

Supervision and supervisory authorities A few introductory remarks

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Ever since the last few decades of the 19th century new supervisory structures and supervisory bodies have been emerging all over Europe. They mark the introduction of a new type of governance, a reorientation in ideas about how to steer and organize society. In many areas, there is a clear shift from a ‘command and control’ or top-down approach to approaches which leave more to the self-regulating capacity of society and, in particular, to the market. Partly, the new type of governance is inspired by the US model of more or less independent agencies to which certain parts of the state’s executive functions have been delegated and which are often entrusted with supervisory tasks. For another part there is a strong influence of the EU competition and liberalization policies and the introduction of ‘market logic’ into areas which were previously considered as being primarily a matter of state responsibility. It is particularly under this latter influence that supervision and supervisors’ roles are often identified with the supervision of market players’ conduct. This is, however, too narrow an understanding, as supervision obviously serves to control and, as a rule, to enforce compliance with also other behavioural standards than those laid down for the proper functioning of the markets. A number of contributions in the present issue of Utrecht Law Review illustrate this.

While supervision, supervisory failures and liability might be a much older phenomenon, these new structures and bodies are subject to intense political and academic debate. One of the reasons for this is, for instance, the fact that they do not easily fit into the existing national constitutional, administrative or other structures. Another reason seems to be the increasing popularity of supervisory liability in case ‘things go wrong’. It is striking, however, that the debates are often – though not for entirely incomprehensible reasons – mainly domestically oriented.¹ It is only more recently that studies and publications have appeared which look at this area from a comparative or EU law perspective.² In our view, this is an important and in many respects a helpful approach for a number of reasons. Often, certainly when brought back to the basics, the problems and tensions which various countries are facing have much in common. The EU influence and sometimes even the EU origin of the supervisory arrangements create an even stronger degree of commonality. All the Member States have to comply with the requirements

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1 This is at least true for the Netherlands. See, however, also the next note.

2 Cf. R. Caranta, M. Andenas and D. Fairgrieve, *Independent Administrative Authorities*, British Institute of International and Comparative Law 2004; T. Zwart and L. Verhey, *Agencies in European and Comparative Law*, Antwerp/Oxford/New York 2003. As for liability, see for instance M Tison, ‘Do not attack the watchdog! Banking supervisor’s liability after *Peter Paul*’, 2005 *Common Market Law Review*, no. 42, pp. 639-675, and C. van Dam, *Aansprakelijkheid van toezichthouders*, WODC/BIICL 2006.

which follow from EU law. A comparative approach may shed some light on how the various national legal systems are able to integrate these requirements within their own understanding. A comparative approach may indeed also help to find appropriate solutions. Not only may various jurisdictions learn from each other's experience. The same holds true for the EU: the findings of comparative research should be fed back into EU law and stimulate further reflection on how the existing arrangements function (or not) and how to improve them. Similarly, a combined European/comparative law approach will make it more visible how the various levels of jurisdiction – European law, national law and national legal systems *inter se* – relate to each other and mutually influence each other. In this way, the approach leads to a better understanding of the processes of legal integration.

The present special issue is aimed at contributing to such a European/comparative approach. Most of the contributions focus at the impact of 'Europe' on the national supervisory mechanisms and the related civil, criminal, administrative and constitutional law aspects thereof. Most of the contributions make comparative leaps to various legal systems. And a considerable number of them also illustrate how national supervision and supervisory authorities are closely interrelated and embedded in European networks and structures with, sometimes, a rather compelling framework.

The issue starts somewhat traditionally with a contribution by Johan van de Gronden and Sybe de Vries on *Independent competition authorities in the EU*. Independence in this area is based on the premise that, in principle, (short-term) political considerations should not creep into the decision-making process in competition law. The authors analyse in detail how this independence is given shape at the EU level, on the one hand, i.e. within the European Commission, and, on the other, within the German, the UK and the Netherlands legal systems. The issues are situated against the background of the so-called 'modernisation' of EC competition law, which implies a more self-standing role for national competition authorities within their own legal system. At the same time, however, there is also a rather close – and not yet really transparent – cooperation with the Commission, in particular in the context of the European Competition Network.

