

Ladies and gentlemen!

- (01) I first want to thank Maarten Pieter Schinkel for inviting me to speak at this venue.
- (02) It is an honour and pleasure alike to be here among so many distinguished guests.
- (03) In this opening address I would like to reflect on the interaction between a strategic firm (or better said: strategic firms) on the one hand, and the Authority (Competition Authority) on the other. This is the central theme to today's ACLE workshop.
- (04) Maarten Pieter Schinkel has outlined the main idea behind this workshop by invoking a powerful image. Enforcement and regulatory authorities and the firms that are being supervised are caught up in an intelligent (if not to say "belligerent") cat-and-mouse-game. What's more, it is like an arms race. Firms that have unlawful intentions, for instance operating in and by means of a cartel, aim to plot in a way that eludes detection by a competition authority. The Competition Authority, then, will do its utmost to bring to light the cartel. Ultimately, of course, it wants to penalise cartel-participants. This image of a cat-and-mouse game holds good even if firms are not intent on wrongdoing, as it helps explore the boundaries of the law and limits to enforcement action.
- (05) The aim of this workshop is – still according to Maarten Pieter Schinkel – to consider objective, academic studies. These include studies on the lack of appropriate grounds and means necessary to a competition authority's selection and handling of the most relevant cases.
- (06) In all modesty, I will comment on the part played by enforcement and regulatory authorities in this interaction. I do not intend to take a mostly academic perspective on the matter under discussion, but would rather consider this matter from a managerial and practical point of view.
- (07) First of all, I would like to point out that a competition authority like the NMa does not deal with firms with unlawful intentions only. As an enforcement body, the NMa serves the market as a whole, or, if you prefer, *all* markets. Evidently, it is impossible to contend that the entire

market is imbued with “unlawful intent”. Though granted that the market is not fundamentally of “unlawful intent”, the hosts to today’s workshop have argued that businesses will always push “the limits of law and enforcement”. The first point I would like to make is that I don’t consider this a problem at all. Current legislation, after all, accounts for companies continually testing law and enforcement boundaries. Statutory provisions by nature set out so-called “open norms”. In each individual case, we need to establish the boundaries to the law and enforcement action in a process of careful exploration. It is evident from daily practice that legislation of this kind triggers innovation. In terms of NMa-enforcement-practice, I would like to mention the NMa’s handling of many hundreds of cases in the construction industry. Our innovative approach applied to investigative methods, legal procedures, as well as fining policy. If firms can push limits, so can we. And I fully endorse it.

- (08) As a matter of fact, testing legal boundaries is inherent to the increasingly juristic and legal nature of society as a whole, and relations between government and business in particular.
- (09) Secondly, I would like to put across to you that the NMa’s mission, in accordance with its statutory tasks, entails “making markets work”. I would like to add that optimal compliance here takes precedence over maximum enforcement. In some cases, our enforcement strategy does not consist of “tough and robust” sanctions. There’s a simple reason for this: alternative instruments prove a more efficient, a cheaper and a more effective means to achieving compliance with the Competition Act and improving on the level of competition. Also, subsequent monitoring procedures help verify implementation. As a strategic and calculating authority, we only impose such alternative measures on firms that we consider trustworthy. Trust, therefore, to a high degree determines the interaction between a strategic authority and calculating and strategically operating firms. As a consequence, trust is to be considered a pivotal concept in competition enforcement, as it is now developing in the Netherlands.
- (10) As to general enforcement practices and the effect of enforcement policy, I highly recommend the report published by the Dutch Scientific Council for Government Policy [Nederlandse Wetenschappelijke Raad] in 2005. The report is entitled: “Proofs of good service provision” [Bewijzen van goede dienstverlening]. In summary, this report argues that enforcement and regulation solely by means of sanctions leads to “a culture of Big Brother is watching you”, to “concerns for safety and security, resulting in a culture of fear or, at the very least, a choice for

mediocrity”. In appropriate circumstances, the Council recommends taking trust in firms that have come under scrutiny, stimulating them, rewarding them even, in case of compliance with the law.

