IN THE COMPETITION APPEAL TRIBUNAL

B E T W E E N:

PERNOD-RICARD SA

First Applicant

and

CAMPBELL DISTILLERS LIMITED

Second Applicant

and

THE OFFICE OF FAIR TRADING

Respondent

supported by

BACARDI-MARTINI LIMITED

Intervener

OFT'S WRITTEN OBSERVATIONS
for hearing on Tuesday, 27 January 2004.

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1. As indicated by the Tribunal at the case management conference held on 16 January 2004, the issues to be dealt with at this hearing are as follows:

   (1) Whether there was an "appealable decision".

   (2) If the Tribunal were to find that there was an "appealable decision" what procedure, if any, should the OFT follow before accepting assurances in a case such as the present? In accordance with its letter to the Tribunal of 16 January 2004, the OFT will deal with the following points:

      (a) Should the OFT have disclosed the Rule 14 Notice to the Applicants when it was issued?

      (b) Should the OFT have consulted the Applicants on the draft assurances when they were being negotiated with the intervener?

(3) What, if any, is the legal basis upon which the OFT is empowered to accept assurances?

Admissibility

2. The Applicants argue that the decisions contained in (i) the press release of 30 January 2003, (ii) the letter from the OFT of 30 January 2003 (together referred to as the "original decision") and (iii) the OFT letter of 15 May 2003 are appealable decisions under section 46(3)(b) of the Competition Act 1998 ("the 1998 Act").

3. The OFT accepts that these documents are evidence that a decision was made, namely the decision to close the investigation into Bacardi. However, the OFT's case is that, in the circumstances of the present case, there was no decision as to whether the Chapter II prohibition had been infringed under section 46(3)(b) of the 1998 Act.

4. The factual background to the OFT's decision is set out in paragraphs 10-49 of its draft Defence, and the Tribunal is respectfully referred to the factual account set out therein. The relevant legal principles are set out at paragraphs 52-62 of the OFT's draft Defence.

5. In their Notice of Application, the Applicants seek to characterise the OFT's decision to close its investigation into Bacardi as two decisions: one on whether there was an infringement of the Chapter II prohibition before 29 January 2003 (the date of the giving of the assurances) and one as to whether there was an infringement after 29 January 2003.

6. It is the OFT's case that it is artificial to attempt to split the OFT's decision in this way. The OFT's decision to accept the assurances cannot be seen other than in its context, i.e. that the decision was made at a stage in the investigation when the OFT had not yet reached a final conclusion as to whether or not there had been an infringement and was in the course of seeking further information and engaging in further work to enable it to reach

a view. The assurances were offered by Bacardi on the basis that they were without prejudice to its case on market definition and dominance and they were accepted by the OFT on that basis.

7. However, and without prejudice to the submission in paragraph 6 above, the OFT makes the following submissions.

Before 29 January 2003

8. As regards the position before 29 January 2003, the Applicants argue, "*in reality, the decision to close the file was a decision to the effect that, on the evidence available, the Chapter II prohibition had not in fact been infringed*" (paragraph 4.13 of the Notice of Application). They also accept (at paragraph 4.5 of the Notice of Application) that

> "It nevertheless appears that the OFT did not reach a decision that Bacardi had infringed the Chapter II prohibition prior to 28 January 2003".

9. The reality is that, as a matter of objective fact, the OFT had not reached a decision either way as to whether the Chapter II prohibition had been infringed by Bacardi when it made its decision to close the investigation. This submission is developed in more detail in the OFT's draft Defence. It may be summarised as follows.

10. As can be seen from the account of the facts set out in paragraphs 10-49 of the draft Defence, the OFT considered that it had reasonable grounds to suspect an infringement of the Chapter II prohibition and had not reached any final conclusion as to infringement.

11. The OFT was still in the process of investigating whether or not there had been such an infringement when it decided to accept the assurances and close its investigation into Bacardi. This was evidenced (among other things) by the issuing of the section 26 notice on 10 December 2002. In the present case, the OFT had genuinely abstained from expressing a (final) view on whether or not there had been an infringement.

