



The American Antitrust Institute

April 25, 2016

The Honorable Renata B. Hesse
Acting Assistant Attorney General
U.S. Department of Justice Antitrust Division
950 Pennsylvania Avenue NW
Washington, DC 20530

Re: Competitive Concerns and Remedy in the Proposed Merger of AB InBev and SABMiller

Dear Acting Assistant Attorney General Hesse:

The American Antitrust Institute (AAI) has a substantial record of commentary on competition and consumer concerns in the U.S. beer industry. We therefore respectfully offer the AAI's perspective and analysis on the proposed merger of AB InBev-SABMiller.¹ This letter outlines what the AAI believes to be the vital elements of a competitive analysis and effective remedy, should the U.S. Department of Justice (DOJ) decide not to seek to block the merger altogether. In order to ascertain the contours of an effective remedy, the DOJ must first consider the full range of potential competitive effects of the AB InBev-SABMiller transaction itself, as well as those resulting from Molson Coors' acquisition of SABMiller's interest in the MillerCoors joint venture (JV).

¹ The American Antitrust Institute is an independent and nonprofit education, research, and advocacy organization devoted to promoting competition that protects consumers, businesses, and society. Many thanks to Kyle Virtue, AAI Research Fellow, for legal and economic research and support. For more information, see antitrustinstitute.org. The analysis contained in this letter is based on publicly available information and on discussions with market participants. Because the AAI does not have access to the confidential and proprietary information that is revealed in the course of a DOJ investigation, our analysis and recommendations are limited accordingly. In November 2014, we urged the Department of Justice to closely scrutinize any forthcoming merger proposal from AB InBev and SABMiller. *See* Letter from Am. Antitrust Inst., to Assistant Att'y Gen. William Baer in re: Anheuser-Busch InBev's Rumored Acquisition of SABMiller (Nov. 19, 2014), *available at* <http://www.antitrustinstitute.org/sites/default/files/AAI-%20Beer%20merger%2C%20to%20DOJ%2011-19.14.pdf>. In December 2015, AAI's President Diana Moss testified before the Senate Judiciary Committee in a hearing on the proposed merger of AB InBev and SABMiller. *See Ensuring Competition Remains on Tap: The AB InBev/SABMiller merger and the State of Competition in the Beer Industry: Hearing Before the Subcomm. on Antitrust, Competition Policy and Consumer Rights of the S. Comm. on the Judiciary*, 114th Cong. (Dec. 8, 2015) (testimony of Diana L. Moss, President, Am. Antitrust Inst.), *available at* http://www.antitrustinstitute.org/sites/default/files/Moss%20SJC%20Testimony%20re%20ABInBev_SABMiller%20copy.pdf.

I. Overview

The proposed merger of AB InBev and SABMiller would place a dominant share of the U.S. beer market in the hands of one vertically integrated company, a transaction that would be likely to substantially lessen competition and be presumptively illegal under Section 7 of the Clayton Act. Putting aside any proposed remedy, the merger, if allowed to proceed, would incent AB InBev to exercise market power both unilaterally and in coordination with rivals. Such effects would likely stifle important competition from smaller market participants such as craft brewers, raise beer prices, reduce quality and choice, and jeopardize innovation in this important sector. Indeed, the timing of the proposed merger highlights the rapid growth of innovative, diverse, high quality craft beers.² Outside the brewpub or the microbrewery, craft beer makers depend on independent distribution to get products onto retail shelves and into the hands of the consumer.³

In a pre-emptive move to make the proposal more palatable for U.S. antitrust enforcers, the merging parties have proposed an up-front remedy to simultaneously divest SABMiller's interests in the MillerCoors JV to Molson Coors.⁴ While the divestiture proposal may seem at first blush to be an easy fix, simply changing the name on the door from "MillerCoors" to "Molson Coors" is unlikely to neutralize significant anti-competitive and anti-consumer effects of the proposed merger. The loss of SABMiller, to be replaced by the full ownership and operation of the SABMiller assets by Molson Coors, introduces a different entity to the market, with potentially different incentives and abilities to compete.

There are a number of factors that complicate the business of crafting an acceptable remedy here. One is direct evidence of tacit coordination on price increases in the wake of the 2008 MillerCoors JV.⁵ Second, both AB InBev and Molson Coors have already taken, or signaled their intentions to engage in strategic maneuvering that could further restrain competition. For example, AB InBev has recently acquired more distribution (i.e., wholesale) capacity, increased their control of independent distributors (potentially to the detriment of smaller competitors), and purchased rival craft brewers. And Molson Coors has attempted to influ-

² See Bernard Ascher, Am. Antitrust Inst., *Global Beer: The Road to Monopoly* 6–7 (2012). See also Trefis Team, *Does the Declining U.S. Beer Trend Spell Doom for Brewers?*, Forbes (June 29, 2015, 8:34 AM), <http://www.forbes.com/sites/greatspeculations/2015/06/29/does-the-declining-u-s-beer-trend-spell-doom-for-brewers/>.

³ The three-tiered system of beer distribution in the U.S. separates manufacturing, wholesale distribution, and retailing. However, there are material variations in how this system is implemented from state to state. This is particularly important for how brewers such as AB InBev can (or cannot) vertically integrate into distribution.

