

Strategic Firm-Authority Interaction in Antitrust, Merger Control and Regulation

Friday March 16, 2007

Universiteit van Amsterdam

Faculty of Law (FdR)

Oudemanhuispoort 4

Amsterdam, The Netherlands



UNIVERSITEIT VAN AMSTERDAM
Amsterdam Center for Law & Economics

Strategic Firm-Authority Interaction

The stakes in competition policy are high and the parties involved are sophisticated players. Effective competition policy requires both good law-making and vigilant enforcement. Decisions are often complex and heavily disputed. There is room for errors of both Type I and Type II. Firms react strategically to the legislative process, the avenues through which competition laws are enforced, and the ways of the competition authorities. Parties with intentions to merge, for example, will seek legal and economic advice on how to increase the likelihood of clearance and draft their notification accordingly. Rivals, or companies unwillingly subject to hostile takeover, may try to influence merger decisions, lodging complaints and lobbying their cases. Private parties might try and abuse the competition laws to hassle their competitors. They may dispute contracts as prejudiced by an antitrust infringement, or try to elicit costly antitrust investigations. Initiating frivolous antitrust or illegal state aid claims may encourage market exit or extort antitrust damage settlements. Hard core cartels are involved in a game of hide and seek with the enforcement agencies. Ever more advanced detection methods are met by clever ways to fly under the radar. Likewise, monopolization or abuse of dominance can be disguised as good competition according to innovative business models. And regulated industries may lobby for favorable rules and treatment.

Competition authorities and regulatory agencies need to be aware of these strategic dimensions of their oversight role. They must protect the competition laws and regulations from being abused by setting the right priorities in enforcement. Law enforcement, however, is a game of asymmetric information and application of unequal resources. Authorities with a reputation for being decisive and just can credibly commit to targeted and efficient interventions. Economic theory and legal studies each provide insight into the political economy of competition law enforcement.

The Competition & Regulation group of the Amsterdam Center for Law & Economics (ACLE) hosts this full-day event to discuss aspects of the strategic interaction between firms, competition authorities and regulators in antitrust, merger control and regulation. A program with keynote speeches by leading scholars, alternated with (parallel) contributed paper sessions and a round-table discussion, offers a platform for discussion. It allows (young) scholars to present research in progress and test developing ideas.

The workshop brings together academics, competition officials, legal counsel and economic consultancy working in the area of competition law and economics.

Workshop Ethics and Timing

There are two times five parallel sessions this year, and they all have interesting papers. Therefore, 'session-hopping' is fine, provided it is done non-disruptively, i.e., quietly and respectfully. It is important – in general and to facilitate hopping – that each presenter keeps to his or her allotted time. Presentations of 20 minutes per paper should work, leaving 5 minutes for questions and discussion after each presentation. Chairs (see program) are asked to keep to this 'roughly 25 minutes' per paper schedule.

Workshop Program – Structure

- 08.30 – 09.00 Registration (with coffee)
(Central Hall, Faculty of Law)
- 09.00 – 09.10 Welcome address by Maarten Pieter Schinkel (ACLE)
(Lecture theatre D1.09)
- 09.10 – 09.30 Opening speech by Pieter Kalbfleisch (Netherlands Competition Authority)
(Lecture theatre D1.09)
- 09.30 – 10.15 R. Preston McAfee (California Institute of Technology)
“Public and Private Antitrust Enforcement: A Strategic Analysis”
(Lecture theatre D1.09)

10.15 – 10.45 *Coffee & tea and pastries (Central Hall, Faculty of Law)*

10.45 – 12.30 Parallel Sessions I

| | | | | |
|-----------------------|-----------------------|-----------------|----------|-------------------|
| Enforcement Standards | Case Studies I: Firms | Merger Remedies | Leniency | Sector Regulation |
| C0.17 | C1.17 | C2.17 | C3.17 | C0.23 |

