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Enforcement of Competition Law in Times of Crisis: Is Guided Self-Assessment the Answer?

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Abstract

One common criticism of the EU's competition regime is that it hinders adequate mitigation of crises by preventing a collaborative response to the problem. In this paper, we suggest that this view is incorrect. We first argue that a collaborative response is unlikely to effectively mitigate most problems. The role of the competition regime is to eliminate market failure occasioned by monopolies. Most crises cannot be resolved through greater monopolisation of the market.

However, there may be exceptions, where some forms of cooperation can facilitate a solution. Ultimately, such cooperation is at the margin of legality, and there may be significant uncertainty as to whether the proposed practice is permitted or proscribed. Regulation 1/2003 requires undertakings to self-assess the legality of their proposed actions. And in the face of the possibility of significant penalties for competition infringements, risk neutral to risk adverse undertakings will not propose or engage in such cooperative practices.

There are significant legal and institutional impediments to providing this Guidance. Although the Commission produces Guidance from time to time, this guidance is necessarily incomplete. Such gaps lead to uncertainty. Where the market is local an identical burden falls upon the NCAs. There is no consistency among the NCAs in regard to engagement with stakeholders. We note the different responses of the Irish and Dutch Authorities in the BIDS and "Chicken of Tomorrow" sagas. In the latter case, perhaps due to NCA engagement, a solution was developed which better promoted the goal in question and was consistent with the competition regime. Such engagement ensured that otherwise marginal activity kept within legal bounds. We conclude the means forward is with greater engagement and guidance by the Commission and NCAs.

Keywords: Enforcement, Competition Law, Regulation 1/2003, Guidance, Crises, Sustainability

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I. Introduction*

One, perhaps cynical, view of life in the Twenty-First Century is that we are lunging from unprecedented crisis to another unprecedented crisis. The year 2000 opened with the "Dotcom" crash, since then we have had the financial crash of 2008, the economic fallout of the Covid-19 pandemic, and we are now facing sustainability and climate crises. In addition to these economy-wide events, industrial sectors have faced their own crises. These latter sorts of crises are not unique to this Century, and likely endemic in any market-based economy, reflecting the inevitable result of the competitive process: less efficient firms or industries which produce unwanted goods will (and should) exit the market.

In spite of inefficient firms and industries exiting the market, these crises have economic consequences: those employed by the firm, the firms' stakeholders, and others relying on the existence of the firm all suffer some form of economic damage. Given this damage, there are inevitable calls for something to be done to mitigate these effects. And mixed with these calls is often the claim that if only competition laws were not in the way, the crisis-stricken industry could mitigate these effects. We saw this during the early stages of the Covid pandemic. In March 2020, in the context of panic buying and resulting shortages at the supermarket, the *Financial Times* reported:

> Industry figures also said that the relaxation of competition rules confirmed by the government on Thursday should help them co-ordinate supplies better.
>
> "It just means [for instance] that people from Tesco and Sainsbury's could sit and talk to Kimberly-Clark about toilet rolls without the fear of being prosecuted for collusion," said one.[1]

Similar claims are made in the context of the current sustainability crisis. Insofar as it is perceived as hindering a solution, competition law is seen as at least part of the problem.

This paper argues that this is not the case. We will argue that not only is the "relaxation" or suspension of competition law in the face of a crisis a mistake, as it cannot cure—or even mitigate—the cause of the crisis. The competition regime is generally well-suited to market-based resolutions of crises situations. In general, a collaborative response is unlikely to either solve or mitigate crises of the sort we are concerned. However, there may be exceptions, where some forms of cooperation can facilitate a solution. Unfortunately, such cooperation may be at the margin of legality, and there may be significant uncertainty as to whether the proposed practice is permitted or proscribed. Regulation 1/2003[2] requires undertakings to self-assess the legality of their proposed actions. In the face of the possibility of significant penalties for competition infringements, risk neutral to risk adverse undertakings will not propose or engage in such cooperative practices. Recent surveys of European undertakings indicate that uncertainty of this sort had prevented engaging in collaborative activity that may have sustainability benefits. Our solution to this is through greater guidance by the Commission and the NCAs.

