A Framework for European Competition Law

Co-ordinated Diversity

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The Importance of Diversity (and Uniformity)

I. Introduction

In the Introduction to this book, we saw that many of the actors in competition policy and enforcement in Europe (the Commission, NCAs, practitioners (lawyers and economists) and academics) are in favour of increasing uniformity in the interpretation and application of both the national and the EU rules (and particularly of the latter). However, Chapter 1 highlighted extensive disagreements in the interpretation and application of substantive competition rules. The same applies to procedural rules and institutional structures, – these matter too, because 'divergences among regulators lead to different outcomes in different countries. This can mean variable fines depending on the country; divergences in the rights of defence or handling of evidence; or limitations on the options to settle cases amicably'.[1]

In the light of this dissonance, this chapter explores the socio-economic and political advantages and disadvantages of imposing one uniform interpretation of competition rules in Europe (but not the legal issues, as this is discussed in Part C of this volume). It argues that while uniformity has many benefits, so does diversity (particularly as regards national preferences and encouraging innovation and experimentation – see below); as such, more diversity should be encouraged rather than less. To illustrate the issues, this chapter focuses on the substantive interpretation of Article 101 TFEU (anti-competitive arrangements) and Article 102 TFEU (abuse of a dominant position). The counterfactual is to allow divergent interpretation and application of each of those articles in different Member States.

One might argue that there is no need to investigate this matter, given the level of agreement in the European competition community. Am I merely following academic fashion for its own sake? Treisman, for example, has recently said that 'political decentralisation is in fashion. Along with democracy, competitive markets, and the rule of law, decentralised government has come to be seen as a cure for a remarkable range of political and social ills'.[2]

[1] Matthew Newman, 'National Antitrust Enforcers Should Seek 'Convergence' in Applying Competition Law, Lasserre Says' *MLex* (EU, 29 December 2015) 2.

[2] Daniel Treisman, *The Architecture of Government: Rethinking Political Decentralisation* (Cambridge University Press, 2007) 1.

While some see decentralisation as a value in its own right, *tout court*,[3] I do not take that view. Instead, I try to articulate reasons for favouring uniformity or diversity (or some middle ground). This is an important topic. If we uncover important potential benefits from diversity, then it could fundamentally change the way in which we think about competition policy and enforcement in Europe. In fact, I believe that embracing more diversity can have far-reaching benefits. This is because uniformity seems to undermine both learning and the legitimacy of EU and Member State solutions, given the diverse preferences on show.

This debate is not helped by the partisan nature of the terminology that is often used. In the words of Fesler:

> Our languages dichotomize 'centralization' [uniformity] and 'decentralization' [diversity], a peculiarity that easily converts to a polarization and antithesis that poorly serve political science. We appear to have neither a term that embraces the full continuum between the two poles, nor a term that specifies the middle range where centralizing and decentralizing tendencies are substantially in balance.[4]

Legal provisions cannot be interpreted uniformly, so the real question is how much diversity is desirable.[5] There are many intermediate points between uniformity and total divergence, and I suspect that, quite often, we are better served on some middle ground rather than constantly pushing for greater uniformity. In addition, it is hard to make general conclusions on the optimal amount of diversity in all cases. In the words of Geys and Konrad:

> [T]he theory of optimal allocation of rights and duties in federations cannot provide unambiguous one size fits all recommendations … [V]arious trade-offs need to be considered simultaneously. As such, it is clear that the decentralisation question is not resolved easily, suggesting that bold policy recommendations are unwarranted … and that more work is needed to develop a more solid ground for policy advice.[6]

This means that we have to examine any arguments in the relevant socio-economic and political context of the case in question. As we will see, it also means that extreme solutions (suggesting absolute uniformity or complete divergence) are likely to be too bold.

This chapter is structured as follows. Section II examines four potential benefits of uniformly interpreting EU competition law: single market benefits; uniform consumer protection; a better ability to control international firms and people; and the development of a detailed body of EU competition case law. Then, section III examines four

[3] As noted by James Fesler, 'Approaches to the Understanding of Decentralisation' (1965) 27 *Journal of Politics* 536, 538–39. Reporting the opposite for convergence, see, Filomena Chirico and Pierre Larouche, 'Conceptual Divergence, Functionalism, and the Economics of Convergence' in Sacha Prechal and Bert van Roermund (eds), *The Coherence of EU Law: The Search for Unity in Divergent Concepts* (Oxford University Press, 2008) 478–80.

[4] Fesler (n 3) 537.

[5] Maartje de Visser, *Network-Based Governance in EC Law* (Hart Publishing, 2009) 183; and Waelbroeck in Claus Dieter Ehlermann and Isabela Atanasiu (eds), *Constructing the EU Network of Competition Authorities* (Hart Publishing, 2002) 304–05, 466–67.

[6] Benny Geys and Kai Konrad, 'Federalism and the Optimal Allocation across Levels of Governance' in Henrik Enderlein, Sonja Wälti and Michael Zürn (eds), *Handbook on Multi-level Governance* (Edward Elgar, 2010) 33. See also Treisman (n 2) 270–74.

potential benefits of allowing more diverse interpretations of these competition rules: diverse national policy preferences; experimentation and innovation; civic virtue; and better uncovering national preferences. Section IV concludes.

However, before we begin, let me make three points about what this chapter is *not* about, as this helps to situate our discussion here within the wider structure of this project. First, what I explore here are the advantages and disadvantages of uniformity/diversity. I do not discuss the mechanisms by which these advantages and disadvantages might be achieved or whether they will work for us (Part B does this). Second, this chapter is unencumbered by the current European legal and constitutional frameworks, which will be discussed in Part C. Finally, when I discuss the Member States, I assume that all of the actors in each Member State are one cohesive unit, with similar goals, prejudices and logics (although these may vary in different Member States). Chapter 3 looks inside these units, unpacks the various actors and their different positions, and considers the implications.

II. In Favour of Uniformity

As trade becomes more and more international, especially within the EU, centralising competition policy and enforcement in order to make it more uniform has a certain allure.[7] The Introduction to this book highlighted overwhelming support in the EU competition community for a uniform interpretation and application of EU competition law and policy (principally Articles 101 and 102 TFEU), as well as national competition laws more generally.

Explicit reasons are rarely given to justify this support; it is often considered obvious. However, some do give reasons, for example, Advocate General Kokott argues that uniformity ensures: 'Not only the fundamental objective of equal conditions of competition for undertakings on the single market but also the concern for uniform protection of consumer interests in the entire Community.'[8]

Kokott gives two justifications for uniformity: the equal conditions of competition for firms throughout the single market; and a uniform protection of consumer interests. Two other reasons are sometimes also mentioned in support of uniformity: the inability of countries to control international firms and citizens; and the fact that legal uniformity can facilitate the development of a detailed body of case law applying those rules. Let us discuss these in turn.

[7] Oliver Budzinski, *The Governance of Global Competition: Competence Allocation in International Competition Policy* (Edward Elgar, 2008) 26; and Jacques Pelkmans, 'The Economics of Single Market Regulation' (2012) Bruges European Economic Briefings, 6.

[8] Opinion of Advocate General Kokott in Case C-8/08 *T-Mobile Netherlands* [2009] ECR I-4529, para 85. See also Opinion of Advocate-General Mazák in Case C–375/09 *Prezes Urzędu Ochrony Konkurencji i Konsumentów v Tele2 Polska sp zoo, Now Netia SA w Warszawie* [2011] ECR I-3055, paras 43–44; Luis Ortiz Blanco and Alfonso Lamadrid de Pablo, 'EU Competition Law Enforcement: Elements for a Discussion on Effectiveness and Uniformity', Fordham 38th Conference on International Antitrust Law and Policy, 2011, 47; de Visser (n 5) 154; Mario Siragusa, 'The Commission's Position within the Network: The Perspective of the Legal Practitioners' in Ehlermann and Atanasiu (n 5) 33, 256–57; and Roland Sturm, 'Networking in Unchartered Territory: The Relationship between the Members of the Network and Their National Governments' in Ehlermann and Atanasiu (n 5) 282.

