UNIVERSITEIT VAN AMSTERDAM
Amsterdam School of Economics

Sustainability and Competition Policy

Prof. Dr. Maarten Pieter Schinkel

Comments in the session “Measurement of Sustainability and Other Aims?”

E.CA Competition Law and Economics Expert Forum

Berlin, 17 April 2023

Universiteit van Amsterdam
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mlex

No easing of EU competition enforcement to achieve Green Deal, Commission says

10 Sep 2021 | 08:50 GMT | Insight
By Natalie McNelis and Nicholas Hirst

Vigorous competition enforcement remains the best way to ensure companies engage with the green transition, a top EU competition official has said. Recent cases offer the best guidance on the European Commission's approach, Inge Bernaerts said, pointing to a July decision ...rman carmakers for colluding on the development of clean

Concurrences
Antitrust Publications & Events

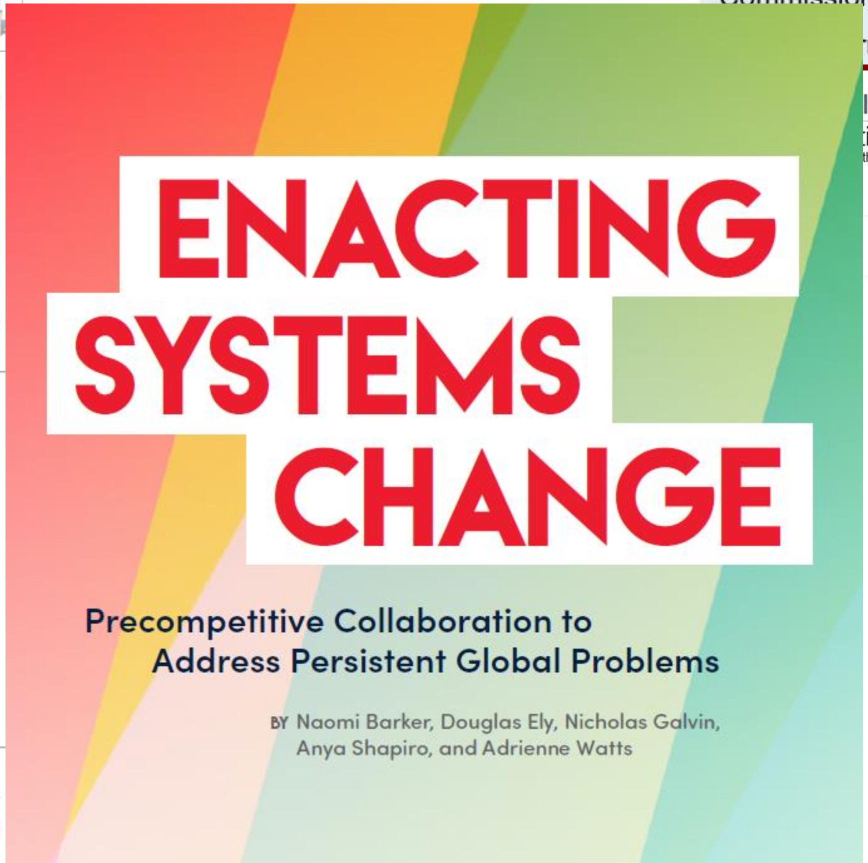
NEW BOOK RELEASE

Competition Law, Climate Change & Environmental Sustainability

"This innovative book provides rich inspiration for policymakers when defining the important role of competition law in achieving a more sustainable economy."
Alan Jope, CEO, Unilever

"This book provides innovative and fresh perspectives to one of the most pressing debates in contemporary competition law."
Marc Van der Woude, President, General Court of the EU

"This groundbreaking book offers rare insights from industry leaders



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DIGITAL PLATFORMS | CORONAVIRUS | ANTITRUST AND COMPETITION | FRIEDMAN 50 YEARS LATER | RESEARCH

MAARTEN PIETER SCHINKEL, LEONARD TREUREN

Green Antitrust: Why Would Restricting Competition Induce Sustainability Efforts?

COMMENTAR...
Senator Klobuc... Far Enough
ERIC A. POSNE...
Senator Klobu... useful propos... enforcement, ...

