Sanctions in EU competition law: principles and practice

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THE ECONOMICS OF DECENTRALISATION
3.1 INTRODUCTION

The decentralisation of EU competition law was mainly driven by the objective to increase enforcement capacity. While the underlying problem of an understaffed central authority could have been addressed more easily by increasing the Commission's budget1 (or by limiting the scope of the Commission's competences2), decentralisation was probably the only alternative that was politically feasible at that time.3 Other implications of decentralisation either were taken for granted (eg costs) or were of secondary importance in the decision to involve the Member States in the enforcement process (eg subsidiarity). As a result, EU citizens now have to bear the costs of 27 or more NCAs4, parallel procedures, and various coordination efforts. Furthermore, the level of uniformity in the treatment of undertakings has been reduced. Some undertakings will be exposed to more severe sanctions than others, depending on the authority that prosecutes the infringement. The other side of the coin is that EU citizens have been given more influence on ‘their’ sanctioning regime via the national parliaments. In this respect, any disparities in the treatment of undertakings should simply be seen as a reflection of the wishes of these citizens. From an economic perspective, the implications of decentralisation can be described as follows. On the one hand, decentralisation seems to have caused diseconomies by multiplying the number of authorities and procedures and by requiring the authorities to coordinate their sanctioning powers and procedures. On the other hand, decentralisation has allowed each Member State to adopt a sanctioning regime that satisfies domestic demand and, therefore, to use its resources in a more targeted and hence more efficient fashion. The decentralisation of EU competition law also has implications for the development of sanctioning powers and procedures. More than ever, the pace of innovation in the area of competition law enforcement has become dependent on the Member States. Experiments by each Member State could accelerate ‘regulatory innovation,’ but Member States may also insulate their jurisdictions from innovation by the Commission. Notwithstanding the various diseconomies, under the right conditions decentralisation may thus result in regulatory innovation and could therefore lead to long-term economic efficiencies. This chapter will clarify these contingencies. After first having provided an overview of the various economic considerations in the allocation of regulatory competences, we will zoom in on these considerations and apply them to the enforcement of EU competition law in


4 Currently, there are already more than 27 NCAs, as some of the Member States have designated more than one authority for the enforcement of Articles 101 and 102 TFEU.
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separate paragraphs. Paragraph 3.8 concludes. For analytical purposes, this chapter will make a sharp distinction between centralised enforcement and decentralised enforcement, meaning that the EU legislator either reserves enforcement powers to the Commission alone, or facilitates the enforcement actions of the NCAs. This simplifies the situation under the former Regulation 17 and the current Regulation 1/2003 only marginally (supra paragraph 2.2).

3.2 AN OVERVIEW OF THE ECONOMIC CONSIDERATIONS IN THE ALLOCATION OF COMPETENCES

It is widely recognised in the economic literature on federalism that the devolution of competences from a central authority to local authorities (decentralisation) can have various implications for the costs of operating a legal system. The devolution of competences may lead both to efficiencies and inefficiencies in the provision and administration of laws (‘regulation’). Within this context, efficiency essentially refers to a situation in which tax money is not wasted.

The efficiencies of decentralisation can be static and dynamic in nature. Static efficiency refers to a situation in which citizens do not overpay for a given set of regulatory products. In many areas, the provision and administration of laws can be organised more efficiently by decentralised authorities than a single centralised authority. This claim is especially true for areas of the law for which there exist strong ‘heterogeneous preferences’ within society. Heterogeneous preferences will arise when some people value particular regulatory products differently than others do. Decentralisation allows for the existence of a variety of legal regimes and this may accommodate these heterogeneous preferences. Fewer people will end up either with a government that in their eyes underperforms or with paying for regulatory products they do not want. However, also in areas of the law where preferences are relatively homogeneous, decentralisation may still result in efficiency gains. This will be the case where decentralised authorities have an interest to perform well in the eyes of their ‘customers’ for reasons that are missing in a system of centralised rule-making. One such reason could be that decentralised authorities compete with each other over mobile taxpayers. Any such ‘regulatory competition’ could improve regulatory outcomes relative to a situation in which rules are provided by a ‘monopolist’ central authority. Decentralisation could further enhance the possibilities for regulatory innovation. Regulatory innovation refers to a process of experimentation and learning by states or authorities which ultimately

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6 In this respect it should be noted that regulatory products, whether provided centrally or on decentralised level, are generally indivisible and non-excludable. See R van den Bergh and P Camesasca, European Competition Law and Economics: A Comparative Perspective (Second Edition, Sweet & Maxwell 2006) 407-408.
brings further the state of the art in a specific area of the law. The possibilities for regulatory innovation increase with the number of regulatory authorities. Several authorities simply have more possibilities to experiment than one. Any form of regulatory competition could even stimulate these authorities to engage in innovative experiments. By perpetually improving the quality of regulation, regulatory innovation generates dynamic efficiencies.

Notwithstanding the above observations, decentralisation will not be efficient for every type of regulation. In areas of the law where the costs and benefits of regulation spill-over into other jurisdictions, a decentralised authority could be tempted to ‘underprovide’ or ‘overprovide’. For example, if the actions by one authority also benefit other jurisdictions, then there is a free-riding problem which can result in insufficient regulation. This will particularly be the case where authorities engage in regulatory competition. In these situations, centralisation (or coordination) could be more efficient. From an economic perspective, centralisation could also be warranted where a diversity of legal regimes would hamper interjurisdictional trade. This may arise when undertakings need to comply with different, potentially conflicting rules. In such a case, decentralisation will result in ‘transaction costs’ for the undertakings concerned. Finally, centralisation may lead to ‘scale-economies’. For some areas of regulation it can be more efficient to maintain a single set of rules with a wide scope of application, than having various authorities ‘reinvent the wheel’ over and over again. In these areas, decentralisation may lead to diseconomies of scale.

Within the context of EU competition law, these efficiencies and inefficiencies may arise in relation to the provision of enforcement powers and procedures. The decentralisation of enforcement competences may result in efficient ‘preference matching’, regulatory competition and regulatory innovation, but it may also lead to interjurisdictional spill-overs, transaction costs and diseconomies of scale. In fact, the coordination costs and duplication costs that have been mentioned earlier can be seen as examples of the latter. From an economic perspective, the decentralisation of EU competition law may thus have various advantages and disadvantages. While the promises and perils of decentralisation appeal to reason, it has been widely accepted that their accuracy and predictive value crucially depend on the object of regulation. To paraphrase Bratton and McCahery, concrete conclusions about the strenghts and weaknesses of decentralisation must be delayed pending an enquiry of the regulatory domain.

3.2 AN OVERVIEW OF THE ECONOMIC CONSIDERATIONS

However, in the words of Inman and Rubinfeld, ‘centralization is no all-purpose cure for the efficiency ills of decentralization’. Under specific circumstances, centralised action upon so-called negative externality problems (where there is a tendency to overprovide) could be even more costly. In these circumstances, central authority could best constrain the use of the good/regulation that causes the problem. See Inman and Rubinfeld (n 5) 1225-1229.

