Ball-Rexam: Not A Typical 3-To-2 Merger

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It is unsurprising that the Federal Trade Commission recently issued a second request to investigate Ball Corporation's acquisition of Rexam PLC.[1] Along with Crown Holdings Inc., these three companies provide just over 60 percent of aluminum beverage can volume globally, and such a level of concentration can potentially lead to anti-competitive effects.[2] However, in investigating a merger or acquisition, the commission and other regulators must consider the unique characteristics of each relevant market. When analyzing the dynamics and overlying factors within the beverage container industry, it is clear that Ball and Rexam are subject to competitive constraints not apparent from a simplistic review of market shares.

First, 80 percent of Ball's sales are to dominant beer and carbonated beverage companiesAnheuser-Busch InBev, MillerCoors LLC, PepsiCo Inc. and Coca-Cola Co., all of whom are significantly larger than the post-merger entity.[3] However, unlike the commission's recently challenged glass bottling manufacturer merger between Ardagh Group SA and Saint-Gobain SA, these large customers utilize their own plants to "self-supply" a substantial portion of their beverage products.[4]

For example, Anheuser Busch InBev's Metal Container Corporation currently self-supplies 45 percent of its total United States' can production and also sells cans to both PepsiCo and Coca-Cola.[5] Beer maker MillerCoors owns a 50 percent stake in Rocky Mountain Metal Container, a plant in Colorado that produces over 4 billion cans a year.[6] Both Coca-Cola and Pepsi self-supply polyethylene terephthalate ("PET") containers and are expanding operations, including Coca-Cola's new venture in Puerto Rico where its bottler recently built its own can plant with a local brewing company.[7] Using their vertical integration, each of these entities self-supplies and takes production of beverage containers in house.

Second, the commission must consider reasonable substitutes for aluminum cans. A large percentage of both Ball and Rexam's business comes from servicing the carbonated beverage industry. Currently, 50 percent of the world's soda is packaged in PET.[8] Moreover, because both Pepsi and Coca-Cola manufacturer their own PET bottles, both companies have an incentive to use promotional activity to quickly shift demand from aluminum cans to PET if the price of aluminum cans were to increase. [9] Furthermore, beer giant Anheuser-Busch is expanding its internal production of aluminum bottles, another competitive substitute for the standard glass bottle or the aluminum can.[10]

Third, while there has been little recent entry in the United States, there has been significant aluminum can manufacturing entry in other parts of the world. In fact, since 2009, 70 new aluminum plants have been opened throughout the world, 60 of which are from companies other than the merging parties.[11] Unlike other beverage container manufacturing plants, new aluminum can plants can be opened within a year and involve minimal investment or technology. Additionally, because a can plant produces hundreds of millions if not billions of cans, it is possible that entry of even a single plant can discipline a price increase, even where the entire output of the plant is dedicated to a single nearby customer.

Given these market dynamics, this is not a "typical" three-to-two merger. When powerful buyers and competitors can readily enter the market, a merger between two larger entities will not substantially lessen competition. As noted by Malcolm Coate, an economist at the FTC, "[h]orizontal mergers that lead to duopoly or even monopoly market structures are not anticompetitive if entry will 'deter or counteract' the adverse market impact of the transaction."[12] In fact, from 1996 to 2011, the commission did not challenge any three-to-two merger where other competitors could easily enter.[13] For example, in the ADS-Hancor merger, the commission closed its investigation on the basis of competitive landscape and potential entry after determining that a "new [] manufacturing plant could be constructed at relatively low costs ... that several firms had entered de novo in the prior ten years, and that several fringe incumbents were expanding output ... [a]lso existing manufacturers of certain other, non-HDPE pipes could enter at relatively low sunk costs."[14]

Additionally, the agencies' merger guidelines note that post-merger price effects are unlikely where powerful buyers, such as the beverage companies in this matter, can "constrain the ability of the merging parties to raise price," because they "have the ability and incentive to vertically integrate upstream or sponsor entry."[15] Any resulting anti-competitive conduct by the merged Ball-Rexam entity would be met by the powerful beverage companies simply altering supply through self-supply of aluminum cans or the use of PET bottles.

In actuality, this merger will have a number of pro-competitive benefits passed on to both buyers and ultimately consumers. According to the parties, the combined entity will provide $300 million in "annual run-rate synergies."[16] This includes significant savings in metal purchases for smaller customers, who purchase their materials through the parties themselves. With a combined Ball-Rexam, purchasing power is greatly increased for these customers.