RESEARCH
Why We Need t...

‘National Energy Agreement’ (2013)

3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:

— any agreement or category of agreements between undertakings,

— any decision or category of decisions by associations of undertakings,

— any concerted practice or category of concerted practices,

which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

(a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;

(b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

Source: Article 101(3) TFEU, *Official Journal*, 9 May 2008

"… allowing consumers a fair share …"

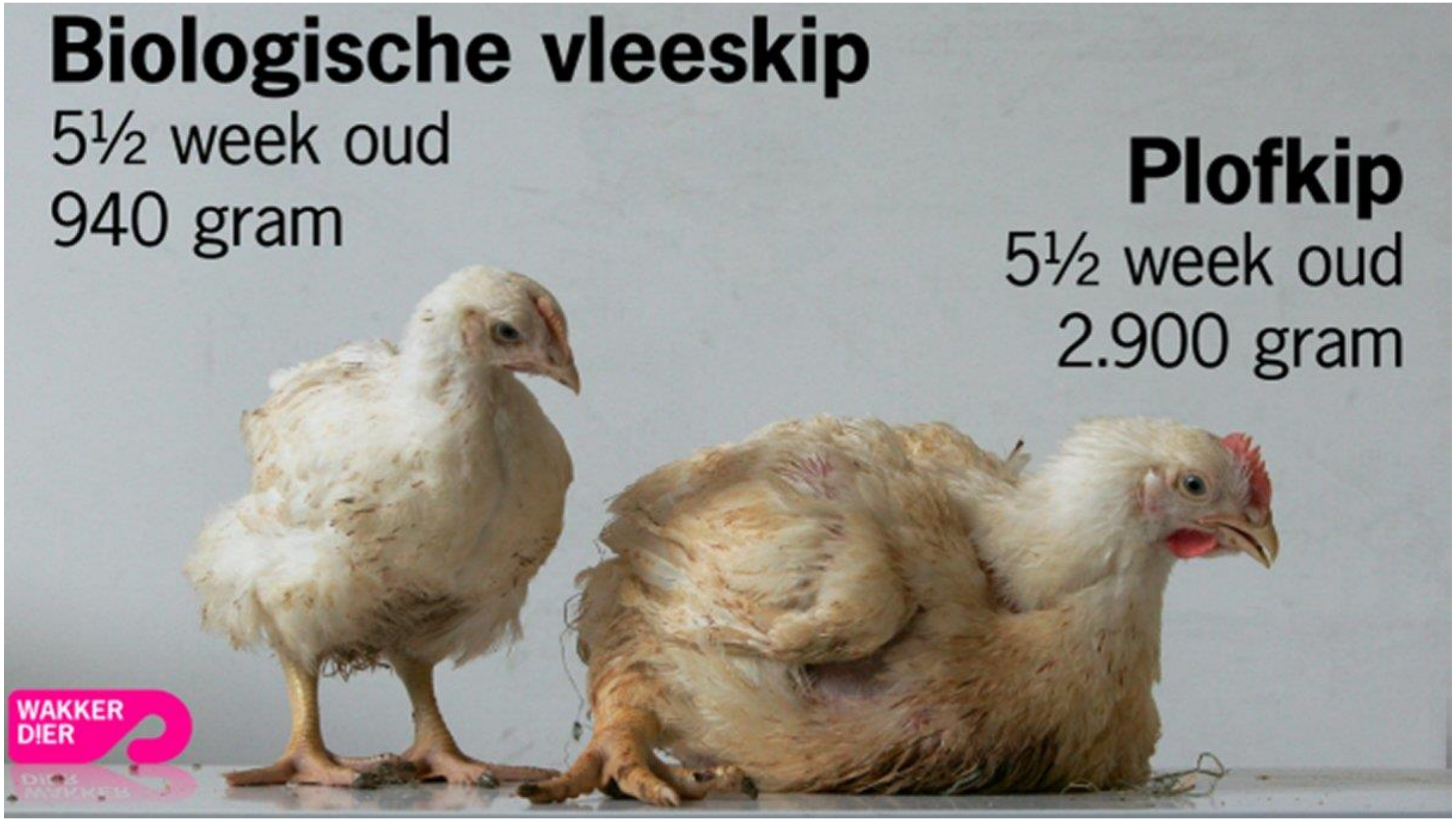
- European Commission (2004), Guidelines on the Application of Article 81(3), recital 87:

"The decisive factor is the overall impact on consumers of the products within the relevant market and not the impact on individual members of this group of consumers"

- *Shaw* (2002): "the average" consumer

- 'Fair share' interpreted (in merger control) as 'at least indifferent'

‘The Chicken of Tomorrow’ (2015)



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Consument & Markt

Guidelines

Sustainability agreements

Opportunities within competition law

DRAFT

Kansen & keuzes voor bedrijven en consumenten

Second draft: 26 January 2021

48. ACM believes that, with regard to environmental-damage agreements, it should be possible, also in a paragraph 3-assessment, to take into account benefits for others than merely those of the users. In such situations, it can be fair not to compensate users fully for the harm that the agreement causes because their demand for the products in question essentially creates the problem for which society needs to find solutions. Moreover, they enjoy the same benefits as the rest of society. In that context, the agreement must contribute (efficiently) to the compliance with an international or national standard (to which undertakings are not bound) or to a concrete policy objective. One example of a concrete policy objective is the government's policy aimed at reducing CO_2 emissions on Dutch soil by year X by Y%.

ACM: Shell and TotalEnergies can collaborate in the storage of CO2 in empty North Sea gas fields

Following an assessment of their plans, the Netherlands Authority for Consumers and Markets (ACM) has decided to allow competitors Shell and TotalEnergies to collaborate in the storage of CO2 in empty natural-gas fields in the North Sea. By transporting CO2 through pipes and storing it in old gas fields, this greenhouse gas will not be released into the atmosphere. This initiative thus helps realize the climate objectives. As cooperation is necessary for getting this initiative off the ground and for realizing the climate benefits, the slight restriction of competition between Shell and TotalEnergies is not that harmful. The benefits for customers of both companies and for society as a whole exceed the negative effects of that restriction.

What is this case about?

Shell and TotalEnergies wish to store CO2 in empty North Sea gas fields on a large scale. This is part of the Aramis project, in which the government, Gasunie and Energie Beheer Nederland work together with Shell and TotalEnergies in order to build a high-capacity trunkline that connects to empty gas fields, among other activities.

Carbon capture and storage helps reduce CO2 emissions of businesses located in the Netherlands that, at the moment, still have few alternatives. Major investments are needed since it concerns a high-capacity trunkline and a new, innovative method. In order to get the project off the ground, Shell and TotalEnergies need to offer the CO2 storage together, and therefore jointly set the price with an eye to putting the first ±20% of the trunkline's capacity into operation. For the remaining 80%, no collective agreements will be made.

alternatives. Major investments are needed since it concerns a high-capacity trunkline and a new, innovative method. In order to get the project off the ground, Shell and TotalEnergies need to offer the CO_2 storage together, and therefore jointly set the price with an eye to putting the first ±20% of the trunkline's capacity into operation. For the remaining 80%, no collective agreements will be made.

realization of the Paris climate agreement. ACM has come to the conclusion that this collaboration is necessary for making this project a success. The benefits for customers and society as a whole exceed the costs of the restriction of competition. In that context, it is important that competition is not restricted for the remaining 80% of transport and storage capacity. That is why, according to ACM, these companies are allowed, under both Dutch and European competition rules, to restrict their mutual competition when selling the first 20% of the transport and storage of CO_2 in their empty gas fields.

Source: ACM Press Release, 27 March 2022

ACM is favorable to joint agreement between soft-drink suppliers about discontinuation of plastic handles

Soft-drink suppliers, including Coca-Cola, Vrumona, and supermarket chains Albert Heijn and Jumbo, wish to make arrangements regarding the discontinuation of plastic handles on all soft-drink and water multipacks. The Netherlands Authority for Consumers and Markets (ACM) has assessed their plans, and is favorable to the agreement. Soft-drink multipacks consist of, for example, six bottles of soda, wrapped in plastic with a plastic handle on top. By removing the handles on these multipacks, they become more recyclable, and less plastic is needed. With this joint agreement, over 70% of multipacks will no longer have handles.