12. This may be illustrated by asking oneself the two questions identified by the Tribunal in paragraph 148 of *Claymore* [2003] CAT 3 as those that should be asked in order to establish whether a section 46(3)(b) decision has been made.

13. First, did the OFT ask itself whether the Chapter II prohibition has been infringed? Second, what answer did it give to that question when making its decision?

14. In the present case, the objective facts show that, the OFT asked itself whether the Chapter II prohibition had been infringed and gave the answer that "an infringement of the Chapter II prohibition may or may not be established, but further information and work is necessary to enable the OFT to answer that question".

15. It is therefore the case that the OFT had not made a decision as to whether the Chapter II prohibition had been infringed by Bacardi's conduct before 29 January 2003.

After 29 January 2003

16. As regards the position after 29 January 2003, the Applicants state that the OFT said that it had closed its investigation because it believed that the assurances given by Bacardi removed the competition problem that gave rise to the alleged breach of the Chapter II prohibition. They argue, "*this is a decision to the effect that, following the giving of assurances by Bacardi, there was no infringement of the Act. This constitutes a decision as to whether the Chapter II prohibition was infringed in relation to the period after the giving of the assurances*" (paragraph 4.3 of the Notice of Application).

17. First, the assurances given by Bacardi were explicitly negative. Bacardi undertook, through the assurances, not to engage in the future (i.e. from the date of the assurances) in certain specified conduct. The assurances did not, either explicitly or implicitly, contain any approval by the OFT of Bacardi's future conduct. Nor did the assurances, either explicitly or implicitly, contain

any approval by the OFT of Bacardi's past conduct. However, the OFT did recognise that if Bacardi acts in accordance with the assurances, it will not act abusively in relation to the type of conduct covered by them (paragraph 108 of the draft Defence). But such recognition is not in any way different from what is an obvious proposition, namely that an undertaking which agrees not to act in an anti-competitive manner will not act abusively in breach of the Chapter II prohibition.

18. It is also important to note that even if Bacardi acts in breach of the assurances at some time in the future, this will not necessarily be an infringement of the Chapter II prohibition. In order to establish a breach of the Chapter II Prohibition, the OFT will, of course, have to establish that Bacardi has a dominant position on the relevant market and that it acted abusively. This assessment will have to be carried out in the light of the economic and factual circumstances pertaining at the time.

19. Even if the OFT's decision to accept the assurances and close its investigation into Bacardi on 29 January 2003 contained an implicit acceptance by the OFT that Bacardi's conduct (or rather lack of conduct) will not infringe the Chapter II prohibition, it is the OFT's case that this could only be a decision regarding the future conduct of Bacardi as from that date. Namely, a decision as to whether the Chapter II prohibition will be infringed. Section 46(3) (b) of the 1998 Act does not cover such a decision.

20. Section 46 provides as follows~:

> "(2) Any party 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 - ...
>
> (b) as to whether the Chapter II prohibition has been infringed, ...".

21. The wording of section 46(3)(b) is clear. The OFT can only make appealable decisions as to whether the Chapter II prohibition has been infringed. This wording is used consistently throughout the 1998 Act to show that the OFT is

only concerned with whether either prohibition has been infringed, see, for example:

- section 14(2): decisions on Chapter I notifications,
- section 22(2): decisions on Chapter II notifications,
- section 25: the threshold for the power to investigate,
- section 31: requirements following proposal to make an infringement decision,
- section 46 (2) and (3): categories of appealable decisions.[1]

22. The OFT's second and third points both arise from and are closely related to its primary submission that it can only make appealable decisions as to whether the Chapter II prohibition has been infringed.