A. The Single Market

Establishing and reinforcing the single market generates two key kinds of benefits: economic and political (this category subsumes sociological and cultural issues as well). I consider these in turn, starting with the economic case.

i. Economic Benefits

One would expect a lot of trade between the Member States, even without the EU's single market policies. This is because many EU Member States are small (the median size is fewer than 10 million people) and they are in close geographical proximity to each other:

> However, the consensus of model-based empirical analyses strongly supports there being additional trade as a result of the Single Market and that these gains are larger for the European Union than for free trade areas such as ASEAN, MERCOSUR and NAFTA. Despite this, intra-EU trade in manufactures remains lower than interstate trade within the United States [even taking into account the role of the distance between markets], although it is higher than Canada.[9]

There is much dispute about the size of the benefits that the single market has actually provided. Methodologically, it is not easy to strip out the relevant gains. Nevertheless, many agree that the single market has had a positive impact on GDP. The World Bank says that the single market may bring an increase of 2–3 per cent in EU-wide trade.[10]

Rolling back some of these gains could be costly in terms of (lost) economic welfare within the EU and specific Member States (it may also reduce employment and tax revenues). In addition, the OECD argues that further progress can be made to integrate the single market. In contrast to what we see in the US, for example, price differences remain wide across the EU. Further integration would help the EU to achieve its full economic potential. The OECD summarises the benefits of further integration in the following way:

> Firstly, deeper market integration would allow the full benefits of comparative advantage to be achieved with each economy specialising in the goods that it is best placed to produce and overall production being efficiently allocated across the European Union. Secondly, a better-integrated Single Market would increase competition between firms in different countries, putting downward pressure on margins, encouraging firms to raise the quality of products and to invest in innovation. Thirdly, consumers would benefit from the greater choice of goods available at lower cost. Fourthly, by lowering production costs and encouraging firms to be more efficient, an integrated market would help to raise the competitiveness of European products on world markets.[11]

The free flow of international trade is interrupted when states implement and apply rules differently. In relation to competition law, more specifically, Chapter 1 gives many

[9] OECD, *A Single Market for Europe* (OECD Publishing, 2012) 32. Similarly, see Pelkmans (n 7) 6, 13; and Deutsche Bank, *The Single European Market 20 Years On*, 2013, 12–13.

[10] Deutsche Bank (n 9) 1, 7–12.

[11] OECD (n 9) 32 and see also 36.

reasons why Member States might do this differently. For example, they might have different goals for the law or have different ways of achieving the same goal (perhaps one favours more competition and another more collaboration), they might value the freedom of economic actors differently or they might interpret the facts in a case differently.[12] They also often focus on the effects in their own jurisdictions, ignoring (or de-prioritising) effects in other states.[13] Diverse procedural rules and institutional structures can also affect these flows. This is true of other areas of law as well, such as tax, health and safety and consumer protection (and areas of law may overlap). For example, Member State A may stipulate a minimum price per unit of alcohol sold in its territory, in the light of medical research that says that this will help to reduce the widespread binge-drinking problem there. To achieve a similar aim, Member State B might prefer to ban alcoholic beverages where the volume of alcohol exceeds 50 per cent, while Member State C might have a different threshold, perhaps 40 per cent. Member State D may prefer to encourage the major drinks firms in its territory to agree a minimum price between themselves. All of these methods aim to achieve public health goals in different ways; each may be more effective than the others in a specific state. These different methods (all of which may be the most appropriate method in their particular contexts) interrupt international trade and each one affects competition differently.

Even if these regulatory differences are not discriminatory (for they may also have discriminatory purposes – and this may even be their main purpose), as the OECD notes:

> [T]he need to comply with different regulatory systems in different countries when entering local markets is a burden on the development of cross-border economic activity. The barriers to entry created by inappropriate regulation hinder the entry of foreign as well as domestic firms. The OECD indicators of product market regulation … indicate that, in some aspects and sectors, the average regulatory barriers in EU countries are high by OECD comparison … This suggests that the burden of regulation in Europe is higher than necessary and less favourable to competition and market entry than in the best performing OECD economies.[14]

I agree with the OECD that such regulatory differences increase the burdens on firms when they enter new markets (or even merely continue operating in different markets). Europe may have more burdensome regulation than in the best-performing OECD countries and this may well be less favourable to competition. However, it is a step too far to deduce from this that 'the burden of regulation in Europe is higher than necessary'. This could be true, of course. Equally, it may be too low. One's answer to that depends on the relative weight that one gives to public policies, such as health (vis-a-vis the benefits of the single market) and the value that one places on the various procedural

[12] Budzinski (n 7) 36–45.

[13] ibid 34, 42. For an example of why this might matter (eg, in mergers), see Hilde Smets and Patrick van Cayseele, 'Competing Merger Policies in a Common Agency Framework' (1995) 15 *International Review of Law and Economics* 425, s III (even when the competition authorities have perfect information); although see also Damien Neven and Lars-Hendrik Röller, 'The Allocation of Jurisdiction in International Antitrust' (2000) 44 *European Economic Review* 845, 847 for a refinement.

[14] OECD (n 9) 37. See also Deutsche Bank (n 9) 4 and also 40.

and institutional protections in each national system.[15] There is no objective answer to what is best; it depends on preferences.

As we have seen, the need to comply with (potentially) different legal regimes in different countries reduces trade between Member States within the EU and makes it more costly. The cost of fragmentation of trade, in terms of productivity and growth, is hard to assess. There are already inherent obstacles to trade, such as language, distance and culture. These assessments also have a kind of network property; the benefits in individual markets depend on the system as a whole. Nevertheless, the OECD believes that the costs of the continuing fragmentation of EU trade are likely to be substantial. The lack of scale in EU businesses:

> [I]s reflected in the large number of enterprises … the overall number of firms in the European Union is far larger than in the United States … While small firms play an important role in the economy, the very large number of firms is likely to have contributed to low productivity and weak innovation and investment: low investment in capital and low productivity growth in distributive trades and business services have driven a slowdown in productivity growth in Europe.[16]

The cost of regulatory differences is particularly important if behaviour is mandatory in one territory and prohibited elsewhere.[17] Yet, even where behaviour is *possible* in one territory, but not in another, then international trade, even if feasible, becomes more expensive. Firms have costs, for example, in understanding what the different rules are.[18] Where there is a risk of conflicting competition decisions, even if both answers are equally (legally) legitimate, trade can be restricted, distorted or even prevented.[19] For example, imagine that a French firm (Bertie SA) wants to roll out a franchise system in Germany, similar to the one that it currently uses in France. If the same competition rule (Article 101 TFEU) is interpreted and applied in the same way in these two countries, once Bertie SA has obtained appropriate legal advice, it should be able to apply the same (successful) franchise system in both countries. It will only need to pay for one set

[15] Other issues are relevant too. For example, the benefits of the Single Market do not fall on all Member States and all firms in the EU equally. This is because the more external trade a Member State carries out with other Member States, the greater the benefits of the Single Market are for it due to the lower costs of trade barriers. This tends to be higher for small countries, so they often benefit disproportionately, especially as their firms also get access to a far bigger market than the one that they are used to (thus, they may value the Single Market goal more highly relative to other public policy goals than other, larger Member States).

[16] OECD (n 9) 35.

[17] Although these kinds of 'true conflicts' are rare; Budzinski (n 7) 42.