3.3 TRANSACTION COSTS AND DISECONOMIES OF SCALE

As has been suggested above, the decentralisation of EU competition law has come with some inherent economic losses. These losses are linked to transaction costs and diseconomies of scale. Transaction costs can arise where undertakings need to invest resources in complying with various legal regimes. The risk of increased compliance costs is mainly relevant with regard to discrepancies between behavioural norms. If the interpretation of the competition laws prohibitions would differ across the Member States, undertakings would have to invest in information and would possibly be unable to implement a business strategy throughout the EU. This would lead to significant transaction costs.\(^9\) However, precisely these costs have been avoided by including mechanisms for the uniform application of Articles 101 and 102 TFEU in Regulation 1/2003.\(^10\) What remains are transaction costs due to disparities in enforcement regimes.\(^11\) However, costs of this kind may be relatively modest. These disparities will ‘only’ amount to additional information costs, ie legal advice. More importantly, these costs are only borne (or only need to be borne) if undertakings decide not to comply with Articles 101 and 102 TFEU.

Arguably a more serious drawback of the decentralisation of EU competition law are the diseconomies of scale. This has led to duplication costs and coordination costs. Coordination costs refers to the resources that have to be spent on making sure that differences in sanctioning regimes do not jeopardise the uniform and effective application of Articles 101 and 102 TFEU.\(^12\) Brammer has noted in this respect:

In view of the increased amount of information transmitted and the elevated complexity of information and information flows, the burden on the NCAs to properly administer the information circulating in the ECN has certainly become heavier. The general workload of the NCAs is further augmented by the fact that they may have to deal with a large number of different languages, which means that all officials have to be trained to understand (more) foreign languages and/or translations will have to be

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\(^9\) Cf KJ Cseres, ‘Comparing Laws in the Enforcement of EU and National Competition Laws’ (2010) 3 European Journal of Legal Studies 7, 36 who nuances the issue of transaction costs: ‘However, these costs can be especially relevant for large firms operating in interstate commerce, the same might not hold for small and medium sized undertakings operating mainly in national markets’.

\(^10\) It should be noted that Member States are allowed to maintain national competition laws. Within the limits of Article 3 Regulation 1/2003, these national competition laws may deviate from EU competition law (supra paragraph 2.2). This could lead to transaction costs after all. See P Pohlmann, ‘Auf dem Weg zur Europäisierung nationalen Kartellrechts’ in CJH Jansen et al, Europäische Dimensionen des Vertragsrechts und des Wettbewerbsrechts (Münsterische Juristische Vorträge, Band 15, LIT Verlag 2005) 75. As this study is concerned with the enforcement of EU competition law alone, these costs will not be considered any further.


made by a separate translation service. It is thus safe to assume that the NCAs will have to make available additional resources (compared to the situation before 2004) in order to meet this new challenge. As concerns the Commission, its overall administrative burden will probably not have increased. However, it is submitted that many, if not all, of the resources that the Commission intended to free by abolishing the notification/authorisation system and shifting part of the workload to the NCAs will actually be absorbed by new tasks it has to assume as a result of the increased information exchange, the need to monitor NCAs and national courts and, possibly, the need to intervene in the proceedings before NCAs or national courts in order to safeguard the uniformity of EC competition law (eg as amicus curiae).13

Most of these resources could have been saved with a centralised enforcement system. Moreover, a centralised enforcement system would not suffer from enforcement disadvantages caused by restrictions to the use of information that has been exchanged between domestic authorities (supra paragraph 2.4). The current system of decentralised enforcement does suffer from these restrictions, and also this could therefore be seen as a cost of coordination.

Decentralisation has further led to duplication costs in terms of infrastructure.14 A decentralised enforcement system requires several authorities and courts with several buildings, libraries, press offices, domain names, etc, and each with its own need for specialised staff. In practice, duplication costs of this kind could be relatively modest, as Member States might be able to 'piggyback' on existing infrastructure for domestic competition law. However, the decentralisation of Articles 101 and 102 TFEU has also led to duplication costs in terms of procedures. First, the Network Notice foresees in parallel actions by two or three NCAs. This will necessarily result in duplication costs.15 Second, the decentralisation of EU competition law, with its deference to national sanctioning regimes, has increased the possibility and need for litigation, with all the associated costs. This is the result of what could be termed the 'deflation of legal precedents'. Legal precedents are welfare enhancing by reducing legal uncertainty and limiting the scope for future litigation.16

13 Brammer (n 13) 470 (footnotes omitted).
14 See also D Geradin, 'Competition Between Rules and Rules of Competition: A Legal and Economic Analysis of the Proposed Modernization of the Enforcement of EC Competition Law' (2002-2003) 9 Columbia Journal of European Law 1, 22-25, who uses somewhat different terminology, naming some of these losses 'transaction costs'.
15 I Simonsson, Legitimacy in EU Cartel Control (Hart Publishing 2010) 341; WPJ Wils, 'The Principle of Ne Bis in Idem in EC Antitrust Enforcement: A Legal and Economic Analysis' (2003) 26 World Competition 131, 137. Cf Wils, The Optimal Enforcement of EC Antitrust Law (n 1) 144: 'It may also make sense for a second authority to take up a case abandoned by a first authority, if the second authority has reasons to believe that it can do a better job than the first.'
16 See on the interplay between uncertainty and litigation G Dari-Mattiacci and B Deffains, 'Uncertainty of Law and Legal Process' (2007) 163 Journal of Institutional and Theoretical Economics 627, 627-656. See also WPJ Wils, 'The European Commission's 2006 Guidelines on Antitrust Fines: A Legal and Economic Analysis' (2007) 30 World Competition 197, 204: '[The Guidelines on the method for setting fines make] it easier for the addressees of fining decisions to understand why the fine was set at the level it was, thus possibly reducing the number of appeals.'
A court ruling on the conditions under which a sanction may be imposed in one case, can be relied upon by the authorities and the undertakings in subsequent cases. This could limit the number of disputes and court procedures. From this perspective it would be most efficient if legal precedents in the context of EU competition law would apply throughout the Union, provided of course that these precedents are welfare enhancing themselves.¹⁷ Cases litigated before the Court of Justice on the basis of EU law, whether in the context of a direct action against a Commission decision or a reference for a preliminary ruling by a national court, will benefit the entire EU and allow for the intervention of the Commission and all the Member States.¹⁸ These precedents are relatively easy to keep track of. The precedent value of cases litigated before national courts on the basis of domestic procedural law will of course be more limited. This loss is compounded by the fact that even if courts would want to draw inspiration from foreign precedents, language barriers alone make these cases more difficult to digest. In any case, and this is crucial, foreign precedents will not effectively limit the possibility for domestic precedents. If the stakes are high (which will typically be the case in relation to competition law disputes), the mere possibility of a domestic precedent could be enough to trigger litigation. The deflation of legal precedents can be seen as a diseconomy of scale which may result in significant duplication costs for the undertakings concerned and society as a whole.¹⁹ However, there is also another side to this issue. The decentralised enforcement of Articles 101 and 102 TFEU will not take place in legal no man’s land. Therefore, the costs associated with the deflation of legal precedents will in practice be compensated, at least partially, by the existence of domestic precedents in other areas of the law. After all, also general administrative law precedents could reduce legal uncertainty and limit the scope for legal disputes in the context of Articles 101 and 102 TFEU.