The agreement helps realize sustainability goals, while not having any negative effects on consumers. In its assessment, ACM applied its draft Guidelines regarding sustainability agreements.

What was ACM's assessment?

In this particular case, several competitors wish to make joint arrangements regarding the discontinuation of plastic handles on their packaging. The suppliers first carried out a self-assessment to see whether their arrangements were compatible with competition rules. Coca-Cola subsequently asked ACM for an opinion. One element of the assessment is to see whether the arrangements negatively affect competition and harm consumers, for example, as a result of higher prices or reduced product quality. That is not the case here.

According to the suppliers, the handles (or the ease thereof) do not play a role in the competitive process. A market study conducted by several of the suppliers did not reveal any other findings either.

In addition, ACM finds it important that the agreement offers participants the opportunity to continue making their own

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News

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Source: ACM Press Release, 26 July 2022

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Haucap et al, *Wettbewerb und Nachhaltigkeit in Deutschland under der EU*, März 2023

"Der Effizienzbegriff ist weiter zu interpretieren als von der Kommission vorgesehen. Effizienzen, die "out-of-market", also bei anderen als den von der Wettbewerbsbeschränkung betroffenen Verbraucherinnen, realisiert werden, sind - entgegen der Ansicht der Kommission - berücksichtigungsfähig." (Zeite 3)

["The concept of efficiency is to be interpreted more broadly than the Commission envisages. Out-of-market efficiencies with consumers benefitting that are not those affected by the restriction of competition in the first place, are – contrary to the Commission's view – eligible for consideration." (page 7)]

Key Premise behind 'Green Antitrust'

- Competition and sustainability can be in conflict – Public Economics 1.01

- **Restrictions of competition will stimulate sustainability initiatives**
    - Exemption of horizontal agreements under Article 101(3) TFEU – unfortunately
    - N.B. 1 This is **not** about output restriction – 'cartel taxation'
    - N.B. 2 This is **not** about R&D – but green transition investments

- **But should we expect companies to take more corporate social responsibility (CSR) in cooperation than in competition?**

- If so, under what conditions? – 'First Mover Disadvantage' (Commission's draft HG, 2022)

- Focus on narrow sustainability: fighting climate change – CO_2-reductions

Policy paradox – sustainability agreements deliver *less* green

- Joint work with Yossi Spiegel and Leonard Treuren (*IJIO* 2017; *EL* 2022; WP 2023)
- CSR is a dimension of competition in Stage 1 – business-stealing
- It is costly to produce more responsibly, but it attracts customers
- Coordination eliminates this competitive drive: saving the firms the investments

- **Findings in stark contrast with the policy – seeks to allow sustainability agreements only**
- Only production agreements increase CSR efforts: competing with better product for the higher rents
- Yet harm consumers
- No surplus wealth to compensate consumers with

‘Green Antitrust’ risks to be counter-productive

- Risk 1: **Cartel greenwashing** – minimal green for maximum price increase – *Coal* (2013)
  - CA would need to constantly monitor a green collaboration
  - With prohibitively large information requirements – ‘mission creep’, Tirole (2022)

- Risk 2: Green antitrust providing **further excuse for continued government failure** – *Chicken* (2015)
  - Allows government to shift responsibility to collaborative self-regulation
  - Whereas public policy is easily superior (vertical) – regulation, taxes, subsidies

Opinion
Cop26

The Cop26 message? We are trusting big business, not states, to fix the climate crisis

Adam Tooze

Tue 16 Nov 2021 08.00 GMT

439

The summit exposed a world looking beyond a broken neoliberal model

- Adam Tooze is a professor of history at Columbia University

What about adding 'Out-of-market-efficiencies'?

… a.k.a.: externalities; less-than-full compensation; 'Citizens' welfare standard'

N.B. ACM (2021): "... to take into account benefits for *others* than merely those of the users."

