

Completed acquisition by Punch Taverns plc of Avebury Holdings Ltd

The OFT's decision on reference under section 22(1) given on 25 October 2005.
Full text of decision published 28 November 2005.

PARTIES

1. **Punch Taverns plc** (Punch) is a publicly listed company operating a portfolio of some 8,200¹ leased and tenanted pubs across the UK. **Avebury Holdings Ltd** (Avebury) is a Guernsey based holding company which previously operated 447 pubs in the UK.

TRANSACTION

2. Punch completed the acquisition of the entire share capital of Avebury on 8 August 2005.

JURISDICTION

3. As a result of this transaction, Punch and Avebury have ceased to be distinct. The parties overlap in the operation of pubs and the share of supply test in section 23 of the Enterprise Act 2002 (the Act) is met given that the acquisition conferred on Punch a share of more than 25 per cent of pubs in several local areas defined as Petty Sessional Divisions² (PSDs) which when taken together would, in the view of the OFT, represent a substantial part of the UK. The OFT therefore believes that it is or may be the case that a relevant merger situation has been created.

¹ Including those acquired from Avebury Holdings Ltd as a result of the merger under discussion in this paper.

² The respective geographical jurisdictions in England and Wales of all magistrate's courts responsible for the regulation and licensing of premises selling alcohol.

RELEVANT MARKET

Product market

4. The parties overlap in the ownership and operation of pubs.
5. In previous cases, a 'pub' has been defined as 'premises operated under a full publican on-licence'. Such a definition includes bars and inns but has so far excluded clubs and restaurants – some of which operate under a restricted form of on-licence.
6. Having due regard to the changes that have taken place in the market since the implementation of the Beer Orders 1989 – and to the impending changes in licensing laws³, consideration has been given in this case as to whether, within the overall pub sector, scope exists for further segmentation according to characteristics and features that differentiate pubs (or types of pub) such as location, customer profile, product range, branding etc. However, as there has been no suggestion from third parties that it may be appropriate to sub-segment pubs in this case and as the overall increment to Punch's estate is very small (less than 0.7 per cent) such considerations have not been developed in the context of this particular merger.
7. Indications that previous distinctions between pubs and other types of on-licensed premises have blurred are a plausible counter-argument in favour of a wider market definition. Clearly some pubs and pub companies (pubcos) have been seeking to expand their business operations to include the provision of higher quality food, a broader range of drinks, entertainment, accommodation, dancing and other amenities. However, whilst pubs are increasingly competing (a) amongst themselves on a number of different levels and (b) with other types of on-licensed premises, there is insufficient information available as yet to assess the extent to which this militates in favour of any alternative product market definition.
8. A body of comment from third parties proposes that pubs are constrained to an extent by off-licences. There is also some evidence to indicate that the trend for pubs seeking to attract more custom by improving facilities and diversifying into areas which overlap with restaurants and clubs is a competitive response due in

³ The current licensing regime involves different types of on-licences with different degrees of restriction placed upon them (e.g. full on-licences, restricted on-licences and club on-licences). This is being replaced with a system in which there is only one type of licence for all types of premises. The new system will come into full effect in November 2005. Responsibility for issuing licences is transferred from PSDs (see paragraph 3 and footnote 2) to local authorities.

part to the availability of increasingly cheaper off-sales – particularly by supermarkets.

9. However, in the absence of relevant data and third party comment in this case, and taking due account of the small increment in pubs that this merger represents, we have not taken a view of the product market different from that in decisions in previous pub mergers. The product frame of reference for the purposes of this assessment is therefore pubs.

Geographic market

10. On the demand side, many pubs exhibit strong local characteristics since customers are generally willing to travel only short distances (frequently walking distances) to visit pubs.
11. On the supply side, a number of commercial and competitive decisions may be taken by individual pubs in response to local conditions. However, in the case of national pub chains, some of the overall business strategy is decided and implemented at a national level, e.g. beer supply arrangements, opening hours, themes, advertising and sales promotions.
12. In previous cases involving pubs, individual PSD areas have been used as the 'local' geographical basis for assessing the increment in terms of the number of pubs added to the merged entity's estate. The use of PSD areas has generally been considered so far to be the only workable proxy for any more reliable method of assessing the availability to consumers of alternative pubs and analysing the extent of local competition.
13. However, there are inherent flaws in this approach. PSD areas are administrative jurisdictions which vary significantly in size as well as in the number of pubs they contain. A considerable number (if not the majority) of PSD areas are likely to overstate the distance that most pub-goers are prepared to travel and are therefore unreliable indicators of the geographic scope for switching between pubs.
14. For this reason, and given that responsibility for licensing the retail sale of alcohol will transfer from PSDs to local authority areas (LLAs) under the Licensing Act 2003, the OFT consulted the parties and third parties as to whether departure from applying the 'PSD test' would be appropriate in this case and in any future mergers in the pub sector.
15. A number of third parties have proposed that the boundaries defined by LLAs should replace PSD areas as the relevant proxy for assessing the geographic

scope of pubs in future cases. Although they acknowledge that both methodologies have similar flaws, information on the number of licences issued within an LAA might prove more reliable for the purposes of competition assessment.