[18] William Kovacic, 'Downsizing Antitrust: Is it Time to End Dual Federal Enforcement?' (1996) 41 *Antitrust Bulletin* 505, 520; de Visser (n 5) 154; Imelda Maher, 'Regulation and Modes of Governance in EC Competition Law: What's New in Enforcement?' (2007–08) 31 *Fordham International Law Journal* 1713, 1719–20, especially fn 36; Giuseppe Tesauro, 'The Relationship between National Competition Authorities and Their Respective Governments in the Context of the Modernisation Initiative' in Ehlermann and Atanasiu (n 5) 172; Mark Thatcher, 'The Causes and Consequences of Regulation by Networks: Telecommunications in Europe' in Ehlermann and Atanasiu (n 5) 132; Roger van den Bergh, 'Economic Criteria for Applying the Subsidiarity Principle in the European Community: The Case for Competition Policy' (1996) 16 *International Review of Law and Economics* 363, 374; and Larry Ribstein and Bruce Kobayashi, 'An Economic Analysis of Uniform State Laws' (1996) 25 *Journal of Legal Studies* 138.

[19] Souichirou Kozuka, 'The Economic Implications of Uniformity in Law' (2007) 4 *Uniform Law Review* 686; Oliver Budzinski, 'Towards an International Governance of Transborder Mergers?' (2004) 36 *NYU Journal of International Law and Politics* 5, 44; and Renaud Dehousse, 'Integration v Regulation? On the Dynamics of Regulation in the European Community' (1992) 30 *Journal of Common Market Studies* 393.

of legal advice (rather than two sets – one from each Member State). The lower costs make it more likely that it will enter the German market and compete there. This should lead to lower prices (higher quality) and more consumer choice in Germany. Assume that there were two separate geographical markets: one for France and one for Germany. If these countries now started applying the same competition law in the same way, then this would reduce Bertie SA's costs of entry into Germany. The two markets may even become one.[20] This should enhance competition between Bertie SA and its competitors in both France and Germany. It may also lead to further consumer welfare gains. Ultimately, this increased competition could push Bertie SA to innovate to the extent that it has a viable business that is able to compete outside of the EU too. Costs arise as soon as difference is possible. One uniform approach within these two countries should reduce the duplication of these kinds of costs for Bertie SA.

However, it is worth highlighting that the cost savings from uniformity might not be as great as they seem at first sight. First, even if only one law applied and this were enforced within one competition authority, different interpretations of the rules might persist (from different case teams, for example). This may be less than when applying different laws in different competition authorities, but it would be costly (probably impossible) to eradicate all difference.[21] Furthermore, uniformly interpreting EU competition law in France and Germany does not even eliminate *legal* costs in these two jurisdictions. Differences in their company law, consumer law, tax law and many other rules mean that legal advice will often have to be sought in both countries (and, as we saw above, different states might use different laws to achieve the same goals). Firms must comply with all laws protecting legitimate values, not just competition law. If these different valuations of, for example, public health benefits are achieved through other laws, transaction costs, lawyers' fees and complying with all the different laws might not change. The only way to eliminate these differences is to unify all law (not just competition law) throughout the EU (although uniform competition law and policy should reduce these costs). Having said that (and furthermore), it is not even true that one only needs one competition analysis if the same law is used throughout the EU, as the wider legal and economic context can change throughout the EU (linguistic or other barriers may mean that France and Germany are, in fact, two separate relevant markets). The conditions on the ground may mean that the same agreement has very different implications in the different Member States. This analysis will still need to be done in all relevant Member States, although this may be cheaper than conducting fundamentally different analyses in each Member State.

In any event, the costs of checking and complying with diverse EU competition law interpretations is unlikely to be large compared to the value of any business deal that triggers the EU competition rules (or assessing other legal compliance).[22] In addition, as competition concerns are often raised fairly late on in commercial or corporate transactions, it is unlikely that they are major drivers in deal completion (although they

[20] See the text below, at n 40.

[21] Kovacic (n 18) 519–20.

[22] However, Fournier finds that 'the heterogeneity of antitrust exemptions [has] … a particularly robust adverse effect on FDI'. Jean-Marc Fournier, 'The Negative Effect of Regulatory Divergence on Foreign Direct Investment' (2015) OECD Economics Department Working Paper No 1268 17.

might affect the precise structure of some deals and, in even fewer, they may prevent agreement at all).

Returning to the OECD's list of competition's benefits, it mentioned the issue of the greater competition generated in a bigger market. The EU agrees:

> The single market allows businesses to operate unhindered in all Member States. Companies have the opportunity to grow as they wish. They have a large market to sell into and no longer need worry about customs duties or tariffs at internal EU borders. Firms can organise their supply chains and finances using any supplier, anywhere in the EU. As a result, businesses, big or small, have the potential to maximise their efficiency and become more competitive.[23]

More specifically, the Commission explains this effect in its competition guidelines in the following way:

> [T]he Commission also takes into account the continuing process of market integration, in particular in the Community, when defining geographical markets … The measures adopted and implemented in the internal market programme to remove barriers to trade and further integrate the Community markets cannot be ignored when assessing the effects on competition … A situation where national markets have been artificially isolated from each other because of the existence of legislative barriers that have now been removed will generally lead to a cautious assessment of past evidence regarding prices, market shares or trade patterns. A process of market integration that would, in the short term, lead to wider geographic markets may therefore be taken into consideration when defining the geographic market for the purposes of assessing concentrations and joint ventures.[24]

One benefit of the removal of barriers to trade within the EU is that it may lead to larger geographical markets. Allowing actors on this larger market to compete on a level (regulatory) playing field encourages competition on the merits between them.[25] There may be more firms, offering greater consumer choice; there may also be the opportunity for firms to lower their costs through any economies of scale.[26] However, this might not lead directly to price reductions (we have seen limited price convergence in many areas), especially where there is product differentiation, or different cultural or other preferences.[27]

Not only may a uniform legal environment throughout the EU reduce costs for multi-nationals (and, if there is sufficient competition, to consumers), de Visser believes that undertakings have the right to have similar situations treated in the same way throughout the EU.[28] However, it is unclear whether such a right to equality exists in this sense. The EU Treaties allow the Member States to create different conditions of competition.[29]

[23] http://ec.europa.eu/internal_market/publications/docs/citizens_en.pdf.

[24] Commission, Notice on the definition of the relevant market, OJ 1997 C 372/5, para 32.

[25] Michael Dougan, *National Remedies before the Court of Justice: Issues of Harmonisation and Differentiation* (Hart Publishing, 2004) 86–91.

[26] Deutsche Bank (n 9) 4.

[27] ibid 12.

[28] De Visser (n 5) 153–54. This view is discussed at Dougan (n 25) 86–91.

[29] eg, art 3(3) of Regulation 1/2003; and arts 34 and 36 TFEU. Richard Revesz, 'Federalism and Regulation: Some Generalisations' in Daniel Esty and Damien Geradin (eds), *Regulatory Competition and Economic Integration: Comparative Perspectives* (Oxford University Press, 2001) 5, makes a similar point in relation to environmental regulation.

ii. Political Benefits

Economic benefits are not the only advantages of EU membership. The second kind of benefit that I want to consider is political – or, as the Preamble to the Treaty on European Union puts it, 'the historic importance of the ending of the division of the European continent and the need to create firm bases for the construction of the future Europe'.[30]

Political benefits may be generated by the creation or solidification of a sense of European 'community'. The EU Treaties strive for 'an ever closer union among the peoples of Europe' and ever more 'European integration' (see the Preambles to the EU Treaties). We have moved from a European Economic Community to an European Community and now a European Union, as the EU's focus has changed from an (essentially) pure economic one to one which integrates the social and environmental to a much higher degree.

