter of 30 January 2003 constituted a decision of non-infringement for the purposes of section 47. Among the points made by Pernod were: (i) there was no jurisdiction to accept assurances; (ii) the assurances were ineffective; (iii) the assurances did not resolve Pernod's complaint; (iv) the OFT had

failed to observe procedural requirements, notably by not consulting Pernod before accepting the assurances.

63. On 15 May 2003 the relevant case officer at the OFT replied to Pernod's application under section 47 of the 1998 Act, as follows:

> "1. I write in response to your application of 28 February 2003 under section 47 of the Competition Act 1998 ('The Act') on behalf of Pernod-Ricard SA, requesting the withdrawal or variation of the decision made by the Director General of Fair Trading ('the Director') to close the file on his investigation into Bacardi-Martini Limited ('Bacardi') under the Chapter II prohibition of the Act. We are writing to you now, having considered the recent judgments handed down by the Competition Appeal Tribunal in *Claymore/Express* and *Freeserve*.
>
> 2. We do not consider that the Director's decision to close the file in this case is a decision as to whether the Chapter II prohibition has been infringed within the meaning of section 46(3)(b) of the Act. Accordingly, we do not consider that section 47 applies.
>
> 3. It may assist your understanding if I set out the background to the Director's decision to close his investigation into Bacardi's conduct.
>
> 4. The Rule 14 Notice sent to Bacardi on 28 June 2002 argued that the relevant market was the supply of white rum to on-trade outlets in the UK. In its representations, Bacardi brought forward evidence that cast doubt on whether this market definition was correct. In particular it cast doubt on whether the nature of the distribution chain allowed Bacardi to price discriminate between the on-trade and the off-trade. It seemed to the Director that, if Bacardi did not have such an ability, it was unlikely that the market definition proposed in the rule 14 Notice was correct.
>
> 5. On the basis of Bacardi's representations, the Director concluded that although he continued to have reasonable grounds to suspect that Bacardi had infringed the Chapter II prohibition, a considerable amount of further work would be required in order to establish the precise scope of the relevant market, upon which any conclusion on the existence of a dominant position (or otherwise) would necessarily have to be based. In the Director's view, in order to justify his original market definition or a modified market definition following the doubt cast by Bacardi's representations, and to do so to the standard of proof required to make an infringement decision, or to decide that it was not possible to make an infringement decision, he would need to obtain a considerable further amount of information, in particular a substantial amount of price and cost information, from Bacardi and from its customers and competitors. In short, and contrary to your suggestion, he was not at that time "*in possession of all information necessary to reach [a decision as to whether an infringement had occurred*]". In fact he was genuinely not in a position to express a view as to whether Bacardi held a dominant position in a market, and accordingly as to whether it had infringed the Chapter II prohibition.

6. As a start in the new round of information gathering following Bacardi's representations, the Director sent a lengthy draft section 26 notice to Bacardi on 7 November 2002, in order to seek Bacardi's comments on the framing of the questions, in case they presented unnecessary difficulties. Bacardi's response to the draft section 26 notice was to threaten to challenge, by way of an application for judicial review, the Director's right to pursue the investigation and, in particular, to make any further information request pursuant to his statutory powers. The Director nonetheless sent the section 26 notice to Bacardi on 10 December, taking the view that, since there continued to be reasonable grounds for suspecting an infringement, the Act did not prevent his resuming an investigation after the issue of a rule 14 Notice.

7. At that point, however, it became apparent that Bacardi was willing to give the assurances in question. The Director took the view that, only for the purposes of the future, these removed the competition problem that had prompted the investigation. In other words, while Bacardi adhered to the assurances, and in the absence of new information, the Director would not have reasonable grounds to suspect an infringement *from the date the assurances were given*. However, there continued to be reasonable grounds for suspecting an infringement up to the date the assurances were given.

8. At the same time, the Director took the view that continuing the investigation in order to establish whether there had been an infringement of the Act to the required standard of proof, or to gather enough information so that he could conclude there was no infringement, would take a considerable amount of time and involve a further large amount of resources. Moreover, the Director considered that even if he had been able to proceed to an infringement decision, any directions imposed on Bacardi would have gone no further in scope than the assurances which were being offered.

9. In these circumstances it seemed to the Director that it would not be a good use of public money to pursue the investigation. Consequently, he closed the file, having accepted the assurances offered by Bacardi.

10. In the light of the above it is apparent that in the circumstances of this case the decision to close the file is not a decision as to whether the Chapter II prohibition has been infringed within the meaning of section 46(3)(b) of the Act. The fact of the matter is that, in the absence of further information on the scope of the relevant market, the Director was simply not in a position to take a view one way or the other as to the existence of an infringement by Bacardi up to the date the assurances were given.

11. Accordingly, and contrary to your contention, at the time of his administrative decision to close the file it is clear that the Director was not "*in possession of all information necessary to reach [a decision as to whether an infringement had occurred]*. It is not correct that "*the Director is satisfied that … the relevant product market is the supply of white rum to on-licensed retailers*", nor that, in consequence, he is satisfied that "*Bacardi holds and has at all material times held a dominant position within Chapter II of the Act*", nor that "*the Director*

was in a position to make a formal infringement decision but did not do so". Equally incorrect is your alternative contention that "*the news release and/or letter absolve Bacardi of infringement"*: this is apparent both from the news release, which states at note 3 that "*The OFT believes that there continue to be reasonable grounds for suspecting that there was an infringement from March 2000 and during the period of the investigation*", and from Bob Macdowall's letter to you of 30 January 2003, which referred to there being a "*competition problem*" in the period prior to the assurances.

12. We have also considered the content of your application in the context of the administrative decision taken. In our view it does not provide sufficient reason for the OFT to change the decision to close the file. In particular, we see no reason to reopen the investigation on the basis of the arguments you have put forward as to the adequacy of the assurances. We have informed Bacardi that the OFT will regard any breach of the assurances as a serious matter which could lead to the reopening of the investigation under the Act. We believe that this in itself is likely to act as a significant deterrent to Bacardi pursuing exclusivity deals of the kind which were the focus of the investigation prior to the Director's acceptance of the assurances.

13. The Chapter II investigation into Bacardi's behaviour will therefore remain closed but may be reopened if the assurances are breached."

64. On 15 July 2003 Pernod appealed to the Tribunal, in reliance on section 47(6) of the 1998 Act.

III THE PROCEDURE BEFORE THE TRIBUNAL

65. The appeal having been lodged on 15 July 2003, on 5 August 2003 Bacardi was granted permission to intervene in the proceedings. On the same date the OFT intimated that it proposed to challenge the Tribunal's jurisdiction on the basis that no appealable decision existed.

66. At a case management conference held on 11 September 2003 the Tribunal directed that the OFT should file a response to the notice of appeal not confined solely to the question of whether the appeal was admissible, but also setting out the OFT's position on the other material issues raised by the notice of appeal: see [2003] CAT 19. As the OFT's document is not a full defence in conformity with the requirements of Rule 14 of the Tribunal's rules, it is entitled the OFT's "draft" defence, but for convenience we refer to it as "the defence". The Tribunal listed a hearing of the matter for 9 and 10 December 2003.

67. The defence was served on 18 October and Bacardi's outline statement of intervention on 3 November 2003.

68. On 6 November 2003 Pernod's solicitors wrote to the OFT requesting access to documents in the OFT's file relating to its investigation of Bacardi. On 11 November 2003 the OFT suggested that only the issue of admissibility of the appeal should be dealt with at the hearing on 9 and 10 December.

69. On 12 November 2003 the OFT replied to Pernod's solicitors stating that Pernod's request for documents was premature in the light of the issues to be dealt with at the hearing on 9 and 10 December 2003. The OFT did however make voluntary disclosure of the section 26 notice of 10 December 2002, and of certain correspondence between it and Bacardi's solicitors which it considered relevant to the issue of whether the OFT had made an appealable decision within the meaning of section 46(3)(b) of the 1998 Act.

70. In a letter of 17 November 2003 to the Tribunal, Pernod's solicitors indicated that in addition to the admissibility issue it considered that the Tribunal should consider at the oral hearing the failure of the OFT to disclose the rule 14 notice to Pernod, the failure to consult Pernod as regards the undertakings the OFT was proposing to accept from Bacardi and, generally, any material bearing on the adequacy of the undertakings that were accepted. In addition the Tribunal should order disclosure of documents bearing on those issues. The OFT, by letter of 18 November 2003, contended that the non-disclosure to Pernod of the rule 14 notice was not a point raised in the notice of appeal and that, in any event, neither the non-disclosure of the Rule 14 notice, nor of Bacardi's undertakings in draft, were matters that had any bearing on the prior question of admissibility.

71. On 18 November 2003 the Registrar wrote to the parties requesting:

> "…further information regarding the informal discussions referred to in paragraph 45 of the draft defence, and in particular disclosure of (a) (i) the correspondence passing between the parties during that period (ii) any notes of any meetings between the parties taking place during that period and (iii) the note referred to in the second paragraph of Dr Mason's letter to Simmons & Simmons of 10 December 2002; and (b) an explanation of the steps taken by the OFT to verify that the assurances offered by Bacardi "remove the

competition problem", together with any relevant documentation, to be supplied by way of a witness statement."

72. As regards the possibility of a witness statement, the OFT indicated, by letter of 25 November 2003, that there was nothing the relevant case officer could add to the matters set out in the OFT's defence.

73. By letter of 2 December 2003 the OFT disclosed an internal memorandum of 5 December 2002 describing Bacardi's initial approach regarding the possibility of settlement of the OFT investigation, and also a letter from Bacardi of 16 December 2002 confirming Bacardi's suspension of steps towards commencing a claim for judicial review. In respect of other correspondence passing between OFT and Bacardi, the OFT stated in its letter of 2 December 2003 that Bacardi had claimed that this was covered by "without prejudice" privilege which could not be waived without the consent of both Bacardi and the OFT.

74. By a letter from the Registrar dated 11 December 2003 the Tribunal intimated its provisional view that it was unable to accept the "without prejudice" contention advanced by Bacardi, but that it was prepared to hold a hearing to determine the matter.

75. By letter of 22 December 2003, the OFT requested a hearing on the disclosure issue, and further submitted that without an order of the Tribunal disclosure of the material in question would be in breach of the restrictions on disclosure of information imposed by section 237 of the Enterprise Act 2002, and would be contrary to the public interest under Schedule 4, paragraph 1(2)(a) of that Act, in that it would hamper the OFT's ability to negotiate informal settlements to its investigations.

76. By letter of 24 December 2003 the Tribunal ordered a hearing to deal with the issue of disclosure on 16 January 2004 and gave directions for that purpose, including a direction that the OFT, in consultation with the intervener, prepare and file a list of the correspondence and meetings held between Bacardi and the OFT.

77. At the hearing on 16 January 2004, for which the Tribunal had both written and oral submissions from the parties, Bacardi stated its willingness to file a document setting out details of the sequence of events between Bacardi's initial approach to the OFT in early

December 2002 and the decision by the OFT to accept the assurances offered by Bacardi and to close its investigation. In the light of that development, the Tribunal made no order as to disclosure.

78. Bacardi's factual account of events between 13 December 2002 and 28 January 2003 was filed on 20 January 2004. That document has assisted the Tribunal in its appeciation of the circumstances of this case.

79. The main oral hearing took place on 27 January 2004.

IV THE ARGUMENTS OF THE PARTIES

80. The arguments of the parties centre on two issues (i) whether the OFT took an appealable decision (ii) what procedure the OFT should follow before accepting voluntary assurances in a case such as the present.

Pernod's submissions

- *Appealable decision*

81. At the oral hearing Counsel for Pernod indicated that Pernod did not seek to pursue its original contention that the OFT had made an appealable decision in respect of the period before 28 January 2003.

82. As regards the period after 28 January 2003, Pernod submitted that in its letter of 30 January 2003 the OFT closed its investigation because the assurances given by Bacardi "removed the competition problem" that gave rise to the alleged breach of Chapter II of the Act. The press release is to the same effect. That, according to Pernod, is a decision to the effect that, following the giving of those assurances by Bacardi, there was no infringement of the Chapter II prohibition. That is confirmed by the OFT's letter of 15 May 2003 which stated that, as long as Bacardi adhered to the assurances, and in the absence of new information, the Director would not have reasonable grounds to suspect an infringement from the date the assurances were given. There was accordingly "an appealable decision" under section 47.

83. Moreover, Pernod submits that the defence (paragraph 105) makes clear that "the assurances evidenced a change in Bacardi's behaviour, which would deal with potentially abusive conduct in the future." The OFT's decision to accept the assurances was therefore premised on a material change in circumstances namely that the legal and economic vice which the OFT had previously alleged no longer existed after 28 January 2003, and would not exist as long as Bacardi complied with the assurances.