In addition, by combining plant production through the United States, Ball and Rexam can now economically ship cans to the majority of customers in geographic areas roughly 200 miles from each plant. Reduced shipping distances will lower total freight costs and thus lower prices to buyers and consumers.[17] Such efficiencies are well recognized within the industry. Red Bull, the marker of a well-known energy drink, trumpets on its website that having a plant "wall to wall" with its filling locations, means that approximately 2.5 billion aluminum cans need no further transport, saving more than 12,500 truck journeys of 700 kilometers and 6,641 tons of carbon dioxide emissions each year.[18] A Ball-Rexam enhanced network of local markets will be particularly helpful to smaller customers such as the over 500 craft brewers who currently package most of their beer in glass.[19]

In analyzing the Ball-Rexam merger, the commission will consider these market dynamics within the aluminum beverage can industry. At the end of the commission's investigation, these dynamics — current entry via self-supply and potential future entry by existing or new competitors, other competing container products such as PET, and quantifiable merger efficiencies — should lead the commission to approve the Ball-Rexam merger.

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[1] Angela Chen, Ball Says U.S. Seeks More Information on Rexam Acquisition, Wall. St. J., Apr. 7, 2015, http://www.wsj.com/articles/ball-says-u-s-ftc-seeks-more-information-on-rexam-acquisition-1428415303.

[2] Id.

[3] Regulatory Case, Ball, http://www.bestinbeveragepackaging.com/regulatory-case (last visited Apr. 21, 2015).

[4] See Statement of the Federal Trade Commssion, In the Matter of Ardagh Group S.A., and Saint-Gobain Containers, Inc., and Compagnie de Saint-Gobain, FTC File No. 131-0087 (April 11, 2014).

[5] See Packaging Operations, Anheuser-Busch, http://anheuser-busch.com/index.php/our-company/operations/packaging-operations/ (last visited Apr. 21, 2015).

[6] Paul V. Arnold, Better planning is Coors' silver bullet, Reliable Plant, http://www.reliableplant.com/Read /373/planning-coors (last visited Apr. 21, 2015).

[7] $60M Can Manufacturing Plant Opens in PR, Caribbean Business, https://caribbeanbusinesspr.com/news/$60m-can-manufacturing-plant-opens-in-pr-92797.html (last visited Apr. 21, 2015).

[8] Regulatory Case, supra note 3.

[9] Locations, Pepsi bottling Ventures, http://www.pepsibottlingventures.com/locations/ (last visited April 10, 2015) (21 plants in four states); The Coca-Cola System, Coca-Colacompany.com, http://www.coca-colacompany.com/our-company/the-coca-cola-system (last visited April 10, 2015).

[10] Anheuser-Busch to Invest $150 million in Arnold Metal Container Corporation Facility, Anheuser-Busch Newsroom, Dec. 18, 2014, http://newsroom.anheuser-busch.com/arnold-

mcc/.

[11] Regulatory Case, supra note 3.

[12] Malcolm B. Coate & Arthur J. Del Buono, Modeling the Ease of Entry in Merger Analysis: Can Financial Analysis Move the Ball? Fed. Trade Comm'n at 1 (Mar. 20, 2014), available at http://papers.ssrn.com /sol3/papers.cfm?abstract_id=2412202.

[13] Horizontal Merger Investigation Data: Fiscal Years 1996-2011, Fed. Trade Comm'n at 12, 22 (2013), available at https://www.ftc.gov/reports/horizontal-merger-investigation-data-fiscal-years-1996-2011 (according to the Commission, there were 10 three to two merger matters involving easy entry, none of which were challenged).

[14] U.S. Dep't of Justice & FTC, Commentary on the Horizontal Merger Guidelines at 41 (2006), available at http://www.justice.gov/atr/public/guidelines/215247.htm.

[15] U.S. Dep't of Justice & FTC, Horizontal Merger Guidelines at § 8 (2010), available at http://www.justice.gov /atr/public/guidelines/hmg-2010.html.

[16] Regulatory Case, supra note 3.

[17]Ball Corporation's offer to acquire Rexam, Ball Corp. at 8 (2015), available at http://www.bestinbeveragepackaging.com/ballrexamacq/media/PDFs/Ball-Offer-to-Acquire-Rexam-PLC.pdf..

[18] Wall-to-Wall Production, Red Bull, http://energydrink-us.redbull.com/production (last visited Apr. 20, 2015).

[19] Lewis Wallace, Brewers Have Been All Bottled Up, But Now They're Canning It, NPR.com (June 10, 2014, 4:15 PM), http://www.npr.org/blogs/thesalt/2014/06/10/320645347/brewers-have-been-all-bottled-up-but-now-theyre-canning-it.