IN THE COMPETITION APPEAL TRIBUNAL

CASE NO 1017/2/1/03

PERNOD RICARD SA

CAMPBELL DISTILLERS LIMITED

v

THE OFFICE OF FAIR TRADING

supported by

BACARDI-MARTINI LIMITED

Bacardi's outline submissions for hearing on 27 January 2004

A. INTRODUCTION

1 The issues on which the Tribunal wishes to hear argument, as set out in its letter of 18 November 2003 and elaborated at the hearing on 16 January 2004, are identified in the OFT's letter to the Tribunal of 16 January They are in short.

(1) the admissibility of the appeal;

(2) the procedure to be followed by the OFT in cases such as the present (requiring consideration of the questions whether (a) the OFT should have sent Pernod the Rule 14 Notice and/or (b) should have consulted Pernod on the draft assurances while they were being negotiated with Bacardi), and

(3) the legal basis for the acceptance of assurances by the OFT.

2 Bacardi's submissions in relation to the first issue are contained in its outline intervention statement lodged on 3 November 2003, notably in paragraphs 37-70 to which the members of the Tribunal are respectfully referred Bacardi will explain those submissions and respond as necessary to points made by the other parties ("Pernod" and "the OFT" respectively) at the hearing.

3 This skeleton argument accordingly addresses issues (2) and (3) The question whether any conclusion reached by the Tribunal on those issues has an impact on the validity of the contested measures only arise for determination by the Tribunal if the application is declared admissible (and then only in so far as any issue as to the correctness of the procedure followed by the OFT has been raised by Pernod in its application).

4. Bacardi will approach those two issues in reverse order, as the question of the appropriate procedure may be affected by the legal framework in which it operates

B. LEGAL BASIS

5 There is no explicit provision in the Competition Act 1998 ("the Act") empowering the OFT to negotiate and accept voluntary assurances in the context of a file closure decision Nor do the Director's Rules (SI 2000/293) which govern the OFT's procedure describe such a power or the manner of exercising it

6 However, that does not mean that the OFT may not, in pursuance of the tasks and responsibilities entrusted to it, negotiate and accept such assurances The OFT has a discretion whether to take up a case[1] and a discretion as to whether or not to proceed to a decision[2]

7 It is submitted that it is likewise a matter for discretion whether a file closure decision may be accompanied by or include the acceptance of voluntary assurances as to conduct, and that, in principle, the acceptance of such assurances should be seen as a positive feature, enhancing the effects of a bare decision to close the file[3]

8. It may be noted that the EC Commission has an extensive practice of accepting voluntary undertakings in competition cases, despite the lack of any express power for it to do so in Regulation 17 Examples include IBM (1984), Irish Distillers (1988), Microsoft (1994), Digital (1997), SWIFT (1997) and NLNG (2002) [4]

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1 Section 25 of the Act provides that the OFT "may" conduct an investigation if there are reasonable grounds for suspicion of an infringement

2 As the Tribunal has recognised in its judgments on admissibility see BetterCare Group Limited v Director General of Fair Trading [2002] CAT 6 para [80], also quoted in Freeserve com plc v Director General of Telecommunications [2002] CAT 8 para [70] Of course, in certain circumstances such a decision may fall within the category of decisions susceptible to appeal to the Tribunal under sections 46 and 47

3 Whether the assurances accepted in a particular case are adequate or objectionable is of course an issue of substance Bacardi's outline intervention statement sets out in some detail its reasons for submitting that the objections raised by Pernod are baseless (see paragraphs 73 to 98)

4 IBM XIV report on Competition Policy, pts 94 and 95 (1984), XVI Report on Competition Policy, pt 75 (1986), XVII Report on Competition Policy, pt 85 (1987), XVIII Report on Competition Policy, pt 78 (1988), XXI Report

9 Bacardi submits that the lack of any explicit statutory basis for the acceptance of assurances does not affect the legality of the course chosen by the OFT (and Pernod does not suggest otherwise in its application)

C. PROCEDURE TO BE FOLLOWED BY OFT

1 No basis for annulment

10. Bacardi first stresses that the only procedural failing put forward by Pernod as a ground of annulment of the contested measures is the allegation that, by not consulting Pernod on the content of the assurances offered by Bacardi before their acceptance by the OFT, the OFT failed to follow the procedure laid down in section 31(2) of the Act: see paragraph 4.42 of the application Pernod does not seek relief on any other procedural ground, and in particular there is no claim in its application that the procedure followed by the OFT was defective by reason of a failure by the OFT to supply to Pernod the Rule 14 Notice (whether in draft, or in a non-confidential version, whether full or summarised)[5].

