

Opening Strategic Interaction Workshop

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Good morning everyone, and welcome to this ACLE workshop on “Strategic Firm-Authority Interaction in Antitrust, Merger Control and Regulation.” We are very happy that you turned up in such large numbers – roughly 120 participants – from all over the world, for today’s specialty topic.

We are proud to present our keynote speakers: US experts on the topic Preston McAfee and Stephen Calkins – European practitioners: Silke Obst of DG Competition, Mark Powell of White & Case in Brussels – and Pieter Kalbfleisch of the Netherlands Competition Authority. We also have a dense program of parallel sessions with about 35 papers in total, that you can find on the middle pages of the program booklet in your pack.

Many thanks for coming to Amsterdam. A warm welcome to all of you.

“Strategic Firm-Authority Interaction”, that is the topic of today. Just like the previous two ACLE workshops, on “Criminal Sanctions” in 2005 and “Forensic Economics” in 2006; a specialty topic in competition law enforcement.

We choose this year’s topic on the observation that competition authorities and regulators are mighty players in the market. They are powerful – as illustrated by the latest record-breaking cartel fine of the European Commission of round about 1 billion euro – noted and respected.

The market parties they control, however, large undertakings and their advisors – law firms and economic consultants – are no fools either. They have a lot at stake in their dealings with the authorities. They may be confronted by new regulations that affects

their business importantly; they may want to merge and fear their plans blocked; or secure State aid that cannot pass the European rules.

Most certainly, firms will try to tailor their business strategies to the expected behaviour of the antitrust agencies. And they will be keen to try to influence it where they can.

Let me just give one simple example: cartel detection – which I happen to think is quite an exciting field.

The US Department of Justice has a publication on the website of the Antitrust Division titled “Antitrust Enforcement and the Consumer”. It has a section “How Can You Know if the Antitrust Laws Are Being Violated?” There, the DoJ gives tips to “Keep an eye out for telltale signs,” that should alert buyers that they may be abused.

These tips include examples, such as to watch for sudden and identical price increases of firms that should be operating independently, in and around the same time.

But also more subtle signs, like to watch for – and I quote: “suspicious statements from a seller suggesting that only one firm can sell to a particular customer or type of customer.”

The Australian Competition and Consumer Commission is even more explicit. Under the heading “Cracking Cartels”, it says that – and I quote again: “Suppliers may accidentally give away their involvement in a cartel by” [and then a list]: “using the same words or ideas when explaining price rises; by telling you that ‘the industry’ has decided to increase margins; or by saying that it cannot sell to you, or cannot sell in your area and that another supplier should not have sold to you.”

These warnings are well intended, of course, but could it be that the price-fixers read them too? What if? Could they perhaps change their ways to avoid being found out about in these somewhat accidental ways? And if so, what should the antitrust authorities do in anticipation of this effect? Should they force cartels further underground? And are the agencies really on top of this all?

Competition law enforcement essentially is a game of hide-and-seeK, of cat-&-mouse between the black firms on the one hand, seeking higher than normal competitive profits at the fringes of the law; and the white knight competition authorities on the other hand, trying to police this anticompetitive behaviour to the best of their abilities.

Both parties get ever smarter at doing what they are doing. They employ the latest technology, including from economics. It is somewhat like an arms race.

----- SLIDE CAT-&-MOUSE -----

If the cat is smart and lies in wait for the mouse to appear, the cartel may be smarter and arm itself with high tech surveillance to know what the antitrust authority is watching.

----- BACK TITLE -----

But the game is more complicated than this. The antitrust authorities are no white knight necessarily. They are manned by people. People have idiosyncratic preferences and information. There is room for errors in their judgements – manipulations of their views and their priorities.

This is turn, introduces strategies of interested parties that play on this.

The games are not simple, as a result. They are games of incomplete and imperfect information, involving many players with opposing objectives. They are complex to analyse, so far little understood, and therefore hard to play.

Some players – is my suspicion – may even be unaware that a game is played at all.

All of today's speakers have great insights to offer into aspects of the strategic interactions between firms and firms, and firms and authorities in the areas of antitrust, merger control and regulation. I, for one, look forward to a very interesting day, full of learning. I wish you lots of excitement too!

----- INTRODUCE SPEAKERS

Concluding Remarks - END OF THE DAY

We have now come to the end of a full and informative day. I hope you have enjoyed it as much as I have.

I put up the cat-&-mouse cartoon this morning – and for my understanding it has been helpful that some people referred to it this image in the course of the day.

At some point during one of the parallel sessions, watching the exchange, it struck me that really what we have had here today is a large group of cats and mice, sizing each other up. With in between them the academics, as designers of mouse traps and cat-snatcher kits.

I hope you go home with new views on your daily work. Things to think about; things to implement maybe. I surely do.

---- THANKS AND INVITATION TO DRINKS