

Anheuser-Busch InBev (ABI) Acquisition of SAB Miller (SAB Miller)

As most of our clients know, the firm does a substantial amount of work in the alcohol industry, particularly the beer industry. That industry has experienced significant change over the course of the last 10 years. For instance, there has been an explosion in the number of craft breweries and brewpubs. There has also been considerable consolidation among the larger brewers as well as distributors and retailers. In October, one of the largest acquisitions in history was announced between the two largest brewers in the world.

On October 12, 2015, it was reported that ABI had agreed to buy SAB Miller for \$104 Billion Dollars. This acquisition would combine the World's two largest brewers and will trigger intense antitrust review around the Globe. No closing date has been set. It is widely believed that the U.S. Department of Justice (DOJ) would require the divestiture of SAB Miller's interest in the U.S. MillerCoors Joint Venture (JV) as a condition of approval. In 2007, SAB Miller and Molson Coors entered into the JV which currently sells about 30% of all beer in the U.S. The JV brews and sells such beers as *Miller Lite*, *Miller High Life*, *Miller Genuine Draft*, *Coors*, *Coors Light*, *Molson Canadian*, *Leinenkugel's*, *Crispin Hard Cider Company*, *Saint Archer Brewing Company* and *Blue Moon*. ABI, the World's largest brewer, currently sells about 50% of all beer in the U.S. Accordingly, if DOJ approved the transaction, ABI would control about 80% of the U.S. beer market. In our opinion, DOJ would never approve the transaction without divestiture and, even with the divestiture of the JV, ABI would control 30% of the global beer market.

The Hart-Scott Rodino Antitrust Improvements Act of 1976 (HSR) provides that parties must not complete certain mergers and acquisitions until they have made a detailed filing with the FTC and DOJ and waited for those agencies to determine that the transaction will not adversely affect US commerce under the antitrust laws. DOJ has jurisdiction over brewer mergers or acquisitions. The first step in the process is the completion of the "Notification and Report Form". If the DOJ requires additional information, they may make a "Second Request". This process can take quite a bit of time.

If DOJ believes that a proposed transaction may violate antitrust laws, it may seek an injunction in federal district court to prohibit consummation of the transaction. It may also undertake settlement discussions with the parties to address its concerns in that manner rather than through the courts.

DOJ under the Obama Administration has been more aggressive in requiring concessions on large deals (AT&T, Apple, 3M). See “Has the Obama Justice Department Reinvented Antitrust Enforcement?”, 65 Stan. L. Rev. Online 13 (July 18, 2012).

In 2013, ABI negotiated a deal to acquire Modelo’s U.S. business (a Mexican brewery). This transaction, which was far smaller and had far less of a market impact than an ABI/SAB Miller acquisition, was subject to intense antitrust scrutiny by DOJ. While the deal was ultimately approved, DOJ imposed many substantial conditions including the divestiture of Modelo’s interest in Crown and the Piedras Negras brewery to Constellation. In light of DOJ’s actions with respect to this prior transaction, it appears a near certainty that they would approve the ABI/SAB Miller transaction with the divestiture of the interest in the JV.

The JV Agreement between SAB Miller and Molson Coors was executed in 2007. That Agreement prohibited Molson Coors and SAB Miller, respectively, from selling their interest in the JV Agreement until December of 2012. Thereafter, either party may sell their interest in the JV but the other party has a right of first refusal. Accordingly, if DOJ requires SAB Miller to divest its interest in the JV as we expect, Molson Coors has the first right to acquire that interest. If it declines, then presumably SAB Miller is free to sell to another party. All recent reports indicate that industry analysts expect Molson Coors to acquire SAB Miller’s interest in the JV. If so, Molson Coors would be the sole owner in the U.S. of both the Miller and Coors brands, as well as the other brands that the JV owns (e.g.).