12.30 – 14.00 *Lunch at ‘Het Atrium’*

14.00 – 15.45 Parallel Sessions II

| | | | | |
|----------------------------|-----------------------|-------------------|----------------------------|-----------------------|
| Assessments and Compliance | Case Studies II: NCAs | Antitrust Effects | Public-Private Interaction | Regulatory Assessment |
| C0.17 | C1.17 | C2.17 | C3.17 | C0.23 |

15.45 – 16.15 *Coffee & tea and pastries (Central Hall, Faculty of Law)*

- 16.15 – 17.00 Stephen Calkins (Wayne State University Law School)
“Private Interests and Public Antitrust Enforcement”
(Lecture theatre D1.09)
- 17.00 – 18.30 Round-table discussion with R. Preston McAfee, Stephen Calkins, Silke Obst (European Commission) and Mark D. Powell (White & Case)
Chair: Maarten Pieter Schinkel
(Lecture theatre D1.09)

18.30 *Drinks and dinner buffet at ‘In de Waag’ (Nieuwmarkt 4)*

Workshop Program - Parallel Sessions I¹

A1. Enforcement Standards (10.45-12.30, room C0.17)

Chair: Oliver Budzinski

An Renckens (University of Antwerp), Decision-making in Merger Control: Communication between Merging Parties and the Competition Authority

Kai Hüschelrath (Centre for European Economic Research, ZEW), On The Importance Of Speed In Antitrust Enforcement

Gisela Aigner, **Oliver Budzinski** and Arndt Christiansen (Phillips-University of Marburg), The Analysis of Coordinated Effects in EU Merger Control: Where Do We Stand after *Sony/BMG* and *Impala*?

B1. Case Studies I: Firms (10.45-12.30, room C1.17)

Chair: Evan Schouten

Cecil Duncan MacRae and Elizabeth Chase MacRae (Singapore Management University), Individual Exemptions and the Strategic Threat of Exit: The Case of Airline Joint Services Agreements

Igor Sloev (University of Madrid, Carlos III), Market-Share Discounts and Incentives in a Vertically Related Industry

Christian Montet (University of French Polynesia and LAMETA, Montpellier I), Protecting Antitrust Agencies from Special Interest Influences: Lessons from the French Case

Daniel Jonas and **Evan Schouten** (Charles River Associates International), Competition Down Under: *Seven Network Limited & Anor v News Limited & Ors*

C1. Merger Remedies (10.45-12.30, room C2.17)

Chair: Andreea Cosnita

Bruce Lyons and **Andrei Medvedev** (University of East Anglia), Bargaining Over Remedies in Merger Regulation

Christian Steiner and Jürgen Weigand (WHU, Otto Beisheim School of Management), How Structural Merger Remedies Should be Implemented

Arnaud Féral (Université de Cergy-Pontoise, THEMA), Merger Control With Transfers from the Capital Gains Tax, and Asset Divestments

Andreea Cosnita (Université de Paris I Panthéon, Sorbonne) and Jean-Phillipe Tropeano (Université de Grenoble, Pierre Mendès), Do Remedies Affect the Efficiency Defense? An Optimal Merger Control Analysis

D1. Leniency (10.45-12.30, room C3.17)

Chair: Adriaan Soetevent

Daniel Leliefeld (Netherlands Competition Authority) and **Evgenia Motchenkova** (Free University Amsterdam), To Protect in order to Serve: Adverse Effect of Leniency Programs in View of Industry Asymmetry

Iwan Bos (Universiteit van Amsterdam), Leniency and Cartel Size: A Note on how Self-reporting Nurtures Collusion in Concentrated Markets

Marie Goppelsröder (Universiteit van Amsterdam), Corporate Leniency Programs in the Cartel Lifecycle: "Cleaning out the Closet"

Jeroen Hinloopen and **Adriaan Soetevent** (Universiteit van Amsterdam), Trust And Recidivism: The Partial Success of Corporate Leniency Programs in the Laboratory

E1. Sector Regulation (10.45-12.30, room C0.23)

Chair: Bertrand Villeneuve

Bert Willems (Tilburg University), Market Power Mitigation By Contracts

Pedro Pereira (Autoridade da Concorrência) and Tiago Ribeiro (Indera), The Impact on Broadband Access to the Internet of the Dual Ownership of Telephone and Cable Networks

Bertrand Villeneuve (CREST, Université de Tours) and Yanhua Zhang (Université de Toulouse), Re-issuing Cards: Regulation and Competition in a Capacity Accumulation Game

¹ The names in bold type are the presenting authors.

