

## Preface

In his *Wealth of Nations* (1776), Adam Smith saw three duties for the State: “protecting the society from the violence and invasion of other independent societies, [...] establishing an exact administration of justice, and [...] erecting and maintaining certain public works and certain public institutions, which it can never be for the interest of any individual, or small number of individuals, to erect and maintain”. Even if this list might seem limitative, all tasks are vast, especially the last two. Similarly, in *Economy and Society* (1922), Max Weber wrote that “the rationalization and systematization of the law in general and the increasing calculability of the functioning of the legal process in particular, constituted one of the most important conditions for the existence of economic enterprise intended to function with stability”. These illustrious scientists recognized the close link between law and economics, but over time these two disciplines have drifted apart. TILEC, through its research programme on Market Governance, brings them together, so as to contribute to finding the proper ways for the State to interact with markets and harness market forces for the greater good.

In February 2003, TILEC was officially opened with a conference on the Law and Economics of Sports. Sporting competitions bring the best out of people and provide enjoyment to spectators, but to these ends some competitive balance needs to be maintained. Economic forces may destroy the balance: a subset of teams may get to dominate and destroy the competition and the associated fun. In innovation markets, similar forces may be at work. Innovation is desired, and should be facilitated, but it also is destructive and entails risks. Again, the question is how to strike the balance: how to ensure that innovation is rewarded and at the same time competition is maintained.

From sports to innovation, the same fundamental questions of market governance pop up. TILEC aims to address this issue of societal relevance with academic rigor by combining and integrating law and economics. This issue of Tilburg Research gives an idea of our work and allows assessment of the extent to which we succeed. We hope you enjoy reading it.

*Eric van Damme and Pierre Larouche,  
Directors of TILEC*

### TILBURG RESEARCH

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### COLOPHON

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4



18



22



32

#### FEATURES

- 4 **Free markets and public interests: DANCING WITH GIANTS**  
By Frank van Empel
- 10 **FROM STATE MONOPOLY TO STATE REGULATION**  
By Karel Soudijn
- 18 **‘CURING WITHOUT KINDNESS IS NO LONGER AN OPTION’**  
By Ellie Smolenaars
- 22 **‘SUSTAINABLE SOURCES ARE THE FUTURE’**  
By Clemens van Diek
- 28 **GAMING REGULATION: PROTECTING OR PATRONIZING?**  
By Marga van Zundert
- 32 **CRASH BARRIERS FOR AGGRESSIVE CAPITAL**  
By Frank van Empel

#### COLUMNS

- 9 **DAMIEN NEVEN (EU)**  
On economics and law in competition enforcement
- 25 **ANDREW MCLAUGHLIN (Google)**  
On innovation and competition
- 39 **RUUD PETERS (Philips)**  
On competition and industrial property
- ON TILEC**
- 12 **FIVE YEARS OF TILEC**  
‘Internal collaboration is changing our view of the world’
- 31 **TILEC’S PARTNERS**
- 21, 38 **NEWS**
- TILEC RESEARCHERS**  
Throughout this issue by Meike Oosterwijk



Photo: Mischa Keijser / Hollandse Hoogte

*Free markets and public interests*

## Dancing with giants

Competition policy is like dancing the tango. It is all about improvising around a central figure. The man leads and the woman follows, making up her own moves. Each partner is constantly surprising the other. Their bodies entwine in a series of flowing movements. If you make a mistake, you just carry on. And this is exactly how European Competition Commissioner Neelie Kroes is dancing with the giants of global business. With TILEC as one of the choreographers. The big difference here: the lady is leading!

*By Frank van Empel*

Autumn 2007. In a small Dutch restaurant, European Competition Commissioner Neelie Kroes and Microsoft CEO Steve Ballmer strike a deal. The computer giant will make it easier for the developers of competing software to run it on the Windows operating system. After coffee, Neelie foots the bill for the meal. Steve stumps up € 280.5 million, his firm's fine for breaching competition rules in 2006.

This expensive evening out is the culmination of nine years of legal catch-as-catch-can. It was Sun Microsystems which started the game in 1998, when it blew the whistle on Microsoft's restrictive

practices. Ever since, Mario Monti – her predecessor – and Kroes have been on the trail like bloodhounds. In 2004 the software giant is given a first fine of € 497 million by Monti, perhaps after a similar dinner. After she takes office, Kroes has her directorate-general go through the case with a fine-tooth comb to calculate possible additional penalties. On 27 February she decides: € 899 million, the highest fine thus far for one company. “We could have gone much

**Neelie Kroes knows what she wants and she knows how to get it**

further”, she says at a press conference, to € 1.5 billion. Neelie Kroes knows what she wants and she knows how to get it. Microsoft founder Bill Gates has already discovered that, on 5 November 1996. That is the day he comes to the picturesque castle housing Nyenrode Business University, to pick up an honorary doctorate. Kroes, at the time President of the institution, greets him in the entrance hall. Gates is in high spirits, dressed for the occasion in a dinner jacket. He approaches Kroes with hand outstretched. But she just looks him up and down, then whispers something to her assistant. Gates feels that there is something wrong.

Then, with a wicked smile, Kroes drops the bombshell: “Brown shoes don’t make it, Bill.” And before the world’s richest man knows what is happening, Kroes’ chauffeur is whisking him to a nearby gents’ outfitters to buy new shoes. Black ones, of course. “Really,” Kroes can be heard muttering in horror, “brown shoes with a black jacket...”

#### A SENSE OF VISION

Since 1996, both Microsoft’s turnover and Gates’ wealth have increased many times over. And Kroes’ own star has been waxing just as fast. No longer is she a government minister in a small yet prosperous nation on the shores of the North Sea, nor even president of a prestigious business university. No, today she watches over the core principles of the free market on behalf of 27 European countries and 480 million people.

#### ‘It is not state or market, but state and market’

Kroes, Gates and Ballmer all share the same sense of vision. All three are convinced that the prosperity and well-being of Europe, the United States and the rest of the world are rooted in competitive markets. As Kroes herself put it on 7 February 2008 at a symposium in Innsbruck, “Free trade and undistorted competition are among the main drivers of economic growth.” But she also knows better than anyone that bu-

caneers like Gates, Ballmer and their friends will do all they can to turn the free market to their own advantage in the quest for ever higher profits.

One way of doing that is to deny others access to crucial technical details, which is what happened to Sun Microsystems in 1998. It needed information to enable its software for network servers to run properly with Windows PCs. Other companies were also complaining that Microsoft was unfairly trying to exclude them from the market. And that was no trivial matter: at the time, more than 90 per cent of the world’s computers used Windows.

Other tactics used by multinationals to distort markets include illegal price agreements to form cartels, abuse of power to play off suppliers and business locations against one another, and also manipulating cash flows so that they pay little or no tax on their profits.

As trade and finance have become increasingly globalized since 1970, governments have lost much of their grip over them. Competition rules are still national, bilateral or – at best – regional, and they are enforced by numerous authorities each acting in its own respective territory. In such an environment, major companies can play “divide and rule”. Their natural counterforce, the state, is too weak to meet them on equal terms. The solution, however, is not to make it stronger in relation to the

#### ‘Faced with global problems we have to design truly global solutions’

market: it is not state *or* market, but state *and* market. Or, as Kroes said in Innsbruck, “Faced with global problems we have to design truly global solutions. But unfortunately attempts to introduce an international competition order within the WTO have failed so far.” So what does this imply for Europe’s strategy for managing globalization? “Put simply,” Kroes continued, “it shows the clear and tangible benefits to be gained from fostering coherence in competition law and enforcement right around the globe.” In her view, the European model can serve as a guide. “I am of course biased,” she admitted. “I come from Europe and have a certain amount of experience with our European competition system. But personally I think that even the most objective observer would find our European approach a rather healthy model.”

Kroes is keen that other countries and trading blocs take up this model, and also wants to ensure in other ways “that our competition policy plays a greater role on the international scene”.

#### Kroes is keen that other countries and trading blocs take up this model



Neelie Kroes, European Commissioner for Competition. Photo Peter Hilz / Hollandse Hoogte

#### JURISDICTIONAL BARRIERS

In practice, as Kroes told the Innsbruck symposium, that comes down to two points. “First and foremost, we have to properly enforce our competition rules to [cover] ‘global’ companies operating ‘at home’. Second, just as multinational companies operate across national and regional boundaries, so too must competition authorities.” In the latter respect, progress is slow:

“At present, there are too many jurisdictional barriers which hamper efficient anti-trust enforcement. Take, for example, the numerous legal and practical obstacles to obtaining the necessary evidence and imposing appropriate sanctions on global cartels. Worse still is the risk that, because of different substantive laws or administrative practice, two competition authorities may issue conflicting decisions in relation to the

behaviour of a single company. So the effective enforcement of competition rules in an international environment requires that authorities in Europe cooperate with authorities outside.”

“Cooperation and dialogue,” Kroes went on to add, “are key tools to find common ground with colleagues from other jurisdictions. That is why the Commission works on a



bilateral basis with the competition authorities of the Community's major trading partners... Regrettably, at this moment we are still unable to share actionable evidence, the kind of information that is most useful for cartel investigations. The time has come to explore ways to enhance some of our bilateral agreements and to share such information among a small number of enforcers."

Kroes also claimed that she and her team are now engaged in constructive dialogue with Russia, South Korea, Chile, South Africa and the countries around the Mediterranean. Even China is within reach of the Commissioner's embrace now that it has adopted its first anti-monopoly law.

#### PROFESSOR OF DANCE

According to Professor Pierre Larouche of TILEC, co-operation ultimately produces better results than stringent controls. "Light regulation will do," he says. Beyond that, competition policy on the global scale is primarily a dance of the Titans, with Neelie Kroes as the leading lady who knows how to tango with the Microsofts of this world. "You lead them and then you let them go," is how Larouche explains her style. "Lean over, don't destroy them.

