

The Chicken of Tomorrow

The tension between competition law and sustainability arrangements

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DOI: [to be filled in by the Library, leave empty]

Short abstract:

In this CBE, we will organize a discussion about the case of the 'Chicken of Tomorrow'. The goal is to gain insight in the ethical dilemmas that arise in practice related to the environment and animal welfare. We will reconstruct a stakeholder meeting with all relevant parties. The aim of this meeting is to discuss the different perspectives of the stakeholders and to reflect on a possible solution to the problem.

Story:

In February 2013, poultry farmers, meat processors and retailers in the Netherlands collectively agreed to make chicken meat production for the Dutch consumer market more animal-friendly and more environmentally sustainable. This initiative was called the 'Chicken of Tomorrow' arrangement and would entail an improvement for the chickens compared to the conditions in which regular broilers (notoriously known as '*plofkippen*' or '*blobhens*') were kept. While regular chickens have a growth rate of 60-65 gram per day and are slaughtered at 40 days of age, the new breed for the Chicken of Tomorrow would grow at 50 gram per day and reach an age of 45 days. More living space would be created by decreasing the occupancy rate from 21 to 19 chickens per square meter. Moreover, litter and distraction materials (straw, roosting poles and straw bales) were to be provided, leading to fewer foot pad lesions. The Chicken of Tomorrow was also to enjoy a more natural circadian rhythm, as it would be dark in the barns for at least six consecutive hours (as against 4 under regular conditions). Finally, the initiative included environmental improvements like reduced use of antibiotics, reductions in ammonia emissions

and particulate emissions and 100% use of sustainable soy in animal feed. According to the agreement, regular chicken meat would be gradually removed from the supermarket shelves; by the year 2020, it was to be completely replaced by the new Chicken of Tomorrow variety or other, even more animal-friendly varieties such as chickens with the Better Life label endorsed by the Dutch Society for the Protection of Animals (for comparison: 1-star Better Life chickens have a growth rate of maximally 45 gram per day and an occupancy rate of 12 chickens per square meter; they have also a free run available). Thus the new Chicken of Tomorrow was intended as a new minimum standard: all supermarket chains in the Netherlands committed themselves to purchase by 2020 only chicken meat that met at least this minimum standard.

The 'Chicken of Tomorrow' initiative was very much in line with the wishes of the Dutch government. For years, politicians had encouraged and strongly urged the animal husbandry sector and subsequent links in the agrofood supply chain to assume responsibility for gradually improving meat production in the Netherlands by ratcheting up standards of sustainability and animal welfare. However, in early 2015 the official competition watchdog, the Netherlands Authority on Consumers and Markets (ACM), threw a spanner in the works of this self-regulation effort. In a so-called provisional opinion, the ACM declared that the 'Chicken of Tomorrow' arrangement was illegal, because the agreement involved a restriction of competition (a cartel) that did not satisfy the exemption criteria to the cartel prohibition which are stipulated in European (and Dutch) competition law.

It was not difficult for the ACM to determine that the agreement indeed amounted to a restriction of competition, as it encompassed all retailers in the Netherlands, together covering 95% of the Dutch chicken meat market. They had all agreed to take regular chicken meat off their shelves. But the ACM also had to look at the exemption criteria to the cartel prohibition. These criteria are set out in the third paragraph of article 101 of the Treaty on the Functioning of the European Union (TFEU) and in a similar paragraph of the Dutch Competition Act.¹ The main issues here are whether the "anticompetitive arrangement" is an improvement that is also in the interest of the consumers (the ACM employs a 'broad' consumer welfare concept here) and whether the arrangement is necessary and proportional for reaching the goals of the improvement.

¹Paragraph 3 of article 101 of the TFEU reads:

"The provisions of paragraph 1 [i.e. the cartel prohibition] 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".

