Sanctions in EU competition law: principles and practice

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GENERAL INTRODUCTION
The competitiveness of the European market has been one of the key drivers of European integration and is probably one of the biggest attributes of the European Union. Competitiveness and competition are part of the EU’s DNA. In its founding Treaty texts it can be read that the EU aims for a ‘highly competitive social market economy’ and that it will conduct its economic policy in accordance with the principles of an open market economy with free competition. One of the EU’s core policy instruments for a competitive internal market is the operation of a legal regime that prohibits companies from distorting competition. More precisely, ‘undertakings’ may in principle not restrict competition through any form of cooperation or coordination and ‘undertakings with a dominant position’ are prohibited from excluding competitors and exploiting trading partners. These two prohibitions are laid down in Articles 101 and 102 of the Treaty on the Functioning of the European Union (‘TFEU’).

In the first decades of European integration, the enforcement of EU competition law was highly centralised. Virtually all enforcement actions under Articles 101 and 102 TFEU were initiated by the European Commission (‘Commission’). Meanwhile, the enforcement of EU competition law has become less centralised, many would say even decentralised. In 2004, essentially in an effort to increase enforcement capacity in the wake of EU enlargement, the involvement of the Member States in the enforcement of EU competition law has been reinforced significantly. This change was brought about by the adoption of Council Regulation (EC) No 1/2003 (‘Regulation 1/2003’). To date, undertakings engaging in anti-competitive behaviour can be chased by a whole network of competition authorities. The Commission and the national competition authorities combine forces (and resources) to guard the competitiveness of the European market.

Instead of harmonising national enforcement procedures, Regulation 1/2003 recognises the wide variation of public enforcement systems existing in the Member States. Accordingly, national competition authorities pursue infringements of EU competition law largely on the basis of domestic enforcement regimes. The combination of decentralisation and enforcement autonomy raises questions on the relationship between EU law and national law. For instance, to what extent are the Member States subject to rules and principles of EU law in the enforcement of Articles 101 and 102 TFEU? Increasingly, this is becoming a topic of debate. The scope of the autonomy of the Member States has been tested in several recent cases before the Court of Justice of the European Union (‘Court of Justice’), it has

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5 Recital 35 of the preamble to Regulation 1/2003.
been the subject of policy debates within the Commission, and it has already featured in a number of academic publications.

Apart from these legal questions, the decentralisation of enforcement competences also raises questions of an economic nature. The enforcement of EU competition law is a big industry. It provides work to many lawyers and economists, whether active in commercial practice or government positions (or even academia). The clients of these services are generally undertakings and government agencies. For them, the enforcement of EU competition law therefore comes with certain costs. Ultimately, these costs are borne by consumers and taxpayers. Certainly for an area such as EU competition law which aims, amongst others, to protect the interests of consumers, these costs should be considered in designing an enforcement system. In this regard it should be noted that a centralised enforcement system and a decentralised enforcement system have different cost structures. This should be clear already from the fact that a decentralised enforcement system requires several authorities. In addition, also the existence of several enforcement regimes, each with its own powers and procedures, could have repercussions for the size of the ‘enforcement industry’ and the concomitant costs for consumers and taxpayers. For example, undertakings might have to consult several lawyers with expertise in various national regimes in relation to a single infringement. This example also makes clear that the economic implications of decentralisation are dependent on the relationship between EU law and national law – the larger the body of EU law that governs the national enforcement regimes, the less need there is for undertakings to consult specialist domestic counsel.

The objectives of this study

The combination of decentralisation and enforcement autonomy that characterises the current framework for EU competition law thus raises questions of both legal and economic nature. The above examples are just the tip of the iceberg and there are still many
unclariies with regard to the relationship between EU law and national law and the costs and benefits of decentralisation. Understanding these issues, both jointly and in isolation, is crucial for the enforcement of Articles 101 and 102 TFEU in individual cases, as well as for policy debates more generally. On the basis of these legal and economic insights, competition authorities may develop policy and practice, courts may render judgments, and legislators may evaluate and reconsider current legislation. Importantly, this would allow all these actors to contribute to EU competition policy with better insights on the economic implications of their choices, while maintaining the integrity of EU law. Against this background, this study aims to clarify the following issue:

What are the legal and economic implications of the decentralisation of enforcement competences in the area of EU competition law?