In sum, the decentralisation of EU competition law has resulted in transaction costs for the undertakings involved, coordination costs for the competition authorities and duplication costs for undertakings, authorities and courts alike. Ultimately, all these costs are borne by taxpayers and consumers. While some of the costs could remain relatively modest, they would not have arisen in a centralised enforcement system. It follows that the economic sensibility of the decentralisation of EU competition law becomes entirely dependent on the countervailing benefits.

¹⁷ Cf Commission, ‘White Paper on Damages actions for breach of the EC antitrust rules’ COM (2008) 165final, where considerations of procedural economy has prompted the Commission to suggest that final decisions of the NCAs should have binding effect in actions for damages by private parties before the national courts.


¹⁹ A similar issue has been raised by Simonsson, arguing: ‘If there is no uniform standard, each and every Member State must make a similar journey, as have the Community courts in defining applicable procedure. Existing national procedure may not be sufficient in all respects. Adjustments in each Member State would include duplication of resources by legislators and courts.’ Simonsson (n 16) 336. See further Pohlmann (n 11) 73-74, making a similar point with regard to substantive competition law.
3.4 INFORMATION ADVANTAGES

One argument in favour of decentralisation is that NCAs have a competitive advantage over the Commission. This advantage consists in having better access to salient information. In this respect it should be pointed out that competition authorities have a natural information disadvantage vis-à-vis the undertakings they have to monitor and that it is more difficult for the latter to hide information from local authorities than it would be from a more remote central authority. In other words, decentralisation ameliorates some problems of asymmetric information. The NCAs will have better insight in domestic market conditions than the Commission. The people they employ read regional newspaper, may have personal shopping experiences, are familiar with the regulatory framework, etc. Decentralisation could thus enhance the effectiveness with which Articles 101 and 102 TFEU are enforced and thereby generate welfare gains.

While this information advantage provides a strong argument to involve the Member States in the enforcement of EU competition law, it does not necessarily argue in favour of the prevailing sanctioning autonomy. This advantage would not have been jeopardised by a uniform sanctioning regime for all authorities. In fact, the information advantage would ‘already’ be obtained by setting up field offices of the Commission in the Member States. These are important considerations precisely because some of the costs associated with the EU framework for decentralised enforcement are due to the sanctioning autonomy of the Member States. In order to justify this framework on the basis of economic considerations, one therefore needs to look for efficiencies that are linked to the sanctioning autonomy of the Member States.

3.5 ACCOMMODATING DOMESTIC PREFERENCES

One of the more profound economic justifications for the current EU framework is that it accommodates domestic preferences. The decentralisation of EU competition law allows each Member State to design its own sanctioning regime for the enforcement of Articles 101 and 102 TFEU. As a result, more EU citizens will end up with the sanctioning regime they desire and this economises the allocation of government resources. This can be explained as follows.

First, decentralised decision-makers are generally more responsive to the preferences of their citizens than a centralised decision-maker. The smaller a given population, the


21 It should be noted that the harmonisation of sanctioning powers comes with costs of its own, eg implementation costs.
more political influence each voter can exert. Votes get more clout, access to politicians will become easier, and information about politicians will become more readily available.\(^22\) Decentralisation also increases the number of enforcement alternatives, which makes it easier for citizens to monitor the performance of their government. Within the context of EU competition law, voters can rank the performance of their Member State to the performance of other Member States and the Commission. This may limit information asymmetries between government and voters and may therefore enhance the possibilities that voters’ preferences will be satisfied even further.

Second, sanctioning preferences may very well differ per Member State.\(^23\) For example, some Member States may wish to criminalise competition law and introduce custodial sanctions in the expectation that this will deter individuals from engaging in infringements. Other Member States may wish to rely on pecuniary sanctions for the undertakings involved. Domestic preferences may also differ in other respects. Some Member States may wish to implement a deterring sanctioning regime by increasing the severity of the penalty. Other Member States could pursue the same objective by relying on a more moderate penalty but increasing the chances of getting caught. Policy choices of this type are highly dependent on the political and moral views prevailing within society. It is very well possible that these views differ per Member State. Some Member States will prefer a penalty that is cheap to administer, such as pecuniary sanctions. Pecuniary sanctions essentially are transfer payments and have little costs for society. Other Member States will prefer custodial sanctions. This type of sanction is more expensive to administer but could send out stronger signals to society. Also the interplay between the severity of the penalty and the chances of getting caught in designing a deterring sanctioning regime could lead to different outcomes per Member States. Some Member States may want to cut on enforcement costs and let a small number of offenders pay hefty fines. Other Member States may think it more appropriate to invest in detection and spread out (higher) enforcement costs more evenly over society. Both approaches could deter as many infringements.

What all these examples should make clear is, first, that decisions as to how a sanctioning regime is designed have a bearing on enforcement expenditures and accompanying tax rates and, second, that sanctioning preferences could very well differ per Member State. A decentralised enforcement system that is premised on sanctioning autonomy can accommodate heterogeneous preferences and may thus economise the allocation of government resources. Decentralisation allows each Member State to spend as many resources on public enforcement as is beneficial to society. Therefore, the current EU framework promises sanctioning regimes that are more efficient than the one-size-fits-all regime that comes with a centralised enforcement system.

Decentralisation could thus create disparities in enforcement expenditures between Member States. Geradin has argued that this could lead to asymmetric application of

\(^{22}\) Cf Inman and Rubinfeld (n 5) 1215.

\(^{23}\) See also Cseres, ‘Comparing Laws’ (n 10) 36-37.
EU competition law and eventually market fragmentation. It is submitted herewith that this potential downside of decentralisation should not be feared. First, even if such fragmentation were to occur, this could be solved in a number of ways. The Commission could focus its attention on markets where decentralised enforcement is lacking and it could bring Member States with insufficient enforcement capacity before the Court of Justice for breach of Treaty obligations. Second, and as a more important point, it is highly unlikely that Member States will cut their enforcement expenditures to levels that are harmful to the EU as a whole. After all, the Member States will experience various disciplining effects in operating a sanctioning regime. This point will be clarified directly below.

3.6 REGULATORY COMPETITION

Decentralisation not only caters for different preferences that may exist between citizens of the various Member States, it also allows citizens to form more homogeneous sub-societies by migrating to the Member State that satisfies their preferences best. Member States can implement a regulatory regime and attract people from abroad that relocate themselves in their jurisdiction. This process requires that citizens are mobile and will take locational decisions on the basis of regulatory preferences. Were this to happen, regulatory preferences can be satisfied at lower costs. Whether such sub-societies will emerge and whether this results in efficiency gains is dependent on various factors. This is predominantly the domain of the theory of regulatory competition. While the decentralisation of EU competition law is unlikely to trigger an efficiency-enhancing migration stream, Member States may still ‘compete on the market for enforcement’. This paragraph will explain the disciplining effects of this market, as well as their economic implications.