To determine whether the 'Chicken of Tomorrow' arrangement was in the interest of consumers, the ACM had its Bureau of the Chief Economist conduct a cost-benefit analysis which also included a survey study into consumers' willingness to pay (WTP) for improved animal wellbeing and a better environment. To find out how much value consumers would attach to such aspects, the respondents in the survey had to make a whole series of choices, each time between two different chicken profiles which differed in relevant attributes like life expectancy, availability of a free run, occupancy rate, mode of anaesthetization, and price. On the basis of all the choices made by all respondents, the researchers were able to estimate the WTP for the various underlying attributes and, by combination, for various types of chickens (regular chicken, Chicken of Tomorrow, 1-star Better Life chicken and organic chicken). One important outcome was that the *extra* WTP for the Chicken of Tomorrow compared to the regular chicken was rather low (68 eurocent per kilo of chicken filet), while the *extra* WTP for the 1-star Better Life chicken was surprisingly high (11.99 euro per kilo) – even more than the extra price such chickens currently command in supermarkets. It appeared that consumers were not unduly impressed by the longer life expectancy and slightly more living space for the Chicken of Tomorrow, but attached much value to the availability of a free run for the 1-star Better Life chicken. The Chicken of Tomorrow also earned a modest extra WTP for the environmental effects (14 eurocent per kilo), but the total extra WTP (68+14=82 eurocent) could not offset the calculated extra cost-price of 1.46 euro per kilo for which consumers would be charged in the supermarket.

From these findings the ACM drew two important conclusions. First, the competition watchdog concluded that the Chicken of Tomorrow arrangement brought no net benefits to consumers and therefore failed to pass the main test. Second, from the surprisingly high extra WTP for the 1-star Better Life chicken, the ACM concluded that retailers and other businesses had actually failed to grasp the economic opportunities that were almost staring in their face. With better communication and more advertising, the ACM declared, it should be possible for individual retailers to tap the potential willingness of consumers to pay for much higher levels of animal welfare and sustainability. In this way, a company could profitably distinguish itself from its competitors. There was therefore, in the ACM's judgment, no need for a market-wide agreement, for instance to overcome the 'first-mover disadvantage'. Thus the criteria of necessity and proportionality were also not fulfilled.

Understandably, ACM's pronouncement on the illegality of the Chicken of Tomorrow arrangement caused much consternation among the poultry farmers and the other parties involved in this initiative. The Dutch government was also not amused, nor were many parliamentarians. The ACM's stance was seen as a threat to current government policy, which refrains from issuing detailed rules and regulations on sustainability and animal welfare, but relies very much on voluntary initiatives from the business world and civil-society organizations. Once such collaborative arrangements are set up by private parties, however, they risk being shot

down by the cartel watchdog as in breach of the prevalent competition rules. Not surprisingly, trade and industry organizations as well as politicians started to plead that the ACM should give more weight to ‘public interests’ (such as sustainability and animal welfare) in its assessments rather than using the more narrow standard of consumer welfare. At a certain moment, the Minister of Economic Affairs called upon the ACM to reassess the entire case in view of the social uproar its provisional opinion had caused, but to no avail. In an interview, the chairman of the ACM defiantly declared that the agency had simply done its job by applying the existing competition law. If the politicians want to ensure that chickens get more daylight and more living space, despite the high costs, it is up to them to introduce new legal rules and regulations. That would be the royal road.

Among civil-society organizations there were widely different reactions to the ACM’s ‘verdict’. The radical animal welfare organization *Animals Awake* (*Wakker Dier*) welcomed the ACM’s conclusions as a confirmation of their own view that the Chicken of Tomorrow is insufficiently animal-friendly. They agreed that with this chicken variety consumers would not get value for money. It was actually no more than a ‘flopkip’ – as the organization designated this new type of chicken, varying slightly on its earlier successful coinage of ‘plofkip’ (‘blobhen’) as a term of choice for the regular chicken. *Animals Awake* also supported the ACM’s conclusion that the 1-star Better Life chicken would give consumers really good value for their money. They would therefore intensify their campaigns aimed at putting retailers under pressure to completely switch to this type of chicken.

