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By Hand Delivery and Email

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Washington, D.C. 20530

Re: *United States v. Anheuser-Busch InBev and SABMiller*, No. 1:16-cv-01483 (EGS), Comments of the International Brotherhood of Teamsters

Dear Mr. Mucchetti:

The International Brotherhood of Teamsters (IBT) has approximately 15,000 members working in the U.S. beer industry. Pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act (the "Tunney Act"), 15 U.S.C. § 16(b), IBT respectfully submits the following comments on the proposed Final Judgment in the captioned matter.

I. Introduction

As DOJ notes in its Competitive Impact Statement, the district court is statutorily "required" under the Tunney Act – not merely permitted – to take into account "competitive considerations bearing upon the adequacy" of the proposed Final Judgment.

In this case, those "competitive considerations" include DOJ's past and present statements about competition in the beer industry, its past enforcement decisions in beer mergers, its own statements of enforcement policy, and independent economic analysis of the competitive effects arising from past beer mergers. Competitive considerations are particularly relevant here, as DOJ has alleged that the beer market is highly concentrated, has high entry barriers, and is subject to tacit collusion between the two largest brewers, Anheuser-Busch InBev and MillerCoors. All of these factors have led to higher prices for consumers.

There is no indication in the Complaint or Competitive Impact Statement that such anticompetitive activity has ceased and will not recur. Moreover, there is no evidence that the

behavioral remedies in the proposed Final Judgment will effectively open the relevant market to competition and prevent ongoing tacit collusion, as the Tunney Act requires.

Instead, DOJ has accepted a highly uncertain and historically unacceptable remedy to combat a major and proven competitive problem. The weakness of the remedy is all the more glaring given the alternative. DOJ could have ordered a structural remedy – the divestiture of a large, efficient and profitable brewery, as it has done in the past. Such a structural remedy would accomplish at least two goals. First, a structural remedy would effectively open the beer market to competition and enable a competitor to disrupt and prevent the recurrence of tacit collusion, without imposing the undue and unnecessary burdens that afflict a behavioral remedy. Second, it would allow independent brewers to have significant expansion capability, which would make such brewers more effective competitors.

In a highly-concentrated industry plagued by coordinated pricing, DOJ's failure to order divestiture of a brewery is part-and-parcel of what makes the remedy in this matter plainly inadequate and not in the public interest.

II. The Tunney Act Public Interest Standard

The Tunney Act provides in relevant part:

> (1) Before entering any consent judgment proposed by the United States under this section, the court shall determine that the entry of such judgment is in the public interest. For the purpose of such determination, the court shall consider—
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> > (A) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration of relief sought, anticipated effects of alternative remedies actually considered, whether its terms are ambiguous, and any other competitive considerations bearing upon the adequacy of such judgment that the court deems necessary to a determination of whether the consent judgment is in the public interest; and
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> > (B) the impact of entry of such judgment upon competition in the relevant market or markets, upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.[1]

In its Competitive Impact Statement, the United States asserts that the court's inquiry under the Tunney Act is "limited" and the government is entitled to "broad discretion."[2] The

[1] 15 U.S.C. § 16(e)(1).
[2] Competitive Impact Statement, United States v. Anheuser-Busch InBev and SABMiller, No. 1:16-cv-01483 (EGS) (July 20, 2016), at 29, https://www.justice.gov/atr/file/877621/download (hereinafter "CIS").

United States mentions in passing the 2004 amendments to the Tunney Act, which from the government's description might seem like clerical modifications, which "effected minimal changes" to the court's review.[3] The government does not explore the purpose of the Tunney Act or explain why it was amended. Instead the general tenor, under the government's position, is that the court's scope of review is sharply proscribed; the court must grant due respect to the United States' prediction as to the effect of proposed remedies, its perception of the market structure, and its views of the nature of the case. Although the government does not use the term "rubber stamp," that is the likely result under the standard of review it advocates.

That is not the law. In enacting and amending the Tunney Act, Congress rejected the notion that courts must broadly defer to the government's predictions or settlement terms when determining whether a consent decree is in the public interest. As the legislative history reveals, Congress "wanted the courts to make an independent, objective, and active determination" without undue deference to DOJ.[4] Courts cannot "unquestionably accept a proffered decree as long as it somehow, and however inadequately, deals with the antitrust and other public policy problems implicated in the lawsuit. To do so would be to revert to the 'rubber stamp' role which was at the crux of the congressional concerns when the Tunney Act became law."[5]

In enacting the Tunney Act, Congress expressed two principal concerns: the excessive secrecy of the consent decree process and the DOJ's failure to provide appropriate relief.[6] The DOJ's failure to provide relief was either because of miscalculations or the great influence and economic power wielded by antitrust violators. The stakes were too great to simply defer to the government's judgment. This is because – then and now – nearly all civil merger cases are resolved through consent decrees.[7] Moreover, DOJ "sometimes simply did not insist upon sufficient remedial action by the defendant."[8] With the Tunney Act, Congress sought "to ensure

[3] CIS at 30 n. 10 (quoting United States v. SBC Commc'ns, Inc., 489 F. Supp. 2d 1, 11 (D.D.C. 2007)).
[4] 150 Cong. Rec. S3617 (Apr. 2, 2004) (quoting Flynn and Bush, *The Misuse and Abuse of the Tunney Act: The Adverse Consequences of the "Microsoft Fallacies*," 34 Loyola U. Chicago L. J. 749, 758 (2003)).
[5] 150 Cong. Rec. S3617 (Apr. 2, 2004) (quoting United States v. Am. Tel. & Tel. Co., 552 F. Supp. 131, 151 (D.D.C. 1982)).
[6] United States v. Am. Tel. & Tel. Co., 552 F. Supp. 131, 148 (D.D.C. 1982) (Greene, J.), aff'd sub nom. Maryland v. United States, 460 U.S. 1001 (1983); United States v. Blavatnik, No. CV 15-1631 (RDM), 2016 WL 593449, at *7 (D.D.C. Feb. 12, 2016) (recognizing that "Congress was spurred to act by its perception that the Justice Department had repeatedly settled antitrust cases for injunctive decrees that were less demanding than Congress believed appropriate").
[7] *See AT&T*, 552 F. Supp. at 148 n. 68 (80 percent of government actions when Act was passed were through consent decrees); Fed. Trade Comm'n and U.S. Dep't of Justice, Thirty-Eighth Hart-Scott-Rodino Annual Report, Fiscal Year 2015, Section 7A of the Clayton Act Hart-Scott-Rodino Antitrust Improvements Act of 1976, at 2-3, https://www.ftc.gov/system/files/documents/reports/federal-trade-commission-bureau-competition-department-justice-antitrust-division-hart-scott-rodino/160801hsrreport.pdf (during its fiscal year 2015, the Antitrust Division challenged 20 merger transactions; in ten transactions, the Division never filed a complaint, as the parties either abandoned or restructured their transactions to address the Division's concerns; in 8 of the remaining 10 cases, the Division filed settlement papers simultaneously with the complaint, and in the two filed cases, the parties abandoned the proposed transaction post-complaint).
[8] *AT&T*, 552 F. Supp. at 148 n. 70 (citing 119 Cong. Rec. 24598 (1973)).

that the Justice Department's use of consent decrees in antitrust cases would fully promote the goals of the antitrust laws and foster public confidence in their fair enforcement."[9]

Because the government is neither omniscient nor infallible, Congress also believed that commentators can play a vital role: "The increasing expertise of so-called public interest advocates and for that matter the more immediate concern of a defendant's competitors, employees, or antitrust victims may well serve to provide additional data, analysis, or alternatives which would improve the outcome."[10]

To ensure that the United States (and its citizens) obtain sufficient remedial action and eliminate "judicial rubber stamping," the Tunney Act requires an explicit judicial determination that the proposed decree is in the public interest. The statute itself does not define the public interest standard. But it is clear from the Act that Congress never intended to significantly proscribe the court's review. Instead, Congress sought to ensure that courts – in determining whether the proposed final judgment is in the public interest – had ample latitude, including:

> (1) taking testimony of Government officials or experts or such other expert witnesses, upon motion of any party or participant or upon its own motion, as the court may deem appropriate;
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> (2) appointing a special master and such outside consultants or expert witnesses as the court may deem appropriate; and request and obtain the views, evaluations, or advice of any individual, group or agency of government with respect to any aspects of the proposed judgment or the effect of such judgment, in such manner as the court deems appropriate;
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> (3) authorizing full or limited participation in proceedings before the court by interested persons or agencies, including appearance amicus curiae, intervention as a party pursuant to the Federal Rules of Civil Procedure, examination of witnesses or documentary materials, or participation in any other manner and extent which serves the public interest as the court may deem appropriate;
>
> (4) reviewing any comments including any objections filed with the United States under subsection (d) concerning the proposed judgment and the responses of the United States to such comments and objections; and
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> (5) taking such other action in the public interest as the court may deem appropriate.[11]

No one disputes that the courts should give some deference to the government's decisions. The question is how much. In the leading case, *United States v. Am. Tel. & Tel. Co.*, Judge Greene sought a balance. On the one hand, in evaluating a settlement, the court cannot freely exercise its discretion to fashion a remedy as it would if there was a full trial and a finding

[9] *AT&T*, 552 F. Supp. at 151.
[10] *Id.* at 148 n. 70 (quoting 119 Cong. Rec. 3452 (1973) (Sen. Tunney)).
[11] 15 U.S.C. § 16(f).

of liability. On the other hand, the court does not have to "unquestioningly accept a proffered decree as long as it somehow, and however inadequately, deals with the antitrust and other public policy problems implicated in the lawsuit. To do so would be to revert to the 'rubber stamp' role which was at the crux of the congressional concerns when the Tunney Act became law."[12] To strike the proper balance, Judge Greene articulated the following standard:

> After giving due weight to the decisions of the parties as expressed in the proposed decree, the Court will attempt to harmonize competitive values with other legitimate public interest factors. If the decree meets the requirements for an antitrust remedy—that is, if it effectively opens the relevant markets to competition and prevents the recurrence of anticompetitive activity, all without imposing undue and unnecessary burdens upon other aspects of the public interest—it will be approved. If the proposed decree does not meet this standard, the Court will follow the practice applied in other Tunney Act cases and, as a prerequisite to its approval, it will require modifications which would bring the decree within the public interest standard as herein defined.[13]

Granted the public interest inquiry under the Tunney Act is subject to constitutional limits to prevent the courts' encroachment on the prosecutor's discretion and Executive Branch's powers.[14] But the fact remains that the *AT&T* consent decree remains the most prominent post-Tunney Act consent decree, and it was significantly modified by the district judge in several material respects in accordance with the Tunney Act's public interest standard. The Supreme Court in affirming, never questioned Judge Greene's articulation of the public interest standard.[15]

III. The 2004 Amendments to the Tunney Act

Under the Tunney Act, the court must act as "an independent check upon the terms negotiated by the Department of Justice."[16] Nonetheless, as the cases cited in DOJ's Competitive Impact Statement reflect, the lower courts by the 1990s were applying a highly deferential standard for reviewing DOJ consent decrees. The lower courts continued to cite *AT&T*, but mainly one aspect of the court's standard: ''[A] proposed consent decree must be

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[12] *AT&T*, 552 F. Supp. at 151.
[13] *AT&T*, 552 F. Supp. at 153 (internal footnotes omitted); United States v. Airline Tariff Pub. Co., 836 F. Supp. 9, 11–12 (D.D.C. 1993) (noting how courts have developed a two-prong public interest inquiry: first, courts inquire as to whether the proposed relief effectively will foreclose the possibility that antitrust violations will occur or recur; second, courts consider whether the relief impinges upon other public policies).
[14] United States v. Fokker Servs. B.V., 818 F.3d 733, 743 (D.C. Cir. 2016).
[15] The Supreme Court summarily affirmed the D.C. Circuit's judgment. Maryland v. United States, 460 U.S. 1001 (1983). Justice Rehnquist, speaking for Chief Justice Burger and Justice White, dissented, noting that the question assigned to the district courts by the Tunney Act is a classic example of a question committed to the Executive. *Id*., 460 U.S. at 1005. But the dissenting Justices had concerns over *any* public interest standard the district court could have devised under the Tunney Act. *Id*. at 1004. The majority of Justices, however, did not share this view in affirming.
[16] *AT&T*, 552 F. Supp. at 149.

approved even if it falls short of the remedy the court would impose on its own, as long as it falls within the range of acceptability or is within the reaches of the public interest.''[17] The district courts increasingly "were reluctant to give meaningful review to antitrust consent decrees, and [were] only willing to take action with respect to most egregious decrees that make a 'mockery' of the judicial function."[18] In construing the public interest inquiry narrowly, the D.C. Circuit, for example, held that a district court "should withhold approval only if any of the terms appear ambiguous, if the enforcement mechanism is inadequate, if third parties will be positively injured, or if the decree otherwise makes 'a mockery of judicial power.'"[19]

The case law that developed, and upon which the United States now relies, however, was "contrary to the intent of the Tunney Act and effectively strips the courts of the ability to engage in meaningful review of antitrust settlements."[20] As Senator Kohl noted, "many courts seem[ed] to have ignored" the Tunney Act and did "little more than 'rubber stamp' antitrust settlements."[21]

In amending the Tunney Act in 2004, Congress's purpose, among other things, was "to effectuate the original Congressional intent in enacting the Tunney Act and to ensure that United States settlements of civil antitrust suits are in the public interest."[22] The 2004 amendments sought to redress the lower courts' overly deferential standard for reviewing consent decrees. As Senator Leahy noted, the amendments intended "to explicitly restate the original and intended role of District courts in this process by mandating that the court make an independent judgment based on a series of enumerated factors."[23] As Senator Kohl noted, "our legislation will restore the ability of Federal courts to review the Justice Department's civil antitrust settlements to be sure that these settlements are good for competition and consumers."[24]

Thus the court's role here is crucial: it must provide an "independent safeguard to prevent against improper or inadequate settlements."[25] To "deter and prevent settlements motivated either by corruption, undue corporate influence, or which were plainly inadequate," courts must give "real scrutiny" and "carefully review antitrust consent decrees to ensure that they are in the public interest."[26] The Tunney Act standard thus *requires* the "meaningful review of antitrust consent decrees to assure that they are in the public interest and analytically sound."[27] This

[17] 552 F. Supp. at 151.
[18] 150 Cong. Rec. S3615-16 (Apr. 2, 2004).
[19] Massachusetts Sch. of Law at Andover, Inc. v. United States, 118 F.3d 776, 783 (D.C. Cir. 1997) (quoting United States v. Microsoft Corp., 56 F.3d 1448, 1462 (D.C. Cir. 1995)).
[20] 150 Cong. Rec. S3615 (Apr. 2, 2004).
[21] *Id.*
[22] Antitrust Criminal Penalty Enhancement and Reform Act of 2004, Pub. L. No. 108–237, § 221(b)(2) (codified at 15 U.S.C. § 16).
[23] 150 Cong. Rec. S3615 (Apr. 2, 2004).
[24] *Id.*
[25] 150 Cong. Rec. S3617 (Apr. 2, 2004).
[26] 150 Cong. Rec. S3616 (Apr. 2, 2004).
[27] 150 Cong. Rec. S3618 (Apr. 2, 2004).

includes, for example, scrutinizing an "overly ambiguous decree . . . incapable of being enforced and [which] is therefore ineffective."[28]

The public interest determination is not simply to prevent sweetheart settlements. A proper Tunney Act review also "provides an opportunity for a judge to act as a mediator, obtaining modifications to deficient settlements."[29] For "'[i]f the government and antitrust defendants come to perceive that meaningful [judicial] scrutiny is not a real threat, the door will be wide open for attempts to swing sweetheart deals and for the public to lose confidence in antitrust enforcement by the government.'"[30] Absent this "robust and meaningful standard of judicial review," a court will simply engage in ''rubber stamping'' of antitrust consent decrees.[31]

The United States, in its Competitive Impact Statement, cites a case decided shortly after the 2004 amendments, where the court found that the scope of its review, despite the 2004 Amendments, "remain[ed] sharply proscribed by precedent and the nature of Tunney Act proceeding."[32] In that case, the court reasoned that it must accord deference to the government's predictions about the efficacy of its remedies, and may not require that the remedies be perfectly matched the alleged violations: this is because the discrepancy "may only reflect underlying weakness in the government's case or concessions made during negotiation."[33] Nothing in the Tunney Act or legislative history supports this belief. Indeed, the reasoning contradicts the intent of the Tunney Act where the court serves as a mediator, obtaining modifications to deficient settlements. If the court simply defers to the government's findings, predictions, and assertions in the competitive impact statement, the court will unlikely see any deficiencies in the proposed final judgment. Even if the court discerns a deficiency, it would simply attribute it to an underlying weakness in the government's case or the concessions the government had to make to reach a settlement. It is hard to reconcile this holding with the "independent, objective, and active determination" that Congress intended.