⁴ Press Release, Anheuser-Busch InBev, Anheuser-Busch InBev Announces Agreement with Molson Coors for Complete Divestiture of SABMiller's Interest in MillerCoors (Nov. 11, 2015), available at <http://www.ab-inbev.com/content/dam/universaltemplate/abinbev/pdf/investors/11November2015/Press%20Release%20-%20Anheuser-Busch%20InBev%20Announces%20Agreement%20with%20Molson%20Coors%20for%20Complete%20Divestiture%20of%20SABMiller%E2%80%99s%20Interest%20in%20MillerCoors.pdf>.

⁵ See Competitive Impact Statement at 7, *United States v. Anheuser-Busch InBev*, No. 13-127 (RWR) (D.D.C. Apr. 19, 2013). See also Complaint at 18, *United States v. Anheuser-Busch InBev*, No. 13-127 (RWR) (D.D.C. Jan. 31, 2013). See also Nathan H. Miller & Matthew C. Weinberg, *Mergers Facilitate Tacit Collusion: Empirical Evidence from the U.S. Brewing Industry 2* (Working Paper, Mar. 25, 2015) (finding that while the MillerCoors joint venture resulted in merger-specific cost reductions, average retail prices increased post-consummation, likely because of tacit collusion).

ence MillerCoors' capacity decisions before any divestiture has been approved.⁶

Given these facts, the AAI suggests that the paramount objective in crafting any remedy should be to ensure that incentives for AB InBev to exercise market power unilaterally, or for AB InBev and Molson Coors to tacitly collude, are not enhanced post-merger. In considering a possible remedy, the DOJ's charge is to "preserve competition," which the agency interprets in its MERGER REMEDIES GUIDE as "restoring competition or enhancing consumer welfare, depending on the specific facts of the transaction and its proposed remedy."⁷ Indeed, the AAI suggests that given the difficult and troubled landscape in the U.S. beer industry, together with the strategic steps taken by AB InBev and Molson Coors in recent months, an effective remedy should enhance consumer welfare by improving competitive conditions generally. This implies that eliminating the anticompetitive risks of the proposed merger may involve moving "levers" that are not entirely co-extensive with the changes caused by the combination.

Accordingly, DOJ should not simply accept the proffered divestiture of SABMiller's interest in the MillerCoors JV to Molson Coors. All options should remain on the table, including divestiture of SABMiller's assets to smaller, more disruptive players in the relevant market.

II. Background to the Proposed Merger, AB InBev and SABMiller

A. Background to AB InBev and SABMiller

Five major mergers in the last 10 years have fundamentally altered the U.S. beer market.⁸ In 2005, Coors and Molson merged to form Molson Coors Brewing Company. In 2007, SABMiller and MolsonCoors formed the MillerCoors JV, combining SABMiller's 18% U.S. market share and Molson Coors' 11% share to place the MillerCoors JV in second place in the U.S. beer market.⁹ In 2008, InBev acquired Anheuser-Busch to form AB InBev,¹⁰ one of the

⁶ See *Ensuring Competition Remains on Tap: The AB InBev/SABMiller merger and the State of Competition in the Beer Industry: Hearing Before the Subcomm. on Antitrust, Competition Policy and Consumer Rights of the S. Comm. on the Judiciary*, 114th Cong. (Dec. 8, 2015) (Responses to Questions for the Record by Mark Hunter, President & CEO, Molson Coors) (responding to questions about the closure of MillerCoors' Eden, North Carolina facility); see also Press Release, Teamsters, Hoffa to MillerCoors: Keep Eden Brewery Open (Jan. 20, 2016), <https://teamster.org/news/2016/01/hoffa-millercoors-keep-eden-brewery-open> (suggesting that the closure of the Eden facility is merger-related).

⁷ Dep't of Justice, *Antitrust Division Policy Guide to Merger Remedies* 1 n.2 (2011).

⁸ See Ascher, *supra* note 2 at 6-7.

⁹ Theresa Howard, *Molson Coors, SABMiller Set Joint Venture*, ABC News, <http://abcnews.go.com/Business/story?id=3710263&page=1> (last visited Apr. 19, 2016); David Kesmodel & Deborah Ball, *Miller, Coors to Shake Up U.S. Beer Market*, Wall St. J. (Oct. 10, 2007), <http://www.wsj.com/articles/SB119192982900853292>.

¹⁰ David Kesmodel et al., *Anheuser, Inbev Reach a Deal for \$52 Billion*, Wall St. J. (July 14, 2008), <http://www.wsj.com/articles/SB121598077288249131>.

top five consumer products companies in the world.¹¹ In 2012, AB InBev acquired Grupo Modelo.¹² The consent decree in that case remains in force today.¹³

Since then, AB InBev has expanded its footprint by acquiring distribution and regional craft brewers, such as Chicago's Goose Island Brewery (2011), Oregon's 10 Barrel Brewing (2014) and New York's Blue Point Brewing Company (2014). In 2015, the company acquired three craft breweries in a five-day period. SABMiller's expansion strategy has also involved acquiring both international and domestic craft brewers, including a minority stake in Georgia's Terrapin Beer Company (2011), Crispin Cider (2012), and San Diego-based St. Archer Brewing Co. (2015).

