Sanctions in EU competition law: principles and practice

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ECONOMIES AND DISECONOMIES IN THE ALLOCATION OF SANCTIONING COMPETENCES
6.1 INTRODUCTION

This chapter draws together the conclusions of the earlier chapters to discuss the economic implications of the current division of sanctioning competences in the area of EU competition law. It has been concluded in chapter 3 that these implications are to a large extent 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. Chapter 4 has detailed the sanctioning autonomy of the Member States. It has been concluded that contrary to what Regulation 1/2003 might suggest, the Member States are not entirely free in the enforcement of Articles 101 and 102 TFEU. When the Member States act as ‘agents’ of EU law, enforcing Articles 101 and 102 TFEU, the domestic sanctioning powers are governed by various EU principles. Another conclusion that was drawn in chapter 3 is that the actual economies and diseconomies of the current EU framework are ultimately dependent on the heterogeneity of sanctioning preferences (reflected in the disparities in sanctioning regimes) and the degree to which Member States engage in innovative experiments. As earlier studies already suggested that the domestic sanctioning regimes have been subject to a process of convergence, chapter 5 has examined the degree and drivers of this process. Convergence can be seen as evidence for homogeneous sanctioning preferences. It may also be evidence for a learning process. The analysis in chapter 5 has demonstrated that there are indeed clear tendencies of convergence. However, it has also been shown that there remain some areas that are characterised by a large degree of differentiation. This could be evidence for experimentation on Member State level. On the basis of all of these findings, this chapter elaborates on the economies and diseconomies of the current division of competences between the EU and the Member States in the area of sanctions. For this purpose it will discuss the cost-reducing capacity of the EU sanctioning principles and the convergence tendencies (paragraph 6.2), the efficiency gains of sanctioning autonomy in light of the heterogeneity (or homogeneity) of sanctioning preferences (paragraph 6.3) and the efficiency gains of Member State-driven regulatory innovation (paragraph 6.4). While this discussion will not permit us to put an actual price on the enforcement system, paragraph 6.5 will draw some conclusions on the economic sensibility of the 2004 decentralisation process in light of the current division of sanctioning competences.

6.2 THE COST-REDUCING CAPACITY OF EU SANCTIONING PRINCIPLES AND CONVERGENCE TENDENCIES

The decentralisation of EU competition law may result 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 will be borne by consumers and taxpayers. To some extent, these costs derive from the fact that multiple authorities need to be staffed and funded and some cases will be prosecuted by more than one authority. Other costs are due to the fact that 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. These domestic precedents will in principle not extend beyond the national boundaries. As a result, more litigation will be needed before the conditions under which sanctioning powers may be exercised by the various authorities have been clarified. For instance, whereas in a centralised enforcement system legal certainty can be provided with a single EU precedent on a particular issue, a decentralised enforcement system requires an additional 27 domestic precedents. This deflation of legal precedents can be seen as a diseconomy of scale which may result in significant duplication costs. Yet, also the efforts that are currently devoted to the coordination of domestic sanctioning regimes could have been saved simply by maintaining (an improved version of) the pre-2004 centralised enforcement system. Many of the civil servants that are now assigned to the coordination activities within the ECN could otherwise have contributed to the uncovering and prosecution of anti-competitive behaviour. With more than 28 authorities currently participating in the ECN, this would have freed up quite some extra manpower. Another ‘coordination cost’ that has been identified is caused by the statutory restrictions to the use of information that has been exchanged between competition authorities (supra paragraph 2.4). Disparities in sanctioning regimes will limit the possibilities to use information that has been exchanged under Regulation 1/2003 and will therefore result in enforcement disadvantages. Finally, disparities in the domestic sanctioning regimes may also lead to some ex ante transaction costs for undertakings (eg having to organise several compliance seminars). It can safely be assumed that the larger the disparities in sanctioning powers across the Member States, the higher the costs in terms of duplicative litigation, ECN coordination, enforcement disadvantages and ex ante legal advice. These costs are not so much the result of the system of shared administration, but rather are due to the sanctioning autonomy of the Member States.