There are real dangers in simply deferring to the government's findings and sharply proscribing the scope of review. Fewer people, as a result, will expend the time and expense to provide meaningful comments. As the incentives to file public comments diminish, courts will rely more on the government's findings. The standard of review becomes more deferential, prompting even fewer comments; and the enforcement agency has less incentive to subject its behavior to public scrutiny.

Indeed, contrary to the language and intent of the 2004 amendments, several district courts have reverted to an overly deferential standard. Some courts erroneously state that "the 2004 amendments to the Tunney Act did not address or undermine the deferential standard of

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[28] *Id.*
[29] 150 Cong. Rec. S3617 (Apr. 2, 2004).
[30] 150 Cong. Rec. S3617 (Apr. 2, 2004) (quoting Lloyd C. Anderson, United States v. Microsoft, *Antitrust Consent Decrees, and the Need for A Proper Scope of Judicial Review*, 65 Antitrust L.J. 1, 38 (1996)).
[31] 150 Cong. Rec. S3618 (Apr. 2, 2004).
[32] CIS at 30 n. 10, quoting United States v. SBC Commc'ns, Inc., 489 F. Supp. 2d 1, 11 (D.D.C. 2007), judgment entered, No. CIV.A. 1:05CV02102EG, 2007 WL 1544428 (D.D.C. Mar. 29, 2007).
[33] *SBC Commc'ns*, 489 F. Supp. 2d at 17–18.

review articulated in *Microsoft*."[34] Some erroneously believe that the Tunney Act obligates them to defer "to government predictions about the effects of proposed remedies"[35] even when the predictions are demonstrably wrong.[36] Some find a consent decree in the public interest despite the strong opposition by commentators and their own personal misgivings of the settlement's weaknesses.[37] One district court went so far as to cite the D.C. Circuit's earlier overly deferential standard that the 2004 amendments specifically repudiated.[38]

This of course is not mandated. In *United States v. Blavatnik*, Judge Moss recently held, over the objection of the United States, that the Tunney Act applied to decrees involving disgorgement.[39] In examining the Tunney Act's plain language and legislative history, the court found that subjecting decrees involving disgorgement to the Tunney Act served the Act's "objectives of increasing transparency and accountability in the settlement of antitrust cases and ensuring that antitrust settlements 'exact a price' sufficient to deter future violations of the antitrust laws." The 2004 amendments' legislative findings, the district court recognized, indicated that "Congress's principal purpose was to overrule the D.C. Circuit's decisions in United States v. Microsoft, 56 F.3d 1448, 1462 (D.C.Cir.1995), and Mass. School of Law at Andover, Inc. v. United States, 118 F.3d 776, 783 (D.C.Cir.1997), both of which held that a proposed consent judgment should be rejected only if it would make 'a mockery of judicial power.'"[40] As the legislative history makes clear, the court observed, the 2004 amendments "sought to ensure robust judicial review" of consent judgments.[41]

In another recent Tunney Act decision, *United States v. SG Interests I, Ltd.*, individual commentators criticized the government's settlement as weak. The defendant in that case filed its own Tunney Act comments suggesting that the case was meritless and the settlement was "nothing more than a payment to be rid of this nuisance."[42] The defendant's "unrepentant arrogance" was "so self-evident" that the court attached a copy of those comments to its opinion.

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[34] U.S. v. Republic Services, Inc., 723 F. Supp. 2d 157, 159 (D.D.C. 2010).
[35] *Id*. at 161.
[36] United States v. Abitibi-Consol. Inc., 584 F. Supp. 2d 162, 166 (D.D.C. 2008), judgment entered, No. CIV.A. 07-1912(RMC), 2008 WL 5155751 (D.D.C. Nov. 6, 2008). A commentator argued that the plant divestiture that the government obtained was too small to deter the merged firm from closing capacity strategically. It pointed to the fact that the merged firm had reduced capacity and increased prices since the merger and divestiture. The government defended its decision. The court believed it did not have to address the issue, as the "relevant inquiry is whether the United States' conclusion about the adequacy of the . . . divestiture was reasonable, not whether it was correct." *Id*. *See also* United States v. US Airways Grp., Inc., 38 F. Supp. 3d 69, 82 (D.D.C. 2014).
[37] United States v. Morgan Stanley, 881 F. Supp. 2d 563, 568 (S.D.N.Y. 2012). The court also noted that the government's theory was novel.
[38] United States v. Gannett Co., No. 13-CV-1984 (RBW), 2014 WL 6844302, at *2 (D.D.C. Nov. 18, 2014) (stating that a "court's review of a proposed final judgment is highly deferential; thus, approval should be withheld only if any of the terms appear ambiguous, if the enforcement mechanism is inadequate, if third parties will be positively injured, or if the decree otherwise makes a mockery of judicial power") (quoting Massachusetts v. Microsoft Corp., 373 F.3d 1199, 1236 (D.C. Cir. 2004) and Mass. Sch. of Law at Andover, Inc. v. United States, 118 F.3d 776, 783 (D.C. Cir. 1997)) (internal quotations omitted).
[39] No. CV 15-1631 (RDM), 2016 WL 593449, at *8 (D.D.C. Feb. 12, 2016).
[40] *Blavatnik*, 2016 WL 593449, at *9.
[41] *Id*. at *10.
[42] United States v. SG Interests I, Ltd., No. 12-CV-00395-RPM, 2012 WL 6196131, at *6 (D. Colo. Dec. 12, 2012).

DOJ nonetheless asked the court to approve the proposed Final Judgment as it was "within the range of settlements consistent with the public interest."[43] The district court, however, refused: "It is not in the public interest to approve a final judgment that permits a defendant to leave its civil action in such a smirking, self-righteous attitude."[44] The government ultimately negotiated a better settlement that responded to the court's concerns, by compensating the United States for the damages it incurred as a result of the alleged antitrust violations, serving as a deterrent to the defendants from engaging in conduct that violates the antitrust laws, and putting others in the industry on notice that such anticompetitive conduct will not be tolerated.[45]

IV. Standard of Review

Accordingly, the court should reject the government's entreaties for a sharply proscribed review, one that entitles it to broad discretion to settle on the terms it desires. We do not argue that the court should afford *no* deference to the government's prediction as to the effect of its proposed remedies, its perception of the market structure, and its views of the nature of the case. Instead, that deference is limited. As one scholar noted, "Courts should enter proposed consent decrees only if they are firmly convinced, after serious consideration of the enumerated factors, that they are reasonably calculated to protect competition. This conclusion is based upon the principle of separation of powers, the text of the 2004 amendments, the legislative history of the 2004 amendments, and sound policy for the effective enforcement of federal antitrust law."[46]

Senator Kohl in amending the Tunney Act specifically endorsed Judge Greene's standard in *AT&T*.[47] Thus after giving due weight to the decisions of the parties as expressed in the proposed decree, the court must harmonize competitive values with other legitimate public interest factors. If the decree meets the requirements for an antitrust remedy – that is, if it *effectively opens* the relevant markets to competition and *prevents the recurrence* of anticompetitive activity, all without imposing undue and unnecessary burdens upon other aspects of the public interest – it should be approved. If the proposed decree does not meet this standard, the court should follow the practice applied in *AT&T* and more recent Tunney Act cases and, as a prerequisite to its approval, require modifications which would bring the decree within the public interest standard.