11. For the reasons given by the OFT in paragraphs 144 to 151 of the draft defence, Pernod's argument in relation to the failure to consult cannot succeed the s 31(2) procedure is only applicable if the OFT proposes to make an infringement decision[6] Pernod's case is put expressly on the basis that the OFT did not make an infringement decision here see paragraph 4 5 of the application

12 It follows that, whatever guidance the Tribunal may give on the procedure to be followed in cases such as this, it cannot lead to the annulment of the contested measures The Tribunal "must determine the appeal on the merits by reference to the grounds of appeal set out in the notice of appeal" (paragraph 3(1) of Schedule 8 to the Act).

13 The Tribunal has raised the issue of the impact of the coming into force of the "modernisation" of EC competition law through Regulation 1/2003 on procedures to be followed by the national competition authorities Whilst recognising the far-reaching

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on Competition Policy, pt 106 (1991), Irish Distillers Group XVIII Report on Competition Policy, pt 80 (1988), Microsoft IP/94/653 of 17/7/1994, Digital IP/97/868 of 10/10/1997, SWIFT IP/97/870 of 13/10/1997, OJ 97/C 335/03, NLNG IP/02/1869 of 12/12/2002

5 As noted at paragraph 100 of Bacardi's outline intervention statement, all Pernod says at paragraph 3 41 of the application is that "CDL has of course not seen the rule 14 notice"

6 Bacardi understands that the obligation in s 31(2) is put into effect through Rule 14 of the Director's Rules

importance of this development, Bacardi will confine its observations to the current state of the law, by which the present case falls to be decided[7].

2 Observations on procedure followed

14 It follows from the fact that the OFT's acceptance of the assurances is not based on explicit legal provisions (see section B above) that there are no explicit legal requirements on the OFT as to the procedure to be followed flowing directly from the Act or the Director's Rules. Bacardi's submission as to the inapplicability of s 31(2) in this context is set out above

15 Bacardi submits that no such requirements flow from any other source of law Bacardi will mention directly applicable EC law, section 60 of the Act and fundamental rights (flowing either from EC law or the Human Rights Act 1998)

16 As regards directly applicable EC law, there is no EC obligation affecting the manner in which a national competition authority such as the OFT may proceed when applying national competition law. The Act, in voluntarily adopting a system modelled as to substance on Articles 81 and 82 EC but as to procedure deliberately taking a different course to Regulation 17 in some respects, reflects a choice which the legislator was fully entitled to make and to which EC law places no obstacle

17 As regards s.60, Bacardi submits that it does not impose an obligation on the OFT to ensure that there is no inconsistency with EC procedural law Section 60 sets out the principles to be applied in determining questions which arise under Part I of the Act "in relation to competition" within the UK Section 60(1) explains the purpose of the section, namely to ensure that so far as is possible (having regard to the relevant differences between the provisions concerned), questions arising in relation to competition within the UK are to be dealt with in a manner which is consistent with the treatment of corresponding questions arising in EC competition law Section 60(2) imposes an obligation, on the OFT amongst others, to ensure a consistency of approach However, there was no intention to make the OFT follow exactly the same procedure as the EC Commission, a position which would clearly be undesirable given the differences between the systems The Government confirmed in Parliament that "In making the procedural rules, the [OFT] is not obliged to secure that there is no inconsistency with the EC

[7] The Tribunal has made it clear that it does not take any different view see transcript of 16 January hearing, (page 5 lines 35 to 37)

procedural law since [the OFT] will not be 'determining a question' under Part I"[8] The procedure adopted, in the Act and in the Director's Rules (which were required to be approved by the Secretary of State), deliberately take a different procedural approach to that adopted in the EC system, including as to the rights of third party complainants There is no basis for any assumption that the UK system is any less fair than the EC system simply because it is different

18. Bacardi submits that the reference to "questions arising .. in relation to competition..." does not extend to procedural questions arising in relation to the enforcement of the competition rules. The procedural system adopted in the Director's Rules is or contains a "relevant difference" or more than one such difference from that applying under EC competition law, such that there is no obligation of consistency laid on the OFT

