The American Antitrust Institute

November 19, 2014

The Honorable William J. Baer
Assistant Attorney General
U.S. Department of Justice Antitrust Division
950 Pennsylvania Avenue NW
Washington, D.C. 20530

Re: Anheuser-Busch InBev's Rumored Acquisition of SABMiller

Dear Assistant Attorney General Baer,

The American Antitrust Institute (AAI)[1] writes to express its opposition to the rumored "ultimate" beer merger. The press is abuzz with speculation that the world's largest brewer Anheuser-Busch InBev (ABI), the maker of Budweiser, Labatt, Stella Artois, and Becks, intends to buy the second-largest player SABMiller (Miller), whose brands include Miller Lite, Peroni, and, in the United States, also Coors.[2]

If realized, the deal would be the latest in a series of large consolidations in the beer industry.[3] In September 2012, the AAI published a monograph, *Global Beer: The Road to Monopoly,* which examines the competitive implications from a combination of ABI and Miller.[4]

The merger would raise major competition concerns in the United States and be, in effect, a much larger version of the ABI/Grupo Modelo merger that the DOJ challenged in 2013.[5] It would eliminate competition between the two biggest brewers in the United States and the world.[6] ABI would have even greater control of distribution and retail channels and could use this enhanced power to undermine the continued emergence of craft beer,[7] which has led to greatly increased beer choice for Americans.[8] The probable result for consumers would be higher prices and diminished non-price competition in the beer market. If ABI pursues this acquisition, the DOJ should investigate the merger carefully, and should treat the efficacy of any conventional divestiture with exceptional skepticism.

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[1] The AAI is an independent non-profit education, research, and advocacy organization. Its mission is to advance the role of competition in the economy, protect consumers, and sustain the vitality of the antitrust laws. For more information, see www.antitrustinstitute.org. The AAI's Board of Directors alone has approved this filing.
[2] Shayndi Raice, et al., *Beer Giant AB InBev Explores Financing to Buy Rival SABMiller*, WALL ST. J., Sep. 15, 2014, *available at* http://online.wsj.com/articles/ab-inbev-seeking-finance-for-sabmiller-deal-1410779802.
[3] AM. ANTITRUST INSTITUTE, GLOBAL BEER: THE ROAD TO MONOPOLY (2012), *available at* http://www.antitrustinstitute.org/sites/default/files/Global Beer Road to Monopoly_0.pdf.
[4] *Id.* at 67-70.
[5] United States v, Anheuser-Busch InBev SA, Complaint at 2, 13-cv-127 (D.D.C. Jan. 31, 2013).
[6] Roberto A. Ferdman, *Nearly One in Every Three Beers in the World Could Soon Be Sold by the Same Company*, WASH. POST, Sep. 15, 2014, *available at* http://www.washingtonpost.com/blogs/wonkblog/wp/2014/09/15/nearly-one-in-every-three-beers-in-the-world-could-soon-be-sold-by-one-company/.
[7] *See* James Fallows, *The Steve Jobs of Beer*, ATLANTIC, Nov. 2014, at 22 (discussing growth of Sam Adams and American craft beers generally).
[8] *See Prohibition Hangover*, ECONOMIST, Sep. 8, 2012 ("These days bars with 20 taps are common. Connoisseurs of chocolate stouts, blueberry wheats and hopmonsters are spoiled for choice.").

An Even More Concentrated Beer Market

To say the antitrust issues are significant would be an understatement. The two companies' market shares indicate that the merger would be presumptively illegal under the Horizontal Merger Guidelines.[9] Based on sales value, ABI has a national market share of approximately 40 percent, and Miller's share is around 25 percent.[10] On the basis of sales volumes, ABI and Miller have shares of 50 percent and 30 percent, respectively.[11] And these share numbers for ABI do not reflect its agreement to supply Constellation with Corona and other Modelo beers through 2016.[12] A combination of the two would leave the United States with one brewing behemoth with a national market share of 65 percent by value and 80 percent by volume. In short, the national beer market is already highly concentrated and would become even more concentrated following the merger. A DOJ investigation may also find that the current concentration level and post-merger increase in concentration are higher in many local markets.