B. The Merger of AB InBev and SABMiller

The merging parties note that the proposed merger is part of a broader strategy to form a "truly global brewer."¹⁴ By combining the "complementary" geographical footprints, brand portfolios, and distribution networks of AB InBev and SABMiller, the merger would allow the company to access growing markets for beer in Asia, South America, and Africa.¹⁵ Company documents suggest that projected efficiencies will come primarily from the SABMiller-side of integrated supply-chain operations, "with approximately 70% of the additional savings . . . coming from procurement and 30% from manufacturing and distribution."¹⁶

To pave the way for this global expansion, and to assuage antitrust concerns in the U.S., the parties have offered to divest SABMiller's U.S. assets engaged in the MillerCoors JV to Molson Coors. The closing of the AB InBev-SAB Miller merger and Molson Coors' acquisition of SABMiller's 50% voting interest in the MillerCoors JV would occur at the same time. Of course, without any integration of brewing capacity or distribution in the U.S., AB InBev's acquisition of SABMiller would provide no material economies of scale, scope, or coordination in this country. While this seems obvious, it is important to highlight because without any merger-related cost savings or consumer benefits, the adverse effects of the merger are magnified.¹⁷

¹¹ Press Release, AB InBev, InBev Completes Acquisition of Anheuser-Busch (Nov. 18, 2008), [http://www.ab-inbev.com/content/dam/universaltemplate/AB InBev/pdf/press-releases/public/2008/11/20081118_1_e.pdf](http://www.ab-inbev.com/content/dam/universaltemplate/AB%20InBev/pdf/press-releases/public/2008/11/20081118_1_e.pdf).

¹² See Ascher, *supra* note 2, at 56 (2012); *Beeropoly: This is What the Family Tree of Beer Companies will Look Like if AB InBev Acquires SABMiller*, Quartz, <http://qz.com/503392/this-is-what-the-family-tree-of-beer-companies-will-look-like-if-ab-inbev-acquires-sabmiller/> (last visited Apr. 19, 2015).

¹³ See Final Judgment at 12, *United States v. Anheuser-Busch InBev*, No. 13-127 (RWR) (D.D.C. Oct. 24, 2013) (stating that part of the consent decree requires AB InBev and Constellation Brands to enter into a Transition Services Agreement for a period of up to three years).

¹⁴ See Press Release, SABMiller, Recommended Acquisition of SABMiller PLC by Anheuser-Busch InBev SA/NV 93-105 app. 5 (Nov. 11 2015), <http://sabmiller.com/docs/default-source/investor-documents/ab-inbev-offer/11-november-2015---recommended-acquisition-of-sabmiller-plc-by-anheuser-busch-inbev-sa-nv.pdf?sfvrsn=10>.

¹⁵ See, e.g., *id.* at 25-26 ("Given the largely complementary geographical footprints and brand portfolios of AB InBev and SABMiller, the Combined Group would have operations in virtually every major beer market, including key emerging regions with strong growth prospects such as Africa, Asia, and Central and South America.").

¹⁶ *Id.* at 102.

¹⁷ Cf. U.S. Dep't of Justice & Fed. Trade Comm'n, *Horizontal Merger Guidelines* § 10 (2010), available at <https://www.ftc.gov/sites/default/files/attachments/merger-review/100819hmg.pdf> ("The greater the poten-

III. The Proposed Merger is Presumptively Illegal Under U.S. Antitrust Law

Data show that since 2007, prices for beer have increased in the U.S. above the rate of inflation and against the backdrop of declining output.¹⁸ Moreover, recent economic analysis indicates that following the formation of the MillerCoors JV, prices increased as a result of tacit coordination between AB InBev and MillerCoors.¹⁹ The AAI suggests that this evidence should be the starting point for evaluating the likely adverse effects of the proposed AB InBev-SABMiller merger.

Based on the most recent publicly available shipment data, AB InBev has 45% of the U.S. beer market, the MillerCoors JV has 26% of that market, and there is a smattering of smaller fringe players.²⁰ These include Constellation (7.0%), Heineken (4.0%), Pabst (2.5%), Boston Beer (2.0%), Yeungling (1.4%), North American Breweries (1.1%), and Diageo Guinness USA (1.1%).²¹ Putting aside the proposed divestiture, a merged AB InBev and SABMiller would control about 60% of the domestic market, creating a dominant firm by any measure. Pre-merger U.S. market concentration, as measured by the HHI, is about 2,850 points. The merger would increase concentration by about 1,200 points, for post-merger concentration of about 4,000. Under the HORIZONTAL MERGER GUIDELINES, such an increase is “presumed to be likely to enhance market power.”²² This further concentration would enhance the likelihood of the exercise of both unilateral and coordinated market power.