To answer this question, the development from the former centralised enforcement system to the current decentralised enforcement system will be studied. As this development has brought the enforcement of EU competition law in line with the enforcement of EU law more generally, this discussion may provide useful insights for the division of enforcement competences in other areas of EU law as well. For example, it may provide food for thought for the centralisation tendencies in the regulated industries, where the EU is gradually expanding its enforcement powers.13

**Contribution to the existing literature**

This study thus aims to clarify the relationship between EU law and national law for the decentralised enforcement of Articles 101 and 102 TFEU and to explain how this relationship influences the costs of enforcing these competition law prohibitions. It should be stressed at the very outset that economic considerations alone should of course not be decisive in dividing enforcement competences between EU level and national level. Issues like these also have important implications for the legitimacy of EU competition policy. While the concept of legitimacy is difficult to define, key for the legitimacy of any act of

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12 EU institutions are often not even equipped with powers to enforce EU law directly and the administration of EU law therefore primarily takes place at Member State level. See JH Jans et al, *Europeanisation of Public Law* (Europa Law Publishing 2007) 200.


14 Legitimacy is a fluid concept and one can easily disagree about its content. One volume on the legitimacy of EU administration speaks in its concluding chapter of the ‘manifold connotations of the issue of legitimacy’. See M Ruffert, ‘Comparative Perspectives of Administrative Legitimacy’ in M Ruffert (ed), *Legitimacy in European Administrative Law: Reform and Reconstruction* (European Administrative Law Series, Europa Law Publishing 2011) 353. Craig and De Búrca conclude that disagreements within the large body of literature on the legitimacy of EU rule-making can often be explained by the fact that commentators regard different aspects as pertinent. See P Craig and G De Búrca, *EU Law: Text, Cases, and Materials* (Fifth Edition, Oxford University Press 2011) 156.
power seems to be that this act is perceived to be right, i.e. that it has popular support.\textsuperscript{15} Earlier research has already looked at the legitimacy implications of decentralisation.\textsuperscript{16} Simonsson, for instance, has focused on what could be called ‘output legitimacy’.\textsuperscript{17} More specifically, she has studied whether EU cartel policy is rationally persuasive and therefore generates average compliance.\textsuperscript{18} Her conclusions show that the legitimacy implications of the current division of enforcement competences are somewhat ambiguous:

On the one hand, the absence of a harmonised system for sanctions will enable Member States to construct their sanctions in conformity with established principles that exist within each system. Looking at enforcement from a more limited national perspective, this might increase legitimacy (locally) because sanctions will be perceived as system-sound and foreseeable. On the other hand, such a development will risk detracting from what could be understood as an efficient fining policy. (…) The lack of harmonisation can in addition give rise to indignation if undertakings perceive that the same infringement is, or similar infringements are, treated differently depending on which Member State brings proceedings.\textsuperscript{19}

The indecisive outcome of decentralisation in terms of legitimacy is compounded by the fact that ‘rationality’ may not be the only relevant criterion. The allocation of enforcement competences between EU level and national level could also be approached from the perspective of ‘input legitimacy’. The more possibilities citizens have to help shape government policy, the more likely it is that this policy will find acceptance in society. Legitimacy is therefore highly dependent on political influence. The decentralisation of EU competition law promises enhanced political influence, thereby making an important contribution to the legitimacy of EU competition policy. This is mainly due to numerical advantages. The smaller a given population, the more political influence each voter can exert. This numerical advantage of decentralisation has particular salience for EU competition policy. In its opening Article, the Treaty on European Union (‘TEU’) states that decisions are taken ‘as closely as possible to the citizens’.\textsuperscript{20} It follows from this brief account of the

\begin{thebibliography}{99}
\item \textsuperscript{16} Simonsson (n 8); De Visser (n 8); S Brammer, \textit{Co-operation Between National Competition Agencies in the Enforcement of EC Competition Law} (Hart Publishing 2009); Lavrijssen-Heijmans (n 8).
\item \textsuperscript{17} Output legitimacy focuses on the extent to which policy satisfies citizens. From this perspective, decision-making is legitimate if decisions are perceived to be in the best interests of the citizens. See Simonsson (n 8) 1. See also R Caranta, ‘Democracy, Legitimacy and Accountability – is there a Common European Framework?’ in M Ruffert (ed), \textit{Legitimacy in European Administrative Law: Reform and Reconstruction} (European Administrative Law Series, Europa Law Publishing 2011) 177.
\item \textsuperscript{18} Simonsson (n 8) 2.
\item \textsuperscript{19} ibid 324-325.
\end{thebibliography}
legitimacy implications of decentralisation that legitimacy is an ambiguous concept. Craig has concluded in this respect 'that successful attainment of one of the senses of legitimacy (...) will not thereby guarantee that a different conception of legitimacy has been secured.  