Loss of Head-to-Head Competition

Consumers can expect higher prices and reduced variety in the beer market. ABI and Miller produce some of the most popular brands in the country—Bud Light, Coors, and Miller Lite. They compete in a number of submarkets, including mass market, premium, and craft. Today, a price increase on, for example, Bud Light can induce many price-sensitive consumers to switch to rival Miller Lite. And if Miller cuts the price on Miller Lite, ABI surely feels some pressure to do the same on Bud Light.[13] This competition extends beyond price. If Miller introduces a successful new beer, ABI is likely to follow suit in short order.[14]

With the Miller brands under the ABI umbrella, the competitive dynamic described above would disappear. Without Miller's disciplining presence, ABI may be able to impose significant price increases on consumers. Miller would also no longer be nipping at ABI's heels and spurring it to improve its portfolio of brands. And since Miller is nearly four times larger than the third biggest brewer today,[15] Miller's presence in the marketplace would not be replaced for the foreseeable

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[9] Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines § 5.3 (2010).

[10] United States v, Anheuser-Busch InBev SA, Complaint at 2, 13-cv-127 (D.D.C. Jan. 31, 2013).

[11] GLOBAL BEER, *supra* note 3, at 4.

[12] Press Release, Dep't of Justice, Antitrust Div., Justice Department Reaches Settlement with Anheuser-Busch InBev and Grupo Modelo in Beer Case (Apr. 19, 2013), *available at* http://www.justice.gov/atr/public/press_releases/2013/296018.htm; Press Release, Constellation Brands, Anheuser-Busch InBev and Constellation Brands Announce Revised Agreement for Complete Divestiture of U.S. Business of Grupo Modelo (Feb. 14, 2014), *available at* http://www.cbrands.com/news-media/anheuser-busch-inbev-and-constellation-brands-announce-revised-agreement-complete-divesti.

[13] *See, e.g.*, James Ylisela Jr. et al., *Pay-to-Play Infects Chicago Beer Market, Crain's Investigation Finds*, CRAIN'S CHICAGO BUSINESS, Nov. 22, 2010, *available at* http://www.chicagobusiness.com/article/20101120/ISSUE01/311209986/pay-to-play-infects-chicago-beer-market-crains-investigation-finds ("The fight between Bud and Miller helps consumers by keeping beer prices in Chicago lower than the national average."); Jayendra Gokhale & Victor J. Tremblay, *Competition and Price Wars in the U.S. Brewing Industry*, 7 J. WINE ECON. 226 (2012) (examining history of price competition in the beer industry).

[14] *E.g.*, Duane Stanford, *Blue Moon vs. Craft Beer Rivals: MillerCoors Strikes Back*, BLOOMBERG BUSINESSWEEK, Aug. 8, 2013, *available at* http://www.businessweek.com/articles/2013-08-08/blue-moon-vs-dot-craft-beer-rivals-millercoors-strikes-back ("[MillerCoors'] Blue Moon, a Belgian-style white beer, had sales equal to 15 percent of the 13.2 million barrels of craft beer sold in the U.S. last year. Its success has even prompted Anheuser-Busch InBev (BUD) to introduce a white beer of its own called Shock Top.").

[15] GLOBAL BEER, *supra* note 3, at 4.

future. ABI would have more power to raise prices and would also feel less competitive pressure to invest in product development.

Exclusionary Threats to Smaller Rivals, Including Craft Brewers

Even those who prefer independent craft beers should be troubled by the rumored merger. Beer in nearly all states must be sold through distributors, who resell to bars, liquor stores, and supermarkets.[16] Direct sales by brewers to customers and retailers are generally prohibited. And at the retail level, ABI, through category management, helps decide what consumers see—and can ultimately buy—at many supermarkets and other beer retailers.

Impaired Access to Distributors

On account of its size, ABI already exercises a domineering presence over its distributors. For a distributor, a falling out with ABI could mean losing brands that account for 40 percent of the national market—a figure that is certainly higher in many local markets.

At present, an independent Miller provides some check on ABI's power over distribution channels. In many markets, a distributor terminated by ABI may be able to switch to Miller and become a wholesaler of Coors, Miller Lite, and other Miller brands. Importantly, the two companies appear to pursue different distribution strategies. ABI has obtained exclusivity from a majority of its distributors and restricted their ability to sell competing beers.[17] In contrast, Miller seems to be more tolerant of its distributors carrying rival brands.[18] Today, an ABI distributor that wants to carry multiple brands may be able to cut ties with ABI and become a Miller wholesaler.

