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I. INTRODUCTION

Tempers frayed earlier this year when the U.K.'s Office of Fair Trading ("OFT") referred A.G. Barr plc's acquisition of Britvic plc to the Competition Commission ("CC"). Britvic's Chairman, Gerald Corbett attacked the OFT decision, saying "We've got two British companies trying to strengthen themselves against a big American corporation. If this is government industrial policy, I'm going to take French lessons." Although the two companies then successfully took the deal through the CC process, it seems that the damage had already been done and it was reported shortly after publication of the CC's unconditional clearance on July 9 that the deal had been abandoned.

Fortunately, a review of recent OFT decisions does not suggest a campaign of sustained sabotage against the U.K. food industry. The two most recent OFT decisions in the food sector are considered below—soft drink manufacturer A.G. Barr plc's acquisition of Britvic plc (*Barrs/Britvic*) and Nakano UK Holding Limited's acquisition of the vinegar and pickles in vinegar businesses of Premier Foods Group Limited (*Nakano/Premier*)

II. FOOD FRENZY?

The most striking observation when looking at recent OFT decisions is the OFT's continuing focus on local markets and overlaps between competing bricks and mortar businesses. Of the nine cases so far this year (as at June 30) where the OFT has found competition concerns, six of these have involved local overlaps in diverse sectors comprising leisure (cinemas and concert venues), food retail, electrical wholesale, and hospitals. This is consistent with the OFT's recent enforcement record and does not represent any marked change in approach—in 2012 for example, six out of the seven cases where the OFT accepted undertakings in lieu of reference ("UIL") involved local markets.

Beyond the OFT's ongoing pre-occupation with local markets, it continues to review transactions in the food industry. However, there is no discernible pattern suggesting a more heavy-handed intervention in the food sector. Excluding the recent *Booker/Makro* wholesale merger[2] (on which, see below), *Barrs/Britvic* was the first OFT reference decision in the food sector since the July 2011 *Kerry/Headland* decision. While there have been a number of cases since then where the OFT has found a food merger likely to lead to a substantial lessening of competition ("SLC"), these have been resolved by UIL without the need for a lengthy CC inquiry—*Solway/Premier* and *Princes/Premier Foods*—and some have been cleared unconditionally – for example, *ABInBev/Grupo Modelo* (although see below in relation to the United States) and *ABF Grain Products/Elephant Atta*. Moreover in absolute terms, the food

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[2] Completed acquisition by Booker Group plc of Makro Holding Limited, referred by the OFT in November 2012 and cleared by the CC in April 2013.C

sector has fared considerably better than some other sectors—notably the transport sector, where the OFT referred four transactions[3] to the CC in the period between the *Kerry/Headland* and *Barrs/Britvic* cases.

III. FOOD FOR THOUGHT

A brief comparison of the OFT's approach in the *Barrs/Britvic* and *Nakano/Premier* cases is instructive, as despite finding competition concerns in both cases, the nature of the OFT's analysis was quite different. The OFT's approach in the *Nakano/Premier* case was a "traditional" one, based on a detailed consideration of the relevant markets and virtually no economic analysis or evidence. The OFT based its conclusions on the fact that the parties were the only or main U.K. suppliers of unbranded malt and spirit vinegar to the food ingredient and retail channels, with market shares of up to 90-100 percent.

In the *Barrs/Britvic* case on the other hand, the OFT defined a market of carbonated soft drinks ("CSDs") on which the parties' share was no more than 35-45 percent (less on some measures) and always less than Coca Cola Enterprises ("CCE"). In reaching its view that this transaction would reduce competition, the OFT relied on economic evidence regarding the extent to which the parties' key brands were seen by customers as particularly close substitutes, focusing primarily on Irn Bru/Pepsi and Tango/Orangina.

IV. VINEGAR, VINEGAR OR VINEGAR

In conducting its analysis in the *Nakano* case, the OFT focused in on the narrowest possible market definition:

- distinguishing between malt, spirit, wine, and cider vinegars on the basis that customers across all channels would be unlikely to switch vinegar types in the event of a 5-10 percent price rise and that few suppliers manufactured more than one type of vinegar;
- distinguishing between each of the food ingredient, food service, and retail channels, on the basis that it was likely that suppliers could discriminate between customers in different channels; and
- segmenting between branded and unbranded supply and also assessing on the basis of treating branded and unbranded supply together.

In terms of geographic market definition, the OFT looked at trade flows between the United Kingdom and the rest of the European Union to assess the extent to which the parties might be constrained by imports and found that, to a greater or lesser extent across the different vinegar types, imports did not materially constrain the parties. On this basis, the OFT assessed the transaction on the basis of a national market definition.

As Nakano and Premier were the only two U.K. producers of malt and spirit vinegar, the OFT unsurprisingly had concerns in relation to the supply of these products (through any channel). The OFT also considered whether Nakano's acquisition of Premier's pickling business might incentivize Nakano to withhold or increase the price of vinegar (a key input for the

[3] *Groupe Eurotunnel/Seafrance*, 29 October 2012; *Stagecoach Devon/First Devon and Cornwall*, 10 July 2012; *Ryanair/Aer Lingus* on 15 June 2012; and *McGills/Arriva Scotland West*, 18 April 2012.

pickling business) from its rivals. However, as the cost of vinegar represents only a small proportion of the overall cost of pickles, the OFT was satisfied that Nakano had no incentive to increase prices to other pickling businesses.

