

WHAT ROLE DOES ANTITRUST PLAY IN HOW FMCG COMPANIES CHOOSE TO PURSUE SUSTAINABILITY GOALS?

BY BEN GRAHAM, EUROPE LEGAL DIRECTOR, AB INBEV

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[Excerpt]

Below are several examples where AB InBev either has taken actions with competitors, has considered such actions but not taken them, or could have gone further but chose not to for antitrust concerns.

Collaboration of competing alcoholic and non-alcoholic beverage producers to **preserve natural resources**. Specifically, AB InBev and five competitors championed a project to ensure broad, long-term watershed sustainability of a water basin in Mexico. All of the competitors had an interest in the sustainability of the water basin, and developed a project encompassing environmental education and studies, reforestation, repairing water filtration and reservoirs and habitat conservation.

Packaging goals with other companies, such as “plastic pacts” to reduce the levels of plastic in packaging. Such pacts are typically coordinated through trade associations or federations of businesses, allowing the development of such joint commitments. Through these “plastic pacts” businesses reduce the overall use of plastic in packaging through elimination, innovation or circulation. More stringent commitments, with closer monitoring, stricter targets and tangible consequences would be possible with a clearer antitrust greenlight.

Potential **logistics collaborations**, or even data sharing, with other beverage or FMCG companies, to facilitate more efficient logistics provision. Such collaboration could serve to reduce the overall kilometers travelled by logistics companies, and so reduce environmental impact. However, this data sharing can also lead to antitrust concerns, and so is either handled very delicately through third parties, or simply left as an unaddressed sustainability opportunity.

As regards **innovation**, there is a delicate balance to be set between competition stimulating innovation for more efficient and sustainable production, and sharing of innovation to benefit an industry more broadly. For AB InBev, let us take the example of “simmer and strip” mentioned above, where the company has chosen to make the related IP available to all brewers to purchase at fair market value, and to small brewers for free. Antitrust rules could help clarify how and when innovations could and should be shared.

The way forward for antitrust and sustainability

Every business, consumer and activist has particular sustainability priorities. Especially when considering this topic from an antitrust standpoint, it is worth considering that – unlike on price – the consumer is not always right. Consumers make a huge number of consumption decisions, which are necessarily partially-informed. Consumers may therefore prefer a product that is, for example, made from glass rather than plastic, when in fact for that particular product, plastic packaging has a much lower environmental impact as it is lighter to transport, preserves the product longer and is recyclable. Relying on competitive markets to promote sustainability risks companies substituting real pro-sustainability decisions, for focus on the preferences of

partially-informed consumers. Antitrust authorities have a real responsibility to ensure that the true, rounded sustainability interests of society are taken into account in their enforcement decisions, over and above protecting the interests of the immediate consumer.

Additionally, antitrust authorities wield enormous power, can shift how companies do business and impose very large fines. Consequently, companies rightly have very low tolerance for antitrust risk. While companies give high priority to sustainability and related investments and innovations, their business is normally much broader. As such, if any particular initiative risks triggering antitrust consequences, there is a real risk that companies opt for the option with the lowest antitrust risk, even if that does not give the best sustainability outcome. If an option requires significant investment in antitrust legal advice before moving forward, this will count against it and may push it off the table altogether. This is even more the case if such legal advice comes coupled with significant delay while an authority is consulted.

Consequently, antitrust authorities can be promoters of sustainability, and foster collaborative and highly impactful initiatives by:

- Providing clear guidance on how sustainability initiatives will be assessed, including on technical aspects. In that way, both advice from external law firms and decisions taken by in-house legal teams can be clear and confident, not inhibited by uncertainty or disclaimers;
- A true open door and show of trust, to be open to optimistic and productive consultations with companies. Such cooperation would be strengthened if the process was fast (and did not involve extensive information requests) and use of any information received was strictly limited (in particular, that it would not be used for any other purpose than the current review).

Especially where antitrust is concerned, companies need swift clarity and certainty to act with confidence. In the absence of this, companies could limit or avoid entirely antitrust-sensitive collaborations, to the detriment of sustainability and, ultimately, the Green Deal itself.