**'TILEC is the music school which explains what kind of dances you can dance'**



Charm the market. Start a debate on corporate social responsibility. See what happens. If it doesn't work out completely right, well maybe you need an intervention to tweak the market. But most of the dancing is more subtle. Like Kroes talking it over with Ballmer in a tiny Dutch restaurant."

And where is TILEC in this picture? Larouche: "We are the music school which explains what kind of dances you can dance. Sometimes, in our reports, we are the instructor. We advise Kroes and Ballmer how to dance."

#### OF COURSE I WANT A BEER

Back to Nyenrode, autumn 1996. The crème de la crème of Dutch business, academia and politics has been invited to the ceremony. Bill Gates receives his scroll, and a medal is hung around his neck. Afterwards there is a reception at the castle.

Everyone wants to shake the famous billionaire's hand. Neelie Kroes and her then husband, Bram Peper, the mayor of Rotterdam, are basking in his shadow. But his feet are hurting in his new shoes, his wrists weak from all the greetings. Gates is feeling shut. "This is a university, isn't it?", he suddenly asks to Kroes' surprise. "So where are the students?" "They're all over in the next building," she replies. "Can't we go and take a look?" "Of course – it's your party."

A few minutes later Bill, Neelie and Bram stroll into the student common room, with their whole entourage in tow. The three of them are engaged in conversation, surrounded by admirers three rows deep. A waiter weaves between the students with a tray of beer. "Give Bill Gates a beer – all that talking must be giving him a thirst." "Bill who?" "Bill Gates, the man responsible for all this." I point to the growing mass of people. "Come with me..." "Hey, Bill!" The software magnate looks surprised. "Do you want a beer?" "Yeah, of course. Thanks!" The crowd parts and I march up to Gates, Kroes and Peper with the waiter. Neelie is charm itself. She introduces me and even allows me to raise a glass with our distinguished guest. But she also knows how to make it clear that the meeting is over, in the subtlest of ways. She leads, Bill and I follow. Before I know it, I am back at the edge of the crowd.

## COLUMN

# Economics and law in competition enforcement

By Damien Neven

The reform of EU policy towards dominant firms has revived the debate on whether an effects-based ("economic") or form-based ("legal") approach should be pursued in competition enforcement. The discussion is often formulated in terms of a tension between law and economics with naturally some interrogation about which discipline will prevail.

This reflects a misunderstanding. Whether or not we should have an "economic approach" to competition enforcement is somewhat beside the point. Indeed, a form-based approach involves a judgment on the likelihood of economic effects. The real question is thus whether effects can be presumed or whether their direction and magnitude should be assessed in individual cases. And the answer to that question is one that should be informed by economic analysis.

This can be illustrated with the example of resale price maintenance. Until the recent judgment by the Supreme Court in the Leegin case, it was considered to be per se unlawful in the US. The Court found that the presumption that resale price maintenance is harmful should not longer be adhered to in light of existing economic evidence. The Court surveyed both economic theory and available evidence on resale price maintenance to justify the adoption of a rule of reason.

The scope for form based rules is however likely to be limited. This arises because there are few instances in which simple indicators will provide reliable proxies for the direction or the magnitude of the effects triggered by a particular practice. Many if not most practices that competition authorities investigate can be beneficial or harmful to consumers and simple indicators will often fail to capture the effects.

So does this mean that we should apply a full rule of reason in every instance? It certainly doesn't. Some effects

can hardly be estimated with an appropriate degree of precision. Capturing others might involve an unreasonable amount of resources. So that presumptions have a role to play out of a concern for workability and legal certainty.

One should thus strive to integrate economic principles into concrete rules wherever feasible. This is the idea of a structured rule of reason such that particular findings trigger a different assessment. The approach identifies instances, when a given practice can be presumed to be pro-competitive (or anti-competitive) and others, under which a full appreciation of the effects is necessary. One example is the dominance screen in antitrust. In the absence of dominance, it is unlikely that Article 82 type practices are harmful. Hence, an effects-based assessment is only needed in instances where dominance could be established.

In addition to embedding economic analysis into a workable legal framework, it is crucial to spell out the economic principles that competition authorities will apply. Communication with the business community in the form of guidelines acts as a welcome commitment. A proper analysis of whether particular conducts are lawful has to rest on consistent principles that have to be made clear to all concerned parties. Arguably the expression of sound principles and methods of validating them provides as much legal certainty as simple rules.

A fruitful interaction between economics, legal norms and their enforcement first requires mutual understanding among academics and practitioners. Studies in law and economics, to which TILEC has contributed so actively in the five years since its inception in late 2002, play a central role in this respect.

*Damien Neven, Chief Competition Economist, Directorate General for Competition of the EU Commission*



# From state monopoly to state regulation

*A short history of network industries liberalisation in Europe*

By Karel Soudijn

## 1957: The state monopoly totters

The Treaty of Rome provides for competition between businesses supplying services of 'general economic interest'. This rule applies to so-called network industries such as the railways, postal services, telecommunications, gas and electricity. Yet none of these areas is opened up to competition for many years. The subject seems to be taboo within the European Union. Until well into the 1980s, the network industries remain state monopolies.

The term 'state monopoly' implies that the government assigns the exclusive right to provide a particular public service to a single enterprise. This is then required to supply its product to everyone in the country, even those in remote and unprofitable areas. This universal provision raises costs, but the presumption is that they are offset by the social and geographical cohesion it creates.

A number of factors undermine this argument, however. High gas, electricity and transport prices, for example, disadvantage industries subject to fierce competition in global markets. Customers increasingly complain about the quality of the service they receive from public monopolies. And the processes of deregulation under way in the United States and the United Kingdom seem to be a success.

## 1970-1980: Thatcher leads the way

By the 1970s, the prevailing Keynesian political and economic consensus is coming under pressure from inflation, unemployment, the oil crisis and increasing government shortcomings. The European nation most seriously affected is the United Kingdom. From 1979, Margaret Thatcher's administration responds by reducing the role of government. Following the privatization of their state-owned monopolies, the network industries are deregulated.

## 1980-1990: Autonomy without disposal

The first network industry to be privatized in the UK, in 1984, is telecommunications. This is a move facilitated by technological advances. More state monopolies soon follow: gas in 1986, water in 1989, electricity in 1990 and the railways between 1993 and 1996.

In the Netherlands in 1983, Finance minister Onno Ruding draws up a policy plan which defines privatization in very broad terms. Here it can include 'autonomization' and 'outsourcing' as well as 'disposal'. Autonomization means that a publicly-owned enterprise is given greater commercial independence, but the government can still step in if things go wrong. And outsourcing implies private production under government direction. Only disposal means privatization in the true sense of the word: outright sale to the private sector. Ruding regards autonomization as the first step on the road to disposal, but in practice the process often goes no further.

## 1990-2000: Deregulation does not mean competition

When it takes office in 1994, Wim Kok's first government of the Netherlands shifts the emphasis from privatization to market forces. What it does not sufficiently realize is that competition is not an inevitable result of liberalizing and deregulating the market. The situation in the Dutch taxi sector shows that scrapping rules can result in higher prices rather than greater competition.

## Late 1990s-2008: Europe takes the lead

In 1998, the Kok government amends Dutch competition law to ban anticompetitive agreements and mergers and to stem the abuse of market power. And, under pressure from the European Union, several network industries are deregulated. Government monopolies have to disappear in order to pave the way for the integration of European markets. A first step on the road to liberalization is to hive off those sections of a network in which competition is possible in theory. A regulator is then appointed to make sure that the process stays on track. But how it unfolds from this point on is not prescribed in detail. This means that there can be different outcomes in different sectors.



*Liberalisation of the Dutch postal services hasn't fully materialised yet. Photo: David Rozing / Hollandse Hoogte*

The only network industry to be formally and completely deregulated throughout Europe is telecommunications, since January 1998. The effects of allowing competition are far less clear in other sectors. The most advanced in this respect are electricity and gas, followed by postal services and – at some distance – the railways. At the other end of the scale, there is virtually no competition in the water industry in Europe.

## The future: state regulation

Has the deregulation of the network industries yet produced any of the economic benefits envisaged by the European Commission and the EU member states? "The short answer is that it is hard to tell," says Dorothe Singer in her 2007 Master's dissertation. "Except in telecommunications, liberalization is still very much an ongoing process. We do not know what the eventual benefits will be. In fact, it is unclear what criteria we should actually be using to determine the effects of deregulation. Those who carry out analyses apply a host of different benchmarks: consumer prices, distribution of benefits, productivity and so on. Moreover, it is difficult to establish whether changes to these criteria are caused by market forces or by other factors."

What is clear is that governments are still playing an active role in network industries. Albeit in a new guise: that of regulator. And this does not look like it is going to be a transient situation. The enthusiasm with which market liberalization was greeted in the 1990s has since been tempered by a series of incidents and accidents attributable to underinvestment in facilities. And it is here that the government has a part to play as a regulator, ensuring that short-term profits do not come before long-term provision.

### Literature

- Gerardin, D. (2006). *Twenty years of liberalization of network industries in the European Union: where do we go now?* Inaugural lecture, Tilburg University.
- Singer, D. (2007). *On the evolution of the liberalization of network industries in the European Union*. First-year MPhil thesis, Tilburg University.
- Van Damme, E. (2004). *Pragmatic privatization: the Netherlands 1982-2002*. TILEC DP 2004-2007, Tilburg University.

Five years of TILEC

# ‘Internal collaboration is changing our view of the world’

By Corine Schouten

Economists who want to solve social problems are often naïve. They base their thinking upon theoretical laws like ‘punishment counters bad behaviour’. But in the real world there are situations where that rule simply does not apply. The economists Uri Gneezy and Aldo Rustichini, for example, have shown that parents who are fined for being late in picking up their children from the daycare do not start arriving on time. They simply accept the penalty. In fact, even more parents now turn up late. “Naïve economists need to have their faces rubbed in reality,” declares Eric van Damme, Professor of Economics at Tilburg University and one of the two directors of TILEC, the Tilburg Law and Economics Center. Gneezy, who published his findings in the *Journal of Legal Studies*, was one of Van Damme’s PhD students.

