ALERT MEMORANDUM - 6 SEPTEMBER 2016

LEGAL UPDATE

UK High Court permits SABMiller to exclude major shareholders from voting on AB InBev scheme of arrangement

AB InBev's £78 billion bid for SABMiller plc is being implemented, in part, by way of a court-sanctioned scheme of arrangement under the UK Companies Act. In *Re SABMiller plc*, the UK High Court confirmed that SABMiller was permitted to exclude its two largest shareholders from the class of SABMiller shareholders who would be asked to vote on the scheme on the basis that both shareholders had given individual consent to the terms of the scheme.

SCHEMES OF ARRANGEMENT IN UK TAKEOVER BIDS

In the UK, public takeover bids are most commonly effected either by way of a contractual offer to acquire target shares directly from target shareholders, or by way of a court-sanctioned scheme of arrangement under Part 26 of the UK Companies Act 2006. Unlike a contractual offer, a scheme, if successful, guarantees the bidder 100% of the target company's shares. However, in order to become effective, the scheme must be approved by the affirmative vote of a majority in number representing 75% in value of each *class* of target shareholders present and voting either in person or by proxy at the scheme meeting(s) convened by the court for that purpose. Following such approval, the court is then itself asked to approve the scheme as a matter of discretion.

In most takeover bids effected by way of a scheme of arrangement, a single meeting of all target shareholders (excluding, where relevant, members of the bidder's group) will be held to vote on the scheme. However, the composition of classes in the context of meetings convened by the court to vote upon a scheme does not simply follow the classification set out in the company's articles as would normally be the case for a shareholders' meeting convened by the company itself. Where there are classes of target shareholders whose legal rights against the target company are so dissimilar from those of other target shareholders that they cannot sensibly consult together with a view to their common interest, a separate meeting must be held for each class (and, for the scheme to be successful, it must be approved by a majority in number representing 75% in value of each such class present and voting).

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The full text of the judgment can be accessed via this link: *Re SABMiller plc [2016] EWHC 2153 (Ch)*

The AB InBev / SABMiller scheme document can be accessed via this link: *SABMiller Scheme Document*

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Questions of class composition on schemes are always highly fact sensitive and ultimately a matter of judgment. Should the class(es) be improperly constituted, then the court will not have jurisdiction to approve the scheme and it will fail in its entirety. The question in *Re SABMiller plc* was whether the company could properly request the court to *exclude* one or more shareholders from the relevant class where those shareholders had consented to such exclusion and had agreed to be bound by the terms of the scheme in any event. By doing so, the company hoped to avoid any suggestion that the inclusion of the relevant shareholders resulted in the class being improperly constituted.

RE SABMILLER PLC

The AB InBev / SABMiller transaction

In November 2015, SABMiller plc (**SABMiller**) and Anheuser-Busch InBev SA/NV (**AB InBev**) announced that they had reached agreement on the terms of a recommended acquisition of SABMiller by AB InBev. The transaction would be implemented through a three-stage process involving a UK scheme of arrangement, followed by a Belgian law cash offer, followed by a Belgian law merger.

AB InBev incorporated a new Belgian bid vehicle for the purposes of implementing the transaction (**Newbelco**).

The cash consideration and the partial share alternative

For each SABMiller share, SABMiller shareholders would be entitled to receive either £45 in cash (the **Cash Consideration**) or £4.6588 in cash and 0.483969 restricted Newbelco shares (the **Partial Share Alternative**, or **PSA**). The Cash Consideration and the cash element of the PSA were increased from £44 and £3.7788 following the UK's Brexit referendum and the resulting decline in the value of sterling against the currencies in which SABMiller conducts most of its business.

The restricted shares would rank *pari passu* with Newbelco's ordinary shares as regards dividends and voting rights, but would be unlisted and non-transferable for a period of five years (after which time they would convert into Newbelco ordinary shares). The restricted shares would also give their holders certain rights to purchase further Newbelco ordinary shares and collectively to appoint up to three directors to Newbelco's board.

The terms of the PSA were structured principally for the benefit of SABMiller's two largest shareholders, Altria Group Inc. (**Altria**) and BEVCO Ltd. (**BEVCO**). Between them, Altria and BEVCO held 40.33% of SABMiller's ordinary share capital. Both had irrevocably undertaken to vote in favour of the scheme (or, if they did not form part of a single class with the other SABMiller shareholders for the purposes of the scheme vote, to give their individual written consent to the scheme).