Workshop Program - Parallel Sessions II

A2. Assessments and Compliance (14.00-15.45, room C0.17)

Chair: Giancarlo Spagnolo

Adriaan Denkers (FIOD-ECD Netherlands Tax Authority), Enhancing Compliance

Marco Lankhorst (Universiteit van Amsterdam), Improving Accuracy in Effects-Based Analysis: An Incentive-Oriented Approach

Paolo Buccirossi (Lear), **Giancarlo Spagnolo** (Stockholm School of Economics) and Cristiana Vitale (Lear), The Cost of Inappropriate Interventions/Non-interventions under Article 82

B2. Case Studies II: NCA's (14.00-15.45, room C1.17)

Chair: Jarig van Sinderen

Paul Gorecki (Irish Competition Authority), Private vs. Public Interest: The Strategic Use of Competition Law in Ireland by Private Interests

Svetlana Avdashева (Higher School of Economics, Moscow) and Andrei Shastitko (Bureau of Economic Analysis), Adoption of the New Law On Protection of Competition in Russia: Can we Explain Changes and Amendment by Strategic Interaction Logic

David Stallibrass and Mario Mariniello (Office of Fair Trading), Predictability and Impact: An Event Study Analysis of the OFT's Investigations under the 1998 Competition Act

Ron Kemp and **Jarig van Sinderen** (Netherlands Competition Authority), Dimensions of Strategic Behavior to the Competition Law: Some Dutch Experiences

C2. Antitrust Effects (14.00-15.45, room C2.17)

Chair: Theon van Dijk

Emilie Dargaud (Université Lumière Lyon 2), Mergers and Collusion with Asymmetric Capacities

Jesko Herre and Achim Wambach (University of Cologne), The Impact of Antitrust Policy on Collusion with Imperfect Monitoring

Sander Onderstal (Universiteit van Amsterdam), Fighting Collusion in Auctions

Jan Bouckaert (University of Antwerp), Hans Degryse (University of Tilburg) and **Theon van Dijk** (University of Antwerp), Banning Price Discrimination by Dominant Firms

D2. Public-Private Interaction (14.00-15.45, room C3.17)

Chair: Morten Hviid

Sylvain Bourjade (Toulouse Business School), Patrick Rey and Paul Seabright (Université de Toulouse I, IDEI), Private Antitrust Enforcement

Ioannis Lianos (University College London) and **Jun Zhou** (Tilburg University), Optimal Tests for Strategic Antitrust Sham Litigation

Andreas Reindl (Fordham University), Plea Bargaining In The Shadow of 1 1/2 Trials: Settlement Negotiations in Cartel Proceedings in Light of Follow-On Private Litigation

Michael Harker and **Morten Hviid** (University of East Anglia), Competition Law Enforcement: The "Free-Riding" Plaintiff and Incentives for the Revelation of Private Information

E2. Regulatory Assessment (14.00-15.45, room C0.23)

Chair: Vivek Ghosal

Vivek Ghosal (Georgia Institute of Technology), Competition Assessments and Regulatory Reform

Sean F. Ennis (OECD), Turning up the Volume: Hearing Aid Regulation in the U.S.