23. Second, the Tribunal recognised in *Aquavitae* [2003] CAT 17 that

> "in order to be 'a decision whether the Chapter II prohibition has been infringed' within the meaning of section 46(3)(b), it must be possible to ascertain both 'the person' in respect of whose conduct the Director has made a decision, and 'the conduct' to which the decision relates".[2]

24. There is no permissive element to the assurances given by Bacardi to the OFT. Bacardi has simply agreed not to engage in certain conduct. However, a decision by the OFT as to whether the Chapter II prohibition applies necessarily requires the identification of the conduct in question and a decision whether or not by engaging in such conduct the undertaking was in breach of the Chapter II prohibition. That cannot apply to the future "non-conduct" that is in issue in the present case.

25. Third, an appealable decision must necessarily derive from a (final and definitive) position reached by the OFT into the conduct that is the subject of the decision. So, for example, Chapter III of the 1998 Act, envisages the

[1] See also the Director's Rules (SI 2000/293), rules 12 and 14-16. Also see the OFT's guideline *The Major Provisions*, OFT 400, March 1999 at paragraph 7.2, which make it clear that notification for guidance or a decision cannot be made in respect of prospective conduct. A copy of the relevant legislative provisions is attached as an Annex to these written observations.
[2] Paragraph 192 of the Tribunal's judgment.

following: a decision by the OFT to conduct an investigation (section 25); an investigation (sections 25-30); a decision by the OFT following that investigation (section 31); an appeal against that decision (section 46). The Tribunal has held that an appealable decision can also arise before a section 25 investigation has been carried out (*Bettercare* [2002] CAT 6). The key point is that in either of these two scenarios, the appealable decision in a file closure case must necessarily derive from the OFT reaching a final and definitive position on one of the elements of the prohibition in question.

26. The decision by the OFT to accept Bacardi's assurances not to engage in certain conduct in the future cannot be equated with the OFT having reached a final and definitive position into the conduct that is the subject of the decision. The OFT cannot have made an appealable decision within the meaning of section 46(3)(b) in respect of future non-conduct by Bacardi with, for example, no assessment as to whether the section 25 threshold will have been reached and no investigation of the facts that will have arisen.

27. The impossibility of undertaking an investigation into future conduct illustrates the difficulty of trying to bring the present decision by the OFT to accept assurances as to future conduct within the statutory procedure set out in Chapter III of the 1998 Act and, in particular, within the terms of section 46(3)(b).

28. In conclusion, it is submitted that it would be torturing the language, structure and purpose of the 1998 Act to characterise the OFT's acceptance of assurances by Bacardi as to its future conduct as a decision "as to whether the Chapter II prohibition has been infringed" within the meaning of section 46(3)(b).

Procedure

29. The questions on the procedure that the OFT should have followed before accepting undertakings in the present case only arise if the Tribunal finds that

there was an "appealable decision" and it therefore has jurisdiction to hear this appeal.

30. The OFT's submissions on the procedure that it should have followed in the present case are made on the basis of the law as it stood at the time that the decision appealed was made, i.e. 29 January 2003. The Government has put forward proposals for legislative change in order to give effect to Regulation 1/2003. However, these are not yet in force, they are still being reviewed by Parliamentary Counsel, they have not been published, and are not of direct relevance to the question of the procedural requirements applicable to the OFT in the present case[3].

31. The challenge in the present case is to the procedure followed by the OFT, a public body, in exercising its statutory powers under Chapter III of the 1998 Act. It is therefore submitted that the Tribunal's review of that procedure should be, first, to determine whether or not the OFT has complied with legislative procedural rules and requirements (as correctly interpreted) and, second, where the OFT has exercised its discretion, whether it has exercised that discretion reasonably: cf. *Freeserve* [2003] CAT 5.

32. It is also important to note that the challenge in the present case is made by the Applicants who were one of the complainants in the investigation carried out by the OFT, rather than by undertakings who were the subject of potential infringement decisions, sanctions and penalties. Concerns about the rights of the defence and/or rights under Article 6 ECHR therefore do not apply.