A very different reaction to the ACM’s analysis came from the Nature and Environment Foundation (*Stichting Natuur & Milieu*). They saw the agency’s view on the Chicken of Tomorrow arrangement as a potential threat to many more sustainability initiatives in which businesses and societal stakeholders voluntarily cooperate for the improvement of the environment, biodiversity, animal welfare, public health and labor conditions within production chains. The Foundation considered the consumer welfare standard too narrow, precisely because it is limited to the consumer. It also took issue with using the WTP as an operative criterion, because this involves an unwarranted extrapolation from answers to hypothetical choice situations in consumer surveys to actual consumer behavior in the supermarket. The Foundation was therefore highly skeptical about ACM’s claim that the surprising high WTP for the 1-star Better Life chicken showed that there were huge untapped business opportunities for improving animal welfare in the market place. This claim was unrealistic, the Foundation reasoned, given that the market share for the Better Life chicken was still no more than 5-10 percent, even after years of campaigning by *Animals Awake* and sustained advertising efforts like the “Week of the Better Life”. The Foundation also held that the ACM misunderstood the very goal of sustainability initiatives. The point of the quest for more sustainability (*verduurzaming*) is precisely to bring the entire sector, not just a small segment of the market, to a higher level. Such a goal can only be

achieved by a market-wide arrangement. The Foundation therefore also criticized the way the ACM applied the exemption criteria of necessity and proportionality. In a very price-sensitive chicken filet market, it would be ‘necessary and proportional’, according to the Foundation, to jointly agree to close and lock the ‘back door’, that is, to block the option of the ‘plofkip’. Individual companies may indeed be stimulated to undertake extra efforts in animal welfare and sustainability (and thereby distinguish themselves from their competitors), but only if a certain minimum level is collectively agreed and thus assured.

On 11 June 2015 a broad coalition of business and civil-society organizations sent an open letter to the Minister of Economic Affairs with a call to create more room for sustainability arrangements. The letter strongly criticized the ACM’s assessment procedures and drew attention to the perverse Catch-22 character of the ACM test on the exemption criteria:

“[The positive effects of sustainability arrangements] are not fully taken into account, because the ACM tests mostly on the consumers’ willingness to pay. Moreover, a low WTP would lead to the conclusion that the consumer does not benefit enough from the arrangement (criteria 1 and 2) while a high WTP would lead to the conclusion that an agreement is unnecessary because the market itself will take it up (criterion 3). The methodology looks therefore set to lead to only one possible conclusion: no exemption to the prohibition on cartels” (Akkerman et al. 2015).

On 13 July 2015 the Ministry of Economic Affairs announced that it would review and amend its “policy rule” for competition and sustainability.

Educational instructions

Student Version

Steps of the exercise - Instructions stakeholder discussion

1. The discussion will be organized as follows. The students will be divided in groups (your assignment group). Each group will represent one of the key stakeholders. You are asked to put yourself in the position of the stakeholder that is assigned to you, and defend their point of view. The key stakeholders are:
 - The Dutch Authority on Consumers and Markets (ACM)
 - The Government (Minister of Economic Affairs)

- Poultry farmers, meat processors, and retailers
 - The Organization Animals Awake (Wakker Dier)
 - The Nature and Environment Foundation (Stichting Natuur & Milieu)
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2. The starting point for the discussion is the statement by the Dutch Competition Authority that the 'Chicken of Tomorrow' is illegal and the publication of their research. This discussion is organized by the government to receive input by the different stakeholders and to reflect on how to proceed.
 3. Each group will receive a separate file in which more information about the stakeholder is given. This separate file also provides you some critical questions which you should consider and take into account in preparation of the stakeholder discussion. Please do not share your mission and vision with the other groups before the discussion. Prepare your argument in your role-group.
 4. During the discussion, try to imagine what somebody in the role you are representing would argue. Engage with this role and take it seriously. The assignment is to practice in argumentation, not to prove your own being-right. Speak clearly and coherently and at the right moments, help making the discussion lively and credible.

References:

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- Sijas Akkerman, Suzan van der Meij, Erik te Brake, Maurits Hekking, Shirley Justice et al. (2015), *Oproep: Meer ruimte voor duurzaamheidsafspraken* (Call for more room for sustainability arrangements), Letter to the Minister of Economic Affairs, The Hague, 11 June 2015.
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