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Dear Members of the Supervisory Board,
Dear Mr. President,
Dear Mr. Dean,
Dear Colleagues, Relatives and Friends,
My fellow citizens,

This is the first inaugural speech in my life. This chair, “EU Competition Policy”, was founded at the beginning of this year and is sponsored by Howrey. I am grateful that this law firm provides me with the opportunity to translate EU competition policy issues to students. Students need to be aware of the fact that nowadays strategic business decisions often need to be based on a prior competition assessment.

Nyenrode is one of the few business schools in the world that has closely focussed on competition for many years. Previous presidents of Nyenrode include former EU Competition Commissioner Karel Van Miert and current Commissioner Neelie Kroes.

Moreover, the Nyenrode Institute for Competition (NIC) was launched in January 2002. The NIC is a centre of excellence in the study of competition and anti-trust policy. NIC develops highly interactive learning programmes, case studies and courses for competition and anti-trust professionals.

In short: throughout the years, Nyenrode Business Universiteit has demonstrated a profound academic interest in the study of competition policy.

This inaugural speech will mainly focus on the recent development of EU competition policy. It is an appeal for further reform of aspects of EU competition policy.
2. The early days

Why should we commemorate President Benjamin Harrison? Should we commemorate him, because his grandfather was also (the 9th – 1841) president of the United States? Should we remember him, because he became father of another child at the age of 63? Or should we remember him because he loved duck hunting, but shot a pig by mistake, which – by the way – made national news in 1889? I guess it is none of the above. President Benjamin Harrison should be remembered, because, one year later, he enacted the Sherman Anti-trust Act.

2.1 Sherman Anti-Trust Act 1890

According to the Sherman Anti-trust Act of 1890 it was illegal to "monopolize or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among several States, or with foreign nations".

However, President Harrisson did not implement the Sherman Anti-trust Act. It was President Theodore Roosevelt who contrasted hostile behavior of industrial conglomerates. Clearly, President Roosevelt could not anticipate that one day it would be possible for companies to do business by using fax machines, mobile telephones, the Internet, blackberries and video conferencing. But in 1905 he believed that:

"Modern life is both complex and intense and the tremendous changes brought by the extraordinary industrial development of the last half century are felt in every fiber of our social and political being."

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1 Sherman Anti-trust Act 1890, Section II.
2 Theodore Roosevelt, inaugural address, March 4, 1905.
President Roosevelt was a man with vision. He was very much aware of the ‘extraordinary industrial development’ that had occurred and would further continue. He was the first President who established a new cabinet position to monitor trusts. He demanded authority to inspect records of companies engaged in interstate commerce.

Moreover, he instructed attorney-general P.C. Knox to bring suit against Northern Securities Company: a merger of two major railroad companies with the “purpose to combine, and by combination destroy competition”. In March 1904 the Supreme Court of the United States decided that the merger was an illegal combination in restraint of interstate commerce. The Supreme Court ordered the company to be dissolved. It was a landmark decision.

Although the judgement is more than a hundred years old, it is remarkable that the concerns, that were expressed by Mr. Justice Brewer in his concurring opinion, are – at least to a certain extent – still present nowadays. Mr. Justice Brewer stated:

“I have felt constrained to make these observations for fear that the broad and sweeping language of the opinion of the court might tend to unsettle legitimate business enterprises, stifle or retard wholesome business activities, encourage improper disregard of reasonable contracts and invite unnecessary litigation”.

Is it not true that nowadays companies complain about “the broad and sweeping language” of competition laws? Is it not true that nowadays sound business opportunities can be frustrated for the same reason? And is it not true that, in particular in the US system, we hear complaints about unnecessary litigation? It seems that some things never change.

President Roosevelt also brought anti-trust actions against other giant corporations, such as Standard Oil, the American Tobacco Company and DuPont. In his inaugural address of March 4, 1905 he made it clear that it was time for a change. President Roosevelt stated:

“So in 1905, exactly 100 years ago, President Theodore Roosevelt endorsed a policy of change.

2.2 Freiburg “ordo-liberal” school of law and economics

Some time later – in 1930 – the Freiburg School of law and economics or the Ordo-liberal School was founded. According to the founding fathers of the Freiburg School – Walter Eucken (economist), Frans Böhm (jurist) and Hans Grossmann-Doerth (jurist) – the essence of the free market economy is an order of free competition in which all economic players meet as legal equals, and in which voluntary exchange and voluntary contract are the only means by which economic activities are coordinated.

Böhm and Eucken understood that creating and maintaining a competitive market order requires more than replacing privileges and restrictions by free trade and freedom of contract. They claimed that an economic constitution is needed that is tuned to uphold competition in the face of anti-competitive interests.

According to the founders of the school, it is essential to understand that areas of law such as bankruptcy law, administrative law and all other parts of the law together constitute the economic constitution and that between them systematic interdependencies may exist that Ordnungspolitik has to pay attention to. According to the Freiburg School, governments have an essential positive role to play in creating and maintaining an appropriate framework of rules and institutions. Such a framework would allow market competition to work effectively.

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“the great development of industrialism means that there must be an increase in the supervision exercised by the Government over business enterprise”.

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4 Böhm, 1937, 105.
7 Eucken, 1938, 81.
The central claim of the Freiburg School is that individual players or members of a jurisdiction are not allowed to abrogate or renegotiate the rules that are established at the constitutional level. In other words: the freedom of contract, which is of obvious importance for a competitive market economy, should not be used for the purpose of entering into contracts which restrict or eliminate the freedom of contract. Therefore, in a competitive economy, economic agents must adhere to the rules of the game of competition. For these reasons, the Freiburg School considered cartel agreements to be incompatible with the economic constitution.

Ordnungspolitik in the Freiburg School sense is foremost competition policy: a policy that aims at securing a competitive process with desirable working properties, one that works to the benefit of consumer interests. Market competition is not just any kind of competition, but it is one that requires appropriate rules of the game. Therefore, it is not surprising that Böhm, one of the founding fathers of the Freiburg School, describes competition as “the moral backbone of a free profit-based economy.”