SABMiller's board unanimously recommended the transaction and stated publicly that the terms of the Cash Consideration were fair and reasonable. The board did not state whether the PSA was fair and reasonable or whether shareholders should elect for the PSA instead of the Cash Consideration.

SABMiller's proposal

Between November 2015 and August 2016, SABMiller received a large number of enquiries from its shareholders (and other market participants) as to whether all SABMiller shareholders would form a single class for the purposes of the scheme vote (in which case Altria and BEVCO's 40.33% would count towards the 75% threshold if they voted) or whether SABMiller intended to treat Altria and BEVCO as a separate class (in which case the scheme would need to be approved by a majority in number representing 75% in value of the other SABMiller shareholders (the **Public Shareholders**) present and voting at the meeting).

Questions of class composition are always fact sensitive and ultimately a matter of judgment. In SABMiller's case, it was arguable that, given that the Public Shareholders could accept the PSA on the same terms as Altria and BEVCO, Altria

and BEVCO's rights under the scheme were not sufficiently dissimilar to those of the Public Shareholders to require them to be placed in a separate class. On the other hand, Altria and BEVCO had existing rights against SABMiller (e.g. under relationship agreements that would be replicated for Newbelco if the bid was successful) and would be likely to have new rights as the holders of a substantial proportion of the restricted shares to appoint directors of Newbelco. The Public Shareholders did not have such existing rights and, even if they opted for the PSA, would be very unlikely to have any rights to appoint any directors of Newbelco (because of the sizes of their respective holdings).

Even if SABMiller considered, on balance, that Altria and BEVCO should not be treated as a separate class, there would nevertheless remain a significant risk that any vote obtained in part by the use of such large voting blocks might be challenged at the court sanction hearing on the basis that Altria and BEVCO were not representative of the class of ordinary shareholders and that they had voted with a view to securing the benefits of the PSA, which had been structured with them in mind. Any such challenge could result in a lengthy hearing and an appeal involving further commercial uncertainty, expense and delay.

With this in mind, and having taken the view that the scheme was likely to be approved by the Public Shareholders without the need for Altria and BEVCO's votes, SABMiller announced in August 2016 that it intended to ask the court to treat Altria and BEVCO as a separate class. However, SABMiller proposed that there should only be one scheme meeting, which would exclude Altria and BEVCO (with their consent). Separately, Altria and BEVCO would undertake to the court at the sanction hearing to be bound by the scheme.

Soroban's application

At the court hearing to consider the convening of the class meeting, Soroban Master Fund LP and Soroban Opportunities Master Fund LP (together, **Soroban**) challenged SABMiller's approach. Soroban held interests in 0.09% of SABMiller's ordinary shares.

Soroban intended to vote in favour of the scheme and to elect for the PSA, but did not share SABMiller's confidence that the scheme would be approved by the Public Shareholders.

Soroban therefore argued that the court had no jurisdiction under the Companies Act to grant the order SABMiller was seeking. It argued that there should be one class meeting to which all SABMiller shareholders (including Altria and BEVCO) should be summoned and at which they should all be entitled to vote (notwithstanding the risk of subsequent challenge).

The High Court's decision

Snowden J dismissed Soroban's arguments and confirmed that SABMiller was permitted to exclude Altria and BEVCO (with their consent) from the single class of shareholders being asked to vote on the scheme.

Snowden J reiterated that it is open to the relevant company to choose the shareholder group with whom it proposes an arrangement and to exclude from the vote on that arrangement any shareholders from whom it has obtained (or will obtain) individual consent.

The court's decision confirms the validity of the common practice whereby a company faced with a potential class composition issue (e.g. where members of management are receiving the same deal as other shareholders in the scheme, but have agreed separately to invest in the bid vehicle) will exclude the relevant shareholders from the vote and thereby both avoid having to determine the class question and neutralize the risk of challenges from dissentient shareholders when the court considers whether to exercise its discretion to sanction the scheme.

Snowden J also reiterated that where a UK scheme of arrangement forms part of a larger transaction, the entire transaction needs to be taken into account when considering questions of class composition and discretion. This was relevant in this case because AB InBev's bid was being implemented via a number of different steps, including a the UK scheme, a Belgian offer and a Belgian merger. Technically, the UK scheme only involved an exchange of Newbelco shares for SABMiller shares, with all SABMiller

shareholders being treated equally – shareholders would only receive restricted shares or cash as part of the Belgian offer and Belgian merger (i.e. after the UK scheme had become effective). However, scheme shareholders' rights in the broader transaction, not just the UK scheme, needed to be taken into account when determining questions of class composition for the purposes of the UK scheme.

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