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Greening Competition Law?

Introductory comments by Maarten Pieter Schinkel
(based on joint work with Yossi Spiegel and Leonard Treuren)

EUI Competition Law Working Group

Tuesday May 24, 2022

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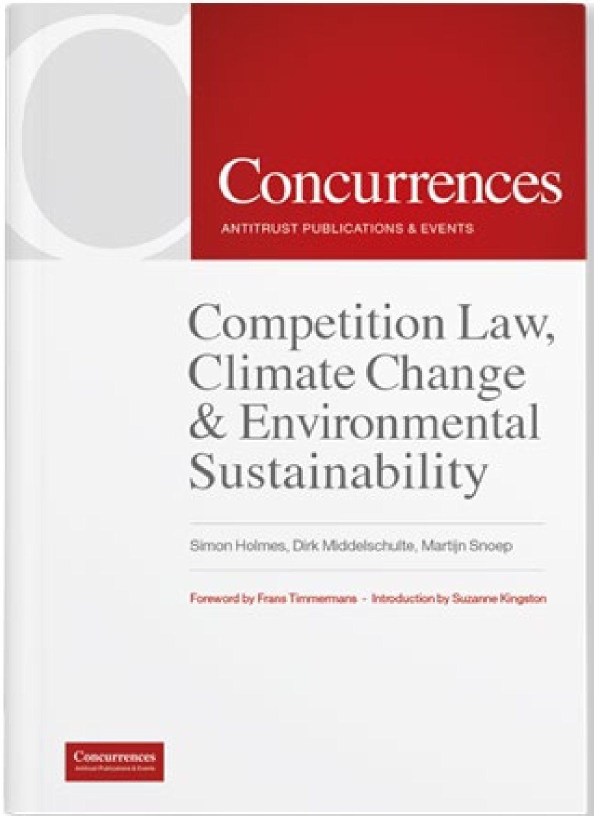

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"This groundbreaking book offers rare insights from industry leaders

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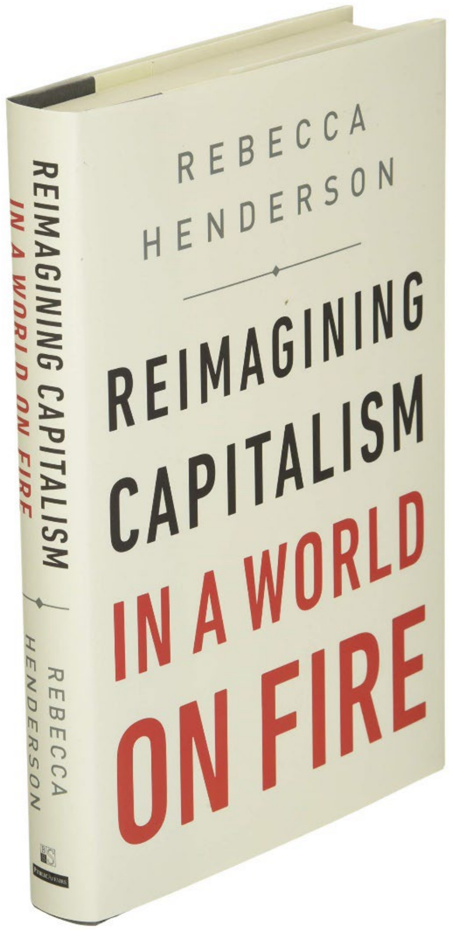

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SPOTLIGHT ON PRACTICAL SUSTAINABILITY

The Collaboration Imperative

New partnership models can protect the environment and create value for everyone.
by Ram Nidumolu, Jib Ellison, John Whalen, and Erin Billman

Unilever CEO Paul Polman

Captain Planet

PAUL POLMAN isn't afraid to shake things up. Since taking over as CEO of Unilever, in 2009, he has transformed the Anglo-Dutch multinational into one of the world's most innovative corporations. He did away with earnings guidance and quarterly reporting, and tells hedge funds they aren't welcome as investors. And last year he launched an ambitious plan to double revenue by 2020 while halving the company's environmental impact.

If he succeeds, he could be a model for other CEOs. But if Unilever falters, he knows, the critics will call for his head. In this edited interview with HBR editor in chief Adi Ignatius, Polman discusses the challenges of leading a socially driven mission while protecting his company's core.

HBR: What motivated you to launch such an aggressive long-term plan?
Polman: We thought about some of the mega-

How far up and down the supply chain are you willing to look?
We look at the entire life cycle—from field consump-

Cartel exemption - Article 101(3) TFEU

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

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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

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Competition Policy and the Green deal Conference, 4 February 2021

https://ec.europa.eu/competition/information/green_deal/

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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

Draft: 1 March 2022

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).

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?