One way of gaining an insight into the practicability of economic solutions is to understand how institutions work. And that requires an understanding of the law. Working with legal experts, Van Damme says, helps economists to conduct more relevant research. Indeed, this is one of the basic reasons why TILEC was originally set up.

Conversely, legal academics studying economic regulation cannot do so without an understanding of economics itself. In contrast to economists, though, their work is driven by actual problems in society. Rubbing shoulders with economists forces lawyers to place problems in a wider context, to stop reinventing the wheel and to think through the consequences of particular measures. ‘The economists’ refreshing view takes the jurists further,’ says Pierre Larouche, Professor of Competition

Law and TILEC’s other director. ‘Our view of the world is changing within TILEC, which is very valuable.’

Tilburg University is home to strong economists who want to go beyond theory and to ambitious legal academics who want to broaden their perspectives. These two groups started coming together on such projects as an evaluation of OPTA, the Dutch post and telecommunications watchdog, and at conferences on corporate governance. Common academic interests, such as the publication of the ground-breaking *Game Theory and the Law*, also prompted them to seek each other out. Since everyone agreed that complex social issues should no longer be viewed from one angle alone, creating TILEC was the obvious next step. This would be a place where motivated economists and jurists could seek out realistic solutions to social problems.

Five years on, TILEC has matured into a successful institute. It has managed to attract leading scholars like Damien Geradin, Professor of Competition Law and Economics, as well as major sponsors and substantial grants from NWO, the Netherlands Organization for Scientific Research and various private and public-sector sponsors and partners. Thanks to the collaboration it has facilitated between law and economics, TILEC now provides a unique academic environment to study current developments in society.

## ‘True cooperation only succeeds when it’s in depth’

However obvious such co-operation may seem, in practice it was not always that easy. Bringing TILEC to where it is today has been quite an adventure, says Pierre Larouche, but one which makes the work all the more fascinating. Lawyers and economists frequently called upon each other’s expertise, but that does not necessarily mean that they understood one another. ‘Only after two or three years,’ Larouche explains, ‘were we able to talk to each other at an academic level and comment on each other’s work. But now, visitors at our seminars are amazed at how we are able to bring jurists and economists around the same table.’

## Market governance: TILEC in search of the right balance

What is the right balance between state intervention and the free play of market forces? That is the core question addressed by the economists and jurists at TILEC, each from their own perspective. As the role of the private sector has expanded in the past fifteen years, with governments moving away from direct control towards a more regulatory function, so the realization has grown that market forces cannot solve every problem. Now that network industries face huge investments and individuals are having to procure more and more of their personal safety net themselves, from care services to pension plans, it seems that the pendulum is beginning to swing back in the opposite direction.

TILEC is constantly investigating how the state and the market can bolster one another, and what the best way forward is for both. “Markets do not function of their own accord,” says director Eric van Damme. “We always emphasize that their institutional design plays a crucial role.” In this respect, the researchers at Tilburg’s Faculty of Economics and Business Administration and Faculty of Law are strong and active in two key areas: firstly, institutions, compe-

tion and regulation and secondly, law and finance. The first of these areas focuses on how institutions function in relation to markets for goods and services. Both economists and jurists are investigating the economic impact of legislation, competition policy and regulation. One of the latest research themes is markets in healthcare, an area in which the Netherlands is setting the pace. Another important topic, one closely associated with developments in liberalized network industries like telecommunications, is the effect of both regulation and increased competition on the innovation which is so actively sought in these sectors. Research into the regulation of international trade is also being expanded.

The second line of research focuses on financial markets and is the domain of financial economists and specialists in company law and financial sector regulation. One important theme for them is the effect of corporate governance upon economic performance, whilst another is the regulation of financial markets.



## Pierre Larouche

Pierre Larouche was born in Chicoutimi, Quebec, in 1968 and studied Law at McGill University in Montreal (BCL, LLB 1990) and the University of Bonn (M. iur. comp. 1993). He obtained his PhD at Maastricht University in 2000, with his work *Competition Law and Regulation in European Telecommunications*. Larouche has been a law clerk at the Supreme Court of Canada. He was attached to the METRO Institute at Maastricht University from 1996 to 2002 as research associate and eventually Associate Professor. Since 2002 he has been Professor of Competition Law in the Faculty of Law at Tilburg University

and a director of TILEC. Larouche is also Professor at the College of Europe, Bruges, where he teaches the main seminar in the inter-disciplinary European Law and Economic Analysis (ELEA) programme. He holds or has held visiting positions at McGill University, National University of Singapore and the University of Bonn. Pierre Larouche has co-authored the first book on Tort Law in the groundbreaking series *Ius Commune Casebooks for the Common Law of Europe* and is a member of the Management Committee of that casebook project. He researches and writes in competition law, regulation of network industries (in particular telecommunications, broadcasting and the Internet), and also in comparative private law and regulatory theory. Together with Damien Geradin, he founded and edited the *Journal of Network Industries* (now *Competition and Regulation in Network Industries*).

This form of interdisciplinary collaboration is seen in action on Wednesdays at internal meeting series with titles like ‘Club Med’ – from ‘mededinging’, the Dutch for competition – WIP (Work in Progress) and the IO (Industrial Organization) Reading Group. Five years ago, TILEC members had to be actively sought out for these sessions; today they flock in of their own motion. One recent meeting concerned who should take

responsibility for the harm caused by cartels (for instance, in the beer sector). The European Commission wants to encourage so-called ‘private enforcement’ by, for example, giving the victims of such cartels (here the pub owners) the means to claim damages. But policymakers find this a tough nut to crack. Yet TILEC researchers managed to make a lot of progress, after 45 minutes of legal debate followed by a consideration of the economic aspects. The results

were promising enough to form the basis for a workshop to be held in June 2008. ‘A few years ago it would have been unthinkable for a Tilburg economist to speak on legal matters,’ declares Van Damme.

Other subjects of discussion and research include the regulation of network industries (telecommunications, energy, post), enforcement actions against dominant firms such as Microsoft, and the regulation of the harmonization of private law at the European level. By putting their heads together, TILEC’s economists and jurists can come up with solutions for policy issues and more theoretical problems – or at least indicate what direction to take.

For instance, when the regime for the regulation of Dutch postal services was reviewed in 2003-2004, TILEC – through its directors, in cooperation with Paul de Bijl, then the research coordinator of TILEC – called for a cautious approach, taking into consideration the needs of market players. A message which was heeded. Regulators in the Netherlands and the rest of Europe have made good use of TILEC recommendations concerning the postal market. ‘We don’t base our thinking purely upon a model,’ explains Larouche. ‘We also think about policy objectives and market forces.’

TILEC researchers also contributed a sobering assessment of the limits and opportunities for Dutch broadcasting regulation within the European context, which fed into the reflections of the Netherlands Council for Government Policy (WRR). The latest conclusions to be published concern mergers in the healthcare sector, particularly services for people with disabilities. The competition authority, TILEC has found, can continue to monitor this area using established procedures – however this might produce different outcomes than expected, given the peculiar situation of the firms concerned.

The interdisciplinary approach is also reflected in TILEC’s contacts with the wider world. A new series of Thursday seminars covers policy issues in energy economics and is being organized jointly with the Netherlands Bureau for Economic Policy Analysis (CPB), the Ministry of Economic Affairs and the Netherlands Competition Authority (NMa). The regular Friday seminars have also proved popular. At these, an economist and jurist from the outside are invited to speak on a particular subject. A fruitful discussion then follows.

TILEC’s growth phase is not over yet. Writing truly collaborative academic articles remains a hurdle yet to be overcome, particularly when it comes to fundamental research. At the practical level, however, as when issuing advice on the regulation of the

electricity market, cooperation does offer clear added value. And the same applies in respect of attracting grants and sponsors. But, the two directors agree, the process could still be made deeper and more intensive. ‘Cooperation only succeeds when it’s in depth,’ says Van Damme.

Just how much deeper TILEC goes we will see in the near future. But there is no question that it is on a productive path.



## Eric van Damme

Eric van Damme, born in 1956, studied Mathematics at the Catholic University of Nijmegen (now Radboud University) and was awarded his PhD by Eindhoven University of Technology. Before becoming Professor of Economics at the Center for Economic Research at Tilburg University in 1989, he had been affiliated with Delft University of Technology in the Netherlands, the J.L. Kellogg School of Management at Northwestern University in Evanston, Illinois, and the Department of Economics at the University of Bonn in Germany. He also held visiting and teaching positions in Bielefeld, Copenhagen, Vienna, Stockholm, Lisbon and Helsinki.

Eric van Damme has written numerous books and articles on a range of topics involving game theory, economic theory, competition policy and regulation, experimental economics, bounded rationality, bargaining, auctions, industrial organization, network industries and privatization. He is a Fellow of the Econometric Society, honorary Fellow of the European Economic Association, member of the Royal Dutch Academy of Sciences (KNAW), as well as Secretary and Treasurer of the Game Theory Society. He is or has served also a member of the editorial boards of many scientific journals. In addition, he has been consulted extensively by commercial companies and has advised the government on various competition issues. He also sits on official committees including the Competition and Market Organization Committee of the Social and Economic Council of the Netherlands (SER) and the Advisory Committee on Administrative Appeals under the Competition Act of the Netherlands Competition Authority (NMa).



## THE RESEARCHERS OF TILEC



### Honesty in the stock market

**Name:** Jérémie Lefebvre  
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**Research programme:** junior member of TILEC  
**Research:** insider trading

“I am investigating how we can measure honesty in the stock market. This involves looking at how insider trading works. A very important topic, since the people who work for an organization – its insiders – have access to sensitive information about the state of its business. If you know that your company is making big losses, for example, then it is against the law to deal in its shares without first making that information available to the market. Trading based upon facts only you know is unfair, because shares you have sold might slump in value once the information you had as an insider becomes public knowledge. More generally, this topic allows me to analyse how information flows from companies to the market, and how this information is incorporated into stock prices.

