Why *Interbrew/Bass* should not be unscrambled

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Following the UK High Court's decision of May 23, which held that Interbrew had not been given an opportunity to comment on concerns arising from its position as owner of Bass Brewers, the Ofice of Fair Trading (OFT) announced (OFT Press release PN 29/01) that it was inviting third parties to comment by July 18 on the merits of four proposals as potential remedies to the concerns raised by the *Interbrew/Bass* merger. (See 'The background' box, page following). Different ownership structures are not mutually exclusive. Therefore in this article I argue that divestment remedies should not be treated as mutually exclusive for competition or merger policy assessment. It cannot be conclusively assumed that any one remedy (and the ownership structure that will follow) can restore effective competition but not another. The key issue is not a presumption of dominance; rather it is an issue of presumption of control and of future variations in common control of the divested entity should the merger be unscrambled.

Irrelevance of market shares

The UK beer market will continue to be an oligopoly structure in the post-remedy market. The OFT has no way to determine on a priori grounds where a particular oligopoly structure turns into a competitive structure. Are three firms better than two? In some respects the number of firms and their respective market shares are irrelevant. The key to the distinction is entirely subjective; it depends on whether or not the management consider themselves rivals and/or perceive a threat of entry. If we take this to its logical conclusion it means that on a priori grounds the OFT cannot give a negative connotation even to the existence of one brewer, since the question is whether or not that one brewer takes into account threats of entry. If the one brewer does, the outcome is competitive and the number of firms the OFT may count does not matter at all in shedding light on this one brewer's behaviour.

The proposed remedies

So much time and effort is devoted in competition evaluations to the definition of the relevant market that little or no time is devoted to the definition of the relevant firm. Although a controlling shareholding in a company will give rise to a presumption of control, such a presumption could be rebutted by behavioural evidence of business autonomy that indicates de facto control. However, ownership may not generally imply a 'controlling' position in competition law. In other words, ownership and a controlling position are legal constructs and their integrity as such has to be respected in any assessment of likely competition remedies by the OFT.

No robust empirical evidence

There is no robust empirical evidence on different ownership structures to suggest that one particular remedy will create a more competitive industry structure in the UK beer market. There are ownership rights within an ownership structure and therefore every ownership structure represents a well-defined set of property rights within the undertaking concerned. With its choice of divestment remedies the OFT perilously recognises ownership rights under competition and merger law. And we must ask: will a particular remedy with a new ownership structure be more or less anti-competitive because of the ownership structure per se ?

An acknowledgement by the OFT of ownership rights would introduce, by default, a new standard of 'intermediate degrees of ownership' into their legal reasoning on control. However, the introduction of such a standard could be deemed (legally) inefficient without a robust and reasonably clear rule as to how the varying degrees of ownership per se under each of the four remedies provided constitute an offence under national or European competition law. In other words, by what ownership criteria does a particular market share threshold become non-compliant under the law and a lesser market share does not?

Proposed remedies and shareholdings

A decision to focus on the *Interbrew/Bass* post-merger market share while assessing the acquisition by a third party (an international brewer, UK or non-UK based) of a divested part of Interbrew/Bass, raises a further question. Namely, how does the third party's shareholding per se (not the market shares aggregated on the presumption of common control) of the divested part of Interbrew/Bass actually alter the competitive structure of the UK beer market between Interbrew/Bass and any other rival?

Let's call the rival 'B'. B acquires a Bass Brewers, the divested entity of Interbrew/Bass. How do we determine that B's taking an x per cent involvement in the divested entity or any change in B's shareholding subsequently is a necessary condition to compensate for the adverse effects of the original *Interbrew/Bass* merger?

I would argue that there may be grounds for Interbrew/Bass to present a case that any remedy, requiring an arbitrary shareholding (say) of x per cent may not be sufficient to restore effec-

The background

July 2000

Belgium's Interbrew agrees to buy UK's largest brewer, Interbrew. Interbrew has 32 per cent of the UK beer market.