Of course there are dissenting opinions. For example Rothbard. He sees no reason why one should object to cartel contracts. Rothbard argues that in the free market “consumers and producers adjust their actions in voluntary cooperation”. In a “pure or unhampered market economy” cartel agreements are nothing more than voluntary contracts between producers. Such agreements are equally legitimate as voluntary agreements between producers and consumers. “To regard a cartel as immoral or as hampering some sort of consumer sovereignty is therefore completely unwarranted.”

Clearly, the founders of the Freiburg School would never have agreed with the concept of the “pure or unhampered market economy” in which cartel agreements are legitimate. The founders of the Freiburg School emphasised that economic policy should focus on the improvement of the institutional framework; a competition policy is needed which aims to secure a competitive process.

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8 Eucken 1982, 125. See also Viktor J. Vanberg, The Freiburg School, Walter Eucken and Ordoliberalism, p. 11.
11 Böhm 1960, 22.
13 The imaginary construction of such a economy assumes that the operation of the market is not obstructed by institutional factors. See Von Mises; 1949, 238 f.
3. The Modernisation Package

Nowadays European competition policy and European competition law are part of the foundation of our market economy. European competition law prohibits anti-competitive agreements, abuse of market power and anti-competitive mergers. European competition policy aims to secure the benefits of competition: increased innovation, lower prices and a stronger economy. Nowadays the importance of competition policy can be illustrated by the fact that each Member State has a national competition authority to enforce both national and European competition law. However, this foundation of our market economy was not created overnight.

3.1 A European Union of 25 Member States

In 1962 the European Commission faced an enormous challenge. A completely new competition policy on a continental scale had to be created in order to meet two needs:

"the integration of national markets into a single economic area and the development of competition as the driving force of our economy."

The primary objective of the European Community was to integrate national markets. Centralised enforcement of European competition rules by the European Commission was regarded as the only appropriate system. It would enable the European Commission to promote market integration by preventing companies from recreating barriers which Member States themselves had gradually eliminated.
After more than 40 years the European Community changed. Its development since 1962 has been extraordinary. The European Community of six Member States has become a European Union of 25 Member States and is likely to become even larger as applicant countries join. Moreover, the internal market with all its imperfections became a reality.22

After more than four decades, the role of the European Commission also changed. In the beginning, the focus of its activity was on establishing rules on restrictive practices, interfering directly with the goal of market integration. Over the years, a body of rules has been created, which is now accepted by all Member States and by industry as fundamental for the proper functioning of the internal market.23

As European competition law and policy developed throughout the years, the European Commission was able to refocus on enforcement and maintaining competitive market structures. This can be demonstrated by the number of cartel decisions that has been adopted by the European Commission. In the last four years, since mid-2001, the European Commission had adopted 31 new decisions against hard-core cartels and imposed nearly € 4 billion in fines. This amounts to approximately 35% of all anti-cartel decisions taken since the first one back in 1969.24

3.2 More economic-based competition policy

Moreover, in the past few years, European competition policy has been reformed towards a more economic-based approach in respect of anti-competitive agreements and anti-competitive mergers.25 Let me give you some examples.

First, for certain anti-competitive agreements the presumption of legality is created depending on the market share of the supplier or buyer. A ‘safe harbour’ exists if the market share does not exceed the threshold of 30%.26

Second, with regard to anti-competitive mergers, European competition policy has recently also been reformed towards a more economic-based approach. Mario Monti referred to ‘a radical reform’, when he announced in 2002 that the European Commission’s decision-makers would need to be provided with an independent economic viewpoint.27 The newly appointed Chief Economist should improve the standards of economic analysis, since the holder of this post is “someone with very sound knowledge of industrial economics”.28 Moreover, the standard of ‘significantly impede effective competition’29 and the Commission’s new horizontal merger guidelines30 seem to indicate that the European Commission has the intention to move beyond purely structural indicators21 and might be on its way to a more effects-based test. We should also take into account that Commissioner Kroes recently stated that a ‘sound economic analysis’ is needed.32

Third, the European Commission is considering a review of its policy on abuse of dominance. A reform towards a more economic-based approach is expected. I agree with Philip Lowe, DG Competition, when he stated that a credible policy on abuse of dominance must be compatible with what mainstream economics teach us’.33

Fourth, Commissioner Neelie Kroes has stated that economic analysis of state aid is still in its infancy, but has indicated more than once that the European Commission is trying to refine its economic approach in the area of state aid.34

However, all of this is not sufficient. I welcome a European competition policy that has been, and continues to be, reformed towards a more economic-based approach. Nevertheless, we need to do more in order to cope with the challenges that result from the enlargement of the European Union.

How can the European Commission guarantee adequate enforcement of its competition policy in 25 Member States, if centralised supervision is maintained? How can the European Commission effectively dawn raid the premises of companies in 25 Member States? Clearly, it cannot be realized without a reform of its centralised enforcement system.

At the same time, the enlargement of the European Union makes it necessary to strengthen competition policy with regard to cartels and abuses of dominant positions. The European Commission needs to be allowed to refocus its activities on the most serious infringements of competition law in cases with a genuine Community interest. An enlarged European Union requires a more efficient and simpler system of control.

Besides, a reform of the European competition policy should not lead to unnecessary bureaucracy and should minimize compliance costs for industry.

In order to meet these new challenges, it was essential for the European Commission to pursue a policy of change: “the modernisation of the competition rules”.

Several measures – hereinafter referred to as the ‘Modernisation Package’ – have been introduced as of May 1, 2004. That is less than one and a half year ago. Therefore, we are still at the break of dawn. I would like to highlight three measures that are part of the Modernisation Package.

### 3.3 Key elements of modernisation

First, the centralised authorisation system has been abolished: no more anti-trust notifications. The centralised enforcement system was based on prior notification of restrictive practices that needed an individual exemption from the cartel prohibition. A positive decision by the European Commission was required. As of May 1, 2004, no prior decision by the European Commission is needed. Without any delay, companies can benefit from the directly applicable exception of the cartel prohibition. Moreover, national competition authorities and national courts are entrusted with the authority to assess whether companies are right when they claim on the basis of self-assessment that they can benefit from the directly applicable exception of the cartel prohibition. In just a few minutes we will see the bright side of self-assessment. And we will see the dark side.