The remainder of this paper is structured as follows. In Section II, we examine competition law's place in the economy. Its purpose is to address the market failure caused by the monopoly problem and thereby increase social (consumer and / or producer) welfare in a particular market. Suspension of a competition regime does not generally address the causes of these crises. Nevertheless, we recognise that there may be some instances where some form of coordination can mitigate a crisis. In Section III, we consider the desire for and practical difficulties which undertakings my face in devising and implementing such coordination. Supposing such strategies do mitigate the crisis without welfare losses, such activities will be at the margin of legality. And in the face of potentially significant fines, a risk-neutral to risk-adverse actor may well rationally opt against this activity—thus the mitigation benefits may be lost. Section IV

* This paper is based on some arguments contained in my forthcoming monograph *Competition Law in Crisis: The Antitrust Response to Economic Shocks* (Cambridge: Cambridge University Press, 2022), and writing was assisted by British Academy / Leverhulme Trust Small Grants Programme (SRG20\201069).

[1] Jonathan Eley and Judith Evans, "Supermarkets Raid Restaurants to Restock Shelves" *Financial Times*, 20 March 2020.

[2] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L-1/1.

briefly examines two well-known cases where cooperative strategies were proposed, Irish Beef ("BIDS") and the Dutch "Chicken of Tomorrow" initiatives. In both cases, market actors proposed cooperative responses to a problem. Their initial solution was at the margin of legality. The Irish and Dutch competition authorities engaged with the players to very different degrees. In the Dutch case, after engagement with and guidance from the NCA, a solution consistent with the competition regime was achieved. The Irish case, where the NCA did not engage, no such outcome resulted. This allows for our suggestions for improvement. We end with these suggestions as concluding remarks.

II. Crises and the Role of Competition Law in a Market Economy

Market societies can be viewed as possessing two different elements: a system by which wealth is created, and another system by which wealth is redistributed. The former is created through the market, and the latter is through a tax and transfer regime. The principles of orthodox price theory show that in a competitive market, the actions of all involved will led to an optimal, and wealth maximizing, outcome for all involved.[3] However, the conditions of perfect competition are very rarely—if ever—realised and resulting market failure will prevent the "invisible hand" directing market forces to achieve this outcome. In such a regime, the purpose of competition law is to eliminate (some of) these market failures, metaphorically releasing the invisible hand from its handcuffs. Hence the social goal of competition law is increase surplus and reduce deadweight losses; in other words, to allow the market to "grow" wealth via the elimination of market failures associated with monopoly. To this end, antitrust law proscribes practices which reduce consumer welfare without providing a countervailing benefit.

To suggest that competition law be suspended or "relaxed" as a solution to or mitigation of a crisis is to in effect suggest that too much competition is the source of the problem, which can be resolved through the injection of further monopoly into the relevant market.

This is unlikely to be the case. Most industrial crises are caused by a sudden drop in demand. The Covid crisis was marked heterogenous shifts in consumption patterns: by a significant decline in demand in some sectors of the economy (travel, entertainment, hospitality), and an increase in demand in other sectors (e.g. anti-viral sanitisers at the start of the crisis). The financial crisis of 2008 was also marked by a mismatch of supply and demand in wholesale financing. The environmental crisis is marked by market failure of externalities and inadequate incentives for investment in means which may abate the problem due to their nature as quasi-public goods. In none of these would an "injection" of monopoly into the situation abate the problem.