Rule 14 Notice

33. The Applicants have not sought to argue in their Notice of Application that the OFT should have disclosed the Rule 14 Notice to them when it was issued. They simply commented (at paragraph 3.41), "CDL has not of course seen the rule 14 notice". Although the point has been raised in subsequent

[3] The proposals are contained in the Government's response to the consultations on giving effect to Regulation 1/2003 and aligning the Competition Act 1998 issued on 16 January 2003. A copy of that document will be included in the agreed bundle for the hearing.

correspondence, the Applicants have not yet provided any reasoning or arguments in support of this point. The OFT therefore reserves the right to add to its submissions in this regard should that prove to be necessary.

34. The Rule 14 Notice in this case was issued on 28 June 2002. As at that date the OFT was proposing to make a decision that Bacardi had infringed the Chapter II prohibition: see paragraph 24 of the Draft Defence.

35. Section 31(2) of the 1998 Act provides that, before making an infringement decision,

> "the OFT must –
>
> (a) give written notice to the person (or persons) likely to be affected by the proposed decision; and
>
> (b) give that person (or those persons) an opportunity to make representations".

36. The persons "likely to be affected" in the present case are identified in rule 14(1)(b) of the Director's Rules, as follows:

> "where no application has been made … to each person who that Director considers is a party to the agreement, or is engaged in the conduct, as the case may be, which that Director considers had led to the infringement".

37. Under the relevant legislation, the OFT only has a duty to consult with those people "likely to be affected" by its decision and those people are identified in rule 14 as parties to the potentially infringing conduct. It does not have a duty to consult with people, such as the Applicants, who fall outside the ambit of rule 14.

38. Rule 14 was made by the Secretary of State to implement the requirements of section 31 of the 1998 Act and therefore reflects the Government's understanding of the requirements of that section.

39. It is the OFT's submission that rule 14 is the proper interpretation of the requirements of section 31 of the 1998 Act. In this regard, the OFT makes the following submissions:

a) It is a natural and reasonable reading of section 31 to identify the "persons likely to be affected by the proposed decision" as being the parties to the agreement or conduct who will be the subject of the proposed decision and who are at risk of sanctions and penalties as a result, i.e. those who are adversely affected by the decision.

b) The purpose of section 31(2) must be to discharge the OFT's obligations to respect the rights of the defence and rights arising under Article 6 ECHR. It is not intended to impose a positive duty on the OFT to give third parties (who are not subject to potential sanctions) the opportunity to make representations. The meaning of "likely to be affected" should be interpreted in light of that purpose and, therefore, limited to the persons set out in rule 14.

c) It cannot have been the intention of Parliament that the phrase "likely to be affected" should be read in its broadest possible sense so as to encompass all those who might be interested in the proposed decision. It is essential to enable the OFT to discharge the duties imposed on it by section 31(2) that the persons who must be given notice of the proposed decision and the opportunity to make representations are clearly identifiable as a closed group at the time of issue of the notice under section 31. If section 31 were to be interpreted so as to catch any person who might be interested in the decision, it would be impossible for the OFT to comply with the duty. It would not have been the intention of Parliament to have put in place an unworkable system.

d) Moreover, there is nothing in section 31 that suggests that "likely to be affected" should be interpreted in a "middle way" somewhere between the interpretation contained in rule 14 and the interpretation set out in

(c) above, e.g. consultation of complainants, but not of other third parties. There is nothing in section 31 that indicates how a distinction should be made between those who should be consulted and all those other people who may be interested in the decision but need not be consulted.

Nor is there anything in section 31 to indicate why complainants, for example, should be consulted while other third parties are not. For example, in the present case, the original complainant was a student. Is that student likely to be any more affected that any other person who frequents a bar subject to the arrangements of which complaint is made? One simply needs to look at existing infringement decisions of the OFT to see the difficulty. In the first *Hasbro* investigation, the original complainant was a small retailer unable to get a discount from its distributor because that distributor had entered into a price fixing agreement with Hasbro. Should all retailers have received notice and been given an opportunity to make representations as their position is no different from that of the original complainant?

e) It is therefore the case that the requirement contained in section 31 to consult those "likely to be affected by the proposed decision" should be interpreted so as to cover only those persons identified in rule 14, i.e. parties to the agreement or conduct who will be the subject of the proposed decision.

