ICLE International Center for Law & Economics

The Honorable Edith Ramirez
Chairwoman
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, D.C. 20580

Re: Ball Corp.'s Proposed Acquisition of Rexam PLC

Dear Chairwoman Ramirez:

The undersigned professors and scholars of antitrust law and economics write to urge the Federal Trade Commission ("FTC") to take special care in its analysis of Ball Corp.'s proposed acquisition of Rexam PLC. It is our understanding that there are distinct characteristics of the market that could cause an inaccurate assessment of the level of competition in the market if not properly taken into account.

While we take no position on the legality of the transaction, we are motivated to write this letter because of the FTC's role in shaping antitrust law and policy. Courts of appeals and the Supreme Court rarely address the antitrust rules governing mergers. As a result, failure by the agencies to take a nuanced, fact-based analysis of each transaction can lead to over-enforcement and bad policy, particularly where, as here transactions that may involve superficial similarities may tempt antitrust authorities to value apparent consistency over the hard work of fact-based analysis.

In spring of 2014, the FTC filed a complaint against the proposed merger of Ardagh Group SA and Saint-Gobain Containers, the second and third largest glass beverage container manufacturers in the United States. The complaint resulted in a consent order requiring parties to divest six manufacturing plants.[1] The commission argued that the loss of head-to-head competition between Ardagh and Saint-Gobain would harm brewers and distillers who "have reaped substantial benefits from the rivalry between the two."[2]

The FTC's decision in Ardagh provoked a strong dissent from Commissioner Wright,[3] and some commentators have suggested that the Ardagh decision will loom in the minds of the commissioners.[4] Commissioner Wright found that the merger's cognizable efficiencies were "up to six times greater than any likely unilateral price effect," and thus the merger should have been approved without requiring a remedy.[5] Commissioner Wright also questioned if the FTC was creating asymmetric standards for the burdens of proof, stating the majority's approach "embraces probabilistic prediction, estimation, presumption, and simulation of anticompetitive effects on the one hand but requires efficiencies to be *proven* on the other."[6]

While this matter might in some respects be similar to Ardagh, there are also important differences. It is vital to consider the matter its own merits rather than as an undifferentiated sequel to Ardagh, or as a second chance for addressing the concerns found in Commissioner Wright's dissent and commentary by legal scholars.

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[1] Statement of the Federal Trade Commission, In the Matter of Ardagh Group S.A., Saint-Gobain Containers, Inc., and Compagnie de Saint-Gobain, File No. 131-0087 (F.T.C. Apr. 11, 2014), *available at* http://www.ftc.gov /system/files/documents/cases/140411ardaghcommstmt.pdf.

[2] *Id.*

[3] Dissenting Statement of Commissioner Wright, In the Matter of Ardagh Group S.A., Saint-Gobain Containers, Inc., and Compagnie de Saint-Gobain, File No. 131-0087 (F.T.C. Apr. 11, 2014), *available at* https://www.ftc.gov/system/ files/documents/public_statements/568821/140411ardaghstmt.pdf.

[4] *See*, *e.g.*, Melissa Lipman, FTC Must Weigh Dense Can Market $7.8B Ball-Rexam Deal, Law360.com (Apr. 7, 2015, 8:42 PM), http://www.law360.com/articles/640181/ftc-must-weigh-dense-can-market-in-7-8b-ball-rexam-deal.

[5] Dissenting Statement of Commissioner Wright, *supra* note 3, at 1.

[6] *Id.* at 5.

I. Product Market

As a starting point for any merger matter, the product market definition is crucial. When there is "interindustry competition," courts will consider a broader market.[7] In Ardagh, there was limited interindustry competition between glass containers and other beverage containers. With aluminum cans, there is significant evidence of competition between aluminum cans and other container products, specifically plastic. Competition within the beer and carbonated beverage container industry is diverse including numerous products such as aluminum cans, aluminum bottles and polyethylene terephthalate ("PET"). In fact, now, 50 percent of the world's soda is packaged in PET instead of aluminum cans, and the move to PET continues to grow as declining energy prices have made plastics even less expensive.[8] This "dynamic intermaterial competition" self-disciplines the competitors like Ball and Rexam ensuring high output, innovation and lower price.[9]

Moreover, purchasers of Ball and Rexam's aluminum can products also directly compete with Ball and Rexam. Ball makes a number of aluminum can products for a variety of small and large companies, but 80 percent of its sales are to dominant beverage companies like Anheuser-Busch and Coca-Cola. Unlike Ardagh, where purchasers largely did not self-supply glass products or compete with Ardagh and Saint-Gobain, each significant buyer within the beverage can and PET industry directly competes with Ball and Rexam. Anheuser Busch InBev's Metal Container Corporation self-supplies 45 percent of its own can production within the United States as well as selling cans to Coca-Cola and PepsiCo.[10] MillerCoors also built its own can facility in Golden, Colorado, which is now owns through a joint venture with Ball. On the soft drink side, the Coke bottler in Puerto Rico makes its own aluminum cans and both Coca-Cola and PepsiCo self-supply

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[7] *United States v. Continental Can Co.*, 378 U.S. 441, 456 (1964).