For example, AB InBev, as a larger player, would have stronger incentives to unilaterally exercise market power by directly raising prices or reducing quality. The proposed deal would also combine the brewing capacity of the merging firms with AB InBev’s current network of wholly owned distribution centers. The proposed merger could thus enhance AB InBev’s unilateral incentives to foreclose rival brewers from access to distribution. The revenues lost by either restricting or wholly cutting off rivals’ access to distribution would likely be recouped by additional sales of AB InBev products at supracompetitive prices. If such conduct were to flow from the merger, rivals would find it more difficult to get their products onto retail shelves and into the hands of the consumer.

tial adverse competitive effect of a merger, the greater must be the cognizable efficiencies, and the more they must be passed through to customers, for the Agencies to conclude that the merger will not have an anticompetitive effect in the relevant market. When the potential adverse competitive effect of a merger is likely to be particularly substantial, extraordinarily great cognizable efficiencies would be necessary to prevent the merger from being anticompetitive.”).

¹⁸ See Ascher, *supra* note 2, at ii, app. II-6.

¹⁹ See Competitive Impact Statement at 7, *United States v. Anheuser-Busch InBev*, No. 13-127 (RWR) (D.D.C. Apr. 19, 2013); see also Nathan H. Miller & Matthew C. Weinberg, *Mergers Facilitate Tacit Collusion: Empirical Evidence from the U.S. Brewing Industry 2* (Working Paper, Mar. 25, 2015) (finding that while the MillerCoors joint venture resulted in merger-specific cost reductions, average retail prices increased post-consummation, likely because of tacit collusion).

²⁰ Market shares are based on the number of gallons shipped to beer wholesalers in 2014. See Beer Marketer’s Insights, *Key Industry Data, Major Supplier Shipments and Share: 2014 vs 2013*, http://www.craftbrewnews.net/index.php?option=com_k2&view=item&id=19559:major-supplier-shipments-and-share-2012-vs-2011&Itemid=201 (last visited Apr. 19, 2016).

²¹ *Id.*

²² *Horizontal Merger Guidelines*, *supra* note 17, at § 2.1.

Combining AB InBev and SABMiller would also significantly enhance incentives for anti-competitive coordination—conduct that has been observed in the beer market since the MillerCoors JV was formed.²³ Tacit coordination could further lessen incentives or pressure for AB InBev-SAB Miller and Molson Coors to compete on price, quality, or innovation. Further, the loss of SABMiller, which has pursued relatively friendly policies toward independent distributors in their decisions to carry rival products, could lead Molson Coors to mimic AB InBev’s more adversarial policies toward independent distribution. Collectively, the likely unilateral and coordinated effects of the proposed merger could raise prices, reduce quality, limit choice and slow innovation, to the detriment of consumers.

IV. AB InBev’s Push Into Distribution is Important in an Analysis of Competitive Effects and Remedy

A. Expansion of Wholly Owned Distribution

AB InBev is estimated to own distribution capacity for over 10% of its own brewing volume, which includes distributors located in eight states: California, Colorado, Ohio, Oregon, Oklahoma, Hawaii, New York, and Massachusetts.²⁴ AB InBev has also engaged in a recent spree of acquisitions and swaps involving independent distributors, generating concern over perceived attempts to curb competition by limiting craft brewers’ distribution options.

In 2014, for example, AB InBev purchased one independent distributorship in Oregon and one in Kentucky.²⁵ A year later in 2015, Kentucky passed a statutory prohibition on brewer ownership of wholesalers.²⁶ AB InBev sold those recently acquired Kentucky operations to an AB InBev distributor in Texas which, in turn, agreed to sell its Colorado distributors to AB InBev.²⁷ This “swap” agreement, while leaving many questions about AB InBev’s ability to continue to control distribution in Kentucky unanswered, consolidated the company’s control over wholesale operations in Colorado. We note that such swaps are not unique to brewing; they have occurred in the cable industry as a way of expanding and consolidating regional footprints and accruing market power.²⁸

A month after the Colorado acquisitions, AB InBev announced the purchase of two other

²³ *Supra* note 5.

²⁴ *Wholesaler Operations*, Anheuser-Busch, <http://anheuser-busch.com/index.php/our-company/operations/wholesale-operations/> (last visited Apr. 19, 2016).

²⁵ Anheuser-Busch InBev SA/NV, Annual Report (Form 20-F), at 44 (Dec. 31, 2014), [http://www.ab-inbev.com/content/dam/universaltemplate/AB InBev/pdf/investors/sec-filings/20F_24032015.pdf](http://www.ab-inbev.com/content/dam/universaltemplate/AB%20InBev/pdf/investors/sec-filings/20F_24032015.pdf); Lisa Brown, *A-B Buying Portland Distributor*, St. Louis Dispatch (Jan. 8, 2014), http://www.stltoday.com/entertainment/dining/bars-and-clubs-other/hip-hops/a-b-buying-portland-distributor/article_46fefe23-42e8-546a-974c-8b7840699e25.html.

²⁶ H.B. 168, 2015 Leg., Reg. Sess. (Ky. 2015), *available at* <https://legiscan.com/KY/bill/HB168/2015>.

²⁷ However, it decided to sell its Kentucky operations to Standard Sales Company, which is an AB InBev distributor based in Odessa, Texas. David A. Mann, *Budweiser to sell Louisville and Owensboro distributorships*, Louisville Bus. First (Aug. 4, 2015), <http://www.bizjournals.com/louisville/news/2015/08/04/budweiser-sells-louisville-and-owensboro.html>.