The theory of regulatory competition

The theory of regulatory competition derives from the seminal article by Charles Tiebout on the provision of public goods. With this article, Tiebout aimed to show that under particular circumstances public goods can be provided more efficiently on local level than on national level. The basic idea behind Tiebout’s model is that individuals can relocate themselves on the basis of preferences for public goods and corresponding levels

24 Geradin (n 15) 19-20. A similar concerns has found its way into the Commission Staff Working Paper accompanying the Communication from the Commission to the European Parliament and the Council: Report on the functioning of Regulation 1/2003 [2009] COM 206final, para 194: ‘Certain criticism has been expressed in the course of the public consultation for this Report as to the limited resources of some national competition authorities and its possible impact on competition proceedings, e.g. limited capacity for investigations, longer duration of proceedings.’

25 Also Geradin has noted the possibility of Commission intervention but has rejected it as it would be ‘contrary to the philosophy of the new system that the Commission replace failing national agencies.’ Geradin (n 15) 27. The fact that the Commission has been granted the power to replace failing national agencies (Article 11(6) Regulation 1/2003) would seem to disprove this point.

of taxation. This could trigger a competition between jurisdictions for taxpayers. This ‘jurisdictional competition’ guarantees the same efficiency in the provision of local public goods as competition among firms assures in the market for private goods. Jurisdictional competition is premised on the perception that a variety of goods and tax levels will better satisfy heterogeneous preferences and relies on a market mechanism to reach an equilibrium in which no consumer-voter would prefer any other outcome (Pareto-efficient). In this equilibrium, the sum of consumer-voters’ marginal rate of substitution of income for the good equals the marginal costs of an additional unit of the good. Under a working system of jurisdictional competition, periodic elections would no longer be needed; citizens would vote with their feet. While the model’s assumptions are too unrealistic ever to be satisfied, the disciplining effect and the potential efficiency gains of jurisdictional competition are broadly accepted and appeal to reason.

The same logic can be extended to the provision and administration of laws. Preferences for regulation too may differ and market mechanisms could drive decentralised decision-makers to efficient outcomes. Analogous to firms in a market for private goods competing for various targets (sales, revenue, profits, etc), jurisdictions may compete for various benefits (e.g., tax income, economic productivity, political support). The greater the regulatory autonomy of each jurisdiction, the greater the scope for competition. Whether regulatory competition indeed results in efficient outcomes is dependent on various factors, most notably the absence of interjurisdictional spill-overs, transaction costs and diseconomies of scale.

27 This issue has been described very clearly by Bratton and McCahery: ‘With private goods, market competition exerts downward pressure on producers’ marginal costs, and market prices provide concrete information about consumers’ rates of substitution. With public goods, in contrast, no obvious market exerts downward pressure on government producers’ marginal costs. Nor does an obvious mechanism force taxing citizen-consumers truthfully to reveal their rates of substitution.’ The authors then describe the attributes of Tiebout’s model of jurisdiction competition: ‘the Tiebout model links citizen mobility with preference revelation and predicts that locational decisions will reveal individual preferences for public goods and levels of taxation. (...) The model goes on to predict that this preference revelation process leads to a market equilibrium.’ See Bratton and McCahery (n 9) 207-209.

28 Bratton and McCahery (n 9) 204.

29 ibid 207.

30 The assumptions underlying Tiebout’s model are the following: i) consumer-voters are fully mobile and will move to the jurisdiction that satisfies their preferences best; ii) consumer-voters have full knowledge about the conditions in each jurisdiction; iii) there are a large number of jurisdictions; iv) restrictions due to employment opportunities are not considered; v) there are no interjurisdictional spillovers; vi) for every pattern of goods there is an optimal jurisdiction size, which is defined in terms of the number of residents for which this bundle of goods can be produced at the lowest average cost; vii) jurisdictions below the optimum size seek to attract new residents to lower average costs. However, already when the model is applied to a situation in which there are fixed jurisdictional boundaries it breaks down. As demonstrated by Epple and Zelenitz, in such a situation competition among local jurisdictions is not sufficient to prevent local governments from exercising monopoly power and usurp some (immobile) land rents. See D Epple and A Zelenitz, ‘The Implications of Competition Among Jurisdictions: Does Tiebout Need Politics?’ (1981) 89 Journal of Political Economy 1197.

The theory of regulatory competition could be extended to the enforcement of EU competition law. By enhancing the role of the Member States and by allowing each Member State to design its own sanctioning regime, Regulation 1/2003 has provided the basic conditions for regulatory competition. Economic benefits are to be expected if Member States are indeed disciplined in designing their enforcement regimes and this leads to a situation in which the preferences of consumer-voters are better satisfied compared to a system of centralised enforcement. Both factors will be considered in turn.

Competition in the enforcement of EU competition law

The conditions under which the enforcement of EU competition law takes place and the interests at stake make it plausible that Member States will experience at least some market discipline in designing their enforcement regimes. This is the effect of what could be conceived as competition for fine proceeds and reputation gains. Competition for fine proceeds is induced by the ‘all-or-nothing’ implications of the EU legal framework, which neither delimits the jurisdiction of the NCAs to apply Articles 101 and 102 TFEU nor the scope of their sanctioning powers, while providing for i) the principle of single authority action as often as possible; ii) case allocation on the basis of enforcement possibilities; and iii) the principle of ne bis in idem – no person may be found guilty or can be made the subject of proceedings a second time on grounds of conduct in respect of which he has already been penalised or acquitted. In other words, once the infringement has been penalised by one authority, all other authorities will remain empty-handed. The multi-million euro fines that may be levied for infringements of Articles 101 and 102 TFEU will provide Member States with an incentive to furnish their authorities with strong enforcement powers and to assume jurisdiction over cases with domestic implications. This point has also been taken up by Simonsson, detailing the Commission’s lucrative enforcement business in 2004.

Anecdotal evidence for this disciplining effect can be found in the parliamentary deliberations preceding the 2005 reform of the German fining regime. With this reform the German competition authorities saw their fining powers being strengthened. As is clear from the report of the parliamentary committee responsible for competition matters, this amendment was considered especially urgent in light of the power of the Commission to

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52 In addition, NCAs that dispose of better sanctioning powers might receive more complaints. Lenaerts has suggested that NCAs that are severe and efficient in the enforcement of Articles 101 and 102 TFEU are likely to receive more complaints than colleagues performing less well, see K Lenaerts, ‘Modernisation of the Application and Enforcement of European Competition Law – An Introductory Overview’ in J Stuyck and H Gilliams (eds), Modernisation of European Competition Law (Intersentia Antwerp 2002) 31. See also M Drahos, Convergence of Competition Laws and Policies in the European Community. Germany, Austria, and the Netherlands (Kluwer Law International 2001) 436.