Van de Gronden and de Vries basically distinguish two aspects of independence. The first relates to the design of the competition authority as such. Their research reveals that in contrast to the Netherlands, where all the power has been concentrated in 'one pair of hands', in the UK and Germany there is a certain spreading of this power over more entities, which provides a guarantee against arbitrariness. Such an guarantee is given an extra perspective if one looks into the second aspect of independence discussed by van de Gronden and de Vries: the independent position of competition authorities vis-à-vis the political sphere. Arrangements that should safeguard a certain 'distance' from politics – none of the national systems discussed have opted for total independence – imply that the common lines of political accountability are weaker. A much debated issue is whether the Minister may intervene in individual cases. This is prohibited in the Netherlands, it is controversial in Germany while it is allowed in the UK. However, in the last-mentioned country, this power is subject to very strict conditions and procedures. An area where Ministerial intervention is more readily allowed is in the field of merger control, with some fine examples of more or less disguised protectionism.

An interesting point raised by the authors is the imbalance between the status of national competition authorities and that of the Commission. The latter operates much closer to, if not within, the political arena than is the case with national authorities. The authors argue that this is partly understandable as competition law and policy lies at the heart of EU policy as such.

However, the authors suggest that some measures should be taken in order to achieve a more balanced position on the part of the Commission in competition law and policy and to enhance more transparency and accountability in that area. They prefer the setting up of a European advisory agency in competition matters.

The contribution by Saskia Lavrijssen and Maartje Visser on *Independent administrative authorities and the standard of judicial review* is in a way a continuation of the previous theme. As Lavrijssen and Visser argue, the emergence of national competition and other regulatory authorities with their independent character and, at the same time, often wide-ranging discretionary powers, has raised the question of how to counterbalance the lack of political and also administrative accountability. More intensive judicial control seems to be one of the answers. The authors globally analyse the intensity of judicial review in a number of countries. The outcome is that, overall, the courts seem to be inclined to review the decisions of the independent authorities/supervisors with more rigour than they would probably do so in other cases where a considerable degree of discretion is present. This is, according to the authors, a first point of convergence in the EU. The other line comes from European law: First, there are certain minimum or sometimes written EU law requirements as to the judicial protection to be provided. This may also influence the standard of review to be applied in the domestic courts, as under EU law, in a procedure for judicial review, the national court must be able to effectively apply the relevant principles and rules of Community law when reviewing the legality of a decision. Second, at the EU level itself, in the Luxembourg courts there is a relatively recent tendency to scrutinize more thoroughly the Commission's decisions in competition cases. The ECJ has pointed out that its own judicial review is a limited one in cases where the Community authorities enjoy a wide measure of discretion and therefore national courts cannot be obliged to carry out a more extensive review than that carried out by the Court in similar situations.³ However, putting it the other way round, wherever the ECJ proceeds, particularly in competition cases, with a more strict scrutiny, national courts seem to adopt the same attitude in comparable cases. To date, this has taken place on a voluntary basis. However, there might be valid arguments for obliging national courts to carry out a more stringent review in Community law competition cases for the sake of coherence within the system of judicial review and protection.

Let us now move on to another market. Michiel Luchtman takes the Market Abuse Directive as an example to describe the *EU influence on law enforcement and international cooperation in the field of insider dealing*, especially by looking at the way the organisation of administrative and criminal law enforcement have their impact on transnational cooperation. Currently, quite a few Member States still make use of administrative punitive means of sanctioning. These sanctions are sometimes complementary and sometimes parallel to criminal law enforcement measures. It differs per country in what way the relationship between administrative and criminal law enforcement is given shape. Luchtman examines the differences between the Netherlands and Germany, focussing especially on the relationship between mutual administrative assistance and mutual assistance in criminal matters, while using the supervision provided for in the Market Abuse Directive as a context.

As financial supervision and criminal law are often interwoven at the national level, Luchtman poses the question of in how far the pillar structure of the European Union effectively contributes

3 Case C-120/97, *Upjohn*, [1999] ECR I-223.

towards an – arguably very inconvenient – development in different directions of judicial assistance and administrative assistance.

Although the Market Abuse Directive provides a number of requirements for the duties and powers of the responsible authorities, the Member States still have the final choice between criminal law enforcement and administrative law enforcement. Luchtman shows the major consequences of this choice for international cooperation. The picture is one of different dividing lines, in particular the division in the powers of the administrative authorities and the powers of the prosecution, which operate differently in the Member States. His concrete comparison of the organization of supervision and investigation and the national rules for cross-border cooperation as they exist in the Netherlands and Germany clearly illustrate the problems. According to Luchtman, a possible solution would be to eliminate the partition between administrative assistance and judicial assistance. As this is a rather controversial option, Luchtman suggests looking for an alternative at the EU level. The main point of his proposal is the partial harmonization of rules that apply in cases of transnational cooperation. In his opinion, more attention is needed for the nature and manner of transnational cooperation in enforcement matters. For that reason, coordination between the first and the third pillar seem essential.