Traders are required to release details of their transactions, but only with hindsight can you see whether these were motivated upon private information. And information is difficult to measure. My PhD research involves projects to develop a way of doing that. It is being supported by the Dutch Financial Markets Authority (AFM), so I travel regularly to its offices in Amsterdam to present my latest findings and to hear its comments. They are extremely valuable, because the people at the AFM have a good feeling about the market. They know what goes on there and how it works in practice. But they do no pure academic research of their own, which is why they are so interested in my work.

For me, the interesting thing about this research is that it combines economics and law, which is the purpose of TILEC. How does the law work? Can it be improved? And how does it influence traders? My work could have important policy implications, too, which is exciting.

TILEC is enriching for my research. In the past, I studied economics, and some political science as well, but not law. The biggest difference between economists and lawyers is that lawyers work with cases, from which they infer general ideas. Economists on the contrary start with a model, or a general idea of what the economy should be. From that, they draw conclusions on the actual state of things. Moreover, each group has its own vocabulary. That can give rise to some funny situations. Working together really forces us to reconsider our own preconceptions.

I find economics fascinating. It looks at how society is organized and the forces at play. But since we have something tangible to measure, money, we are able to use mathematical methods, develop models and equations, and thus draw very precise conclusions. In a constantly changing world – just look at the current liquidity crisis facing banks – I enjoy the challenge of producing analysis-based research which might shape future policy.”



### The Internet as TV's competitor

**Name:** Ilse van der Haar  
**Education:** Law (Maastricht University)  
**Research programme:** Department of European and International Public Law; junior member of TILEC  
**Research:** new media and the principle of technological neutrality

“Having studied law, I am used to looking at issues in terms of justice, sometimes without being aware that I am doing so. But economists have a different perspective; they rather care about the efficiency of a legal measure. And that combination, law and economics, which is what we have at TILEC, makes the picture of a problem more complete.

I studied Dutch law and specialized in European law. European media law especially appealed to me because it is something we experience every day. It is a reflection of what is happening in the world: journalists that are obliged to reveal their sources, cartoonists that are accused of defamation. Although I was initially mostly interested in matters regarding freedom of expression, my interest later on shifted to content regulation. What can a broadcaster show on television? Why are minors given special protection? As a field of law I find it challenging because it combines several areas of law: competition law, internal market law and consumer protection. This makes it a difficult area to grasp at first, but more rewarding in the end.

For my thesis I am studying the regulation of new media. Ten years ago, television and telephone entered households through separate networks. Each medium was governed by its own legislation. But as a result of the emergence of the Internet and digital technologies, dif-

ferent networks can now offer similar services. And that raises legal questions.

The traditional European rules concerning content for television, for example, are relatively strict. There are limits on the amount of advertising that can be shown. And at least 50 percent of TV programming must be made in Europe. When television and the Internet started to compete, the question came up whether similar rules should apply to both. Broadcasters could face a competitive disadvantage when they have to comply with rules that do not apply to the Internet. At the same time, the imposition of rules to the Internet can also make this market less accessible for new firms.

Not everyone believes that both media are indeed the same. Television is considered a so-called linear service: the programmes are prescheduled and simply presented to the viewer. The Internet, on the other hand, is non-linear. Consumers can decide what content they want to watch, and at what time. This is believed to cause a difference in impact. This distinction is taken up in a recently revised European Directive. In my thesis, I examine whether this Directive complies with the legal principle of technological neutrality. This principle prohibits to discriminate in law on the basis of technology. Can a distinction between linear and non-linear services be made, while respecting this principle?”



*Market forces and innovation in healthcare*

## 'Curing without kindness is no longer an option'

A battle of quality is raging in the Dutch health service. That is the trend observed by Mike Leers, Chief Executive of Dutch health insurer CZ, two years after the introduction of a new health insurance system in the Netherlands. He predicts a rise in quality league tables. After the initial price competition, quality competition is the latest clear effect of the partial deregulation of the health sector. But healthcare is no ordinary market, says Jan Boone, Professor of Economics at Tilburg University and a member of TILEC.

*By Ellie Smolenaars*

There is a great need for innovation, for example, says Jan Boone, yet infinite demand for health services is undesirable. And customer focus should not result in increased use of health products and services. "A simple example: I spend half an hour on the phone to my GP, just for a repeat prescription. Why can't I order that by e-mail, and why can't the doctor send an electronic prescription to the chemist? But if that leads to the GP doing everything the 'client' wants – referring them straight to

the best specialist, for instance, or prescribing experimental medicines which have not yet been properly tested – then it would better if the health service were not too customer-driven." Dilemmas of this kind are not easy to solve, but they are exactly what make the health market so fascinating for Boone as a researcher.

As well as running one of the largest health insurers in the Netherlands – CZ has 2.7 million policyholders and recorded turnover in excess of

€ 4 billion from standard policies in 2007, plus another € 3 billion from long-term care provision – Mike Leers is a Tilburg graduate and sits on the board of Tilburg University's governing foundation. Two years into the new health insurance system, he says that we are entering a new phase in the sector's deregulation. Quality is replacing price as the main competitive battleground.

As far as Leers is concerned, though, the liberalization process could be

much faster and more rigorous. As he told an Ernst & Young conference on innovation late last year, "We're all talking about deregulation, but when push comes to shove everyone has umpteen arguments for slamming on the brakes." CZ wants to operate as a true business, with the ability to take risks, and Leers thinks that "the comfort zone for all concerned, insurers included, is still too big". Certainties in the form of assured income flows and safety nets like retrospective costing need to be

**'Better isn't always more expensive – in fact, it's often cheaper'**

reviewed if there is to be genuine innovation.

So what kind of innovations might CZ come up with? The insurer is looking at areas where they would be relatively easy to introduce, such

as chronic disease. Starting with diabetes care. This is particularly ripe for innovation, Leers explains, because healthcare providers agree on treatment standards. Which is not the case with, say, asthma and depression.

Another area where innovation holds out a lot of promise is the efficiency of provision. Caring for chronically ill patients involves a lot of specialists working together. "But more doesn't mean merrier," declares Leers. There is too much duplication, so



*Doctors and assistants with a patient at the Leeuwarden Medical Centre, the best hospital of the Top 100 of a Dutch national newspaper in 2006. Photo: Pim Ras / Hollandse Hoogte*



plenty of scope for both quality and efficiency gains. “Better isn’t always more expensive – in fact, it’s often cheaper.”

Academic Boone is more sceptical about the effects so far of the freer market in healthcare. The reforms two years ago gave the insurers more power, he says, which they could exploit to be more selective in their choice of contracted hospitals and specialists. But so far they have not made full use of the opportunities available to them.

Leers, though, believes that this is one area in which there has been considerable movement. Not just in the health sector, but throughout society. He predicts significant developments soon: all kinds of indicators making the quality and effectiveness of services more transparent, which will boost the market.

“We use ‘the ultimate question’ as a tool,” he explains. “We ask policyholders, ‘Would you recommend this medical specialist to your family, friends and neighbours?’”

Then there is the introduction of the Consumer Quality Index, which measures what patients find important in healthcare and what their experiences have been. The plan is that this index will be published on [www.kiesbeter.nl](http://www.kiesbeter.nl), the Dutch National Institute for Public Health (RIVM) website to guide users through the healthcare system. Will all this give the consumer more influence? Boone is cautious: “Market forces can help where consumers properly understand their own preferences. But the question is whether that is the case in healthcare.” If we are no longer inclined to think of man as ‘homo economicus’, he continues, then we have to ask what the ideal shape of the health market actually is.

Boone looks worriedly across the Atlantic. “The United States has the greatest experience with free markets in healthcare. But the cost per head of population is incredibly high, whilst the US scores poorly in health indices. One reason could be that market forces have created a divide. Some people have access to the best care available anywhere in the world. But the rest can’t pay for that and so receive poor quality. Or they can’t afford medical insurance at all. How can we avoid that divide in the Netherlands?”

Insurer CZ rejects the American example. “Let’s stop always comparing ourselves with the US,” says Leers. “The Dutch health insurance system is closer to that of the former Soviet Union. It has been collectivized since 1941, whereas there is a lot of private financing in the US.

## ‘We are no longer inclined to think of man as homo economicus’

Insurers in the Netherlands are required to accept prospective policyholders and we have a risk equalization system to prevent them taking on only the lowest risks.” Leers himself has travelled to

Belgium for an operation. Why? “I’m close to the fire,” he explains. “Where is the best care available? The surgeon there talked passionately about his work. You are asked when would be the most convenient time for your appointment. I have noticed that patients are finding that kind of attitude more and more important. For that reason, a lot of CZ policyholders are going to Belgium for treatment now.”

The Dutch health service needs to provide compassion as well as medical skill, Leers argues. It should combine professional quality with empathy for the patient. “You want someone who reassures you, informs you and takes your problem seriously. Curing without kindness, which is what a lot of Dutch hospitals do now, is no longer an option.”

## Professor Leigh Hancher: Medicines in Europe

What is the best way of regulating competition in the drugs industry at the European level? That is a question Leigh Hancher has been wrestling with for some time. As Professor of European Law at Tilburg University, she is a leading expert in the field where competition law

meets sector-specific regulation. She also regularly acts as an adviser to the European Commission and European Parliament. “Pharmaceuticals is a lively market with fierce competition,” she explains. “The European system should serve as an example to America.” Hancher’s new research programme covers several countries, studying the latest developments and tracking the EU’s recently launched Innovative Medicines Initiative, which it is hoped will result in better and safer drugs becoming available more quickly. Leigh Hancher also works for international law firm Allen & Overy and is a member of the Dutch Scientific Council for Government Policy (WRR).



## News

### New European network on Competition Law and Economics

Many of the problems raised by competition policy and market regulation gain from being addressed not only from an interdisciplinary perspective but also from an international one. In 2007, TILEC contributed to setting up a European network of research institutions with a similar focus: CLEEN (Competition Law and Economics European Network). As of January 2008, the network also comprises the Amsterdam Center for Law and Economics (ACLE) at the University of Amsterdam, the Centre for

Infocommunication Law at the Hungarian Academy of Sciences, Budapest, the Centre for Competition Policy (CCP) at the University of East Anglia, the Centre for Market and Public Organization (CMPO) at the University of Bristol, the Max-Planck Institute for research on collective goods, Bonn, and the Robert Schuman Centre for Advanced Studies at the European University Institute, Florence.