[8] Regulatory Case, Ball, http://www.bestinbeveragepackaging.com/regulatory-case (last visited Nov. 13, 2015).

[9] *FTC v. Owens-Illinois*, 681 F. Supp. 27, 54 (D.D.C. 1988).

[10] See Packaging Operations, Anheuser-Busch, http://anheuser-busch.com/index.php/our-company/operations/ packaging-operations/ (last visited Nov. 13, 2015).

PET containers for their carbonated beverages.[11] As noted by the FTC in Ardagh, glass bottle prices have gone up significantly compared to aluminum can and plastic suggesting a greater level of competition within and between aluminum and PET containers.[12]

II. Barriers to Entry

Competitive entry is important in cases where parties potentially have high market shares. While glass manufacturing plants need significant investments in proprietary mold libraries and furnaces and time for environmental permits,[13] an aluminum can plants can be constructed quickly with attractive economics and do not involve significant know-how or intellectually property.[14] This difference can be seen through the pre-merger dynamics of the aluminum beverage container industry, which is undergoing significant new entry in local customer markets and internationally. Along with many beverage companies increasing self-supply, since 2009, there have been 56 new aluminum plants built from companies other than Ball and Rexam.[15] While emerging markets have been a focus for this investment, North America has attracted substantial investment as well, with new plants recently built or announced by Crown in upstate New York and Mexico, by ABI in Mexico and by Coke in Puerto Rico. Thus, unlike Ardagh, the Ball-Rexam deal takes places within an industry where new investment an important real-world dynamic.

Also, there are significant differences in determining geographic markets in glass container and aluminum can container markets. In Ardagh, the parties competed on a national basis. The relevant market for aluminum can and PET is local.

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[11] Heather Caliendo, Pepsi to manufacturer its own plastics bottles at Latham, NY facility, Plastics Today (Oct. 19, 2012), http://www.plasticstoday.com/articles/pepsi-manufacture-its-own-plastics-bottles-latham-ny-facility; see also PlantBottle, Coca-Cola.com, http://www.coca-colacompany.com/plantbottle-technology/plantbottle (last visited Nov. 13, 2015).

[12] Complaint, In the Matter of Ardagh Group S.A., Saint-Gobain Containers, Inc., and Compagnie de Saint-Gobain, at 6.

[13] Complaint, In the Matter of Ardagh Group S.A., Saint-Gobain Containers, Inc., and Compagnie de Saint-Gobain, at 13.

[14] *See* Solutions in Action: Roeslein & Associates, ROESLEIN.COM (Jan. 26, 2015), http://www.roeslein.com/news /article/solutions_in_action_roeslein_associates.

[15] Regulatory Case, *supra* note 8.

In fact, due to high shipping costs, the vast majority of aluminum cans ship 200 miles or less to buyers.[16]

III. Efficiencies

In Ardagh, the parties failed to identify any verified marginal cost reductions. Here, Ball and Rexam have demonstrated significant efficiencies from the merger that will be passed along to buyers and ultimately consumers. After careful analysis, which was validated by an independent third party, Ball and Rexam determined that the acquisition would lead to $300 million in synergies, much of which are marginal cost savings.[17] There will be significant savings in metal purchasers for the combined entity due to its combined purchasing power. As a result, the newfound savings will passed on to smaller customers that rely on Ball and Rexam for their aluminum purchasing power.

Moreover, by acquiring Rexam, Ball will be able to increase its manufacturing footprint throughout the United States, in turn helping many customers better optimize their merchant supply network to lower shipping costs.[18] The lowering of shipping costs is an important and well-recognized efficiency. In the U.S. Department of Justice Antitrust Division's review of the Coors and Miller joint venture, the division approved the transaction, in part, because of a resulting reduction in shipping costs to beer purchasers.[19]

While sharing the overarching beverage container industry label, the facts and market analysis demonstrate that the Ball-Rexam and Ardagh-Saint-Gobain mergers should be analyzed differently. However, Ardagh is nonetheless instructive in analyzing Ball's acquisition of Rexam. Product market definition based on market realties, ease of entry and self-supply, geographic distribution, and efficiencies

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[16] *See* Ball/Rexam: Extended Review in Multiple Jurisdictions Likely to Result in Divestitures; Geographic Market Definition Crucial, THE CAPITAL FORUM at 2 (Apr. 2, 2015).

[17] Regulatory Case, *supra* note 8.

[18] *Id.*

[19] Orley Ashenfelter, Daniel Hosken, & Matthew Weinberg, *Efficiencies Brewed: Pricing and Consolidation in the U.S. Beer Industry*, NAT'L BUREAU OF ECONOMICS RES. 1, 2 (2013), *available at* https://www.ftc.gov/sites /default/files/documents/public_events/Federal%20Trade%20Commission%20Microeconomics%20Conference/weinberg.pdf.

are all critical metrics in determining the competitive harm or pro-competitive benefits of a merger. Ardagh raised concerns by eliminating competition and providing intangible benefits to buyers and consumers. In contrast, the Ball and Rexam merger will improve beverage container manufacturing and provide pro-competitive benefits to the market.

Sincerely,[20]

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