According to Max Weber, 'communal relationships' (eg, national or familial relations) are 'based on a subjective feeling of the parties, whether affectual or traditional, that they belong together'.[31] He distinguishes communal relationships from 'associative relationships' (eg, contractual relations), where the orientation of social action rests on rationally motivated adjustment of interests or a similarly motivated agreement (although these are purely ideal types at either end of a continuum). In communal relationships, the parties often react to situations in the same way, but this is not enough. In fact, a communal relationship will not even exist unless those involved in it have a:

> [C]ommon 'feeling' about this situation and its consequences. It is only when this feeling leads to a mutual orientation of their behaviour to each other that a social relationship arises between them rather than of each to the environment. Furthermore, it is only so far as this relationship involves feelings of belonging together that it is a 'communal' relationship.[32]

We might think of the European Economic Community as establishing a largely associative relationship. However, according to Weber, it is possible for associative relationships to transform into communal relationships. This might be what the EU has become.[33] Spaak may even have been acknowledging the need for this sort of transition in Europe when he said:

> All those who, in trying to meet the economic challenges set out by the Treaty of Rome, neglected the political dimension have failed. As long as [those] challenges will be addressed

[30] Depending upon one's perspective, of course, these may or may not be benefits. Here, I assume that increasing development of a sense of European community is a benefit (at least from an EU perspective) and thus is relevant in our assessment of uniformity and its benefits. If one disagrees with this view, then there will not be benefits and there may even be disbenefits.

[31] Max Weber, *Economy and Society* (University of California Press, 1978) 41.

[32] ibid 43.

[33] In the words of Djelic and Quack, 'any social aggregate coming together around a common end, objective, or project for a certain period of time could eventually come to exhibit a sense of community. This would naturally vary in degree, intensity, and forms of expression … This means that individuals [and/or nations] in a similar situation or predicament should come to do more than simply coexist. They should engage with each other and reciprocally around that situation or predicament. The social relationship that emerges in the process can become "communal" if this reciprocal engagement generates "feelings of belonging together"'. Marie-Laure Djelic and Sigrid Quack, 'Transnational Communities and Governance' in Marie-Laure Djelic and Sigrid Quack (eds), *Transnational Communities: Shaping Global Economic Governance* (Cambridge University Press, 2012) 5.

> exclusively in an economic perspective, disregarding their political angle, we will run – I am afraid – into repeated failures.[34]

Perhaps as a consequence of these efforts to build communal relationships, EU solutions are often proposed for environmental, social and other problems. This often generates a push for uniformity, despite different preferences and interests in the Member States. Such approaches suggest one homogeneous system of rules for all (prioritising the single market), admitting that many states will not like many parts, but overall they will all be better off (once everyone compromises). This can sometimes be almost to the exclusion of allowing Member State divergent solutions at all.[35]

The EU is not alone in this respect. Phillips and Sharman remark that in international relations theory more generally and other disciplines, there is a widespread normative bias connecting institutional and cultural homogeneity with international order (the inverse is asserted too): 'Even contemporary liberal internationalists' insistence on the necessity of global integration through the universalising forces state-building, economic liberalisation and democracy-promotion represents a different form of the belief in institutional uniformity as a prerequisite for international order.'[36]

A high level of integration facilitates the movement of EU citizens between Member States, and their purchasing and other activities throughout the EU as a whole. This can bring us closer together, generating a deeper understanding, sympathy and tolerance between EU nations and their peoples. Personally, I think that this is extremely valuable.

However, a great benefit of Europe is our different cultures, histories, social mores and traditions. It is precisely these differences (also reflected in law and its limits) that makes being part of this community so rich and fun. The problem is that pushing for legal uniformity, even in areas like competition policy and enforcement, tends to undermine these differences. In the end, this might push us towards a political and cultural uniformity which makes us lose some of the things that enrich us. There is a delicate balance to be found between that achieved through integration and maintaining our diverse identities.

B. A Uniform Level of Protection of Consumer Interests

As we have seen, Advocate General Kokott argues that uniformity helps to realise uniform protection of consumer interests across the EU. Similarly, the Commission argues that barriers to economic integration in the EU are particularly heinous because they shield entire industries from exposure to effective competition and because they

[34] Paul-Henri Spaak, discours à la Chambre des Représentants, 14 June 1961, cited in Mario Monti, *A New Strategy for the Single Market: At the Service of Europe's Economy and Society* (2010), 2.

[35] ibid 7–9, 16, 20–35, 48–49 comes close to this, although note, eg, 68 and 93.

[36] Andrew Phillips and JC Sharman, *International Order in Diversity: War, Trade and Rule in the Indian Ocean* (Cambridge University Press, 2015) 222; see also 1 and 4.

make the European consumer pay the price for cosy industry arrangements.[37] As the OECD notes:

> Effective consumer protection is important in its own right but also to underpin the confidence of customers in making transactions. Consumers' lack of confidence that their rights will be respected in other countries limits cross-border sales and the direct ability to benefit from the Single Market.[38]

The Commission sometimes even talks of a consumer *right* to buy anywhere in Europe:

> Consumers benefit from the single market. You now enjoy the advantages of wider choice, better quality and lower prices. In principle, you can buy goods and services from any provider in the EU without having to accept contractual conditions different from those that apply in your own country.[39]

Important though these consumer benefits might be, they are not the only values in our system, and the Member States have prioritised diversity over them before. In order to get similar consumer terms throughout the EU, one also needs (for example) uniformity in the level of consumer protection across the EU. Thanks to EU law, consumers enjoy a minimum level of protection in the EU. However, differences in the actual level of protection remain. Some Member States give significantly more protection than this minimum.[40] Consumers may find this confusing. The OECD believes that more needs to be done in order to 'strengthen the backstop for cross-border purchases and to reduce widespread variations in the quality of consumer protection across countries'.[41]

Once again, this may indicate the weight that the OECD places on efficiency considerations. When drafting the Council Directive on unfair terms in consumer contracts, the Member States debated these same issues.[42] The Member States understood that 'more effective protection of the consumer can be achieved by adopting uniform rules of law in the matter of unfair terms'. Nevertheless, they felt that because 'the laws of Member States relating to unfair terms in consumer contracts show marked divergences', they could not agree uniform provisions at the moment. So, once a certain minimum level of protection had been reached under the Directive, it was agreed to allow Member States to give their consumers a higher level of protection than that offered

[37] Commission, *RCP 1991*, 15. See also Joined Cases C-468/06 to C-478/06 *Sot Lélos kai Sia EE and Others v GlaxoSmithKline AEVE Farmakeftikon Proïonton, formerly Glaxowellcome AEVE* [2008] ECR I-7139, particularly para 68.

[38] OECD (n 9) 53. What the OECD is referring to here is that if consumers purchase EU-wide, they will push competition between systems. There are several limits to this type of competition between systems; we discuss many of them below in ch 5.

[39] http://ec.europa.eu/internal_market/publications/docs/citizens_en.pdf; Commission, *Vertical Guidelines* [2010] OJ C130/1, para 100(d); Commission, *Report on Competition Policy* (1999), para 53; Commission, *Report on Competition Policy* (2000), para 93 and Commission decision, *Opel* [2001] OJ 2001 L59/1, para 160; Commission decision, *Distribution System of Ford Werke AG* [1983] OJ L327/31, para 43; C Rakovsky and V Verouden, 'Comments on the Role of Efficiencies in EC Merger Control' in G Drauz and M Reynolds (eds), *EC Merger Control: A Major Reform in Progress* (Richmond Law & Tax 2003) 530; and Deutsche Bank (n 9) 4.

[40] Case C-484/08, *Caja de Ahorros de Piedad de Madrid v Ausbanc* [2010] ECR I-4785, paras 27–44, interpreting Directive 93/13 on unfair terms in consumer contracts [1993] OJ L95/29.