- Introduces redistribution of wealth: from consumers to non-consumers; poor to rich?
- Hugely increases information requirements CA – preferences of all citizens
- *Reduces* level of sustainability required to compensate for a given price increase
- Weakens bargaining position of CA for green
- Consumer welfare standard serving total welfare – Farrell and Katz (*CPI*, 2006), Armstrong & Vickers (*Econometrica*, 2010)
- Still sustainability agreements are ineffective – see Schinkel and Treuren (2021)

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EUROPEAN
COMMISSION

Brussels, 1.3.2022
C(2022) 1159 final

ANNEX

ANNEX

to the

COMMUNICATION FROM THE COMMISSION

Approval of the content of a draft for a COMMUNICATION FROM THE COMMISSION
Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements

EN EN

conditions offered by insurance undertakings. Those comparisons in turn facilitate switching between insurance undertakings and thus enhance competition. Furthermore the switching of providers, as well as market entry by competitors, constitutes an advantage for consumers. The fact that the consumer association has participated in the process could, in certain instances, increase the likelihood of those efficiencies which do not automatically benefit the consumers being passed on. The standard policy conditions are also likely to reduce transaction costs and facilitate entry for insurers on a different geographic and/or product markets. Moreover, the restrictions do not seem to go beyond what is necessary to achieve the identified efficiencies and competition would not be eliminated. Consequently, the criteria of Article 101(3) are likely to be fulfilled.

9. Sustainability Agreements

9.1. Introduction

541. This Chapter focuses on the assessment of agreements between competitors that pursue one or more sustainability objectives ('sustainability agreements').

542. Sustainable development is a core principle of the Treaty on European Union and a priority objective for the Union's policies[309]. The Commission committed to implement the United Nation's sustainable development goals[310]. In line with this commitment, the European Green Deal sets out a growth strategy that aims to transform the Union into a fair and prosperous society, with a modern, resource-efficient and competitive economy, where there are no net emissions of greenhouse gases from 2050 onwards and where economic growth is decoupled from resource use[311].

543. In broad terms, sustainable development refers to the ability of society to consume and use the available resources today without compromising the ability of future generations to meet their own needs. It encompasses activities that support economic, environmental and social (including labour and human rights) development[312]. The notion of sustainability objective therefore includes, but is not limited to, addressing climate change (for instance, through the reduction of greenhouse gas emissions), elimintating pollution, limiting the use of natural resources, respecting human rights, fostering resilient infrastructure and innovation, reducing food waste, facilitating a shift to healthy and nutrious food, ensuring animal welfare, etc.[313].

309 Article 3 TEU.
310 The 2030 Agenda for Sustainable Development, adopted by all United Nations Member States in 2015..
311 Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the regions. The European Green Deal COM/2019/640 final.
312 See for example, UN Resolution 66/288 adopted by the General Assembly on 27 July 2012
313 The 2030 UN Agenda for Sustainable Development identifies 17 Sustainable Development Goals (including, for example, Goal 7: ensure access to affordable, reliable, sustainable and modern energy; Goal 9: build resilient infrastructure, promote inclusive and sustainable industrialization and foster innovation; Goal 13: take urgent action to combat climate change and its impacts); and 169 targets (including, for example, Target 9.1: develop quality, reliable, sustainable and resilient infrastructure, including regional and transborder infrastructure, to support economic development and human well-being, with a focus on affordable and equitable access for all; and Target 13.1: strengthen resilience and adaptive capacity to climate-related hazards and natural disasters in all countries).

Draft: 1 March 2022

9.4.3. Pass on to consumers

588. The second condition of Article 101(3) requires that consumers receive a fair share of the claimed benefits. The concept of 'consumers' encompasses all direct or indirect users of the products covered by the agreement[335]. Consumers receive a fair share of the benefits when the benefits deriving from the agreement outweigh the harm caused by the same agreement, so that the overall effect on consumers in the relevant market is at least neutral[336]. Therefore, sustainability benefits that ensue from the agreements have to be related to the consumers of the products covered by those agreements.

599. More generally, to discharge with their burden of proof under Article 101(3), the parties to an agreement need to provide cogent evidence demonstrating the actual preferences of consumers. Parties to the agreement should avoid superimposing their own preferences on consumers.