- (11) The concept of “trust”, and “high trust” in particular, is an important point of departure for the recently appointed Dutch government, as is evident from the coalition-agreement. Moreover, the financial underpinnings of government policy relate “high trust” to enforcement and regulatory bodies such as the NMa. As to the exact meaning of this, the government document sets out the following. With a view to the substantial administrative burden on business, the level to which firms are being monitored and investigated upon is to be – I might as well say *will* be - brought down. However, if supervision and research indeed bring to light a legal infringement, sanctions will be more rigid. Sanctioning policies because of budgetary requirements?!?! Leaving aside issues of state law and considerations of expediency here, it shows the involvement of yet more parties in the interaction between authority and firms. The government, for instance, is of importance here, which is my third point.
- (12) Just to round this off, I would like to remark on the fact that the interaction between an enforcement or regulatory authority and firms also involves other third parties besides the government. We should think of consumers here. Competition enforcement is tied up with safeguarding consumers welfare, as we all know. This requires sound market-operations. These can be realised by optimising competition. The NMa’s favourite mantra exemplifies this:
- Competition benefits the functioning of markets;
  - Sound competition benefits the economy;
  - A strong economy benefits prosperity;
  - Prosperity benefits consumers.
- (13) Moreover, we should take into account so-called “third-party-interests”. These are no less important because of the legal framework within which the NMa has chosen to operate: the context of administrative law. Apart from consumer-interests, current Dutch legal practice also considers the interests of competitors, potential competitors and all parties whose interests may be affected by the activities of the firms under supervision. It is in no way strange, actually, that the NMa shall take to heart the interests of these groups. We should bear in mind that the relations under consideration here are based on social trust. After all, the Latin equivalent of “trust” is “fides”. This also means “protection”. The

interests just mentioned should govern NMa activities. This adds to the complexity of our tasks.

- (14) The combination of trust and competition is not in any way new. It goes back to the early days of competition. The godfather of competition, Adam Smith, professor in moral philosophy at the University of Glasgow, intimated in “The Wealth of Nations” that self-interest is inseparably linked to respecting the interest of others, in other words: giving trust to your fellow citizens.
- (15) Which NMa activities best express this concept of trust? I will list a series of relevant aspects to this question:
- (16) First of all, “trust” – in the sense of a trustworthy performance – pervades all our procedures. No matter how intrusive investigative procedures can be, procedures should always be state-of-the-art whenever rights of defence are at stake. The NMa has strongly developed its portfolio of digital research techniques. It is necessary to practise and use these specialist skills during dawn raids. On the other hand, the NMa has always to consider the interests of the firm under scrutiny. This creates an area of tension. Over time, a research method was “invented” – and authorised by case law – which awarded both parties their due.
- (17) Also, I would like to mention consumer-protection. A fine example is the Office of Energy Regulation (DTe). This regulatory body, housed under the NMa, strongly focuses on consumer protection. By exerting pressure, by arguing convincingly and by undertaking action (as instigated by the NMa at all times), the Office of Energy Regulation has proved successful on the issue of consumer protection. In 2006 the energy business society accepted binding agreements on transparency of supply conditions, on a further tightening of complaint processing procedures and on the prohibition on canvassing or door-to-door-selling. It is vital that these agreements contribute to consumer trust, if sound competitive relations are truly to evolve.
- (18) I would also like to mention the trust invested by the NMa in firms that are of “good intent”. This may involve a cooperative attitude towards drafting compliance programmes or – in a more general sense – towards NMa-guidelines setting out the “do’s-and-don’ts” when it comes to cooperation between firms. Compliance programmes are particularly relevant to sectors in which NMa-enforcement-policy has been successful (construction-industry and insurance-sector). Following NMa

intervention, companies are willing to impose self-regulation. In doing so, they hope to ensure an enduring compliance with the Competition Act. It is up to the NMa to convince the companies involved that a system of checks-and-balances is most conducive to maintaining compliance. This is also helped along by requiring the obligatory notification of Boards of Directors whenever consultants or accountants establish infringements of competition law.