[41] OECD (n 9) 53.

[42] Directive 93/13 on unfair terms in consumer contracts [1993] OJ L95/29, recitals.

by the Directive. The Member States could not agree on what other interests should be protected in this directive. Nor could they agree on the relative importance of consumer protection vis-a-vis, for example, protecting businesses.[43]

There is no uniform protection of consumer interests in the EU and no level playing field for businesses. Moreover, when they turned their minds to the issue, Member States thought that a uniform level of consumer protection throughout the EU was inappropriate, even though they understood that uniform provisions would have meant more competition. Competition is not the only value, and the Member States value these myriad values differently. Diverse rules allow for these differences to be expressed. This may impact upon consumers' ability and willingness to purchase throughout the EU. We have seen an example of diversity being explicitly valued, even when it undermines consumer protection and competition. This could happen in competition policy and enforcement too.

C. The Inability of Countries to Control Global Commerce

Within a wider discussion of globalisation, one must consider states' changing capacities to control the flow of goods, money, pollution, ideas and people. Scharpf says the major constraint on democratic 'self-determination within national boundaries arises from the reintegration of global capital markets and transnational markets for goods and services'.[44]

Democracy and capital markets depend on each other. However, there are tensions. Capitalism is increasingly global; democracy is generally national. Capitalists (here undertakings) are motivated by the anticipation of future profits for themselves. This can increase income inequality and create structural and sectoral crises. Democracy generally gains part of its legitimacy from defending people, particularly the weak, from these effects. Government intervention (and the collective bargaining of powerful unions) generally reduces firms' post-tax incomes and re-distributes these to the poor.

However, this is not a symbiosis. Governments and unions cannot do without undertakings, but undertakings often can move, at least in principle, if there are more attractive places to invest. Investors care about the cumulative cost of labour, regulation, tax etc. Thus, individual states must be careful lest they reduce the investors' incentives to invest in their state.[45] Today, firms seem to have the upper hand in the EU. I say this because inequality is increasing throughout the region. In the words of Stiglitz:

> [W]hile there may be underlying economic forces at play, politics have shaped the market, and shaped it in ways that advantage the top at the expense of the rest. Any economic system

[43] For a similar outcome in relation to EU company law, see Simon Deakin, 'Legal Diversity and Regulatory Competition: Which Model for Europe?' (2006) 12 *European Law Journal* 440, s 3.

[44] Fritz Scharpf, *Governing in Europe: Effective and Democratic?* (Oxford University Press, 1999) 29. A similar idea can be found in Budzinski (n 7) 27; and James Rosenau, 'Strong Demand, Huge Supply: Governance in an Emerging Epoch' in Ian Bache and Matthew Flinders (eds), *Multi-level Governance* (Oxford University Press, 2004) 35.

[45] Scharpf (n 44) 31–32.

> has to have rules and regulations; it has to operate within a legal framework. There are many different such frameworks, and each has consequences for distribution as well as growth, efficiency, and stability. The economic elite have pushed for a framework that benefits them at the expense of the rest, but it is an economic system that is neither efficient nor fair.[46]

The negotiating power of large firms has increased (along with inequality) in the past 50 years.[47] Firms are increasingly able to shift regions with the liberalisation of markets through the World Trade Organization, de-regulation and privatisation. These policies should generate benefits in terms of competition. Yet, once states give up the power to control capital transfers, increases in business taxes risk reducing the tax base. Once the state gives up control over the boundaries of markets for goods and services, competing suppliers will not be governed by the same regime. If we increase regulation or collective bargaining increases labour costs, then these costs cannot be passed on to consumers so readily, as they can just buy cheaper products from other places. Imports increase, exports decrease, profits fall, investment falls and firms go bankrupt, or move to places with less regulation.[48]

To deal with this issue, there is a trend towards the internationalisation of policy regimes.[49] The idea is that the capacity of these larger regimes to control pollution, income inequality etc is greater than that of states acting alone. The bigger these regimes are or the more valuable that they are to firms (because they are big markets with many consumers), the more firms are willing to offer in exchange for access to these territories and the consumers they contain (although not all markets grow beyond the Member State).[50] So states might do well to come together not only to stop firms playing them off against each other (for more on regulatory competition, Chapter 5 below), but also to give these states (jointly) more negotiating power vis-a-vis the firms, so that they can capture a bigger share of the firms' surplus for their citizens.[51]

We expect our states to prevent mass unemployment and extreme poverty, and to ensure a fair share of benefits and burdens. Many societies define these terms (and what they will tolerate) differently. If these things cannot be protected (in a way that is tolerable in each state), then this may undermine the political legitimacy of these Member States. Increased leverage may come through re-organising these benefits at the EU level. Where this is not possible (perhaps there is insufficient agreement between Member States or a lack of jurisdiction), then the legitimacy of both the EU and the Member States may be affected.[52]

[46] J Stiglitz, *The Price of Inequality* (Penguin, 2012) l.

[47] R Wilkinson and K Pickett, *The Spirit Level: Why More Equal Societies Almost Always Do Better* (Allen Lane, 2009).

[48] Scharpf (n 44) 40.

[49] Bob Jessop, 'Multi-level Governance and Multi-level Metagovernance' in Bache and Flinders (n 44) 66.

[50] More generally, see Daniel Drezner, 'Globalisation, Harmonisation, and Competition: The Different Pathways to Policy Convergence' (2007) 12 *Journal of European Public Policy* 841; ch 5 of this volume; and Budzinski (n 7) 38–39 (specifically in relation to competition law, mentioning the power of the EU and the US to dictate terms, but noting that other countries, such as Egypt and Mexico, struggled to impose themselves in a similar way).

[51] Nonetheless, when states are able to exercise power over firms, they may end up over-regulating, so one needs to be careful of this too; Revesz (n 29) 5.

[52] Scharpf (n 44) 121–22.

D. The Development of a Detailed Body of Case Law Applying the Rules

Uniformity of interpretation can facilitate the development of a more detailed body of case law applying the (competition) rules. This is because there will be more relevant actors (and ultimately more cases) building upon the same principles and ideas.[53]

In principle, this argument makes sense. However, three points might be made in response. First, a more detailed body of precedent is only a good thing if it is based on the 'right' principles. This is particularly problematic when what is 'right' looks different across the EU. Second, in order for this argument to have real force, it would have to be easy to access judgments and decisions in different Member States (which has proven to be a problem).[54] However, even if this were possible, the different languages in which these cases are written makes them hard for all to access and expensive to translate. The different 'precedential' value of these various sources of 'law' in the EU is a further complicating factor (ie, the weight to be put on administrative decisions and court judgments varies within and between Member States).[55] Third, might it be possible for the relevant actors across the EU to build on each other's work where there is agreement, and yet diversify where there is disagreement (in either aims or methods)? This might be a productive middle ground between building up a unified body of 'law' and yet allowing Member States to explore 'better' solutions, or 'better solutions for them' openly and clearly (which helps learning; see Chapters 6 and 7).

Uniformity in competition enforcement also reduces the deadweight litigation costs involved in forum shopping.[56] This is because it should not matter where in the EU a firm or consumer litigates; the answer should always (or nearly always) be the same. Having said that, this would require uniform substantive interpretation, but also uniform procedural rules and institutional structures (Chapter 9 shows the Commission pushing more uniformity there too). Some suggest that forum shopping may be beneficial between jurisdictions with the same goals and methods because it could encourage competition on procedural rules[57] (although it could undermine important procedural values). However, between jurisdictions with different goals or methods, forum shopping might just lead to a race to the bottom as firms seek benefits to themselves (even at the expense of others). Such races are, in fact, relatively rare

[53] Making a similar point from the opposite perspective, multiple competition authorities enforcing the same law can undermine coherence; see William Kovacic and David Hyman, 'Competition Agency Design: What's on the Menu?' (2012) *GW Law Faculty Publications and Other Works* 8.