Two considerations tell against collaborative solutions to supply problems. First, there is the assumption that collaboration in a crisis will be in the public interest. This is unlikely to be the case. Firms are motivated by profit, and it is the pursuit of profit that drives their activities.[4] The opportunities for activity that is both eleemosynous and simultaneously successfully profit-seeking is, at best limited, as those interested in an adequate return on capital will note.[5]

Second, anti-competitive collaboration typically results in a reduction in output. This is the main driver of the price increase leading to extra profit. In fact, if anything, collaboration is likely to prioritise production of those goods with the highest profit margins.[6] The literature which appears in business and

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[3] See e.g. Wolfgang Kerber, "Should Competition Law Promote Efficiency? Some Reflections of an Economist on the Normative Foundations of Competition Law" in Josef Drexl, Laurence Idot and Joël Monéger (eds) *Economic Theory and Competition Law* (Cheltenham: Edward Elgar, 2009) pp 93 – 120 at 96.

[4] On this point see Peter Ormosi and Andreas Stephan, "The Dangers of Allowing Greater Coordination Between Competitors During the COVID-19 Crisis" (2020) 8 *Journal of Antitrust Enforcement* 299, 300.

[5] Maarten Pieter Schinkel and Abel d'Ailly, "Corona Crisis Cartels: Sense and Sensibility" Amsterdam Law School Legal Studies Research Paper No. 2020-31 / Amsterdam Center for Law & Economics Working Paper No. 2020-03 (11 June 2020) (SSRN=3623154) at 9.

[6] In March 2020 during the early stage of the Covid-19 pandemic, one UK manufacturer of own-brand toilet and kitchen paper reduced its range of production "from 120 to 30 so more can be manufactured quickly. Each supermarket it supplies now gets one type of kitchen roll and two of toilet roll." (Eley, supra, n 1) One need not be overly cynical to ask whether the least profitable lines were reduced.

marketing journals seem to suggest this point.[7] If cooperative activity could remedy crises without harming the public interest (i.e. diminishing consumer welfare), that activity would not be precluded by the competition rules. But more significantly, the encouragement of anti-competitive activity may well leave a post-crisis anti-competitive hangover hindering an effective recovery for the economy.

III. Cooperation and Its Barriers

Nevertheless, we are open to suggestions that some form of cooperative activities could provide social or crisis mitigating benefits. This arises in the context of environmental and sustainability concerns. A recent study showed that, "An overwhelming number of businesses want to work closely with peers when pursuing sustainability goals, with 9 in 10 saying that collaboration is key to achieve progress on ESG [environmental, social and governance] issues."[8]

Yet collaboratively pursuing these ESG goals is dangerous. Under the present regime undertakings are to self-assess the compatibility of their proposed agreement or arrangement with the competition laws. The consequences for an undertaking "crossing the line" in spite of bone fide self-evaluation can be dire. Engaging in activity which contravenes Article 101 TFEU (or its national law counterpart) risks a substantial fine. Even if undertakings are not fined (or if a nominal fine is meted out), defence costs in an investigation and / or hearing are non-trivial. In the face of this contingent cost, simple economics tells us that a risk-neutral actor will likely forego the activity notwithstanding possible social benefits. Experience confirms theory.[9]

Impediments to self-assessment have both legal and institutional origins. The former has its origins in Article 101's object / effect distinction, the latter's origins rest in institutional practice which has evolved from Regulation 1/2003's self-assessment regime.

Article 101's object / effect distinction is a notorious source of difficulty for assessment.[10] Although there is significant ECJ case law on point there is nevertheless uncertainty at the boundary. "By object" restrictions are those which have been shown by experience (which presumably includes experience gleaned from economic analysis,[11] as opposed to—or supplementing—the casual empiricism of one's experiences in the marketplace) to have sufficient likely detrimental effects that further analysis is not needed. These are typically forms of horizontal collusion which lead to reductions of output, increases in prices and thus harm to consumer welfare.[12]

The Court's guidance regarding by effect restrictions is less clear. When an authority or court is required to analyse a "by effects" restriction, this analysis is to take place in the light of the commercial context of the agreement, evaluated against the counterfactual of what the state of competition would be in the absence of the agreement in question.[13] This applies to both inter- and intra-brand competition. If the agreement is viewed as anti-competitive (or "restrictive of competition"[14]) with a "reasonable degree of

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[7] See for example James M Crick and Dave Crick, "Coopetition [sic] and COVID-19: Collaborative Business-To-Business Marketing Strategies in a Pandemic Crisis" (2020) 88 *Industrial Marketing Management* 206 who suggest (at 211): "If competition laws are relaxed, firms should capitalise on the increased freedom to share resources and capabilities with their trustworthy and complementary industry rivals for mutually-beneficial outcomes."

