

**ACLE Workshop 17 March 2006, Faculty of Law, University of Amsterdam
Forensic Economics in Competition Law Enforcement**

Opening by Maarten Pieter Schinkel

Good morning everyone, and welcome to this ACLE workshop on “Forensic Economics in Competition Law Enforcement.” We are very happy that you turned up in such large numbers – roughly 130 participants – from all over the world, for today’s specialty topic.

Proud we are of our key-note speakers, US experts John Connor, Franklin Fisher and Andrew Gavil, all well as the full program of parallel sessions that we were able to put together on the basis of the many excellent submissions we received to our call for papers. Many thanks for your efforts to come to Amsterdam today, and a warm welcome to all of you.

“Forensic Economics” – I received a lot of questions the last couple of months what that would all be about.

Now, without wanting to take away from the gravity of today’s topic – on which more later – I must admit that the idea for doing a workshop on “Forensic Economics” was conceived while watching television. The Discovery Channel, to be specific, which runs a show called “Forensic Detectives.”

In each episode, a capital murder or serious fraud case is solved using top-notch scientific methods, such as DNA-profiling, body decay time-tables, and mobile phone triangulation.

The natural sciences employed to fight crime; it clearly speaks to people’s imagination.

So much so, in fact, that apart from many scholarly books on the topic, there even is a “Forensics for Dummies”.¹

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I would get this, if I were planning a murder, but that aside.

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Why restrict this use of scientific methods to the natural sciences only?

The dictionary definition of “forensics” is: – and I quote – “the application of scientific practices within the legal process.” – end quote.

¹ Lyle, D.P., *Forensics For Dummies*, Wiley Publishing, Indianapolis, 2004

Economics is a “scientific practice”. Moreover, Microeconomics – and Industrial Organization in particular – has its own category of “legal processes”: antitrust cases on violations of our competition laws.

As you all know, a very active and highly advanced practice of using academic economics in competition law enforcement exists worldwide. The specialty discipline of “Forensic Economics” advises it.

And in fact, when you think about it, “forensics” applied in antitrust is considerably more interesting than in your normal every-day-crime: there is so much more at stake!

Murder and assault are a difficult matter, of course, and I leave them aside. But take robbery. Consider what is presently “the world’s biggest diamond robbery” – which happened little over a year ago, on Schiphol Airport – which many of you used coming over here.² This was a heist that made the news big time. It involved a stolen airport van, and “insider”, and a cunning escape plan.

The value of the loot in this case was roughly 75 million euros.

Now, that is a lot of money – don’t get me wrong. But compared to competition law violations, it is peanuts. Using very conservative static measures, the Netherlands Competition Authority estimated last year, on the basis of the cases it had acted in alone, that the positive welfare effect of its presence had been in the order of 350 million euro.³

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The US DoJ similarly reported to have saved consumers 2.3 billion dollars in 2003, and even 6 billion in 2000. This is from the latest annual report on their website.⁴

And the larger US private antitrust damage cases settle for billions of dollars each.

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Moreover, whereas diamond robberies or bank heists are arguably a welfare neutral redistribution of money, in competition cases we are talking about real deadweight-losses. Only through artificial scarcity can one create antitrust profits, after all.

Apart from the stakes, “forensic economics” also is considerably more complex than standard crime. To begin with, in antitrust there are not necessarily any signs of break-in, no traces of arson, no “body”.

² See <http://news.bbc.co.uk/2/hi/europe/4300741.stm>

³ Netherlands Competition Authority (NMa), *Annual Report NMa and Dte*, The Hague, 20 April 2005, pp. 58-61

⁴ US Department of Justice, *2003 Performance and Accountability Report*, Washington D.C., 2004. See: <http://www.usdoj.gov/>

Whereas in a murder case, this is where the forensic detectives come in to do their work, in competition cases, even the very fact that a crime has been committed at all often has to be discovered by the authorities.

On top of that, we know that economics is a considerably more difficult science than physics is. Whereas stones, particles and stuff behave well and representative in isolation in laboratories, our subjects are to be studied “in the wild.” Moreover, people and their choices tend to change in light of our theories, once published. As a result, it is difficult to extract rock hard economic laws, similar to Newton’s laws of motion, for example. It therefore is much easier to determine the path of a bullet shot from the barrel of a gun, than, say, the effect of a conference call by a ring-leader on cartel prices.

But there are similarities too. We know from philosophy of science that all sciences share a complex relationship between theory and empirical observations. Methodology teaches that there is no observation-without-theory. But it is also essential to apply theory that is corroborated by the facts of the case.

The key is to find that theory that best explains the evidence. This is no different from physics, and exactly where economics can advise the practice of competition law enforcement. It can point out tell-tale signs of cartels, for example. Or warn for sophisticated firm behaviour that may well be aimed at obtaining or maintaining dominance in unsuspected ways.