Second, in the new system national competition authorities are given the power to apply the European competition rules in individual cases. Acting on their own initiative or on a complaint, national competition authorities may require that an infringement is brought to an end, order interim measures, accept commitments and impose fines or any other penalty provided for in their national law. In the new system, the national competition authorities bear the primary responsibility for enforcing the European competition rules. The European Commission will concentrate its efforts on detecting and prosecuting the most serious infringements.

Anti-competitive practices are generally complex in nature, require in-depth investigation and cooperation with other competition authorities. In the new system such cooperation is embedded in the European Competition Network that is created as a result of the Modernisation Package.
The Network is made of the European Commission and the national competition authorities within all 25 EU Member States. How does it work? How to ‘ensure both an efficient division of work and an effective and consistent application of European competition rules’? \(^{45}\)

After commencing the first formal investigative measure, a national competition authority will inform the European Commission without delay.\(^{46}\) This information may also be made available to the competition authorities of the other Member States.\(^{47}\) Moreover, a national competition authority must notify certain important draft decisions to the European Commission.\(^{48}\) For example, a decision that requires that an infringement is brought to an end or a decision to accept commitments by companies. After the submission of this information,\(^{49}\) the European Commission will make an assessment of the case.\(^{50}\) Subsequently, the national competition authority may finalize its decision, for example a decision to impose a fine. National competition authorities may also exchange information between themselves necessary for the assessment of a cartel case or abuse of dominance case that they are dealing with.\(^{51}\) The proper functioning of the Network seems crucial for the effectiveness of the reform that is envisaged by the Modernisation Package.

Third, in the new system, national courts are empowered to apply the European competition rules.\(^{52}\) The European Commission has given up its monopoly of exemption. In other words, as a result of a private action before a national court, national courts have the authority to assess whether a company is right when it claims that it can benefit from the exception of the cartel prohibition. Never before were national courts entrusted with this authority. This might explain why national courts are not left in the dark. National courts may ask the European Commission to transmit to them its opinion on questions concerning the application of the European competition rules.\(^{53}\) But there is more.

Acting on its own initiative the European Commission may submit written observations to national courts.\(^{54}\) With the permission of the court, the European Commission may also make oral observations.\(^{55}\) For these purposes, the European Commission may request the court to transmit any documents necessary for the assessment of the case.\(^{56}\) In each case, a copy of a written judgment of national courts deciding of the application of European competition rules shall be forwarded to the European Commission.\(^{57}\)

Besides, national competition authorities are also entrusted with the authority to submit written observations to national courts and, with permission, make oral observations.\(^{58}\)

In short: national competition authorities and national courts can challenge the self-assessment that is made by a company. Moreover, not only the European Commission, but also national competition authorities can impose fines for cartels and abuses of dominant positions.\(^{59}\) Today, companies are living in a world that has a more decentralised enforcement system of European competition rules. More decentralised than ever before.

3.4 Leading role of the European Commission

But let there be no doubt. From the very beginning it was clear that in the new, more decentralised system, the European Commission would keep a ‘leading role’ in determining European competition policy. The European Commission continues to adopt Regulations and Notices setting out the principle rules of interpretation of the cartel prohibition and abuse of dominance. The European Commission will continue to adopt important prohibition decisions and positive decisions to set out guidance for the implementation of these provisions.\(^{60}\)

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\(^{45}\) Commission Notice on cooperation within the Network of Competition Authorities, OJ C 101/43, 27.4.2004, point 3.

\(^{46}\) Article 11(3) of Regulation 1/2003.

\(^{47}\) Article 11(3) of Regulation 1/2003.

\(^{48}\) Article 6 of Regulation 1/2003.

\(^{49}\) Article 6 of Regulation 1/2003 refers to Articles 81 and 82 of the Treaty.

\(^{50}\) Article 6 of Regulation 1/2003 refers to Articles 81 and 82 of the Treaty.

\(^{51}\) Article 5 of Regulation 1/2003.

\(^{52}\) Article 11(3) of Regulation 1/2003 refers to Articles 81 and 82 of the Treaty.

\(^{53}\) Article 11(3) of Regulation 1/2003 refers to Articles 81 and 82 of the Treaty.

\(^{54}\) Where, according to Article 15(3) of Regulation 1/2003, ‘the coherent application of article 81 or 82 of the Treaty so requires’.

\(^{55}\) Article 11(3) of Regulation 1/2003.

\(^{56}\) Article 11(3) of Regulation 1/2003.

\(^{57}\) Article 11(3) of Regulation 1/2003.

\(^{58}\) Article 11(3) of Regulation 1/2003.

\(^{59}\) For infringements of Articles 81 and 82 of the EC Treaty.

4. Impact on business

Five years after the presentation of its *White Paper on Modernisation*, the Modernisation Regulation became effective as of May 1, 2004. Until now, there has been some experience in dealing with the *Modernisation Package*.

4.1 Some figures

Since May 1, 2004, eleven cartel decisions were taken: six were taken by the European Commission and five by national competition authorities. With regard to abuse of dominance one decision was taken by the European Commission and eight by the national competition authorities. I was told that until now, in most cases, the assessment of draft decisions submitted by national competition authorities to the European Commission has only led to minor amendments of these decisions. However, it is too soon to conclude that the assessment by the European Commission has a limited influence on the final decisions of national competition authorities. For example, normally it takes several years before a cartel investigation leads to a decision whereby a fine is imposed. Therefore, it will take a few more years before reliable figures are available. Today it is too soon to tell.

The demand for such a ‘leading role’ explains why the European Commission maintains the power to remove a case from the jurisdiction of national competition authorities and to deal with the case itself. Re-allocation of a case might occur if there is ‘a risk of divergent policy’ or when the European Commission is ‘particularly well placed to deal with a case’ for example if practices have effects on competition in more than three Member States.

The European Commission does not only claim a ‘leading role’ in determining European competition policy. It also has the ambition to become more active in the pursuit of serious competition infringements. In this regard the European Commission has a ‘zero tolerance policy’. Thus, it comes as no surprise that in the new system the European Commission has obtained enhanced powers of investigation.