(19) Considering the element of “trust” in NMa enforcement practices, I cannot leave untouched our so-called ‘mix of instruments’. This involves settling competition infringements by alternative means. In other words: to refrain from imposing a tough fine. However, we don’t want to take a gamble on the trust invested in the NMa by society and politics. Not by any manner or means! Therefore, in order to retain that trust, we do not consider the employment of alternative enforcement instruments unless five strict criteria are met:

- a. there is an immediate termination of the infringement;
- b. alternative enforcement yields a consumer profit;
- c. alternative enforcement does not harm third-party-interests;
- d. a structural solution is to be preferred above a change of behaviour;
- e. the infringement does not concern a hard-core-cartel.

(20) Now I can hear you think: isn’t it just a bit naive to employ the concept of “trust” and give it such a prominent position in the relation to and the interaction with firms, whilst knowing that potentially calculating firms are out there?

(21) Here, I would like to emphasise the following. The focus on the concept of “trust” is not in any way new. Francis Fukuyama related social virtues to the creation of prosperity in his book entitled “Trust”, published in 1995. He distinguishes “high trust societies” (such as the United States, Germany and Japan) from “low trust societies” (such as Italy, France, Korea and Taiwan). This distinction is important with a view to future economic development. “Trust” is not the only factor to be taken into account when assessing potential economic growth. Nevertheless, the so-called network organisation will ultimately win the day. This will benefit “high trust societies”, as their very nature puts them at an advantage. Of course, “trust” should never give way to naïvity. A society that is guided by “high trust” and wishes its enforcement and regulatory bodies to operate likewise, should not slip into a state that holds no suspicion against its citizens whatsoever. In other words, a state that is wholly unfamiliar with law enforcement. Suspicions, however, should always be

of a reasonable nature. In terms of law and case law: a reasonable suspicion of infringement of the law, ie the Competition Act.

- (22) In case of a justified and specific mistrust, or – in legal terms – whenever a reasonable suspicion of infringement occurs, it is important for a competition authority to find substantial evidence. We need to get the facts right. In competition enforcement generally this proves extremely difficult. As compared to criminal-law-cases, investigations relating to competition cases prove more complex. This is due to the often hidden nature of the offences.
- (23) In order to help find the required data necessary to upholding a case, the NMA has started a project on economic detection. The NMA's Chief Economist, also prominent in today's workshop, heads a programme of systematic research into relevant developments within sectors of the Dutch economy. Research targets aim at identifying and analysing specific competitive risks. In doing so, we cooperate with fellow competition authorities abroad. Research staff at various Dutch universities, including – of course – ACLE, are also involved. I hope and expect this cooperation to prove fruitful and intense. The latter will also depend on the current debate about our financial means, I'm afraid.
- (24) Whatever the importance of economic detection, finding the data necessary to establishing a reasonable suspicion of infringement is also dependent on tip-offs and crime reports, and – most importantly – leniency-applications. Past practices in competition enforcement, here and abroad, indisputably show one thing. Fine immunity or fine reduction as a possible reward for voluntarily admitting to cartel participation acts are a superb incentive to terminating unlawful practices. It is striking that this instrument (submitting an application and then claiming fine-immunity or a fine-reduction) is also based on trust in an important way. It involves “trusting” the fact that cooperating with a competition authority will indeed justify a fine-reduction in return, according to the conditions set out in writing. In order to maximise the trust invested in this “quid-pro-quo”-relationship and with a view to legal security, the NMA has outlined its leniency policy in a Leniency Notice.
- (25) As many of you will know, the NMA made ample use of policy options provided by its leniency regime, while handling a large number of cases in the construction industry. In order to process many hundreds of leniency applications, the NMA was forced to implement its leniency policy with a fair degree of flexibility. Last year's evaluation tells us that

this approach may perhaps have been too flexible. It is for this reason that we have decided to go ‘back to basics’ and give up on playing “Mr Nice Guy”. This intention was announced in media interviews, speeches and press releases.