More specifically, the decentralisation of EU competition law could be legitimacy-reducing or legitimacy-enhancing, depending on whether one looks at output legitimacy or input legitimacy. In light of these conceptual problems of legitimacy as a proxy for the division of enforcement competences, the economic implications become increasingly important. Considering the coverage of existing literature, a study into the economic implications of decentralisation could be informative for practitioners and scholars alike and contribute to an ongoing debate in a novel way.

Methodology

How to determine the legal and economic implications of decentralisation? This will be done by studying the process of decentralisation and its legal implications through an economic lens. More specifically, it will be determined how the costs of organising the enforcement of Articles 101 and 102 TFEU are influenced by the distribution of competences over EU level and national level. The enforcement of Articles 101 and 102 TFEU relies on a variety of powers and procedures (sanctioning powers, investigatory powers, burden of proof, rights of defence, etc). Irrespective of the enforcement authority, these powers and procedures can be provided by EU law or national law. It is beyond debate that EU law and national law jointly contribute to the current enforcement framework: some issues are subject to the 'centralisation effects' of EU law, other issues remain within the autonomy of the Member States. One need not to engage in a detailed analysis of the totality of enforcement powers and procedures to identify the legal and economic implications of decentralisation. This study will therefore focus on a single (but arguably the most important) aspect in the enforcement process: the availability and conditions of measures to terminate and penalise (putative and/or prima facie) infringements of Articles 101 and 102 TFEU. These measures will be referred to as 'sanctions'. It will be determined how the competences in the area of sanctions are distributed over EU level and national level and how this influences the costs of enforcement.

The enforcement actions of the Commission and the national competition authorities are generally referred to as 'public enforcement'. Public enforcement is at the centre of this study. In order to prevent any confusion about the term 'sanction' it is deemed appropriate to explicitly exclude 'private enforcement' from the scope of this study. Private enforcement refers to the actions initiated by private parties before national courts and tribunals. The prohibitions laid down in Articles 101 and 102 TFEU do not only impose obligations, they

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also confer rights. Anyone whose rights under Articles 101 and 102 TFEU have been breached may apply to the national courts for injunctive relief and/or full compensation of the damage suffered. These responses too could be conceived as ‘sanctions’ for breach of EU competition law. However, as national courts may apply Articles 101 and 102 TFEU in private disputes irrespective of how public enforcement is organised, private enforcement is of no import to the economic implications of decentralisation and will not be considered any further.

This being set out, the structure and approach of this study is as follows. After this general introduction, chapter 2 will describe how the enforcement of EU competition law has developed from a highly centralised system operated by the Commission into a system of decentralised enforcement. This analysis will be based on legislative texts, policy documents, case law and literature. Chapter 3 then provides a theoretical framework for the examination of this and further legal developments by setting out the relevant economic considerations in allocating sanctioning competences. This framework mainly derives from the economic literature on federalism. Chapters 4 and 5 contain the empirical work of this study. Chapter 4 identifies and analyses EU sanctioning principles. These principles are capable of limiting the sanctioning autonomy of the Member States and therefore effectively centralise parts of the sanctioning regime applicable to infringements of Articles 101 and 102 TFEU. This analysis is based on EU case law and supplemented with the relevant literature. Chapter 5 analyses domestic sanctioning powers in a subset of jurisdictions. This subset includes Germany, the Netherlands and the United Kingdom. This should provide an impression of the development of sanctioning powers on Member State level, which can be used to study some of the economic implications of decentralisation. The analysis in chapter 5 is based on legislation and policy documents and supplemented with relevant case law and literature. Jointly, chapters 4 and 5 describe the relationship between EU law and national law in terminating and penalising (putative and/or prima facie) infringements of Articles 101 and 102 TFEU. Chapter 6 then applies the theoretical framework to the empirical results with the aim to clarify the economic implications of the current division of sanctioning competences. More specifically, the costs and benefits of the various legal developments on EU and national level will be identified and discussed. Chapter 7 provides an overview of the study’s main findings in terms of legal and economic implications and offers some reflections and recommendations. Throughout the text, grey text boxes elaborate on issues that are relevant to the topic of this study, but that are not crucial for understanding the main line of argument. The cut-off date for this study was 1 July 2012.

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