84. In particular the "Must Stock" and "Preferred Status" agreements which were identified in the rule 14 notice as objectionable were not covered by the assurances. This was because those obligations were no longer regarded as objectionable by the OFT. Similarly, the Solus Pouring and Solus Optic agreements were regarded by the OFT as lawful provided paragraph 6 of the assurances was observed. Thus the assurances "de facto" brought to an end the alleged prior illegal conduct. In those changed circumstances, Pernod submits, the decision by the OFT to accept the assurances was a decision that the Chapter II prohibition has not been infringed within the meaning of section 46(3)(b) of the Act.

85. Pernod further refers to the OFT's response of 15 May 2003 which pointed out that "the [OFT] considered that even if [it] had been able to proceed to an infringement decision, any direction imposed on Bacardi would have gone no further in scope than the assurances which were being offered." (paragraph 8). This shows that the OFT considered there was nothing more to decide in relation to Bacardi's behaviour after 28 January 2003.

86. As far as the words "has been infringed" in section 46(3)(b) of the 1998 Act are concerned, according to Pernod it is clear that when the OFT accepted the assurances a material change of circumstances had already taken place. Moreover the contested decision was taken following the communication to the OFT of the assurances. Pernod submits that section 46 should be interpreted in a purposive sense. It cannot matter, according to Pernod, whether the OFT's implicit finding that the abusive behaviour had ceased was made very soon after the assurances were communicated, or a few weeks later.

-The procedural issues

87. Pernod submits that the OFT should have disclosed both the Rule 14 notice, suitably redacted for confidentiality, and a copy of the draft assurances, to Pernod prior to accepting them.

88. In its notice of appeal Pernod submitted that section 31(2) of the 1998 Act required the OFT to disclose to Pernod the assurances in draft as a person "likely to be affected by the decision", but that contention was not pressed at the hearing.

89. Pernod submits, however, that even if there is no specific statutory duty to disclose either the Rule 14 notice or a draft of the assurances, the discretionary power to do so certainly exists and should have been exercised in favour of disclosure. Pernod supports its submission by reference to (a) the position under corresponding provisions of Community law, having regard to section 60 of the Act, and (b) general principles of good administration and fairness in English administrative law.

90. According to Pernod, Article 19 of Council Regulation no 17 of 6 February 1962, OJ 1962 87, as amended ("Regulation 17") enshrines a general principle of fairness to third parties who have a "sufficient interest" in the outcome of an investigation by the EC Commission. Moreover, Commission Regulation (EC) no 2842/98 of 22 December 1998 on the hearing of parties in certain proceedings under Articles 81 and 82 of the EC Treaty, OJ 1998 L 354/18 ("Regulation 2842/98"), provides that the EC Commission must provide the complainant with a non-confidential version of the statement of objections and set a date by which the complainant may make known its views in writing (Article 7). Where appropriate the Commission may afford a complainant the opportunity of expressing its views orally (Article 8).

91. Pernod submits that under Council Regulation no 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ 2003 LI/1, ("Regulation 1/2003"), even greater provision is made for the involvement of complainants in investigations and hearings: Article 27. Article 27(4) provides that before the EC Commission adopts a decision accepting commitments, or finding the competition rules inapplicable, it must publish a summary of the circumstances, or of the proposed course of action, and give third parties an opportunity to comment. According to Pernod, following the coming into force of Regulation 1/2003 on 1 May 2004 the OFT will not be able, without breaching Article 10 of the EC Treaty, to apply hearing rights that are less fair than those available before the EC Commission.

92. In any event, Pernod submits, Community law is not materially different from English administrative law as regards the duty of fairness. In this case section 47 of the Act recognises third party rights of appeal, and thus third parties' legitimate interests. The OFT itself places great importance on the role of third parties to bring potential infringements to their attention. Such parties are directly affected by the conduct in issue, and have an important role in assisting the OFT's investigation. This emphasises the importance of providing complainants such as Pernod with a proper opportunity to participate in the administrative proceedings, including the opportunity to comment on the Rule 14 notice, and on the suggested text of undertakings. That was particularly so in this case in December 2002, when Bacardi had succeeded in questioning the case being advanced by the OFT, notably in relation to market definition.

93. Disclosure in such circumstances is required, says Pernod, in the interests of fairness, because it would improve the quality of decision-making, and because it would also help to insulate the OFT from the pressures it may come under, such as those in the present case.

94. Both the OFT in its *BSkyB* decision (CA/98/20/2002), and the Director General of Telecommunications in *Freeserve* (Decision of 20 November 2003), considered that it was appropriate to disclose the Rule 14 notice to the complainant(s) during those investigations. There is no justification for this inconsistency in practice. Moreover, the OFT's discretion should be exercised on a principled basis, with no element of caprice.

95. Finally, although the Rule 14 notice was not specifically raised in the notice of appeal, the parties were sufficiently put on notice of the point by the Tribunal itself.

The OFT's submissions

- A*ppealable decision*

96. The OFT submits that the relevant starting point for determining the issue as to whether it has made an appealable decision is the wording of section 46(3)(b) as applied by the Tribunal in *Bettercare* [2002] CAT 6, *Freeserve* [2002] CAT 8, *Claymore* [2003] CAT 3 and *Aquavitae* [2003] CAT 17.

97. The OFT submits, notably by reference to paragraphs 122, 130, 132, 137, 138, 139, 142, 145, 148 and 151 of *Claymore*, that for the OFT to have made an appealable decision it must have reached a final and conclusive decision following a full investigation. Moreover no appealable decision arises where the decision to close the file is based on some other independent reason which does not involve the OFT taking a considered position on the merits of the case: see, for example, *Aquavitae*.

98. On the facts of this case no settled conclusion had been reached by the OFT and the fact that the OFT issued a section 26 request on 10 December 2002 indicates that it considered that, unlike the situation in *Claymore*, it did not have sufficient information to reach a final view on whether or not there had been an infringement.

99. Specifically, the OFT submits that, if one asks the two questions posed by the Tribunal in paragraphs 148 and 149 of *Claymore*, the OFT could not have answered that no infringement can be established on the evidence, but would inevitably have said that further work is necessary to establish whether or not an infringement had been committed.

100. According to the OFT, a decision that the assurances will in future ensure that there is no infringement of the Chapter II prohibition is not an appealable decision as to whether the Chapter II prohibition has or has not been infringed. Sections 14(2), 22(2), 25, 31 and 46 of the 1998 Act all point to the fact that the question of whether a decision is appealable turns on whether or not the prohibition in question *has been* infringed. The decision in this case is a decision as to the future, taken on 29 January 2003, to accept assurances as to future conduct while at the same time closing the file.

101. Moreover, a decision as to future conduct cannot amount to an appealable decision because, as the Tribunal made clear in *Aquavitae* at paragraph 192, such a decision must relate to ascertainable conduct. "Future non-conduct" is by its nature unascertainable.

102. According to the OFT, the wording of the OFT's press release and letter of 30 January 2003 and its further letter of 15 May 2003 do not support Pernod's case. According to the OFT, the assurances evidenced a change in Bacardi's behaviour which would deal with potentially abusive conduct in the future. In the light of those matters and the extra investigative work

that would be required, the OFT decided simply that it would not be appropriate to devote further resources to the case.

103. "Must Stock" and "Preferred Status" agreements were not covered by the assurances because the OFT did not consider that such agreements would create any appreciable foreclosure effect on the market in circumstances where agreements granting Bacardi some form of exclusivity were prohibited. According to the OFT, Must Stock agreements do not prevent retailers from stocking other brands of rum. In the circumstances, once the assurances had been given, Must Stock agreements would not impede competition. According to the OFT, "Preferred Status" agreements affected less than 1 per cent of on-trade retailers and would not have any appreciable foreclosure effect either.

104. According to the OFT, the exceptions in paragraph 6 of the assurances apply only to Solus Pouring and Solus Optic agreements. Those exceptions are designed to deal with the situation where a retailer (such as NUSSL) requires suppliers to compete for the retailer's business on the basis of the extent of the financial assistance the supplier is prepared to offer, and offers in return preferential treatment for the supplier's brand. Furthermore, the exceptions apply only where Bacardi will be barred from an outlet completely unless it offers Solus Pouring or Solus Optic arrangements. According to the OFT, paragraph 6 "provides a reasonable balance between protecting other brands' access to retail outlets and ensuring that Bacardi itself is not unfairly excluded from them."

105. According to the OFT, the exception in paragraph 2 of the assurances, which allows Bacardi to discuss with the OFT whether it might be allowed to enter into Solus Agreements, will rarely, if ever, arise. As to the fact that the assurances do not require the termination of existing agreements, the OFT understands that no Solus, De-listing or Solus Optic agreements were any longer in force, and that Solus Pouring Agreements are in force with only a small percentage of retailers for periods of one or two years. Given the acceptance of the assurances, allowing the agreements to continue would not have a significant effect on competition, and it would have been administratively burdensome to terminate them.

106. Finally, the OFT considers that exclusivity agreements outside the scope of the Promotional Support arrangements covered by the assurances are unlikely to arise.

-Procedure

107. The OFT submits that none of the procedural grounds that Pernod now relies upon were set out in its notice of appeal.

108. The OFT further submits that Section 31(2) of the 1998 Act only requires it to give written notice to a person likely to be affected by a proposed decision that the Chapter II prohibition has been infringed. The "person likely to be affected" by the proposed decision is explicitly identified in rule 14(1)(b) of the Director's Rules as the person whose conduct is the subject of the proposed decision. According to the OFT, there is no duty on it to consult third parties such as Pernod where it proposes to make a decision that the Chapter II prohibition has not been infringed.

109. In this case, the OFT decided that it was unnecessary to consult Pernod since the concerns raised in the original complaint were addressed by the assurances.

110. As to the relevance of Community law, notably the provisions of Article 7 of Regulation 2842/98, and section 60 of the Act, the OFT submits that section 60 is concerned with consistency as regards questions which arise "in relation to competition", not in relation to detailed questions of procedure. The parliamentary debates on the Competition Bill make clear that section 60 of the Act is only intended to import "high level principles, such as proportionality, legal certainty and administrative fairness, into domestic law" (see Lord Simon of Highbury, Hansard, House of Lords' debates, 25 November 1997: Column 961). Rule 14 of the Director's Rules makes clear that Pernod had no legitimate expectation that it would be served with a copy of any notice under that rule. Nor do "general principles of administrative fairness" require third parties to be served with the Rule 14 notice. In any event, the terms of section 31 of the 1998 Act, and Rule 14 of the Director's Rules provide a "relevant difference" from Community law.

111. Furthermore, the OFT submits that any proposed changes to domestic law following the entry into force of Regulation 1/2003 are irrelevant for the purposes of this case. The OFT's understanding is that that Regulation would not require any changes to the OFT's procedures.

112. The OFT accepts that it is not prevented by the 1998 Act from providing a copy of the Rule 14 notice to a complainant, and on occasions it has done so where it considered that this would facilitate the exercise of its functions, for example as in the *BSkyB* case. However, the OFT is mindful of the need to avoid a "proliferation of paper and of being diverted by side issues".

113. Even if, contrary to the OFT's submissions, Community law were relevant, Article 6 of Regulation 2842/98 only requires the EC Commission to inform a complainant of its reasons for refusing to investigate a complaint. That situation is quite different from the present where it is alleged that the OFT should have consulted Pernod over the content of the proposed assurances.

114. According to the OFT, assurances of the kind given here are merely an extra-statutory administrative tool used in appropriate cases by the OFT as a factor in exercising its discretion whether or not to continue with an investigation (see *Bettercare* at paragraph 80 and *Claymore* at paragraph 89). Unlike the proposals for binding commitments proposed in forthcoming legislative amendments to the 1998 Act, there is no sanction for their breach other than to re-open the investigation. They are akin to an undertaking agreeing to terminate certain behaviour and are evidence of a proposed change in behaviour and/or equivalent to a promise not to engage in certain conduct. The OFT submits that there is no reason why it should always be required to consult the complainant or other third parties before it decides to close its investigation if, as here, it considers this to be unnecessary.

115. The OFT submits that in the instant case there was nothing unlawful or irrational about its decision not to disclose a copy of the Rule 14 notice and/or the draft assurances to Pernod, nor would doing so have made any difference to the OFT's decision.

116. As regards the disclosure of a Rule 14 notice in oral submissions the OFT did, however, seek the Tribunal's guidance as to the appropriate procedure to follow. The OFT submitted that it would be administratively workable to disclose a Rule 14 notice to a complainant or third party who demonstrated that it had a substantial interest in the proposed decision, unless the OFT considered that the interests of protecting competition would be adequately protected without the need to involve the complainant or third party. More generally, the OFT's

position was that in the exercise of its discretion it would generally consult complainants and third parties when to do so could facilitate the exercise of its functions under the Act.