Today, when the European Commission carries out investigations, it has the power to conduct searches of private homes and cars of company directors, managers and other members of staff, where the Commission reasonably expects to find books or other records related to the investigation. Other new or enhanced powers include the ability to seal business premises and the ability to conduct interviews. The fines, which may be imposed for failing to comply with the Commission’s powers of investigation, have been increased.

Where does all of this lead to? The European Commission has endorsed a policy of change. But what will it bring to business? Let us try to discover what is waiting under the new horizon. And let us take time to do so. Let me use the words of Abraham Lincoln to set our minds in the right direction:

“My countrymen, one and all, think calmly and well upon this whole subject. Nothing valuable can be lost by taking time.”

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62 Commission Notice on cooperation within the Network of Competition Authorities, points 14 and 15 and Articles 11 and 13 of Regulation 1/2003.
64 Article 21 of Regulation 1/2003.
65 With the consent of the interviewee. See Article 19 of Regulation 1/2003. See also Article 3 of Regulation 773/2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the Treaty, OJ L 1/123 of 27.4.2004.
67 Abraham Lincoln, inaugural address, March 4, 1861.
68 Decisions under Article 81 of the EC Treaty.
70 Decisions under Article 82 of the EC Treaty.
But there is more to it, if we think about it twice. It will always be difficult to determine what the actual influence is of the European Commission as long as this influence is not visible. We cannot see what is invisible. If the final decision by a national competition authority simply states that the draft decision was submitted to and approved by the European Commission, it is impossible to understand the actual impact of the assessment by the European Commission.\footnote{For example in case 2021/OSB, 15.3.2005, the Dutch Competition Authority (DCA) simply states that the European Commission was informed about the DCA’s draft decision according to Article 11(4) of the Regulation 1/2003. See Van Marissing, _De NMa in actie: de praktijk van de Nederlandse Mededelingsautoriteit_, p. 51.}

At this point in time, it is difficult to make assumptions on the impact of the _Modernisation Package_ on the judgments of national courts.\footnote{See par. 4.4. (Impact on national courts).}

Clearly, nobody knows what the future will bring. However, already today, it is possible to comprehend certain important consequences of the _Modernisation Package_. As a result of it, we do live in a different world. Nowadays, business strategies of companies are already affected. Let me give you some examples.

### 4.2 Impact of self-assessment

As a result of the _Modernisation Package_, self-assessment has become a key word. But what does it mean?

If we look at the bright side, self-assessment is an analysis by a company, which results in a valid and enforceable agreement, without the need for a decision by the European Commission. For example, a distribution agreement is caught by the cartel prohibition. The distribution agreement is nevertheless valid and enforceable, if a company can prove that it should be allowed to benefit from an individual exception of the cartel prohibition. For that reason, the company has to assess _inter alia_ whether the restrictive agreement contributes to improving the production or distribution of goods or to promoting technical or economic progress.\footnote{The conditions of Article 81(3) of the EC Treaty must be satisfied. See Article 1(2) of Regulation 1/2003.}

However, there is also a dark side. The burden of proof that these conditions are fulfilled rests on the shoulders of the company that claims the benefit of an individual exception.\footnote{Article 2 of Regulation 1/2003.} At first sight, it would seem that the Notice of the European Commission on self-assessment\footnote{Commission Notice, Guidelines on the application of Article 81(3) of the EC Treaty, OJ C 101/97, 27.4.2004.} more or less summarizes the settled case law of the European Court of Justice. However, one might argue that a more detailed analysis seems to indicate that the European Commission might have used the occasion to increase the burden of prove that lies on the shoulders of companies.

For example, it follows from the case law of the European Court of Justice that only objective benefits can be taken into account.\footnote{See for example joined cases 56/64 and 58/66, _Consten and Grundig_ 1966, _ECR_ 429.} This requirement dictates that the issue of efficiencies cannot be assessed from the subjective point of view of the parties. Moreover, the European Commission is of the opinion that cost savings that arise from the mere exercise of market power by the parties cannot be taken into account. For instance, when companies agree to fix prices or share markets they reduce output and thereby production costs. The cost reductions in question do not produce any pro-competitive effects on the market.\footnote{Notice application Article 81(3) of the EC Treaty, point 49.} So far, so good. However, the European Commission takes it further.

According to the European Commission all efficiency claims must be substantiated so that the following can be verified:

- The nature of the claimed efficiencies;
- The link between the agreement and the efficiencies;
- The likelihood and magnitude of each claimed efficiency; and
- How and when each claimed efficiency would be achieved.\footnote{Notice application Article 81(3) of the EC Treaty, point 51.}
Moreover, in its Notice, the European Commission further indicates that in the case of claimed cost efficiencies the undertakings must as accurately as reasonably possible calculate or estimate the value of the efficiencies and describe in detail how the amount has been computed. They must also describe the method(s) by which the efficiencies have been or will be achieved. The data submitted must be verifiable so that there can be a sufficient degree of certainty that the efficiencies have materialised or are likely to materialise.80

At the end of the day, businesses must verify the value of the claimed efficiencies, which must be balanced against the anti-competitive effects of the agreement.81 That is what self-assessment is all about. Self-assessment is a Do-It-Yourself project. But once you have finished the project, there is no legal certainty.

So how can we obtain legal certainty? As a result of the Modernisation Package the European Commission will, only under exceptional circumstances, provide some sort of informal guidance to companies that are trying to cope with uncertainties that arise as a result of self-assessment. This means that life has become more difficult. On a day-to-day basis, there are many business practices that are too complex for self-assessment as a Do-It-Yourself project.

Let me give you one example. On February 19, 1999 the Union des Associations Européennes de Football (UEFA) notified the joint selling arrangement regarding the sale of the commercial rights of the UEFA Champions League. After receiving the statement of objections by the European Commission, UEFA notified an amended joint selling arrangement.82 On June 23, 2003 the European Commission decided to grant an individual exemption from the cartel prohibition. This decision was taken after more than four years of deliberations and negotiations. The decision itself contains 55 pages. Imagine that UEFA would have had to analyse the joint selling agreement on the basis of self-assessment. It seems impossible.