[54] See, eg, Commission, *Communication from the Commission to the European Parliament and the Council, Report on the Functioning of Regulation 1/2003* (2009), para 36; Commission Staff Working Document, *Ten Years of Antitrust Enforcement under Regulation 1/2003* (2014), para 247.

[55] In ch 9 we see confusion about the precedential value of the Commission's competition decisions.

[56] Ribstein and Kobayashi (n 18) 138. See Commission, *Commission Explanatory Memorandum, Proposal for a Council Regulation Implementing Articles 81 and 82 of the Treaty* (2000) 8 for the modernisation of art 101 TFEU.

[57] Wolfgang Kerber and Oliver Budzinski, 'Towards a Differentiated Analysis of Competition of Competition Laws' [2003] *ZWeR – Journal of Competition Law* 411, 436.

(see Chapter 5). Uniformity is not the only way to stop forum shopping; Chapter 8 discusses other options.

The size of this 'detailed body of case law' effect is unclear. However, lack of clarity may be particularly important for the competition provisions (including in the EU), which tend to be principles rather than clear rules (making it particularly helpful to have a large body of case law filling in the gaps). Having said that, making the competition rules as clear as possible can even happen under diversity. In fact, it might even be easier there because (once diversity in substantive and procedural rules, as well as institutional structures, is embraced) then different enforcers can be more transparent about what they are trying to achieve and why. This is because they no longer need to hide behind opacity to achieve their preferred ends or to use their preferred methods.

Even if we all agree about these benefits of uniformity, one also needs to discuss the costs of changing to uniformity and to discount the uncertainty of achieving all (or some) uniformity benefits that we seek.[58] Most agree that the current system does not achieve uniformity (substantively, procedurally or in institutional structures; see Chapter 9). As such, we need to discuss any of the current benefits of diversity that might be lost in a transition to uniformity (which is the task we turn to below in section III). Nor is it certain, even if we all agree that uniformity is the best strategy (which we do not), that it could be achieved. Many comparative lawyers tell us that absolute uniformity is impossible. For example, one might impose the same procedural rule throughout the EU, but this might not work in the same way in all Member States – for example, the legal context may change the way it works.[59] The chances of imposing uniformity certainly appear slim.

III. In Favour of Diversity

I examine four benefits of diverse competition policy and enforcement in Europe. First, Chapter 1 noted many ways that Member States' preferences sometimes differ from those of the EU (and each other) in this area. The second argument notes that, in some areas, there is reasonable disagreement about the economics (assuming predominantly economic goals for EU competition law), such that it is unclear what is the best rule to make in certain circumstances (eg, the optimal amount of innovation; see also Chapter 1). Experimentation and innovation by competition authorities may add value here. Third, diversity might also allow local people (and their community) to take part in local administrative actions, and this might make them more tolerant and open (generating civic virtue). The final argument discusses whether NCAs are more attentive (than a central EU authority) to the wishes of those in their Member State.

[58] Chirico and Larouche (n 3) 486–87.

[59] See, eg, World Bank, *Economic Growth in the 1990s: Learning from a Decade of Reform* (World Bank, 2005) xiii, 5; and World Bank, *The Political Economy of Reform: Issues and Implications for Policy Dialogue and Development Operations* (World Bank, 2008) vii.

A. Diverse National Preferences

In a democracy, law-makers seek to reflect their citizens' preferences. Given the democratic deficit in the EU, as well as the national histories and traditions, the legitimate *poli* for these purposes are likely to remain the Member States at this stage (see the discussion in Chapters 3 and 9). As Eberlein notes: 'Decentralisation encourages flexible rule adjustment tailored to specific local conditions that may vary substantially with a heterogeneous polity.'[60]

As we saw in Chapter 1, there are many ways in which national preferences may differ for the purposes of competition policy and enforcement.[61] There might be substantive disagreements, such as about the type of competition that we value (focusing on rivalry, choice or consumer welfare, for example),[62] as well as how best to achieve these goals.[63] Attitudes on procedural issues and institutional structures also differ (eg, Chapter 3 discusses NCA independence). There may also be tensions between single market benefits (uniform interpretations of competition law in the EU) and national preferences on certain competition issues.[64] In addition, public policy goals are important in EU law. For example, recent EU Court judgments under Articles 101 and 102 TFEU have incorporated public policy values such as public health, environmental protection,

[60] Burkard Eberlein, 'Policy Co-ordination without Centralisation? Informal Network Governance in EU Single Market Regulation' in Ehlermann and Atanasiu (n 5) 146. See also Budzinski (n 19) 44; John Donahue and Mark Pollack, 'Centralisation and its Discontents: The Rhythms of Federalism in the United States and the European Union' in Kalypso Nicolaïdis and Robert Howse (eds), *The Federal Vision: Legitimacy and Levels of Governance in the United States and the European Union* (Oxford University Press, 2001) 74; Fritz Scharpf, 'European Governance: Common Concerns vs the Challenge of Diversity' in Christian Joerges, Yves Mény and Joseph Weiler (eds), *Mountain or Molehill? A Critical Appraisal of the Commission White Paper on Governance*, Jean Monnet Working Paper No 6/01 (EUI, 2001) 4–5; Gráinne de Búrca, 'Differentiation within the "Core"? The Case of the Internal Market' in Gráinne de Búrca and Joanne Scott (eds), *Constitutional Change in the EU: From Uniformity to Flexibility?* (Hart Publishing, 2000) 141; and Eric Philippart and Monika Sie-Dhian-Ho, 'Flexibility and Models of Governance for the EU' in Gráinne de Búrca and Joanne Scott (eds), *Constitutional Change in the EU: From Uniformity to Flexibility?* (Hart Publishing, 2000) 301.

[61] Phillips and Sharman (n 36) 46; these differences need not be based on material interests (speaking generally rather than on competition).

[62] Mark Thatcher, 'Varieties of Capitalism in an Internationalised World: Domestic Institutional Change in European Telecommunications' (2004) 37 *Comparative Political Studies* 374; Oliver Budzinski, 'Pluralism of Competition Policy Paradigms and the Call for Regulatory Diversity' (2003) 14 *Volkswirtschaftliche Beiträge* 3–24; and Oliver Budzinski, 'An Economic Perspective on the Jurisdictional Reform of the European Merger Control System' (2006) 2 *European Competition Journal* 119, 125–26.

[63] Budzinski (n 7) 70–71. There is considerable agreement about the undesirability of many restraints (such as horizontal price-fixing): Eleanor Fox, 'Antitrust and Regulatory Federalism: Races up, down, and Sideways' (2000) 75 *New York University Law Review* 1781, 1783. However, important differences remain (eg, the optimal balance between intellectual property rights and competition, or predatory pricing rules and rebates, under art 102 TFEU). Even within the consumer welfare standard, disagreement exists about whether to focus on short-term or long-term consumer welfare gains; C Townley, 'Remembering Those Not Yet Born: Intergenerational Impacts in Competition Analysis' (2011) 32 *European Competition Law Review* 580; and Angela Wigger and Andreas Nölke, 'Enhanced Roles of Private Actors in EU Business Regulation and the Erosion of Rhenish Capitalism: The Case of Antitrust Enforcement' (2007) 45 *Journal of Common Market Studies* 487.