Particularly relevant here is the fact that DOJ is not writing on a blank slate. As DOJ notes in its Competitive Impact Statement, the district court is statutorily "required" – not merely

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[43] United States' Motion for Entry of the Final Judgment, United States v. SG Interests I, Ltd., at 3 (D. Colo. Aug. 16, 2012), https://www.justice.gov/atr/case-document/file/510581/download.
[44] *SG Interests I*, 2012 WL 6196131, at *6.
[45] Plaintiff's Memorandum in Support of its Motions for Entry of Final Judgment, United States v. SG Interests I, Ltd., at 3 (D. Colo. Mar. 6, 2013), https://www.justice.gov/atr/case-document/file/510536/download.
[46] Lloyd C. Anderson, *Mocking the Public Interest: Congress Restores Meaningful Judicial Review of Government Antitrust Consent Decrees*, 31 Vt. L. Rev. 593, 612 (2007).
[47] 150 Cong. Rec. S3617 (Apr. 2, 2004).

permitted – to take into account "competitive considerations bearing upon the adequacy" of the proposed settlement by the Tunney Act.[48]

In this case, those "competitive considerations" include DOJ's past and present statements about competition in the beer industry, its past enforcement decisions in beer mergers, its own statements of enforcement policy, and independent economic analysis of the competitive effects arising from past beer mergers. Competitive considerations are particularly relevant here, as DOJ has alleged that the beer market is highly concentrated, has high entry barriers, and is subject to tacit collusion between the two largest brewers, ABI and MillerCoors. All of these factors have led to higher prices for consumers. There is no indication in the Complaint or Competitive Impact Statement that such anticompetitive activity has ceased and will not recur. Moreover, there is no evidence that the weak behavioral remedies will effectively open the relevant markets to competition and prevent ongoing tacit collusion.

V. Price Coordination in the Beer Industry

A. The Modelo Complaint

In its 2013 Modelo complaint,[49] DOJ described the U.S. beer industry as "highly concentrated," with just two firms (ABI and MillerCoors) accounting for approximately 65% of all sales nationwide.[50] The government asserted that the industry was characterized by "high barriers to entry," including the importance of brand reputation, the time and cost of building new breweries, and the difficulty of developing distribution networks.[51] Perhaps most importantly for present purposes, the government alleged that the industry was subject to "interdependent pricing" or "price coordination" between the two market leaders, ABI and MillerCoors.[52] DOJ alleged that the acquisition by ABI of the remaining equity interest in Modelo that it did not already own would facilitate additional price coordination in the industry, and therefore violated Section 7 of the Clayton Act.[53]

Interdependent pricing and price coordination have a specific meaning in antitrust law and economics. The Horizontal Merger Guidelines refer to such behavior as "coordinated effects" and explain:

> A merger may diminish competition by enabling or encouraging post-merger coordinated interaction among firms in the relevant market that harms customers. Coordinated interaction involves conduct by multiple firms that is profitable for

[48] CIS at 29.
[49] Complaint, United States v. Anheuser-Busch InBev SA/NV and Grupo Modelo S.A.B. de C.V., No. 1:13-cv-00127 (D.D.C. Jan. 31, 2013), https://www.justice.gov/atr/case-document/file/486606/download (hereinafter "Modelo Complaint").
[50] Modelo Complaint ¶ 1.
[51] Modelo Complaint ¶¶ 1, 69.
[52] Modelo Complaint ¶¶ 3, 45.
[53] Modelo Complaint ¶¶ 1, 2, 86.

> each of them only as a result of the accommodating reactions of the others. These reactions can blunt a firm's incentive to offer customers better deals by undercutting the extent to which such a move would win business away from rivals. They also can enhance a firm's incentive to raise prices, by assuaging the fear that such a move would lose customers to rivals.[54]

The issue of price coordination between ABI and MillerCoors was front and center in the Modelo complaint, and determinative of the remedy.

The first paragraph of the Modelo complaint alleges in relevant part:

> Fundamental to free markets is the notion that competition works best and consumers benefit most when independent firms battle hard to win business from each other. In industries characterized by a small number of substantial competitors and high barriers to entry, further consolidation is especially problematic and antithetical to the nation's antitrust laws. The U.S. beer industry – which serves tens of millions of consumers at all levels of income – is highly concentrated with just two firms accounting for approximately 65% of all sales nationwide.[55]

The opening focuses on industry concentration, and the fact that two firms accounted for 65% of beer sales nationwide. The focus on market shares is particularly relevant to a coordinated effects analysis. Market shares can directly influence firms' competitive incentives. Two firms with large market shares may not feel pressure to reduce price even if a smaller rival does. The first paragraph of the Modelo complaint has strong language suggesting that horizontal mergers in such highly concentrated industries are "antithetical to the nation's antitrust laws."

DOJ alleged that an "interdependent pricing dynamic" existed between ABI and MillerCoors:

> As the two largest brewers, ABI and MillerCoors often find it more profitable to follow each other's prices than to compete aggressively for market share by cutting price. Among other things, ABI typically initiates annual price increases in various markets with the expectation that MillerCoors' prices will follow. And they frequently do.[56]

This language is about coordinated effects. The fact that the two largest brewers tend to follow each other's price increases rather than compete aggressively (e.g. by reducing prices to gain market share) is significant. It suggests that the market is not only susceptible to such "coordinated" pricing, but that it is actually occurring. (MillerCoors, parenthetically, was not a

[54] Fed. Trade Comm'n and U.S. Dep't of Justice, Horizontal Merger Guidelines § 7 (2010), https://www.justice.gov/atr/horizontal-merger-guidelines-08192010.
[55] Modelo Complaint ¶ 1.
[56] Modelo Complaint ¶ 3.

party to the ABI/Modelo merger. Coordination, as we have noted, does not need to be between the merging parties to be a problem.)

The Modelo complaint sets out some of the affirmative steps that ABI was taking in order to discourage price competition by its rivals:

> 45. The specifics of ABI's pricing strategy are governed by its "Conduct Plan," a strategic plan for pricing in the United States that reads like a how-to manual for successful price coordination. The goals of the Conduct Plan include: "yielding the highest level of followership in the short-term" and "improving competitor conduct over the long-term."
>
> 46. ABI's Conduct Plan emphasizes the importance of being "Transparent – so competitors can clearly see the plan;" "Simple – so competitors can understand the plan;" "Consistent – so competitors can predict the plan;" and "Targeted – consider competition's structure." By pursuing these goals, ABI seeks to "dictate consistent and transparent competitive response." As one ABI executive wrote, a "Front Line Driven Plan sends Clear Signal to Competition and Sets up well for potential conduct plan response." According to ABI, its Conduct Plan "increases the probability of [ABI] sustaining a price increase."

These paragraphs evince the strength and durability of the anticompetitive coordinated effects. As DOJ alleged, the conduct here was a "how-to manual for achieving price coordination." ABI's goal of transparency dovetails with the 2010 Horizontal Merger Guidelines, which state that "transparent" pricing can help achieve price coordination:

> A market typically is more vulnerable to coordinated conduct if each competitively important firm's significant competitive initiatives can be promptly and confidently observed by that firm's rivals. This is more likely to be the case if the terms offered to customers are relatively transparent.[57]

Still later in the Modelo complaint, DOJ alleged that "ABI is intent on moderating price competition" and that "ABI, as the price leader, would prefer a market not characterized by aggressing pricing actions to take share because '[t]aking market share this way is unsustainable and results in lower industry profitability.'"[58]

Finally, DOJ alleged, among the competitive effects of the Modelo acquisition, the role of coordinated pricing:

> 86. . . . (e) The acquisition would likely promote and facilitate pricing coordination in the relevant markets.