Against this background, chapter 4 has analysed the scope of the sanctioning autonomy of the Member States. This analysis has shown that the domestic sanctioning powers for infringements of Articles 101 and 102 TFEU are subject to a variety of EU principles. These principles contribute to the uniformity of enforcement procedures by centralising parts of the sanctioning regime. These centralisation effects are capable of limiting the need for duplicative litigation, ECN coordination and ex ante legal advice, while at the same time enhancing the mechanisms for information-exchange under Regulation 1/2003. The

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1 The importance of these ex ante transaction costs for UK undertakings has been demonstrated in BJ Rodger, ‘A Study of Compliance Post-OFT Infringement Action’ (2009) 5 European Competition Journal 65.
magnitude of these cost-reductions is dependent on the degree and areas of centralisation. For example, only an EU standard (as opposed to an EU minimum requirement) for the conditions of intent and negligence in imposing penalties for infringements of Articles 101 and 102 TFEU would effectively reduce duplicative litigation before the national courts on the issue of *nulla poena sine culpa*. Coordination costs would be reduced, for instance, if the principle of effectiveness were to require Member States to recognise and match penalty reductions awarded in other jurisdictions in the context of a leniency application. After all, this would largely take away the need for coordination within the ECn in the area of leniency. Subparagraphs 4.5.10 and 4.6.3 have shown that these examples do not reflect current EU case law. More generally, several conclusions can been drawn with regard to the degree and areas of centralisation (*supra* paragraph 4.7). First, the EU sanctioning principles are hardly concerned with the type of sanctions that the Member States impose. Second, and this is in line with the first conclusion, the EU sanctioning principles are mainly concerned with the conditions under which the sanctioning powers are exercised. Third, many of the EU sanctioning principles still leave the Member States considerable leeway to develop these conditions. Fourth, many of the more detailed EU sanctioning principles relate to the legal safeguards for the undertakings involved, rather than to the performance standards for the competition authorities. Fifth, the detailed sanctioning principles deriving from the EU fundamental rights only provide a floor below which the Member States may not operate. As the costs of decentralisation increase with the sanctioning autonomy, it can be concluded from the foregoing that the EU sanctioning principles are only capable of reducing some of these costs.

However, the costs of decentralisation that are related to the sanctioning autonomy of the Member States could phase out gradually. At some stage, all the disparities that impede the effective enforcement of Articles 101 and 102 TFEU may have levelled out as a result of ECN coordination. Beyond this stage, enforcement resources that formerly were allocated to policy coordination can be redirected to investigations. Moreover, information-exchange under Regulation 1/2003 will then not be hampered any longer either. Ultimately, also the need for *ex ante* legal advice and duplicative litigation will diminish. This end stage may even be precipitated by the unilateral alignment initiatives of the Member States. Chapter 5 has demonstrated that the domestic sanctioning powers in Germany, the Netherlands and the UK have indeed been subject to such tendencies of convergence. This is most clearly the result with regard to interim measures and early resolution measures and, to a more limited extent, reparatory sanctions and pecuniary sanctions. However, chapter 5 has also indicated that there do remain some fundamental differences between the four jurisdictions and these disparities are partially the result of ‘national experiments’. This is the case most clearly with regard to the institutional enforcement frameworks, declaratory findings, reparatory sanctions, pecuniary sanctions, custodial sanctions and disqualification orders. From the perspective of enforcement costs, disparities in the latter three areas could be particularly problematic. After all, to the extent that these differences relate to the treatment of natural persons, this could form an obstacle to the information-exchange mechanisms of Regulation 1/2003. With an enforcement framework that could actually encourage Member
States to experiment in an effort to outcompete their peers (*supra* paragraph 3.6), the costs of the current enforcement framework are not likely to phase out entirely.

In sum, the decentralisation of EU competition law appears to have been a costly way to increase enforcement capacity. Some of these costs are inherent to the allocation of enforcement competences to the Member States. Other costs are closely linked to the sanctioning autonomy of the Member States. The EU sanctioning principles and the convergence tendencies bring down only some of these costs.

### 6.3 AUTONOMY, DISPARITIES AND THE EFFICIENT USE OF ENFORCEMENT EXPENDITURES

Chapter 3 has also provided a more positive perspective on decentralisation. The decentralisation of EU competition law, with the accompanying sanctioning autonomy, 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. After all, decentralised decision-makers are generally more responsive to the preferences of their citizens than a centralised decision-maker and sanctioning preferences may very well differ per Member State. Considering that decisions as to how a sanctioning regime is designed have a bearing on enforcement expenditures and accompanying tax rates, it will be clear that a decentralised enforcement system that is premised on sanctioning autonomy may lead to a more efficient use of enforcement expenditures and therefore to a more efficient redistribution of tax income. Based on domestic preferences each Member State can decide on the distribution of government resources over advocacy and enforcement, or over public enforcement and private enforcement. But also within the domain of public enforcement there are choices to be made which have an impact on government resources. Some Member States will prefer penalties that are cheap to administer (e.g. fines), whereas others will prefer penalties that are more costly to impose but do send out stronger signals to society (e.g. custodial sanctions). Or, some Member States will finance monitoring costs entirely out of government resources, whereas others might want to share these costs with the undertakings concerned (e.g. by requiring undertakings to remunerate an independent third party to monitor and/or arbitrate on the implementation of remedies).