²⁸ *See, e.g.*, Reinhardt Krause, *Comcast, Charter, Altice, Cable Swaps After Deal Approvals*, Investor’s Bus. Daily (Mar. 26, 2016), <http://www.investors.com/news/technology/comcast-charter-altice-cable-swaps-eyed-post-deal-approvals/> (discussing asset swaps after cable mergers).

distributors in California.²⁹ In that connection, AB InBev did not purchase the rights for rival brands, forcing those brands into the remaining MillerCoors wholesalers. Several reports indicate that state regulators in California are looking into these transactions, but the California Attorney General has not released a statement about them.³⁰

The Craft Brewers Association reports that AB InBev has significant market power in the wholesale tier, controlling over 50% of distribution in many geographic markets where it has direct or indirect ownership of a wholesaler.³¹ In many areas, one MillerCoors wholesaler and one AB InBev wholesaler are the only wholesalers serving the market. In the states where AB InBev has most recently purchased craft brewers (California, Oregon, Washington, and Colorado), it is also one of the largest wholesalers, giving AB InBev enhanced control over both brewing and distribution.³²

With an already dominant market share in brewing and successful moves toward vertical integration, AB InBev has both the ability and incentive to frustrate the ability of rivals to reach the retail consumer. Indeed, this strategy has reportedly adversely affected craft brewers. Reports indicate, for example, that when AB InBev acquired the distributors of an Oregon craft brewer in 2011 and 2012, previously healthy growth in sales stalled until the brewer found alternative distributors. Other craft brewers indicated to the media that distributors' divestment of non-AB InBev brands put the "last-to-go" craft brewers at the mercy of the big players, given their limited options for alternative distribution. These experiences deserve close scrutiny in evaluating the AB InBev-SABMiller transaction. Moreover, high distribution switching costs and state laws limiting the ability of craft brewers to terminate a distribution agreement³³ make it difficult for these smaller rivals to stay in business.

B. AB InBev's Ability to Control Independent Distribution

In instances where AB InBev does not own distribution, it still exerts significant control over distributors through practices that limit or even eliminate rivals' ability to distribute their products to customers. AB InBev distributes its products through about 500 independ-

²⁹ Bob Tallett, AB InBev's Vice President of Business and Wholesaler Development, announced that the company would purchase the rights to its own brands from the Oakland, Calif.-based Horizon Beverage Company. In a second transaction, AB repurchased its brand rights from M.E. Fox & Company Inc., a beer and non-alcoholic beverage distributor based in San Jose, California. Chris Furnari, *Consolidation Continues as A-B Invests 2 California Wholesalers*, Brewbound (Sept. 2, 2015), <http://www.brewbound.com/news/consolidation-continues-as-a-b-invests-in-california-wholesalers>.

³⁰ See, e.g., Diane Bartz, *Exclusive: U.S. probes allegations AB InBev seeking to curb craft beer distribution*, Reuters (Oct. 12, 2015), <http://www.reuters.com/article/us-AB-InBev-doj-antitrust-exclusive-idUSKCN0S623R20151012>.

³¹ *Ensuring Competition Remains on Tap: The AB InBev/SABMiller merger and the State of Competition in the Beer Industry Before the Subcomm. on Antitrust, Competition Policy & Consumer Rights of the S. Comm. on the Judiciary*, 114th Cong. 3 (Dec. 8, 2015) (Responses to Questions for the Record by Bob Pease, CEO, Brewers Ass'n), available at <http://www.judiciary.senate.gov/meetings/ensuring-competition-remains-on-tap-the-ab-inbev/sabmiller-merger-and-the-state-of-competition-in-the-beer-industry>.

³² *Ensuring Competition Remains on Tap: The AB InBev/SABMiller merger and the State of Competition in the Beer Industry Before the Subcomm. on Antitrust, Competition Policy & Consumer Rights of the S. Comm. on the Judiciary*, 114th Cong. 2–3 (Dec. 8, 2015) (testimony of Bob Pease, CEO, Brewers Ass'n), available at <https://www.judiciary.senate.gov/imo/media/doc/12-08-15%20Pease%20Testimony.pdf>.

³³ In 48 states, brewers can only terminate a distribution agreement for cause if it determines the wholesaler is not using its best efforts to distribute its products. See Pease Responses, *supra* note 31, at 1–2.

ent distributors in the U.S.,³⁴ including through approximately one half of the top 30 distributors by volume, while MillerCoors distributes through the other half. AB InBev is, in turn, exclusive in about one half of the independents through which it distributes, while MillerCoors has no exclusivity.³⁵ AB InBev recently developed a new incentive program for its independent wholesalers where eligibility is based on volume-share requirements. While no public statements are available from AB InBev on this program, details have made their way into the public domain.

