

# ABI/DOJ United State District Court Action

Last year, Anheuser Busch InBev (ABI), the World's largest brewer, entered into an agreement to purchase SAB Miller, the World's second largest brewer. Together, those two companies sell over 30% of all beer consumed on the planet. The proposed acquisition triggered antitrust scrutiny in many countries, including a review by the U.S. Department of Justice ("DOJ") under the Hart-Scott Rodino Antitrust Improvements Act ("HSR"). On July 20, 2016, the DOJ filed a complaint in the U.S. District Court for the District of Columbia alleging the merger violated Section 7 of the Clayton Act. That same day, the DOJ also filed a proposed final judgment to settle the matter and a competitive impact statement explaining the provisions and goals of the proposed final judgment.

The case, *United States v. Anheuser-Busch Inbev and SABMiller*, Case No. 16-CV-01483 (D.D.C. 2016), has been assigned to Judge Emmet Sullivan. The proposed final judgment ("PFJ") requires the following:

- **Divestiture.** PFJ requires a divestiture of all SABMiller assets sold in the U.S. to Molson Coors. This requires the parties to create transition and supply agreements within 10 days that allow for Molson Coors to import SABMiller brands of beer into the U.S. and operate the Miller International Business. Despite the divestitures of the SABMiller business in other countries, the PFJ requires that ABI divest the U.S. rights to imported brands, including Peroni, Grolsch and Pilsner Urquell, to Molson Coors, notwithstanding the divestiture of the ex-U.S. rights to those brands to other buyers.
- **Numerous provisions concerning U.S. distribution.** ABI is prevented from:
  - Acquiring a distributor if the acquisition would cause more than 10% of ABI's beer in the United States to be sold through ABI-owned distributors;
  - Prohibiting or impeding a distributor that sells ABI's beer from using its best efforts to sell, market, advertise, promote, or secure retail placement for rivals' beers, including the beers of high-end brewers;
  - Providing incentives or rewards to a distributor who sells ABI's beer based on the percentage of ABI beer the distributor sells as compared to the distributor's sales of the beers of ABI's rivals;
  - Conditioning any agreement or program with a distributor that sells ABI's beer on the fact that it sells ABI's rivals' beer outside of the geographic area in which it sells ABI's beer;

- Exercising its rights over distributor management and ownership based on a distributor's sales of ABI's rivals' beers;
  - Requiring a distributor to report financial information associated with the sale of ABI's rivals' beers;
  - Requiring that a distributor who sells ABI's beer offer its sales force the same incentives for selling ABI's beer when the distributor promotes the beers of ABI's rivals with sales incentives; and
  - Consummating non-reportable acquisitions of beer brewers-including craft brewers, without providing the U.S. with advance notice and an opportunity to assess the transaction's likely competitive effects
- **Notification of non-reportable acquisitions.** The PFJ requires ABI to notify the United States in advance of any purchase of distribution or brewer assets, which would otherwise not be HSR reportable, if assets generate at least \$7.5 million in annual gross revenue from beer sold in the U.S., if distribution licenses generate at least \$3 million in annual gross revenue in the U.S., and if beer distribution generates at least \$3 million in annual gross revenue in the U.S. In addition to advanced notice to the DOJ, PFJ provides DOJ with the opportunity to evaluate such acquisitions including the ability to seek additional information during which time ABI cannot consummate the transaction.
  - **No termination.** The PFJ requires ABI and SABMiller to agree—and for ABI to further require Molson Coors to agree—not to cite the transaction or the required divestiture as a basis for modifying, renegotiating, or terminating any contract with any distributor.
  - **No retaliation.** ABI may not discriminate against, penalize, or retaliate against a distributor that brings to the attention of the Monitoring Trustee or the U.S. a potential violation by ABI of Section V of the PFJ.
  - **Confidential information.** The PFJ requires ABI and SABMiller to implement and maintain procedures to prevent the disclosure of the confidential commercial information of MillerCoors and Molson Coors by ABI and SABMiller to any of their affiliates who are involved in the marketing, distribution, or sale of beer in the U.S.
  - **Monitoring Trustee.** The PFJ imposes a Monitoring Trustee, who, among other things, will have the authority to investigate complaints that ABI has violated the restrictions related to its distribution practices. The responsibilities of this Monitoring Trustee go beyond those created for the ABI-Modelo deal.

The scope of the PFJ is unprecedented and illustrates the magnitude of concern that the DOJ had about the competitive impact of the proposed acquisition. The provisions of the DOJ go a long way to mitigate that impact and safeguard a level playing field in the U.S. market for small and medium-sized brewers. It is anticipated that the Court in *United States v. Anheuser-Busch Inbev and SABMiller* will approve and file the PFJ.

*\*Madigan, Dahl & Harlan represents the National Beer Wholesalers Association*

<sup>1</sup>Judge Emmet Sullivan was the judge on the recent *FTC v. Staples* matter, in which the FTC challenged the proposed merger of Staples, Inc. and Office Depot, Inc., and has presided over approximately 21 antitrust cases in the past decade.

<sup>2</sup>In 2013, ABI completed its acquisition of Mexican brewer, Grupo Modelo, in a deal valued at \$20.1 billion.