[8] Linklaters, "Competition Law Needs to Cooperate: Companies Want Clarity to Enable Climate Change Initiatives to be Pursued" (29 April 2020) <https://www.linklaters.com/en/insights/publications/2020/april/competition-law-needs-to-cooperate-companies-want-clarity-to-enable-climate-change> accessed 19 May 2022.

[9] Linklaters, supra n 8.

[10] On this point see my *Competition, Effects and Predictability: Rule of Law and the Economic Approach to Competition* (Oxford: Hart, 2020) pp 99 – 106.

[11] See Opinion of Advocate General Bobek in C-228/18, *Gazdasági Versenyhivatal v Budapest Bank Nyrt.,* ECLI:EU:C:2019:678, point 42.

[12] Case C-228/18 *Gazdasági Versenyhivatal v Budapest Bank Nyrt*. ECLI:EU:C:2020:265 paras 36 – 44.

[13] See Case 56-65, *Société Technique Minière v Maschinenbau Ulm GmbH* ("*STM*") ECLI:EU:C:1966:38, at 249 – 250 and *Budapest Bank*, ibid, para 55.

[14] Ibid.

probability"[15] after this evaluation, it would be considered as prohibited subject to justification under 101(3). However, the test appears circular. There is a need to determine what is precisely meant by "anti-competitive" or "restrictive of competition."[16]

The object / effect distinction, and how a proposed arrangement is viewed in this context is crucial for its analysis, as European competition lawyers know. We only need to recall the BIDS[17] case before the ECJ to recognise the significance of the distinction—particularly in the context of cooperative attempts at crisis mitigation. The object / effect boundary is vague, to the detriment of certainty.

Providing guidance would be a straightforward means of resolving some uncertainty, particularly in novel situations. The CJEU is unlikely to be in a position to do so: it will rule only on matters before it, and is reluctant to provide what common lawyers term "orbiter" comments, for fear of prejudging future disputes. The second-best source of guidance is the Commission and NCAs. Although their guidance is not binding on Courts (CJEU and national), such guidance is self-binding.[18] However there are issues of institutional unwillingness, inability and inconsistency which interfere with the authorities' ability to issue effective guidance that provides the needed certainty to undertakings which wish to engage in novel, and perhaps beneficial, practices.

At the outset and to be fair, the Commission provides a fair amount of guidance, and the relevant rule making bodies also produce Block Exemption Regulations, which recognise the "legality" of those arrangements which are brought within their scope. This aids in self-assessment of some proposed arrangements.[19] However, this guidance is necessarily general and incomplete, as no set of guidance can ex ante envisage every situation. And while this guidance is updated from time to time,[20] it will remain incomplete. The authors of the 2011 Guidelines on Horizontal Cooperation[21] could not have the foresight to consider a Pandemic which would occur eight years later.

The existing Regulation 1/2003 regime allows for two ways that these gaps can be filled: the Commission could introduce supplementary guidance, or provide specific guidance in individual cases which raise a novel issue. In terms of supplementary guidance, the Commission can act fast when it is required to so do. This was done during the 2008 financial crisis.[22] But there is no guarantee that the Commission will issue guidance. We note the case of environmental and sustainability agreements. While some guidance was given in the 2001 Guidelines,[23] this was withdrawn from the 2011 Guidelines, only to reappear in the 2022 draft Guidelines. This is in spite of the significance that sustainability and environmental concerns took on during the second decade of the Twenty-First Century.