[64] Pelkmans (n 7) 31. In line with Pelkmans, our focus is on consciously desired heterogeneity. By this we mean difference founded on diverse preferences between Member States rather than differences generated through historical accident; ibid 28–29.

administration of justice and culture.[65] Yet, citizens in different Member States value these public policy goals (both absolutely and relative to competition) differently.[66]

There are often distinct (national) variations in political values. Allowing diversity between Member States allows them to reflect these preferences. In the words of the World Bank:

> A primary objective of decentralisation is to maintain political stability in the face of pressures for localisation. When a country finds itself deeply divided [in our case, the EU], especially along geographic … lines, decentralisation provides an institutional mechanism for bringing opposition groups into a formal, rule-bound bargaining process.[67]

Europeans share many values. However, there are also many diverse views on the absolute and relative importance of environmental and social factors. By way of an example, when EU citizens were asked to pick two areas that society should emphasise in order to face major global challenges, 45 per cent thought that the emphasis should be on social equality and solidarity, 35 per cent on protecting the environment, and 30 per cent on progress and innovation. However, there were significant variations in different Member States. Portugal (65 per cent) and Germany (57 per cent) were most enthusiastic about social equality and solidarity, which was of less importance in Italy (27 per cent). The issue of most importance in Italy was progress and innovation (35 per cent), but those emphasising this were fewer than in Spain (41 per cent) or Greece (43 per cent). Lithuanians are far less worried about progress and innovation (23 per cent); for them, the environment (49 per cent) and social equality and solidarity (53 per cent) were most important. Latvians (18 per cent) and Hungarians (21 per cent) were much less interested in the environment.[68]

Support for free competition being the best guarantee of prosperity is widespread in the EU: 65 per cent of respondents agree and 25 per cent disagree (the remaining 10 per cent do not know).[69] Furthermore, in another (earlier) survey, 53 per cent thought that

[65] Case C-136/12 *Consiglio nazionale dei geologi v Autorità garante della concorrenza e del mercato*, 18 July 2013, not yet reported, paras 52–7; Case C-1/12 *Ordem dos Tēcnicos Oficiais de Contas v Autoridade da Concorrência*, not yet reported, 28 February 2013; Case C-519/04 P *Meca Medina v Commission* [2006] ECR I-6991, para 45; and Case T-193/02 *Laurent Piau v Commission* [2005] ECR II-209, para 102. Christopher Townley, 'Is There (Still) Room for Non-economic Arguments in Article 101 TFEU Cases?' in Caroline Heide-Jørgensen et al (eds), *Aims and Values in EU Competition Law* (DJØF Publishing, 2013); Christopher Townley, *Article 81 EC and Public Policy* (Hart Publishing, 2009), Introduction, ch 2 and pt B; and G Monti, 'Article 81 EC and Public Policy' (2002) 39 *Common Market Law Review* 1057. *cf* Wouter Wils, *Principles of European Antitrust Enforcement* (Hart Publishing, 2005) 9–10.

[66] A further complication arises in diagonal clashes, which is when areas of EU competence, such as competition law, conflict with areas where the EU has no or only limited competence, because the Member States have retained their competence here, such as culture. For example, some Member States might use anti-competitive arrangements to achieve cultural benefits (eg, fixed book price agreements), while others might prefer to use price regulation; Fesler (n 3) 558. This can produce conflicts, as the EU and the Member States are able to affect each other's areas, which undermines citizens' ability to assess the competence of each actor and to punish or reward them for their work.

[67] World Bank, *World Development Report 1999/2000: Entering the 21st Century: The Changing Development Landscape* (World Bank and Oxford University Press, 1999/2000) 107–08.

[68] Commission, *Special Eurobarometer 467 Report* (2017) 16–18.

[69] Commission, *Standard Eurobarometer 77: The Values of Europeans* (2012) 21.

the economy should take precedence over the environment. However, once again, the national pictures are diverse. Hungary (69 per cent) and Ireland (68 per cent) thought that the economy should take precedence. Nevertheless, this was a minority view in the Netherlands (29 per cent), Germany (34 per cent) and Austria (37 per cent).[70]

As a result, it is worth reflecting upon Oates' *Decentralisation Theorem*, which states:

> For a public good [eg, environmental protection] … it will always be more efficient (or at least as efficient) for local governments to provide the Pareto-efficient levels of output for their respective jurisdictions than for the central government to provide *any* specific and uniform level of output across all jurisdictions.[71]

Assume that it costs the central or local governments (in our discussion, the EU is the central government and the Member States are the 'local governments') essentially the same amount to provide a public good (ie, there are no economies of scale; see below). Oates says that where the desire for this public good varies in different regions, it is more efficient to provide (different) levels of this public good in the regions (as long as this is Pareto efficient per region), in line with these desires. This is because, under these circumstances, the costs per unit do not change, but the benefits are closer to what the people in each region want. Oates believes that there can be large potential welfare gains if local regions are allowed to tailor laws to local preferences.[72] The diversity needed to allow Member States to more closely reflect their citizens' preferences may even mean a less efficient system (perhaps due to lost economies of scale). Yet, people may prefer a system that better reflects their views. There is no right or wrong here; these are preferences.[73]

Such an argument may well be used to argue that allowing the Member States to employ different competition policy and enforcement interpretations that are more closely aligned to their citizens' preferences could be welfare-enhancing.[74] This might be when they apply their national (as well as EU) competition laws. At the start of this discussion, we saw many ways in which these differences might manifest (see also Chapter 1). This does not only apply to substantive determinations. For example, there are also procedural differences, as well as those relating to institutional structures. As Cengiz reports:

> Variances in national procedures and standards for setting fines still exist in Member States. This is particularly the case in the Member States, which follow the judicial enforcement method and/or impose criminal remedies on breaches of competition rules. Since these procedures and standards are highly entrenched in national legal cultures, their harmonisation through legislation might not be easily justified in the light of the principles of subsidiarity and the national procedural autonomy.[75]

[70] ibid 34–36.

[71] Wallace Oates, *Fiscal Federalism* (Edward Elgar, 1972) 35.

[72] Wallace Oates, 'On the Evolution of Fiscal Federalism: Theory and Institutions' (2008) LXI *National Tax Journal* 317.

[73] Budzinski (n 7) 104–05; and Oates (n 72) 317.

[74] With the possible exception of the relevance of other goals (which is only possible as this relates to welfare too), the 'economics of federalism offers a way to approach the state-federal relation with an eye to maximising efficiency and thus to achieving the substantive goal of antitrust'. Frank Easterbrook, 'Antitrust and the Economics of Federalism' (1983) 26 *Journal of Law and Economics* 23, 42.

[75] Firat Cengiz, *An Academic View on the Role and Powers of National Competition Authorities: Background to the ECN Plus Project* (European Parliament, 2016) 41.

Budzinski writes that differing 'preferences across Member States demand a decentralisation of competences'.[76] This might be true despite the benefits of uniformity that section II has highlighted. There are three key issues to consider when reflecting on the importance of diverse national preferences here: the homogeneity of views; externalities; and economies of scale. There is often a tension between these three issues and the Member States' different values. This makes it hard to predict, in advance, in a simple general rule, whether uniformity or diversity is best (or some middle ground). Even if one retains national preferences, one may want to reduce the costs of difference between regimes if these differences are not there for a specific reason (or cannot be achieved in another way while causing less distortion between different Member States).[77]

i. Homogeneity of Views

The benefits of decentralisation are more pronounced the more diverse (and strong) each Member State's desire is for the public good in question, and the more homogeneous those desires are in the citizens within each Member State. Taking these points in turn, we saw in Chapter 1 that in the Netherlands, they believe that it is very important to take account environmental sustainability in competition law and in the UK, they strongly believe that this is inappropriate (always assuming that they have this choice).[78] Allowing the interpretation of Article 101 TFEU to diverge in these two Member States should generate substantial benefits, all other things being equal. The stronger the two states hold their views of the benefits of their own approach, the greater the benefits that they receive from diversity. The ability to walk different paths here may outweigh the costs that a lack of uniformity generates.