Some very serious crises in the food sector – especially the BSE crisis – were the main trigger for EU food legislation with a strong focus on consumer protection. In their contribution *Millefeuille*, Annelies Freriks and Bernd van der Meulen discuss the multilayered supervision system in European and national food law. The first layer in the control system of food safety are the food operators. The food and feed operators are responsible for compliance with food legislation and an adequate system of risk management which takes care of tracing products throughout the whole food chain (From Farm to Fork). The responsibilities of the food operators are mainly checked by self-control mechanisms. The official control and enforcement of European food legislation – first-line inspections – is a task for the Member States, and this can be seen as the second layer of control. Therefore an official food control system must be established. The specific requirements of that system have been laid down in two EC regulations. The third layer of the control system is that of the Commission – more precisely the Food and Veterinary Office, a part of DG Sanco – which not only has to investigate whether the control system of the Member State is adequate, but which also sends inspectors to farms, food processing establishments to check whether, in practice, the control system of the Member States is working properly.

The latest development in the supervision system concerning food safety is the changing of the official controls from product inspections to process inspections and, moreover, to system inspections. In a recent Dutch proposal called ‘supervision of supervision’ it was suggested that when a private control system within a food production chain works well (probably aided by the fear of liability), less formal control of individual food businesses is necessary. The authors are rather enthusiastic about this lessening of formal controls, stating that too many layers of controls concerning the food sector are over the top and lead to administrative burdens which nobody wants.

The same focus on self-monitoring can be found in the contribution by Marjan Peeters on *Inspection and market-based regulation through emissions trading*. European environmental law has always been based on a strict ‘command and control approach’. The new European regulation concerning greenhouse gas emissions is inspired by the USA acid rain allowance trading scheme and the obligations following from the Kyoto Protocol. The system is based on the idea that

industries need to cover their emissions with tradable emission rights and that price incentives will lead to a reduction in emissions. At the same time these price incentives carry the risk that firms will seek loopholes within the rules. The main strength of the system (price incentives as the main instrument for reducing emissions) is at the same time its greatest risk (by avoiding paying these high prices for emission rights). Although the system basically relies on self-monitoring supported by verification, it is the government that has the ultimate responsibility for inspections and the enforcement of the system.

Thus while the enforcement of the EU system of emissions trading is the responsibility of the Member States, the Commission supervises whether the Member States execute their enforcement tasks satisfactorily. Different enforcement strategies among the Member States could affect the level playing field of the industries concerned. This means that, besides the decentralized approach, there is also a centralized approach with regard to some inspection powers concerning the protection of the ozone layer, especially the possibility for the Commission to obtain information from the governments of the Member States and the industry itself. The way the Member States organize the inspections of the self-monitoring and reporting behaviour of industries and the activities of the verifiers is not regulated at the EU level.

The Netherlands has chosen for an independent agency that takes care of the licensing involved, the inspection and the enforcement tasks.

Just like the European food legislation, the European emission trading legislation consists of a multilevel supervision system, primarily based on self-monitoring and reporting, secondly on controls and enforcement by the Member States and, finally, on the ultimate supervision by the Commission. The difference lies in the fact that self-monitoring and control is the basis and starting point for emissions trading, while in the case of food legislation self-control is merely a reaction to governmental and EU supervision.

How a national self-regulatory system has undergone a profound change under the influence of EU law and has ended up with a kind of hybrid situation is discussed by Michiel Heldeweg in his contribution *Supervisory governance – the case of the Dutch Consumer Authority*. Almost since the very beginning consumer protection has been a major concern for the European Union, in particular in cases where an interstate trade element is present. The Regulation on cooperation between national authorities responsible for the enforcement of consumer protection laws introduced certain requirements which considerably changed the Dutch system. The new Dutch Consumer Authority had to be squeezed – for political reasons – into the strait-jacket of the previously existing civil law and the self-regulatory mechanisms of consumer protection, but, at the same time, it had to dispose of administrative law instruments. The result is a mixture between self-regulatory safeguards and a command and control public law approach. It seems that the Netherlands was one of the few countries which had to introduce a public law element into its consumer protection system.

Heldeweg discusses the Dutch Act on the Enforcement of Consumer Protection and, in particular, the supervisory framework provided for this. He also analyses the nature of the new supervisor. Similarly, he briefly discusses how the Consumer Authority still has to find its proper place within the European network of national consumer authorities on the one hand, While, on the other, it also has to coordinate its actions at the national level together with other public law supervisors and private consumers' organisations. In particular, the functioning within the European Network, according to the author, is a reason for concern since the traditional mechanisms of accountability are lacking in this respect. Here he shares the same concerns with a

number of other authors in this volume, in particular those who discuss the functioning of the European Competition Network.

