General Introduction

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

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

Instead of harmonising national enforcement procedures, Regulation 1/2003 recognises the wide variation of public enforcement systems existing in the Member States. Accordingly, national competition authorities prosecute infringements of

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5 Recital 35 of the preamble to Regulation 1/2003.
EU competition law largely on the basis of domestic enforcement regimes. The combination of decentralisation and enforcement autonomy raises questions in relation to the relationship between EU law and national law. For instance, to what extent are the Member States subject to rules and principles of EU law in the enforcement of Articles 101 and 102 TFEU? Increasingly, this is becoming a topic of debate. The scope of the autonomy of the Member States has been tested in several recent cases before the Court of Justice of the European Union (hereinafter ‘the Court of Justice’), has been the subject of policy debates within the Commission and has already featured in a number of academic publications.

Apart from these legal questions, the decentralisation of enforcement competences also raises questions of an economic nature. The enforcement of EU competition law is a big industry. It provides work to many lawyers and economists, whether active in commercial practice or government positions (or even academia). The clients of these services are generally undertakings and government agencies. For them, the enforcement of EU competition law therefore comes with certain costs. Ultimately, these costs are borne by consumers and taxpayers. Certainly for

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10 Provided that the enforcement of EU competition law has net welfare gains, the costs of enforcement can be wholly justifiable. It will be assumed that this is indeed the case, cf JB Baker, ‘The Case for Antitrust Enforcement’ (2003) 17 Journal of Economic Perspectives 27; Hüscherlath (n 10). Some competition authorities have started making outcome assessments to measure the welfare effects of their intervention. See NMa, ‘Outcome van NMa-optreden: Een Beschrijving van de Berekeningsmethode’ (2010) 1 NMa Working Papers <www.acm.nl/nl/publicaties/publicatie/7121/NMa-Working-Paper---Outcome-van-NMa-optreden-Een-beschrijving-van-de-berekeningsmethode/> accessed 1 July 2013;
The Objectives of this Book

The combination of decentralisation and enforcement autonomy that characterises the current framework for EU competition law thus raises questions of both a legal and an economic nature. The above examples are just the tip of the iceberg and there are still many unclarities with regard to the relationship between EU law and national law, and the costs and benefits of decentralisation. Understanding these issues, both jointly and in isolation, is crucial for the enforcement of Articles 101 and 102 TFEU in individual cases, as well as for policy debates more generally. On the basis of these legal and economic insights, competition authorities may develop policy and practice, courts may render judgments, and legislators may evaluate and reconsider current legislation. Against this background, this book aims to clarify some of the legal and economic implications of the decentralisation of enforcement competences in the area of EU competition law. More specifically, it aims to clarify the relationship between EU law and national law for the decentralised enforcement of Articles 101 and 102 TFEU, and to explain how this relationship influences the costs of enforcing these competition law prohibitions. As this development has brought the enforcement of EU competition law into line with the enforcement of

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12 EU competition law aims to protect the interests of competitors, consumers and the structure of the market, cf Joined Cases C-501, C-513, C-515 and C-519/06 P GlaxoSmithKline Services Unlimited [2009] ECR I-9291 [63].

13 It should be stressed that economic considerations alone need not be decisive in dividing enforcement competences between the EU level and the national level. Issues like these also have important implications for the legitimacy of EU competition policy. On the issue of decentralisation and legitimacy in the area of EU competition law, see Simonsson (n 8).

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EU law more generally, the discussion in this book may provide useful insights for the division of enforcement competences in other areas of EU law as well.

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

The enforcement actions of the Commission and the national competition authorities are generally referred to as ‘public enforcement’. Public enforcement is at the centre of this book. In order to avoid any confusion about the term ‘sanction’, it is appropriate to explicitly exclude ‘private enforcement’ from the scope of study. Private enforcement refers to the actions initiated by private parties before national courts and tribunals. The prohibitions laid down in Articles 101 and 102 TFEU not only impose obligations, they also confer rights. Anyone whose rights under Articles 101 and 102 TFEU have been breached may apply to the national courts for injunctive relief and/or full compensation of the damage suffered. These responses too could be conceived as ‘sanctions’ for a breach of EU competition law. However, as national courts may apply Articles 101 and 102 TFEU in private disputes irrespective of how public enforcement is organised, private enforcement is of little import to the topic of this book.

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

15 For example, it may provide food for thought for the centralisation tendencies in the regulated industries, where the EU is gradually expanding its enforcement powers. cf S Lavrijssen and L Hancher, ‘Networks on Track: From European Regulatory Networks to European Regulatory “Network Agencies”’ (2008) 34 Legal Issues of Economic Integration 23.


This book is structured as follows. After this general introduction, chapter two will describe how the enforcement of EU competition law has developed from a highly centralised system operated by the Commission into a system of decentralised enforcement. Chapter three then provides a theoretical framework for the examination of this and further legal developments by setting out the relevant economic considerations in allocating sanctioning competences. Chapters four and five detail the legal developments in the area of sanctions to which decentralisation gave rise. More specifically, chapter four identifies and analyses EU sanctioning principles. These principles are capable of limiting the sanctioning autonomy of the Member States and therefore effectively centralise parts of the sanctioning regime applicable to infringements of Articles 101 and 102 TFEU. In chapter five, the development of domestic sanctioning powers is analysed for a subset of jurisdictions. This subset includes Germany, the Netherlands and the UK. This provides an impression of the development of domestic sanctioning powers more widely. Jointly, chapters four and five describe the relationship between EU law and national law in terminating and penalising (putative and/or prima facie) infringements of Articles 101 and 102 TFEU. Chapter six then applies the theoretical framework of chapter three to the conclusions of chapters four and five with the aim of clarifying the economic implications of the current division of sanctioning competences. More specifically, the costs and benefits of the developments at the EU and the national level will be identified and discussed. Chapter seven provides an overview of the study’s main findings in terms of legal and economic implications and offers some reflections and recommendations. Throughout this book, grey text boxes are used to elaborate on issues that are relevant to the discussion, but that are not crucial for understanding the main line of argument.