Further, in novel cases, the Commission undertook to provide guidance letters to undertakings that feared their practices would infringe the competition rules.[24] To this end, the Commission has issued a

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[15] Ibid, citing Guidelines on the Application of Article 81(3) of the Treaty [2004] OJ C-101/97, para 24.
[16] See e.g. Pablo Ibáñez Colomo, "Anticompetitive Effects in EU Competition Law" (2021) 17 *Journal of Competition Law & Economics* 309, 361.
[17] Case C-209/07), *Competition Authority v Beef Industry Development Society Ltd and Barry Brothers (Carrigmore) Meats Ltd ('BIDS')* ECLI:EU:C:2008:643.
[18] E.g. Joined Cases C-189/02 P, 202/02 P and 213/02 P *Danske Rørindustri A/S and Others v Commission*, ECLI:EU:C:2005:408.
[19] See e.g. *XXXIVth Report on Competition Policy (2004)*, point 1.
[20] E.g. see the revisions to the Guidelines on the Applicability of Article 101 of the Treaty of the Functioning of the European Union to Horizontal Co-operation Agreements (Brussels 1.3.2022 C(2022) 1159 final).
[21] Guidelines on the Applicability of Article 101 of the Treaty on the Functioning of the European Union to Horizontal Co-operation Agreements [2011] OJ C-11/1.
[22] Council of the European Union, "Immediate responses to financial turmoil Council Conclusions - Ecofin Council of 7 October 2008" (Luxembourg, 7 October 2008) 13930/08 (Presse 284), <https://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/misc/103202.pdf > accessed 19 May 2022 and Commission, Press Release, "State Aid: Commission gives guidance to Member States on measures for banks in crisis" (13 October 2008) (IP/08/1495), <https://ec.europa.eu/commission/presscorner/detail/en/IP_08_1495> accessed 19 May 2022.
[23] Guidelines on the Applicability of Article 81 of the EC Treaty to Horizontal Co-operation agreements [2001] OJ C-23/2.
[24] Regulation 1/2003, Recital 38.

Notice on the circumstances under which it will offer such guidance and issue comfort letters.[25] However, this "guidance on guidance" and use of comfort letters is illusory. The Commission issued its first comfort letter issued in April 2020 during the Covid pandemic.[26]

NCAs will also issue guidance and / or engage with their stakeholders, albeit to varying degrees. European principles surrounding reasonable expectations entail that such guidance is binding on the issuing authority, there need not be absolute consistency among national guidance or with the guidance promulgated by the Commission. In spite of the fragmentated manner of NCA response, it nevertheless shows a way forward, through greater engagement with stakeholders, particularly in novel situations.

In the next section, we consider briefly two such situations, the Irish Beef (*BIDS*) case and the Dutch "Chicken of Tomorrow" (CoT) initiative. Both cases involved novel concerns. The former resulted from a crisis in that country's beef processing industry, the latter raised animal welfare concerns; and its significance cannot be understated. These animal welfare concerns were novel, and as such did not fit well into existing competition analysis; but more significantly, these concerns mirror some of the concerns which underlie cooperative sustainability proposals. There was a stark difference in NCA engagement with the parties, and—perhaps not coincidentally—a similar stark difference in outcome.

IV. Guidance: Failure and Success

1. The "Irish Beef" Case

The facts of this case in the Irish Courts are presented in some detail in McKechnie J's judgment.[27] Post-EEC entry Irish farmers could obtain the numerous benefits of the Common Agricultural Policy (CAP).[28] Among these benefits, the CAP provided for price supports and grants to construct slaughterhouses.

Traditionally cattle were slaughtered in autumn months. There were early incentive to build for these peaks. But as part of the 1992 reforms to the CAP, farmers received financial incentives to reduce delivery of cattle during peak periods, smoothing out demand (and need for capacity) in production, entailing that capacity designed for peak periods would be superfluous. [29] Hence the incentives for beef production were divorced from market realities.[30] By the late 1990s the severity of the situation was apparent. Representatives of the industry and Government engaged the consulting firm McKinsey to produce a report on the state of the industry.[31] The Report recommended coordinated action to reduce total capacity by 32% per annum, with those remaining in the industry ("stayers") compensating those leaving ("goers"). In turn, the Government recognised the need for rationalisation and provided indications of its support.[32] In May 2002 the Beef Industry Development Society Limited ("BIDS") was established to implement the rationalisation strategy suggested by the McKinsey Report.

