



UNIVERSITEIT VAN AMSTERDAM
Amsterdam Center for Law & Economics

CALL FOR PAPERS

The Amsterdam Center for Law & Economics (ACLE) organizes its 9th annual Competition & Regulation Meeting on the specialty topic:

The Public Interest-Defense in Cartel Offenses

Thursday 12 December 2013
University of Amsterdam
Amsterdam, The Netherlands

Keynote Speakers

Erik Kloosterhuis (ACM)
Giorgio Monti (EUI Florence)
Gareth Myles (University of Exeter)
Luc Peepkorn (European Commission)

Introduction to the Topic

Competition authorities around the world struggle with questions regarding the weighing of other public interests in their decisions than just competition. The recently reformed Dutch competition authority ACM has published a position paper for the integration of the public interest argument of sustainability in its cartel cases – following a guideline to this effect by the Ministry of Economic Affairs.¹ The authority states to be receptive to cartels arguing the collusive production of public interests in defense of cartel overcharges. The idea is that certain public interests – such as respecting farm animal rights – are not necessarily served by competition, so that, when neglected by government, private coordination may be needed to advance them by making agreements regarding the selling and quality of certain products. Guidance is offered on how the ACM will treat sustainability initiatives under the cartel prohibition if “a negative external effect is being eliminated in a way that benefits consumers, now and in the future.”

Illustrative in this case is the shrimp cartel, in which Dutch shrimp fishers argued as a justification for colluding the need to coordinate new seabed-friendly shrimp fishing techniques. Another is the so-called exploding chicken concern; poultry overfed in appalling living conditions, which a cartel agreement is believed could better. Moreover, the trade-off was just seminally made in the assessment of the closure of

¹ The Ministry’s guideline is available in Dutch at: <http://www.rijksoverheid.nl/bestanden/documenten-en-publicaties/publicaties/2013/07/11/besluit/besluit.pdf>. The position paper is available also in English at: <https://www.acm.nl/en/download/publication/?id=11733>.

five coal power plants in The Netherlands, which was programmed as part of a national societal agreement to move towards cleaner energy. The ACM concluded that the agreement related to the closure of the coal-fired plants was in violation of the cartel prohibition. The agreement would raise electricity prices in the Netherlands and would not reduce CO2 emissions, as claimed by the producers, as the redundant emission rights would be sold on the open market and would therefore only be relocated.²

Should Competition Authorities weigh Non-competition Interests?

Whether and the extent to which national competition authorities (NCAs) can take non-competition interests into account is controversial. The European Commission takes the view that NCAs should focus on competition arguments when applying competition law. However, distinguished legal scholars have argued that the approach of the Commission is inconsistent with the EU Treaties and with case-law of the European courts. According to some, the Treaty on the Functioning of the European Union underscores the duty of the European Commission and the NCAs to consider non-competition interests in applying European competition law. Furthermore, the NCAs are urged to co-operate with each other and the Commission within the framework of the European Competition Network (ECN) to ensure consistent application of European competition law in all Member States. However, the practices of the national supervisors with regard to non-competition interests do not find their basis in a consistent policy.

Three Conditions

So the ACM seems to have gone ahead of the European Commission and other NCAs in the weighing of sustainability arguments when applying the cartel prohibition.

The advance of public interests by collusion may be considered by the ACM under three main conditions: the public interest gains claimed to be generated should be (1) verifiable – that is, there must be proof that the agreement in practice achieved the public interest concerned; (2) cartel-specific – that is, it must have been necessary to collude to produce the public interest gains; and (3) consumers of the cartelized product should have gotten their fair-share of the gains – so that they are compensated. If so, even hard core cartels that covered the entire relevant market and raised prices could be excused, once discovered. There is no ex ante notification requirement, nor the possibility for issuing a comfort letter for comfort. Firms are expected to determine whether a public interest-defense is likely to be successful through self-assessment, though the ACM may provide informal guidance if requested by the undertakings concerned.

