UNIVERSITEIT VAN AMSTERDAM
Amsterdam School of Economics

Competition and Sustainability

Maarten Pieter Schinkel

CEPR/EAERE Tenth Webinar on Climate Policy

Competition and Sustainability: On proposals to relax competition policy to promote Green Deal objectives

25 October 2022

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

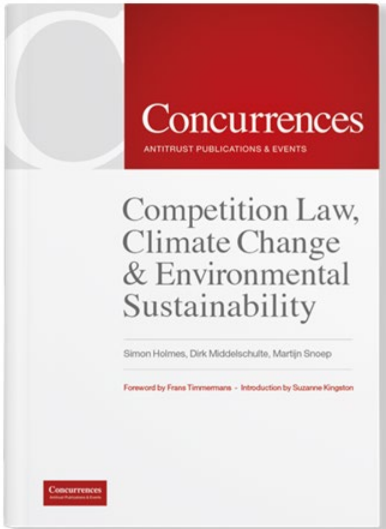
10 Sep 2021 | 08:50 GMT | Insight

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 against German 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

ENACTING SYSTEMS CHANGE

Precompetitive Collaboration to Address Persistent Global Problems

BY Naomi Barker, Douglas Ely, Nicholas Galvin, Anya Shapiro, and Adrienne Watts

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MAARTEN PIETER SCHINKEL, LEONARD TREUREN

Green Antitrust: Why Would Restricting Competition Induce Sustainability Efforts?

COMMENTAR

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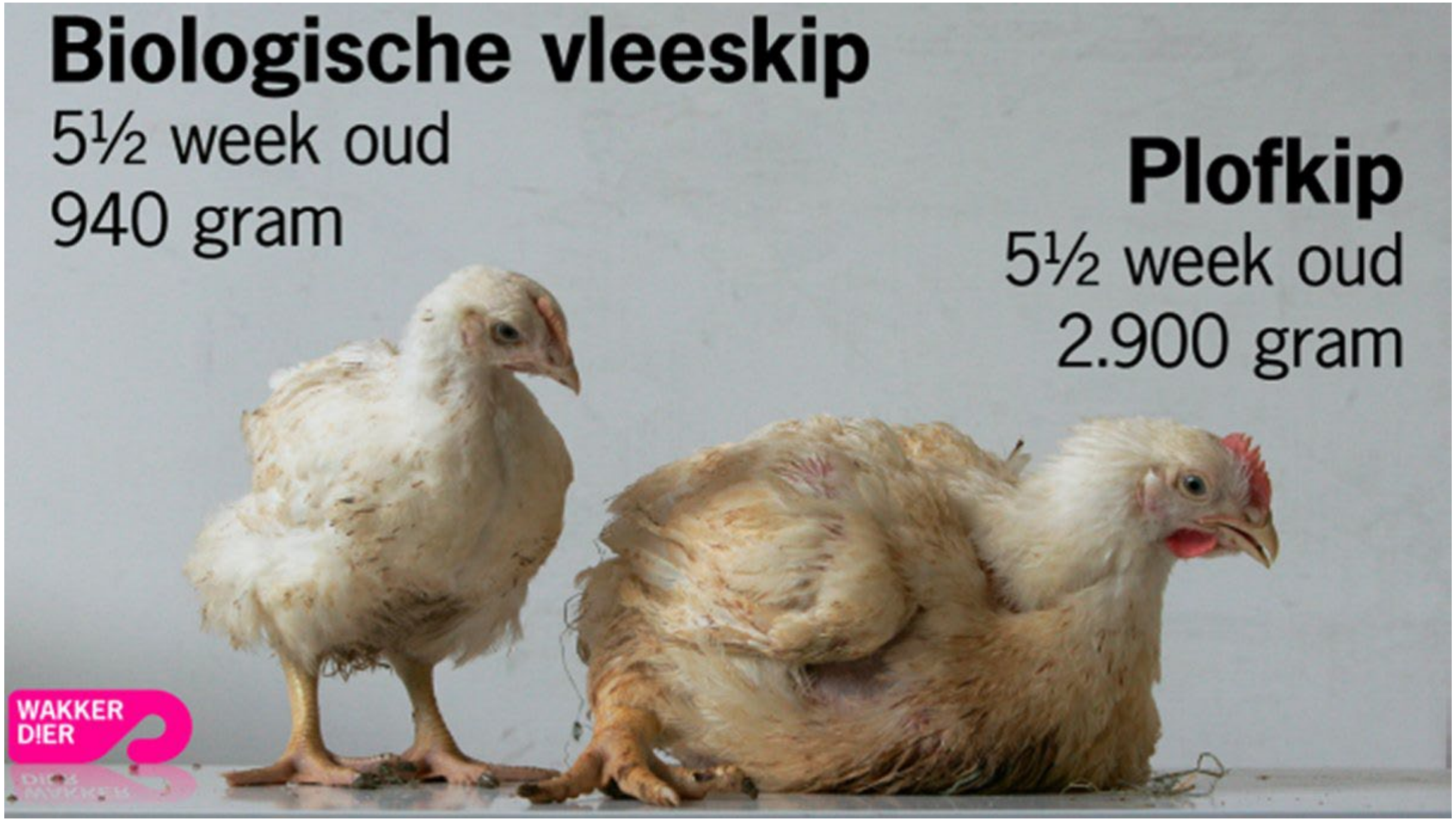
RESEARCH