Of course, there are less complicated matters. There are - and will be - situations where self-assessment will enable companies to move on without delay i.e., without having to wait for a decision of the European Commission. In those cases, self-assessment is an improvement. That is the bright side. But only when it is too late, a company will find out whether the self-assessment was right. Only if a company is accused of an infringement of the cartel prohibition, its self-assessment will be tested by a national competition authority, the European Commission or a national court. But when that day comes, it is already a day late. This is the dark side.

This uncertainty can influence the business strategy of a company. For example, if a company decides to introduce a new European distribution strategy, it will try to seek certainty that the new strategy is in line with European competition rules. However, the European Commission will only provide informal guidance in cases of ‘genuine uncertainty’ regarding ‘novel or unresolved questions’ for the application of the competition rules. This means that in most cases there is no possibility to seek informal guidance.83

As a result of the lack of legal certainty, a company may fear to act in violation of European competition rules. On the basis of self-assessment, it could decide to make unnecessary amendments to its new strategy and lose some of its competitive edge, without due cause. That would be a shame. Let us remember the words of Mr. Justice Brewer, when he stated – one hundred years ago - that we should not “stifle or retard wholesome business activities”.84

I would like to use this opportunity to give you some other examples of areas where the Modernisation Package has consequences that you may not like. Let me give you an example that comes to my mind.

80 Notice application Article 81(3) of the EC Treaty, point 56.
81 In the context of Article 81(3) of the EC Treaty.
83 Notice on informal guidance relating to novel questions concerning Articles 81 and 82 of the EC Treaty that arise in individual cases (guidance letters), OJ C 101/79, 27.4.2004.
84 See para. 2.1(Sherman Anti-trust Act 1890).
4.3 Impact on sanctions

Two Chief Executive Officers (one British, one Dutch) are engaged in price fixing and meet on a regular basis in London. The Office of Fair Trading (OFT) obtains evidence only with regard to the illegal activities of the British CEO. The OFT sends a request for investigation to the Dutch Competition Authority (NMa). After an inspection of the premises of the Dutch company, the NMa is able to submit conclusive evidence to the OFT regarding the participation of the Dutch CEO in the price fixing.

On the basis of UK competition law, the British CEO can be sentenced to jail. However, under Dutch competition law it is not possible to impose custodial sanctions. Since the evidence with regard to the participation of the Dutch CEO was submitted by the NMa, the OFT cannot impose criminal penalties on the Dutch CEO. The OFT may decide that the British CEO has to go to jail, while there is no possibility to impose a custodial sanction on the Dutch CEO, although both managers were engaged in the same illegal activities at the same time and at the same place. One walks and one does not. That is simply not fair and not acceptable. My imaginary example shows that as a result of the Modernisation Package, there is a growing need for harmonisation of national laws that sanction breaches of competition law.

4.4 Impact on national courts

Let me give you another example that comes to my mind when we consider the impact of the Modernisation Package. Again, an example that you may not like. If a national competition authority applies the European cartel prohibition it is under the obligation to submit its draft decision to the European Commission e.g. a draft decision to bring an infringement to an end. It is likely that if the national competition authority decides to impose a fine, such a decision will be appealed at a national court.

Now all of this is new. Never before did national competition authorities submit draft decisions to the European Commission. Never before were decisions of national competition authorities challenged before a national court, while the European Commission had already made an assessment of the draft decision.

Who will be able to convince a national court that two competition authorities i.e. the national competition authority and the European Commission made a wrong assessment? Which national court will have the courage to set aside a decision that is endorsed by two competition authorities? No one knows.

What comes to my mind, is that the implementation of the Modernisation Package is likely to have a negative impact on the likelihood that a decision i.e. a decision to impose a fine will be reversed by a national court. If I am right – and why should I be wrong? – this would mean that as a result of the modernisation of European competition policy, the position of companies standing before a national court is weakened. I do believe that this was never intended. But I also believe that we have to face reality. Even if such a consequence was never foreseen.

So the Modernisation Package has a bright side and a dark side. In our effort to try to discover what is waiting under the new horizon, we can see on the bright side the opportunity for business to benefit from Do-It-Yourself-assessment in individual cases. As a result of it, agreements are valid and enforceable, while no prior decision of the European Commission to that effect is required: no more anti-trust notifications.

On the dark side, we can see that there is no – or almost none – guidance if there is uncertainty about the outcome of self-assessment. Moreover, since sanctions and penalties provided for in the national law of the Member States are not harmonised, there is a serious risk that the same breaches of European competition rules may lead to different sanctions. Besides, as a result of the Modernisation Package, it will become much more difficult to convince a national court that a national competition authority – supported by the European Commission – made a wrong assessment.

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85 Such request can be based on Article 12 of Regulation 1/2003.
86 According to Section 190 (penalty) of the Enterprise Act 2002, Chapter 40, a person guilty of an offence under Section 188 (cartel offence inter alia price fixing) is liable to imprisonment.
4.5 No need for further reform?

I mentioned that a policy of change was needed to cope with the challenges that result from a European Union of 25 Member States. I have demonstrated that the European Commission has pursued a policy of change. However, according to Commissioner Neelie Kroes we are at the end of the road. Recently, she stated that

“there is no need for further root and branch reform of the anti-trust regime now in place”. 87

With all due respect, I tend to disagree with this statement for several reasons. I believe that the European Commission should go for the extra mile(s). And I would like to challenge the European Commission to do so.

First, I will demonstrate that there is a need to modify its leniency policy. Then, I will encourage the European Commission to set out options for improving the current system of private enforcement. Finally, I will call upon the European Commission to pursue a policy of change in the field of state aid.

Let us take time to consider these changes. Let me use the words of Bill Clinton to set our minds in the right direction:

“We all know in every way in life change is not always easy, but we have to decide whether we’re going to try to hold it back and hide from it, or reap its benefits.” 88

5. Change the leniency policy

There is a need to modify the European Commission’s policy regarding leniency applications. 89 This is a policy that grants favourable treatment to companies that cooperate with the European Commission in order to detect secret cartels. 90 A company that is the first to submit evidence will be granted immunity from any fine that would otherwise have been imposed. 91 Other members of the cartel that come forward to ‘spill the beans’ might be eligible to benefit from a reduction of a fine. 92

5.1 No submit and stop

The Commission’s leniency programme is regarded as a success as a case generator. In 2004 the European Commission received 29 applications for leniency compared to 16 in 2003. 93 That is indeed an impressive figure. However, we should not be blinded by figures. The question remains whether the European Commission will be able to deal with this growing caseload. 94 Nevertheless, today I would like to address another issue.