On balance, as these supervisory structures are very recent and partly have not yet started to operate, it is difficult to come to a conclusion concerning their functioning. However, Heldeweg already calls for caution. In his view, for instance, multilevel cooperation should not infringe upon domestic systemic discretion and ministerial responsibility. At the same time, however, domestic ministerial responsibility should not infringe on the authorities' capacity to enter into reciprocal networks. As is usually the case, finding the proper balance is of the utmost importance.

A contribution from a rather different angle is the one by Ivo Giesen on *Regulating regulators through liability – the case for applying normal tort rules to supervisors*. The title speaks for itself! Giesen advocates the application of common tort law and is opposed to various efforts to limit *a priori* or even to exclude supervisory liability. In his opinion traditional tort law rules will guarantee that there are no unreasonable outcomes. While using some examples from various jurisdictions, Giesen does not plunge into an extensive comparative law exercise but prefers to go back to the basics: the arguments for and against normal tort law liability of supervisors. After an overview of both the argument for and against (while some of them may work in both directions!), Giesen argues rather convincingly in favour of the application of normal liability rules. However, before reaching a final conclusion – ‘Final words are not in order yet ...’ as he puts it – a few more specific issues pertaining to supervisors are briefly addressed. One of these issues is the question whether the existence of discretion should influence the liability question. According to the author, discretion should be a factor to be included in weighing whether the act or omission has been careless or not. Here there is an interesting parallel with State liability under the Community law regime where, after some initial confusion, the ECJ seems to have accepted that the existence of discretion is not a criterion to decide whether or not the requirement of a sufficiently serious breach should be imposed (a liability limiting condition), but that discretion has become an element in the context of the assessment whether or not the breach committed is to be qualified as serious.⁴ Another parallel is also striking: where Lavrijssen and Visser argued that the existence of discretion does not induce national courts to a more limited review where an act of an supervisor is at issue – perhaps even to the contrary – it also seems reasonable not to accept that discretion plays a decisive role as a limiting factor at the liability stage.

To put it briefly, the immunity of supervisors is not the way forward, according to Giesen. He regrets that in the well-known *Peter Paul* judgment⁵ the ECJ gave a signal in the wrong direction, suggesting that immunity is compatible with Community law. Without wanting to take that judgement to such a far-reaching conclusion – *Peter Paul* was after all concerned with the interpretation of a number of specific directives – it may be clear that also at the EU level a more fundamental reflection on supervisors' liability and its pros and cons would be welcome.

Finally, in quite a different context, Bart Hessel discusses the issue of how European law compels the adoption of stronger instruments of supervision. In his contribution *European integration and the supervision of local and regional authorities* Hessel discusses the question whether central governments possess sufficient supervisory instruments for complying with their obligations under Community law. After all, Member States must ensure that errors by local and regional

4 Joined Cases C-178/94, C-179/94, C-188/94, C-189/94 and C-190/94, *Dillenkofer*, [1996] ECR I-4845.

5 Case C-222/02, *Peter Paul*, [2004] ECR I-9425.

authorities are rectified in time and are indeed avoided in the future. Although this discussion seems to be mainly taking place in the Netherlands, the question itself and the possible solutions thereto may be of interest to other Member States of the EU.

The main tension in this discussion is between those wanting to cling on to the traditional national system (with not too much supervision) and those who realise that European integration calls for an adjustment of the national system (with stronger instruments of supervision with regard to regional and local authorities). Moreover, the problems cannot be divorced from the issue of paying more attention to the knowledge and implications of EU law for local and regional authorities.

In this debate, the focus lies on instruments regarding preventive and repressive supervision. As far as preventive supervision is concerned, there are ideas for peer pressure, information and advice by the minister involved and, finally, the cabinet sees possibilities for the special instruction instrument. Regarding ex post measures the Dutch cabinet is of the opinion that the number of repressive instruments should be limited to the absolute minimum, the existing distribution of powers should be respected and the responsibility of the local and regional authorities should be left intact as much as possible. That leaves room for three new instruments, being an individual instruction, an amendment of the rules on neglect of duty and a right of recovery (regarding the financial consequences of not complying with EC law).

Hessel's contribution in any case makes it clear that although Community Law is said not to interfere with internal legal structures, European integration may in the end lead to the need for stronger supervisory instruments. And is this, after all, not a form of interference too?