

SPEAKING NOTES PANEL CONTRIBUTION  
SUSTAINABLE DEVELOPMENT AND COMPETITION LAW  
SEPTEMBER 28 2020

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Thanks for having me, Simon. After Ioannis' glowing pro-introduction, I've decided to respond in less nuanced terms than I would prefer as an academic.

Obviously it is extremely important and urgent that we work towards more sustainable production and consumption – a cleaner, fairer world.

Also I am happy to see that competition lawyers take this to heart. A lot of energy is spent in finding smart loopholes in the competition rules, to except anticompetitive agreements that claim to improve sustainability.

But as an economist – having researched this subject for some years now – I'm afraid I have to warn that of the many ways in which we can save the planet – this is a particularly bad one. It risks to be ineffective, while costing a lot of competition agency resources – I fear cartel greenwashing.

After all, the key question to address first and foremost is: Is it to be expected that competitors will do more on sustainability/fairness in anticompetitive agreements than in competition? Is, in other words, greater corporate social responsibility taken in collusion than in competition?

From the evidence – theory, empirics, case studies – I'm afraid the answer is quite generally “no, on the contrary”.

The problem is that the incentives of corporations are adverse. And if there is one thing that economics teaches firmly, it is: incentives matter!

Ultimately, firms seek profits. More sustainable production can be a source of revenue – because increasingly consumers want it (which is good). But it is also a cost – investments in less polluting emission technology, better care for farm animals, fairer labor conditions etc.

So firms will ultimately seek to do a minimum of costly green for a maximum of profitable price increase. Such green washing is extensively documented. Yet in competition for customers, producing greener is a way of stealing business. It is a dimension of competition – certainly now that consumers increasingly want sustainable products – biological, durable, cradle to cradle.

What happens if you now allow competitors to make agreements instead? Well, jointly they will have all the incentive to REDUCE their investments in green – while increasing prices. Essentially, allowing green cartels provides the companies possibility to kill the dimension of green competition that makes investment in greener product. Achieving the opposite from what is intended, I'd say is the strongest form of unintended consequence.

Empirical research (of which much more is to be done, but so far) shows: CSR is stimulated in competition. And cartels reduce care for public interests.

Essentially, environmental problems are problems of EXTERNALITIES. Again, Economics 101 teaches: externalities need to be internalized, so that prices reflect the true social costs.

Well, there is no reason to think that firms in collusion will internalize externalities. It is rather naïve to believe this – also when companies say they will in questionnaires, for example (keep in mind that such answers are self-serving).

[Sometimes it is argued that there would be blocking “first mover disadvantages”. This is a peculiar phenomenon, however – certainly if consumers have a willingness to pay for green (which is a prerequisite for the policy to begin with – for compensation) and if products are at least somewhat differentiated (and which aren't?). It is questionable if it exists at all.]

The pricing of true social costs through their internalization in corporate decision making requires government regulation. That's where we should put our efforts. Not hoping that somehow private cartels are going to serve public interests – produce public goods.

It think that is dangerous, in fact – because of the risk of cartel greenwashing. Competition authorities will have to constantly monitor such exempted agreements for abuse. Is there still enough sustainability delivered to compensate the overcharges? That is a very complex, information intense, and costly amount of work. Not the right spending of competition agency resources. Worse than second-best.

The forerunning by the Dutch competition authority in green cartel policy goes to show this.

The Chicken case and The Coal case illustrate my point: both were (rightly, I think) denied by the ACM for offering too little sustainability for the price overcharge. In coal: firms refused to take the CO2 emissions rights off the market (they found that too expensive) – so there was no carbon reduction, in fact. And in Chicken the poultry farmers offered a miniscule cage increase, and only for Dutch consumption chicken – not export chicken, mind you – they could still be tortured. [ACM just confirmed in her own investigation that in competition indeed, chicken well-being has improved much more than promised by the Chicken of Tomorrow joint-agreement at the time.]

Why want to say “yes” to such poor initiatives?

[The Dutch draft guidelines idea to stretch the compensation requirement from “consumers need to be compensated” to “every citizen’s appreciation weighs in on the compensation size”, I think is a bad idea. Because it makes that the competition authority can barely say “no” anymore: Add a few vegetarians with strong feelings for chicken, and the balance is in favor of the smallest cage increase against any price overcharge, paid only by the consumers. The CONSUMER compensation criterion, at least, is a tough test. And without the ability to bargain tough with cooperative initiatives, competition agencies will have to accept even flimsier joint sustainability contributions.]

Simon, I conclude:

The tension between competition and the environment – which is very real and very worrying (externalities are hugely problematic) – is NOT to be solved by “let’s allow collusion”. On the contrary: competitors coordinating will rather do

LESS green than in competition – they will instead coordinate on a more watery greenwashing.

Directly to the lead question of this panel: The competition laws are NOT a burden. In fact, by protecting competition is how competition authorities can make their best contributions to sustainability – think of *Trucks, Recycling Automotive Batteries, German Car Manufacturing*. The green cartel exemption policy risks rather to leading to less, rather than more sustainability.

I beg to have a deep Law & ECONOMICS discussion first, before rushing further ahead in law. Hopefully face-to-face – under the guidance of the DG Competition, as Commissioner Vestager has wisely initiated.