The point here is simple: Front and center in the DOJ's 2013 Modelo complaint was the government's concern with coordinated effects. DOJ investigated this industry, obtained internal

[57] 2010 Horizontal Merger Guidelines § 7.2.
[58] Modelo Complaint ¶ 62.

business documents and other evidence reflecting the prevailing anticompetitive behavior, and highlighted this concern, along with the incriminating evidence, in its complaint.

B. Econometric evidence: The Miller and Weinberg Study

DOJ's conclusion about coordinated effects in the beer industry was later supported by a sophisticated empirical study conducted by two economists, Nathan Miller and Matthew Weinberg.[59] Using price data that spans 39 geographic regions over the period 2001-2011, their analysis found DOJ's allegations about price coordination between ABI and MillerCoors in the Modelo complaint were both plausible and empirically supported.

Significantly, the economists found, by looking at the data, that price coordination between ABI and MillerCoors appears to have started shortly after DOJ permitted SABMiller and Molson Coors to form the MillerCoors joint venture in 2008. They found that beer prices had been going down before 2008, but that changed significantly and abruptly after MillerCoors was formed in 2008. ABI and MillerCoors raised their prices, and continued to do so in ensuing years.[60]

In closing its investigation (without enforcement action) into the formation of the MillerCoors joint venture in 2008, DOJ predicted that the MillerCoors joint venture would "significantly reduce the companies' cost of producing and distributing beer" and this was "likely to have a beneficial effect on prices."[61]

The authors of the economic study found that DOJ got it partially right in 2008: unilateral effects, they found, were in fact counterbalanced by production and distribution efficiencies. But DOJ got it wrong overall, as the formation of MillerCoors in fact led to higher prices throughout the time period of the study and a net consumer welfare loss. They found that coordinated effects – pricing coordination, tacit collusion – were likely responsible for the observed price increases and loss of consumer welfare. In the technical language of the authors of the study:

> The results are consistent with the [2008] Miller/Coors merger having coordinated effects. The governing supply-side parameter is statistically different than zero, and robust across a number of modeling choices. The model thus rejects Nash-Bertrand competition in the post-merger periods. Strictly interpreted, the point estimate on our preferred specification implies that ABI and MillerCoors internalize 26 percent of their pricing externalities after the merger. Using

[59] Nathan H. Miller and Matthew C. Weinberg, *The Market Power Effects of a Merger: Evidence from the U.S. Brewing Industry* (July 25, 2016), available at http://www.nathanhmiller.org/miller%20weinberg%202016%2007%2025%20revised.pdf.

[60] *Id*. at 1 "(Inflation-adjusted prices are stable around a small downward trend over the seven years preceding the merger. The prices of MillerCoors and ABI then increase abruptly in the Fall of 2008, just after the Miller/Coors merger, and these higher prices persist through the end of the sample.").

[61] Statement of the Department of Justice's Antitrust Division on its Decision to Close its Investigation of the Joint Venture between SABMiller PLC and Molson Coors Brewing Company (June 5, 2008), https://www.justice.gov/archive/atr/public/press_releases/2008/233845.htm.

> counterfactual simulations, we determine that the observed post-merger prices of these firms are 6-8 percent higher than they would have been under Nash-Bertrand competition, and markups are 17-18 percent higher. We develop a number of additional results, including: (i) merger-specific cost reductions are large and roughly counter-balance unilateral effects; (ii) consumer surplus loss is due to post-merger coordination; and (iii) the merger increases total surplus due to the magnitude of marginal cost reductions.[62]

The authors also commented that the beer industry does in fact possess the attributes of an industry susceptible to coordinated effects:

> Our empirical analysis does not inform *why* the Miller/Coors merger may have had these coordinated effects. Indeed, one challenge for future research is understanding the conditions under which consolidation either enables collusion or exacerbates the impact of collusion. That said, the U.S. brewing industry does exhibit many of the characteristics that the Merger Guidelines enumerate as contributing to the likelihood of coordinated effects. Retail prices are observable, and ABI and MillerCoors may also gain visibility into wholesale prices through their interactions with wholesalers and retailers. Individual sales are small and frequent, which means that firms may be more easily deterred from making competitive initiatives because the short-term gain is smaller. That market demand is inelastic suggests large gains from coordination. The bargaining power of retailers is limited by the lack of viable private-label store brands and the regulatory prohibition on slotting allowances (which makes it harder for retailers to discipline coordination by auctioning shelf space).[63]

In summary, coordinated effects are a significant competitive problem in the beer industry. DOJ missed this in 2008 (price coordination appears to have started after the DOJ review), but hit the nail on the head in 2013. DOJ was correct to focus on these effects in ABI/Modelo.

C. Pricing Trends 2008-2015

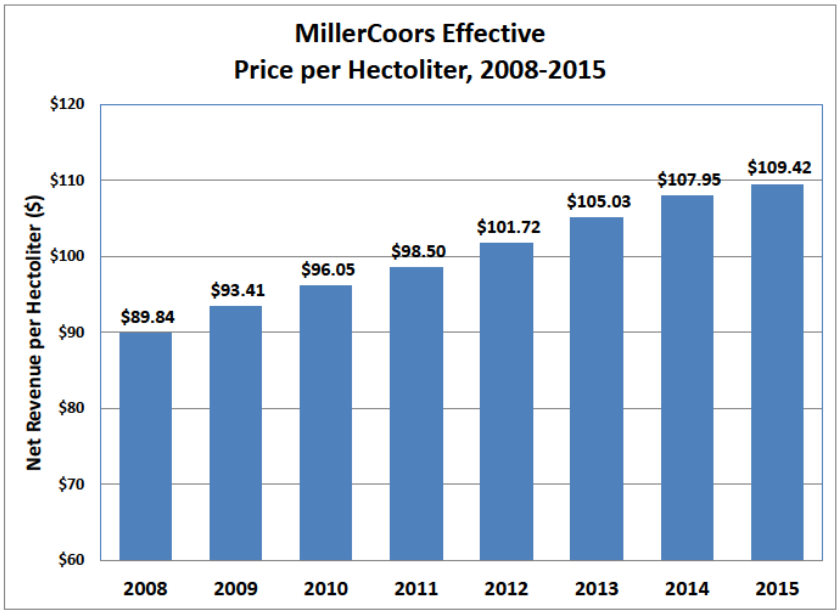
It is worthwhile to take a look at what has been happening to beer prices in the industry more recently. Both ABI and SABMiller report U.S. volume and revenue information from which it is possible to derive the companies' revenue per hectoliter (a hectoliter is 100 liters). In

[62] *Id*. at 2. U.S. law generally applies a consumer welfare standard, not a total welfare standard. *See Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 221 (1993) (referring to "the antitrust laws' traditional concern for consumer welfare and price competition."); *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979) ("Congress designed the Sherman Act as a 'consumer welfare prescription.'"). The antitrust agencies likewise generally apply a consumer welfare standard, with some exceptions not relevant here. Thus, the relevant economic finding is that the MillerCoors joint venture led to a loss of consumer welfare, which means that it also likely violated the antitrust laws.

[63] *Id*. at 34.

other words, how much money do ABI and MillerCoors make for each 100 liters of beer that they sell? The answer is that existing upward pricing trends appear to have continued for both companies.

Every year since 2008, MillerCoors' revenue per hectoliter of beer has gone up:



Confirmatory evidence of ongoing MillerCoors price increases is readily available to DOJ. When MillerCoors announced, in February 2015, that CEO Tom Long would be retiring at the end of June, Chairman Peter Coors made this statement:

> Under Tom's leadership, the company consistently delivered profit growth, *pricing growth* and cost savings, while dramatically improving capabilities in key areas like innovation, chain sales, revenue management, learning and development, and beer knowledge and appreciation[.][64] (Emphasis added.)