40. It is therefore submitted that there was no requirement on the OFT to disclose the Rule 14 Notice to the Applicants at the time it was issued. The procedural requirements in this regard are set out in section 31 of the 1998 Act and in rule 14 of the Director's Rules. Those requirements are clear and binding on the OFT.

41. It is the case that rules relating to complainants to the EC Commission are somewhat different. Under Article 7 of Regulation 2842/98, complainants are

entitled to "a non-confidential version of the objections" and are to be given an opportunity to make their views known to the Commission in writing.

42. The relevance of the position in Community law to domestic competition law is governed by section 60 of the 1998 Act, which provides as follows:

> "(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".

43. It is the OFT's submission that the Tribunal cannot override the clear terms of section 31 of the 1998 Act and rule 14 of the Director's Rules in order to ensure "consistency" with the provisions of Article 7 of Regulation 2842/98. The Tribunal cannot and should not read across the rules contained in Article 7 into the domestic procedure. In support of this submission, the OFT relies upon the following:

44. First, the question of whether the OFT should issue a Rule 14 Notice to a complainant is not a "question arising under this Part in relation to competition within the United Kingdom" because it is purely a detailed question of procedure. It was made clear in the Hansard debates[4] on the Competition Bill that it was the intention of Parliament to import high level principles, such as proportionality, legal certainty and administrative fairness, into domestic law

[4] A copy of the relevant extracts from Hansard will be included in the agreed authorities bundle for the hearing.

through section 60, but that it was not intended to import purely procedural rules. In this regard, Lord Simon of Highbury stated:

> "In making the procedural rules, the DGFT is not obliged to secure that there is no inconsistency with EC procedural law since he will not be "determining a question" under Part I. The Bill provides that the rules made by the DGFT are not to come into effect until they have been approved by order made by the Secretary of State. These orders are to be subject to annulment by a resolution of either House"[5].
>
> "At the Community level, much of the detailed procedure for the administration of the EC prohibition system is set out in Commission or Council regulations. **The governing principles clause will not import any of these detailed procedures.** This is especially so since the Commission is made up of a college of Commissioners and many of its procedures would simply not be appropriate for the director.
>
> The Bill provides that **the detailed procedure for the administration of the domestic system is to be set out in the director's rules**. Clause 51 sets out the procedure for making the director's rules. These are the rules to which business will look to find out how the detail of the administration of the prohibition system will operate. In practice of course many of the detailed procedures adopted by the director may be very similar to the procedure set out in EC regulations. Parliament of course will also have the opportunity to object to the rules since they cannot come into operation until made by order". [6]
>
> (emphasis added)

45. As regards high-level principles, the OFT's submissions are as follows. The Applicants could not have had a legitimate expectation that they would receive a copy of the Rule 14 Notice: rule 14 makes it clear that they are not among the persons to whom such a notice will be provided. General principles of administrative fairness do not require the Applicants to be given a copy of the Rule 14 Notice: the Applicants were not the potential subjects of the decision.

46. In any event, there are "relevant differences" between the provisions contained in the 1998 Act and the Director's Rules on the one hand and in Regulation 2842/98 on the other. Section 60 only seeks to ensure consistency "so far as is compatible with the provisions of this Part". The domestic legislative regime provides for the OFT to carry out investigations of potentially anti-competitive behaviour. There is no formal complaints procedure under the 1998 Act. The OFT may decide to instigate an investigation under section 25 following a complaint, information received from a whistle-blower or anonymously, or as

[5] 25 November 1997: Column 961.
[6] 5 March 1998: Column 1364.

a result of any number of factors. It is the OFT that then carries out the investigation and decides, for example, what information it requires and how it will go about obtaining that information (for example, under sections 26 and/or 27).

