

The Public Interest-Defense in Cartel Offenses

Thursday December 12, 2013

De Industriële Groote Club

Dam Square 27

&

University of Amsterdam

Faculty of Law

Oudemanhuispoort 4

Amsterdam



UNIVERSITEIT VAN AMSTERDAM
Amsterdam Center for Law & Economics

The Public Interest-Defense in Cartel Offenses

Competition authorities around the world struggle with questions regarding the weighing of other public interests in their decisions than just competition. Examples are quality of the health care system, the environment, and living conditions of farm animals. The authorities are increasingly expected to do so. Certainly are public interests not necessarily always 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. The Dutch ACM stated to be receptive to cartels arguing the collusive production of public interests in defense of cartel overcharges. 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. Apart from the question whether this Dutch initiative is compatible with EU competition law, how in practice will any gain in public interests be weighed against the anti-competitive effects of a cartel? It is quite likely, after all, that discovered cartels will now like to mount a public interest-defense overly enthusiastically. 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 unmeritorious claims and only grant the true ones.

Conference Questions

This year's ACLE Competition & Regulation meeting focuses on the following questions. 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? Is the 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 anticompetitive 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 ACM's position paper on sustainability, 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 present their work in one of the contributed paper sessions.

Conference Venue

The program takes place at two venues in Amsterdam:

- De Industriële Groote Club, Dam 27, and
- Faculty of Law of the University of Amsterdam, Oudemanhuispoort 4.

Registration

The registration desk will be staffed in the morning by Sidonie Rademaker. She will be happy to assist you with any inquiries concerning the conference, your stay in Amsterdam or onward travels.

Conference Ethics and Timing

There are two parallel sessions and they each 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 10 minutes for questions and discussion after each presentation. Chairs (see program) are asked to keep each presentation to no more than 30 minutes.

Lunch

Lunch is served at 12.30 hours in Het Atrium, Oudezijds Achterburgwal 237 in Amsterdam. This restaurant is a short walk from the conference venues.

Drinks and Dinner Buffet

After closing the program, you are invited for drinks and a dinner buffet at De Industriële Groote Club, hall to the Groote Zaal.

Internet Access

There is a wireless connection at De Industriële Groote Club:

Network: **industrialeden**

Password: **club2012**

Internet access to the Eduroam network at the Faculty of Law can be provided only individually at the registration desk. There are no printing facilities.

Arriving and leaving Amsterdam

Schiphol airport is best reached by regular train service. The 15-minute train ride leaves every 10 to 15 minutes from Amsterdam Central Station, which is a 5-minute taxi ride from the conference venue. It is a 10 minutes walk from the Central Station to the conference venue. A taxi from the conference venue to Schiphol airport would take about 25 minutes and costs approximately euro 40.

Public Transport

You can buy train tickets from the yellow machines at the railway station. Some machines take credit cards and/or coins, some only take Dutch bank cards. For other types of public transport (bus/metro/tram) you will need an electronic transport card (“ov chip card”). These can be purchased from the machines at most metro stations or at the GVB office at Amsterdam Central Station. For more information, visit <http://en.gvb.nl/pages/home.aspx>. To plan your trip, visit: <http://9292.nl/en>.

Conference Organization

The organizing committee consists of Maarten Pieter Schinkel (chair), Saskia Lavrijssen, Lukáš Tóth and Sidonie Rademaker.

Conference Program

8.45 – 9.00 Registration and coffee

De Industriële Groote Club (Groote Zaal)

Plenary session I – chair: Saskia Lavrijssen (University of Amsterdam and ACLE)

9.00 – 9.15 Maarten Pieter Schinkel (University of Amsterdam and ACLE): *Opening*

9.15 – 9.45 Erik Kloosterhuis (Authority for Consumers & Markets): *ACM's Position Paper on Competition & Sustainability*

9.45 – 10.30 Giorgio Monti (European University Institute): *EU Competition Law and the Public Interest*

10.30 – 11.00 Coffee and tea

Faculty of Law

11.00 – 12.30 Contributed papers session I

Perspectives	Cases
Room C1.23	Room C1.17

The Atrium

12.30 – 14.00 Lunch

Faculty of Law

14.00 – 15.30 Contributed papers session II

Parallels with other fields	Weighing public interests
Room C1.23	Room C1.17

De Industriële Groote Club (Groote Zaal)

Plenary session II – chair: Maarten Pieter Schinkel

15.30 – 16.00 Coffee and tea

16:00 – 17.00 Gareth D. Myles (University of Exeter): *The Economics of Valuing Public Interests*

17.00 – 17.15 Coffee and tea

17.15 – 17.45 Luc Peepkorn (European Commission): *EU Competition Policy: Is Protecting Competition and Consumers not enough?*

17.45 – 18.15 Panel Discussion with Erik Kloosterhuis, Giorgio Monti, Gareth D. Myles and Luc Peepkorn

18.15 – Drinks and diner buffet in the Groote Zaal of De Industriële Groote Club

Workshop Program – Contributed Papers Sessions I

Perspectives – chair: Tom Ottervanger (Leiden University)

Ludger Breuer (Referendar at Oberlandesgericht)

European Competition Law in the Force Field of the Cross-Sectional Clauses

Laurens Ankersmit (Free University Amsterdam)

Anti-Competitive Conduct in the Public Interest: A Democratic Legitimacy Approach

Sonja Keske (Bundeskartellamt) and Markus Janowski (Bundeskartellamt)

Competition Policy and the Public Interest Defense – Perfect Complements or Contradiction in Terms?