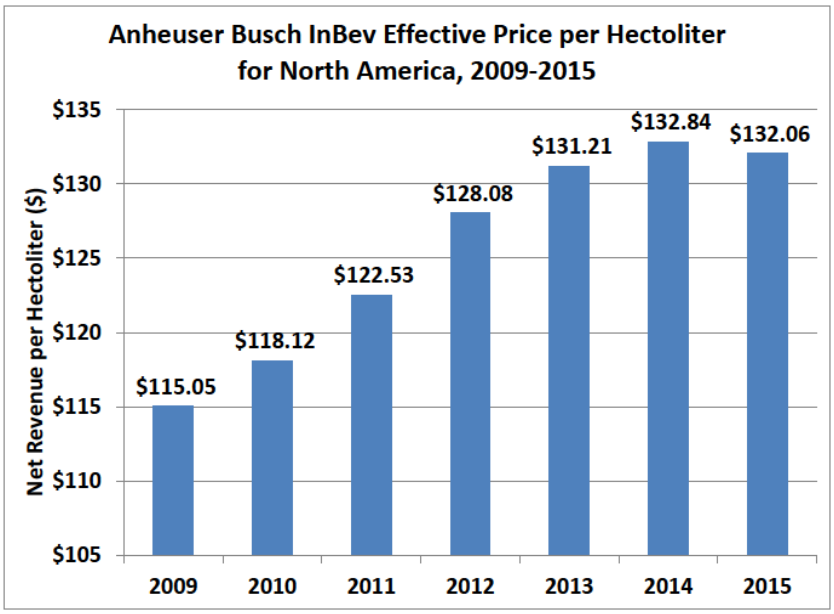
The *Milwaukee Journal Sentinel*, reporting the announcement, added:

> MillerCoors has posted profits even as its sales volumes have dropped. Both MillerCoors and Anheuser-Busch, the nation's largest brewer, have been losing market share to the increased popularity of craft beers.
>
> MillerCoors has remained profitable in part through higher beer prices, and by operating more efficiently.

[64] http://ir.molsoncoors.com/investors/investor-news/investor-news-details/2015/Millercoors-CEO-Tom-Long-To-Retire-June-30/default.aspx.

> The joint venture reduced its workforce, including layoffs of corporate office staff in Milwaukee, and took advantage of reduced shipping expenses by spreading production of Coors Light, its bestselling brand, to what were formerly Miller breweries throughout the country.
>
> The latest earnings report, issued Tuesday, reflected those cost savings and pricing tactics.[65]

ABI's North American revenues per hectoliter have followed a similar upward trajectory for most of the period:



Revenues per hectoliter went up each year from 2009 through 2014. The only slight dip took place in 2015, when ABI was contemplating and then actively pursuing the acquisition of SABMiller. As DOJ is aware, companies often will avoid price increases when DOJ is watching. This is especially true when a company is acquiring its largest competitor, and particularly after DOJ has recently called the company out for coordinated pricing in a complaint. 2015 may well be an outlier.

[65] "MillerCoors CEO Tom Long to retire June 30," Milwaukee Journal Sentinel (Feb. 10, 2015), http://archive.jsonline.com/business/millercoors-ceo-tom-long-to-retire-june-30-b99442296z1-291373931.html.

D. The ABI/SABMiller Complaint and Competitive Impact Statement

The ABI/SABMiller Complaint contains very few explicit references to coordinated effects. The term "price coordination" does not appear. Did coordinated effects, so central to DOJ's antitrust analysis in 2013, become irrelevant in 2016? Has the industry changed so much that price coordination between ABI and MillerCoors is no longer a problem or competitive concern? The answer, for several reasons, is "no."

First, the 2013 Modelo Complaint alleged that ABI and MillerCoors had a combined 65% national market share based on sales and relevant markets were "highly concentrated." The 2016 ABI/SABMiller Complaint alleges that ABI and MillerCoors have a combined market share of "approximately 72%" and relevant markets are "highly concentrated."[66] Indeed, the beer market, both nationally and in many local areas, appears to be as concentrated in 2016 as it was in 2013, if not more so.

Second, in the ABI/SABMiller Complaint, DOJ suggests that price coordination continues to be a competitive problem. That is not surprising, given that the industry structure has not changed (meaning it is still susceptible to coordinated effects), the industry remains highly concentrated, despite the increased popularity of craft beers. The ABI/SABMiller Complaint alleges:

> 21. Historically, ABI has employed a "price leadership" strategy whereby ABI, as the largest U.S. brewer, seeks to establish industry-wide price increases by being the first brewer to announce its prices for the upcoming year. In most local markets, ABI is the market share leader and issues its price announcement first, purposely making its price increases transparent to the market so its competitors will follow its lead. These price increases vary by region, but typically cover a broad range of beer brands and packages.
>
> 22. For many years, MillerCoors has followed ABI's price increases to a significant degree.

These allegations are similar to the allegations in the Modelo complaint. They are slightly ambiguous, as DOJ uses the past tense in places ("ABI has employed," "MillerCoors has followed") but uses the present tense in others ("seeks to establish industry-wide price increases," "issues its price announcement first"). Does ABI continue to employ a "price leadership" strategy? Does MillerCoors continue to follow ABI's regional price increases? For present purposes, what matters most is that in the Complaint, DOJ has again alleged coordinated effects as it did in the Modelo complaint and nowhere states that coordination has stopped or is no longer a competitive concern.

Third, in its Competitive Impact Statement, DOJ alludes to the fact that the proposed merger, if unremedied, would allow ABI to have substantial influence over MillerCoors, as ABI

[66] Complaint, United States v. Anheuser-Busch InBev and SABMiller, No. 1:16-cv-01483 (EGS) (July 20, 2016) ¶ 39, https://www.justice.gov/atr/file/877581/download (hereinafter "Complaint").

would be stepping into SABMiller's shoes in the MillerCoors joint venture. The competitive effects would be potentially the same as a full-scale merger of ABI and MillerCoors, according to the government. This, the government states, would also materially increase the level of price coordination between ABI and MillerCoors:

> The beer industry in the United States is highly concentrated and would become significantly more so if ABI were allowed to acquire SABMiller, including its ownership interest in MillerCoors. As a majority owner with equal governance rights over MillerCoors, ABI would be able to direct the competitive behavior of MillerCoors, leading to a loss of competition between the firms both nationally and in every local market in the United States. Although Molson Coors would continue to own a minority equity interest in MillerCoors and have equal governance rights, Molson Coors' interest in MillerCoors would not eliminate the anticompetitive effects that would result from the acquisition. After the acquisition, ABI would have the right to appoint half of the board members of MillerCoors, who would have the same governance rights as other board members over MillerCoors' business. Given that ABI would have significant influence over MillerCoors, *ABI and MillerCoors would be able to coordinate their competitive behavior, possibly to the extent where they behaved as a single, profit-maximizing entity.*[67] (Emphasis added.)

The Competitive Impact Statement therefore makes explicit that ABI/SABMiller transaction, just like the earlier Modelo transaction, would facilitate coordinated conduct.

Fourth, and significantly, in the Competitive Impact Statement, DOJ states that *the sale of SABMiller's stake in MillerCoors to Molson Coors will increase (not lower) the risk of coordinated interaction between ABI and MillerCoors.* This is a critical acknowledgement, suggesting that a large chunk of the remedy DOJ has obtained is likely to make an existing competitive problem worse, not better:

> The change in ownership of MillerCoors—from a joint venture between SABMiller and Molson Coors to a wholly owned subsidiary of Molson Coors—will increase the number of highly concentrated markets across the world in which ABI competes directly against Molson Coors. By increasing the number of markets in which ABI and Molson Coors compete, *the divestiture of SABMiller's interest in MillerCoors to Molson Coors could facilitate coordination between ABI and Molson Coors in the United States*. For example, *this multi-market contact could lead Molson Coors and ABI to be more accommodating to each other in the United States* in order to avoid provoking a competitive response outside the United States or disrupting their cooperative business arrangements in other countries. Coordination could also be facilitated by the existing and newly-

[67] CIS at 7-8.

> created cooperative agreements between ABI and Molson Coors around the world.[68] (Emphasis added.)