In a decentralised enforcement system, no Member State pays for the other one’s choices and the costs of enforcement are entirely borne by domestic taxpayers. The magnitude of these efficiencies will depend on the heterogeneity of sanctioning preferences. The more heterogeneous these preferences, the larger the advantages of decentralisation. Sanctioning preferences may of course also differ within a single Member State, but decentralisation will probably not solve this issue: ‘bundling and mobility problems’ will prevent Member States from becoming more homogeneous (*supra* paragraph 3.6). The economic advantages of decentralisation are therefore dependent on the heterogeneity of sanctioning preferences *between* the Member States.
However, decentralisation will not result in a more efficient use of enforcement expenditures if heterogeneous preferences cannot be accommodated anyway. Against this background, chapter 4 has studied the applicable EU framework for domestic sanctioning powers. Member States can only satisfy the preferences of their citizens within the boundaries of the EU sanctioning principles. The analysis in chapter 4 has shown that these principles are concerned with the conditions under which sanctions may be imposed rather than with the actual type of sanctions. But even for those areas that are covered by the EU sanctioning principles, the Member States still retain a considerable margin of discretion in organising the enforcement of Articles 101 and 102 TFEU. This means that the current system of decentralised enforcement in large parts indeed accommodates heterogeneous sanctioning preferences.

Domestic sanctioning powers will generally be the reflection of domestic sanctioning preferences. By examining convergence and differentiation with regard to sanctioning powers in Germany, the Netherlands and the United Kingdom, chapter 5 has attempted to clarify the heterogeneity of sanctioning preferences between these Member States. Convergence can be seen as evidence for homogeneous sanctioning preferences. Differentiation testifies that sanctioning preferences are heterogeneous. The conclusions that were drawn in paragraph 5.10 can be summarised as follows. On the one hand, there are strong tendencies of convergence. This is most clearly the case with regard to interim measures and early resolution measures and, to a more limited extent, reparatory sanctions and pecuniary sanctions. On the other hand, there are also some fundamental differences between the four jurisdictions. This is the case most clearly with regard to the institutional enforcement frameworks, declaratory findings, reparatory sanctions, pecuniary sanctions, custodial sanctions and disqualification orders. These differences, as described and analysed in chapter 5, can only partially be explained by national traditions. Other differences are the result of more recent legal changes in one or more Member States. These more recent legal changes are particularly informative, as these may truthfully reveal prevailing differences in sanctioning preferences. If these ‘national experiments’ indeed have substantial implications for enforcement expenditures, then this provides a strong economic argument in favour of decentralisation. After all, the decentralisation of enforcement competences requires each Member State to bear the costs of its own unique mix of sanctioning powers and procedures.

The analysis in chapter 5 has identified various national experiments with clear implications for enforcement expenditures. In particular, this is the case in respect of the experiments in the field of custodial sanctions and disqualification orders. These sanctions could deter and even prevent future infringements and therefore have beneficial welfare effects. However, this does require substantial ‘investments’ and amounts to ‘deadweight losses’, as

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2 That this need not always be the case is explained in R Williams, ‘Cartels in the Criminal Law Landscape’ in C Beaton-Wells and A Ezrachi, Criminalising Cartels: Critical Studies of an International Regulatory Movement (Hart Publishing 2011) 289. Williams calls this the ‘bootstraps’ problem: ‘an attempt by the law to pull itself up by its own bootstraps’.
prison facilities need to be created and those that are imprisoned or disqualified cannot contribute to society any longer. Especially the UK is experimenting with these types of sanctions. Not only does this suggest that the sanctioning preferences in the UK differ from those in Germany and the Netherlands. It also means that only UK taxpayers bear the costs of these expensive (yet possibly very effective) sanctioning powers. In this respect, the decentralisation of enforcement competences has efficiently matched sanctioning preferences with enforcement expenditures.

Another national experiment with a clear impact on enforcement expenditures is the decision of the Dutch legislator to supplement the authority’s power to impose corporate fines with fines for the responsible individuals. While this could effectively deter individuals from engaging in anti-competitive practices, it will lead to additional costs in terms of administrative procedures and subsequent appeals. These costs are borne by the Dutch taxpayers alone, thereby efficiently matching sanctioning preferences with enforcement expenditures.