584. There may be other instances where, due to market failures, sustainability benefits cannot be achieved if left to the free interplay of market forces or can be achieved more cost efficiently if undertakings cooperate. For example, a sustainability agreement may be necessary to avoid free-riding on the investments required to promote a sustainable product and to educate consumers (overcoming the so-called "first mover disadvantages").

Source: Draft Horizontal Guidelines, 1 March 2022

‘First mover disadvantages’ – two conditions

- What would those be?

  1. **A hurdle** that no firm takes in competition – individual firm would benefit too little;
  2. Resulting in a competitive stand-off **that collaboration would help overcome**

- N.B. We already know that it must be more than: little WTP, well-intending CEO, stake-holder interests, existential threat, altruism

- Spill-over effects – ‘efforts by one firm that (also) benefit other firms’
- Why would the initiator company not itself benefit enough? – very case-specific
- Why should we expect a coalition to form for these public goods? – back at freeriding

Concluding remarks

- Considering a ‘sustainability defense’ for a cartel exemption, CA is to ask critically:
  1. Is there a real reason for the sector to be stuck in a grey competitive equilibrium? – a FMD?
  2. Will an anticompetitive agreement get the sector unstuck and move to a greener equilibrium? – are the benefits ‘cartel-specific’?
  3. Is the agreement required to keep the sector in that greener equilibrium? – temporary?
- Competition authorities best stay reserved and ‘tough’ – demand full consumer compensation
- The wider the benefits that are taken into account, the thinner the green coating becomes
- Develop the indispensability requirement – what “less restrictive means” will be considered?
- The debate is badly off – better focus on polluting cartels, mergers and abuses; targeted state aid

(83) Although the assessment of indispensability under Article 210a also applies a two-step test, this test cannot, however, be applied in the same way as the two-step test under Article 101(3) TFEU. The EU co-legislators (i.e. EU Parliament and the Council of the EU) adopted Article 210a to create a framework excluding the application of Article 101(1) TFEU[24]. Due to the importance of attaining certain sustainability standards in the realm of agriculture, the EU co-legislators considered that for a sustainability agreement to be able to benefit from the exclusion under Article 210a, it should meet different conditions than those required to benefit from an exemption under Article 101(3) TFEU. For example, the exclusion under Article 210a does not require that parties to an agreement ensure that consumers receive a fair share of the benefits resulting from the sustainability agreement in question as is the case in Article 101(3) TFEU. Therefore, the standard of scrutiny of the assessment of the nature and intensity of a restriction of competition under Article 210a is different than under Article 101(3) TFEU. This means, among other things, that under Article 210a, restrictions that would be considered to be serious restrictions of Article 101(1) TFEU (such as agreements on price fixing or reductions of output) may be considered as "indispensable", if the conditions outlined below are satisfied, whereas such restrictions would be unlikely to satisfy the conditions of Article 101(3) TFEU.

Source: Draft Guidelines for sustainability agreements in agriculture, 10 January 2023

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Source: Draft Guidelines for sustainability agreements in agriculture, 10 January 2023

16 feb 18:08

Kartelwaakhond roept boeren op prijsafspraken te maken

Vasco van der Boon

Boeren, bedrijven en milieuorganisaties benutten de ruimte voor onderlinge groene prijsafspraken 'onvoldoende', zei de bestuursvoorzitter van de Autoriteit Consument & Markt. Foto: Kees van de Veen/ANP

In het kort

- Boeren, voedselproducenten en milieuorganisaties moeten meer prijsafspraken in de keten maken.
- Die oproep doet Martijn Snoep, bestuursvoorzitter van kartelwaakhond ACM.