The two statements in the Competitive Impact Statement are clear: A merger between ABI and SABMiller without any remedy would increase the risk of coordination between ABI and MillerCoors, and even with the divestiture of SABMiller's stake in MillerCoors, the potential for coordination also increases.

To put it in the bluntest terms: the only structural remedy DOJ has obtained (the sale of SABMiller's stake in MillerCoors) does nothing to address price coordination between the two largest brewers in the United States, and in fact, according to DOJ itself, the remedy may actually make it *worse*.

We expect that DOJ's response to this glaring problem to be one of three arguments: (1) price coordination between ABI and MillerCoors has in fact ceased; (2) the merger doesn't make coordination any worse because SABMiller is divesting its stake in MillerCoors; or (3) the behavioral remedies on distribution in the proposed Final Judgment are adequate and effective in preventing coordinated pricing between ABI and MillerCoors.

In terms of (1), as already discussed, the evidence supports, rather than discounts, tacit collusion. There are steady price increases by the two market leaders, ABI still appears to be a price leader, and the level of concentration remains extremely high. Given this reality, the Complaint and Competitive Impact Statement suggest that price coordination remains an ongoing competitive problem. Nothing in the Complaint or Competitive Impact Statement suggests the contrary. We would be interested in learning if DOJ has concluded that coordinated behavior between ABI and MillerCoors has ground to a halt, or that the industry structure has changed in such a way that it is no longer possible. We doubt that DOJ can credibly make either argument, as they are unsupported by anything in the Complaint or Competitive Impact Statement. Moreover, DOJ has taken the official position that past coordination is relevant to future coordination: "Facts showing that rivals in the relevant market have coordinated in the past are probative of whether a market is conducive to coordination. . . . A past history of coordination found unlawful can provide strong evidence of the potential for coordination after a merger."[69] DOJ alleged price coordination in the Modelo complaint, so there is without question a past history of coordination that was found to be unlawful.

In terms of (2), DOJ states in the Competitive Impact Statement that the divestiture of SABMiller's stake in MillerCoors will not solve the problem, but actually may facilitate such coordination. By increasing the worldwide interactions between Molson Coors and ABI, there are more opportunities to coordinate. The result, according to DOJ, is that "this multi-market contact could lead Molson Coors and ABI to be more accommodating to each other in the United States . . . ."

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[68] CIS at 12.

[69] U.S. Dep't of Justice & Fed. Trade Comm'n, Commentary on the Horizontal Merger Guidelines (2006) at 22, https://www.justice.gov/atr/file/801216/download.

This conclusion is also supported by looking at Molson Coors' incentives. The negative financial consequences of increased price competition on Molson Coors' bottom line would be greater after it becomes a full owner of MillerCoors than they are today, when Molson Coors only holds 42% of the financial interest in the joint venture. Section 7.2 of the Horizontal Merger Guidelines states that "[a] firm is less likely to be deterred [from making competitive initiatives] by whatever responses occur if the firm has little stake in the status quo." What this suggests is that, all else equal, the more a firm depends on revenues from a given market to its overall financial performance, the less likely it is to rock the boat in that market. Molson Coors, as single owner, would get approximately 68% of its global revenues from the U.S., up from approximately 48% today. As single owner, it has less incentive to rock the boat and compete aggressively against ABI on price because it has a larger stake in the status quo and therefore more to lose.

That brings us to (3), the argument that behavioral remedies on ABI's distribution are adequate to prevent further price coordination between ABI and MillerCoors. We expect DOJ to make this argument. Unfortunately, it does not pass muster.

There are suggestions in the Complaint and Competitive Impact Statement that craft beers are becoming a constraint the ability of ABI (and perhaps also MillerCoors) to continue to raise prices. In the complaint, DOJ alleges:

> 23. Brewers with a broad portfolio of beer brands, such as ABI and MillerCoors, seek to maintain "price gaps" between each beer segment to minimize competition across segments. As ABI has continued to raise premium prices, it is increasingly concerned about the threat of high-end brands constraining its ability to lead future price increases. As the prices of premium brands approach the prices of high-end brands, consumers are increasingly willing to trade up from one category of brands to another. Consequently, competition in the high-end beer segment serves as an important constraint on the ability of ABI and MillerCoors to raise—either unilaterally or through coordination—beer prices in the United States.

The remedy DOJ has proposed places conditions on ABI's distribution practices and ownership of distributors, and requires ABI to provide notice of future acquisitions, including acquisitions of craft brewers, prior to their consummation.[70]

The first thing to note is that the author of the most important retrospective study of merger remedies, Professor John Kwoka, has found that behavioral remedies are significantly less effective than structural remedies in preventing future price increases.[71] Behavioral remedies, standing alone (i.e. without accompanying divestitures), have on average resulted in

[70] CIS at 3.

[71] John E. Kwoka, Jr., "Does Merger Control Work? A Retrospective on U.S. Enforcement Actions and Merger Outcomes," 78 Antitrust L.J 619, 641 (2013), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1954849.

double digit price increases.[72] The economic evidence suggests that behavioral remedies are no more effective in preventing future price increases than simply permitting an anticompetitive merger to take place with no remedies at all.

DOJ may argue that there is a divestiture here, namely the sale of SABMiller's stake. But in terms of coordinated effects, that is unavailing. As noted, DOJ has stated affirmatively that the divestiture of the stake could increase the risk of coordinated interaction. As far as coordinated effects are concerned, the only remedy DOJ has obtained is behavioral.

Behavioral remedies, as the DOJ recognizes, are difficult to craft, difficult to enforce, and often do not work as planned. As these problems are well-known to DOJ, it for many years has articulated a strong preference for structural relief over behavioral relief in merger cases for exactly these reasons.[73]

More recently, DOJ expressed great skepticism in the effectiveness of behavioral remedies in the context of its 2014 settlement of the US Airways/American Airlines merger case. The government pointed out in its Tunney Act filing that proposed behavioral remedies, which it refused to adopt, "would be exceedingly difficult to craft, entail a high degree of risk of unintended consequences, entangle the government and the Court in market operations, and raise practical problems such as the need for ongoing monitoring and enforcement."[74] We would be interested to hear from DOJ if there are any horizontal mergers in recent memory in which DOJ accepted only behavioral conditions as a merger remedy in a highly concentrated industry plagued by tacit collusion.

The problem is only compounded by the theory advanced by DOJ in support of its behavioral remedy in the present matter. DOJ alleges that independent craft brewers – namely those craft brewers that have not been acquired by ABI or MillerCoors – will protect consumers from further price increases. Why? Because, according to the Complaint, ABI and SABMiller apparently have been so successful at increasing beer prices that their "premium" beers are now almost as expensive as "high end" craft beer.[75] In other words, craft beer prices, according to the government, are becoming something of a price ceiling on future price increases by ABI and MillerCoors.

This is as much an admission of failure of past enforcement efforts in the beer industry as it is a justification for a remedy. It hardly instills confidence. And as a remedy, it depends on so

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[72] Id at 640 (mergers with only behavioral conditions resulted in price increases in excess of 16%).
[73] Antitrust Division Policy Guide to Merger Remedies (October 2004), at 7-8, https://www.justice.gov/sites/default/files/atr/legacy/2011/06/16/205108.pdf ("A carefully crafted divestiture decree is 'simple, relatively easy to administer, and sure' to preserve competition. A conduct remedy, on the other hand, typically is more difficult to craft, more cumbersome and costly to administer, and easier than a structural remedy to circumvent.") (citing *United States v. E.I. du Pont de Nemours & Co.*, 366 U.S. 316, 331 (1961) and *California v. American Stores Co.*, 495 U.S. 271, 280-81 (1990)).
[74] Response of Plaintiff United States to Public Comments on the Proposed Final Judgment, United States v. US Airways Group, Inc., Case No. 1:13-cv-01236-CKK (D.D.C. March 10, 2014), at 30 n.52, available at http://www.justice.gov/atr/cases/f304200/304233.pdf.
[75] Complaint ¶ 23.

many future variables and is so porous as to be on its face inadequate and almost certain to fail. Both ABI and MillerCoors continue to acquire craft beers. The remaining craft beers are by definition so small as to be only fringe players in the market – fringe players, moreover, that (according to DOJ) cannot rapidly increase their production in response to a price increase by ABI or MillerCoors because of high barriers to entry and expansion. Craft brewers face obstacles not faced by the industry giants, such as supply chain issues: the Wall Street Journal recently reported that the proliferation of small breweries has left owners struggling to find enough specialty hops, and this has contributed to a drop in craft sales in 2016.[76] And what constrains craft beers from raising their own prices and thereby raising the height of the alleged ceiling?