87 Commissioner Neelie Kroes, Taking Competition Seriously– Anti-Trust Reform in Europe, speech International Bar Association, Brussels, 10.3.2005, p. 4. A few weeks later, Commissioner Kroes stated that we need to look at wider systemic changes in the cartel area (…). Moreover, she stated that the (…) would like to share initial thoughts on (…) aspects of cartel enforcement (…). See The First Hundred Days, speech Studienvereinigung Kartellrecht, Brussels, 7-4-2005.

88 Bill Clinton, State of the Union Address, January 27, 1998.

89 Commission Notice on immunity from fines and reduction of fines in cartel cases, OJ C 45/3, 19.2.2002. This Notice replaces the 1996 Notice on the non-imposition or reduction of fines in cartel cases, OJ C 207/4, 18.7.1996. Therefore, the European Commission already modified its leniency policy in 2002.

90 National leniency programmes are in place in 17 Member States, according to Commissioner Kroes, See Taking Competition Seriously– Anti-Trust Reform in Europe, March 10, 2005, International Bar Association Brussels, p. 4. If a cartel operates in several Member States it might be prudent to submit leniency applications in each Member State since the European Commission could decide to re-allocate a case to a national competition authority. There is no ‘one-stop-shop’ for leniency applications although this is under consideration. See Commissioner Neelie Kroes, The First Hundred Days, speech Studienvereinigung Kartellrecht, Brussels, 7-4-2005.

91 Other requirements also need to be met in order to be granted immunity. See Notice on Immunity, OJ C 45/1, 19.2.2002, point 8-11.

92 In order to be granted a reduction of a fine, several conditions need to be met. See Notice on Immunity, OJ C 45/4, 19.2.2002, point 20-23.

93 Commissioner Neelie Kroes, The First Hundred Days, speech Studienvereinigung Kartellrecht, Brussels, 7-4-2005.

94 Critical issues are, for example, confidentiality, discovery, due process and time frame: “what is the point of generating a flood of new cases if the Commission cannot dispose of them in real time?” See Julian M. Joshua and Peter D. Camesasca, Where angels fear to tread: the Commission’s new leniency policy revisited, The European Anti-trust Review 2005, p. 13. The European Commission is aware of the growing caseload. For example, Commissioner Kroes stated that “the Commission therefore risks becoming the victim of its own cartel-busting success.” See The First Hundred Days, speech Studienvereinigung Kartellrecht, Brussels, 7-4-2005.
I would like to suggest to abolish the rule that the company that applies for leniency must end its involvement in the suspected infringement no later than the time, at which it submits evidence. Submit evidence and stop participating immediately: the ‘submit and stop’ rule. That is the rule we need to abolish. I will demonstrate why.

5.2 Example

Let us assume that a company has been participating in cartel meetings for several years. At these meetings competitors make arrangements on price increases. As soon as our company has applied for leniency, it must stop its participation in the cartel meetings. Immediately. This means that suddenly, one of the members of the cartel no longer participates in the meetings. With a little bit of imagination we can understand that the other members of the secret cartel might get suspicious. How can a company not act suspicious, if the employees are suddenly no longer allowed to attend meetings at which prices are discussed? How can a company not act suspicious, if an employee is no longer allowed to answer the telephone, if a member of the cartel is on the other side and needs to know what price increases will be suggested at the next meeting? That seems impossible.

If the other cartel members assume that a company has applied for leniency – since all of a sudden it is no longer participating in the meetings – they will expect an investigation (a ‘dawn raid’) by the European Commission. As a result, it is most likely that the other members of the cartel will decide to remove or destroy evidence of their participation in the cartel. All of this can be prevented if the company would be allowed to continue its involvement in the cartel for some time.

The company, the applicant, and the European Commission will benefit if we abolish the ‘submit and stop’ rule. Let me clarify this.

5.3 Improvements

The company that applies for leniency will have more time after submission to substantiate its application for leniency. Moreover, it will be easier to obtain more relevant evidence if, after the submission, the company will continue to participate in the cartel meetings and will be much more aware of the kind of evidence that the European Commission is looking for.

The European Commission needs time to assess the evidence that has been submitted by the company that applies for leniency. Since the company would be allowed to continue to participate in the cartel meetings, there is less or no risk that the other members of the cartel will suspect anything. Therefore, it is unlikely that they will decide to remove or destroy evidence before the European Commission undertakes an investigation. The Commission will have more time to prepare such a dawn raid in the new world of cooperation with the national competition authorities. As a result, the European Commission will have sufficient time to prepare a dawn raid decision and prepare an immunity decision.

I welcome the fact that the European Commission reformed its policy in the field of leniency in 2002. As a result of that modification full immunity from fines is available to the first cartel participant that ‘spills the beans’ about the secret cartel. We have seen that the Commission’s leniency programme is regarded as a success as a case generator. A further reform is nevertheless needed. The current system makes it impossible to deal with certain important practicalities, as I have demonstrated.
6. **Change the non-existence of private enforcement**

If a successful leniency policy leads to the detection and punishment of cartels, cartel victims should be encouraged to demand compensation for their losses. I would not be surprised if a few years from now cartel victims – or abuse of dominance victims – will find it normal to try to recover damages in the EU.

Victims might be encouraged by the judgement of the EC Court of Justice in the Crehan case (2001):

“The full effectiveness of the cartel prohibition would be put at risk if it were not open to any individual to claim damages for loss, caused to him by a contract or by conduct liable to restrict or distort competition. Indeed, the existence of such a right strengthens the working of the Community competition rules (…). From that point of view, actions for damages before the national courts can make a significant contribution to the maintenance of effective competition in the Community.”