In the new incentive program, AB InBev's distributors are divided into classes based on the percentage of sales of AB InBev products.³⁶ The AB InBev contracts constrain higher-level distributors by conditioning incentive programs on carrying craft brewers that produce a relatively small volume per year, or sell in only one state. This restriction effectively limits the size of any of AB InBev's competitors in the wholesale system because distributors must decide whether to keep craft products or lose incentives under the incentive program.³⁷ Anecdotal evidence indicates that AB InBev has a history of pressuring independent wholesalers into distributing only AB InBev products. For example, in 2013, the Washington Post reported that distributors who chose to sell other companies' products were frequently visited by ABI staff and sometimes publicly criticized at trade meetings.³⁸

V. Divestiture of the SABMiller JV Assets to Molson Coors May Not be a Sufficient Remedy

A. Accumulating Evidence on Failed Remedies Suggests Caution in this Case

There is mounting evidence of remedies in previous merger consent decrees that have failed to fully restore competition, either because of the nonviability of the buyer of the divested assets or inadequacy of related relief.³⁹ These failures have been particularly apparent in highly concentrated markets, as is the case in AB InBev-SABMiller. For example, in the 2008 merger of UnitedHealth Group and Sierra, the DOJ required UnitedHealth to divest its individual Secure Horizons Medicare Advantage HMO plans in certain Nevada counties to Hu-

³⁴ *Wholesaler Operations*, *supra* note 24.

³⁵ In cases where AB InBev is non-exclusive, they distribute in the same distributorships as do Crown, Heineken USA, NAB, and Boston Beer brands.

³⁶ The "A+ Class" consists of distributors whose sales are comprised of 98% or more of AB branded products. For this class, the company will offer an annual reimbursement covering up to 75% of the distributor's contractual marketing support. Distributors whose sales are comprised 95% or more of AB InBev brands can have half of the contractual marketing support covered by AB InBev (A Class). Those that are 90% aligned would get a 10% reimbursement. There are also financial incentives for distributors that are below 90%. *See* Tripp Mickle, *Craft Brewers Take Issue with AB InBev Distribution Plan*, Wall St. J. (Dec. 7, 2015, 2:16 PM), <http://www.wsj.com/articles/craft-brewers-take-issue-with-ab-inbev-distribution-plan-1449227668>. Bob Pease's written testimony provides detailed notes of the meeting. Pease Testimony, *supra* note 32, at 20–22.

³⁷ Ashlee Kieler, *Anheuser-Busch Distributor Incentive Program Raises More Concerns Of A Stifled Craft Beer Market*, Consumerist (Dec. 10, 2015), <https://consumerist.com/2015/12/10/anheuser-busch-distributor-incentive-program-raises-more-concerns-of-a-stifled-craft-beer-market/>.

³⁸ Steven Pearlstein, *Beer Merger Would Worsen Existing Duopoly by AB InBev, SABMiller*, Wash. Post (Feb. 2, 2013), https://www.washingtonpost.com/business/beer-merger-would-worsen-existing-duopoly-by-ab-inbev-sabmiller/2013/02/01/efa78ce8-6b1c-11e2-af53-7b2b2a7510a8_story.html.

³⁹ *See generally* John Kwoka, *Mergers, Merger Control, and Remedies: A Restrospective Analysis of U.S. Policy* (2015).

mana. The deal went through, but economic evidence gathered since the merger suggests that the combined UnitedHealth-Sierra was nonetheless able to exercise market power, as demonstrated by the increase in premium prices, up to 13.7% in Nevada markets.⁴⁰

In two other instances, failed remedies are also apparent. The FTC's complaint in Safeway-Albertsons, for example, alleged that the proposed transaction would likely be anticompetitive in 130 local markets.⁴¹ A consent decree required the grocers to divest the bulk of stores to Haggen, a regional grocery chain.⁴² Soon after the merger was consummated and the divestiture completed, Haggen filed for bankruptcy, and in late 2015 a federal bankruptcy judge allowed Haggen to sell about 25% of its stores back to Albertsons.⁴³ A similar outcome was observed in Hertz's acquisition of Dollar Thrifty in 2012, a proposed transaction that combined two of the four largest rental car companies in the U.S. The FTC alleged that the deal would have harmed competition at 72 airports around the U.S. Among other provisions, the FTC required Hertz to sell its Advantage Rent-a-Car business.⁴⁴ But in late 2012, four months after the FTC closed its investigation, Advantage filed for bankruptcy.⁴⁵

This expanding record on failed remedies should bear importantly on future decisions taken by the agencies in determining whether to block a proposed merger under Section 7 of the Clayton Act or to negotiate for a remedy that involves structural and/or behavioral relief.

B. Removal of SABMiller From the Competitive Mix May Exacerbate Post-Merger Coordination

Any remedy should be evaluated in light of the concern that the merger will likely exacerbate incentives for continued tacit coordination between AB InBev and its major rival. A number of factors are particularly relevant. First, taking an independent SABMiller out of the com-

⁴⁰ Premium increases were observed relative to a control group. José R. Guardado et al., *The Price Effects of a Large Merger of Health Insurers: A Case Study of UnitedHealth-Sierra*, 1 Health Mgmt., Pol'y & Innov. 16 (2013), <http://www.hmpi.org/pdf/HMPI%20-%20Guardado,%20Emmons,%20Kane,%20Price%20Effects%20of%20a%20Larger%20Merger%20of%20Health%20Insurers.pdf>. See also Press Release, UnitedHealth Grp., UnitedHealth Group Completes Acquisition of Sierra Health Services (Feb. 25, 2008), <http://www.reuters.com/article/idUS17532+26-Feb-2008+BW20080226>. See also Shannon Firth, *Health Policy Experts Fear the Worst with Payer Mergers*, MedPage Today (Oct. 9, 2015), <http://healthleadersmedia.com/content/HEP-321488/Health-Policy-Experts-Fear-the-Worst-With-Payer-Mergers>.