47. Under the European regime, on the other hand, there is an application procedure, and the particular role of a complainant is recognised under Regulation 17/62. If Parliament had intended there to be a formal role for complainants in the domestic procedure, it would have provided for it and replicated the European procedure. It did not do so and, for the reasons set out above, it is not permissible to read across the detailed European procedure into the domestic rules.

48. The OFT was under no obligation to provide a copy of the Rule 14 Notice to the Applicants in the present case. Nor is there any obligation to disclose the Rule 14 Notice to third parties and/or complainants in other cases. However, the OFT recognises that there is no prohibition on such disclosure[7]. In certain limited cases, the OFT has exercised its discretion to disclose redacted Rule 14 Notices to third parties and complainants where it would facilitate the exercise of by the OFT of its functions under the 1998 Act. However, it is not required to do this. Moreover, the OFT is mindful of the need in this context to avoid a proliferation of paper and of being diverted by side issues not forming part of the OFT's proposed decision not least in the interests of the recipients of a Rule 14 Notice.

49. In the present case, the OFT did not consider it necessary to disclose the Rule 14 Notice to the Applicants. The Applicants had been involved in the investigation since an early stage, had submitted a detailed complaint and had responded to information requests made by OFT on the issues arising. The OFT's decision not to disclose the Rule 14 Notice to the Applicants was neither irrational nor unlawful.

[7] Subject to the requirements of sections 237 and 241(1) of the Enterprise Act 2002.

Consultation on the draft assurances

50. In paragraph 4.42 of their Notice of Application, the Applicants complain that the OFT failed to observe the procedural requirements laid down by Section 31(2) of the 1998 Act by failing to consult them on the draft assurances.

51. It is the OFT's case that section 31 of the 1998 Act imposes no such requirement on it. Section 31(1) provides that

> "Subsection (2) applies if, as the result of an investigation conducted under section 25, the OFT proposes to make – …
>
> (b) a decision that the Chapter II prohibition **has been infringed**".
>
> (emphasis added)

52. Under section 31(2), as indicated above, before making such a decision, the OFT is required to give written notice to the person(s) likely to be affected by the decision and give that person(s) an opportunity to make representations.

53. The Applicants argue that, by accepting Bacardi's assurances and deciding to close its investigation, the OFT has made a non-infringement decision (see paragraphs 4.3 and 4.13 of the Notice of Application). However, section 31 only applies to "a decision that the Chapter II prohibition **has been infringed**", i.e. an infringement decision. Therefore, even if a decision that Bacardi had not infringed the Chapter II prohibition has been made, section 31 cannot apply.

54. Moreover, for the reasons set out above, the OFT contends that the Applicants are not persons likely to be affected by the decision as required under section 31(2) and so there was no obligation to consult with them in any event.

55. Furthermore, there is no duty for the OFT to consult where it proposes to make a non-infringement decision. Even where the OFT proposes to make a non-infringement decision following an application under sections 14 or 22 of

the 1998 Act (which is not the present case), it has a discretion rather than a duty to consult (see Rule 12(1)(b) and 12 (2) of the Director's Rules).

56. Article 6 of Regulation 2842/98 provides that, if the Commission decides not to act on a complaint, it will tell the complainant of the reasons for that decision and give it an opportunity to make submissions. This is quite different from the present case where the issue is whether the OFT should have consulted the Applicants before accepting the assurances from Bacardi.

57. In any event, for the reasons set out in paragraphs 43-47 above, it is the OFT's case that the Tribunal cannot override the clear terms of section 31 of the 1998 Act and rule 14 of the Director's Rules in order to ensure "consistency" with the provisions of Article 6 of Regulation 2842/98.

