‘Green Cartels’
On Sustainability and Competition Policy

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Europese
Commissie
Commission
européenne
European
Commission

Article 101
(ex Article 81 TEC)

1. The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which:

Source: TFEU, *Official Journal*, 9 May 2008

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Where Regulation Fails …

- … is constrained; incomplete; inflexible; slow; lacks political will
- Cartel coordination may help an industry to move to more sustainable production, reduce externalities and improve upon under-provision of public goods in competition

- Companies arguably have superior knowledge how to reduce externalities
- Competition agencies are well equipped to do cost-benefit analysis, environmental economics-style

The National Energy Agreement (September 2013)

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Dutch Policy Rule

- Minister of Economic Affairs, Policy Rule WJZ/14052830, 6 May 2014, Article 2:

"In the application of Article 6(3) of the competition law [the Dutch equivalent of 101(3) TFEU] the Authority for Consumers and Markets considers in its assessment of the conditions whether […] in agreements that restrict competition made to enhance sustainability, a fair share of the improvements benefits "users" in the long run."

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: TFEU, *Official Journal*, 9 May 2008

"… allowing consumers a fair share …"

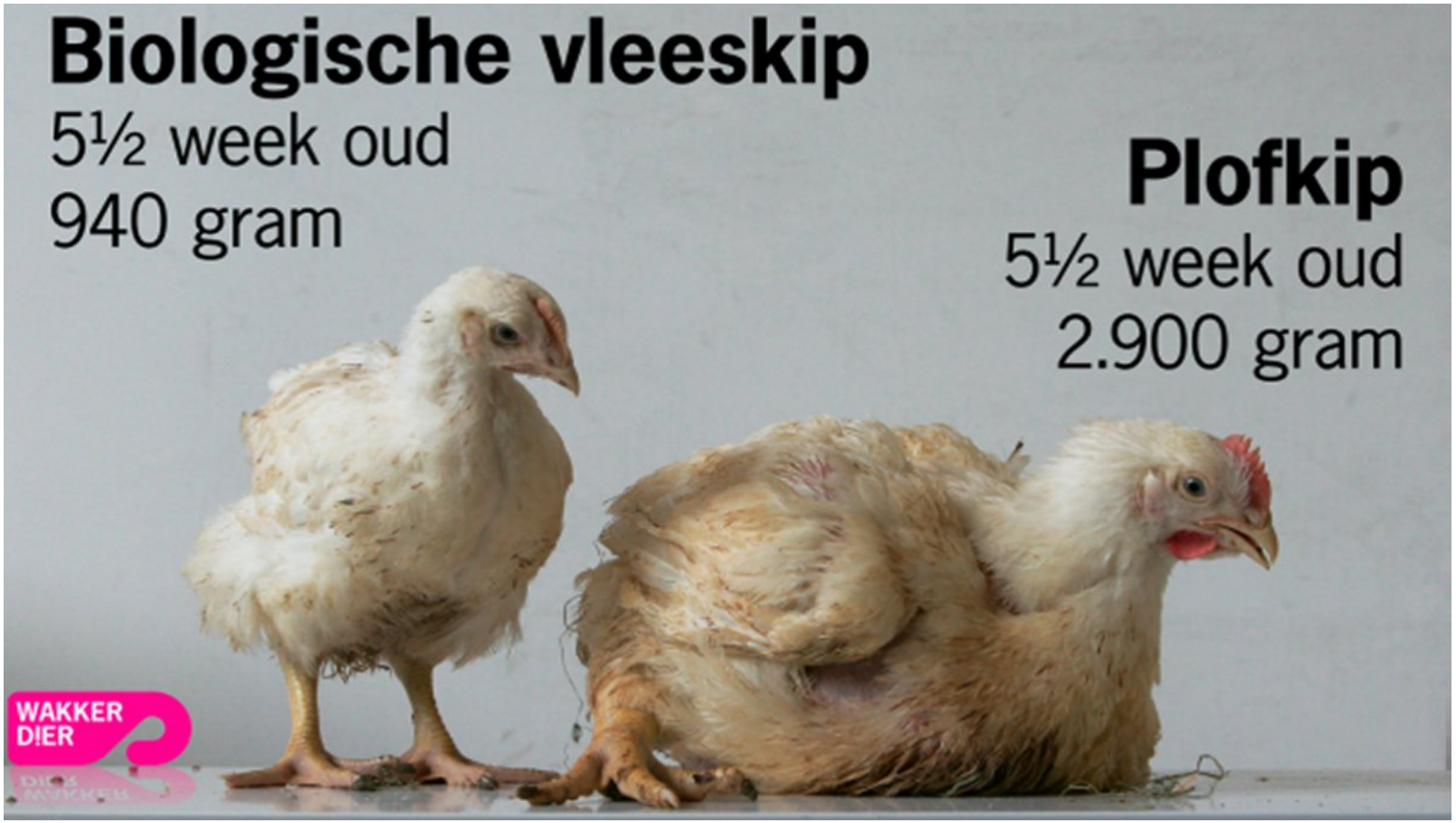
- European Commission (2004), Guidelines on the Application of Article 81(3), recital 87:

"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' so far interpreted (in merger control) as 'at least indifferent'

The Chicken of Tomorrow (2015)



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Revised Dutch Policy Rule – 30 September 2016

Article 2:

".. In this [assessment] will be involved:

"a. … benefits to the society as a whole…"

"b. … quantitative and qualitative benefits for users that materialize in the long."

Para 3.3, page 9: "With this approach, the benefits both to the current consumer in the future, as well to future consumers of the product or service concerned are taken into account: it is about a longer term than right here, right now, and others that do not themselves consume the product."

Autoriteit
Consument & Markt

Guidelines

Sustainability agreements

Opportunities within competition law

9 July 2020

40. ACM believes that, with regard to environmental-damage agreements, it should be possible to take into account benefits for others than merely the users. For example, if undertakings in a certain sector jointly decide to use carbon-neutral energy only, greenhouse gas emissions will decrease as a result thereof. This is a benefit that both customers of the producers involved as well as the rest of Dutch society can reap. As a consequence, the agreement will also help realize the government's policy objective of reducing CO2 emissions.

41. 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. However, in that context, the agreement must contribute to a policy objective that has been laid down in an international or national standard to which the Dutch government is bound. Moreover, that contribution must be efficient (see section 50). In such cases, users will, as a rule, reap the benefits in the same way as the rest of society does.

Premises of ACM Guidelines Sustainability Agreements

- Welcomes sustainability agreements with anticompetitive effects ('green cartels')
    - Clarification
    - Relaxation of the compensation requirement for exemption (para 3)
- ACM presumes that:
    - Competition and sustainability can be in conflict – Public Economics
    - Restriction of competition stimulates sustainability initiatives

- Is the ACM correct in this last presumption?
- Should we expect a cartel to promote sustainability?

Can Collusion Promote Sustainable Consumption and Production?

- Suppose sustainability is a product improvement (tied)
- Consumers have a higher willingness to pay for more sustainable product
- Will for-profit firms investment more when they are allowed to collude?

- Schinkel & Spiegel (IJIO, 2017): semi-collusion model
- Two-stages: Stage 1. sustainability investments (v); Stage 2. quantities (q)
- One-shot: contractable; symmetric equilibria
- Constant marginal costs of production (k); fixed sustainability cost (r)

price firm 1 (inverse demand)

$$\pi_1(q_1, q_2, v_1, v_2) = (a + v_1 - q_1 - \gamma q_2)q_1 - kq_1 - \frac{rv_1^2}{2},$$

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price firm 1 (inverse demand)

$$\pi_1(q_1, q_2, v_1, v_2) = (a + v_1 - q_1 - \gamma q_2)q_1 - kq_1 - \frac{rv_1^2}{2},$$

$$\pi_2(q_1, q_2, v_1, v_2) = (a + v_2 - q_2 - \gamma q_1)q_2 - kq_2 - \frac{rv_2^2}{2}.$$

price firm 2 (inverse demand)