54 Simonsson (n 16) 341-342.
take over cases pursuant to Article 11(6) Regulation 1/2003 and the desire to secure fine proceeds for German citizens:

Im zukünftigen Netzwerk der europäischen Wettbewerbsbehörden müssen alle Behörden über im Wesentlichen gleichwertige Sanktionsbefugnisse verfügen. Ist dies nicht der Fall, so steht der Europäischen Kommission die Möglichkeit zur Verfügung, einen Kartellfall an sich zu ziehen (...) mit der Folge, dass die umsatzbezogene Bußgeldbemessung nach Maßgabe von Artikel 23 Abs. 2 Satz 2 der Verordnung (EG) Nr. 1/2003 zur Anwendung kommt. Um der dezentralen Anwendung des europäischen Wettbewerbsrechts praktische Wirksamkeit ("effet utile") zu verschaffen, wird die Bußgeldbemessung nach deutschem Recht der europäischen Regelung angepasst. Damit wird eine effektive Bußgeldbemessung durch die deutschen Kartellbehörden sichergestellt. Dies dient auch dazu, dass die volkswirtschaftlichen Schäden durch den Kartellrechtsverstoß in Deutschland kompensiert werden.35

Similar concerns prompted parliamentarians in the Netherlands to enquire what would happen with a fine that was collected by the Commission in relation to an infringement of Article 101 TFEU on the Dutch beer market.36 These parliamentarians were of the opinion that as Dutch consumers suffered from the infringement, Dutch taxpayers were to benefit from the fine.37 They also questioned why this case was prosecuted by the Commission instead of the Netherlands authority. Also this example demonstrates the disciplining effect of fine proceeds, albeit indirectly and ex post.

Where fine proceeds alone are insufficient to rally a competition for cases (for instance, in cases where the imposition of a fine is not warranted), reputation gains will add to the equation. Member States may try to reinforce their status within the ECN and other international forums in order to increase their influence in policy making and/or to export their enforcement regimes to foreign jurisdictions.38 International reputation could thus work as another disciplining factor in designing a domestic enforcement regime.39 To grasp the importance of reputation in the field of competition law enforcement, one needs only to refer to a 2011 consultation document by the UK Department for Business, Innovation & Skills, which boasts:

37 Where the Commission imposes a fine, in principle this fine becomes part of the Commission’s yearly budget. Excess amounts are distributed among the Member States. See TK 2006-2007, Aanhangsel 1586.
38 Member States could have an interest to export their enforcement regimes to foreign jurisdictions in an effort to reduce the transaction costs for national businesses dealing abroad.
The UK competition regime is highly regarded internationally. In 2010 the Global Competition Review awarded the Competition Commission (CC) its highest rating of 5 stars and the Office of Fair Trading (OFT) 4.5 stars, both appearing in the top 5 agencies in the world. In addition, an independent review of competition regimes by KPMG ranked the UK’s competition regime third, behind the US and Germany. The National Audit Office (NAO) has also concluded that the competition regime (including as enforced by the sector regulators) is generally effective in meeting its aims and is well regarded internationally.\footnote{Department for Business, Innovation & Skills, A Competition Regime For Growth: A Consultation On Options For Reform (2011), para 1.4 (footnotes omitted) <www.bis.gov.uk/Consultations/competition-regime-for-growth> accessed 1 July 2012.}

In the same document it can be read that ‘The Government is committed to ensuring the UK’s competition regime remains among the best in the world.’\footnote{ibid para 1.8.} The United Kingdom will certainly not be the only contender on the market for reputation. It may be assumed that reputation gains will accrue to Member States that handle infringements of Articles 101 and 102 TFEU efficiently.\footnote{See also Simonsson (n 16) 342.}

This disciplining effect of reputation gains also fits neatly into the discourse on ‘rank-order competition’.\footnote{P Salmon, ‘Decentralisation as an Incentive Scheme’ (1987) 3 Oxford Review of Economic Policy 24. This phenomenon is also referred to as ‘yardstick competition’, see Bratton and McCahery (n 9) 256-259.} Rank-order competition is premised on the dual presumption that voters will demand of their government to provide for regulation of an equal quality as regulation in other jurisdictions and that government wants to be re-elected. Rank-order competition enhances the possibilities that consumer-voters’ preferences will be satisfied.\footnote{Rank-order competition due to decentralisation makes another powerful prediction: it limits information assymmetries between government and vote-casting consumers. This gives decentralised government units yet another efficiency advantage over central government. Cf Salmon (n 44); Bratton and McCahery (n 9) 258; Inman and Rubinfeld (n 5) 1246-1247.} The term ‘competition’ should not obscure the fact that this is not a contest between jurisdictions for a group of (potential) taxpayers or other (financial) advantages, but a contest between politicians within a single jurisdiction.\footnote{Inman and Rubinfield use the terms ‘intergovernmental economic competition’ and ‘intragovernmental political competition’ to make a similar distinction, see Inman and Rubinfield (n 5) 1241ff. In their paper, Inman and Rubinfield argue that in case of i) open access to reform, ii) full information about policy consequences and iii) ability to mobilize support for reform, ‘then policies that make a majority of citizens better off will be on the agenda, known and understood by the voters, and chosen either directly by referendum or through elected representatives.’ The conditions for this intragovernmental political competition would be more realistic than Tiebout’s conditions for intergovernmental economic competition (at 1256-1246). See also De Visser (n 12) 242.} Within the context of EU competition law, voters can rank the performance of their Member State to the performance of other Member States (horizontal competition) and the Commission (vertical competition).\footnote{See also De Visser (n 12) 242.}

In sum, it is plausible that Member States are disciplined in designing their enforcement regimes, whether through fine proceeds or (external or internal) reputation gains.
In theory, Member States could also compete for *tax-paying consumers* and *growth-creating producers*. However, upon a closer look it is implausible that there is a market for either one, at least in the context of EU competition law. It should be admitted that an effective enforcement regime for Articles 101 and 102 TFEU will enhance consumer welfare and could potentially attract tax-paying consumers. However, ‘bundling and mobility problems’ dampen the disciplining potential of tax-paying consumers significantly, if not entirely. Even if disgruntled consumers would act rationally, relocating to a different Member State would still be unlikely. This is due to consumers’ bundled regulatory preferences and the limited number of jurisdictional alternatives, on the one hand, and the costs of mobility, on the other hand. It should be noted that as there is no convincing narrative for competition for tax-paying consumers, Member States cannot get caught in a prisoner’s dilemma either. This is important as the decentralised enforcement of Articles 101 and 102 TFEU has positive interjurisdictional spillovers; the enforcement actions by one Member State have benefits for other Member States. Under market conditions, these positive interjurisdictional spillovers could give rise to inefficient underprovision.