Mario Pagliero (University of Turin), The Impact of Potential Labor Supply on Licensing Exam Difficulty in the US Market for Lawyers

Michal S. Gal and **Inbal Faibish** (University of Haifa), Six Principles for Limiting Government-Facilitated Restraints on Competition

Key-note Speakers

Stephen Calkins is Professor of Law and Director of Graduate Studies at the Wayne State University Law School in Detroit. He holds degrees from Yale (B.A.) and Harvard (J.D.). Professor Calkins is widely published in the area of antitrust, consumer, corporate and tort law. He publishes in leading academic and specialty journals and is the author of several books, including *Antitrust Law and Economics in a Nutshell* (with Ernest Gellhorn and William Kovacic). During 1995-97, Professor Calkins served as General Counsel to the Federal Trade Commission. He consults with federal, state, and foreign governmental agencies, and has testified before Congress and federal and state agencies. Professor Calkin is senior fellow of the American Antitrust Institute and served on the councils of various sections for the American Bar Association.

Pieter Kalbfleisch has been Director General of the Netherlands Competition Authority (NMa) since September 2003. He obtained his law degree from the Vrije Universiteit in Amsterdam in 1972. Among the many positions in which he served prior to heading the NMa, Mr. Kalbfleisch was attorney-at-law in Arnhem, Deputy Presiding Judge, and later Acting Presiding Judge of the Court of The Hague. Mr Kalbfleisch taught in the Dutch Bar Association. He has published on matters relating to family, juvenile, criminal and competition law.

R. Preston McAfee received his undergraduate degree in economics from the University of Florida, and master of science in mathematics, and a Ph.D in economics from Purdue University. He is the J. Stanley Johnson Professor of Business, Economics & Management, and also executive officer for the social sciences, at Caltech. The author of many academic papers on auctions, Professor McAfee was one of the designers of the Federal Communication Commission's first auction of radio spectrum rights for cellular phones, and over \$20 billion has been raised with this auction. He served as an economic expert in a variety of antitrust cases, including advising the Exxon-Mobil, BP-Arco, Lockheed Martin-Northrop Grumman, and Peoplesoft-Oracle. Professor McAfee also testified in *U.S. versus Rambus*, and has testified before several United States Senate committees on antitrust enforcement and gasoline pricing.

Silke Obst is an official at the European Commission, in the antitrust policy and scrutiny unit of DG Competition. Prior to her career in the Commission, she worked as a managing associate in the Brussels and Paris offices of Linklaters, where she specialized in European, German and French competition law, merger control and Franco-German corporate law, with a special focus on the energy, telecommunications and Internet industries. Silke Obst is a member of the Cologne bar and holds a diploma in Public Administration from the Ecole Nationale d'Administration (ENA) in Paris/France. She is a regular lecturer at the Centre for European Integration Studies (Zentrum für Europäische Integrationsforschung) in Bonn/Germany.

Mark D. Powell is a partner in White & Case LLP in Brussels. He holds an LL.B., University of Lancaster, is Solicitor of England and Wales since 1989, and was admitted to the Brussels Bar in 1998. Mr. Powell advises on all aspects of EC competition law. His practice focuses particularly on the interface between competition law and sector-specific regulatory requirements in areas such as energy, telecommunications, transport, pharmaceuticals and the media. Mr. Powell also handles the regulatory clearance of complex mergers and acquisitions with a European dimension. He has advised a number of clients involved in cartel investigations in e.g., the district heating pipe, nucleotides and plumbing supplies sectors. Mr Powell handled aspects of the defenses of Microsoft and Sony (PlayStation) against Commission allegations of anti-competitive behavior. His State aid practice focuses on advice to clients in new and candidate EU Member States.

Workshop Venue

The workshop is held at the Faculty of Law of the Universiteit van Amsterdam, Oudemanhuispoort 4 in Amsterdam. The main place of assembly – for refreshments in particular – is the top plateau in the central hall behind the main entrance of this old faculty building. The plateau is next to lecture theatre D1.09, where all plenary meetings will take place. The parallel sessions are all in rooms in building C, on four different floors. The short walk is sign posted.

Please note that the Faculty of Law is a public building and items left unattended are not secure. Please let our staff know if you want to lock away coats or bags. We cannot take responsibility for lost items.