After the BIDS programme was agreed, its members informed the Competition Authority of the programme, and provided submissions as to the programme's compatibility with Irish and EC competition law. BIDS and its members attempted to engage with the Competition Authority (and cooperated with it throughout its investigation).

The plan was proposed prior the self-assessment regime of Regulation 1/2003, and BIDS sought clearance (under the domestic equivalent of Regulation 17) of the programme. Yet, the Authority did not vet

[25] Commission Notice on Informal Guidance Relating to Novel Questions Concerning Articles 81 and 82 of the EC Treaty that Arise in Individual Cases (Guidance Letters) [2004] OJ C-101/78, points 3 and 4,

[26] Commission (DG Comp) to Medicines for Europe, Comfort letter: coordination in the pharmaceutical industry to increase production and to improve supply of urgently needed critical hospital medicines to treat COVID-19 patients (8 April 2020) <https://ec.europa.eu/competition/antitrust/medicines_for_europe_comfort_letter.pdf > accessed 19 May 2022.

[27] *Competition Authority v Beef Industry Development Society Ltd & Anor* [2006] IEHC 294, paras 8 – 31.

[28] *BIDS* (High Court), ibid para 9.

[29] Ibid.

[30] Ibid, para 11.

[31] *BIDS* (High Court), n 27, para 13 – 26.

[32] *BIDS* (High Court) ibid, para 28.

these proposals and "declined to engage in this way."[33] The Competition Authority took the view that these arrangements were contrary to domestic provisions mirroring Article 81(1), and could not benefit from the equivalent of 81(3).[34] In the end, the Authority commenced proceedings.

In the High Court, McKechnie J held that these restrictions were not restrictive of competition by their object and found that the programme met 81(3)'s criteria. McKechnie J's judgment was appealed to the Supreme Court, which made a reference to the ECJ for a preliminary ruling. At issue was whether agreements possessing features of the BIDS arrangements are anti-competitive by object alone, or whether it is also necessary to demonstrate the anti-competitive effects of the agreements.[35]

The ECJ held that the BIDS arrangements had as their object the restriction of competition.[36] Hence the compatibility of this crisis cartel with EU competition law relied on a 101(3) justification. The Irish Supreme Court referred the case to the High Court to consider the 101(3) issue de novo, and in light of the ECJ's judgment.[37] The High Court heard these arguments in 2010. It did not issue a ruling, as in January 2011 BIDS withdrew its action against the Competition Authority.

In concluding our discussion of *BIDS*, we make two points. First, the cause of the overcapacity was a result of the distortive effects of subsidies. Subsidies created an artificial floor for beef prices, underwrote the cost of expansion of processing plants, and smoothed out the demand for capacity during the year. It is hardly a surprise that the industry acquired too much capacity. Second, we note the lack of engagement by the Irish NCA,

2. <u>The Dutch "Chicken of Tomorrow" Initiative</u>

The Chicken of Tomorrow, ("CoT") initiative arose from a February 2013 agreement among Dutch poultry farmers, processers and supermarkets to enhance the sustainability and welfare in broiler chicken production.[38] This was not a "crisis cartel" in the standard sense. It was a buying arraignment among Dutch supermarkets, motivated by non-economic concerns of enhancing welfare and environmental sustainability in chicken production. This initiative is regarded as a test case for competition law's ability to take into account non-economic values.