January 2001

UK Government adopts a decision requiring the divestment of Bass.

February 2001

Interbrew seeks judicial review.

May 2001

Judge overturns the Secretary of State's decision (despite its being in line with Competition Commission recommendations). Mr Justice Moses rules largely in favour of the Government, but the one point is enough for an overturning. That point explained: the Competition Commission had decided against another divestiture, that of the 'Whitbread' business, owing to "licence issues" between Interbrew and Whitbread (Interbrew licenses the Stella Artois brand to Whitbread). Moses thought that Interbrew should have been given a chance to respond to this CC view.

June 2001

The OFT invites comments on four specific remedies: (i) The divestiture of Bass; (ii) The divestiture of Whitbread; (iii) The divestiture of Bass brands and distribution assets in England and Wales (the 'Carling Brewers remedy'); and (iv) The Divestiture of the same as (iii) but in Scotland and Northern Ireland (the 'International Brewers remedy').

tive competition in the UK beer market. Furthermore they could present a case of a rival Firm C acquiring a y per cent shareholding in the future that does in and of itself constitute anti-competitive behaviour or contribute to a substantially lessening of competition such that retrospectively an unscrambling of the original *Interbrew/Bass* deal is deemed to be less preferable to any other combination for the restoration of effective competition?

Such permutations in shareholdings with different market shares raises the question: why focus on a specific remedy? What is particularly non-compliant about one remedy, which is more compliant about a lesser remedy? In other words, what precise and reasonably clear rule on ownership has been broken as a result of which one remedy is deemed not sufficient to restore effective competition on the market?

Different ownership structures are not mutually exclusive

Different equity stakes or shareholdings should not be mutually exclusive for the purposes of competition policy assessment. If they do not represent different ownership structures it cannot be conclusively assumed that any one ownership structure under any one remedy is more anti-competitive or non-compliant than another, because:

- no one remedy will sufficiently address the adverse effects; and/or
- the effect of any one remedy on the issue of common control at rival firms B or C could be inextricably linked to future variation(s) in ownership of the majority equity stake in either firm; and furthermore
- could be inextricably linked to future variation(s) in ownership of the equity stake in rival firms A, B or C or future variation(s) in the ownership of the divested entity under the remedies.

Concluding comments

The existence of any shareholders' agreements at present between prospective UK bidders for the divested part of Interbrew/Bass should be taken into account by the OFT, if any remedy is adopted. A key concern for the OFT in that case, analogous to Article 3(3) of the ECMR, would be "the possibility of exercising decisive influence". Therefore the key question for the OFT should be whether or not the acquiring firm of the divested entity will actually exercise the decisive influence on the divested entity and if so, how the divested entity contributes to restoring effective competition in a market structure with Interbrew/Bass unscrambled. The *Interbrew/Bass* case is a clear signal to businesses that the creation of a dominant position in the UK is now sufficient for prohibition of a merger in the UK. Contrast with the fact that a (UK beer) market, with a Hirschman-Herfindahl Index of less than 1800, would be defined as "moderately concentrated" under the US Horizontal Merger Guidelines. This absolute approach may not be feasible because of the lack of a clear, concise rule on ownership and a generalised economic theory on ownership structures.

Possible solution?

If *Interbrew/Bass* were to remain unscrambled, an alternative and more efficient remedy could be one of assurances that the Interbrew/Bass group would not grant special discounts to beer distributors on certain product lines if they took other products from the group's portfolio, and that it would not in general use product line profits to reduce the prices on other lines. This is not without precedent. The precursor to the Competition Commission, the MMC, had required assurances in the past that separate disclosure of the results of specific activities be given after a merger was approved: for example, in the case of *British Match/Wilkinson Sword* in 1973, and *Berisford/British Sugar* in 1980. The OFT could therefore signal a clear indication to Interbrew/Bass of its intention to review the group's conduct in this regard under the provisions of the UK Competition Act 1998. Therein may lie a more efficient remedy, on the balance of convenience, to an unscrambling of a merger.