117. Miss Smith, for the OFT, also advanced a "higher level submission", to the effect that the Act envisages an independent investigation by the OFT, however that might have come about. The OFT investigates conduct: it does not arbitrate complaints. Parliament has provided no specific role for complainants. In this case Pernod was given the opportunity to submit all relevant information to the OFT, and was told what issues were exercising the OFT in October 2001. However, Pernod had no legitimate expectation that they would be consulted or informed: the procedural structure of the 1998 Act is quite different from that under Community law.

Bacardi's submissions

118. According to Bacardi, at the time the assurances were given all the relevant practices had ceased. Bacardi denies both dominance and abuse.

- *Appealable decision*

119. Bacardi submits that the principles relevant to whether a decision is an appealable one are set out in paragraph 122 of the Tribunal's judgment in *Claymore*, followed in the Tribunal's decision in *Aquavitae*, at paragraph 174. In Bacardi's submission, the acceptance of the undertakings cannot support any inference that the OFT has formed a view as to whether or not Bacardi has infringed the Chapter II prohibition.

120. In *Aquavitae,* the Tribunal made plain at paragraphs 192 to 195 that an infringement decision under the Chapter II prohibition must identify the relevant conduct. However, here the decision to accept the assurances was not adopted on the basis of knowledge of the actual facts. To make an appealable decision, namely a decision that Bacardi has not infringed the Chapter II prohibition the OFT would need to know whether Bacardi had complied with the assurances. This is not a matter the OFT has investigated.

121. Without prejudice to its contention that no "competition problem" ever existed, Bacardi submits that the assurances it offered were entirely appropriate and effective to remove any competition concern there may have been.

122. Bacardi submits in particular that the requirements of the assurances as to Promotional Support Arrangements cover all the "exclusive" arrangements which Bacardi might enter into with on-trade retailers of white rum. As regards Solus Optic and Solus Pouring Agreements, paragraphs 6(a) and (b) of the assurances permit Bacardi to meet competition where, objectively speaking, it would risk having its white rum excluded altogether from the premises if it did not comply with the retailers requirements. According to Bacardi no Solus Pouring or Solus Optic agreements were in force at the time of giving the assurances. The exception for Bacardi to approach the OFT in certain circumstances as regards Solus Agreements under paragraph 2 of the assurances has never arisen.

-Procedure

123. Bacardi agrees with the submissions made by the OFT in its defence as to why it was under no duty to consult Pernod regarding the assurances.

124. As a matter of discretion the OFT was perfectly entitled to consult Pernod only to the extent that it did during the course of its investigation. In particular, Pernod failed to support its complaint with any useful information or evidence on key issues, such as whether other spirits are in the same product market as white rum, and whether a distinction should be drawn between supplies to the off and on trades. According to Bacardi, Pernod's contribution was positively misleading as regards the distribution channels in question.

125. In addition, according to Bacardi, there is no evidence that Pernod asked to see the Rule 14 notice, and it is clear that Pernod was aware of the developments in the OFT's thinking about the crucial issues, notably the relevant product market and the relationship between the off trade and the on trade. Pernod was specifically invited by the OFT to comment on the issue of market definition in the email of 19 October 2001.

126. Finally, even if the Tribunal were to conclude that the OFT should ordinarily disclose the Rule 14 notice to a complainant, the failure to do so in this case has had no practical effect.

As far as Bacardi is able to ascertain, the EC Commission's practice when accepting voluntary assurances does not seem to include consulting third parties before they are accepted.

V THE FINDINGS OF THE TRIBUNAL

General Observations

127. We note that, in this case, the OFT opened its investigation into whether Bacardi was in breach of the Chapter II prohibition on 13 June 2000. The Rule 14 notice was issued on 28 June 2002. During that period of two years, significant resources were devoted to the investigation, in particular to determine whether white rum and vodka were in the same relevant market. That question, and the further question of the relationship between the on-trade and the off trade in sales of white rum, seem to us to be questions of a standard type likely to arise in a Chapter II investigation, and have been previously considered by both the European Commission and the Federal Trade Commission (see e.g. Pernod's submission to the OFT of 23 January 2003).

128. Although admittedly the OFT's investigation commenced at a time when the Act had only recently come into force, we have nevertheless been somewhat perplexed to learn from the OFT's letter to Pernod of 15 May 2003, and from the OFT's defence at paragraphs 35 to 42, that by November 2002 Bacardi's response to the Rule 14 notice had so undermined the OFT's case, as set out in that notice, that considerable further time and work, and the commitment of yet further resources, including the service of further section 26 notices, would still be necessary in order to determine whether white rum and vodka were in the same, or different, markets, and also to understand the distribution structure for Bacardi products to on-trade retailers. The question that inevitably comes to mind is, how did it come about that by late 2002, after an apparently intensive investigation lasting two and a half years, the OFT felt that it had, as it were, "to go back to the drawing board"?

129. The question of the internal efficacy of the OFT's investigatory processes and structures is not, of course, a matter for the Tribunal. However, the course of events in this case does in our view bring into sharper focus the legal questions the Tribunal has to decide, namely (a) whether there is an appealable decision and (b) if there is such a decision, what if any

procedures should the OFT have followed, vis à vis Pernod, before closing its file on Pernod's complaint?

A. IS THERE AN APPEALABLE DECISION?

Statutory Framework

130. The Chapter II prohibition is contained in section 18 of the 1998 Act which provides, so far as material:

> "18.–(1) … [A]ny conduct on the part of one or more undertakings which amounts to the abuse of a dominant position in a market is prohibited if it may affect trade within the United Kingdom.
>
> (2) Conduct may, in particular, constitute such an abuse if it consists in–
>
> (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
>
> (b) limiting production, markets or technical development to the prejudice of consumers;
>
> (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
>
> (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of the contracts.
>
> (3) In this section–
>
> "dominant position" means a dominant position within the United Kingdom; and
>
> "the United Kingdom" means the United Kingdom or any part of it.
>
> (4) The prohibition imposed by subsection (1) is referred to in this Act as "the Chapter II prohibition"."

131. Under Chapter III of the 1998 Act (Investigation and Enforcement) the OFT and other sectoral regulators are given extensive powers to investigate possible infringements of the Chapter II prohibition and make decisions enforcing that prohibition.

132. The provisions governing appeals against decisions made under the 1998 Act, as amended by the 2002 Act, are set out in sections 46 and 47. Section 46 provides, so far as relevant:

"46.- (1) Any party to an agreement in respect of which the OFT has made a decision may appeal to the Tribunal against, or with respect to the decision.

(2) Any person in respect of whose conduct the OFT has made a decision may appeal to the Tribunal against, or with respect to, the decision.

(3) In this section "decision" means a decision of the OFT-

(a) as to whether the Chapter I prohibition has been infringed,

(b) as to whether the Chapter II prohibition has been infringed,

…

and includes a direction given under section 32, 33, or 35 and such other decision as may be prescribed."

133. Section 47 of the 1998 Act as amended provides:

"47.-(1) A person who does not fall within section 46(1) or (2) may apply to the OFT asking him to withdraw or vary a decision ("the relevant decision") falling within paragraphs (a) to (f) of section 46(3) or such other decision as may be prescribed.

…

(4) If the OFT, having considered the application, decides that it does not show sufficient reason why it should withdraw or vary the relevant decision, it must notify the applicant of its decision.

(5) Otherwise, the OFT must deal with the application in accordance with such procedure as may be specified in rules under section 51.

(6) The applicant may appeal to the Tribunal against a decision of the OFT notified under subsection (3) or (4).

…"

134. Section 46 of the 1998 Act, set out above, is directed to appeals by the parties principally affected by a decision of the OFT, notably

— the parties to an agreement in respect of which the OFT has made a decision "as to whether the Chapter I prohibition has been infringed" (section 46(1) and (3)(a)); or

— any person in respect of whose conduct the OFT has made a decision "as to whether the Chapter II prohibition has been infringed" (section 46(2) and (3)(b)).

135. On the other hand, section 47 of the 1998 Act envisages appeals to the Tribunal by third parties who do not fall within section 46(1) and (2). Section 47(1), as in force at the material time, entitles third parties to apply to the OFT asking it

> "to withdraw or vary a decision ("the relevant decision") falling within paragraphs (a) to (f) of section 46(3) or such other decision as may be prescribed".

136. Section 17 of the Enterprise Act 2002 ("the 2002 Act"), brought into force on 20 June 2003 by The Enterprise Act 2002 (Commencement No. 3, Transitional Provisions and Savings) Order 2003 S.I. 2003 No. 1397 ("the Commencement Order"), substitutes a new section 47 of the 1998 Act under which a third party may appeal a decision falling with section 46(3) without first having to make an application to the OFT to withdraw or vary that decision. However, that change does not affect appeals made under section 47(1) in relation to decisions adopted by the OFT prior to 20 June 2003, and hence has no bearing on the present case: see paragraph 5 of the Commencement Order.

137. It is not disputed that in the present case Pernod has followed the section 47 procedure, as applicable at the time, and has "a sufficient interest" for the purposes of those provisions.

Section 60

138. Section 60 of the 1998 Act provides:

> "(1) The purpose of this section is to ensure that so far as is possible (having regard to any relevant differences between the provisions concerned), questions arising under this Part in relation to competition within the United Kingdom are dealt with in a manner which is consistent with the treatment of corresponding questions arising in Community law in relation to competition within the Community.
>
> (2) At any time when the court determines a question arising under this Part, it must act (so far as is compatible with the provisions of this Part and whether or not it would otherwise be required to do so) with a view to securing that there is no inconsistency between –
>
> > (a) the principles applied, and decision reached, by the court in determining that question; and
> > (b) the principles laid down by the Treaty and the European Court, and any relevant decision of that Court, as applicable at that time in determining any corresponding question arising in Community law.

(3) The court must, in addition, have regard to any relevant decision or statement of the Commission.

(4) Subsection (2) and (3) also apply to –
(a) the [OFT]; and
(b) any person acting on behalf of the [OFT], in connection with any matter arising under this Part.

(5) In subsections (2) and (3), "court" means any court or tribunal.

(6) In subsection (2)(b) and (3), "decision" includes a decision as to –

(a) the interpretation of any provision of Community law;
(b) the civil liability of an undertaking for harm caused by its infringement of Community law."

Appealable decisions: The Claymore test

139. In *Bettercare* at paragraph 61, and subsequently in *Freeserve* and *Claymore*, the Tribunal identified the following relevant questions as to whether or not an appeal is admissible :

"(i) Does the correspondence between [the OFT] and the applicant contain "a decision"?

(ii) If so, does any such decision constitute an "appealable decision" as to whether the Chapter II prohibition has been infringed?

(iii) If so, has the procedure envisaged by section 47 been observed?"

140. As to whether the OFT has made a "decision" (point (i) above), the Tribunal said in *Bettercare* at [62]:

"On the ordinary meaning of words, to take a decision in a legal context means simply to decide or determine a question or issue. Whether such a decision has been taken for the purposes of the Act is, in our view, a question of substance, not form, to be determined objectively. If there is, in substance, a decision, it is immaterial whether it is formally entitled a decision: otherwise the decision-maker could avoid his act being characterised as a decision simply by failing to affix the appropriate label."

141. As to whether any decision is an "appealable decision" (point (ii) above) the relevant principles are summarised at paragraph 122 of the Tribunal's judgment in *Claymore* as follows:

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

(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 OFT] made a decision as to whether the Chapter II prohibition has been infringed, either expressly or by necessary implication, on the material before [it]? (*Freeserve*, [96]).

(iii) There is a distinction between a situation where [the OFT] has merely exercised an administrative discretion without proceeding to a decision on the question of infringement (for example, where [the OFT] decides not to investigate a complaint pending the conclusion of a parallel investigation by the European Commission), and a situation where [the OFT] 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 OFT] 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])."

142. The Tribunal also said in *Claymore* at [148]:

> "In our view a useful approach is to pose two questions: Did [the OFT] ask [itself] whether the Chapter II prohibition has been infringed? What answer did [the OFT] give when making [its] decision?"

143. In this case the decision of the 1998 Act relied on by Pernod as an appealable decision under section 46(3)(b) is the decision by the OFT to accept Bacardi's voluntary assurances and close its file on its investigation into Bacardi's conduct, including its investigation of Pernod's complaint, as evidenced by the OFT's letter of 30 January 2003 and accompanying press release of that date.

Analysis

144. On the facts of this case it is not disputed that the Director made "a decision". The only question which arises is whether the decision is "appealable" within the meaning of section 46(2) and 46(3)(b).

- A decision as to infringement since 28 January 2003

145. Pernod concedes that there is no appealable decision as regards the period prior to 28 January 2003. Pernod's argument is that there is, however, a decision by the OFT that the Chapter II prohibition is or has not been infringed since 28 January 2003. In order to address that submission, we begin by asking ourselves what, if anything, was the content of the decision communicated to Pernod by the OFT in the letter of 30 January 2003, over and above the decision simply to close the file on Pernod's complaint?