Cases – chair: Paul de Bijl (Radicand Economics / WHU Otto Beisheim School of Management)

Jotte Mulder (European University Institute)

Finding the public interest and the case of the Friesian horse

Machiel Mulder (Authority for Consumers & Markets / University of Groningen)

Competition Law and Public Interests: The Dutch Agreement on Coal-Fired Power Plants (joint with Erik Kloosterhuis)

Xu Liu (University of Heidelberg)

The Public Interest – Defense in Cartel Offenses and Chinese Antimonopoly Law

Workshop Program – Contributed Papers Sessions II

Weighing public interests – chair: Eric van Damme (Tilburg University)

Nicole Rosenboom (SEO Economic Research)

How does article 101(3) TFEU case law relate to EC guidelines and the welfare perspective?

Anna Gerbrandy (University of Utrecht)

Democratic Deliberation: Design of the Competition Law Procedure to Accommodate a Balancing Between Sustainability and Competition Law

Lukáš Tóth (University of Amsterdam)

Public Goods as a Compensation in Cartel Offenses (joint with Maarten Pieter Schinkel)

Parallels with other fields – chair: Gareth Davies (VU University Amsterdam)

Julien Nowag (University of Oxford)

How to Evaluate Environmental Protection Claims in Competition Proceedings? Lesson from Free-Movement and State Aid Law

Bruce Wardhaugh (Queen's University Belfast)

Crisis Cartels: “Orderly” Downsizing and the Public Interest

David Reader (University of East Anglia)

Lessons from the Management of Public Interest Considerations in International Merger Control: A Comparative Analysis

