

# Kluwer Competition Law Blog

## Global Competition

Damien Gerard (College of Europe, Belgium) · Wednesday, August 18th, 2010

With the recent adoption of competition law statutes in East and South Asia and reforms completed or under way in Latin America, among other developments, the design - and enforcement - of competition principles for the global economy has attracted renewed interest on the part of practitioners and academics alike.

On the academic side, this is apparent from, e.g., the forthcoming **conference** organized by Daniel Sokol (Univ. of Florida, Levin) and Ioannis Lianos (Univ. College London) on November 18-19, 2010 in New Delhi, India, on “**Implementing Competition Law and Policy, Global Perspectives**” (see [here for more information](#)).

It is also marked by the publication of a monograph by **Prof. David Gerber** (Chicago-Kent College of Law) entitled “**Global Competition: Law, Markets and Globalization**” (OUP, 2010). In his new book, the author of “Law and Competition in Twentieth Century Europe” (OUP, 1998) displays once again an uncommon ability to combine historical and sociological, together with legal and economic, considerations with a view to conveying his views on the management of competition at a global level.

The starting point of the reasoning is the well-know paradox of global markets regulated by the laws of individual states, and the alleged prevalence of those legal systems that have sufficient economic leverage to reach outside their borders. As Gerber acknowledges upfront, the paradox is two-fold: (i) national laws reflect the needs, interests and values of the states in which they operate rather than the needs and characteristics of global markets; while (ii) any body of global competition principles also ought to be “responsive to the needs of people everywhere”.

From there, the book unfolds in three parts. The first one offers an in-depth historical account of past attempts at building a global competition regime, of unilateral strategies to expand the scope of domestic laws and of new approaches developed in the context of the “turn to the market” that has characterized the late 20th - early 21st century. In doing so, Gerber provides a welcome sense of perspective and highlights the path-dependency of the modern dichotomy between convergence avenues and multilateral compacts, which is further discussed in Part 3.

Part two reviews the US, EU and some of the emerging competition law regimes and discusses their origins and underlying assumptions with a view to informing their own

perspective as to how competition law might or should work on the global level. By mapping the variety of goals, norms, languages and experiences associated with the design and enforcement of domestic regimes, Gerber illustrates the complexity of devising global principles. At the same time, he enables translations and exchanges to take place and contributes to foster mutual understanding and dialogue among the actors in the field.

Parts one and two form the background for the third part, which develops the core policy-oriented thesis of the book, namely that an approach based on a new form of multilateral agreement – called “commitment pathway” – is likely to be more effective at triggering the emergence of global competition principles than voluntary convergence strategies. The commitment pathway is described as a multilateral framework aimed to coordinate individually set short-term and long-term objectives and associated implementation processes, with a view to moving towards shared goals and creating an effective regime for global competition. In turn, the instrument would be supported by regular and extensive feedback exchanges among participants, allowing for the development of network relationships and trust among participants.

In essence, to achieve global principles likely to benefit all participants, Gerber advocates a model of multilateral cooperation combining substantive principles and procedural means to move towards shared goals. To move or to converge? (...) Here lays, in my view, the main ambiguity in the reasoning: even though he offers a rare discussion of convergence as a concept, Gerber adopts a narrow definition of convergence as based on independent choices by states that are “not the subject of agreement”. In turn, he dismisses convergence as an effective strategy or, at least, presents it as a suboptimal option. Yet, convergence hardly occurs in a vacuum; rather, it is the outcome of convergence mechanisms, which often involve cooperative schemes of some sort, even if of a pure procedural nature, i.e., targeted at the implementation rather than the design of competition rules. In other words, it is doubtful that the contrast between “loose” convergence and “hard” cooperation is as decisive as Gerber contends. In fact, in outlining his proposal, Gerber could have moved beyond the dichotomy between convergence paths and agreed solutions and explored the relationship between substantive outcomes and procedural means. Likewise, some of the criticisms he addresses to convergence strategies, e.g., as to the need for identifiable points of convergence, could be opposed in a somewhat similar way to his “commitment pathway” model. Moreover, Gerber does not study the functioning of existing cooperation agreements, mostly of a bilateral nature, and their impact on the emergence of converging global competition principles. Eventually, those critiques are somehow reassuring: there is still scope for another book developing an inductive reasoning starting with existing cooperative schemes, identifying their achievements and shortcomings and extrapolating recommendations for improved processes, knowing that global principles would in any event take time to surface and are inherently contingent on the convergence of economic fundamentals.

Overall, Professor Gerber’s book provides a thoughtful account of where we come from and where we stand on the way toward global competition principles. It challenges wisely common assumptions and convenient proposals and raises sharp questions informed by the study of a broad range of materials, in relation to a topic that is not ripe yet for clear answers anyway. “Global Competition” sets the stage,

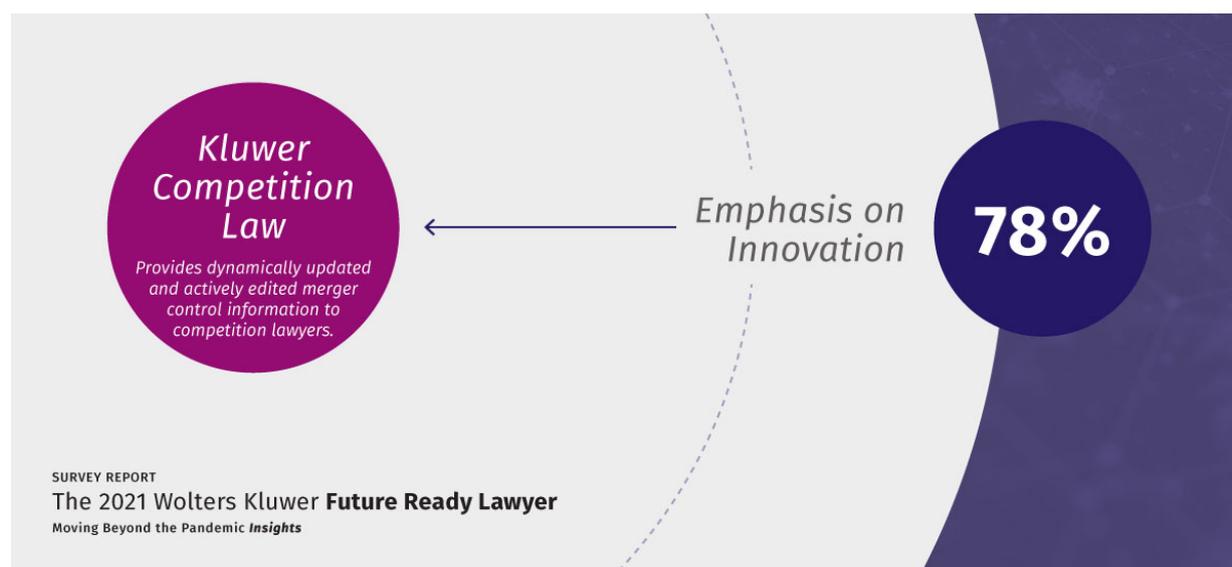
suggests innovative solutions and calls for renewed policy initiatives.

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