The goal of the CoT agreement was to phase out entirely the sale of regularly produced broiler chicken by 2020, in an effort to replace it with meat produced according to the CoT standard. The immediate consequences of this would be that supermarkets would pay more for such chicken, and these costs passed on to consumers.[39]

This initiative was popular with the Dutch public.[40] The ACM was asked to provide an informal opinion (similar to a comfort letter[41]). It opined that arrangement would deny customers the freedom of choice regarding their chicken purchases, and would "have a considerable effect (real or potential) on the

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[33] Ibid, para 87.
[34] Ireland, *Competition Act 2002* (No 14 of 2002), ss 4(1) and 4(5).
[35] *BIDS* (ECJ) n 17, para 14.
[36] Ibid, para 34.
[37] *The Competition Authority v Beef Industry Development Society Ltd and Barry Brothers (Carrigmore) Meats Ltd* [2009] IESC 72.
[38] Autoriteit Consument en Markt ("ACM"), Memo: Welfare of today's chicken and that of the 'Chicken of Tomorrow' (13 August 2020), p 3; <https://www.acm.nl/sites/default/files/documents/2020-08/welfare-of-todays-chicken-and-that-of-the-chicken-of-tomorrow.pdf> accessed 19 May 2022.
[39] Jacqueline M Bos, Henk van den Belt, and Peter H Feindt, "Animal Welfare, Consumer Welfare, and Competition Law: The Dutch Debate on the Chicken of Tomorrow" (2018) 8 *Animal Frontiers* 20, 20.
[40] See e.g. Anna Gerbrandy, "Solving a Sustainability-Deficit in European Competition Law" (2017) 40 *World Competition* 539, 540.
[41] Gerbrandy, ibid at 541 fn 6; see also ACM, "ACM procedure regarding informal opinions" (Dutch Government Gazette No. 11177 – 26 February 2019) <https://www.acm.nl/sites/default/files/documents/2019-07/acm-procedure-regarding-informal-opinions.pdf> accessed 19 May 2022.

consumer market for chicken meat."[42] Further, given that supermarkets would sell only chicken which was raised according to the CoT standard, this would preclude the sale of imported chicken.[43]

The measures violated both Article 101(1) TFEU and its Dutch analogue.[44] Hence its compatibility with the competition rules rested with whether or not they could be exempted under Article 101(3) TFEU (and its domestic analogue). The ACM's analysis found that the proposed CoT standard would not satisfy any of the 101(3) criteria.

The starting point of the ACM's analysis of Article 101(3)'s first criterion (improvement in productive or distributive efficiencies) is that any such efficiencies are efficiencies only to the extent that customers are willing to pay for them. Accordingly, the Authority collected data to determine consumers' willingness to pay for the animal welfare, environmental and public health benefits which would accrue from the arrangement.[45] As the costs of the initiative to the consumer exceed its benefits, it did not improve production or distribution of a good. In light of this cost-benefit balance, the initiative also failed the second criterion (consumers obtaining a fair share).

The ACM's findings were subject to criticism from all corners.[46] The immediate consequence of this was that it forced the supermarkets and producers to work, without colluding or otherwise restricting competition, to improve chicken-welfare standards of their product. In May 2014, the largest Dutch supermarket chain, Albert Heijn, became the first chain to introduce higher-welfare chicken. Jumbo (the second largest), followed suit in October 2014.[47] In August 2020, the ACM published a stock-taking exercise which to assess the extent to which sustainability and welfare goals had been achieved in the absence of the Chicken of Tomorrow initiative.

The results of the study showed that "the welfare conditions of the current selection of chicken meat sold in Dutch supermarkets more than exceeds the minimum requirements of the Chicken of Tomorrow."[48] This was established by competition among the main supermarkets (representing over 97% of the market) over chicken-welfare standards. Though these vary, all are in excess of those that the Chicken of Tomorrow programme would have established.[49] In addition to these own-brand standards, supermarkets also sell chicken certified under market-wide labels (with three levels, initiated by the Dutch Society for the Protection of Animals), these also exceed the CoT standard. The participation of organisations such as that society added trust and made consumers more willing to pay for the more sustainable, higher-welfare product.[50]

In this regard, the approaches of the Dutch and Irish competition authorities are worth contrasting. In CoT, the Dutch authorities were in a position to provide an informal opinion to the industry about the legality of the proposed arrangements, and—when it they determined that the proposal likely contravened the competition rules—to engage with them and provide suggestions as to how to move forward. Eventually the industry, likely heeding these suggestions, developed a solution.