There were a handful of other notable points emerging from this decision:

- **Buyer power**. Nakano had sought to argue that many of its customers—particularly the larger retailers—had buyer power and could therefore resist any price increases. However, the OFT rejected this argument, partly on the basis that as Nakano supplies a narrower range of products than Premier, it would have more of an incentive to increase prices (and would be less vulnerable to customers retaliating by switching away from its other products).
- **Branded v unbranded**. As well as accounting for virtually all sales of unbranded malt vinegar, the transaction also saw Nakano purchase the Sarsons brand, accounting for 90-100 percent of sales of branded malt vinegar to retailers. Although the OFT considered that the acquisition of the Sarson brand would increase Nakano's incentives to increase the prices of both branded and unbranded malt vinegar, it did not reach a conclusion on whether the transaction would give rise to an SLC in the supply of branded and unbranded malt vinegar to retailers. No reason was given, although presumably any concerns would have been mitigated by Nakano's divestment of the unbranded malt vinegar business.
- **Wine vinegar**. The OFT did not find it necessary to conclude on whether the transaction gave rise to an SLC in relation to unbranded and branded wine vinegar, despite high combined market shares in unbranded wine vinegar (until recently, 90-100 percent); the acquisition of Dufrais (a major wine vinegar brand); and customer complaints and evidence suggesting that the majority of customers of the target considered Nakano as their second choice. As such, the remedy offered by Nakano did not cover wine vinegar. The OFT's reasoning for not finding an SLC in wine vinegar is not clear, but may be due to the fact that Nakano had recently lost a major contract (accounting for 25-30 percent of overall U.K. volumes).

V. CLOSE, CLOSER, CLOSEST

In *Barrs/Britvic* on the other hand, the exercise of defining the market simply revealed the leading position of the parties' main rival, CCE. The OFT defined a market of CSDs on which the parties' share was no more than 35-45 percent (less on some measures) and always less than CCE. The OFT therefore focused primarily on economic evidence—comprising an "event study" (where it analyzed the effects of a customer's decision not to stock one of the party's products) and a survey undertaken on behalf of the parties which asked consumers which brand of CSD they would buy if their preferred brand was unavailable.

The use of survey evidence has become increasingly common and the OFT typically attaches great weight to the proportion of customers' spend which would switch from one supplier to another (the diversion ratio). By combining the diversion ratio with the parties' margins, it is also possible for the OFT to estimate the degree of upward pricing pressure that the merger might give rise to.

The evidence from AG Barr's internal documents suggesting that Coke was its closest competitor was brushed aside. Similarly, the OFT did not find the evidence from a "de-listing event" sufficiently compelling, even though it apparently showed that the removal of Britvic's brands had not resulted in an uplift in sales of AG Barr's products. The evidence from the survey showed more customers would switch from Irn Bru to Coke (and its sister brands) than to the Britvic brands. However, the OFT focused on the fact that the combination of a moderately high customer diversion ratio from Irn Bru to Britvic (15-25 percent according to the OFT) and from Orangina to Britvic (30-40 percent), together with high variable margins, translated into an incentive on the merged firm to raise prices by 5-10 percent.

This case therefore turned on the notion, correctly expressed but not always applied, that for a merger to be anticompetitive, it is not necessary for the merging parties to be each other's closest competitors—it is sufficient that they are close.

In the Nakano case, Nakano's main reason for pursuing that transaction seems to have been to acquire a presence in the branded sector and so Nakano could accept a remedy requiring it to divest manufacturing assets. However, in the *Barrs/Britvic* case, the OFT's concerns related directly to the parties' major brands and so no remedy would have been viable.

In their joint initial submission to the CC, Barrs and Britvic echoed Gerald Corbett's reference to industrial policy quoted above by emphasizing that the merger would have a "strong industrial logic" that would allow the merged entity to compete more effectively. As it turned out, the CC found this logic more compelling than Britvic ultimately did. On 9 July, the CC unconditionally cleared the merger, although the parties are reported to have abandoned the deal.

VI. OTHER CONSIDERATIONS

These two cases also highlight a couple of noteworthy procedural points.

First on timing, which was an issue in both cases. The *Barrs/Britvic* notification was deemed complete on November 14, 2012 (and no doubt followed a period of pre-notification) and was referred on February 13, 2013—following a number of announcements from Barrs regarding delays in the expected decision date. The CC's final report was published on July 9, 2013—giving a review period of slightly less than eight months.

The *Nakano/Premier* deal on the other hand was notified on July 13, 2012 and although the OFT's initial decision was issued on September 26, 2012, it was not until February 26, 2013 that the OFT confirmed its approval of Baxters as a suitable buyer for the divested business, giving a review period of seven and a half months. In other words, the OFT's requirement in *Nakano/Premier* that Nakano divest its plant to an upfront buyer (meaning that the OFT could refer the *Nakano/Premier* transaction to the CC until a satisfactory buyer had committed to purchase the divestment business) meant that it took almost as long for *Nakano/Premier* to get phase I clearance as it will take *Barrs/Britvic* to get phase II clearance.

Secondly, on the use of monitoring trustees. The *Nakano/Premier* transaction completed shortly after having been notified to the OFT and (in common with many other transactions), Nakano gave hold separate undertakings under which it committed to manage the target business separately. However, the OFT also required Nakano to appoint (and pay for) a

monitoring trustee to oversee the hold separate process and a divestment trustee to oversee the divestment process. Although commonly used by the CC, the OFT has only recently started to require the appointment of monitoring trustees and *Nakano/Premier* was one of the first cases of a trustee being appointed. It is expected that the OFT will make much greater use of these powers in the future.