Also outside the field of punitive sanctions, there are several examples showing that decentralisation has actually generated efficiencies of the above type. Under Dutch law, behavioural remedies may be imposed for a maximum duration of two years only. While this limits the risks of overregulation, it does mean that a case has to be reassessed regularly. Also these costs are entirely borne by Dutch taxpayers. Under German law, declaratory findings of past infringements can be adopted with a view to assist injured third parties in follow-on damages actions. The German taxpayers are responsible for the costs associated with these administrative procedures.

But there are of course many other domestic sanctioning preferences/powers that have a clear impact on government resources. To name but a few: under German law, interim measures can be ordered without prior hearing of the parties and commitment decisions can be adopted without consulting third parties; under Dutch and UK law, interim measures may be adopted in the interest and at the request of third parties; under German law, the authorities are able to skim-off illegal gains and to order undertakings to pay damages to

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4 See however A Stephan, ‘A Principled Argument for Personal Criminal Sanctions as Punishment under EC Cartel Law’ (2008) *The Competition Law Review* 123, presenting a survey conducted in the UK from which it follows that only one out of ten Britons think individuals responsible for cartels should be imprisoned. This could suggest that sanctioning preferences in the UK might not differ that much from those in Germany and the Netherlands.

5 Also under German law individuals may be fined for their contribution to infringements of Articles 101 and 102 TFEU, but this should be qualified as a national tradition rather than a national experiment.
injured third parties. These national experiments provide as many indications that the
decentralisation of enforcement competences has come with certain efficiencies.

It should be clear from the above that the enforcement of Articles 101 and 102 TFEU comes
with various costs and that these costs differ with the preferences of each Member State.
In reality, the differences in enforcement expenditures are probably much higher as only
a fraction will be determined by the (disparities in) sanctioning powers. On the basis of
the foregoing, it may be assumed that the current decentralised enforcement system has
resulted in a more efficient redistribution of tax income. In order to fully appreciate these
benefits, it should be recalled that the current EU framework provides such disciplining
effects as to overcome free-rider problems and ‘race-to-the-bottom’ scenarios (supra
paragraph 3.6). In other words, Member States do not have an incentive to free-ride on
the enforcement activities of other Member States. It follows that in terms of preference
matching, decentralisation has made the enforcement of EU competition law a more
efficient venture.

6.4 INNOVATION THROUGH DECENTRALISATION

The decentralisation of enforcement competences may also create efficiencies of a dynamic
type. By allowing for experimentation and learning among the Member States in terminating
and punishing infringements, decentralisation could bring further the state of the art in
competition law enforcement. The learning effects of national experiments in the area of
sanctions should be sought in the type, structure, conditions and effects of a sanction.
While regulatory innovation is not inherently linked to decentralisation, a decentralised
enforcement system simply sustains more experiments than a centralised enforcement
system. Not only can several jurisdictions experiment more than one. The consequences
of unsuccessful experiments remain limited to the territory of a single Member State.
Moreover, the disciplining effects of fine proceeds and reputation gains – which are absent
in a centralised enforcement system – are likely to induce Member States to engage in
innovative experiments (supra paragraphs 3.6 and 3.7).

This ‘innovation through decentralisation’ theorem hinges on the possibilities for
experimentation and learning. The possibilities for experimentation are dependent on
the autonomy of the Member States. This has been analysed in chapter 4. The analysis has
shown that the sanctioning autonomy of the Member States is narrowed down by a variety
of EU sanctioning principles. In the areas covered by these principles national experiments
are excluded. However, the analysis in chapter 4 has also shown that the EU sanctioning

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6 While national experiments are excluded in the areas covered by the EU sanctioning principles,
regulatory innovation is not. In accordance with what was concluded in paragraph 3.7, regulatory
innovation could also take place in the national courts and with regard to legal safeguards. As a result
of decentralisation, EU law will be applied more frequently in the national courts: national courts will
principles are more concerned with the conditions under which sanctions may be imposed than with the actual type of sanctions. In any case, the Member States retain a considerable margin of discretion in designing their enforcement regime. This means that the current EU framework for decentralised enforcement indeed allows for national experiments. As has been established in chapter 2, this framework also facilitates interjurisdictional learning. It does so in two ways. First, it requires the competition authorities to consult with each other in individual cases. The Commission needs to consult with 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 with the Commission before sanctions can be imposed. These consultation mechanisms have created a structural dialogue between the various authorities. As a consequence, competition authorities learn about the sanctioning possibilities and methods abroad and this may feed back into domestic policy. Second, the creation of the ECN has provided a forum for policy discussions. Within this context, competition authorities discuss and share experiences with sanctioning powers and procedures. In sum, the current EU framework for decentralised enforcement has the basic ingredients for regulatory innovation.