58. Moreover, the informal assurances given by Bacardi in the present case are not equivalent to the "binding commitments" envisaged by the Government's modernisation proposals. The acceptance of informal assurances is an extra-statutory administrative tool used in appropriate cases by the OFT (amongst other things) as a factor in exercising its discretion to decide whether or not to continue with an investigation. The only sanction for breach of assurances is a reopening of the investigation and, in the event of an infringement decision being made as a result of that investigation, the breach of the assurances being a possible aggravating factor in a financial penalty.

59. The informal assurances are evidence of a proposed change in behaviour and/or equivalent to a promise not to engage in certain conduct. They are in essence no different from an undertaking ceasing the behaviour that the OFT is concerned about, or informing the OFT, by letter or telephone for example, that it is going to change that behaviour. There is no obvious reason why, in such circumstances, the OFT should be required always to consult the complainant or other third parties before it decides to close its investigation.

60. As with disclosure of Rule 14 Notices, although there is no obligation on the OFT to consult with complainants and third parties before accepting

assurances, there is no prohibition on it doing so and it will consider doing so in cases where that would facilitate the exercise by the OFT of its functions under the 1998 Act (and where disclosure is not contrary to the OFT's obligations under section 237 of the 2002 Act).

61. In the circumstances of the present case, the OFT decided it was not necessary to consult the Applicants given that in the OFT's view the assurances addressed the concerns raised by the Applicants in the original complaint concerning the conclusion by Bacardi of exclusivity agreements with on-trade retailers. This decision was neither irrational nor unlawful.

Basis for accepting assurances

62. The third issue regarding the basis upon which the OFT accepted informal assurances from Bacardi was not raised in the Applicants' Notice of Application. These submissions are made by the OFT in response to the Tribunal's request of 16 January 2004 to be "better informed" on this subject.

63. There is no express power under the 1998 Act or the 2002 Act for the OFT to accept informal assurances offered by the subject of an investigation. Nor is there a prohibition under the legislation against the OFT accepting informal assurances offered. The OFT cannot prevent a party from offering and seeking to negotiate assurances any more than it can prevent that party from informing the OFT, by letter or telephone for example, that it is going to change its behaviour. The acceptance of informal assurances is an extra-statutory administrative tool used in appropriate cases by the OFT (amongst other things) as a factor in exercising its discretion to decide whether or not to continue with an investigation. The only sanction for breach of assurances is a reopening of the investigation and, in the event of an infringement decision being made as a result of that investigation, the breach of the assurances being a possible aggravating factor in a financial penalty.

64. The decision in this case against which the appeal has been brought is the OFT's decision to close its investigation into Bacardi. The OFT's acceptance

of the informal assurances offered by Bacardi is part of the background to and, as evidence of its change in behaviour, one of the reasons for that decision: see OFT's press release of 30 January 2003.

65. Under section 25 of the 1998 Act, the OFT has discretion as to whether or not to conduct an investigation (as long as the criteria set out in section 25 are fulfilled): it "may" conduct an investigation.

66. By necessary implication, therefore, the OFT has a discretion as to how to conduct that investigation (subject to the various requirements set out in the 1998 Act and the 2002 Act), and as to whether to proceed with the investigation. This discretion as to whether or not to proceed to an infringement decision was recognised and accepted by the Tribunal in paragraph 80 of its judgment in *Bettercare* (repeated in paragraph 89 of *Claymore* [2003] CAT 3).

67. The decision to close the investigation into Bacardi in the present case was an exercise by the OFT of that statutory discretion. In the present case, in light of the assurances given, the OFT decided not to proceed with the investigation. Bacardi offered, through the assurances, not to engage in the potentially abusive conduct identified in them. The OFT decided that, in those circumstances, the resources necessary for continuing with an investigation in order to reach a final conclusion as to whether the Chapter II prohibition had been infringed could better be deployed elsewhere.