(26)The extent of possible implications in terms of ‘game-theory’, flowing from this tightening of policy and subsequent publicity on the matter, would pose an interesting research question. The fact remains that we received 11 serious leniency applications in 2006, pertaining to 9 different cartels.

(27)At any rate, this evaluation of our leniency approach highlighted the conditions that are vital to leniency’s success. These need to be taken into account in any debate on the interaction between a competition authority and calculating firms.

(28)Leniency is successful...:

- a. whenever there is a prospect of rigid sanctioning, which may act as a deterrence towards the firms involved (special case prevention) and other firms (general prevention). However, three criteria need to be met: (a) fining guidelines shall be at hand, outlining the fine level in relation to the turnover produced by a cartel, (b) the authority under consideration shall have already imposed similar fines in the past (c) the fining system shall be upheld by court rulings. Though NMA fines were not all upheld as far as the level of the fines was concerned, I may safely say that the NMA generally meets these three conditions.
- b. whenever the risk of detection is perceived to be significant and, as a result, the risk of being caught is substantial. Whoever perceives himself to be under threat will more readily decide on turning himself in. In order to increase the perceived chance of being caught, the NMA has from the start focused on refining its investigation techniques and has recently initiated a project on economic detection, as said before.
- c. whenever a fair treatment of whistleblowers is guaranteed. Since my appointment as Chairman, I have argued in favour of a whistleblower-scheme to be introduced. If whistleblowers are to some extent protected, cartel participants may feel less confident about their business: trust will give way to distrust. Unfortunately, the political decision-making-process concluded otherwise.
- d. and whenever a fair treatment of leniency applicants may be realised. The NMA would like to contribute by introducing a

marker system as set out in the ECN Leniency Notice. As a result, the party that first applies for leniency in a specific case will be awarded a marker, as will the second and third party to apply etc. What is important here, is that the party which arrives earlier in time is given the opportunity to supplement the formal application, according to strict conditions set out by our Leniency Officer with the NMa.

(29) Whereas leniency is an important factor in the interaction between competition authorities and firms under scrutiny, it is now also apparent from practices in France and the Netherlands that a policy of less rigid fining to be imposed on firms that cooperate more fully than is required by law also fundamentally affects a firm's strategy. In such cases, we speak of "direct settlements". EU Commissioner Kroes commented upon these and similar experiences in a speech delivered at last week's IBA-conference in Brussels by saying:

- a. In certain cases we should be able to reach an agreement with the parties on the scope and duration of the infringement ..... Cooperation and voluntary assistance by the party (those parties) would justify a rebate in the amount of the fine. This could come on top of the leniency rebate, although we need to think more about the exact modalities.

(30) As to strategic behaviour among firms, I would like to conclude by briefly remarking on the issue of fining. The looming threat of substantial fines in conjunction with a low risk of being caught yields hardly any effect. Incentives to compliance, at any rate, are hardly there. Furthermore, severe fines may lead to undesired additional effects: (a) creation of a situation of unrest in the sector, which is especially important whenever a sector as a whole is being targeted (b) company instability; I should mention here that in the Netherlands the Explanatory Memorandum to the new Competition Act sets out that fines should not result in a firm going bankrupt (c) continual legal opposition, in which (d) a firm's conviction of being right takes root, thus precluding a change of behaviour.

(31) It is therefore important under all circumstances to find a balancing point between enforcement and acting on the basis of trust. This renders the work of a competition authority into an "art" rather than a "craft" (see Dutch National Audit Office, citing Mr P. Kalbfleisch). This is the essential backcloth to the NMa's assessment of its relation to and interaction with a strategic firm. Still, as a learning organisation, the



NMa needs to be in touch with scientific developments that may help sharpen its outlook. We know how legal experts consider the issue of antitrust, but it remains to be seen how economists think about trust. I would like this dimension to be part of today's discussion. After all, precisely this dimension was added to the new Dutch government's coalition agreement. It is a practical dimension to reckon with.

(32)I do hope today's exchange of ideas will be full of inspiration. I have full trust that "trust" will be an issue of some importance to reflect upon today.

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