Similar to Efficiency-defense

The public interest-defense resembles the efficiency-defense available in 101 and 102 cases. In practical terms, the three conditions stated by the ACM maybe most closely resemble the trade-off in an efficiency-defense in merger control – albeit that the efficiency-defense is made ex ante and the public-interest defense ex post. If a proposed merger generates verifiable merger-specific efficiencies that compensate the anticompetitive effects of the merger, their price decreasing effect can be weighed against the price increasing effect of the reduction of competition. In fact, cast this

² See <https://www.acm.nl/en/publications/publication/12046/ACM-deal-over-closing-down-coal-power-plants-harms-consumers/>.

way, the public-interest defense in cartel cases could be feasible, both from a (European) legal perspective and from the point of view of developing the economics to implement the public-interest defense in practice.

An issue with the efficiency-defense is that parties readily claim overly rosy efficiency gains that are hard to verify. The implementation of the efficiency-defense therefore inspired the use of quantification methods such as merger simulation analysis or the Upward-Pricing-Pressure (UPP) measure, to weight the efficiency pros against the anticompetitive cons of a merger. These methods constrained frivolous efficiency claims and allowed real ones to be heard. The public interest-defense in cartel cases will likely also be enthusiastically mounted. Found-out cartels will claim to have generated public gains by their illegal actions, now that those can justify them. Without a proper structure to assess ex post whether public-interest gains were true, cartel-specific and passed-on, it will be hard for competition authorities to discard false claims and only accept the ones with true merit.

Conference Questions

This year's ACLE Competition & Regulation meeting focuses on the question: Whether and to what extent should public interests be weighed in the cartel prohibition? When is a public-interest defense against the cartel prohibition justified? Sub-questions are: Is this Dutch initiative compatible with EU competition law? Do other competition authorities, or the ECN, deal with these issues, and if so, how? What is meant by "public interests"? How to know those of future generations? How is any gain in public interests weighted against the anticompetitive effects of the cartel? What are legal and economic principles for assessing public interest? How to assess whether a restrictive agreement was indeed the designated form to advance the public interest? Is the national competition authority the designated institution to weigh anti-competitive effects against public interest defenses? How do NCAs from different Member States deal with these issues? What are examples of cases in which public interests played a crucial role in justifying restrictive agreements?

To introduce the debate, we have invited four key-note speakers. Erik Kloosterhuis of the ACM, and one of the authors of the sustainability position paper, will explain the ACM's objective with this initiative. Luc Peeperkorn of the European Commission and Giorgio Monti, professor of law at the European University Institute in Florence, will hold the matter against the light of the European competition rules. Gareth Myles, professor of economics at the University of Exeter, will explain what welfare economics and public economics have to offer on valuing public interests quantitatively, both in theory and in practice.

The 9th ACLE Competition & Regulation Meeting

The objective of this C&R Meeting is to bring together renowned specialists in this specialty area in competition law and economics in conference to debate. The conference is academic, yet we also welcome practitioners with a keen interest in this year's subject, including agency officials, competition lawyers and consultants. Young scholars working on the topics are offered the opportunity to submit their work for presentation in one of the contributed paper sessions.

Call for Papers – OPEN

Academics, private practitioners and competition officials, both with a legal and an economic background, are encouraged to submit their research for inclusion in the conference program. We welcome all original research (in progress).

Submissions for inclusion in the program (full papers or abstracts) may be sent together with the author's address information to: ACLE@uva.nl

The deadline for submission is 1 November 2013. Decisions on acceptance to the program will be communicated mid November.

Organizing Committee

Maarten Pieter Schinkel (chair), Saskia Lavrijssen, Lukás Tóth and Lars van Amsterdam.

More Information

For more information, please visit the ACLE conference website: <http://PID.acle.nl>

The ACLE C&R Meetings

The ACLE Competition & Regulation meetings are a series of annual workshops that focus on topics in competition law enforcement and regulation. Around a program of key-note speakers, scholars discuss submitted academic papers in parallel sessions. The leading idea is to inform European competition policy. The aim is to attract roughly 100 specialized participants from academia, government antitrust agencies, law and consulting firms to create the optimal conditions for a high level exchange of views. A specialty topic meeting usually attracts a smaller, more specialized, audience.

For more information, see: <http://PID.acle.nl>