146. The first answer to that question, it seems to us, is that the OFT decided that Bacardi's assurances "remove the competition problem" that gave rise to the alleged breach of the Chapter II prohibition, as stated expressly in the OFT's letter of 30 January 2003. The press release of the same date confirms that conclusion, stating: "The assurances remove the competition problem that prompted the investigation". Paragraph 7 of the OFT's letter of 15 May 2003 is to the same effect, stating that "only for the purposes of the future, the assurances removed the competition problem that prompted the investigation".

147. The second step in the analysis is, it seems to us, to identify "the competition problem" or "the competition problem that prompted the investigation" which the assurances are said to have "removed".

148. Relying on what we have been told by the OFT, it seems to us that "the competition problem" being referred to in the above documents is, at the least, the matters provisionally identified in the Rule 14 notice as infringements of the Chapter II prohibition, namely the following agreements entered into by Bacardi:

(a) De-listing agreements,
(b) Solus agreements,
(c) Solus pouring agreements,

(d) Must Stock agreements, and

(e) Preferred Status agreements.

(see paragraph 39 above).

149. Since the OFT also referred, both in the press release of 30 January 2003 and in the letter of 15 May 2003, to the "competition problem *which prompted the investigation"* it could also be inferred that the assurances removed "the competition problem" raised by the original complaint of 27 April 2000, namely that of an alleged exclusive supply agreement between Bacardi and the NUSSL (paragraph 10 above), as well as the matters complained of in Pernod's complaint of 28 September 2000. However, for the purposes of this judgment it is sufficient for us to assume that "the competition problem" intended to be dealt with by the assurances was the allegedly infringing agreements identified in the Rule 14 notice.

150. The third step of the analysis is in our view to examine the assurances in order to see in what ways those assurances "removed" the competition problem in question, in the light of the explanations we have been given.

151. The first point to note is that the assurances do not cover "Must Stock" and "Preferred Status" agreements. As regards "Must Stock" agreements, the OFT has explained to the Tribunal that the reason for this is that, against the background of the assurances, the OFT considered that "Must Stock" agreements entered into by Bacardi "could not give rise to appreciable effects on the market"(defence, paragraph 110). Since such agreements do not prevent retailers from stocking other brands of white rum, and do not make any stipulations as to quantities, the OFT considers that such agreements "could not deter competing suppliers" from concluding agreements with retailers (defence, paragraph 111).

152. In the light of that explanation, it seems to us implicit that, in accepting the assurances, the OFT decided that, even if it were established that Bacardi had a dominant position for the purposes of the Chapter II prohibition then, on the information then available, it would not be an abuse of that position for Bacardi to enter into a "Must Stock" agreement.

153. As regards "Preferred Status" agreements, the OFT has explained to the Tribunal that it did not consider that these agreements could have any appreciable foreclosure effects, since such

agreements did not prevent retailers from stocking other brands of white rum and, according to the OFT, covered less than 1% of on-trade retailers (defence, paragraph 112).

154. Again, that seems to us to amount to an appreciation by the OFT that, on the information then available, Bacardi would not abuse any dominant position it had, were it to enter into "Preferred Status" agreements[2] .

155. As regards Solus Pouring and Solus Optic agreements, those are covered by the assurances, but are subject to the exception set out in paragraph 6. The effect of that exception, as we understand it, is that Bacardi is not precluded from entering into Solus Pouring or Solus Optic Agreements if (a) the retailer expressly requires Bacardi to offer Promotional Support Arrangements as defined in the assurances, including Solus Pouring or Solus Optic status, in the context of a tendering process, and (b) Bacardi would "on a reasonable and objective assessment", risk having its white rum excluded from the premises if it failed to comply with the retailer's requirements.

156. Again, the OFT has explained to the Tribunal that this exception is designed to deal with a situation where a retailer (such as the NUSSL) requires suppliers to compete for listings of their brands in the retailer's premises on the basis of the promotional support they are prepared to offer and, in return, is prepared to award preferential status to that supplier's brand (defence, paragraph 125). According to the OFT, the exception applies only if there is a risk of Bacardi being excluded completely from the premises, a situation which, in the OFT's view will rarely, if ever, arise (defence, paragraph 126). According to the OFT

> "[T]he exception contained in paragraph 6 provides a reasonable balance between protecting other brands' access to retail outlets and ensuring that Bacardi itself is not unfairly excluded from them" (defence, paragraph 122).

157. Again, that in our view amounts by necessary implication to an appreciation or judgment, by the OFT, as to the circumstances in which the entering into by Bacardi of Solus Pouring or Solus Optic agreements would not be an abuse of any dominant position. In the OFT's own

[2] We add in parenthesis that, from the explanations we have been given, we are not entirely clear whether there is any overlap between "Preferred Status" agreements and, for example, the "Solus Optic" agreements dealt with below, but nothing seems to turn on that for present purposes.

words, paragraph 6 of the assurances represents "a reasonable balance" between protecting other competitors and ensuring that Bacardi itself is not "unfairly excluded". We note also that paragraph 6 appears to be directed towards retailers such as the NUSSL. Bacardi's earlier arrangements with the NUSSL apparently provoked the original complaint of 27 April 2000 and also figured in Pernod's complaint of 28 September 2000.

158. We add, in relation to Solus Pouring agreements, that it emerges from paragraphs 136 and 137 of the OFT's defence that the OFT considered that the continuation, after the assurances had been given, of a small number of Solus Pouring Agreements would not have any appreciable affect on other suppliers' opportunities to compete, given that the majority of Solus Pouring Agreements were for a duration of between one and two years. Hence it was not, according the OFT, necessary to require that the existing Solus Pouring Agreements be brought to an end, it being the OFT's understanding that Delisting, Solus and Solus Optic agreements had already been terminated.

159. That, in our view, is a further example of the OFT arriving at an appreciation or judgment that the continuation of a limited number of Solus Pouring Agreements after the assurances had been given would not amount to an abuse by Bacardi.

160. We are not concerned at this stage with whether the OFT's conclusions as summarised above, as they have now emerged in the course of these proceedings, are right or wrong, nor are we concerned, at this stage, with the wisdom or otherwise of the OFT's decision to accept Bacardi's assurances and close the file. All we are concerned with is whether, in so doing, the OFT by necessary implication took a decision "as to whether the Chapter II prohibition has been infringed" within the meaning of section 46 (3) (b) of the Act.

161. As the Tribunal has found in previous judgments, the words "as to whether" in section 46 (3) (b) refer both to a decision that the Chapter II prohibition *has* been infringed, and to a decision that the Chapter II prohibition *has not* been infringed. It is equally common ground that there may be a decision that the Chapter II prohibition "has not been infringed" if the decision in question finds that at least one of the necessary elements comprising the Chapter II prohibition is lacking. Thus, even if the decision is limited to deciding that the body in question is not an "undertaking" (as in *Bettercare*), that by necessary implication is a decision that the Chapter II prohibition has not been infringed, because an element essential

to establishing the infringement is not present. The same applies, in the Tribunal's opinion, if the decision in question is to the effect that there is no dominant position, or no abuse, or no effect on trade in the United Kingdom. In each case it follows, necessarily, that there is no infringement of the Chapter II prohibition.

162. In the present case it seems to us, for the reasons given above, that when the Director stated in his letter of 30 January 2003 that the assurances "removed the competition problem" he also decided, by necessary implication that, on the information then available to him, and assuming that Bacardi complied with the assurances, it would not be an abuse of any dominant position which Bacardi might have for Bacardi to:

- enter into Must Stock agreements, because such agreements would not or do not "give rise to appreciable foreclosure effects on the market" (defence, paragraph 110)
- enter into Preferred Status agreements, again because such agreements "could not have any appreciable foreclosure effects" (defence, paragraph 112)
- enter into Solus Pouring and Solus Optic agreements in the circumstances set out in paragraph 6 of the draft assurances, on the basis that paragraph 6 "provides a reasonable balance between protecting other brands' access to retail outlets and ensuring that Bacardi itself is not unfairly excluded from them" (defence, paragraph 127).
- continue in force for one or two years any Solus Pouring agreements in existence at the date of the assurances, on the basis that following the assurances such agreements "would not have an appreciable effect on other suppliers' opportunities to compete in the future" (defence, paragraphs 136 and 137).

163. It may be possible to draw other inferences from the assurances (e.g. that even if Bacardi's dominant position were established, Solus Agreements would not necessarily be prohibited *per se*), but for present purposes it is sufficient for us to hold that, by necessary implication, the Director decided that, as from the date when Bacardi gave the assurances, and for as long as Bacardi observed those assurances, the matters summarised in paragraph 162 above would not amount to an abuse within the meaning of the Chapter II prohibition.

164. That approach, in our view, is supported by the terms of the OFT's letter of 15 May 2003, in two respects. First, at paragraph 7 of that letter the OFT states:

> "In other words, while Bacardi adhered to the assurances, and in the absence of new information, the [OFT] would not have reasonable grounds to suspect an infringement *from the date the assurances were given*." (Emphasis in the original).

165. That is a clear statement, in our view, that the OFT had decided that on the information then available, and so long as Bacardi observed the assurances, it would not infringe the Chapter II prohibition in the absence of a change of circumstances. That necessarily implies that the matters summarised in paragraph 162 above, which are permitted by the assurances, did not constitute such an infringement.

166. Moreover, at paragraph 8 of the OFT's letter of 15 May 2003 it is stated:

> "Moreover, the [OFT] considered that even if [it] had been able to proceed to an infringement decision, any directions imposed on Bacardi would have gone no further in scope than the assurances which were being offered."

167. The directions there referred to are those contemplated by section 33 of the 1998 Act which empowers the OFT, where it has made a decision that conduct infringes the Chapter II prohibition, to give such directions as it considers appropriate "to bring the infringement to an end." It seems to us clear that, in paragraph 8 of the letter of 15 May 2003, the OFT is saying that it decided that, even if Bacardi were found to have a dominant position, and were further found to have abused that position, the OFT would not have regarded the matters summarised in paragraph 162 above as infringements, standing alone. The basis for that view, as now explained in the defence, was that the OFT did not consider those matters to give rise to any appreciable foreclosure effects. The necessary inference, in our view, is that the OFT did not consider such conduct to be an abuse, at least once the assurances had been given.

168. We conclude from the foregoing that, at the least, the OFT took a decision on the substance in this case to the effect that the matters set out in paragraph 162 above did not amount to an infringement of the Chapter II prohibition, even assuming that Bacardi had a dominant position, at least for so long as Bacardi observed the assurances. There being, to that extent, an implicit decision on the substantive application of the Chapter II prohibition, we would

ordinarily expect such a decision to be appealable to the Tribunal, applying the *Claymore* principles.

- *The words "has been" in Section 46(3)(b)*

169. The OFT argues, however, that the only decision that may be appealed to the Tribunal under section 46(3)(b) of the Act is a decision as to whether or not the Chapter II prohibition "has been" or "has not been" infringed. It is impossible to say, argues the OFT, that the OFT decided that the Chapter II prohibition "has not been" infringed, since such a finding necessarily applies to past conduct. Here, at most, the OFT's view can only relate to Bacardi's future conduct after giving the assurances. Moreover, since by definition Bacardi's future conduct is not yet ascertainable, the OFT is not yet in a position to decide whether or not such future conduct would or would not infringe the Chapter II prohibition: see *Aquavitae* at [192].

170. As regards that argument, the use of a particular tense in a statute may sometimes give rise to difficulties if read literally (see Bennion *Statutory Interpretation*, 4th edition, at pp 1019 to 1021). In this case, in our view, the words "has been" are not necessarily free of ambiguity since, depending on the circumstances, a finding that a prohibition "has been" infringed may also imply that the prohibition "is" infringed (e.g. if the agreement or conduct still exists when the decision is taken) or that it "will be" infringed (e.g. if the agreement or conduct were to continue into the future). To take another illustration by way of example, in ordinary English the phrase "he has come of age" also means he "is" of age and, presumably, will continue to be so. In those circumstances in our view the correct approach to the issue of construction raised by the OFT is to examine the context of the 1998 Act as a whole to see how the words "has been" in section 46(3) of the Act should be construed.

171. It is true that, for the purposes of the decisions which are appealable under section 46(1) and (2) of the 1998 Act, both section 46(3)(a), in relation to Chapter I infringements, and section 46(3)(b), in relation to Chapter II infringements, refer to a decision as to whether the relevant prohibition "has been" infringed.

