Sanctions in EU competition law: principles and practice

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Summary

Chapter 1: General Introduction
In the first decades of European integration, the enforcement of EU competition law was highly centralised. Virtually all enforcement actions under Articles 101 and 102 TFEU were initiated by the European Commission. Meanwhile, the enforcement of EU competition law has become less centralised, many would say even decentralised. In 2004, essentially in an effort to increase enforcement capacity in the wake of EU enlargement, the involvement of the competition authorities of the Member States has been reinforced significantly. These national authorities may pursue infringements of EU competition law largely on the basis of their domestic enforcement regimes. This combination of decentralisation and enforcement autonomy raises questions on the relationship between EU law and national law, as well as on the costs of enforcement. This study links these questions together by analysing how the competences in the area of sanctions are distributed over EU level and national level and how this influences the costs of enforcement. As sanctioning competences in the area of EU competition law are not cast in stone, the conclusions of this study may allow competition authorities, courts and legislators to contribute to the development of EU competition policy with better insights on the economic implications of their choices.

Chapter 2: The Decentralisation of EU Competition Law
The enforcement of Articles 101 and 102 TFEU by the Member States can only take place within the boundaries of EU law. This legal framework is provided, first and foremost, by Council Regulation (EC) No 1/2003, which lays down procedural rules for the application of Articles 101 and 102 TFEU. This Regulation contains the basic rules for the division of sanctioning competences between the EU and the Member States. It also provides for procedures with a direct bearing on the costs of enforcement (eg parallel proceedings). Chapter 2 does the groundwork for this study, first, by describing how the enforcement of EU competition law has developed from a highly centralised system into its current form and, second, by clarifying the basic rules and procedures for decentralised enforcement. It follows from the analysis in this chapter that the current EU framework is based on a system of shared administration, sanctioning autonomy and institutionalised cooperation. It is further concluded that these characteristics result in various ‘transaction costs’ and ‘diseconomies of scale’ that were absent in the former system of centralised enforcement.

Chapter 3: The Economics of Decentralisation
The economic pros and cons of the current system of decentralised enforcement are examined further in chapter 3. This chapter sets out the relevant economic considerations in determining whether to allocate sanctioning powers to a single central authority or to various decentralised authorities. This theoretical discussion relies on insights from the economic literature on federalism. It is concluded in this chapter that some of the costs and benefits of the current enforcement system 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, with regard to the costs of having to finance 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. For instance, the larger the sanctioning autonomy of the Member States, the higher the chances that the sanctioning preferences of domestic taxpayers will be satisfied and the better the possibilities for Member States to contribute to (rather than follow) developments in enforcement policy. The economic literature on federalism suggests that ‘preference matching’ and ‘regulatory innovation’ of the above kind result in efficiencies for taxpayers. Ultimately, the economies and diseconomies of the current EU framework are dependent on the heterogeneity of sanctioning preferences (reflected in the disparities in sanctioning regimes) and the degree to which Member States actually engage in innovative experiments in the area of competition law sanctions.

Chapter 4: Centralisation by Stealth: Uncovering EU Sanctioning Principles

Chapter 4 revisits the sanctioning autonomy of the Member States. It analyses to what extent national sanctioning powers for infringements of Articles 101 and 102 TFEU are subject to EU rules and principles other than Regulation 1/2003. Apart from clarifying the relationship between EU law and national law in the context of the decentralised enforcement of EU competition law, this analysis establishes whether Member States really have the possibility to accommodate domestic sanctioning preferences and to engage in regulatory innovation. Furthermore, it indicates areas in which transaction costs and diseconomies of scale should not arise precisely because of the existence of a uniform EU regime. It is concluded, first, that beyond the basic rules of Regulation 1/2003, EU sanctioning principles derive from: i) the Articles 101 and 102 TFEU themselves; ii) the EU free movement rights; iii) the EU fundamental rights; and iv) the EU duty of sincere cooperation. However, and as a second conclusion, the EU sanctioning principles still leave the Member States considerable discretion in designing their sanctioning regime. It follows that the prevailing body of EU law limits neither the costs nor the benefits of the decentralised enforcement system to any significant extent. This means that the economic sensibility of the current EU framework is largely dependent on the heterogeneity of sanctioning preferences and the degree to which Member States engage in innovative experiments.