Competition for growth-creating producers is equally unrealistic. Granted, a competition policy aimed at increasing consumer welfare will not necessarily be desired by every producer. At the margins, therefore, producers with finite investment-resources will leave jurisdictions/markets with severe enforcement regimes and enter jurisdictions/markets whose enforcement regimes are more relaxed. These costs in foregone trade and employment could discipline Member States and provide them with incentives to shirk on their enforcement efforts. This process is compounded by the fact that the costs of

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47 Bratton and McCahery (n 9) 223, 234 and 260. See further Inman and Rubinfeld (n 5) 1241-1244.
48 The broad jurisdiction of the NCAs to apply Articles 101 and 102 TFEU and to punish infringements means that there are ‘deterrence spillovers’. If tax-paying consumers would be mobile and sensitive to competition law enforcement regimes, they would move away from the jurisdiction that bears the full costs of enforcement without reaping the full benefit. This prisoner’s dilemma would be particularly relevant with regard to a jurisdiction’s choice to implement costly enforcement measures (eg custodial sanctions). A similar point has also been made by Teichman in the context of US criminal law, arguing that ‘Apprehending and prosecuting a criminal who commits crimes in several jurisdictions lowers the crime rate in all those jurisdictions if it deters the apprehended individual from committing future crimes. Similarly, incapacitating a criminal through incarceration lowers the crime rate in all jurisdictions victimized by the criminal at hand. Viewed from this perspective, jurisdictions might have insufficient incentives to invest in crime prevention since they will try to free-ride on the efforts of neighboring jurisdictions’ (footnote omitted). D Teichman, ‘The Market for Criminal Justice: Federalism, Crime Control, and Jurisdictional Competition’ (2004-2005) 103 *Michigan Law Review* 1831, 1861-1862. See further A Ezrachi and J Kindl, ‘Cartels as Criminal? The Long Road from Unilateral Enforcement to International Consensus’ in C Beaton-Wells and A Ezrachi, *Criminalising Cartels: Critical Studies of an International Regulatory Movement* (Hart Publishing 2011) 419, 424.
49 Cf Drahos (n 33) 228, who puts it even stronger: ‘It is generally easier for firms to calculate the costs of a strict competition law, flowing from opportunity costs and administrative costs, than any possible gains, like protection from dominant firms or restrictive distribution contracts and increasing economic growth. It is much more insecure whether the firm will profit in the future from the decisions of the competition authority. The consequences of competition policy on growth and welfare depend even more on subjective beliefs. Thus I argue that it is probable that a large majority of firms will have a preference for a weak competition law.’
enforcement will rise with the severity of the sanctions. Moreover, in cases where the anti-competitive effects are partially exported whereas the monopoly profits are spent at home, Member States could have a further reason to be soft on business. In theory, therefore, Member States could compete for a producer-friendly environment by softening the consumer-friendly competition policy. In practice, this type of competition is unlikely, though. First, Member States and undertakings may have more confidence in the long-term benefits of technological leadership than the short-term benefits of an industrial policy favouring big enterprises. Second, if the costs in terms of foregone consumer welfare are mainly borne by the consumers/voters of the producer-friendly jurisdiction, any such policy would be difficult to sell and probably lead to domestic welfare losses. Third, if anti-competitive effects are in large parts exported to other jurisdictions, these jurisdictions, as well as the Commission, may start proceedings themselves. Indeed, the Network Notice allocates cases to the Commission where effective enforcement so requires. While this prospect alone might not lead Member States to toughen up against ‘national champions’, it does reduce the disciplining effect of growth-creating producers and the risk of a ‘race to the bottom’ in terms of enforcement.

In sum, the threat of exit and the promise of entry do not appear credible enough to discipline Member States in satisfying consumer/producer preferences in the field of competition law enforcement. But even if there would be a market for tax-paying consumers and growth-creating producers, competition on this market would still be frustrated by the ‘universal jurisdiction’ of the Commission and the failure to delimit the jurisdictions of the NCAs. What remains, therefore, is a plausible case for some ‘competition’ between (and within) Member States for fine proceeds and reputation gains.

A race to the top?
The next question is whether competition between Member States leads to a situation in which the preferences of consumer-voters are better satisfied. It may be assumed that competition for fine proceeds and reputation gains will enhance the enforcement efforts of domestic authorities. The more effective the Articles 101 and 102 TFEU are enforced, the lower the magnitude of anti-competitive behaviour. In principle, consumer-voters

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50 See also Van den Bergh, ‘Economic Criteria for Applying the Subsidiarity Principle in the European Community’ (n 21) 372-373.
51 ibid 377: ‘A decision to move to “cartel paradises” will be made primarily for commercial reasons and not because of the prospect of a lax antitrust jurisdiction. (…) Successes in international trade are achieved through technological leadership, which is not necessarily due to monopoly power but may be the consequence of strong competitive pressures on the home market. Hence, competition policy may improve international competitiveness, contrary to the arguments in favor of an industrial policy favoring big enterprises through law merger control. Nevertheless, it may not totally be excluded that considerations relating to the stringency of competition laws matter at the margin.’
52 See also EM Fox, ‘Antitrust Law on a Global Scale: Races Up, Down, and Sideways’ in DC Esty and D Geradin (eds), Regulatory Competition and Economic Integration: Comparative Perspectives (Oxford University Press 2001) 348-363; Geradin (n 15) 7.
53 See also Geradin (n 15) 26.
will thus benefit from this competition between Member States. This claim is based on the assumption that decentralised enforcement is not a zero-sum game in which effective enforcement in one jurisdiction merely displaces infringements to another jurisdiction. While some displacement of infringements of Articles 101 and 102 TFEU may occur at the margins, ultimately increased enforcement throughout the EU will change the calculus of at least some rational operating undertakings in whether or not to comply with the law.

Nevertheless, there is an enforcement level beyond which the ‘race to the top’ will change into a ‘race to the bottom’ in terms of social welfare. This will be the case where the administrative costs of enforcement start outweighing the benefits. For example, a Member State that wants to root out every single infringement will probably be faced with excessive costs. A race to the bottom of such a kind seems unlikely, however, as Member States would incur all losses themselves and no one therefore has an interest to enter such a race. Yet, there may be a race to the bottom of a different kind, one resulting in ‘overdeterrence’. Such a race could be triggered by a competition for fine proceeds. Where the expected fine for the undertakings concerned exceeds the social costs of the infringement, there will be a situation of ‘inefficient overdeterrence’. This could lead to at least four types of inefficiencies: i) deterring socially valuable behaviour falling within the scope of the prohibition; ii) deterring socially valuable behaviour falling outside the scope of the prohibition as a result of legal ambivalence or error; iii) excessive monitoring costs by addressees of the prohibition – the private gains of monitoring exceed the social gains of compliance; iv) excessive litigation costs for all parties involved in the proceedings – the higher the stakes, the higher the investments in litigation. When these costs are not fully borne by the prosecuting Member State, a market for fine proceeds may have perverse incentives. Each Member State could gain by inflicting greater welfare losses on society. This could stimulate Member States to impose excessive fines, or to lower legal safeguards so as to raise the expected fine. To the extent that market forces indeed trigger such a race to the bottom, this race will in any case be slowed down, if not completely halted, by the competition for reputation gains. Reputation gains are unlikely to accrue to Member States

54 Cf Lenaerts (n 33): ‘National competition authorities which will prove to be severe and efficient in the enforcement of Articles 81 and 82 EC [now Articles 101 and 102 TFEU] are indeed likely to receive more complaints than others. It is submitted that this kind of forum shopping should not be discouraged since it will enhance the protection of competition.’