⁴¹ Complaint at 4, *In re Cerberus Institutional Partners V et al.*, Dkt. No. C-4504 (F.T.C. Jan. 27, 2015).

⁴² Press Release, Fed. Trade Comm'n, FTC Requires Albertsons and Safeway to Sell 168 Stores as a Condition of Merger (Jan. 27, 2015), <https://www.ftc.gov/news-events/press-releases/2015/01/ftc-requires-albertsons-safeway-sell-168-stores-condition-merger>.

⁴³ The FTC allowed such a return in cases where there were no competing buyers for the particular store. Brent Kendall & Peg Brickley, *Albertsons to Buy Back 33 Stores It Sold as Part of Merger With Safeway*, Wall St. J. (Nov. 24, 2015), <http://www.wsj.com/articles/albertsons-to-buy-back-33-stores-it-sold-as-part-of-merger-with-safeway-1448411193>. See also Brent Kendall, *Haggen Struggles After Trying to Digest Albertsons Stores*, Wall St. J. (Oct. 9, 2015, 1:06 PM), <http://www.wsj.com/articles/haggen-struggles-after-trying-to-digest-albertsons-stores-1444410394> (reporting that soon after Haggen acquired 164 stores because of the merger, it filed for bankruptcy and closed 26 stores).

⁴⁴ Press Release, Fed. Trade Comm'n, FTC Requires Divestitures for Hertz's Proposed \$2.3 Billion Acquisition of Dollar Thrifty to Preserve Competition in Airport Car Rental Markets (Nov. 15, 2012), <https://www.ftc.gov/news-events/press-releases/2012/11/ftc-requires-divestitures-hertz-proposed-23-billion-acquisition>.

⁴⁵ Press Release, FSNA, Franchise Services of North America Inc. Announces Bankruptcy Filing by Simply Wheelz LLC (Nov. 4, 2013), <http://www.fsna-inc.com/newspdfs/115201391920.PDF>.

petitive mix may strengthen incentives for Molson Coors to coordinate with AB InBev after the merger. Molson Coors is arguably a different market player than MillerCoors, with potentially different competitive incentives and abilities.

The AAI suggests that the DOJ should assess how the loss of SABMiller's independent decision-making in the transfer of Miller's interest to Molson Coors could adversely affect the competitive landscape post-merger. While AB InBev and MillerCoors have engaged in tacit coordination as to pricing, their approaches to distribution have been different. As noted above, for example, MillerCoors has reportedly taken a less adversarial approach than AB InBev to independent distributors that carry rival brands. With the elimination of SABMiller from the mix and total ownership and control of those assets by Molson Coors, that dynamic may disappear.

Any change in competitive dynamic through the loss of an independent SABMiller is also concerning because of a lack of explanation or clarity regarding how Molson Coors would approach any renegotiation of contracts with former MillerCoors independent distributors. It would be risky to assume that existing contracts transfer seamlessly to Molson Coors with the same MillerCoors terms and conditions in place. When the MillerCoors JV was formed in 2008, for example, there were disputes over the disposition of independent distribution contracts. What happens to the MillerCoors distribution contracts must be resolved as part of a remedy that aims to keep independent distribution open and nondiscriminatory.

Second, SABMiller is a global company while Molson Coors has only a smaller, North American footprint. The potential for importing additional, innovative products into the U.S. that were part of the SABMiller global portfolio provided an additional source for competition on product positioning, price, diversity, and quality. This may be lost with a smaller Molson Coors, strengthening incentives to coordinate rather than compete independently.

Collectively, these factors raise the risk that an already troubled landscape in beer could be made worse by a divestiture that creates a market player in Molson Coors with more incentives to more closely coordinate with AB InBev generally, and more specifically to mimic AB InBev's distribution policies than before the merger. In light of the foregoing, the DOJ should keep open other possible options for divestiture of the SABMiller assets. A more effective remedy may be to dissolve the joint venture and thereupon divest the SABMiller assets, not to Molson Coors but to one or more smaller players in the domestic market such as Heineken or Constellation.⁴⁶

C. Strategic Conduct by AB InBev and Molson Coors Raises Questions

Other factors complicate the question of whether the proposed divestiture of SABMiller's U.S. assets to Molson Coors will fully restore competition and enhance consumer welfare. One is AB InBev's recent acquisition of craft brewers, further integration into distribution, and attempts to influence independent distribution in ways that could adversely affect rival brewers. Such activity signals an intention to continue to strategically limit competition.

⁴⁶ To be sure, the competitive benefits of such an option would have to be weighed against efficiency losses from breaking up the joint venture, and Molson Coors may have contractual objections that would have to be overcome.