172. The OFT correctly points out that the words "has been" or "has not" or "has not been" infringed are (or were at the relevant time) used in the 1998 Act also in section 14(2)

(decision on a notification of an agreement), section 16 (effect of a decision under section 14 that the Chapter I prohibition has not been infringed), section 22(2) (decision on a notification of conduct), section 24 (effect of a decision that the Chapter II prohibition has not been infringed), section 25 (which gives the OFT power to conduct an investigation if he considers that the relevant prohibition "has been" infringed) and section 31 (which applies where the OFT proposes to make a decision that the relevant prohibition "has been infringed"). Section 35(1), which deals with interim measures, also refers to the OFT's reasonable suspicion that the relevant prohibition "has been infringed". The OFT also contrasts the language of sections 13(2), 15(1), 21(2) and 23(1) where, in applications for guidance as to whether an agreement or conduct may infringe the relevant prohibition, the OFT may give guidance as to whether or not, in his view, the agreement or conduct in question is "likely to" infringe. It is common ground that the giving of such guidance is not an appealable decision, although as we understand it those provisions have been little used.[3]

173. We note, however, that both the Chapter I and Chapter II prohibitions set out in sections 2 and 18, respectively, of the Act are couched in the present tense. Thus section 2 provides that agreements between undertakings which (a) *may* affect trade within the United Kingdom, and (b) *have* as their object or effect the prevention, restriction or distortion of competition within the United Kingdom *are* prohibited. Section 18(1) provides that conduct amounting to an abuse of a dominant position in a market *is* prohibited if it *may* affect trade within the United Kingdom. The use of the present tense in these circumstances seems to us strongly to imply that the OFT has power to take decisions that certain agreements or conduct either do infringe (present) or have infringed (past) or, on certain assumed facts, will infringe (future), or not, as the case may be. In those circumstances it would be odd indeed, in our view, if there was no corresponding right of appeal in all these three cases.

174. Moreover the OFT's power to give directions under sections 32(1) and 33(1) of the Act is also expressed in the present tense: that power applies where an agreement, or conduct, as the case may be, "infringes" the relevant prohibition: see sections 32(1) and section 33(1). Those directions are appealable to the Tribunal under section 46. Paragraph 5(1)(d) of Schedule 9 of the Act also uses the present tense in relation to the procedure to be followed

[3] Although not relevant for present purposes, sections 14 to 23 of the Act have since been repealed by the 2004 Amendment Order: see footnote to paragraph 1 above.

by the OFT if the OFT decides to take further action after having decided that an agreement or conduct "does not infringe" the relevant prohibition.

175. Although in some cases under the Act, little will turn on the use of the words "has been" in section 46, sub-sections (1), (2) and (3), in other cases, in our view, it would be incorrect or artificial, even absurd, to describe the OFT as having taken a decision that the relevant prohibition "has been" or "has not been" infringed. The obvious examples concern the situation where the relevant agreement has not yet come into force, or where the OFT's appreciation is essentially based on present, or future, circumstances rather than on matters in the past. Four examples will illustrate the point.

176. In *GISC*, the General Insurance Standards Council notified certain rules, known as the GISC rules, to the Director, seeking a decision either that the GISC rules did not contravene the Chapter I prohibition or, if they did so, the grant of an exemption from the Chapter I prohibition under section 9 of the 1998 Act.

177. At the time of the Director's decision CA98/1/2001 of 24 January 2001, the GISC rules had not yet fully come into force. In particular, the principal controversial rule, Rule F42, which prohibited members of GISC from dealing with insurance intermediaries who were not members of GISC, was not due to come into force until later. The principal issue for the Director was whether, when it came into force, Rule F42 would have as its object or effect the prevention restriction or distortion of competition within the meaning of the Chapter I prohibition.

178. The Director's decision in *GISC* is expressed exclusively in the present and future tense. That decision is described in its title as a decision "relating to a finding by [the Director] that the rules notified by GISC … *do not* infringe" the Chapter I prohibition (emphasis added). The decision concludes at paragraph 36 that "On the basis of the facts and for the reasons set out above, the Director has decided pursuant to section 14(2) of the Act that the Rules notified by GISC *do not* infringe the prohibition imposed by section 2 of the Act" (emphasis added). In the body of the decision, the Director's assessment is expressed largely in the future tense, for example, "The Rules *will* apply" (paragraph 19), "GISC *intends* to regulate" (paragraph 23, 25), "Rule F42 *will* prevent members of GISC …", "The Director does not have any indication that this Rule *will* result [in intermediaries exiting the market]"

(paragraph 35). "The Director has therefore concluded that Rule F.42 *will not* give rise to an appreciable restriction or distortion of competition" (paragraph 35).

179. The *GISC* decision was subject to an appeal to the Tribunal under section 47: *Institute of Independent Insurance Brokers and Association of British Travel Agents v Director General of Fair Trading* [2001] CAT 4.

180. However, as far as we can see, the OFT's submission in the present case, if correct, would mean that the Director had no power to take the *GISC* decision under section 14(2), nor would the Tribunal have had jurisdiction to entertain the appeal, since the Director did not decide, in that case, whether the Chapter I prohibition "has been" infringed. Since the GISC rules were not yet fully operational, what the Director, in effect, decided was that the GISC rules either "do not" or "would not" infringe the Chapter I prohibition when in force. The Director did not decide that the Chapter I prohibition "has been" infringed in circumstances where he was considering the future effect of rules yet to be implemented.

181. Similarly, the decision of the Director of 1 February 2002 under section 14(2) of the Act relating to the standard conditions of the *Film Distributor's Association* No. CA/98/10/2002 concerned standard trading terms which were due to come into force on the same day as the decision, following amendment of the standard terms previously applicable. The decision is couched in the present tense: see e.g. paragraph 44 ("the Standard Conditions as amended *no longer have* the effect of restricting … competition"), paragraph 55 ("the Standard Conditions *do not have* the object or effect of restricting competition … Therefore they *do not* infringe the Chapter I prohibition") and paragraph 56 ("the notified agreement, as amended, *does not* infringe the prohibition") (emphasis added). Apart from the fact that the decision nowhere uses the past tense, it is difficult to see how the Director could have decided whether the Chapter I prohibition "has been infringed", in a literal sense, when the rules only took effect on the same day as the decision.

182. In *British Midland/United Airlines* the decision of the Director of 1 November 2002 relating to the notification by British Midland and United Airlines of their Alliance Expansion Agreement was adopted under the EC Competition Law (Articles 84 and 85) Enforcement Regulations, 2001 SI 2001 no. 2916. Those regulations are for all material purposes in the same terms as the 1998 Act, including the use of the words "has been" (see e.g. regulation 25

relating to appeals). In that case, the relevant agreement had not yet come into force and would not do so until some indeterminate time in the future, on the signing of a new air services agreement between the United Kingdom and the United States of America. At paragraph 122 of the decision the Director concluded that "the Agreement, if implemented, would fall within the scope of the Article 81(1) prohibition", albeit that the Director went on to grant an exception under Article 81(3). It is very hard to see that a decision that an agreement *would, if implemented* at some future date, constitute an infringement, is a decision as to whether the relevant prohibition "has been" infringed, if those words are to be given their literal meaning.

183. Finally, the OFT's decision in *Pool Re Company Limited* of 15 April 2004, CA98/03/2004, is entirely directed to whether the rules of Pool Re, which concern a collective agreement about reinsurance against terrorist attacks, "are" caught by the Chapter I prohibition (see e.g. paragraphs 67 and 75). That decision is again couched throughout in the present tense, and contains various conclusions that a specific rule "does not" infringe the Chapter I prohibition (see paragraphs 42, 52) or that a specific rule "prevents, restricts or distorts competition (paragraphs 48, 55, 60, 65) or that "the remainder of the notified agreements *do not* contain restrictions that are likely appreciably to prevent, restrict or distort competition". In a case such as that, it is plain that the present tense is the natural one to use.

184. Similarly the OFT's own *Guidelines*, published at or around the inception of the Act, are almost all written in the present tense. Although not intended to be a technical document, it is of interest that OFT Guideline 400, *The Major Provisions*, published in March 1999, states that **"**a decision may be that the agreement or conduct *is* (i) outside the relevant prohibition … or (ii) that it *is* prohibited …" (paragraph 7.4, emphasis added).

185. Looked at in its full context, and again bearing in mind that the OFT and its predecessor the Director must be expected to take a wide range of decisions relating to past, present and future conduct, we think it would be artificial to construe the words "has been" in section 46(3) of Act in a narrow literal sense, so as strictly to limit the OFT's powers, and the rights of appeal to the Tribunal, only to matters arising in the past. Parliament, we think, must be presumed to have known that cases of the kind referred to above would be likely to occur, not least because that is and always has been commonplace of the existing system under Community law on which the 1998 Act is modelled. In those circumstances, it seems to us it

is not an unduly strained construction to read section 46(3)(a) and (b) of the Act as if the words "is or" are to be implied immediately before the words "has been". That would align section 46 with the present tense used in the basic prohibitions set out in sections 2 and 18, and ensure that the system established by the Act corresponds to practical reality. As we have already said, it would, in our view, be incongruous indeed if the OFT were unable to take decisions expressed in the same tense as the Chapter I and Chapter II prohibitions which the OFT is called on to apply.

186. Such an approach would also secure consistency between the system established by the Act and the system for the enforcement of Articles 81 and 82 established under Community law upon which the Act is based. Up until 1 May 2004 the EC Commission's powers to grant "negative clearance" or to make infringement decisions were based on Articles 2 and 3 of Regulation 17, which provide respectively:

> "Article 2
>
> Negative Clearance
>
> Upon application by the undertakings or associations of undertakings concerned, the Commission may certify that, on the basis of the facts in its possession, there *are* no grounds under Article 85(1) or Article 86 of the Treaty for action on its part in respect of an agreement, decision or practice.
>
> Article 3
>
> Termination of infringements
>
> 1. Where the Commission, upon application or upon its own initiative, finds that there *is* infringement of Article 85 or Article 86 of the Treaty, it may by decision require the undertakings or associations of undertakings concerned to bring such infringement to an end.
>
> …"
>
> (emphasis added)

187. Both these provisions are expressed in the present tense, not the past tense. The EC Commission is not limited to taking decisions regarding matters in the past, and appeals from decisions of the EC Commission to the Court of First Instance are not limited to decisions on "past" infringements to the exclusion of decisions on present, or even future, infringements. As regards the period after 1 May 2004, Regulation 1/2003 is similarly expressed in the

present, not the past tense: see e.g. the Commission's powers under Article 7 and Article 10, to which we refer again below.

188. For those reasons, we are not minded to accept the OFT's submissions on the construction of the words "has been" as found, in particular, in section 46(3)(b) of the Act.

- *The circumstances in this case*

189. However, for the purposes of this case we do not need to found this judgment solely on the point of statutory construction considered above. In this particular case, Bacardi gave the assurances on 28 January 2003. It is plain that, as from that date, there had been a change of behaviour by Bacardi, such that the conduct previously considered by the OFT to be an infringement had ceased. That change of behaviour is referred to in the press release of 30 January, and is relied on by the OFT in these proceedings. As the OFT's letter of 15 May 2003 points out, as long as Bacardi observed the assurances the OFT no longer had reasonable grounds for suspecting an infringement "*as from the date when the assurances were given*" (emphasis in the original). In our view the OFT was entitled to assume that Bacardi already was observing, and would continue to observe, the assurances, as from the date that they were given, namely 28 January 2003 or, at the latest, from the date on which the OFT accepted the assurances, which was 29 January 2003.

190. In these circumstances, even if, which we do not think, the words "has been" in section 46 had to be construed strictly in the past tense, in this particular case the situation is that when the OFT wrote to Pernod on 30 January 2003, it was then already the case that, in the OFT's view, the Chapter II prohibition "has not" been infringed since the date when Bacardi gave the assurances, i.e. on 28 January 2003. As Pernod points out, it cannot be the case that the right to bring an appeal depends on the hazard of when, after an agreement has been amended or assurances have been given, the OFT actually closes the file. If, for example, the OFT had written to Pernod four weeks later saying, in effect, "[We] take the view that in any event Bacardi has not infringed the Chapter II prohibition since the assurances were given on 28 January 2003" that in our view would be an appealable decision in relation to the period after 28 January 2003. That in our view is the correct analysis here, albeit that the relevant letter was written by the OFT only shortly afterwards, on 30 January 2003.

191. That approach can also be tested by looking at the matter as at the date of the OFT's letter of 15 May 2003, when the OFT declined to withdraw or vary the decision of 30 January 2003. As at 15 May 2003, the OFT plainly considered that, on the information it had, Bacardi had not infringed the Chapter II prohibition since 28 January 2003. The sense of that letter is "Bacardi has not infringed the Chapter II prohibition since the date the assurances were given", whatever may have been the situation prior to that date.

192. We accept that the OFT did not decide that the Chapter II prohibition either had or had not been infringed when looking back to the period prior to 28 January 2003. But in our view it decided that, as from that date, the Chapter II prohibition was not infringed and would not be infringed as long as the assurances were observed. In our view that decision looks forward from 28 January 2003, and implies a continuum of non-infringement after that date, absent a change of circumstances.