55 For a different approach towards regulatory competition and crime displacement, see Teichman (n 49). Teichman concludes that a decentralised criminal justice system could result in a dynamic process of inefficiently harsh punishments.

56 AM Polinsky and S Shavell, ‘Punitive Damages: An Economic Analysis’ (1997-1998) 111 Harvard Law Review 869, 886ff. The notion of overdeterrence implies that the optimal level of violations, in terms of social costs, can be above zero. While this might not be socially acceptable for breach of any law, for EU competition law this seems a point for consideration.

whose enforcement regimes would create welfare losses. It is therefore concluded that race to the bottom scenarios are unlikely.

However, this does not mean that a competition for fine proceeds is without downsides. This competition may not only strengthen national fining powers, it could also frustrate efficient case allocation within the ECN.58 In this respect it should be reminded that the rules for case allocation remain somewhat informal (supra paragraph 2.4). The desire to collect a fine could frustrate the ECN objective of single authority action and lead to an increased number of parallel procedures by the NCAs. As soon as one NCA starts an investigation, other NCAs may follow suit in order to secure their piece of the pie. This scenario is particularly likely for cases involving two or three Member States – cases involving more than three Member States will generally be picked up by the Commission. In other words, the competition for fine proceeds may increase the number of duplicative procedures (supra paragraph 3.3).

Taking into account all the above considerations, it is plausible that the regulatory framework of Regulation 1/2003 fosters a market mechanism through which the Articles 101 and 102 TFEU are enforced more effectively and the interests of consumer-voters are initially better served. This suggests that the decentralisation of EU competition law brings certain economic benefits. Notwithstanding these benefits, it should not be forgotten that the decentralisation of EU competition law has also led to duplication costs and that these costs are partially due to this market mechanism. Against this background, it is important to consider one final benefit of decentralisation: regulatory innovation.

3.7 REGULATORY INNOVATION

By increasing the possibilities for experimentation and learning, decentralisation can also be beneficial for regulatory innovation. Decentralisation creates ‘legal laboratories’ in which experiments can be carried out without risk to the greater polity.59 Justice Brandeis of the US Supreme Court has called this ‘one of the happy incidents of the federal system’ .60 The same

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58 See also Wils, ‘The Principle of Ne Bis in Idem in EC Antitrust Enforcement’ (n 16) 139.
59 See also A Arcuri and G Dari-Mattiacci, ‘Centralisation versus Decentralisation as a Risk-Return Trade-Off’ (2010) 53 Journal of Law and Economics 359. These authors conclude, amongst others, that ‘decentralization is a desirable solution for decisions that are important to society, that are affected by serious scientific uncertainty, and for which society is risk averse’ (at 374).
60 New State Ice Co v Liebmann, 285 US 262, 311 (1932) (dissenting opinion). Justice Brandeis further concluded: ‘The discoveries in physical science, the triumphs in invention, attest the value of the process of trial and error. In large measure, these advances have been due to experimentation. In those fields experimentation has, for two centuries, been not only free but encouraged. Some people assert that our present plight is due, in part, to the limitations set by courts upon experimentation in the fields of social and economic science; and to the discouragement to which proposals for betterment there have been subjected otherwise. There must be power in the states and the nation to remould, through
could be said for the constitutional system of the EU. One need not to see decentralised governments as laboratories to admit that independent efforts by various jurisdictions will provide more information about what does or does not work. Where jurisdictions engage in regulatory competition, innovative regulatory solutions are even likely to emerge. The value of regulatory innovation is especially strong in areas of the law that are characterised by their complexity and technical difficulty. However, in any setting of imperfect information and learning-by-doing, there are potential gains from experimentation. This could include the area of competition law enforcement. In this respect reference could be made to a 2012 consultation report of UK's Office of Fair Trading:

Effective enforcement of competition law is vital for efficient markets and as a driver for economic growth, delivering benefits for consumers and the economy. It is important that the Office of Fair Trading (...), like other competition authorities, keeps innovating and constantly improving the conduct of effective and efficient competition enforcement.

By allowing for experimentation and learning among the Member States in terminating and punishing infringements of EU competition law, decentralisation could bring further the state of the art in competition law enforcement. For instance, were a Member State to experiment with custodial sanctions, other Member States can learn from these experiences and make an informed choice on whether or not to follow this example. The learning effects of this experiment should be sought in the achievements in terms of deterrence (‘will the number of infringements decrease?’) and in the technical aspects of introducing this criminal law penalty (eg ‘how will criminal courts deal with this new type of offence?’).

More generally, it can be argued that the potential for regulatory innovation is greatest if Member States would experiment with sanctioning powers for which there is no Commission equivalent whatsoever.

Member States can learn from successful regulatory experiments elsewhere – and this immediately confronts the concept of regulatory innovation with a theoretical problem. The


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61 Geradin (n 15) 5-6.
possibility to learn from experiments abroad creates a free-riding problem and a prisoner’s dilemma, in which there will be less innovation than socially preferred. However, in the context of EU competition law, any such free-riding problem will be seriously mitigated by the reputation gains that accrue to first-movers. Moreover, the ECN awards a ‘prize’ to innovative Member States. As enforcement possibilities are part of the ECN’s case allocation criteria, innovative Member States have better changes in collecting fines for infringements of Articles 101 and 102 TFEU (in cases where a fine would be warranted). The EU enforcement framework even facilitates interjurisdictional learning. First of all, the Commission needs to consult the Advisory Committee composed of representatives of the NCAs before imposing any sanction for infringements of Articles 101 and 102 TFEU. The NCAs, in turn, have to consult the Commission before sanctions can be imposed. These consultation mechanisms have created a structural dialogue between the various authorities. As a consequence of this consultation process, competition authorities learn about the sanctioning possibilities and methods elsewhere and this may feed back into domestic policy. In addition to these consultation requirements with regard to individual cases, the ECN provides a forum for policy discussions. Also this may contribute to interjurisdictional learning. Within the context of the ECN, competition authorities can discuss and share experiences with sanctioning powers for the enforcement of Articles 101 and 102 TFEU. The Commission’s administrative services have noted in this respect:

This constant dialogue between the network members on all levels over the last years has significantly contributed to a coherent approach and coherent application of the EC competition rules. The permanent exchange of experiences and views, very often in an informal manner, has established confidence and trust between network members, increased the expertise and promoted convergence. It has led to the creation of a space to think that allows fruitful discussions in a spirit of close cooperation and with the final objective of promoting a common competition culture in Europe.