16. No third parties have expressed concerns regarding the degree of concentration in Punch/Avebury pubs at any local level. Taking into account that the increments to Punch's pub estate are low, and also that there is insufficient information and data at this stage to reliably depart from the approach taken in previous cases, PSDs will be considered as the most appropriate proxy for assessing the geographic scope of the market in this case at the local level. In future pub cases, however, PSD licence data will no longer be available and alternative means of defining the geographic market may need to be adopted.
17. Consideration will also be given to the impact of this merger on competition at the national level.

HORIZONTAL ISSUES

Local level

18. The methodology applied in previous pub merger cases is based on determining whether the merger either confers or increases a share of more than 25 per cent of pubs within a particular PSD. If that is case, the parties are required to divest a number of pubs within that PSD to reduce their market share to no more than 25 per cent or, if appropriate, to the levels of market share that prevailed prior to the merger.
19. Since completing the acquisition of Avebury, Punch has disposed of a sufficient number of pubs in all of the PSD areas where the above market share thresholds were met. Consequently, while there may have been potential local competition concerns at the time of the merger, these have all been resolved. This proposition is supported by third party respondents.

National level

20. Based on the figures available at the time of writing, Punch will own a total of 8,221 pubs. As previously identified by the OFT, different sources propose different totals for the number of pubs in the UK, but estimates provided by Experian⁴ suggest that there are between 60,000 and 66,000. Using the cautious

⁴ A company specialising in business information, research, credit ratings etc.

baseline of 60,000 pubs, Punch has 13.7 per cent of pubs in the UK, the Avebury estate representing an increment of less than 0.7 per cent.

21. No third parties had concerns regarding the possible unilateral lessening of competition at a national level. Some third parties raised concerns regarding the enhancement of the large pub chains' buyer power vis à vis the brewers.
22. It is, however, difficult to impute any significant increase in buyer power to a merger that represents such a small increment to Punch's national market share. There are no indications in any case that exercise of any such increased buyer power – even on a hypothetical basis – would be to the detriment of consumers.
23. Consequently there is no scope for any lessening of competition to be considered substantial at a national level as a result of Punch's acquisition of 409 pubs in the Avebury estate.

Barriers to entry and expansion

24. In view of the lack of horizontal concerns, it is not necessary to conclude on barriers to entry and expansion.

Buyer power

25. In view of the lack of horizontal concerns, it is not necessary to conclude on the existence of countervailing buyer power. However, as in previous cases, third parties have been concerned that the merged entity would enjoy enhanced buyer power in relation to the brewers as a result of the merger. This has been addressed above.

VERTICAL ISSUES

26. The acquisition raises no vertical issues.

CO-ORDINATED EFFECTS

27. One third-party suggested that the growth of pubcos raised concerns about the development of a complex monopoly. It pointed to the fact that Punch and Enterprise now own close to 20,000 pubs, or around a third of all pubs in the UK.
28. However, the fact that competition takes place on many non-price factors undermines possibilities for sustained co-ordination of prices. Moreover, there is no suggestion or evidence that Avebury in particular, which accounted for only a small number of pubs, had been impeding possibilities for co-ordination. Finally,

the fragmented nature of the sector (over 50 per cent of all pubs in the UK are free-houses or are owned by companies smaller than the 10 large pubcos) does not provide the type of market structure where sustained co-ordination is easily achievable.

29. The OFT does not, therefore, consider that the merger will result in increased possibilities for co-ordination.

THIRD PARTY VIEWS

30. Thirteen third parties responded to our enquiries. None of these had any concerns regarding the unilateral effects of the merger. However, two respondents suggested that the merger may increase the buying power in relation to the breweries and one proposed possibilities for co-ordinated effects. These comments are addressed above.

ASSESSMENT

31. The parties overlap in the operation of pubs.
32. Punch had already made provision for the divestment of 39 pubs prior to acquiring Avebury. The divestment was made in order to ensure that the merger did not confer or increase Punch's share of more than 25 per cent of pubs within a local licensing area (PSD). According to this methodology, the parties propose, and third parties have agreed, that no competition concerns are raised at the local level.
33. At the national level, the increment to market share is very small at less than 0.7 per cent. No substantial competition concerns are raised.
34. Consequently, the OFT does not believe that it is or may be the case that the merger has resulted or may be expected to result in a substantial lessening of competition within a market or markets in the United Kingdom.

DECISION

35. This merger will therefore **not be referred** to the Competition Commission under section 22(1) of the Act