### Prestigious grants

Two TILEC researchers have recently secured prestigious research grants. NWO, the Netherlands Organization for Scientific Research, has awarded Jan Boone a Vici grant worth €1,250,000 for his work aiming to identify the costs and benefits of intensifying competition in healthcare markets. Greater competition should lead to higher quality and lower prices, but the question is whether there

can be too much of it in the health sector. Meanwhile, the European Commission has bestowed a two-year Marie Curie Fellowship on Bert Willems. He will use this to research investments in electricity markets – specifically, whether governments should regulate security of supply and how generating companies make their investment decisions.



Photo: Mischa Keijser / Hollandse Hoogte

Organization and regulation of energy markets:

## ‘Sustainable sources are the future’

The electricity sector has been subject to major structural changes during the last decade. Liberalization policies all over the world have led to a separation of formerly vertically integrated monopolies into three parts: production, retail and network services. TILEC member Bert Willems investigates the organization and regulation of energy markets. He presents his views on competition, the abuse of market power, and transmission capacity.

By Clemens van Diek

COMPETITION has been introduced at the production and retail levels, although most markets remain highly concentrated and incumbent firms often continue to be dominant. Bert Willems: “Competition at the level of network services is not feasible, as it is inefficient to build and operate multiple parallel networks. These network assets are therefore essential facilities whose efficient allocation is crucial for a well-functioning upstream (production) and downstream (retail) market. Regulation generally requires that access to the essential facility be organized in such a way that it is non-discriminatory and market-conform. This implies that price arbitrage becomes possible, and that it is harder for the incumbent generation firm to price discriminate.”

Bert Willems is an industrial economist from Belgium who is studying the organization and regulation of energy markets. He also publishes on climate change. Willems graduated in thermodynamics and did research at the University of California Energy Institute, the Florence School of Regulation, and the universities of Dresden and Leuven. TILEC was able to appoint Bert Willems through funding by Essent, the Dutch energy company and market leader with more than 2,5 million customer clients in the electricity and 2 million in the gas market. Essent stated that fundamental research is important to improve the knowledge and expertise on specific subjects. Willems’ research at TILEC

is structured around questions such as: How can we organize the market such that we will use the optimal mix of renewable and conventional technologies? Do energy firms have market power? If abuse of market power is a problem, which steps can the government take to reduce market power? Are standard competition policy rules sufficient or should we rely on sector-specific regulation? Which regulatory instruments are necessary to obtain a sustainable energy system? Will a healthy and competitive energy sector deliver a secure energy supply system? What is the role of the government?

ABUSE OF MARKET POWER by dominant players is a major concern in electricity markets. This concern has to be addressed by regulators. Traditionally, regulators rely on ex-post regulation: abuse of firms is punished by anti-trust authorities such as the Netherlands Competition Authority (NMa), or Euro Commissioner Neelie Kroes, and structural remedies (firms have to divest generation capacity). But both methods are not possible in electricity markets: the legal burden of proof for market abuse is too high and economies of scale and politics make divestitures impossible. Hence, regulators have to develop behavioral remedies to mitigate market power. One such behavioral remedy is to oblige firms to sell long term contracts to consumers. These long term contracts reduce the incentives of generators to raise prices in the spot market. Two questions are to

be answered here. One: how do long term contracts affect the strategic behavior of firms? Two: can long term contracts be used as a regulatory device to mitigate market power?

Willems: “Currently, I am looking into one specific implementation of a contract remedy where firms face a fine if they contract too little. The existing literature on long term contracts and market power considers only one type of contracts: futures contracts. I try to fill this gap by studying other types of contracts. Main conclusions are that a virtual divestiture should not be a pure

### Facts on electrical energy

- 58% of the European electricity is still produced in a traditional way (mainly coal and gas);
- 19% is produced by nuclear power (50% in France!), 18% by hydropower and 5% by wind energy;
- Wind energy is growing fast in Denmark (23%), Germany (13%) and Spain (12%);
- Major players in the Dutch electricity market are Essent, Nuon, Eneco and Delta.
- The European Union has set itself the target to limit greenhouse gas emissions with 20% in 2020. At the same time 20% of final energy consumption should be from renewable energy.

financial transaction, but should give the buyer effective control over production decisions. Furthermore, regulators should support markets for financial options as they have large pro-competitive effects.”

**TRANSMISSION CAPACITY.** In ‘Arbitrage in Energy Markets’, Willems, together with Gerd Küpper (KU Leuven), analyzes the welfare implications of using market mechanisms to allocate transmission capacity in recently liberalized electricity markets. The question is whether access to this essential facility should be traded on a market, or whether the incumbent firm should retain exclusive usage rights. The researchers show that granting exclusive use to the incumbent firm can reduce production costs by taking advantage of interregional production-cost differences. This result counters the intuition that arbitrage will improve the social surplus when there is no output contraction. The reason is that when competition is imperfect, arbitrage might reduce production efficiency. The authors advise policymakers to introduce market mechanisms for the allocation of transmission capacity only if sufficient investment in the network is ensured or if the market power of the incumbent is broken in at least one of the markets in which it is active.

Bert Willems was recently granted a two-year Marie Curie Fellowship by the European Commission for his research project about investments

## TILEC & Essent

TILEC’s work on energy markets is partly performed in the context of a cooperation agreement with Essent, which was signed in December 2003 and renewed in 2006. The contract has enabled TILEC to hire energy economists such as Gert Brunekreeft (currently professor in Bremen, Germany) and Bert Willems. In return, TILEC has organized a conference on supply security (November 2005), and several Round Tables on topical issues. TILEC researchers have also done projects on, for instance, legal and ownership unbundling in the energy sector. Most recently, TILEC has published a report on cross-subsidization in regulated industries, which concludes that cross-subsidies are

in electricity markets. Willems will study how generator firms make their investment decisions in a competitive electricity market and whether governments should regulate the security of supply. Willems: “Governments should introduce a form of regulation in energy markets that is market conform: capital adequacy requirements will give firms incentives to invest

normal business practices that are not illegal per se, but may nevertheless be part of abusive practices forbidden by Article 82 EC.

As of 2008, TILEC organizes a Seminar Series on Energy Economics together with the CPB, the Ministry of Economic Affairs, and NMa, with the aim to create a discussion platform for Dutch energy economists, and to bridge the gap between policy makers and academics. It intends to improve the economic foundation of the Dutch energy policy. TILEC’s contribution to the series has also been facilitated by financial support of Essent. To receive information about future meetings, please contact [tilec@uvt.nl](mailto:tilec@uvt.nl).

sufficiently in a mix of generation plants using different technologies and fuels. Tradable emission certificates and green certificates will lead to cheaper sustainable sources, the introduction of carbon storage and sequestration, and, possibly, nuclear power. So, in the long run electricity producers, like Essent, have to and will invest more in clean and less polluting energy sources.”

### Further reading: [www.bertwillems.com](http://www.bertwillems.com)

- Kupper, G., & Willems, B.R.R. (2007). Arbitrage in Energy Markets: Competing in the Incumbent’s Shadow, TILEC Discussion Paper 2007-034
- Willems, B.R.R., Rumiantseva, I., & Weigt, H. (2007). Cournot versus Supply Functions: What Does the Data tell us? TILEC Discussion Paper 2007-023
- Willems, B., Ehlers, E. & Marti Fraga, V. (2007). Cross-subsidies in the Electricity Sector, TILEC. Willems, Bert (2004). Electricity Networks and Generation Market Power, Dissertation (PhD) Dept. of Economics, KU Leuven

## COLUMN

# Creative disruption

By Andrew McLaughlin, Director of Global Public Policy, Google

Innovation is central to economic growth, and fuels competition. However, the exact contours of the relationship between innovation and competition are still vigorously debated in the academic literature. Given the political and social imperatives around economic growth, it is not surprising that this question is now getting high-level attention from governments around the world.

Taking a pragmatic approach, let me offer a few potentially generalizable insights from Google and its approach to innovation. Google has defined for itself the mission "to organise the world's information and make it universally accessible and useful." In pursuit of that mission, Google offers free services - web search, email and calendar, video and photo sharing, blogs, maps and directions, and book search, just to name a few - to any individual on the planet with access to a computer or mobile phone. In effect, these services give every individual the ability to actively contribute to any civic, political, artistic, or cultural dialog in which he is interested.

Central to Google's mission, then, is the desire to give individuals powerful tools that enable them to unleash their creativity. To put it another way, we want to shift control over information - over the creation, distribution, and discovery of information - from distant institutions directly into the hands of the individual. Thanks to the Internet, it is now possible for like-minded individuals in all corners of the world to find each other and work together to solve problems. This is a good thing, in that the wisdom of a crowd is often greater than the wisdom of a single person acting alone.

How does this collective creativity feed innovation and foster competition? At the risk of making the obvious reference, Joseph Schumpeter identified "creative destruc-

tion" as a positive feature of capitalism's embrace of competition, generating the possibility of sustained long-term economic growth. In the pre-Internet economy, innovation was primarily viewed as the outcome of employees in firms pursuing structured programs of new product development. The communication and collaboration tools enabled by the Internet now allow otherwise unaffiliated individuals to pool their collective wisdom and creativity in tremendously powerful (and previously impractical) ways. The Internet is a great vehicle for individual expression, but its true contribution to creatively destructive innovations in fields as diverse as clean energy, agricultural botany, disease research, and pop culture will come from its ability to enable collaboration.