Registration

The registration desk in the central hall of the Faculty of Law will be occupied during the entire day. ACLE staff is happy to assist you with any inquiries concerning the conference, your stay in Amsterdam or onward travels.

NOvA

Dutch participants can receive a certificate with 5 permanent education points from the NOvA for participating in this workshop. Those interested in receiving these NOvA points have to make this known at the registration desk.

Internet Access

A number of terminals with internet access are open for public use in the central hall and at the registration desk. There are no printing facilities.

Lunch

Lunch is served at 12.30 hours in the university restaurant 'Het Atrium', Oudezijds Achterburgwal 237. It is a short (2 minutes) walk from the conference venue.

Drinks and Diner Buffet

After closing of the program at approximately 18.30 hours, you are invited for drinks and a buffet diner at restaurant 'In de Waag' at Nieuwmarkt 4. This facility is a 5 minutes walk from the conference venue. Leaving the Faculty of Law, turn left and out of the Oudemanhuispoort, turn left again and continue along the canal. 'In de Waag' is the medieval building in the middle of the square (De Nieuwmarkt) you reach first. If you are accompanied by your partner or spouse, he or she is welcome to join.

Leaving Amsterdam

Schiphol airport is best reached by regular train service. The 15 minutes train ride leaves every 10 to 15 minutes from Amsterdam Central Station, which is a 10 minutes taxi ride from the conference venue (approximately euro 10). A taxi from the conference venue to Schiphol airport would take about 25 minutes (depending on traffic, reserve 45 minutes during rush hour) and cost approximately euro 40.

Conference Organization

The organizing committee consists of: Iwan Bos, Kati Cseres, Jakob Rüggeberg, Francesco Russo, Maarten Pieter Schinkel (chair), Jeroen van de Ven, Floris Vogelaar and Irene Wameling.

The Amsterdam Center for Law and Economics

The Amsterdam Center for Law & Economics (ACLE) is a joint initiative of the economics and law faculties of the Universiteit van Amsterdam. The objective of the ACLE is to promote high-quality academic research in fields at the interface of law and economics. The ACLE combines the research expertise of some twenty scholars in both disciplines. The Center's main focus areas are: Competition & Regulation, Corporate Governance & Law, and Foundations of Law & Economics. In these three areas, the ACLE contributes through fundamental research, academic teaching, independent advice and commentary on the public debate.

The ACLE C&R Meetings

The Competition & Regulation meetings of the ACLE are a series of annual workshops that focus on topics in competition law enforcement. Around a program of keynote speakers, international scholars present submitted academic papers in parallel sessions. The leading idea is to inform European competition policy on the basis of the considerably longer US antitrust tradition. The aim is to attract roughly 150 specialized participants from academia, antitrust agencies, regulatory bodies, and law and consulting firms active in the area of competition law and economics to create the optimal conditions for a high level exchange of views.

The first C&R Meeting, in February 2005, titled *Remedies and Sanctions in Competition Policy: Economic and Legal Implications of the Tendency to Criminalize Antitrust Enforcement in the EU Member States*, investigated the trend to criminalize antitrust law in Europe. Keynote speakers included Claus-Dieter Ehlermann, William Kovacic, Eleanor Fox, Giancarlo Spagnolo, Wouter Wills and Bruce Lyons. In total 27 papers were presented in eight parallel sessions. The conference volume, including the best efforts of this opening event of the ACLE, was published by Edward Elgar in 2006.

The second C&R Meeting, in March 2006 discussed *Forensic Economics in Competition Law Enforcement*. Keynote speakers included Franklin Fisher, Andrew I. Gavil and John Connor. In total 29 papers, presented in eight parallel sessions, covered a wide variety of scholarly contributions from a wide array of backgrounds. A special issue of the *Journal of Competition Law and Economics* on the topic is forthcoming in 2007.

For more information, see our website: www.acle.nl under 'Events'.

ACLE Office

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Financial support from the following organizations for this year's event is gratefully acknowledged.

ALLEN & OVERY

Stibbe



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