Why We Need t

‘National Energy Agreement’ (2013)

‘The Chicken of Tomorrow’ (2015)



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Autoriteit
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 CO2 emissions on Dutch soil by year X by Y%.

Key Premise behind 'Green Antitrust'

- Competition and sustainability can be in conflict – standard Public Economics
- **Restrictions of competition will stimulate sustainability initiatives**
    - Exemption of horizontal agreements under Article 101(3) TFEU
    - Green merger efficiencies
    - Green abuse of dominance – exclusion of a polluting rival?
- **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' (EC DHG, 2022)
- Focus on narrow sustainability: fighting climate change – CO2-reductions

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.

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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 CO2 in their empty gas fields.

Source: ACM Press Release, 27 March 2022

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, 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’

Reduces sustainability for any (net) willingness to pay

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

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

Policy paradox

- 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 if a production agreement is allowed, consumer welfare decreases steeply
- Compensation needs to enforced, but there is no surplus wealth to compensate consumers with
- Requires a lot of (private) information – all and full consumer preferences

‘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

- 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

EUROPEAN COMMISSION

Brussels, 1.3.2022
C(2022) 1159 final

ANNEX

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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

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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, existential threat, altruism

‘First mover disadvantages’ – spill-overs

- Spill-over effects – ‘efforts by one firm that (also) benefit other firms’:
  - Common cost sharing – Castroviejo et al. (2021)
  - Consumers misunderstanding their own true preferences – education, paternalism
  - Developing a social norm for green appreciation – Inderst (2022, et al.)

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- Why would the initiator company not itself benefit enough? – empirical question/case-specific
- Why should we expect a coalition to form for these public goods?
- Back at freeriding, dishonest reporting, shirking, etc
- Forming a sustainability agreement seems to present just another ‘First Mover Disadvantage’

Concluding remarks

- Allowing sustainability agreements may seem sympathetic, but risks to be counterproductive
- Large spill-overs may create FMD situations – but not obvious that collaboration will improve things
- It will be (very) hard for a well-intending CA to identify genuine cases – high risk of abuse, costly
- 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
- Develop the indispensability requirement – what "less restrictive means" will be considered?

What about adding ‘Out-of-market-efficiencies’?

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

- 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
- Still sustainability agreements are ineffective:

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$$E(\mathbf{q}, \mathbf{v}) = \sum_{i=1}^{n} \frac{q_i}{v_i}$$

Proposition 10. $\Delta E(q^p, v^p) > 0 > \Delta E(q^f, v^f) > \Delta E(q^{csr}, v^{csr})$

Self-referencing

- Schinkel, M.P. & Y. Spiegel (2017) "Can collusion promote sustainable consumption and production?", *International Journal of Industrial Organization*
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- Schinkel, M.P. & L. Treuren, "Corporate Social Responsibility by Joint Agreement," *ACLE Working Paper No. 2021-01* (July 2, 2021)
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