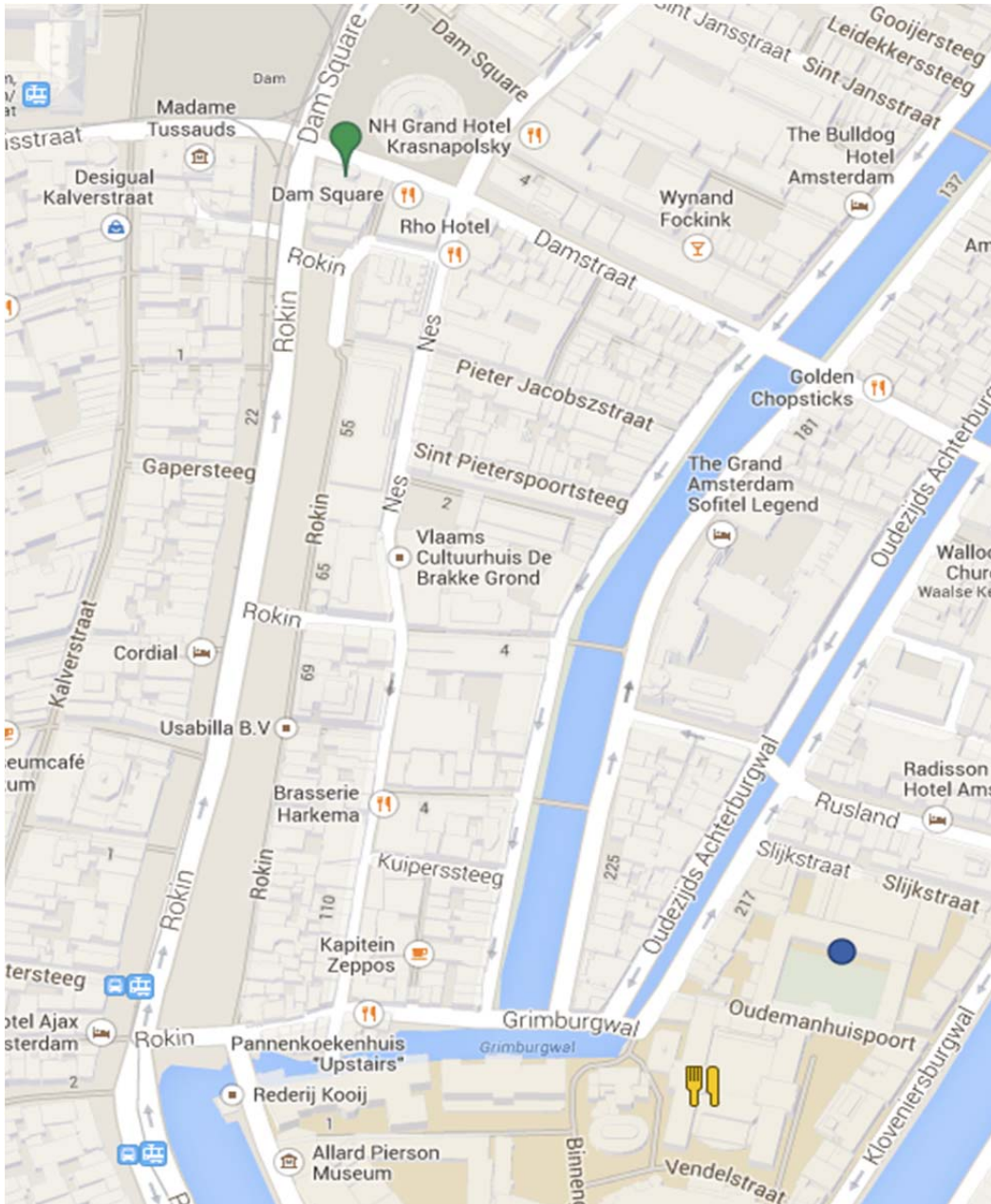
Keynote Speakers

Erik Kloosterhuis works at the Netherlands Competition Authority (now Authority Consumer and Markets, ACM) since 1998. He studied Economics at de University of Amsterdam (1974-1981), worked at the Ministry of Economic Affairs from 1982 until 1997 and as a national expert in the Merger Task Force of DG Competition in 1996. At the Ministry he was co-author of the present Dutch Competition Act (1997). At the Competition Authority he worked in several functions in de field of anti-trust and merger control. He was co-editor of *Modelling European Mergers* (Edward Elgar, 2005). He co-authored ACM's (draft) *Position Paper Competition and Sustainability* (2013). At present, he is involved in the assessment of several cases that imply environmental as well as competition issues, including the Dutch Energy Agreement.

Giorgio Monti is Professor of Competition Law at the European University Institute. He is the author of *EC Competition Law* (Cambridge, 2007) and (with Damian Chalmers and Gareth Davies) *European Union Law – Text and Materials* (3rd edition in press, 2014). He has taught competition law for nearly twenty years to graduate and undergraduate students, to judges and policy-makers. He has written commentary on most aspects of the field. He is a non-governmental advisor to the ICN, co-organizes the Annual Competition Law and Policy Workshops at the EUI, and is on the editorial committee of *Concorrenza e Mercato*. Of specific reference to the topic of this conference, he has written 'Article 81 EC and Public Policy' (2002) 39 *Common Market Law Review* 1057 where he considered the scope for non-competition factors.

Gareth D. Myles is Professor of Economics and Director of the Tax Administration Research Centre at the University of Exeter, and a Research Fellow at the Institute for Fiscal Studies. He is Managing Editor of *Fiscal Studies* and an Associate Editor of the *Journal of Public Economic Theory*. He obtained his B.A. from Warwick in 1983, his M.Sc from the London School of Economics in 1984 and his D.Phil in 1987 from Oxford. His major research interest is in public economics and his publications include *Public Economics* (1995), *Intermediate Public Economics* (2006) and numerous papers in *International Tax and Public Finance*, the *Journal of Public Economic Theory*, and the *Journal of Public Economics*. Professor Myles is an Academic Adviser to HM Treasury and HM Revenue and Customs. He has also provided economic advice to international bodies including the European Commission and the OECD.

Luc P. Peeperkorn studied economics and political science at the University of Amsterdam and worked as an assistant professor at the Erasmus University Rotterdam. In 1991 he joined the European Commission, DG Competition. He was the main author of the *Vertical Restraints Block Exemption Regulation and Vertical Restraints Guidelines* (2000). He was also the author of the *De Minimis Notice* (2001). Subsequently he co-authored the *Transfer of Technology Block Exemption Regulation* (2004). Subsequent to that he co-authored the *Discussion Paper on the Application of Article 82* (2005) and the *Guidance on the Commission's enforcement priorities in applying Article 82* (2009). More recently he was responsible for the review of the *Vertical Restraints Block Exemption Regulation and Vertical Restraints Guidelines* (2010). Currently he works on the review of the *Transfer of Technology Block Exemption Regulation* and the review of the *De Minimis Notice*.



De Industriële Groote Club
 Dam 27
 1012 JS Amsterdam



Faculty of Law
 Oudemanhuispoort 4
 1012 CN Amsterdam



Mensa Atrium Universiteit Restaurant
 Oudezijds Achterburgwal 237
 1012 DL Amsterdam
Lunch



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 University of 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-five scholars in both disciplines, ranging from full professors to PhD students. The Center's main focus areas are: Competition & Regulation, Corporate Governance & Law, and Foundations of Law & Economics. In these three areas, the ACLE seeks to advance understanding, through both research and teaching.

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 specialized participants from academia, government antitrust agencies, law and consulting firms to create the optimal conditions for a high level exchange of views.

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

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