Back to Google. Often people ask what kind of company Google is. Google is an engineering company in the sense that we are organized to invent new products that take advantage of Internet technology to deliver valuable services to consumers. However, as any economist may tell you, new technology nearly always leads to disruption of existing business models. Disruption is inherent to new technology. But let's be clear. While Google has achieved a set of creative disruptions in Internet services, our primary work is to facilitate innovation by others. The success of Google is based on the open Internet model and on its power to enable every citizen around the world to both obtain and contribute information. From this perspective, it is only a matter of time that some bright teenagers will use Google's own disruptive collaboration technologies to fashion their own, even more dramatic innovations to make this world an even better place. For the current crop of innovators, like Google, there is no time to relax, because it might well be that we will be swept up by the creative disruptions that we helped to facilitate. Especially in this accelerating Internet age.

## THE RESEARCHERS OF TILEC



## Just and efficient

**Name:** Filomena Chirico

**Education:** Law (LUISS University of Rome), European Master's in Law and Economics (Rotterdam, Hamburg, Berkeley), PhD Institutional Economics (University of Rome 'La Sapienza')

**Research programme:** Institutions, Competition and Regulation; senior member of TILEC; Assistant Professor, Department of European and International Public Law

**Research:** Internet governance, contract law and economics

“How do you fight cartels and monopolies? How do you guarantee that consumers get low prices and freedom of choice? My expertise is in competition law. This is a very broad subject, covering everything from telecommunications, oil and energy to books and bread. Sometimes it is very technical, but I've always found it fascinating.

I came to work at TILEC in 2005. Before that, I studied and worked in Rome, Strasbourg, Berkeley, Brussels and Bruges. How did I end up in Tilburg? Because some of the best scholars in my research area work here. I have found a great environment to do my research.

Take the question of Internet providers blocking access to certain online content. There has been a fierce debate about that in the United States, with hundreds of articles written on the subject. My colleagues and I at TILEC looked into whether it should be an issue in Europe too. The problem in the United States turned out to be that they have only two broadband Internet providers. In other words, there is a duopoly: companies with market power increase prices and reduce consumers' freedom of choice. But European markets are much more open. With more Internet providers, restricting access to content becomes more difficult, although not impossible.

I wrote a paper on this issue together with two colleagues at TILEC: *Net Neutrality and European Law*. Our colleagues from Economics also wrote a paper about it, but

from an economic perspective. We presented our results at conferences in different countries: Germany, Belgium, Canada, Turkey. Analysing problems of this kind jointly with economists has the great advantage that, on both sides, we are forced to specify the implicit assumptions. Economists sometimes ask questions which may sound naïve to lawyers, but in fact go straight to the rationale of legal rules. We jurists often ask them to forget about formulas and explain the policy implications and the social relevance of their models.

I teach a course on law and economics to Tilburg law students. Jurists are concerned mostly with justice and coherence of the law, while economists focus on consequences and efficiency of the law. Some people believe that this difference makes it impossible for the two groups to communicate with each other. We, at TILEC, try to show that this belief is wrong and also, maybe, that the law can be both just and efficient.”



## “The results of my research affect ordinary people's lives”

**Name:** Jens Prüfer

**Education:** International Economics and Chinese Studies (University of Tübingen, National University of Singapore); Ph.D. in Economics (Goethe University Frankfurt)

**Research programme:** Assistant Professor of Economics at the CentER for Economic Research (Tilburg University); senior member of TILEC

**Research:** non-firm organizations, industrial organization

“The key term in my work is *non-firm organizations*. A lot of economic research has been done into companies concerned with maximizing their profits, but non-firm organizations are different: entities like football clubs, hospitals and public agencies. They have an impact upon our daily lives. They earn some money, but that is not what they are all about. I investigate how these ‘not-for-profit’ organizations are structured, and how they act in competitive markets. In particular, I analyze how non-firm organizations differ from commercial companies.

For me, academic research is an intellectual challenge. I enjoy breaking new ground: revealing things that nobody has ever shown before. But that is only part of the matter. Research should be useful to society. Practically, the implications of our research for policymakers are important. For example, the Dutch government and the National Healthcare Authority (NZa) want to know if it would be a good idea to allow hospitals to operate on a commercial basis. Apart from a few cosmetic surgery clinics, that kind of institution has always been banned here. But they do now exist in Germany and Sweden. We are analysing data about them in order to produce a model of hospital competition and to indicate whether legalizing commercial hospitals would be a good idea in the Netherlands.

I find it exciting that the results of my research can influence the laws enacted in The Hague because those

laws affect ordinary people's lives. For me, that is the great thing about TILEC: the combination of high-level research with practical relevance. The application of up-to-date theory. Another interesting aspect comes from working with legal experts, looking at the same problem from different perspectives. The lawyers know the cases, the legal constraints and the institutional settings, whilst the economists have the tools to conduct quantitative research.

As a science, economics is not about making money. It is ultimately about understanding how people behave. Not so much about the roots of behaviour but more about its consequences and strategic aspects. Economic research leads to predictions of human behaviour in specific situations, e.g. which school to send your child to or where to go on vacation. When something interesting happens in real life, we put it into a model, solve it, and then translate the theoretical findings back to reality. One plus one is two. If you accept the assumptions, you also have to accept the results. That is what fascinates me: being able to map human behaviour like that.

Conducting research is the best job I can think of. For me, personal freedom is very important. Here, I can just sit in my room and think. As an Assistant Professor I can do what I want, investigate the things which interest me. And some of the output generated might even contribute to improve our society.”

# Gaming regulation: protecting or patronizing?

People love to take a gamble. But European governments impose strict controls on gambling to prevent addiction and crime. The European Union, on the other hand, sees it as an industry like any other. The calls from Brussels for a freer market are growing ever louder. Is that a good idea? “No,” says criminologist Cyrille Fijnaut, Professor of Gaming Regulation at Tilburg University and a member of TILEC. “Impossible to prevent,” counters Dick Flint, Chief Executive of Holland Casino, the Dutch state gambling monopoly. *Tilburg Research* put seven statements to them both.

By Marga van Zundert

## 1 A restrictive gaming policy is the nanny state in action.

Cyrille Fijnaut: “Gambling addiction and crime are real problems. There are enough examples of people losing the family fortune or stealing money from their employer to fund a gambling habit.

Our research shows that there are about 40,000 gambling addicts in the Netherlands, so these are not insignificant numbers. Moreover, games of chance have traditionally been the domain of organized crime,

just like drugs and prostitution. So there are very good reasons for the government to keep a firm hand on things.”

Dick Flint: “A restrictive policy helps protect the consumer and ensures that the game remains a game. Figures from the Dutch National Alcohol and Drugs Information System show that 2,649 people were treated for a gambling addiction in 2006, a fall of 12 per cent from the previous year and the lowest number since 1995.”

## 2 Deregulation of the gaming market is inevitable in the end.

Dick Flint: “Competition has never sent anyone to sleep. At the moment, the Dutch government is deliberately holding on to its state monopoly. The question is whether that can be maintained in the long term, particularly under pressure from Europe. Like any healthy and responsible business, we are preparing for a range of scenarios. Whatever happens, Holland Casino will continue to offer a safe, legal gaming and entertainment environment for the adult consumer.”

## 3 More gambling means more addicts.

Cyrille Fijnaut: “Not automatically. Who’s addicted to a monthly lottery? But the progressive slot machines of the 1980s really encouraged people to keep on playing, to try to win the jackpot and make up their losses.

It’s not for nothing that they were banned. As for internet games, we don’t know enough about them yet to make any definitive statement. But they certainly have their dangerous side.”

Dick Flint: “Despite the growth in the number of Holland Casinos, the number of gambling addicts is falling. We have an active prevention policy to identify dependency issues at an early stage. Our staff are specially trained to challenge people displaying problem behaviour. That policy recently won us the Socially Responsible Operator title at the 2008 Gaming Awards in London. So there’s no need to make life hard for people who just enjoy a game.”



Holland Casino. Photo: Peter Hilz / Hollandse Hoogte

#### 4 A government which runs gambling becomes addicted itself.

Dick Flint: "You can't say that the monopoly is being abused. The number of gambling addicts is currently at its lowest level since 1995."

Cyrille Fijnaut: "A government should not fuel people's desire to gamble in order to generate more income for itself. On the other hand, why should this market not be a source of revenue? After all, we pay duty on petrol and alcohol as well. Gambling is a normal activity. It just has to be regulated to prevent problems."

### 'The greatest danger is that criminals gain control of the gambling operation itself'

#### 5 A US-style ban on banks and credit card companies accepting payments to overseas gambling websites is a good idea.

Cyrille Fijnaut: "Ultimately, it's impossible to ban online gaming. The internet has become part of our lives. I think it would be a good idea to allow Holland Casino to run a pilot project offering games on the internet. It would then be logical to talk to the banks and credit card companies. After all, they are in a position to



monitor things and intervene when necessary."

Dick Flint: "Any gaming website targeting the Dutch market is currently operating illegally. They are banned here, after all. So it seems only right to take action against banks which facilitate transactions with them."

#### 6 Gaming operators are always vulnerable to criminal activity.

Dick Flint: "Research shows that, of the estimated € 18.5 billion laundered annually in the Netherlands, € 1.5 million (0.0081%) at most passes through Holland Casino. So the risk is very small. We can't speak for every operator, but we report all suspicious transactions and we have an ID requirement. Moreover, our extensive risk management and control systems guarantee reliable reporting and compliance with the rules."

Cyrille Fijnaut: "The greatest danger is that criminals gain control of the gambling operation itself. That leads to profits being creamed off, distortion of the games, extortion from wealthy players and police corruption. And this is not just a throwback to

### 'It's all pure speculation. That's why I'm so cautious'

1960s America. Research shows that a significant proportion of the gaming market in Italy is currently in the hands of organized crime."

#### 7 Enough academic research has been done to take sound decisions about gaming regulation.

Cyrille Fijnaut: "Absolutely not. When I began in the late 1980s, there was no academic literature at all. Even now, with gambling a booming business, I still have to search hard to find authors for the series of books we are publishing. When I hear the European commissioner's plans, I ask what the consequences will be. And nobody can give me a properly researched answer. It's all pure speculation. That's why I'm so cautious."