With ABI controlling Miller, distributors would lose a great deal of bargaining power. They would have no remotely comparable alternative to which they could turn. Following an acquisition of Miller, ABI would account for 65 percent of the national market. ABI distributors would have even less leverage than they today—a dispute with ABI would risk forsaking brands that comprise two-thirds of U.S. beer sales. As a practical matter, they would have little choice but to accept ABI's terms, however onerous or unfair.

Along with more power over distributors, ABI would have a larger share of the market to defend from rivals. In addition to acquiring mass market brands like Coors and Miller Lite, ABI would have an expanded portfolio of craft brands, adding the popular Blue Moon to its current stable that includes Goose Island and Shock Top.

With an even larger market share, ABI would have more power over distributors and more to gain from excluding rivals. In other words, ABI would have a greater ability and incentive to foreclose

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[16] *Id.* at 38.

[17] GLOBAL BEER, *supra* note 3, at 10. *See also* Steve Hindy, *Don't Let Big Brewers Win Beer Wars*, CNN, Dec. 12, 2012, *available at* http://www.cnn.com/2012/12/12/opinion/hindy-beer-wars/; *A-B Expands Wholesaler Plan, Incentives*, ST. LOUIS BUS. J., Apr. 3, 2008, *available at* http://www.bizjournals.com/stlouis/stories/2008/03/31/daily73.html; David Kesmodel, *Beer Distributors Want More than One Best Bud*, WALL ST. J., Feb. 6, 2008, *available at* http://online.wsj.com/articles/SB120226269926846331.

[18] Kesmodel, *supra* note 17; *Dogfish Head Leaves Louis Glunz and Signs with MillerCoors Distributor Cluster in Chicago*, MYBEERBUZZ, Dec. 29, 2012, *available at* http://mybeerbuzz.blogspot.com/2012/12/dogfish-head-leaves-louis-glunz-and.html.

rivals, including the dynamic craft segment. ABI could expand its exclusive dealing with distributors to give its larger brand portfolio a competitive advantage over smaller rivals. ABI, for example, could insist that all its distributors carry only ABI craft beers and not stock beers from rivals like New Belgium and Sierra Nevada.

Diminished Visibility on Retail Shelves

Under the practice of "category management," many retailers have outsourced the management of their beer aisles to "category captains." In their designated product line, category captains, who are typically the leading manufacturer in the segment, select the particular brands to carry and also design the configuration of retail shelves. While this system can improve the retailer's sales and profitability, it is also ripe for anticompetitive abuse.[19] A category captain can give greater shelf prominence to its own products and opt not to stock rival products.[20] This type of opportunism frustrates competition on the merits and can doom lesser-known brands to failure.

If ABI acquires Miller, it would have more power at the retail level to marginalize rivals. In beer, ABI is the leading category captain and, together with Miller, accounts for the overwhelming majority of category captaincies.[21] From the perspective of retailer profitability, evidence suggests that ABI and Miller category captains, in some parts of the country, are devoting too much space to their own brands and too little to craft beers.[22] Following an acquisition of Miller, ABI would control a greater number of beer aisles and have more power to manipulate retail shelves to promote its own brands and hurt rivals.

The merger could raise barriers to entry and expansion, diminishing non-price competition and reducing choice for beer drinkers. Without access to efficient distribution and retail shelves, craft and other rival brewers may face greater difficulties in reaching American consumers.

We thank you for taking the time to consider our views. We would be pleased to discuss this matter with you and your staff.

Sincerely,

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[19] *See generally* ABA SECTION OF ANTITRUST LAW, CATEGORY MANAGEMENT ANTITRUST HANDBOOK (2010).

[20] Robert L. Steiner, *Category Management—A Pervasive, New Vertical/Horizontal Format*, ANTITRUST at 77, 80 (Spring 2001). *See also* Conwood Co. v. U.S. Tobacco Co., 290 F.3d 768 (6th Cir. 2002) (affirming jury verdict that found that leading smokeless tobacco manufacturer had abused category captaincies to exclude rival from the market).

[21] *Chain Retailers: How to Get the Most Out of Category Management for Your Craft Segment*, BA INSIDER (Brewers Assoc., Boulder, CO), 2013.

[22] *Id.*; Brewers Assoc., *Craft Fights Back vs. the Foreign Beer Giants; Craft Is Under-Spaced in the Off-Premise Chains*, BA INSIDER (Brewers Assoc., Boulder, CO), 2013.