193. Finally, as regards the identification of the conduct in question, unlike the situation in *Aquavitae* where neither the conduct, nor even the parties concerned, were clearly identifiable, in this case the conduct considered by the OFT not to infringe the Chapter II prohibition, absent any change of circumstances, is that which we have already identified at paragraph 162 above. That conduct in our view is sufficiently clear and ascertainable.

194. For all these reasons we conclude that the OFT's decision to close the file on Pernod's complaint of 30 January 2003 is an appealable decision.

B. THE PROCEDURAL ISSUES

195. Two issues were canvassed:

(i) Should the Rule 14 Notice have been disclosed to Pernod?
(ii) Should the OFT have consulted Pernod before closing its file on Pernod's complaint?

In dealing with these issues we first briefly summarise the relevant statutory provisions with regard to (a) the 1998 Act (b) the Community law provisions prior to 1 May 2004 (c) the Community law provisions after 1 May 2004 and (d) the implementation of Regulation 1/2003 in the United Kingdom.

(a) The domestic statutory framework under the 1998 Act

196. As already seen, section 47 of the 1998 Act provides for appeals to the Tribunal by third parties who have "a sufficient interest". Although not in force at the time of the contested decision in this case, section 47 as amended by the 2002 Act now permits such third parties to appeal appealable decisions directly to the Tribunal, without going through the step of first asking the OFT to withdraw or vary the decision in question. The Tribunal's experience to date is that the persons who seek to appeal under section 47 are very often complainants who are competitors of the undertaking in question. There is in our view no doubt that most complainants who are competitors have "a sufficient interest" for the purposes of section 47.

197. However, apart from the right of appeal under section 47, the United Kingdom statutory provisions are virtually silent on the procedure for dealing with complaints. On the other hand it is, we think, generally recognised that complaints have an essential role to play in bringing matters to the attention of the OFT, in stimulating investigations under the Act, and in securing the effective enforcement of the Chapter I and Chapter II prohibitions. Thus OFT 427, *A Guide to making a complaint under the Competition Act 1998*, refers to complaints as an extremely important source of information for the OFT (page 1). Margaret Bloom, then Director of Competition Enforcement at the OFT, has said that complaints are the main way in which the OFT uncovers anti-competitive behaviour (see *Key challenges in enforcing the Competition Act*, [2003] Comp Law 85).

198. This, however, is the first case to come before the Tribunal in which the question of the procedural rights of complainants during the administrative proceedings has arisen.

The position in Community law until 1 May 2004

199. There is in our view a considerable contrast between the relative absence of statutory provisions about third parties under the 1998 Act described above, and the equivalent provisions of Community law. Although, since this judgment is being delivered after 1 May 2004, we use the past tense, the provisions referred to in this part of the judgment are those in force at the time of the Director's decision to close the file in this case.

200. First, the right of any person having a legitimate interest to complain to the EC Commission was explicitly recognised in Article 3 of Regulation 17:

> "1. Where the Commission, upon application or upon its own initiative, finds that there is infringement of Article 85 or Article 86 of the Treaty, it may by decision require the undertakings or associations of undertakings concerned to bring such infringement to an end…"
>
> 2. Those entitled to make application are –
> (a) Member States;
> (b) natural or legal persons who claim a legitimate interest"

201. Secondly, pursuant to Article 19(2) of Regulation 17, third parties showing a sufficient interest had the right to be heard by the EC Commission:

> "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.
>
> 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."

202. Thirdly, in implementation of the general principles set out in Article 19 of Regulation 17, if the EC Commission decided to send a statement of objections (the equivalent of the Rule 14 notice) to an alleged infringer, the complainant was entitled to receive a copy of the non-confidential version of that document and to submit its views in writing, and usually orally as well, under Articles 7 and 8 of Regulation 2842/98:

> "Article 7
>
> Where the Commission raises objections relating to an issue in respect of which it has received an application on a complaint as referred to in Article 6, it shall provide an applicant or 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.
>
> Article 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."

203. Fourthly, where the EC Commission was considering rejecting a complaint, the EC Commission was obliged, before doing so, to give the complainant the opportunity to express his views in writing under Article 6 of Regulation 2482/98:

> "Article 6
>
> Where the Commission, having received an application made under Article 3(2) of Regulation No 17 or a complaint made under Article 10 of Regulation (EEC) No 1017/68, Article 10 of Regulation (EEC) No 4056/86 or Article 3(1) of Regulation (EEC) No 3975/87, considers that on the basis of the information in its possession there are insufficient grounds for granting the application or acting on the complaint, it shall inform the applicant or complainant of its reasons and set a date by which the applicant or complainant may make known its views in writing."

204. Article 6 of Regulation 2482/98 is to the same effect as Article 6 of Regulation 99/63 on the hearings provided for in Article 19(1) and (2) of Regulation 17, OJ 1963 2268 ("Regulation 99"), which was one of the earliest regulations adopted in implementation of Regulation 17. As we understand it, Articles 7 and 8 of Regulation 2482/98 reflect the practice followed by the Commission for many years pursuant to Article 5 of Regulation 99, which provided: "If natural and legal persons showing a sufficient interest apply to be heard pursuant to Article 19(2) of Regulation 17, the Commission shall afford them the opportunity of making known their views in writing within such time limits as it shall fix". Article 7 of Regulation 99 also provided for oral hearings in certain circumstances.

205. Fifthly, a complainant is entitled to a decision on his complaint which can be appealed to the Court of First Instance under Article 230 of the EC Treaty: Case C-282/95P *Guerin Automobiles v Commission* [1997] ECR I-1531, at paragraphs 33 to 41. Similarly, a failure by the EC Commission to take a position on a complaint within a reasonable time may in certain circumstances also be appealed to that Court under Article 232 of the EC Treaty: see e.g. *Guerin*, at paragraphs 35 to 38.

206. Sixthly, the Court of First Instance and the Court of Justice have developed a number of principles which the EC Commission must observe in dealing with complaints. For example, in case C-119/97P *Ufex v Commission* [1999] ECR I-1371 the Court of Justice said at paragraphs 86 to 96:

"86. It should be observed, to begin with, that according to the settled case-law of this Court, the Commission must consider attentively all matters of fact and of law which the complainants bring to its attention (Case 210/81 *Demo-Studio Schmidt v Commission* [1983] ECR 3045, paragraph 19, Case 298/83 *CICCE v Commission* [1985] ECR 1105, paragraph 18, and Joined Cases 142/84 and 156/84 *BAT and Reynolds v Commission* [1987] ECR 4487, paragraph 20). Furthermore, complainants are entitled to have the fate of their complaint settled by a decision of the Commission against which an action may be brought (Case C-282/95 P *Guerin Automobiles v Commission* [1997] ECR I-1503, paragraph 36).

87. However, Article 3 of Regulation No 17 of the Council of 6 February 1962, First Regulation implementing Articles 85 and 86 of the Treaty (OJ, English Special Edition 1959-1962, p. 87), does not give a person making an application under that article the right to insist that the Commission take a final decision as to the existence or non-existence of the alleged infringement (Case 125/78 *GEMA v Commission* [1979] ECR 3173, paragraphs 17 and 18).

88. The Commission, entrusted by Article 89(1) of the EC Treaty with the task of ensuring application of the principles laid down in Articles 85 and 86, is responsible for defining and implementing the orientation of Community competition policy (Case C-234/89 *Delimitis v Henninger Brau* [1991] ECR I-935, paragraph 44). In order to perform that task effectively, it is entitled to give differing degrees of priority to the complaints brought before it.

89. The discretion which the Commission has for that purpose is not unlimited, however.

90. First, the Commission is under an obligation to state reasons if it declines to continue with the examination of a complaint.

91. Since the reasons stated must be sufficiently precise and detailed to enable the Court of First Instance effectively to review the Commission's use of its discretion to define priorities (Case C-19/93 P *Rendo and Others v Commission* [1995] ECR I-3319, paragraph 27), the Commission must set out the facts justifying the decision and the legal considerations on the basis of which it was adopted (*BAT and Reynolds*, paragraph 72, and Joined Cases 43/82 and 63/82 *VBVB and VBBB v Commission* [1984] ECR 19, paragraph 22).

92. Second, when deciding the order of priority for dealing with the complaints brought before it, the Commission may not regard as excluded in principle from its purview certain situations which come under the task entrusted to it by the Treaty.

93. In this context, the Commission is required to assess in each case how serious the alleged interferences with competition are and how

persistent their consequences are. That obligation means in particular that it must take into account the duration and extent of the infringements complained of and their effect on the competition situation in the Community.

94. If anti-competitive effects continue after the practices which caused them have ceased, the Commission thus remains competent under Articles 2, 3(g) and 86 of the Treaty to act with a view to eliminating or neutralising them (see, to that effect, Case 6/72 *Europemballage and Continental Can v Commission* [1973] ECR 215, paragraphs 24 and 25).

95. In deciding to discontinue consideration of a complaint against those practices on the ground of lack of Community interest, the Commission therefore cannot rely solely on the fact that practices alleged to be contrary to the Treaty have ceased, without having ascertained that anti-competitive effects no longer continue and, if appropriate, that the seriousness of the alleged interferences with competition or the persistence of their consequences has not been such as to give the complaint a Community interest.

96. In the light of the above considerations, it must be concluded that, by holding, without ascertaining that the anti-competitive effects have been found not to persist and, if appropriate, had been found not to be such as to give the complaint a Community interest, that the investigation of a complaint relating to past infringements did not correspond to the task entrusted to the Commission by the Treaty but served essentially to make it easier for the complainants to show fault in order to obtain damages in the national courts, the Court of First Instance took an incorrect view of the Commission's task in the field of competition."

(c) *The position in Community law after 1 May 2004*

207. Although not directly relevant to the outcome of the present case, it is appropriate to complete the picture under Community law as it now prevails after 1 May 2004. As far as we can see, the rights of complainants under Community law described above have been fully confirmed since that date.

208. Regulation 1/2003, often known as "the Modernisation Regulation" but now referred to in the 1998 Act, as amended, as the "EC Competition Regulation"[4] repeals Regulation 17 and introduces, among other things, a number of fundamental changes in Community

[4] See the 2004 Amendment Order, cited in paragraph 1 above

competition law and procedure. Regulation 1/2003 came into force on 1 May 2004, although it had already been adopted on 16 December 2002, prior to the decision in this case.

209. The first change made by Regulation 1/2003 is the abolition of the previous system of notification, and the administrative grant of exemption under Article 81(3) by the EC Commission, in favour of a system based on the direct application of both Article 81(1) and 81(3). Under the new system, an agreement will infringe Article 81 if it falls within Article 81(1) and does not satisfy the provisions of Article 81(3), no administrative notification or prior decision being required: see Article 1. That has the consequence, among other things, that national authorities and national courts may have to determine whether Article 81(3) applies, whereas previously that issue was reserved exclusively to the EC Commission.

210. The second change made by Regulation 1/2003 is that the power to enforce Articles 81 and 82 of the Treaty is now conferred on the competition authorities of the Member States, as well as on the Commission. Article 5 of Regulation 1/2003 provides:

> "The competition authorities of the Member States shall have the power to apply Articles 81 and 82 of the Treaty in individual cases. For this purpose, acting on their own initiative or on a complaint, they may take the following decisions:
>
> - requiring that an infringement be brought to an end,
> - ordering interim measures,
> - accepting commitments,
> - imposing fines, periodic penalty payments or any other penalty provided for in their national law.
>
> Where on the basis of the information in their possession the conditions for prohibition are not met they may likewise decide that there are no grounds for action on their part."

211. The third change made by Regulation 1/2003 is that when national competition authorities, such as the OFT, apply national competition law (i.e. the Chapter I prohibition) to agreements, decisions by associations of undertakings or concerted practices within the meaning of Article 81 of the Treaty, which may affect trade between Member States within the meaning of that provision, or apply national competition law (i.e. the Chapter II

prohibition) to any abuse prohibited by Article 82 of the Treaty, they shall also apply Article 81 or Article 82 of the Treaty, as the case may be: Article 3(1) of Regulation 1/2003.

212. As far as the powers of the EC Commission are concerned, the Commission's power to find an infringement, "acting on a complaint or on its own initiative", is set out in Article 7(1) of Regulation 1/2003. Under Article 7(2):

> "Those entitled to lodge a complaint for the purposes of paragraph 1 are natural or legal persons who can show a legitimate interest and Member States".

213. Article 9 of Regulation 1/2003 gives the EC Commission power to accept commitments without proceeding to a final decision of infringement. Article 9 provides:

> "1. Where the Commission intends to adopt a decision requiring that an infringement be brought to an end and the undertakings concerned offer commitments to meet the concerns expressed to them by the Commission in its preliminary assessment, the Commission may by decision make those commitments binding on the undertakings. Such a decision may be adopted for a specific period and shall conclude that there are no longer grounds for action by the Commission."

