From the Board

Ten Years of Modernized European Competition Law in Floris Vogelaar's Landmark Notes

Around ten years ago, Floris Vogelaar opened this journal's pages with an editorial on the state of the art in competition law at the turn of the twentieth and twenty-first centuries.[1] His editorial (re)marked the change from introducing competition law rules, in the national legal orders of all Member States to actually enforcing and actively invoking those rules. Ten years ago the fact that the black letter of competition rules had been laid down in all the EU Member States and that the national competition rules often closely matched the provisions of the EC Treaty was rightly applauded and acknowledged as the initial step in creating competition law culture in Europe. However, after reaching a common understanding of what kind of practices should be prohibited, questions of how and who should enforce those rules came to the forefront. While most Member States voluntarily converged their substantive competition rules with those of the EC Treaty, national competition policies differed on enforcement methods, in particular which remedies and sanctions were effective in deterring wrongdoers and what was an ideal institutional setting to enforce the competition rules. The discussion, therefore, shifted from substantive issues to enforcement and institutional matters. This change in European competition policy had formed an inherent part of a broader EU development, which was taking place in the shadow of enlargement. It was clear that the enlargement process has pushed open the discourse on enforcement and made the complexity and the relevance of enforcement for the effective working of Community rules manifest.[2] While previous issues of enforcement and institutional structures were regarded to rest in the sacred competence of the Member States according to the Community principles of procedural autonomy and institutional neutrality, enlargement has pushed crucial questions of enforcement methods and institutional choice and design to the forefront of the EU agenda.[3] In competition law, this change was taking shape through what Vogelaar called the 'economization' of competition

[1] F.O.W. Vogelaar, 'Competition Law and the Turn of the Century', *Legal Issues of Economic Integration* 28 (2001): 135–141.

[2] A. Bakardjieva-Engelbrekt, 'Grey Zones, Legitimacy Deficits and Boomerang Effects: On the Implications of Extending the *Acquis* to Central and Eastern Europe', in *Swedish Yearbook of European Law*, eds N. Wahl & P Kramér (Oxford: Hart Publishing, 2001), 1–36.

[3] This trend can be followed in many other policy areas. In consumer protection, for example, very similar developments take place today. See K.J. Cseres, 'Collective Consumer Actions: A Competition Law Perspective', in *Collective Consumer Interests and How They Are Served Best in Europe; Legal Aspects and Policy Issues on the Border between Private Law and Public Policy*, eds W.H. Van Boom & M. Loos (Groningen: Europa Law Publishing, 2007); K.J. Cseres, 'Consumer Protection in Eastern-European Member States', *Vergelijkend Wijs* (2007): 37–58.

'From the Board'. *Legal Issues of Economic Integration* 37, no. 1 (2010): 1–4.

rules, for example in the new Block Exemption Regulation on vertical agreements, and the modernization of European competition rules as announced in the White Paper of 1999 and later implemented by Regulation 1/2003 and several accompanying notices.

Floris Vogelaar noted himself that whether the forms of enforcement or control are equally effective in all countries where these formally apply was an interesting topic for research.[4] In the academic discourse that has taken place during the last decade addressing efficient enforcement methods, Floris Vogelaar has had an undisputed role in formulating the message that competition law enforcement had to be stepped up in order to fight hard-core restrictions and to avoid significant economic harm to society. He argued in favour of communicating this message to the corporate world in the form of dissuasive and deterrent remedies and sanctions affecting collective and individual incentives of firms to obey the law. Vogelaar has been an advocate of transforming compliance with competition rules into the basic audit requirements of a good corporate governance system.[5] He has also argued in several forums for stricter sanctions such as disqualification orders for individuals and even criminal sanctions (custodial sanctions for individuals) as an *ultimum remedium* by carefully setting out the legal and economic theories behind this delicate mechanism and the more generally applied administrative law system.[6]

Floris Vogelaar has recently retired from the University of Amsterdam and left the board of editors of this journal. He has edited a number of special issues in this journal, such as issues in 2001 and in 2005, both on the modernization and the entering into force of Regulation 1/2003. His last editorial in the first issue of 2009 was a true trademark of Vogelaar-style: a concentrated but informative overview with exact numbers and of course paragraphs and with a well-chosen French expression as its closing words. Perhaps only that often included metaphor with music and art was missing. This issue is dedicated to him and to articles and a case note on topical issues in European competition law and regulation. Three contributions, from Dirk Schroeder, Phedon Nicolaides, and Paul Lugard, are written submissions of the symposium, which was organized on 18 September 2009 in Amsterdam for the retirement of Floris Vogelaar.[7]

The contributions in the present issue discuss different but topical issues of European competition law.