Dick Flint: "There are academic studies about various aspects of the casino business. As to whether there are enough, I'll leave it to the scholars to answer that. But the fact is that a lot of the international research is irrelevant to the Dutch situation, where players are registered and there are strict rules in place to prevent money laundering."

## TILEC's partners: growing momentum

By Corine Schouten

*"Slowly but surely, we are beginning to reap the rewards of our work. You can see that in the increasing sponsorship we find for our research, for example. That is governed by the rules laid down by the KNAW (Royal Netherlands Academy of Arts and Sciences): the research area can be discussed with the sponsor, but the investigators are given a completely free hand in how they tackle it. Sponsors know that they have no say over the results. But they also benefit from supporting critical research."*

Professor Pierre Larouche, Director of TILEC

The Netherlands AUTHORITY FOR THE FINANCIAL MARKETS (AFM) supports the TILEC network in Financial Markets Regulation. Since 2006, this has been directed by three professors: Hans Degryse of the Faculty of Economics and Business Administration and, from the Faculty of Law, Erik Vermeulen and Joe McCahery. Part of the AFM grant was used to establish the international AFM-TILEC Research Network on Financial Market Regulation, which aims to encourage the wider academic investigation of this topic by acting as a point of reference for scholars throughout Europe and beyond.

PRICEWATERHOUSECOOPERS sponsors the chair in competition and innovation, which has been held by Erik Brouwer since its inception in 2006. In his inaugural address,

Brouwer stated that the productivity of the Dutch market can be stimulated by striking the right balance between innovation and competition. Too much competition can stifle innovation in some sectors, but too little competition can also be counterproductive. Together with other Tilburg researchers, Brouwer is now developing a model of the interaction between these two factors. American technology firm QUALCOMM made a large donation in 2007, with the intent to repeat it for a five-year period, to support TILEC research on competition law, intellectual property law and innovation. The initiative was prompted by the ongoing debate between those who believe that investment is encouraged by protecting intellectual property rights and those who want limit those rights in order to stimulate competi-

tion. Competition law is increasingly drawn into the debate.

ESSENT NV, the largest Dutch energy company, has been backing TILEC research into market organization issues since 2006. Its contribution enabled the appointment of industrial economist Bert Willems, who is investigating market forces and regulation in the energy sector as well as studying economic aspects of climate change.

Pierre Larouche, Filomena Chirico and Saskia Lavrijssen of TILEC have been awarded a grant by the HAGUE INSTITUTE FOR THE INTERNATIONALIZATION OF LAW (HiIL) for their project "Coping with the challenges of globalization". From a legal, economic and political perspective, they are investigating how national legal systems can cope with the pressures of globalization.

TILEC junior researchers Ting Jiang, Maartje de Visser, and Jun Zhou have their PhD projects sponsored by the NETHERLANDS ORGANIZATION FOR SCIENTIFIC RESEARCH (NWO). Ting's project "Combating Bribery with Leniency" aims to redesign a preventive leniency policy for deterring bribery, and to analyze it in a game-theoretical framework with a cross-country experimental study. It is sponsored through the Mozaïek program that aims to increase the number of researchers from ethnic minorities in Dutch Academia. Wieland Müller's research on "Unfair Competition" is sponsored through a VIDI grant of NWO.



Flora Holland flower auction. Photo: Mischa Keijser / Hollandse Hoogte

## Crash barriers for aggressive capital

Private equity and hedge funds are buying up or taking significant interests in Dutch companies, then forcing them to take measures to increase their profitability. This is a sector currently subject to no regulation, or even supervision. But that is set to change as a result of the credit crisis. TILEC is calling for 'co-regulation'.

By Frank van Empel

On 19 February 2008, Stork disappeared from the stock exchange. It had been acquired for € 1.5 billion by private equity fund Candover. One division, Food Systems, a manufacturer of machinery such as poultry processing equipment, was immediately sold on to Icelandic firm Marel for € 415 million. The takeover brought an abrupt end to a long struggle for power and direction at Stork.

This was not the first time a major Dutch company had been bought by private equity funds. In fact, Stork is just the latest in a long list. VNU was sold to Alpinvest, Blackstone, KKR and Carlyle for € 8.3 billion. Philips Semiconductors went to Alpinvest, KKR and Apax for € 7.4 billion. Warburg Pincus and Cinven paid € 2.6 billion for Essent Kabelcom. And so on...

In all, private equity houses spent more than € 25 billion buying companies in the Netherlands in 2006. Much of that money originated with Dutch banks, insurance companies and pension funds. The level of investment in acquisitions of this kind has increased considerably since 2000, when it amounted to no more than a few billion euros, and so private equity can definitely be called a trend (see diagram on page 34) – although still a fairly modest one in the overall scheme of things. By comparison, the total value of publicly traded shares in the Netherlands was € 549 billion at the end of 2006.

### BUYOUTS

The term 'private equity' refers to investments in the share capital (equity) of unlisted (private) companies, with the intention of selling them on at a profit after a period of several years. One distinctive characteristic of private equity investors is their active involvement in the policy of the businesses they buy into. As in the case of Stork, funds of this kind are usually out to acquire the entire company. In 2005, three quarters of Dutch private equity investments took the form of buyouts.

The total acquisition price of a business is usually many times greater than the amount of capital the private equity fund itself invests. The majority of the money is actually borrowed on the account of the company being bought. When that amount exceeds 70 per cent of the purchase price, it is referred to as a 'leveraged buyout'. The 'lever' is the capital borrowed in the expectation of achieving a higher return on the investment than the cost of repaying the loan. In other words, the investor takes the bank's money and makes it work for them. This approach only works, however, if the new owners succeed in reorganizing the business – by disposing of parts of it, for example – in such a way that it can be sold on again at a profit. If that gambit fails, there is every likelihood that the debts incurred will weigh so heavily on the company that it goes under. Banks cover themselves against this risk by only partially accounting for the loans in question on their balance sheets.

### Critics depict the behaviour of private equity and hedge funds as the 'Wild West' of financial economics

The remainder of the credit risk is sold through to investors in the form of bonds, a process known as 'securitization'.

### SHIFTING CREDIT RISKS

Innovative new products of this kind give the banks more elbow room, but they also undermine the financial system. All the more so because the same trick of shifting credit risks to investors is now being applied to mortgages and other loans as well. And then you have the hedge funds. These are active investment funds which prey on underperforming companies. They acquire a minority stake, put management under pressure to take action and then sell their holding as quickly and as profitably as possible.

The Netherlands is one of many countries where the influence of private equity and hedge funds over the economy and employment has become a matter of public debate. Critics depict their behaviour as the 'Wild West' of financial economics. A motley collection of unregulated moneypots with which dealmakers can experiment unhindered, just as long as they stick to the contracts they



have signed with their institutional investors. Those agreements set out what the fund managers are expected to deliver, and that is first and foremost a relatively good return compared with the benchmark. These arrangements are currently beyond the regulatory reach of the Dutch central bank (DNB) and the Financial Markets Authority (AFM).

But that is set to change, say Joseph McCahery and Erik Vermeulen of TILEC. In a paper entitled *The Impact of Private Equity Funds and Hedge Funds on Corporate Governance: A Regulatory Puzzle*, they write, “The global turbulence in the credit markets, triggered by the turmoil in the subprime mortgage market in the United States in 2007, has arguably ended the private equity bonanza as well as the laissez-faire era in the alternative asset sector. In fact, the credit squeeze has already slowed down the level of private equity activity and, more importantly, resulted in increased scrutiny from regulators, policymakers and the judiciary. We can see, moreover, that a wide range of regulatory options, from industry self-regulation to governmental intervention, are being considered in order to lower the level of risk and to redress the balance between investors and private equity firms.”

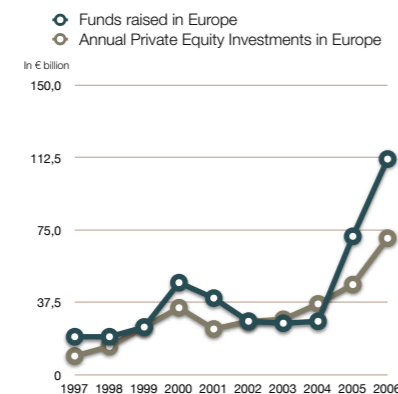
**OVERAGGRESSIVE CAPITAL**

McCahery and Vermeulen prepared their paper for a Corporate Governance Summit held in Dubai on 19-21 February 2008. It was

written against the backdrop of an impending global financial crisis. In such a dire situation, they conclude, it is hardly surprising that private equity and hedge funds are now being regarded with suspicion. “In a period when private equity flourished,” they write, “the mere contractual basis for the funds [was] usually adequate to address the agency problems among the players in this sector. However, when the economy gets weaker and the performance of buyouts is jeopardized because of overaggressive capital structures, lawmakers are more likely to intervene without analysing the contractual structure of the funds.”

The Tilburg jurists go on to stand up for self-regulation. “Self-regulatory strategies are likely to be more effective

**Facts and figures**



Source: EVCA/Thomson Financial/PricewaterhouseCoopers

**Self-regulatory strategies are likely to be more effective**

...tive [than government regulation] because they are generated by persons directly involved in the industry. Conversely, the realities of self-regulation can involve complex conflicts of interests, which may have a detrimental effect on the transparency and coverage of the regulation.”

McCahery and Vermeulen then propose an idea of their own devising: co-regulation, a combination of governmental and non-governmental regulatory actions. “Co-regulation,” they explain, “involves a mixture of techniques that can be more appropriate in achieving a public policy goal. Combining the advantages of the predictability and legal certainty of legislation and the flexibility and acceptance of self-regulation, co-regulation is an effective means to coordinate public and private resources to manage regulatory risk. In turn, co-regulation holds out the possibility of resolving conflicts through co-operative engagement involving firms choosing from a variety of mechanisms to manage a specific problem.”