Actual regulatory innovation should be looked for at the level of the individual sanctioning regimes. Against this background, chapter 5 has analysed the development of domestic sanctioning powers in Germany, the Netherlands and the United Kingdom and contrasted these with the powers of the Commission. One of the conclusions that came out of chapter 5 is that there are clear tendencies of convergence. Partially, these tendencies are the result of Regulation 1/2003 and the powers of the Commission, which have functioned as points for convergence. This is most clearly the case with regard to interim measures and early resolution measures and, to a more limited extent, reparatory sanctions and pecuniary sanctions. Another driver of convergence are the policy coordination initiatives in the context of ECN and ECA. As yet, these initiatives do not extend beyond the field of pecuniary sanctions. A third driver of convergence are the successful national experiments. This has been the case most clearly in the area of pecuniary sanctions and, to a more limited extent, in the area of custodial sanctions and disqualification orders.

It should be emphasized that not all of the above drivers of convergence can be seen as examples of regulatory innovation. Instead, some of them may be seen as 'simple imitation'.

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need to review the legality of domestic decisions adopted on the basis of Articles 101 and 102 TFEU. 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 (supra 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 domestic procedures could lead to important precedents. Also this may bring further the state of the art in competition law enforcement.


8 The term 'simple imitation' has been borrowed from Drahos, who uses this term for similar purposes. Drahos (n 7) 28.
or ‘deliberate alliance’ to the Commission model. There are indeed some instances where this process of convergence has the appearance of simple imitation. This implies that the institutional possibilities for experimentation and learning have been left unexploited. A good example of such simple imitation is the power to impose structural remedies. Not long after this power was granted to the Commission pursuant to Regulation 1/2003, the NCAs in the analysed jurisdictions were granted similar powers. Yet, thus far neither the Commission nor these NCAs have ever used this power. This example should not obscure the fact that there is also clear evidence for convergence through learning. One example is the OFT’s 2011 consultation on a proposal for a revamped version of its Penalty Guidance (supra subparagraph 5.7.4). The OFT proposes to follow foreign examples (notably the Commission model and the German model) and to increase the starting amount of the fine from 10 per cent of the relevant turnover to 30 per cent. This proposal is based on a detailed assessment of various penalty regimes.

Apart from the fact that convergence is not always the result of learning processes, the existence of any such processes does not necessarily argue in favour of decentralisation. In fact, to the extent that Member States learn from the Commission model (rather than the other way around) decentralisation could even be seen as an obstacle for regulatory innovation. After all, compared to a system of centralised enforcement the implementation of these improvements is at best delayed. In order to be able to link decentralisation with

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9 The term ‘deliberate alliance’ has been borrowed from Glenn, who uses this term to isolate one form of ‘persuasive authority’. The concept of persuasive authority itself refers to ‘authority which attracts adherence as opposed to obliging it’. Persuasive authority can be seen as a conduit for the reception of non-national responses to social problems. This may either be effected ‘in a spirit of deliberate alliance’ or ‘to draw constructive domestic advantage from the useful characteristics of the external model’. In the case of deliberative alliance, the persuasiveness of authority is largely content-neutral and authority could be persuasive regardless of what is said. Reception for constructive purpose is more discriminating and particularized, in that it follows from a present will to receive aspects of foreign law simply because it is perceived as useful. HP Glenn, ‘Persuasive Authority’ (1987) 32 McGill Law Journal 261, 264-265, 274.

10 Already in 1996, Van den Bergh has raised the question whether the process of voluntary convergence in the area of substantive competition law should be seen as the result of a dynamic competitive process between legal orders. His prediction was pessimistic: rather than copying EU rules because of their superior quality in terms of allocative efficiency, the main argument in favour of alignment was the strongly perceived need for legal certainty. As a result, trial-and-error processes have been inhibited in a field of law where learning-by-doing is so important. R van den Bergh, ‘Economic Criteria for Applying the Subsidiarity Principle in the European Community: The Case of Competition Policy’ (1996) 16 International Review of Law and Economics 363, 371. Also Parret is critical on the convergence to the Commission model, in L Parret, Side Effects of the Modernisation of EU Competition Law (Wolf Legal Publishers 2011) 227.