214. Article 10 of Regulation 1/2003 gives the Commission power, in the public interest, to make a finding of inapplicability in respect of Article 81 and 82.

215. As regards the hearing of the parties, complainants, and others are concerned, Article 27 of Regulation 1/2003 provides:

> "1. Before taking decisions as provided for in Articles 7, 8, 23 and Article 24(2), the Commission shall give the undertakings or associations of undertakings which are subject of the proceedings conducted by the Commission the opportunity of being heard on the matters to which the Commission has taken objection. The Commission shall base its decisions only on objections on which the parties concerned have been able to comment. Complainants shall be associated closely with the proceedings
> …
>
> 3. If the Commission considers it necessary, it 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. The

competition authorities of the Member States may also ask the Commission to hear other natural or legal persons.

4. Where the Commission intends to adopt a decision pursuant to Article 9 or Article 10, it shall publish a concise summary of the case and the main content of the commitments or of the proposed course of action. 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 one month. Publication shall have regard to the legitimate interest of undertakings in the protection of their business secrets."

216. Pursuant to Article 33 of Regulation 1/2003 the provisions of that Regulation relating to complaints and hearings are implemented by Commission Regulation (EC) no. 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82, OJ 2004 2123/18 ("Regulation 773/2004"). Recitals (5) to (9) of that Regulation provide:

"(5)Complaints are an essential source of information for detecting infringements of competition rules. It is important to define clear and efficient procedures for handling complaints lodged with the Commission.

(6) In order to be admissible for the purposes of Article 7 of Regulation (EC) No 1/2003, a complaint must contain certain specified information.

(7) In order to assist complainants in submitting the necessary facts to the Commission, a form should be drawn up. The submission of the information listed in that form should be a condition for a complaint to be treated as a complaint as referred to in Article 7 of Regulation (EC) No. 1/2003.

(8) Natural or legal persons having chosen to lodge a complaint should be given the possibility to be associated closely with the proceedings initiated by the Commission with a view to finding an infringement. However, they should not have access to business secrets or other confidential information belonging to other parties involved in the proceedings.

(9) Complainants should be granted the opportunity of expressing their views if the Commission considers that there are insufficient grounds for acting on the complaint. Where the Commission rejects a complaint on the grounds that a competition authority of a Member State is dealing with it or has already done so, it should inform the complainant of the identity of that authority."

217. Article 5(1) of Regulation 773/2004 provides:

> "1. Natural and legal persons shall show a legitimate interest in order to be entitled to lodge a complaint for the purposes of Article 7 of Regulation (EC) No 1/2003.
>
> Such complaints shall contain the information required by Form C, as set out in the Annex. The Commission may dispense with this obligation as regards part of the information, including documents, required by Form C."

218. Articles 6 to 8 of Regulation 774/2004 provide:

> "Article 6
>
> Participation of complainants in proceedings
>
> 1. Where the Commission issues a statement of objections relating to a matter in respect of which it has received a complaint, it shall provide the complainant with a copy of the non-confidential version of the statement of objections and set a time-limit within which the complainant may make known its view in writing.
>
> 2. The Commission may, where appropriate, afford complainants the opportunity of expressing their views at the oral hearing of the parties to which a statement of objections has been issued, if complainants so request in their written comments.
>
> Article 7
>
> Rejection of complaints
>
> 1. Where the Commission considers that on the basis of the information in its possession there are insufficient grounds for acting on a complaint, it shall inform the complainant of its reasons and set a time-limit within which the complainant may make known its views in writing. The Commission shall not be obliged to take into account any further written submissions received after the expiry of that time-limit.
>
> 2. If the complainant makes known its views within the time-limit set by the Commission and the written submissions made by the complainant do not lead to a different assessment of the complaint, the Commission shall reject the complaint by decision.
>
> 3. If the complainant fails to make known its views within the time-limit set by the Commission, the complaint shall be deemed to have been withdrawn.

Article 8

Access to information

1. Where the Commission has informed the complainant of its intention to reject a complaint pursuant to Article 7(1) the complainant may request access to the documents on which the Commission bases its provisional assessment. For this purpose, the complainant may however not have access to business secrets and other confidential information belonging to other parties involved in the proceedings.

2. The documents to which the complainant has had access in the context of proceedings conducted by the Commission under Articles 81 and 82 of the Treaty may only be used by the complainant for the purposes of judicial or administrative proceedings for the application of those Treaty provisions."

219. Those provisions are now further elaborated on in the Commission's *Notice on the handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty* published on 27 April 2004, OJ 2004 C101/65 ("The Commission's Complaints Notice"). The Commission's Complaints Notice contains a detailed description of the Commission's practice and procedure in handling complaints, and of the rights of complainants, as set out in numerous decisions of the Court of Justice and the Court of First Instance cited in the Commission's Complaints Notice.

(d) *Implementation of Regulation 1/2003 in the United Kingdom*

220. The Competition Act 1998 and Other Enactments (Amendment) Regulations 2004 SI 2004 no. 1261 ("the 2004 Amendment Order"), made under section 2(2) of the European Communities Act 1972 and section 209 of the Enterprise Act 2002, amend the 1998 Act in order to give effect to Regulation 1/2003 as from 1 May 2004. Sections 31A to 31E, and Schedule 6A, as inserted by the 2004 Amendment Order[5], give the OFT a statutory power to accept commitments. The procedure set out in Schedule 6A envisages that, before accepting any such commitments, the OFT must give notice to persons likely to be affected, setting out the relevant facts and matters, and permit representations to be made. The OFT may not accept the commitments until after it has considered such representations: see Schedule 6A, paragraphs 2 and 8. The commitments must be published: paragraph 7. By virtue of section

[5] Schedule 1, paragraphs 18 and 52

47(1)(c) of the 1998 Act, as inserted by the 2004 Amendment Order[6], a decision of the OFT to accept or release commitments under section 31A is appealable to the Tribunal by a third party who shows a sufficient interest. Under Schedule 8, paragraph 3A of the 1998 Act, as inserted by the 2004 Amendment Order,[7] the Tribunal must determine such an appeal by applying the same principles as would be applied by a court on an application for judicial review.

221. In April 2004 the OFT published for consultation a draft *Guideline on Enforcement*, including the OFT's guidance on when it would be appropriate to accept commitments. That document indicates, among other things, that the OFT will not accept binding commitments in cases involving a serious of abuse of a dominant position, as assessed by the OFT, nor where the OFT considers that not to complete its investigation and make a decision would undermine deterrence (paragraphs 4.4. and 4.5.). The OFT also states that it is unlikely to consider it appropriate to accept commitments offered at a very late stage in its investigation, for example, after the OFT has considered representations in response to its statement of objections (paragraph 4.17).

222. As far as we are aware there has not, or not yet, been any specific implementation in the United Kingdom of procedures for handling complaints equivalent to those envisaged by Articles 7(2) and 27 of Regulation 1/2003, as now implemented at Community level by Regulation 773/2004 and the EC Commission's Complaints Notice.

223. Since the present case is not concerned with the situation after 1 May 2004, we do not have to address the question of how far the United Kingdom, when implementing Regulation 1/2003, was obliged to adopt provisions equivalent to those set out above. Nor do we have to decide whether the OFT, when applying Articles 81 and 82, either alone or in conjunction with national law under Article 3 of Regulation 1/2003, would be obliged, whether under Community law or otherwise, to follow procedures in complainants' cases equivalent to those now established at Community level. Nor do we have to address the further question of whether or not the same would apply when the OFT was applying the 1998 Act alone in a case where there is no effect on trade between Member States. We venture to suppose, however, that one or more of those questions are likely to arise sooner rather than later.

[6] Schedule 1, paragraph 30
[7] Schedule 1, paragraph 52

Analysis of the procedural issues

224. Against that background we start from the premise that, as far as the domestic statutory provisions are concerned, there was no express statutory requirement for the OFT either to disclose the Rule 14 notice to Pernod or to give Pernod an opportunity to comment before closing the file on its complaint. It is, however, common ground that there was a discretion to do so.

225. Taking the situation under Community law, at the time the contested decision was taken in this case – 30 January 2003 – a complainant had at least the following rights under Community law:

(i) To make a complaint to the EC Commission: Art 3(2) of Regulation 17.

(ii) If the EC Commission proceeded to issue a statement of objections, to receive a non-confidential copy of the statement of objections, and to make written (and usually oral) comments on the statement of objections: Article 19(2) of Regulation 17, Articles 7 and 8 of Regulation 2842/98.

(iii) If the EC Commission came to the view that there were insufficient grounds for acting on the complaint, to be so informed in writing and be given an opportunity to make written comments before the complaint was rejected: Article 6 of Regulation 2842/98.

(iv) To be given reasons if the Commission decided not to continue with the examination of a complaint, including the facts and legal considerations relied on, such reasons to be sufficiently precise and detailed to enable the Court of First Instance to review the Commission's use of its discretion to define priorities: *UFEX*, cited above, at paragraphs 90 to 91.

(v) To have the fate of the complaint settled by a decision of the EC Commission against which an action may be brought: *UFEX*, cited above, at paragraph 86.

226. As far as the domestic law in the United Kingdom is concerned, a complainant under the 1998 Act has a right equivalent to (i). Despite the lack of any formal procedure, Pernod were entitled to complain to the OFT. In our view such complaints are an essential element in the proper functioning of the 1998 Act.

227. In the present case, the issues concern the position in domestic law as regards (ii) and (iii) above. As to (ii), in this case the OFT did not supply Pernod with the Rule 14 notice. As to (iii), in this case the OFT closed its file on Pernod's complaint, without giving Pernod any prior opportunity to comment before its complaint was rejected. Pernod simply received the letter of 30 January 2003 stating that, "we have closed our investigation into Bacardi". That, by necessary implication, was also a decision to close the OFT's investigation of Pernod's complaint. Although thereafter Pernod was able to follow the procedure then envisaged by section 47(1) (but abrogated with effect from 20 June 2003 by the Enterprise Act 2002), that procedure was not triggered until *after* the OFT's decision to close the file was taken.

228. Against that background, the first question that arises, it seems to us, is the application in this case of Section 60 of the Act set out at paragraph 138 above. For convenience we reproduce section 60(1) and (2):

> "(1) The purpose of this section is to ensure that so far as is possible (having regard to any relevant differences between the provisions concerned), questions arising under this Part in relation to competition within the United Kingdom are dealt with in a manner which is consistent with the treatment of corresponding questions arising in Community law in relation to competition within the Community.
>
> (2) At any time when the court determines a question arising under this Part, it must act (so far as is compatible with the provisions of this Part and whether or not it would otherwise be required to do so) with a view to securing that there is no inconsistency between –
>
> > (a) the principles applied, and decision reached, by the court in determining that question; and
> > (b) the principles laid down by the Treaty and the European Court, and any relevant decision of that Court, as applicable at that time in determining any corresponding question arising in Community law."

Section 60 binds both the OFT and the Tribunal.

229. Taking section 60(1) first, the questions that arise in this case are whether Pernod had (a) a right to be heard on the matters set out in the Rule 14 notice and (b) a right to have the opportunity to comment before the OFT decided not to take its complaint any further. The "corresponding question" under Community law is, in our view, what are the principles of administrative fairness which apply in relation to competition, i.e. in the sphere covered by

the competition rules of the Treaty? Thus, although the question with which we are dealing does not relate directly to competition, as would for example a question covering the scope and meaning of the Chapter II prohibition, it seems to us that the question at issue does arise "in relation to competition" within the meaning of section 60(1), at least indirectly, since it concerns the procedural principles to be applied in the application and enforcement of the competition rules. We add that complaints to the OFT and the EC Commission play a central role in both the Community and domestic systems of competition law, and may in many cases be the only means of detecting the abuse of monopoly power or illegal agreements. The procedures by which such complaints are handled have, in our view, a key bearing on how effectively the competition rules set up by Treaty, and adopted in the 1998 Act, are applied and enforced in practice. If that approach is correct, it would follow that we should, so far as possible, decide this case consistently with the corresponding provisions of Community law.

230. As to "any relevant differences between the provisions concerned", to which the Tribunal must have regard, there is nothing in the Act or the Director's Rules which *prevents* the participation of the complainant in the ways indicated above. It is not therefore a case of a positive provision of the Act or of subordinate legislation precluding an approach which is in conformity with Community law. It is simply that the existing procedural framework does not *expressly* provide for complainants' rights in the same way as Community law does.