Four possible regimes:

- Competition (*)
- sustainability coordination (*sc*)
- production cartel (*pc*)
- full collusion (*fc*)

$$\pi_1(q_1, q_2, v_1, v_2) = (a + v_1 - q_1 - \gamma q_2)q_1 - kq_1 - \frac{rv_1^2}{2},$$

$$\pi_2(q_1, q_2, v_1, v_2) = (a + v_2 - q_2 - \gamma q_1)q_2 - kq_2 - \frac{rv_2^2}{2}.$$

The Policy: Exempting Sustainability Coordination

Stage 1: firms choose sustainability levels v_1 and v_2 cooperatively

Stage 2: firms choose q_1 and q_2 non-cooperatively

Symmetric equilibria – contractible

$$v_1^{sc} = v_2^{sc} = v^{sc} = \frac{2A}{r\left(2+\gamma\right)^2 - 2}$$

$$A \equiv a - k$$

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Main Finding: Policy Paradox

Proposition 1 $v^{pc} > v^{*} > v^{fc} > v^{sc}$.

- 'Green' is a dimension of competition in Stage 1 – business-stealing
- It is costly to produce more sustainably, but it attracts customers
- Collusion eliminates this competitive drive: saving the firms the investments

- Findings in stark contrast with the policy – seeks to allow sustainability agreements only
- Paradox: sustainability is increased, *because* cartel appropriates the surplus
- Yet if a production cartel is allowed, consumer welfare decreases steeply
- Not eliminating competition undermines investments – more than it increases output

Some Conclusions

- The ‘green cartel’ exemption policy is sympathetic, but it may be counterproductive
- A production/price cartel would need to be strictly controlled and then *may* do more green
- Essentially: minimal green for maximum price increases – green-washing

- Competition authority would need to constantly monitor a green cartel
- Prohibitively large information requirements for agency – idem self-assessment

- Public policy seems easily superior (vertical) – regulation, taxation, subsidies

- Moreover: *Trucks* (2016); *Recycling Automotive Batteries* (2017); *German Car Manufacturers* (ongoing)

European Commission - Press release

Antitrust: Commission sends Statement of Objections to BMW, Daimler and VW for restricting competition on emission cleaning technology

Brussels, 5 April 2019

Commissioner Margrethe **Vestager** in charge of competition policy said: *"Companies can cooperate in many ways to improve the quality of their products. However, EU competition rules do not allow them to collude on exactly the opposite: not to improve their products, not to compete on quality. We are concerned that this is what happened in this case and that Daimler, VW and BMW may have broken EU competition rules. As a result, European consumers may have been denied the opportunity to buy cars with the best available technology. The three car manufacturers now have the opportunity to respond to our findings."*

The Commission's preliminary view is that BMW, Daimler and VW participated in a collusive scheme, in breach of EU competition rules, to limit the development and roll-out of emission cleaning technology for new diesel and petrol passenger cars sold in the European Economic Area (EEA). This collusion occurred in the framework of the car manufacturers' so-called "circle of five" technical meetings.

In particular, the Commission has concerns regarding the following technologies:

- **Selective catalytic reduction ('SCR') systems** to reduce harmful nitrogen oxides (NOx) emissions of **diesel passenger cars** through the injection of urea (also called "AdBlue") in the exhaust gas stream. In the Commission's preliminary view, BMW, Daimler and VW coordinated their AdBlue dosing strategies, AdBlue tank size and refill ranges between 2006 and 2014 with the common understanding that they thereby limited AdBlue-consumption and exhaust gas cleaning effectiveness.
- **'Otto' particle filters ('OPF')** to reduce harmful particle emissions from the exhaust gases of **petrol passenger cars** with direct injection. In the Commission's preliminary view, BMW, Daimler and VW coordinated to avoid, or at least to delay, the introduction of OPF in their new (direct