11 For the pre-2009 period, see 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 92. However, the same Staff Working Paper indicates that the Commission does occasionally adopt structural commitment decisions (97). One could argue that the Commission would not have been able to secure such commitments if it did not have the power to adopt structural remedies.

innovation, one should either observe convergence to a domestic model or domestic deviations from the Commission model. While the former can be seen as proof for successful experiments (provided this is not the result of simple imitation again), the latter could either be evidence for an unsuccessful experiment or ‘learning in progress’. All three will clarify what does or does not work and thereby bring further the state of the art in competition law enforcement. There have been some examples of convergence to a domestic model. For instance, it appears that the Commission’s method for calculating the basic amount of the fine, using a percentage of the relevant turnover, has been inspired by the Dutch model (supra subparagraph 5.7.1). Nevertheless, chapter 5 has mainly identified convergence to the Commission model and domestic deviations. The latter are noticeable in the institutional enforcement frameworks of the Member States and in the areas of declaratory findings, reparatory sanctions, pecuniary sanctions, custodial sanctions and disqualification orders. These domestic deviations are partially due to the idiosyncrasies of the various legal orders that are unrelated to competition law. Other deviations are deliberate and can be seen as national experiments in the area of EU competition law. While only national experiments are evidence for the ‘innovation through decentralisation’ theorem, also national traditions may provide valuable information on what does or does not work. These experiments and traditions can be considered ‘innovative’ only to the extent that they add to earlier Commission experiences and at least have the potential to improve the enforcement of Articles 101 and 102 TFEU. It should be emphasized that they need not necessarily be successful in order to be valuable. What is important is that these experiments and traditions enhance our knowledge on competition law enforcement.

Member States operating sanctioning powers unknown to the Commission (eg custodial sanctions, disqualification orders, pecuniary sanctions for individuals) will in any case bring further the state of the art in competition law enforcement. Yet, even more conventional sanctions such as corporate fines could be subject to regulatory innovation. In light of the Commission’s extensive experience in this area, regulatory innovation as a result of decentralisation may be less obvious, but certainly not excluded, and in any case not less important. Determining an appropriate fine can be a complex matter, which may profit from learning-by-doing and from experiences with diverse calculation methods. Furthermore, corporate fines are probably the most important penalty for infringements of

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EU competition law and any innovation in this area could therefore have great value for the enforcement of EU competition law more generally. By revisiting some domestic deviations in the area of corporate fines, we can test the ‘innovation through decentralisation’ theorem.

The analysis in paragraph 5.7 has identified various domestic deviations in the area of corporate fines. These deviations relate to the conditions, methods and procedures for imposing a fine. Some of these qualify as innovative deviations. This is the case, for instance, with regard to the possibility under German law to levy fines in excess of 10 per cent of the undertaking’s worldwide turnover where this is needed to disgorge illegal gains. This possibility serves clear retributive and deterrence purposes, without limiting the accessibility and foreseeability of the fine as required by the EU principle of legality (supra subparagraph 4.5.4). Unfortunately, the German authorities have not run experiments with this power. Probably this is due to the difficulty of establishing the magnitude of the illegal gains, or maybe because the illegal gains typically do not exceed the 10 per cent boundary.

With other domestic deviations there is more experience. One of these concerns the penalisation of infringements lasting more than a year. Unlike some of its colleagues abroad, the Netherlands authority has to calculate the basic amount of the fine by summing up real turnover figures for the entire duration of the infringement. The Commission model uses a fictitious amount based on the turnover in the last business year. This Dutch deviation is innovative, in the sense that it allows for a better approximation of the illegal gains. The flipside of this approach is that the Netherlands authority needs more information to calculate the amount of the fine. The longer the duration of the infringement, the more challenging it will be obtain this information.14

Another deviation from the Commission model is the treatment of compensation as an explicit ground for mitigating the fine. This German and Dutch ‘experiment’15 attempts to deal with the interplay between public enforcement and private enforcement. The innovative features of this experiment are that it stimulates wrongdoers to compensate injured parties and takes away some of the disadvantages of the accumulation of fines and damages in relation to a single infringement.16

14 Precisely because of this difficulty in calculating the basic amount of the fine, Wils is less enthusiastic about this experiment. See Wils, ‘The European Commission’s 2006 Guidelines on Antitrust Fines’ (n 13) 211-212.

15 It should be noted that compensation as a ground for mitigation is in accordance with the ECA Fining Principles, para III.18.