Monckton Chambers
Gray's Inn

KASSIE SMITH
23 January 2004

IN THE COMPETITION APPEAL TRIBUNAL

B E T W E E N:

PERNOD-RICARD SA

First Applicant

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THE OFFICE OF FAIR TRADING

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ANNEX 1

Competition Act 1998

Section 14(2)

"On an application under this section, the OFT may make a decision as to –

(a) whether the Chapter I prohibition has been infringed; and
(b) if it has not been infringed, whether that is because of the effect of an exclusion or because the agreement is exempt from the prohibition".

Section 22(2)

"On an application under this section, the OFT may make a decision as to –

(a) whether the Chapter II prohibition has been infringed; and
(b) if it has not been infringed, whether that is because of the effect of an exclusion".

Section 25

"The OFT may conduct an investigation if there are reasonable grounds for suspecting-
(a) that the Chapter I prohibition has been infringed; or
(b) that the Chapter II prohibition has been infringed".

Section 31(1)

"Subsection (2) below applies if, as a result of an investigation conducted under section 25, the OFT proposes to make –

(a) a decision that the Chapter I prohibition has been infringed; or
(b) a decision that the Chapter II prohibition has been infringed".

Section 46

"(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 ...".

Director's Rules (SI 2000/293)

Rule 12

"(1) On an application under section 14 for an agreement to be examined –
(a) if the Director proposes to grant an individual exemption, whether or not subject to conditions or obligations, he shall consult the public; and
(b) if the Director proposes to make a decision that the Chapter I prohibition has not been infringed, he may consult the public.

(2) If, on an application under section 22 for conduct to be considered, the Director proposes to make a decision that the Chapter II prohibition has not been infringed, he may consult the public".

Rule 14

"(1) If the Director proposes to make a decision that the Chapter I prohibition or the Chapter II prohibition has been infringed he shall give written notice –
(a) where an application has been made, to the applicant and, subject to rules 25 and 26 below, to those persons whom the applicant has identified in the application as being the other parties to the agreement, or the other persons, if any, who are engaged in the conduct, as the case may be, which that Director considers has led to the infringement; and
(b) where no application has been made, subject to rules 25 and 26 below, to each person who that Director considers is a party to the agreement, or is engaged in the conduct, as the case may be, which that Director considers has led to the infringement".

Rule 15

"(1) If the Director has made a decision as to whether or not an agreement has infringed the Chapter I prohibition, or as to whether or not conduct has infringed the Chapter II prohibition, he shall, without delay -
(a) give written notice of the decision –
(i) where the decision was made following an application, to the applicant and, subject to rules 25 and 26(2) below, to those persons whom the applicant has identified in the application as being the

other parties to the agreement, or the other persons, if any, who are engaged in the conduct, as the case may be; and

(ii) where no application has been made, subject to rules 25 and 26(2) below, to each person who that Director considers is a party to the agreement, or is engaged in the conduct, as the case may be

stating in the decision the facts on which he bases it and his reasons for making it; and

(b) publish the decision.

(2) Where the Director determines an application for a decision by exercising his discretion not to give a decision, he shall -

(a) give written notice of that fact to -

(i) the applicant, and

(ii) subject to rules 25 and 26 below, those persons whom the applicant has identified in the application as being the other parties to the agreement, or the other persons, if any, who are engaged in the conduct, as the case may be; and

(b) repay the whole of the fee in accordance with rule 6(6)(b) above".

Rule 16

"If, having made a decision that an agreement has not infringed the Chapter I prohibition, or that conduct has not infringed the Chapter II prohibition, the Director proposes to take further action under Part I, he shall:

(a) where the decision was made following an application, consult the applicant and, subject to rules 25 and 26 below, those persons whom the applicant has identified in the application as being the other parties to the agreement, or the other persons, if any, who are engaged in the conduct, as the case may be, which is the subject of the decision; and

(b) where no application has been made, subject to rules 25 and 26 below, consult each person who that Director considers is a party to the agreement, or is engaged in the conduct, as the case may be, which is the subject of the decision".