In *BIDS*, there was no such engagement, despite the old (notification) regime not expiring. This was a cause for comment by McKechnie J. One can only speculate what the eventual outcome may have been, had the Irish Authority engaged. Indeed, to go forward, this difference between the two cases show the need for competition authorities to engage with stakeholders in times like this.

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[42] Autoriteit Consument en Markt ACM's analysis of the sustainability arrangements concerning the "Chicken of Tomorrow," ACM/DM/2014/206028 (January 2015) p 4.
[43] Ibid.
[44] Mededingingswet (22 May 1997) Art 6(1), and ACM, Sustainability Arrangements, n 42, p 4.
[45] Machiel Mulder, Sigourney Zomer, Tim Benning en Jorna Leenheer, "Economische effecten van 'Kip van Morgen' Kosten en baten voor consumenten van een collectieve afspraak in de pluimveehouderij" (Office of the Chief Economist ACM, October 2014) <https://www.acm.nl/sites/default/files/old_publication/publicaties/13759_onderzoek-acm-naar-de-economische-effecten-van-de-kip-van-morgen.pdf> accessed 19 May 2022.
[46] ACM, Welfare of today's chicken and that of the 'Chicken of Tomorrow (13 August 2020) p 3
[47] Berrie Klein Swormink, "Chicken of Tomorrow is here today" *Poultry World* (13 March 2017), <https://www.poultryworld.net/Meat/Articles/2017/3/Chicken-of-Tomorrow-is-here-today-103092E/> accessed 19 May 2022.
[48] ACM, Memo: Welfare of today's chicken, n 46, p 2.
[49] Ibid, pp 5 – 8.
[50] Ibid, p 15.

V. Conclusion

We seem to be in a continuous process of facing crises; and in particular our present climate crisis calls out for action. Although we are sceptical about coordinated efforts, we nevertheless recognise that there may be some instances where our general scepticism is unwarranted. To this end coordination among actors may aid in meeting some of the challenges. Article 101 TFEU does not prohibit coordinated efforts—it prohibits such efforts which are harmful to competition. There is room within the Article for coordinated activity which promotes this end. Standardisation is one very effective means forward.

The Dutch "Chicken of Tomorrow" initiative suggests the general suitability of standards as a means of achieving such goals. In addition to animal welfare labelling, as in the Dutch case, a coordinated approach could permit the development of, for instance, recyclability and carbon footprint standards. However, this requires consistency—presupposing agreement—among the metrics used in expressing these standards. There is no point in developing standards if they cannot be clearly expressed, readily understood or easily compared by consumers of the relevant products.[51] Industry-wide coordination that allows for meaningful comparisons of, say the carbon footprint, of comparable goods will provide information to consumers to inform their consumption.[52]

The main barrier to such effective implementation is lack of guidance. Some guidance has been provided for elements of the state aid regime, and for standardisation under Article 101[53] the Commission and National Competition Authorities can assist further. In this regard the Dutch Competition Authority's approach is commendable.[54] The need for guidance is important and the more the specific guidance, the better. It is by providing such guided self-assessment that Authorities can alleviate significant enforcement problems.

[51] See e.g. Judith Evans, "Could Carbon Labelling Soon Become Routine?" *Financial Times,* 19 November 2020.

[52] See also Simon Holmes, "Climate Change, Sustainability, and Competition Law" (2020) 8 *Journal of Antitrust Enforcement* 354, 382 – 383.

[53] The 2011 Horizontal Cooperation Guidelines, n 21 paras 257 – 335.

[54] Organisation for Economic Co-operation and Development, "Sustainability and Competition–Note by the Netherlands" contribution for 134th OECD Competition Committee meeting on 1-3 December 2020 DAF/COMP/WD(2020)66 (Paris: OECD, 2020) paras 2, 8 – 9.

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