- Should we expect companies to take more corporate social responsibility (CSR) in cooperation than in competition? Conditions? 'First Mover Disadvantage'

- Focus on sustainability – fighting climate change – CO2-reductions

- For a review, see:

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Green Antitrust: Friendly Fire in the Fight Against Climate Change

MAARTEN PIETER SCHINKEL* AND LEONARD TREUREN**
University of Amsterdam

> People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices… But though the law cannot hinder people of the same trade from sometimes assembling together, it ought to do nothing to facilitate such assemblies; much less to render them necessary.
>
> Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (first published 1776), Book I, Chapter 10.

I. Introduction

The urgency of the climate crisis and the apparent failure of many governments to meet the Paris Agreement objectives have led inspired competition law scholars to push for "green antitrust policy".[1] The idea behind this movement is to revise the competition rules, as far as they may stand in the way of companies

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** PhD candidate, University of Amsterdam: l.m.treuren@uva.nl. He works in industrial organisation, with a focus on competition policy, in particular investigating product and labour market effects of cartels and mergers. Parts of this paper were previously published in Dutch as one of the KVS Preadviezen titled "Beter geen mededingingsbeperkingen voor duurzaamheid." In MA Haan and MP Schinkel (eds), KVS Preadviezen 2020 Mededingingsbeleid (Koninklijke Vereniging voor de Staathuishoudkunde 2020).

1 See Christopher Townley, *Article 81 EC and Public Policy* (Hart Publishing 2009); Suzanne Kingston, *Greening EU Competition Law and Policy* (CUP 2011); Giorgio Monti, "Four options for a greener competition law" (2020) 11(3) – (4) JECL & Pract.

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

CSR and joint agreements

- Baron (2001), McWilliams and Siegel (2001) – strategic CSR
- Bénabou and Tirole (2010), Hart and Zingales (2017) – CSR incentives

- Schinkel and Spiegel (2017); Schinkel and Treuren (2021)
- Semi-collusion model – Fershtman and Gandal (1994)
- Consumers have a (growing) willingness to pay for CSR – e.g. Flammer (2015b)
- CSR is a form of product quality improvement – Fershtman and Pakes (2000)

What type of collaboration promotes CSR?

- Two-stages: Stage 1. CSR 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)

Varying (net) willingness to pay

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

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

Intrinsic motivation

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

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

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

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:

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

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

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%.

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‘Green Antitrust’ risks to be counter-productive

- Risk 1: *Cartel greenwashing* – minimal green for maximum price increase
  - CA would need to constantly monitor a green collaboration
  - Prohibitively large information requirements

- Risk 2: Green antitrust providing *excuse for continued government failure* – *Chicken* (2015)
  - Public policy easily superior (vertical) – regulation, taxes, subsidies
  - Allows government to rely on collaborative self-regulation

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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

‘First Mover Disadvantage’

- What would those be?
  - A hurtle to green transition that no firm takes in competition – individual firm benefits too little
  - A competitive stand-off that collaboration would ‘unlock’

- Must be more than: little WTP, well-intending CEO, existential threat, altruism
- Spill-over effects – ‘efforts by one firm also benefit other firms’:
  - Common cost sharing – Castroviejo et al. (2021)
  - Consumers misunderstanding their own true preferences – education, paternalism
  - Social norm for green appreciation – Inderst (2022, et al.)

- Why would the initiator company not also benefit enough? – empirical question/case-specific
- Why should we expect a coalition to form? – just another FMD?

Spill-overs may cause a 'First Mover Disadvantage'

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

- Truly substantial spill-overs may change the efforts order
- Schinkel and Spiegel (2017) duopoly – $v^{sc} > v^{*}$ if $s > \frac{\gamma}{2}$
- This threshold appears to be independent of *n* – with a decreasing upper-bound

‘First Mover Disadvantage’

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Concluding remarks

- Collaborative CSR is sympathetic, but risks to be counterproductive
- Competition is a main driver of CSR – for any non-negative net WTP, with altruistic motives too
- CSR agreements tend to reduce CSR efforts – also when firms are intrinsically motivated
- Only strong spill-overs may create FMD – but not obvious that collaboration will improve things

- Competition authorities best stay reserved and 'tough': full consumer compensation
- The indispensability requirement needs to be further developed – what "less restrictive means"?

- The debate is badly off: 101(3) TFEU-route is least effective to the green objective
- 'Yes' to greening competition law, but: polluting cartels, mergers, abuse, and targeted State aid

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 against German carmakers for colluding on the development of clean emissions technology.

Vigorous competition enforcement remains the best way to ensure companies engage with the green transition, a top EU competition official has said, pointing as an example to a recent fine of 875 million euros ($1 billion) against German carmakers for colluding on the development of clean emissions technology.

The European Commission will publish a policy paper to this effect later today, Inge Bernaerts told a conference* today. The senior official, who oversees antitrust policy at the EU regulator, was reading a speech prepared for competition commissioner Margrethe Vestager, who couldn’t attend.

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.

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"

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