Moreover, just like a smart killer will wear gloves when he knows that his fingerprints and DNA can be traced, a cartel can pretend to be a competitive industry. In particular, cartels can try to stay off the competition authorities’ radar screens, when they know how breaches of competition law are detected.

For this reason – although we have quite some advanced techniques presented today by the Dutch, the Italian and Swedish competition authorities, as well as by DG Competition – the authorities are clever to keep their cards close to their chests. After all, firms seeking anticompetitive profits and the competition authorities trying to prevent them from doing so, play a complex and highly strategic game of hide-and-seek.

As with many competition policy matters, the US are squarely ahead of Europe in these areas. I am therefore very happy that we have three top academics as key-note lecturers today.

Our first speaker is John Connor, Professor of Industrial Economics at Purdue University in Indiana. Professor Connor has extensively studied antitrust cases and is an expert on cartels and cartel overcharges. On the latter he has several recent papers that are very important for going cartel cases, and are much cited. Professor Connor also wrote a best-selling book, *Global Price Fixing*, on the spectacular cartel investigations in lysine, citric acids and vitamins.⁵ When I discovered that John

⁵ Connor, J.M., *Global Price Fixing: Our Customers are the Enemy*, Springer-Verlag, Berlin, 2001.

teaches a short-course on “Forensic Economics” at Purdue, I knew he would be an excellent speaker to introduce the topic today. I will give him the floor in a few minutes.

Andrew Gavil and Franklin Fisher – both of whom I will introduce more extensively later today – each have enormous experience with the use of economics in competition law proceedings – respectively from a legal and an economic perspective – that they have agreed to share some of in their contributions today.

Even though there is a large literature on Industrial Organization and competition law, the speciality discipline of “forensic economics in competition law enforcement” is relatively open. There exists, in fact, a *Journal of Forensic Economics*.⁶ Yet, its papers are on such topics as accounting fraud, and damage estimation in tort cases over lost life’s and limbs. Not antitrust.

There are a number of classic papers – many of which are on the reading list for John Connor’s course – including several seminal ones by Frank Fisher.

There also is an excellent book with case studies, published in 1999, on *The Role of Academic Economist in Litigation Support*, edited by Daniel Slottje.⁷ And the magazine *Antitrust* published a special issue on “Working with Economic Experts” in 2003.⁸

Yet, to my knowledge, there is no book that collects methods and best-practices. A kind of handbook on “Forensic Economics in Competition Law Enforcement.” With do’s and don’ts – obligations of the expert witness in the finding of truth. A manual for the scientist, called upon for public duty.

I think there is a need for such a book. Not too long ago, when I was called upon by the Netherlands Competition Authority to advise in a case, I bought this manual in a US mall bookshop.

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In the *Nolo’s Law-for-All-series*, it is the *Deposition Handbook*.⁹ As you can see an “easy-to-follow”, comprehensive resource for the “witness” – with or without a lawyer or expert knowledge – and people representing themselves.

I found it very helpful, but I do think there ought to be a more serious reference book.

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⁶ Published by the National Association of Forensic Economics (NAFE), see: <http://nafe.net>

⁷ Slottje, D.J. (ed.), *The Role of Academic Economist in Litigation Support*, Elsevier, Amsterdam, 1999.

⁸ Garza, D.A. (ed.), “From Theory to Practice: Working with Economic Experts,” *Antitrust*, Spring 2003, vol. 17, no. 2.

⁹ Bergman, P. and A.J. Moore, *Nolo’s Deposition Handbook*, second edition, Nolo, Berkeley, 2001.

I do not see why forensics in competition law enforcement should not become as big and important as it is in criminal law enforcement. There, the agencies and the courts can use independent “forensic institutions”, with laboratories and large budgets, which involve scientists to run ballistic-and-other tests to support their investigations. These specialists often testify in court to advise the judges.

This week, for example, the Netherlands Forensic Institution (NFI) established the cause of death of Slobodan Milosevic.

I think we should take our science equally seriously – in particular given what is at stake. I hope today will help towards stimulating this.

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We are very happy with the wonderful group that assembled today.

There will be great talks in the parallel sessions. You can go see advanced automated detection methods for suspicious cartel email traffic; or the latest econometric techniques to reconstruct “but for worlds” for the assessment of damages. Enforcers will talk about “forensic IT”. And there is a full afternoon session on the question what can count as economic evidence across different antitrust regimes.

You can find all the details on the middle page of your program booklet.

Ladies and gentlemen, we share that we are all in this wonderfully exciting and highly important line of work of applying economics in competition law enforcement – we are not always on the same side of the argument, but nevertheless. I am not sure if public imagination will ever be ready for a specialized “Forensic Economics” series on the Discovery Channel. But an episode of “Forensic Detectives” on the uncovering of the “Lysine Cartel”, sampling the FBI-video-tapes, would surely get high ratings. And so would, I bet, a back-to-back special on “The Microsoft Case.”

Yet, before public imagination can follow, surely we can inspire ourselves. I am confident that today will do just that.

I wish you a very fruitful workshop!