231. Turning to sub-section (2) of section 60, that sub-section does not repeat the words "in relation to competition" found in sub-section (1), although it is true that sub-section (1) refers to the "purpose of this section", which phrase may include sub-section (2). However, the OFT has referred us to a passage in the debates on the Competition Bill (see paragraph 110 above) which indicate that "the principles" referred to in sub-section (2) were intended to include not just the principles of competition law strictly so called, but other principles of Community law relevant to the enforcement of competition law. Thus, it was said on behalf of the Government that section 60 was intended to import "high level principles, such as proportionality, legal certainty and administrative fairness" into domestic law (Hansard 25 November 1997, column 961). Having been invited to do so by the OFT, in order to resolve any perceived ambiguity in section 60, we take note of that statement having regard to *Pepper (Inspector of Taxes) v Hart* [1993] A.C. 593.

232. In relation to "administrative fairness" we have already indicated above that in Community law, the principle that the complainant has a "right to be heard" has stood for forty years, since the Community system was set up in 1962. The implementation of that principle takes the form of two further principles, namely

(i) that the complainant is entitled to be heard when a statement of objections is issued: see variously Article 19(2) of Regulation 17, Article 5 of Regulation 99, Articles 7 and 8 of Regulation 2482/98, Article 27 of Regulation 1/2003 and Article 6 of Regulation 774/2004 ; and

(ii) that a complainant is entitled to be heard before the Commission decides not to examine its complaint any further: see Article 6 of Regulation 99, Article 6 of Regulation 2482/98 and Article 7 of Regulation 774/2004.

233. The consistent development of the case law since 1962 (see e.g. paragraphs 204 and 205 above) reinforces our view that the procedural opportunities afforded to complainants form a basic element of administrative fairness in the system of Community competition law as a whole. The principle of administrative fairness as regards complainants finds its expression in the legislative provisions we have already referred to above.

234. In all these circumstances, we are of the view that, by virtue of section 60 of the Act, we should resolve the questions before us in the same way as they would be resolved under Community law in an equivalent situation. Indeed, it seems to us that section 60(2) of the Act gives us little or no choice in the matter. Nor can we see any good reason for not following Community law in situations such as that arising in the present case as regards complaints by competitors. The system as it has evolved under Community law appears to have worked satisfactorily, and has been an important element in ensuring fairness, transparency and rigour in decision making. We would have thought it undesirable if, at this stage of the development of Community law, the United Kingdom should go the other way on an issue such as this.

235. Turning to domestic administrative law, and looking at it from the point of view as to how the OFT should exercise its discretion under the 1998 Act, we take the general principle to be that where Parliament has conferred an administrative power, that power is to be exercised in manner which is fair in all the circumstances. What is fair in all the circumstances depends notably, on the context of the particular decision in question and on the "shape of the legal

and administrative system in which the decision is taken", having regard to the particular statute in question: see Lord Mustill in *R v Security of State for the Home Department ex parte Doody* [1994] 1 AC 531, at 560, as cited by Lord Woolf in *R v Home Secretary ex p. Fayed* [1998] 1 WLR 763, at 766.

-Disclosure of a Rule 14 notice

236. Turning first to the issue regarding the Rule 14 notice, on which the OFT has sought the Tribunal's guidance, the context of this particular case is as follows:

- Bacardi has a 90% market share in the supply of white rum.
- Pernod is a new market entrant challenging that high market share through Havana Club.
- Pernod complained to the OFT about a number of practices having the effect of excluding or eliminating Havana Club from the market.
- The OFT conducted a detailed investigation lasting 2½ years, including resort to external consultants.
- The OFT sought a great deal of information from Pernod, some at least of which was apparently used in the Rule 14 notice.
- Pernod's interests were directly and closely affected by the outcome of the OFT's investigation.
- Pernod provided submissions to the OFT, and regularly sought information about the progress of its complaint and meetings with the OFT, largely unsuccessfully, throughout the 2½ years that the matter was being investigated.

237. In circumstances such as those, it seems to us, it would generally be proper, as a matter of fairness in administrative law, for the OFT, in exercising its discretion, to disclose a non-confidential version of the Rule 14 notice to a complainant in a position equivalent to that of Pernod. Such a course, in our view, enables the complainant, if he wishes, to put forward his point of view on an informed basis, instead of being largely in the dark . It is also likely to facilitate the OFT's understanding of the case and its implications, and lead to a sounder decision. Such a course is also likely, in our view, to introduce an important element of transparency and balance into the administrative proceedings which are conducted behind closed doors. It is particularly at the stage of the Rule 14 notice that defendant companies,

often powerful and well resourced concerns, will understandably enough deploy all available substantive or tactical arguments to persuade the OFT to abandon or modify its position.

238. Moreover, whatever the strict interpretation of section 60, in deciding what would be a fair and reasonable exercise of the OFT's discretion, we think we are entitled to take into account how the EC Commission would proceed in similar circumstances. It is also desirable, in our view, that the OFT's discretion should be exercised on a consistent and predictable basis. For those reasons, absent exceptional circumstances, we think the OFT's discretion should normally be exercised in favour of disclosure of a non-confidential version of the Rule 14 notice in circumstances comparable to those of the present case.

- *The right to be heard before a complaint is rejected*

239. As to the procedure to be followed where the OFT decides to discontinue its examination of a complaint, we are dealing in this case with a complainant in the position of Pernod. As regards such complainants, again having regard also to the general context, and to the provisions of Community law on which the United Kingdom system is modelled, it seems to us that it would be a reasonable exercise of the OFT's discretion to give such a complainant the opportunity to submit its views to the OFT *before* a decision is taken not to investigate the complaint any further, in accordance with the consistent practice followed by the EC Commission. In the circumstances of this particular case, we think it was unfair not to do so, given notably the specific factors identified at paragraph 236 above, namely that:

- Bacardi has a 90% market share in the supply of white rum.
- Pernod is a new market entrant challenging that high market share through Havana Club.
- Pernod complained to the OFT about a number of practices having the effect of excluding or eliminating Havana Club from the market.
- The OFT conducted a detailed investigation lasting 2½ years, including resort to external consultants.
- The OFT sought a great deal of information from Pernod, some at least of which was apparently used in the Rule 14 notice.
- Pernod's interests were directly and closely affected by the outcome of the OFT's investigation.

- Pernod provided submissions to the OFT, and regularly sought information about the progress of its complaint and meetings with the OFT, largely unsuccessfully, throughout the 2½ years that the matter was being investigated.

240. In addition, we also note that according to the OFT's draft guideline on how it will exercise its discretion to accept binding commitments in the future (paragraph 221 above) it will be unusual to accept such assurances at a late stage after a Rule 14 notice has been issued. That is, however, what happened in the present case.

- *Other considerations*

241. Our conclusions on both the issues considered above are reinforced by the fact that, under section 47 of the Act, Parliament has expressly conferred rights of appeal to the Tribunal on persons demonstrating a sufficient interest, which Pernod has shown in this case. Having regard to the general system of the Act, it seems to us desirable that complainants should be afforded a structured opportunity to be heard by the OFT before decisions are taken, rather than having to raise matters for the first time before the Tribunal in circumstances where the complainant has been kept by the OFT largely at arms-length during the administrative process. If complainants are "closely associated with the proceedings" as Article 27(1) of Regulation 1/2003 now requires, that in our view is likely to lead to fewer and less costly appeals, and better decision making.

242. We emphasise that, in reaching the above conclusions, we accept the OFT's submission that the Act does not envisage an adversarial system in which the function of the OFT is to arbitrate on complaints. Community law is not an adversarial system either (see Cases 142 and 156/84 *BAT and R J Reynolds v Commission* [1987] ECR 4487 at paragraph 19). However, that does not preclude the need to afford the complainant an opportunity to defend its interests during the administrative proceedings (ibid, paragraph 20).

243. We also point out that the Community system, amongst other things, provides for the possibility of the EC Commission entering into confidential negotiations in order to allow the companies concerned to bring their agreements or practices into conformity with the rules laid down by the Treaty: *BAT and Reynolds*, paragraphs 23 and 24. The OFT can, therefore, in principle, conduct negotiations about the possibility of accepting undertakings in

confidence, subject to the possible application of the principles set out in Schedule 4, paragraph 2 of the 2002 Act if the matter were subsequently to reach the Tribunal. That is no doubt a valuable tool in the OFT's armoury, enabling appropriate cases to be settled. On the other hand, it is in our view essential, from the point of view of fairness and transparency, that the complainant be informed of the outcome of the negotiations, and given an opportunity to be heard *before* the OFT closes its file on the complaint: *BAT and Reynolds*, at paragraph 24. That, in effect, means that the OFT cannot definitively commit itself to accepting the undertakings without giving the complainant the chance to comment.

244. Such a system, as a system, seems to us to be not dissimilar from the system now envisaged when the OFT is minded to accept binding commitments under what is now sections 31A to 31G of the 1998 Act as amended. That system is also similar in principle to that which ordinarily applies where the OFT is minded to accept undertakings in lieu of a merger reference under the Enterprise Act 2002 pursuant to Section 73 and Schedule 10 of that Act, or in lieu of a market investigation under sections 154 and 155 of that Act.

245. We also stress that in this judgment we are dealing with the circumstances of this particular case, and not with the apparently numerous 'complaints' received by the OFT which have little or nothing to do with the 1998 Act, or which are too vague or insubstantiated to form a basis for further investigation. Nor are we dealing with the case of a complainant as a member of the public whose position is no different from other members of the public.

Specific application of the principles in this case

246. It follows, in our view, from the foregoing that in the specific circumstances of this case the OFT should have:

(i) provided to Pernod a non-confidential version of the Rule 14 notice

(ii) given Pernod an opportunity to submit observations before deciding to close its file on Pernod's complaint.

247. It does not, however, necessarily follow in our view, that it would be appropriate to set aside the OFT's decision of 30 January 2003 to close the file in the exercise of the Tribunal's powers under paragraph 3(2) of Schedule 8 of the 1998 Act.

248. First, as regards the Rule 14 notice, it is not wholly clear to what extent Pernod specifically sought sight of the Rule 14 notice in the course of the administrative procedure. The e-mail of 3 July 2002 merely states "The OFT say they will not provide us with a copy of the Rule 14 notice". There is no letter on the file from Pernod to the OFT which makes an explicit written request to see the Rule 14 notice.

249. More importantly, the failure to disclose the Rule 14 notice is not raised in the notice of appeal as one of Pernod's grounds of appeal, and was not raised by Pernod at all until the Tribunal intimated that it would like to hear submissions on the point. Pernod's notice of appeal, at paragraph 3.41, assumes that Pernod had no right to see that document: "CDL has not of course seen the Rule 14 notice".

250. Thirdly, the failure to let Pernod see a non-confidential copy of the Rule 14 notice of 28 June 2002 seems to us by now to have been largely overtaken by events.

251. Accordingly, in the specific circumstances of this case, we do not base this judgment on the failure to disclose the Rule 14 notice to Pernod.

252. As regards the failure to consult Pernod before deciding to cease examining Pernod's complaint, it does appear that "failure of the OFT to consult the Appellant" is raised as an issue at p.29 of the notice of appeal. Albeit that the arguments there set out are extremely sparse, we take the view that that constitutes a "ground of appeal" within the principles recently set out by the Tribunal in *Floe Telecom Limited (in administration) v OFCOM* [2004] CAT 7. The issue was also raised in Pernod's letter to the OFT of 28 February 2003.

253. As already stated, we regard the failure to allow Pernod to make observations before closing the file on its complaint as a breach of the principle of administrative fairness. However, in this particular case, Pernod has had the opportunity of raising its concerns, both in its letter to the OFT of 28 February 2003 and in its notice of appeal of 15 July 2003. The OFT, for its part, has provided in its defence the reasons why it considered that the activity permitted by

the assurances did not infringe the Chapter II prohibition, and why those assurances "removed the competition problem". In those circumstances, it seem to us, provisionally, that at this stage there would be little to be gained by remitting this case back to the OFT to reopen the file in order for Pernod to state its views, or to enable a formal "consultation" to take place.

254. In these circumstances it seems to us that, realistically speaking, the live issues remaining in this appeal are Pernod's arguments that "The Assurances do not adequately address the competition problem" set out at paragraphs 4.30 to 4.41 and Annex 15 of the notice of appeal, and that "The OFT unlawfully fettered its discretion in dealing with future infringements by Bacardi" at paragraph 4.43 of the notice of appeal. There is also the related issue of Pernod's argument as to the Director's reasons at paragraphs 4.16 to 4.29, albeit that that may no longer be a live issue at this stage, since the OFT has now set out in more detail the reasons for its decision.

255. In such circumstances it seems to us that the correct course is for the Tribunal now to hear submissions from the parties with a view to deciding what relief, if any, should be granted at this stage and/or what is the most just and economical way of dealing with the remaining issues in these proceedings. The Registry will accordingly fix a date for a further hearing in this case on that and any other matter arising at this stage.

Christopher Bellamy Paul Stoneman David Summers

Charles Dhanowa
Registrar 10 June 2004