98 Provimi Ltd v. Roche Products Ltd et al. QB (2003), approved judgement, 6.5.2003.


6.1 **A trend towards recovering of damages?**

Already today, one might argue that there is a trend towards recovery of damages by cartel victims. For example in the Provimi case, the English High Court held that the damages claims against European vitamins cartel members could proceed to trial. The actions are private law claims for damages and rely heavily on the European Commission decision which established the existence of a European vitamins cartel.
The claimants argue that they would have been able to buy vitamins at lower prices and from other entities if there were no cartels.  

Another interesting case concerns the Crehan decision of the Court of Appeal (UK) of May 21, 2004. Mr. Crehan, who gave up possession of his pubs, argued that his leases required him to purchase most of his beer from Courage. He argued that his leases were unlawful under the European cartel prohibition. Mr. Crehan claimed that he suffered significant losses, as independent tenants could purchase beer at considerably lower prices. The Court of Appeal awarded damages to Mr. Crehan of £131,000 (plus interest). This was the first UK case awarding damages for breach of competition law. It could well be that in due time the Crehan decision will be regarded as a landmark decision.

### 6.2 Study on private enforcement

However, at present, private enforcement in Europe is 'totally underdeveloped'. A study published by the European Commission shows that there have been only a very limited number of successful damages awards for breaches of EU competition law in the last forty years. Therefore, there is no comprehensive private enforcement of the competition rules and the deterrent effect 'is not as great as it could be'. Yet, the importance of effective civil anti-trust litigation cannot be underestimated.

### 6.3 Example: Microsoft

A good example of private enforcement of competition rules in parallel to public enforcement by competition authorities is the Microsoft case. On March 24, 2004 the European Commission imposed a fine of €497 million on Microsoft. Although this amounts to a record fine, Microsoft paid even more money to reach settlements with its opponents for claims under US anti-trust law. This case clearly demonstrates that in the US system, private action accounts for an important share of competition enforcement.

Microsoft paid Novell $536 million dollars to withdraw from its legal proceedings against Microsoft. A smaller amount was paid to the Computer and Communications Industry Association (CCIA). Moreover, Microsoft agreed to pay Sun Microsystems $700 million dollars to resolve anti-trust issues. Novell, CCIA, Sun and other companies complained that Microsoft uses its dominant position in the operating system market to give it an illegal advantage in other markets.

Overall, Microsoft estimates it has paid roughly under $3 billion to settle anti-trust cases with Sun, Novell and other companies and to set aside a reserve for litigation in various state anti-trust actions. This amount for civil claims under US anti-trust law is significantly higher than the (€497 million) fine that was imposed by the European Commission. I do understand that this is an exceptional case. Nevertheless, it demonstrates the importance of private enforcement of competition rules.
7. Change the state aid regime

Ten years ago, I proposed a policy of change in the field of EU public procurement. In the last chapter of my thesis on EU public procurement, I suggested several changes. Recently, the European Commission implemented most of these changes.  

Today, I will propose a policy of change in the field of state aid. I would like to think that this time, it will not take ten years before the European Commission decides to implement the changes that I will suggest. I will demonstrate that there is an urgent need for a policy of change in the field of state aid.

It seems that – at least to a certain extent – the European Commission is aware of this. In the Spring 2005 update, the European Commission announced that it is preparing a consultation document on the future of state aid policy. It appears that the review process for a series of guidelines and frameworks in the state aid field has already been started. This has resulted in the State Aid Action Plan.

I would like to argue that this “modernisation” of the state aid policy should not be qualified as such. In order to be qualified as “true modernisation”, the European Commission would have to give up its monopoly to declare aid compatible with the common market.

6.4 Example: Austrian banks

Another good example concerns the proceedings before the Austrian civil courts by the Verein für Konsumenteninformation. By decision of June 11, 2002, the European Commission found that eight Austrian banks had participated in a cartel covering almost the whole of Austria. The banks had *inter alia* jointly fixed the interest rates for certain investments and loans. A fine of more than € 124 million was imposed on the banks.  

Currently the Verein is conducting several sets of proceedings against the banks before the Austrian courts. In those proceedings the Verein claims that as a result of the cartel the banks charged their customers too much interest over a number of years.

6.5 Green Paper

Despite some encouraging examples, there is – as stated - no comprehensive private enforcement of the competition rules in Europe. Therefore, I am pleased that by the end of this year the European Commission will present a Green Paper setting out options for improving the current system of private enforcement. We cannot ignore the importance of effective civil anti-trust litigation. The threat of such litigation could have a strong deterrent effect and might lead to a higher level of compliance with EC competition rules and policy.

108 In that context, the Verein applied to the European Commission for access to the administrative file. On April 13, 2005 the EC Court of First Instance annulled the European Commission decision to reject the request in its entirety. See case T-203.
110 See, for example, European Commissioner Mario Monti, Private Litigation as a key complement to public enforcement of competition rules, speech IBA – 8th Annual Competition Conference, Fiesole, 17.9.2004, p. 2.
and create a decentralised enforcement system of the state aid rules. However, that was not proposed in the State Aid Action Plan. Therefore, the wording “modernised State aid policy” is misleading.

Besides, even more important, it raises the question why there is no modernisation of the state aid policy? If enlargement of the EU is a reason for a decentralised application of the European cartel prohibition and abuse of dominance, why is enlargement not a good reason for a decentralised application of the prohibition of illegal state aid?

7.1 Modernisation of state aid

Yet, the Modernisation Package does not relate to state aid. If a national competition authority can apply the European cartel prohibition, why should it not be able to apply the prohibition on state aid? Moreover, if the European Commission is able to give up its monopoly to apply the exemption to the cartel prohibition, why should it not be able to give up its monopoly to declare aid compatible with the common market? In other words, why should a national competition authority not be empowered to declare aid compatible with the common market?

Is it because the European Commission has to develop a policy with regard to state aid? I would think not. The European Commission could keep a ‘leading role’ in determining EU state aid policy by adopting important decisions and set out guidance for the implementation of the state aid provisions. The European Commission could maintain the power to remove a case from the jurisdiction of a national competition authority and deal with the case itself. Give me one good reason why there is no “true modernisation” of the state aid policy and rules? What are we waiting for?