**DIALOGUE**

In most cases, they continue, contractual arrangements and self-regulatory measures are sufficient. However,



Photo: Gerard Til / Hollandse Hoogte

too little regulation could damage market confidence. Their co-regulation option stresses the virtues of a dialogue between all the stakeholders involved: industry, government, regulators and supervisors. They favour an approach based upon principles and trust rather than rigid rules, control and red tape.

**Too little regulation could damage market confidence**

At the heart of this notion are flexibility and agility. The concept of co-regulation is adaptable to the ever-changing and fast-moving sector in which private equity and hedge funds operate. It also takes into account differences between funds. And, last but not least, it adds value to the traditional contractual relationship between investor and fund management.

## THE RESEARCHERS OF TILEC



## Using networks in the enforcement of European law

**Name:** Maartje de Visser  
**Education:** LLM (Maastricht University); MJur (Oxford University)  
**Research programme:** Department of European and International Public Law; junior member of TILEC  
**Research:** the application and enforcement of European law

“How law structures society, determines its character. That fascinates me. Not ‘What are the rules?’ but ‘How do they come about?’ What are the ground rules that structure this process? Do laws achieve their objectives, and if not, why, and how can we change that?”

These days, many aspects of national law are directly influenced by European law. Every lawyer will therefore need to have at least a basic training in European law. However, a good understanding of the field requires a specialized education. This is why I chose to go to the European Law School in Maastricht. After four years I decided that I had not yet had enough and moreover, that it was time for me to cross some borders as well. Studying at Oxford for my MJur met both objectives. It was there that my interest in European institutional law was triggered.

The enforcement of European rules in practice causes difficulties. While ‘Europe’ makes the rules, the Member States must usually implement them. A single rule thus has to be applied in the same way in 27 different states. This does not always go as planned and regularly results in inconsistencies between the various Member States. This situation is the result of the wide differences in regulatory capacity, resources and expertise. Moreover, sometimes the rules are deliberately misapplied for protectionist reasons.

I examine whether a network in which representatives of the Commission and the national authorities work together, would help to improve this situation. My focus is on competition and electronic communications law, where such networks have been in place since 2003.

I also investigate whether these networks respect legal values such as judicial review and how they fare in the light of economic criteria like transaction costs. This is where my TILEC membership is an advantage. Should firms always be able to go to court to challenge a decision, even when this means more costs than benefits for society? Are the resources that national authorities have available better spent on participating in these networks or should they rather be used for applying the European rules in individual cases? Regular TILEC meetings that bring lawyers and economists together are the perfect place to test my thoughts on matters like this.”



## Beauty in simplicity

**Name:** Jun Zhou  
**Education:** Economics (Tilburg University), PhD exchange student (University College London)  
**Research programme:** Access to Justice; junior member of TILEC  
**Research:** Access to Justice: an Economic Approach

“The annual cost of tort litigation in the United States in 2006 was \$865.37 billion, more than the Pentagon budget, plus Iraq and Afghan conflicts combined; however, less than 15% of that amount goes to compensate injured people. In 2003, the United Kingdom had a 0.7% ratio of tort cost to GDP, the same size as its costs of war in Iraq and Afghanistan. However, more than 50% of the plaintiffs received no compensation after having incurred a substantial amount of legal costs. How can we improve the legal system to give people fair and efficient access to justice? This is the question I seek to answer in my research.

TILEC combines economics and law, and these are the two disciplines addressed in my research. I am looking at a legal problem from an economic point of view. The law fascinates me: I have taken courses in law and keep track of recent development in legal systems. But it is my training in economics that enables me to rigorously apply scientific method to accurately pin down the core of a legal problem, such as ‘prejudgment interest’. TILEC is playing an important role in my everyday work. The interaction with other members and the supervision I am receiving are most certainly benefiting the quality of my academic output. The research atmosphere at TILEC is vibrant and friendly.

Recently, I carried out a study of the ‘prejudgment-interest-law’. Say you were run over by a car and the time

between your accident and court judgment is one year, and the annual prejudgment-interest-rate is 10%. Then, by the prejudgment-interest-law, a defendant deemed liable for a damage of 10,000 euros in court will be required to pay the plaintiff 11,000 euros. The rationale behind this law is that, if the defendant would not have to pay interest on the damages, he would have an incentive to delay settlement. However, my study shows that prejudgment-interest has the counter effect of increasing settlement delays: a 1% increase in prejudgment-interest-rate delays settlement by eight months. This is because it increases the litigants’ uncertainty about trial outcomes thereby making settlement agreement more difficult to reach.

For me as a researcher, economics has a beauty in its simplicity. The challenge lies in finding the underlying simplicity so that I can produce a consistent analysis on a complex social problem like access to justice. Simplifying things until only the essence remains is an art. In economics, just like in any art, it is often more difficult to be simple and concise than to be complicated and adequate. The simplicity in economics seems very abstract, but in fact it can teach you much about yourself and about life. If you want to go to A, for example, then you cannot go to B at the same time. That economic methodology helps me to understand human behaviour, and hence myself. And that was my basic reason for first choosing economics when I was still at secondary school in China.”

## Latest TILEC news

### Two new professors of Economics and Healthcare Regulation appointed

The Dutch Healthcare Authority (NZa) and Tilburg University have recently started working together on research and education in the fields of competition and regulation in health markets. The NZa is to invest € 200,000 a year in the partnership between 2008 and 2011, whilst the university will contribute at least € 1 million in all. Also involving Tilburg University's care and welfare research institute, Tranzo, the venture will be based at TILEC. The research programme is led by Professor Jan Boone, with Professor Leigh Hancher acting as co-ordinator for the legal studies. To bolster the project, two new part-time professors have been appointed with effect from 1 March 2008. They are Marcel Canoy in the Faculty of Economics and Business Administration and Wolf Sauter in the Faculty of Law.

**Marcel Canoy** was born in Amsterdam in 1963 and read Econometrics at the University of Amsterdam, where he obtained his doctorate in 1993 for a thesis on the theory of price competition. He is currently a member of BEPA, the Bureau of European Policy Advisers to José Manuel Barroso, President of the European Commission. In the past he has worked at the Netherlands Bureau

for Economic Policy Analysis (CPB), the universities of Maastricht and Louvain (Belgium) and the French Centre for Economic Research and its Applications (CEPREMAP).

**Wolf Sauter** was born in Amsterdam in 1966 and read History, Dutch Law and Public Administration at the University of Groningen, as well as Political Science at Illinois State University in the US. He obtained his doctorate, with distinction, at the European University Institute in Florence, Italy, in 1996. He went on to work as a lawyer in Brussels, as a researcher at the Centre for European Law and Politics at the University of Bremen in Germany and as Professor of Economic Regulatory Law at the University of Groningen. In recent years he has been employed at the Directorate-General for Competition of the European Commission, at the Dutch Independent Post and Telecommunications Authority (OPTA) and at the Financial Markets Directorate of the Netherlands Ministry of Finance. He is currently active as a competition expert at the Dutch Healthcare Authority (NZa) and has been an extramural fellow of TILEC since July 2007.

### TILEC investigates impact of European contract law

While many researchers around the continent are drafting rules for submission to the European Commission as part of its "Common Principles of European Contract Law" project (CoPECL), TILEC members Filomena Chirico, Pierre Larouche and Eric Van Damme are leading a group of highly qualified European economists and lawyers to provide insights into the economic repercussions of these

rules. This Economic Impact Group (EIG) will next meet in June 2008. At its December 2007 gathering, the group discussed performance and breach of contract, measure of damages, consumer contracts, long-term contracts and insurance contracts. The boundary between contractual and extracontractual obligations was also touched upon.

For more news, subscribe to TILEC's newsletter at [TILEC@uvt.nl](mailto:TILEC@uvt.nl), call +31 13 466 8789, or visit [www.tilburguniversity.nl/tilec](http://www.tilburguniversity.nl/tilec).

## COLUMN

### Competition law and industrial property law: two means to one end

By Ruud Peters, CEO Philips Intellectual Property & Standards

It is often felt that competition law and industrial property law conflict with each other, which may explain why the invitation for this column asked to write about the tension between these two. Doing that is, however, quite a challenge if one believes that in fact, there is no tension, as these two fields of law are rather mutually supportive than in conflict. Both aim to promote healthy competition between businesses. As the readers of this contribution are probably well aware about how competition law promotes a healthy competition, I will confine myself to showing how the very same purpose is achieved by industrial property law.

The cornerstone of international industrial property law is formed by the Paris Convention of 1883, by means of which an international Union for the protection of industrial property is established. Already in this cornerstone, there are important provisions relating to promoting a healthy competition. According to Article 5, each country of the Union shall have the right to take legislative measures providing for the grant of compulsory licenses to prevent the abuses which might result from the exercise of the exclusive rights conferred by a patent, for example, failure to work. Where the grant of compulsory licenses would not have been sufficient to prevent the said abuses, the patent may even be forfeited. If a trademark is not used, the trademark registration may be cancelled, so as to clear the way for others to register and use the trademark. According to Article 10bis of this convention for

the protection of industrial property, the countries of the Union are bound to assure effective protection against unfair competition, which shows that in fact, competition law is just a part of industrial property law, and not in conflict therewith.

More recently, in 1994, the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights was adopted. Already the very first paragraph<sup>1</sup> of the introduction to that agreement shows that a decent IP protection regime is one that does not bar legitimate trade. This WTO-TRIPs Agreement not only contains provisions ensuring that enforcement procedures are available so as to permit effective action against any act of infringement of intellectual property rights, including expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringements. It also contains provisions acknowledging that some licensing practices or conditions pertaining to intellectual property rights which restrain competition may have adverse effects on trade and may impede the transfer and dissemination of technology, and thus allowing appropriate measures to prevent or control such practices.

By showing that the two most important international treaties on intellectual property already contain provisions promoting a healthy competition, I hope to have proven that competition law and industrial property law are not in conflict.

<sup>1</sup>'Desiring to reduce distortions and impediments to international trade, and taking into account the need to promote effective and adequate protection of intellectual property rights, and to ensure that measures and procedures to enforce intellectual property rights do not themselves become barriers to legitimate trade'