16 With regard to the disadvantages of the uncoordinated accumulation of fines and damages for a single infringement, see MJ Frese, ‘Fines and Damages Under EU Competition Law: Implications of the Accumulation of Liability’ (2011) 34 World Competition 393. See also Wils, ‘The Relationship between Public Antitrust Enforcement and Private Actions for Damages’ (n 13) 21, who warns: ‘Competition authorities should thus certainly not facilitate compensation at the expense of deterrence and punishment. This implies that, if fine reductions are granted in recognition of compensation paid, any reduction should certainly stay well below the amount of the compensation paid. It also implies that the competition authority should not have to spend significant resources on assessing whether compensation is adequate. (…) It may be possible to satisfy all these concerns by having a policy under which a fine reduction (of an amount well below the amount of compensation (expected to be) paid) is granted if the offender has either reached settlements with injured parties, and/or has accepted an
EU competition policy is also indebted to the United Kingdom. Through its experimental leniency policy, the OFT has contributed to the state of the art in competition law enforcement. The experiments with ‘leniency plus’ and leniency in the context of resale price-maintenance are capable of uncovering more anti-competitive practices.\(^{17}\) The experiments with using leniency applicants as ‘secret sources’ and with requiring leniency applicants to provide exculpatory material and to indicate what is fact, assumption or belief are capable of enhancing the reliability of leniency applications. Also the Netherlands is in the process of making a contribution to leniency policy, with its plans to protect individuals against the adverse effects of whistle-blowing.

Finally, national experiments with regard to the early disclosure of the severity of the fine should be mentioned. In the context of its settlement procedure, which seems available for any type of infringement, the BKartA has indicated to inform the undertakings involved at an early stage about the maximum amount of a possible fine. The OFT, for its part, has indicated to ensure that undertakings are provided with an opportunity to comment in writing and orally on the key elements of the draft penalty calculation in advance of the penalty decision being taken. The innovative element in these experiments is that they could decrease the number of appeal procedures and therefore result in procedural efficiencies.

In sum, the decentralisation of EU competition law has led to regulatory innovation.\(^{18}\)

However, these benefits should not conceal that decentralisation has also obstructed regulatory innovation. After all, not every domestic deviation from the Commission model may carry the label of innovation. In fact, some national traditions seem outdated or even misguided. Also this can be demonstrated with examples in the area of corporate fines. For example, the application of a capped deterrence multiplier at some intermediary stage of the calculation process seems inappropriate to secure deterrent fines. Even if this multiplier is initially adequate, the subsequent application of mitigating and aggravating circumstances may still result in a fine that either fails to deter or overdeters. One would therefore expect an increase for reasons of deterrence to be the final increment, just before the statutory cap and the leniency reduction are applied. This is indeed also the Commission’s approach. Yet, independent arbitration system the use of which is optional and free for damage claimants. Such a policy could help victims of the antitrust violation to obtain compensation at lower costs, without undermining deterrence and without using significant public enforcement resources’ (footnotes omitted).

\(^{17}\) Wils seems less enthusiastic with the experiments in the area leniency plus (or amnesty plus), see Wils, ‘Leniency in Antitrust Enforcement’ (n 13) 60-61: ‘Given this increased probability of detection of the second cartel, once the participation of a company in a first cartel has been detected, the justification for an “Amnesty Plus” policy does not appear obvious.’

\(^{18}\) Apart from the experiments with custodial sanctions, disqualifications orders and pecuniary sanctions, there are some other domestic sanctioning powers and developments that could be highly informative for other jurisdictions: the proposals of UK government to facilitate interim measures (\textit{supra} subparagraph 5.3.4); the possibility for German authorities to use administrative procedures to compensate injured parties, whether through declaratory findings or by ordering compensatory measures (\textit{supra} subparagraphs 5.5.2 and 5.6.2); the approach of the Dutch courts in dealing with undue delays (\textit{supra} subparagraph 5.7.3).
NCAs in all the analysed jurisdictions either still apply or until recently have applied such a (capped) deterrence multiplier at an intermediary stage.

Another domestic deviation that misses the potential to improve the enforcement of Articles 101 and 102 TFEU is the possibility under German and Dutch law to punish smaller undertakings more severely than larger undertakings. Yet, this is the consequence of the power to levy fines of EUR 1 million and EUR 450,000 respectively. Undertakings with a worldwide turnover of less than EUR 10 million (in Germany) or EUR 4.5 million (in the Netherlands) may thus face a fine in excess of 10 per cent of their turnover. Apart from the fact that these national traditions are unlikely to improve enforcement, they in any case do not add to earlier experiences. After all, under the regime of Regulation 17 also the Commission was allowed to punish smaller undertakings more severely than larger undertaking.19 The adoption of Regulation 1/2003 has made an end to this possibility.

Probably the clearest example of a misguided approach can be found in Dutch law. Under current domestic case law the NMa may not take into account periods of a single and continuous infringement dating back more than five years from the day at which the decision has been adopted in determining the amount of the fine. Not only could this limit the amount of the fine, it also has for a consequence that a single and continuous infringement can be partially time-barred. This approach is at odds with EU case law on the SCI-concept (supra subparagraph 4.3.3) and the ECA Fining Guidelines20, and it is in any case incomprehensible why a five year period as per the date of the decision has been chosen.