7.2 Recovering from companies

I would like to share another revolutionary idea. If the European Commission is able to address companies when they violate the European cartel prohibition, why should the European Commission not be able to address recovery decisions to companies (instead of addressing recovery decisions to Member States)?

In the present system the Member State that breaches the prohibition of granting state aid, must correct its own behaviour and recover the unlawful aid that it granted to a company. With just a little bit of imagination, one can understand why recovery of unlawful granted aid is a huge problem in the current system. The hand who gave the unlawful aid, must also take it back. That is difficult since we are all human beings. Let me give you one example.

On June 5, 2002 the European Commission decided that aid granted by Italy to companies active in the utilities sector was incompatible with the common market and ordered recovery from the beneficiaries. Under the rules on recovery on illegal aid, Italy should have taken all the available measures under national law to ensure immediate and effective enforcement of the Commission’s decision. Nevertheless, 2.5 years after the decision was issued, the European Commission noted that no specific measures were taken by Italy to recover the aid from the beneficiaries. Therefore, the European Commission decided on January 20, 2005 to refer Italy to the Court of Justice for failure to comply with its decision of June 5, 2002 which ruled the aid incompatible. This is just one example.

Recovery of incompatible state aid is a lengthy process. The total amount of aid to be recovered on the basis of decisions adopted between 2000 and 2004 is € 9.7 billion. Some € 6.7 billion (including interest) has been effectively recovered by the end of 2004. Therefore, € 3 billion of unlawful aid remains to be recovered. If we exclude interest, almost 50% of the total amount to be recovered (€ 9.7 billion) is still pending. This means that from the 91 decisions adopted between 2000 and 2004, only 21 have been closed by the end of 2004. Besides, the “inflow” of new recovery cases is likely to remain high in 2005 and in 2006.

These figures clearly demonstrate that the recovery of unlawful state aid is a serious problem that cannot be ignored. In particular, if we take into

115 IP(05)76, Commission refers Italy to the Court of Justice for failure to recover illegal aid, 20.1.2005.
account that the first recovery decisions for the ten new Member States are expected later this year, things will only get worse.

Surely, my suggestions for reform – entrust national competition authorities with the application of state aid and recover unlawfully granted aid from companies directly instead from Member States – are radical and will lead to much opposition. Let me use the words of John F. Kennedy to set our minds in the right direction:

“Some men see things as they are, and say why. I dream things that never were, and say why not”.

The review of existing guidelines and frameworks in the state aid field is useful. However, it is not sufficient in order to eliminate the distortion of effective competition that results from unlawfully granted state aid. This review will not solve the problem of recovery of unlawfully granted state aid. A radical reform of the state aid regime is necessary.

I would like to think that if the European Commission is capable of imposing a fine on a company, it is also capable of imposing a recovery decision on a company.117 And would my suggestion not be in line with the Commission’s determination to rationalize and simplify state aid rules and to minimise administrative red tape?118 All that is needed is a change of the law. That is a hurdle that can be taken. Who has the courage to do it?

Let me ask you, what is the use of a combat against anti-competitive agreements, abuse of market power and anti-competitive mergers if companies continue to receive unlawful state aid from their government? In such a situation, effective and fair competition can never be achieved. If there is no radical reform of the combat against unlawful state aid, Member States will continue to corrupt one of the fundamental rules of our market economy.

8. Conclusion

Ladies and gentlemen, as a professor of EU competition policy it is not my primary responsibility to assess whether my proposals for a policy of change are politically sound. Moreover, it is not my direct concern whether the European Commission and a majority of Member States are willing to endorse a policy of change. As a professor, that is my prerogative. At the same time I do believe that it is possible to pursue and apply the changes that I have proposed, even if some of these changes are far-reaching.

I would like to end now, but not with my own words. I would like to end with the words of a man who called upon us: “Let us never negotiate out of fear. But let us never fear to negotiate”.119 The words of a man who had the courage to endorse a policy of change. Unfortunately, he was not given the time to implement the changes he envisaged. I hope that time will be on my side.

I would like to end with a quote from John F. Kennedy from a time when he stood at the break of dawn. Because that is exactly where I am standing today. At the break of dawn.

“All this will not be finished in the first hundred days. Nor will it be finished in the first thousand days, nor in the life of this Administration, nor even perhaps in our lifetime on this planet. But let us begin”.

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117 Assuming that this company can be identified. Member States often claim that recovery is difficult because of the large number of beneficiaries, especially in the fiscal and social security schemes. See report State Aid Scoreboard. Spring 2005 update, COM (2005) 147 final, 20.4.2005. However, in most cases it will be possible to identify the beneficiary.

118 Commissioner Neelie Kroes, Services of General Economic Interest Introductory remarks, Brussels, speech 15.7.2005 (Press Conference) Brussels.


120 John F. Kennedy, inaugural address, January 20, 1961.
Het citaat heb ik reeds eerder uitgesproken. Mijn studenten kennen het. En de eerste woorden – *het moet mooier, het moet beter* – hoor ik zo nu en dan in de wandelgangen. Of ik zie het ergens staan in een stuk dat één van mijn studenten heeft geschreven. Dat is geweldig!

Het citaat is van Thé Lau en gaat als volgt:

*Het moet mooier, het moet beter. Met meer amoureus gevoel. Meer vanuit de onderbuik, zoals het is bedoeld.*

Zwaaien met het lichaam. Schudden met het hoofd.

*In de geest wat mama zegt: niets telt, niets werkt, niets doet wat het moet doen, zonder geloof.*


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Ik heb gezegd.
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The collaboration between Howrey and Nyenrode Business Universiteit, which is focussed around this chair, is an existing one and potentially very beneficial for all parties involved.

For Howrey it represents an opportunity to structure its academic activities in a more professional setting and gain access to academic challenge and sparring.

For Nyenrode Business Universiteit it represents an opportunity to gain more access to a wealth of real life business experience to further leverage its academic value.

For myself it represents the opportunity to continue this chair and make students more aware of the impact of EU competition policy on strategic business decisions.

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I hope that this collaboration will continue for a long time, since – as I have said – today, we are standing at the break of dawn. Let us see how the sun rises. Over and over again.
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