Fundamentally, the proposed decree fails to meet the Tunney Act requirements for an effective antitrust remedy. The DOJ fails to establish how its weak behavioral remedy – a departure from its own policy preference for structural remedies – will effectively open the beer market to competition and will prevent the recurrence of anticompetitive activity that has plagued this industry. In sum, DOJ has accepted a highly uncertain and historically unacceptable remedy to combat a major and proven competitive problem. This does not meet the *AT&T* standard of "prevent[ing] the recurrence of anticompetitive activity." It won't fly.

E. Given the history of price coordination, divestiture of a brewery is the only remedy likely to be effective

Why is all of this important? Because consumers are being harmed. ABI and MillerCoors have a history of acting in concert to charge supra-competitive prices. Since the market has been (and continues to be) susceptible to coordinated pricing, structural relief – the divestiture of one or more breweries – is the only effective way to remedy coordinated effects, at least short of breaking up the MillerCoors joint venture. Under the *AT&T* standard, the court should require divestiture in order to bring the decree within the public interest standard.

DOJ insisted on structural relief in Modelo, where it forced the sale of a brewery to a third party (Constellation). The Competitive Impact Statement in Modelo emphasized that divestiture of a brewery is "a clean, structural remedy that eliminates the likely anticompetitive effects of the acquisition."[77] The government affirmed that the divestiture of Modelo's recently constructed and highly efficient brewery in Piedras Negras, Mexico, would "properly" address the competitive harm alleged in the complaint (i.e. coordinated pricing) and would "effectively and economically" allow an acquirer to compete with ABI.[78]

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[76] "Trouble Brewing in the Craft Beer Industry," Wall Street Journal (Sept. 27, 2016), available at http://www.wsj.com/articles/trouble-brewing-in-the-craft-beer-industry-1474990945.

[77] Competitive Impact Statement, United States v. Anheuser-Busch InBev SA/NV and Grupo Modelo S.A.B. de C.V., No. 1:13-cv-00127 (D.D.C. Apr. 19, 2013), at 9, https://www.justice.gov/atr/case-document/file/486551/download.

[78] *Id*. at 13.

An appropriate structural remedy has been present from early on. Shortly before the announcement of the ABI/SABMiller transaction, MillerCoors announced that it was closing its very large, efficient and profitable brewery in Eden, North Carolina.

The Eden brewery is one of the larger breweries in the MillerCoors system, with 8.8 million barrels per year capacity and 10 production lines.

The brewery is efficient. MillerCoors' CEO acknowledged in 2016 that "Eden is an efficient brewery and . . . a very strong performing brewery, winning [the MillerCoors award for] 'Brewery of the Year' in 2010, 2011 and 2012." The brewery consistently outperformed other MillerCoors' breweries under various metrics including machine efficiency, whole plant operating efficiency, capacity utilization, water-to-beer ratio, and estimated cost per barrel. Eden is among the most modernized and efficient of MillerCoors' breweries.

The brewery is also profitable. In 2015, the brewery's performance on a budgetary basis was better than any other brewery in the system.

The circumstances surrounding the closure decision, the decision to remove significant capacity from the industry, and the timing of the announcement, should have raised suspicion at DOJ. The decision was made months after ABI had approached some SABMiller board members about a possible transaction,[79] and was announced just two days before merger discussions were made public.[80] The fact that MillerCoors decided to close the brewery (and thereby reduce industry-wide capacity) and not sell it because, in the words of MillerCoors management, "[we] don't want to sell to a competitor," should have been a red flag. The fact that MillerCoors management justified the decision by claiming MillerCoors had "excess capacity" in the system but allegedly stated to Pabst Brewing around the same time that it would no longer have "sufficient capacity" in its breweries to continue to brew Pabst products on a contract basis, and rebuffed Pabst's effort to lease the Eden brewery, should have been another red flag.[81]

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[79] *AB InBev Warns of Thousands of Merger-Related Job Losses*, Wall Street Journal (Aug. 26, 2016), http://www.wsj.com/articles/abinbev-warns-of-thousands-of-merger-related-job-losses-1472202321 ("Friday's filings also disclose for the first time that AB InBev approached some SAB Miller board members about a combination much earlier than previously thought—about 10 months before news of it broke. In December 2014, one of the Belgian brewer's major shareholders—who wasn't identified—approached representatives of the Santo Domingo family, which owns roughly 14% of SABMiller, about a merger. An AB InBev representative later broached the possibility with Altria Group Inc., the tobacco company that has an approximately 27% stake in SABMiller.
After months of talks, AB InBev shared a nonbinding term sheet with Altria and the Santo Domingos in August 2015, setting in motion a deal that would combine the world's two largest brewers. They announced their agreement on Nov. 11, 2015.).

[80] The closure of the brewery was announced on September 14, 2015. See http://www.millercoors.com/News-Center/Latest-News/millercoors-to-close-eden-nc-brewery-in-september-2016. The negotiations between ABI and SABMiller were made public on September 16, 2015. See http://www.prnewswire.com/news-releases/anheuser-busch-inbev-statement-regarding-sabmiller-plc-300143986.html.

[81] Complaint, Pabst Brewing Company LLC v. MillerCoors LLC, No. 2016-cv-002536 (Wisc. Cir. Ct., Milwaukee Cty. Mar. 30, 2016) ¶¶ 5-7, 38-50.

The Eden brewery, as an operating entity, has been responsible for almost 4% of all U.S. beer production. It is a profitable brewery. There were (and likely still are) interested purchasers who would operate the brewery if it is ordered divested. Indeed, MillerCoors' decision not to sell the brewery to a competitor shows that it is a competitively significant asset.

The divestiture of Eden and/or another large and efficient brewery would accomplish at least two goals. First, the structural remedy would effectively open the beer markets to competition and enable a competitor to disrupt and prevent the recurrence of tacit collusion, without imposing the undue and unnecessary burdens that afflict a behavioral remedy. Second, it would allow independent brewers, such as Pabst, to have significant expansion capability, which would make such brewers more effective competitors (they could easily scale up in response to a price increase by ABI or MillerCoors).

In a highly-concentrated industry plagued by coordinated pricing, DOJ's failure to order divestiture of a brewery is part-and-parcel of what makes the remedy in this matter plainly inadequate and not in the public interest.

Finally, we note that both Judge Mehta and Judge Sullivan recently enjoined mergers between the largest and second largest firms in an industry. Judge Mehta stated that "[t]he proposed merger of the country's first and second largest broadline foodservice distributors is likely to cause the type of industry concentration that Congress sought to curb at the outset before it harmed competition" and rejected the parties' attempt at a partial fix.[82] Judge Sullivan rejected the defendants' theory that Amazon Business, a recent entrant facing structural and institutional challenges not faced by the industry giants, would curb the competitive effects of the merger of Staples and Office Depot.[83] Craft brewers are the Amazon Business of this merger.

Sincerely,

Allen P. Grunes

[82] Memorandum Opinion, FTC v. Sysco Corp., No. 1:15-cv-00256 (APM) (D.D.C. Jun. 29, 2015) at 3, https://www.ftc.gov/system/files/documents/cases/150623syscomemo.pdf.
[83] Memorandum Opinion, FTC v. Staples, Inc. and Office Depot, Inc., No. 1:15-cv-02115 (EGS) (D.D.C. May 17, 2016) at 62-70, https://www.ftc.gov/system/files/documents/cases/051016staplesopinion.pdf.