Chapter 5: The Development of Domestic Sanctioning Powers: In Search of Convergence and Differentiation

Chapter 5 turns to the domestic sanctioning regimes of three prominent Member States when it comes to competition law enforcement (Germany, the Netherlands and the United Kingdom) to get an impression of the heterogeneity of preferences across the EU and to look for instances of regulatory innovation. The idea behind this chapter is that sanctioning powers will be a reflection of sanctioning preferences. Accordingly, the greater the disparities between the analysed regimes, the more heterogeneous the sanctioning preferences of these Member States. The analysis in this chapter is further based on the
premise that regulatory innovation will not materialise if Member States only follow the initiatives of the Commission. While convergence to the Commission model could be economically advantageous in that it might reduce enforcement costs, it will not bring further the state of the art in competition law enforcement. With a view to study domestic sanctioning regimes, chapter 5 provides a detailed analysis of the terms and conditions of all the measures to terminate and penalise (putative and/or \textit{prima facie}) infringements of Articles 101 and 102 TFEU that are available in Germany, the Netherlands and the United Kingdom. This analysis renders mixed results. On the one hand, the sanctioning powers in the analysed jurisdictions display clear tendencies of convergence. Partially, these are the result of Regulation 1/2003 and the powers of the Commission, which have functioned as a model for all three Member States. Another driver of convergence are the coordination initiatives in the context of the European Competition Network, operating under the aegis of the EU. Finally, the convergence process has been enhanced by Member States aligning their sanctioning powers to other domestic regimes. On the other hand, the analysis of the domestic sanctioning regimes has shown that there are also some fundamental differences across the four jurisdictions. These differences are partially due to idiosyncrasies of the various legal orders that are unrelated to competition law. Other differences are deliberate deviations from the EU model. Notwithstanding the convergence tendencies, the current system of decentralised enforcement is therefore more than a simple geographic expansion of the EU model.

\textbf{Chapter 6: Economies and Diseconomies in the Allocation of Sanctioning Competences}

Chapter 6 applies the theoretical framework of chapter 3 to the empirical results of chapters 4 and 5 and discusses the economic implications of the 2004 political decision to increase enforcement capacity through decentralisation. For this purpose, chapter 6 elaborates on the capacity of the EU sanctioning principles and the convergence tendencies to reduce the costs of decentralisation, on the efficiency gains of sanctioning autonomy in light of the heterogeneity (or homogeneity) of sanctioning preferences, and on the efficiency gains of Member State-driven regulatory innovation. It is 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 sanctioning powers and concomitant enforcement 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 regulatory innovation. While the information advantages due to regulatory innovation too are very real, they are only capitalised if Member States truly learn from experiments abroad. This seems not always the case. Two further conclusions therefore seem warranted. First, it cannot be assumed that the decentralisation of EU competition law has been an efficient way to increase enforcement capacity, neither in the short term...
nor the medium term. Second, the latent advantages of regulatory innovation are not fully exploited.

Chapter 7: General Conclusions
Chapter 7 concludes this study with an overview of the main findings in terms of legal and economic implications, as mentioned above, and offers some reflections and recommendations. First, national courts and the Court of Justice of the EU should continue to work together to resolve the multitude of prevailing legal questions on the relationship between EU law and national law, as well as on the relationship between diverse EU interests. Second, the Court of Justice and the General Court should fully recognise the current decentralised enforcement context in rendering decisions and carefully decide in all their cases under Articles 101 and 102 TFEU whether or not certain rulings should have *erga omnes* effect. Third, in deciding on the requisite level of uniformity in the enforcement of EU competition law, the EU Courts and the EU legislator should take into account the economic implications of their choices as much as possible. Accordingly, they should choose autonomy over uniformity, unless there are clear indications that more uniformity will limit enforcement costs. If cost-reductions can be expected as a result of 'uniformisation,' then these should still be weighed against the information disadvantages (no room for innovation) and the repercussions for the expenditures of individual Member States. Fourth, Member States should make better use of the latent advantages of decentralisation and regulatory innovation. For this purpose, they should evaluate national feedback systems and contribute to the development of EU competition policy by taking care of lacunae in EU law. Fifth, the costs of the decentralised enforcement system should be reduced by improving the conditions for information-exchange between the authorities and by limiting the number of parallel proceedings.