Aside from unilateral effects resulting from this stepwise accretion of market power, Molson Coors could find it harder to oppose strategic anticompetitive policies established by a more powerful AB InBev (that has valuable SABMiller assets at its disposal), choosing to “go along” rather than to compete.

MillerCoors’ announcement on September 14, 2015 (two days before the announcement of merger talks) that it would be closing its brewery in Eden, North Carolina also raises fundamental questions about strategic intent.⁴⁷ Citing the objective of “optimizing” their brewery footprint, “streamlining” operations to enhance efficiency across the remaining several MillerCoors breweries, and distribution overlaps with a nearby plant,⁴⁸ the brewery is slated to be shuttered by September 2016. It has a capacity of nine million barrels per year, just over 10% of total MillerCoors brewing capacity.⁴⁹ The facility has won numerous awards.⁵⁰ Whether this announcement could be viewed as a merger-related, anticompetitive, gun-jumping reduction in capacity, or as part of a larger “unilateral” strategy to keep industry capacity tight, it does not inspire confidence that merely swapping out MillerCoors for Molson Coors will leave consumers whole.

VI. An Effective Remedy Requires a Number of Strong Prescriptive and Proscriptive Conditions

Holding aside any proposed remedy, the foregoing analysis demonstrates that an AB InBev-SABMiller merger would be likely to substantially lessen competition by enhancing incentives for both unilateral and coordinated exercise of market power. This picture is complicated by direct evidence of pre-existing anticompetitive coordination in the U.S. beer market and AB InBev and Molson Coors strategies for altering competition. These factors significantly raise the bar on a showing that a divestiture of the SABMiller assets to Molson Coors will not exacerbate anticompetitive incentives or abilities after the merger and will instead improve the state of competition in the market. This fact pattern provides a compelling reason for why the DOJ should seek a remedy that restores competition *and* enhances consumer welfare.

The AAI therefore suggests that there are a number of conditions that should be considered in devising a remedy that involves the divestiture of the SABMiller JV assets to Molson Coors, if DOJ does not move to block the merger outright. First, as in AB InBev-Grupo Modelo, the DOJ should give high priority to creating an “independent” market player. Second, there should be prohibitions on further acquisitions of distribution or craft brewers by AB InBev or Molson Coors. Third, steps should be taken to preserve a truly “open access,” independent distribution channel.

⁴⁷ Press Release, MillerCoors, MillerCoors to Close Eden, N.C. Brewery in September 2016 (Sept. 14, 2015), <http://brookstonbeerbulletin.com/millercoors-to-close-north-carolina-brewery/>.

⁴⁸ *Id.*

⁴⁹ See *Brewing Locations*, MillerCoors, <http://www.millercoors.com/breweries/brewing-locations> (last visited Apr. 19, 2016).

⁵⁰ See Press Release, AME, MillerCoors’ Eden Brewery Receives 2013 AME Manufacturing Excellence Award (Oct. 15, 2013), <http://www.ame.org/sites/default/files/MillerCoors%20Eden%20to%20Receive%20AME%20Manufacturing%20Excellence%20Award.pdf>.

- **Creation of an independent market entity in Molson Coors.** A consent decree should ensure that AB InBev and Molson Coors do not control any economic resources that are necessary for rivals to compete. The prohibition would cover input materials such as cans and glass products, agricultural inputs such as hops and barley, and brewing capacity. An independent Molson Coors would be free of any involvement with AB InBev or other rivals. This condition thus requires termination of existing connections and prohibition on any future contract or supply agreements involving AB InBev (and rivals) and Molson Coors (and rivals). Such a prohibition would apply to Molson Coors contract brewing of former Miller brands (e.g., Pabst).
- **Prohibitions on acquisitions by AB InBev or Molson Coors.** A consent decree should ensure that post-merger AB InBev and Molson Coors do not have the enhanced incentive or ability to exercise market power through further horizontal or vertical integration. AB InBev and Molson Coors should thus be prohibited from acquiring additional brewing or distribution capacity. A consent decree should state a time frame for periodic evaluation of competitive conditions in the U.S. beer market in order to determine if and when such a provision should expire.
- **Preserving an open and independent distribution channel.** A consent decree should include requirements that prevent AB InBev or Molson Coors from foreclosing rivals through enhanced control over independent distribution. A remedy should extend the nondiscrimination provisions in the AB InBev-Grupo Modelo consent decree. More important, a remedy should frame out and require the use of a pro forma, “open access” independent distribution contract. Such a contract would include enforceable nondiscrimination provisions that prevent AB InBev or Molson Coors from pressuring any independent distributor from favoring their brands over rival brands. While the specifics are best left to the DOJ, the contract would restrain or prohibit the use of incentive programs that set requirements based on: volume shares; employee or managerial compensation; “maximum efforts,” display, shelf space, and placement; and marketing programs. Preserving an open and independent distribution channel would also require provisions governing an open and transparent process by which former MillerCoors distributors transition to Molson Coors.

* * * *

The AAI appreciates the opportunity to share the foregoing analysis and commentary with the DOJ.

Sincerely,

Diana L. Moss

A handwritten signature in black ink, appearing to read 'DL Moss', is centered below the typed name.

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