Concluding remarks

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European Commission

THE GREEN DEAL INDUSTRIAL PLAN

State aid Temporary Crisis and Transition Framework.
Fast, clear and predictable framework to accelerate green investments

March 2023

Paving the way for Member States to design and implement support measures in sectors which are key for the transition to a net-zero economy

Self-referencing

- Schinkel, M.P. & Y. Spiegel (2017) "Can collusion promote sustainable consumption and production?", *International Journal of Industrial Organization*
- Schinkel, M.P. & L. Treuren, "Green Antitrust: Friendly Fire in the Fight against Climate Change," in: Holmes, S., D. Middelschulte and M. Snoep (eds.), *Competition Law, Climate Change & Environmental Sustainability*, Concurrences, 2021

Updated on SSRN as: "Green Antitrust: (More) Friendly Fire in the Fight against Climate Change"

- Schinkel, M.P. & L. Treuren, "Corporate Social Responsibility by Joint Agreement," *ACLE Working Paper No. 2021-01* (July 2, 2021)
- Schinkel, M.P., Y. Spiegel & L. Treuren (2022), "Production Agreements, Sustainability Investments, and Consumer Welfare," *Economics Letters*

CSR and joint agreements

- Baron (2001), McWilliams and Siegel (2001) – strategic CSR
- Bénabou and Tirole (2010), Hart and Zingales (2017) – intrinsic CSR incentives
- Flammer (2015a), Aghion *et al* (2020) – competition, empirics
- Lyon and Maxwell (2004), Ahmed and Segerson (2011) – voluntary collaboration

- Schinkel and Spiegel (2017); Schinkel and Treuren (2021); Schinkel, Spiegel and Treuren (2022)
- Semi-collusion model – Fershtman and Gandal (1994)
- Consumers have a (growing) willingness to pay for CSR efforts – e.g. Delmas and Colgan (2018)
- A higher CSR-profile is a form of ‘product quality improvement’

What type of collaboration promotes CSR?

- Two-stages: Stage 1. CSR efforts/investments (v); Stage 2. quantities (q)
- One-shot: contractable; symmetric equilibria
- Constant marginal costs of production (c); fixed transitioning cost (t)
- n-firms, any net WTP (δ), intrinsic motivation (I) – image/goodwill
- Four possible regimes:
  - competition (*);
  - CSR agreement (*csr*);
  - production agreement (p);
  - full agreement (f)

Reduces sustainability for any (net) willingness to pay

$$\pi_i^\delta(\mathbf{q}, v_i) = \Big(\underbrace{\alpha + \delta v_i - q_i - \gamma \sum_{i \neq j}^{n} q_j - c}_{\text{price firm } i \text{ (inverse demand)}}\Big) q_i - \frac{t v_i^2}{2}$$

Proposition 3. $v_\delta^p > v_\delta^* > v_\delta^f > v_\delta^{csr}$ for all $\delta > 0$.

Intrinsic motivation

$$\pi_i(\mathbf{q}, v_i) = \underbrace{\left(\alpha + v_i - q_i - \gamma \sum_{i \neq j}^{n} q_j - c\right)}_{\text{price firm } i \text{ (inverse demand)}} q_i - \frac{t v_i^2}{2} + \theta v_i,$$

Proposition 5. $v_I^p > v_I^* > v_I^f > v_I^{csr}$ for all $\theta > 0$.

Proposition 6. $\frac{\partial(v_I^p - v_I^*)}{\partial\theta} > 0$, $\frac{\partial(v_I^* - v_I^f)}{\partial\theta} > 0$, and $\frac{\partial(v_I^f - v_I^{csr})}{\partial\theta} > 0$ for all $\theta > 0$.

'First mover disadvantages' – spill-overs

$$\pi_i^\delta(\mathbf{q}, v_i) = \Big(\underbrace{\alpha + \delta v_i + \sum_{i\neq j}^{n} s_j v_j - q_i - \gamma \sum_{i\neq j}^{n} q_j - c}_{\text{price firm } i \text{ (inverse demand)}}\Big) q_i - \frac{t v_i^2}{2}$$

Proposition 3. $v_\delta^p > v_\delta^* > v_\delta^f > v_\delta^{csr}$ for all $\delta > 0$.

•Truly substantial spill-overs may change the efforts order:

•Schinkel and Spiegel (2017) duopoly: $v^{sc} > v^*$ if $s > \frac{\gamma}{2}$ N.B. higher for closer substitutes

•Condition appears to be independent of *n* in *n* > 2 extension