Paradoxically, the sanctioning autonomy of the Member States may thus block innovation, whether temporarily or permanent. This observation brings us back to the theoretical underpinnings for regulatory innovation in the field of EU competition law. It has been theorised in chapter 3 that the dynamic efficiencies underlying the enforcement framework for EU competition law are partially due to the disciplining effects of fine proceeds and reputation gains. These effects, it was suggested, would induce Member States to engage in innovative experiments in a bid for cases and recognition from their peers. It has been shown through various examples that the ‘innovation through decentralisation’ theorem indeed corresponds with developments on Member State level. Notwithstanding this conclusion, the above observation suggests that these disciplining effects are in any case not as strong as to root out every outdated or misguided approach to competition law enforcement instantly.

The ‘innovation through decentralisation’ theorem needs to be nuanced for a second reason. Even if Member States do engage in innovative experiments and other Member States learn from these experiences, the latter may still not embrace the successful foreign experiments for ‘cultural’ reasons. This has to do with the fact that some of the ‘national experiments’ that have been identified can be explained, at least partially, by the closely

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19 Pursuant to Article 15(2) Regulation 17, the Commission could adopt a fine in the range 1000 to 1 million ‘units of account’, or, in excess thereof, a fine of up to 10 per cent of the undertaking’s turnover.

20 ECA Fining Guidelines, para III.8
linked theories of chaos and path dependence (rules prevail because of the original conditions), rather than experimentation, learning and evolution-to-efficiency.\textsuperscript{21} For example, the possibilities under German law to penalise individuals and to skim-off illegal gains are deeply rooted in German law. The same could be said of disqualification orders under UK law.\textsuperscript{22} To be sure, this is not to say that these solutions are not innovative for the purpose of EU competition policy or that they cannot provide valuable information to other jurisdictions. However, it does mean that the evolution-to-efficiency paradigm fails to explain fully why these jurisdictions ended up with these sanctions\textsuperscript{23} and, importantly, it also limits the changes that these sanctions are introduced elsewhere. Indeed, the analysis in chapter 5 has only identified a few examples of convergence to a domestic model.

6.5 CONCLUSION

The decentralisation of EU competition law has come with costs and benefits. Some of these costs are closely linked to the sanctioning autonomy of the Member States. The EU sanctioning principles and the convergence tendencies are likely to bring down some of these costs, but probably not all and certainly not rapidly. It is telling that more than nine years after the adoption of Regulation 1/2003 there are still considerable differences between the sanctioning powers of the Member States. From this perspective, decentralisation should be seen as a rather inefficient way to increase enforcement capacity. However, decentralisation also has some countervailing benefits. These benefits too are closely linked to the sanctioning autonomy of the Member States. This autonomy accommodates the heterogeneous sanctioning preferences between the Member States and results in a more efficient use of enforcement expenditures. Also, it has led to regulatory innovation. The variety of sanctioning powers applicable throughout the EU has provided more information about what does or does not work in terms of competition law enforcement. At the same time, the national autonomy with regard to sanctioning powers and procedures has also prevented Commission-driven innovation from proliferating in the Member States.

The current distribution of sanctioning competences between the EU and the Member States can be considered economically sound as long as the benefits outweigh the costs. This is ultimately a question of accounting. This legal study has not rendered the data allowing for a conclusive cost-benefit analysis. However, it can be concluded that the costs of a decentralised enforcement system premised on sanctioning autonomy are real and significant, while the countervailing benefits are perhaps not as spectacular as one could have hoped for. The benefits of matching sanctioning preference with enforcement


\textsuperscript{22} See also A Khan, ‘Rethinking Sanctions for Breaching EU Competition Law: Is Director Disqualification the Answer?’ (2012) 35 World Competition 77, 89.

\textsuperscript{23} Cf Roe (n 21) 642.
expenditures are very real but limited to those areas where sanctioning disparities prevail. In some areas of competition law enforcement these disparities are gradually phasing out. This means that the countervailing benefits will become ever more dependent on the information advantages that are due to national experiments. While these information advantages too are very real, they are only capitalised if they truly influence sanctioning policy in the various jurisdictions. It has been shown that this is not always the case.

Two conclusions seem warranted on the basis of the above discussion. First, the decentralisation of EU competition law seems to have been a costly way to increase enforcement capacity. It cannot be assumed that the current distribution of sanctioning competences between the EU and the Member States has resulted in positive welfare effects, neither in the short term nor the medium term. Second, the potential welfare advantages through regulatory innovation are not exploited to their fullest extent. The implications of these conclusions will be dealt with in chapter 7, which is the final chapter of this study.