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66 S Rose-Ackerman, ‘Risk Taking and Reelection: Does Federalism Promote Innovation?’ (1980) 9 The Journal of Legal Studies 593. Through a simple model in which the elected official only cares about re-election, a single elected official controls government policy and bureaucracies play a passive role, Rose-Ackerman has established that due to the re-election motive, the lack of sorting by risk preferences, external effects, and the impact of migration, there will be few useful experiments among local governments. See also Oates (n 64) 1133.

67 The use of ‘prizes’ to encourage innovation by decentralised government units has been proposed by Rose-Ackerman as (second-best) solution to solve the free-rider problem with regulatory innovation, see Rose-Ackerman (n 67) 615-616.

68 See also Drahos (n 33) 434.

69 Cf Cseres, ‘Comparing Laws’ (n 10) 27, who is less enthusiastic, noting: ‘the possibility to function as a melting pot of national laboratories is limited by the dominance of the Commission and its clear intention to push EU law as the benchmark of harmonisation.’

As a result of these discussions, the ECn has already drawn up guidelines for effective domestic leniency programmes. In addition to the activities within the ECn, the Commission and the NCAs regularly discuss enforcement policy with colleagues from outside the EU. In light of the cooperation between the authorities within the ECn, the governance structure created by Regulation 1/2003 could be described in terms of ‘regulatory co-opetition’, pulling together competition and cooperation and indicating that the enforcement of Articles 101 and 102 TFEU relies on a combination of these two opposing approaches.71

Regulatory innovation could also take place in the national courts and with regard to legal safeguards for undertakings and individuals. As a result of decentralisation, EU law will be applied more frequently in the national courts. These courts will need to review the legality of domestic decisions adopted on the basis of Articles 101 and 102 TFEU.72 In this capacity, national courts will not only apply domestic procedural law, they will also have to apply EU legal safeguards, for example EU fundamental rights (infra chapter 4). In the context of these procedures, national courts may refer questions to the Court of Justice for a preliminary ruling. Whether or not with the help of the Court of Justice, the application of these EU legal safeguards in national procedures could create important precedents.73 Also this may bring further the state of the art in competition law enforcement.

It follows from the above that the EU framework for competition law enforcement is conducive to regulatory innovation. Also in this respect, decentralisation has clear economic benefits compared with the former system of centralised enforcement.

3.8 CONCLUSION

This chapter has detailed the economic implications of the political decision to move from a highly centralised enforcement system, in which the majority of sanctions for infringements of Articles 101 and 102 TFEU were imposed by the Commission, to a decentralised system, in which various sanctioning regimes operate in parallel. At the outset it was concluded that decentralisation comes with some additional costs, but may also lead to economic benefits. The above discussion has detailed these costs and benefits.

On the costs side, the decentralisation of EU competition law has resulted in an increase in transaction costs for the undertakings involved, coordination costs for the competition authorities and duplication costs for undertakings, authorities and courts alike. To some extent, these costs derive from the fact that multiple authorities need to be funded and some cases will be prosecuted by two or more authorities. Other costs are due to the fact that

71 DC Esty and D Geradin, ‘Regulatory Co-Opetition’ in DC Esty and D Geradin (eds), Regulatory Competition and Economic Integration: Comparative Perspectives (Oxford University Press 2001) 40-43.
72 National courts may also apply Articles 101 and 102 TFEU in the context of private enforcement.
73 For a more extensive discussion of national precedents on EU law, see HJ van Harten, Autonomie van de Nationale Rechter in het Europees Recht: Een Verkenning van de Praktijk Aan de Hand van de Nederlandse Europeesrechtelijke Rechtspraak Over de Vestigingsvrijheid en het Vrijedienstenverkeer (Boom Juridische uitgevers 2011) 177ff.
sanctioning regimes may differ per Member State. Arguably one of the most costly feature of the current EU framework is what has been termed the deflation of legal precedents. The precedent value of cases litigated before national courts on the basis of domestic procedural law will be more limited than cases litigated before the Court of Justice. This deflation of legal precedents can be seen as a diseconomy of scale which may result in significant duplication costs. The larger the sanctioning autonomy for the Member States, the larger the transaction costs, coordination costs and duplication costs.

On the benefits side, decentralisation has reduced the problem of asymmetric information that confronts any competition authority. National authorities can be assumed to have superior knowledge over domestic market circumstances. By involving the Member States in the enforcement of Articles 101 and 102 TFEU, more infringements can be uncovered. However, this benefit justifies only part of the current EU framework. Costs that are associated with the sanctioning autonomy of the Member States will in any case not be justified by the information advantages of decentralisation. These costs could have been avoided by harmonising the national sanctioning regimes. However, not only would this have created costs of its own (eg the costs of implementation), it would also have ignored various economic benefits that are the consequence of this sanctioning autonomy. First, a decentralised enforcement system that is premised on sanctioning autonomy can accommodate heterogeneous preferences between Member States and may thus economise the allocation of government resources. Second, sanctioning autonomy allows for Member State-driven regulatory innovation. The legal framework of Regulation 1/2003 and the market mechanism it fosters make it likely that these efficiencies indeed materialise. In this respect it can be concluded that the larger the sanctioning autonomy for the Member States, the larger the potential benefits in terms of preference matching and regulatory innovation.

It follows from the above that some costs and benefits are more or less given with the decision to involve the Member States in the enforcement of EU competition law. This is the case, for instance, for the costs associated with having multiple authorities and the benefits of having knowledge on domestic market circumstances. Other economic implications of the decentralisation of EU competition law are dependent on the scope of the sanctioning autonomy and the development of the domestic sanctioning regimes. The larger the sanctioning autonomy of the Member States, the better the possibilities for preference matching and regulatory innovation, but also the larger the losses in terms of transaction costs, coordination costs and duplication costs. The actual economies and diseconomies of the current EU framework are ultimately dependent on the heterogeneity of sanctioning preferences between Member States (reflected in the disparities in sanctioning regimes) and the degree to which Member States engage in innovative experiments.74

74 The economic implications of the decentralised enforcement system are of course not limited to the costs and benefits associated with sanctioning powers. Other enforcement powers and procedures matter too (eg investigatory powers). Moreover, the learning effects of decentralisation are not limited to the enforcement of Articles 101 and 102 TFEU (‘what are the public law consequences of an infringement?’). As important, if not more important, are the learning effects with regard to the
In the light of these considerations, chapter 4 will revisit the sanctioning autonomy of the Member States. More specifically, it will analyse the extent to which national sanctioning powers for infringements of Articles 101 and 102 TFEU are subject to EU rules and principles other than Regulation 1/2003. Chapter 5 will detail the development of a number of national sanctioning regimes within these EU boundaries. By establishing the scope of the sanctioning autonomy and the development of the national sanctioning regimes, the actual economies and diseconomies of the decentralisation of EU competition law can be clarified. This will be done in chapter 6.

application of Articles 101 and 102 TFEU (‘what type of commercial practices fall within the scope of the prohibitions?’). However, it should be noted that as these costs and benefits are not linked to sanctioning powers, they are not linked to the sanctioning autonomy of the Member States either.