Maartje Visser's article discusses the networked system for the enforcement of European competition law and electronic communications law and shows that these networks exhibit judicial accountability deficits as regards soft law instruments. She examines whether judicial review could remedy this inefficiency in an effective way taking

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[4] Vogelaar, 135.

[5] F.O.W. Vogelaar, *Mededingings Clean Gedrag als Onderdeel van een Goede Corporate Governance* (Markt & Mededinging, 2005), 113–115.

[6] Amsterdam Center for Law and Economics (ACLE) Conference on Remedies and Sanctions in Competition Policy: Economic and Legal Implications of the Tendency to Criminalize Antitrust Enforcement in the EU Member States (Amsterdam, 17–18 Feb. 2005); K.J. Cseres, M.P. Schinkel, & F.O.W. Vogelaar (eds), *Criminalization of Competition Law Enforcement Economic and Legal Implications for the EU Member States* (Chelthenam: Edward Elgar, 2006).

[7] Professor Jacques Steenbergen and Professor Annetje Ottow were also participating in the symposium.

account of the costs and benefits of such an approach. Visser argues that judicial review is economically inefficient and legally difficult to implement and therefore proposes the possibility of relying on the participation of affected interests to achieve the same goal.

Dirk Schroeder discusses the striking lack of harmonization in concentration control among Member States and its legal complications and whether there is a case for harmonization at all.

Paul Lugard discusses the current, much debated question of whether it is still correct to consider resale price maintenance as an offense under European competition law. He argues that economic insights have come to the fore that demonstrate that vertical price and non-price restraints may indeed in exceptional circumstances give rise to negative effects but may equally be inspired by efficiency considerations. In the latter case, those vertical restraints benefit consumers in the form of increased output, variety, or innovation and should not be treated unfavourably under Article 81 or equivalent provisions of national competition law. Lugard argues that as the Commission is embracing consumer welfare as the guiding principle for the interpretation of Article 81, its policy has definitively moved away from the freedom of action doctrine to an effects-based approach, which should handle resale price maintenance accordingly.

Phedon Nicolaides discusses the role of economics in the present state aid practice of the European Commission by analysing the application of the balancing test in a number of Commission cases. This test is applied in order to assess the compatibility of the proposed state aid measure with the common market. He comes to the conclusion that the Commission has not managed to implement a more refined economic approach in its practice because the cases show a binary way of the applying the test.

Michael Frese puts the recent preliminary ruling of the European Court of Justice in Case C-8/08 *T-Mobile* against a thorough legal scrutiny focusing on three aspects where the Court has formulated novelties for the competition law jurisprudence. Accordingly, Frese discusses the notion and criteria of restrictions of competition by object, concerted practices, and the notable ruling of the Court that the presumption of causality between concerted action and market conduct is a matter of substantive law and does not belong to the procedural autonomy of respective Member States.

Where does European competition law go from here in the next ten years? Presently, the parallel application of national and EC rules as well as the close institutional cooperation between national authorities and the Commission form significant channels of the Europeanization process. Europeanization of competition law is taking shape through the opposing dynamics of convergence and divergence. Convergence is induced and encouraged by Regulation 1/2003 and the European Competition Network; divergence is present in the wide diversity of enforcement methods and institutional design among competition authorities across the EU, which is based on a large variety of country-specific institutional traditions and legacies. In the absence of a Community blueprint or a clear methodology, institutional choices were guided by a learning process characterized by improvisation and experimentation. The Report on the functioning of

Regulation 1/2003[8] has acknowledged this institutional deficit. How institutional designs and the interaction between the various institutional actors enforcing competition law influence effective law enforcement merits further research. The fact that institutional actors matter, not only how they individually enforce the law but also how they are linked to each other and how they together strive for effective enforcement, is something Floris Vogelaar had indicated already ten years ago when he expressed his personal scepticism about the role that national courts were given in the overall enforcement of Articles 81 and 82 EC.

KCs, November 2009

[8] Commission Staff Working Paper accompanying the Report on the functioning of Regulation 1/2003, SEC(2009) 574 final, 29 Apr. 2009, points 190 and 200.