19 As regards fundamental rights, Bacardi submits that, while procedural issues fall to be scrutinised with particular care in respect of an undertaking accused of an infringement which is facing the possibility of a heavy penalty and substantial limitations on its commercial freedom in the event of an adverse decision, no such rights of defence considerations apply in respect of a trade complainant A competition authority such as the OFT should (in the absence of express legal provisions) accordingly be given a wide margin of discretion in deciding the extent to which it involves such a complainant in its procedure

20 It follows that it is indeed a matter of discretion for the OFT whether or not to supply the Rule 14 Notice in some form or other to a complainant or to consult such a complainant in the event that it is considering the acceptance of voluntary assurances when closing the file

21 As regards the question whether the OFT should have disclosed the Rule 14 Notice in some form to Pernod, Bacardi notes first that Pernod supplies no evidence that it made any request to see the Notice.

22 However, the correspondence that it has disclosed, even in its redacted state[9], shows that in fact Pernod was aware of the developments in the OFT's thinking about the crucial issues, notably product market definition (i.e. is white rum in a distinct market from vodka) and segmentation (i e. does the wholesale supply of white rum to the on-trade lie in a

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[8] Hansard House of Lords' debates, 25 November 1997, column 961 See also Hansard House of Lords' debates, 5 March 1988 columns 1363-1365

[9] For the record, Bacardi notes that it reserves its position on the extent of Pernod's confidentiality claims – see footnote 14 of the outline intervention statement

separate market from the wholesale supply of white rum to the off–trade). It was given every opportunity to comment and assist – see the correspondence attached to the application at Annex 8, especially page 65 (e-mail to Pernod's solicitors from the OFT of 19 October 2001 in which the OFT fully sets out both issues and says it will be "grateful for any further views Pernod Ricard might have on the question of market definition" and invited it to answer as many questions as it could on an attached list). Pernod accepted that invitation to the extent that it chose[10] Having done so, it is in no position to complain that it would have been able to correct the alleged flaws in the OFTs understanding if it had seen the Rule 14 Notice - and, as already noted, it has in fact made no such complaint Indeed, it seems that the OFT accepted the market definition for which Pernod had been contending (see page 73 of Annex 8 where that precise point is made by Pernod's advisers)

23 Accordingly, even if the Tribunal were to take the view that the OFT should ordinarily disclose the Rule 14 Notice to complainants, it would not have made any practical difference in the present case if that course had been followed. The OFT in effect did disclose to Pernod the relevant parts for Pernod's comments

24. As regards consultation before acceptance of voluntary assurances, it may be noted by way of analogy that the OFT has a discretion whether or not to consult the public when it is considering reaching a decision that there has been no infringement of the Chapter II prohibition when it has a received an application from a person for a decision as to whether its conduct infringes that prohibition (see sections 20 and 22 of the Act and Rule 12(2) of the Director's Rules)[11]. If the OFT has such a discretion when considering a formal non-infringement decision, it is in Bacardi's submission entitled to a wider discretion as to consultation when considering whether to close its file

25 Further, in the present case, where Bacardi gave unequivocal assurances that it would not engage in the conduct to which the complainant had taken objection, the OFT was entitled to consider that there was no practical purpose in consulting the complainant

26 Bacardi also notes that, so far as can be seen from the description given in the public sources quoted, the EC Commission's practice when accepting voluntary assurances,

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10 Bacardi's criticisms of Pernod's contribution to the OFT's understanding of the relevant products and the structure of the market are set out in paragraphs 100 to 107 of the outline intervention statement

11 See also Rule 12(1)(b) the OFT also has a discretion whether to consult the public if it intends to make a non-infringement decision in relation to a notification in relation to an agreement under Chapter I

referred to above, does not seem to include consulting third parties before they are accepted.

D. CONCLUSION

27 Bacardi accordingly submits that, for the reasons set out in its outline intervention statement, the appeal is inadmissible (and therefore falls to be dismissed with costs)

28 The only procedural objection taken by Pernod is wrong in law. As to the issues identified by the Tribunal, even if the Tribunal takes the view that the OFT should have followed a different course, there is no basis for setting aside the contested measures In any event, no practical purpose would have been served by disclosure to Pernod either of the Rule 14 Notice (as it had every opportunity, and took it, to comment on the issues) or of the draft assurances (as they in effect secured the relief that Pernod sought)

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23 January 2004