Second, this 'Oates effect' is further enhanced the more homogenous the desires of the people *within* each Member State are.[79] There seems to be quite a lot of homogeneity on many of the issues that we saw statistics for above. It may be, for example, that one Member State (perhaps the Netherlands) becomes known for giving more weight to the protection of the environment than others (perhaps Ireland or Hungary).

As we will see in Chapter 5, where these differences are important (relative to the costs), people in Member States that do not give a high priority to the things they value may move to states that better reflect their priorities (and vice versa). This movement of people (if it took place in sufficient numbers) would enhance the effect where those *within* the different states become more homogeneous and the different states themselves become more heterogeneous in relation to each other (and movement should be

[76] Budzinski, 'An Economic Perspective' (n 62) 126. See also Karl Meessen, 'Competition of Competition Laws' (1989) 10 *Northwestern Journal of International Law and Business* 17, 20–21; Budzinski, 'Pluralism of Competition Policy Paradigms' (n 62) 24; and van den Bergh (n 18) 369–70.

[77] Chirico and Larouche (n 3) 480.

[78] Clashes between competition and environmental protection can arise in the application of competition law. We have seen quite high variance in relation to the relative importance of different public policy criteria from citizens in various Member States. Remember, eg, Hungary (69 per cent) and Ireland (68 per cent) thought that the economy should take precedence over the environment, whereas this was a minority view in the Netherlands (29 per cent), Germany (34 per cent) and Austria (37 per cent). Ignoring the environmental impact of a competition decision may be much more acceptable in Hungary than in the Netherlands.

[79] Oates (n 71) 37.

higher where states are open about their value judgements).[80] However, as Chapter 5 will explain, such movement of citizens due to differences in competition policy and enforcement seems unlikely. As a result, ensuring that competition authorities respond to the democratic will of local citizens is even more important.

ii. Externalities

Externalities may arise where the territorial scope of the competition jurisdiction is not the same as the effects of an arrangement; for us, this is the relevant geographical market(s) (jurisdiction may be too large or too small). Two kinds of externalities – positive and negative – are relevant and these might be generated horizontally or vertically.[81]

Think of a public good, like an anti-theft device that helps police find stolen cars. Member State A subsidises it.[82] The enhanced presence of this device in Member State A also discourages thefts in neighbouring Member State B (thieves cannot tell which cars have this device and which do not). Generally, Member State A only considers the benefits to its own citizens when deciding whether or not to subsidise schemes. Member State A's citizens only get some of the benefits of the scheme (Member State B's citizens get some benefits too, as crime is reduced there as well). Positive externalities of this kind can generate free-riding.[83] Member State A's citizens pay the full amount for the scheme (Member State B's citizens free-ride on this investment). The efficiency problem is that Member State A will under-value the good (and thus stop providing it) before Member States A and B (jointly) would stop.

Alternatively, negative externalities arise where Member States favour their constituents while hurting people or groups based outside their state. Here, the costs of the decision are borne (in whole or in part) by others outside of the jurisdiction and its decision-makers.

Competition cases may generate positive or negative externalities. Officials might prioritise cases that produce greater national effects by focusing on local consumers or industrial policy, for example,[84] but any difference of competition goals could have a similar effect.[85] Consider the *Wouters* case mentioned in Chapter 1. An arrangement between Dutch lawyers prohibited multi-disciplinary partnerships between them and accountancy firms. The Dutch Bar argued that this arrangement should be allowed, fearing that to do otherwise would undermine the administration of justice (due to the

[80] This effect may be outweighed by the diseconomies of scale due to the population movements, see discussion below starting around n 142.

[81] Budzinski (n 7) 97.

[82] This discussion is based on the description of LoJack in Ian Ayres, *Super Crunchers* (John Murray Publishers, 2007) 14–16.

[83] Oates (n 71) 33.

[84] Andrew Guzman, 'Is International Antitrust Possible?' (1998) 73 *New York University Law Review* 1501; Keith Head and John Ries, 'International Mergers and Welfare under Decentralised Competition Policy' (1997) 30 *Canadian Journal of Economics* 1104 (mergers). For a discussion of other models, see Budzinski (n 7) 98–102.

[85] Negative 'externalities provide incentives for the engagement in welfare reducing strategies like selective (non) enforcement of competition rules to discriminate against foreign producers or consumers (strategic competition policy)'; Budzinski, 'An Economic Perspective' (n 62) 125. Similarly, see Budzinski (n 7) 96.

different conflict rules and roles in the two professions). They argued that even if this arrangement undermined consumer welfare, this effect was outweighed by the justice benefits. Note that if accountancy firms cannot form multi-disciplinary partnerships in one or more countries in which they operate, this may undermine a global strategy to offer integrated legal and accountancy services. As a result, they might not merge at all anywhere, or it may mean that they have to organise a merger in such a way that it does not undermine their ability to operate in the Netherlands, which may generate extra costs. Either way, such a decision in the Netherlands has impacts for consumers beyond its borders (which may be negative). Similarly, if other states are tempted to only focus on efficiency criteria, then this generates negative externalities in the Netherlands. Reasonable disagreement is possible.[86]

Various suggestions have been made to deal with externalities. One solution is to get the Member State that benefits to agree to subsidise the other Member State (for example, Member State B might contribute towards Member State A's subsidy of the anti-theft device, insofar as those in Member State B benefit from it). Unfortunately, the value of such benefits is hard to quantify and controversial, so externalities are unlikely to be eliminated.[87] Furthermore, in some systems, such as the EU, there is very little scope for transfers of this nature.

Centralisation is another possible solution. A global competition authority would be able to consider the global costs and benefits of allowing multi-disciplinary partnerships between lawyers and accountants (considering the effects on the administration of justice in the Netherlands and elsewhere, as well as the global efficiency benefits).[88] This allows the internalisation of externalities. Smets and van Cayseele claim that the effects principle allows Member States to apply competition law as soon as there is a relevant effect on their territory. They argue that as competition law is so easily triggered, Member States can easily protect themselves against negative externalities.[89] Under this logic, negative externalities only provide a weak justification for centralisation. That said, one

[86] eg, in relation to the inadequate protection of intellectual property rights (perhaps in a state with few producers/innovators); see Fred McChesney, 'Talking' Bout My Antitrust Generation: Competition for and in the Field of Competition Law' (2003) 52 *Emory Law* Journal 1401. For differences in policy goals, see Meessen (n 76). A further example here may also be pertinent. Imagine the anti-theft device scheme for cars, but with a twist. In this scenario, thieves can tell which cars have the system fitted. So, when Member State A subsidises the use of these devices for its citizens, the effect is to push crime out of its territory into the neighbouring territory, Member State B, which does not use or subsidise these devices. Generally, Member State A will only consider the effects on its own citizens when deciding whether or not to subsidise such a scheme. Member State A's citizens get the benefits of the scheme (Member State B's citizens are harmed by it, which is a cost of the scheme). However, Member State A does not take account of the full costs of the scheme; it ignores those costs which affect others, here Member State B's citizens. So, Member State A will over-value the good's benefits (and provide it) even when Member State A and B (jointly) would not. Again, centralisation (or, at least, joint discussion by Member States A and B) is more likely to provide appropriate levels of output (whether done directly or through incentives to private firms).

[87] Oates (n 71) 10 and see also 46–47.

[88] Ribstein and Kobayashi (n 18) 139. Similarly, see Jonathan Faull and Ali Nikpay (eds), *The EC Law of Competition*, 2nd edn (Oxford University Press, 2007) para 2.203; Katalin Cseres, 'Comparing Laws in the Enforcement of EU and National Competition Laws' (2010) 3 *European Journal of Legal Studies* 7, s B (also applies for procedural rules); Budzinski (n 19) 5, 45; and Damien Geradin and Nicolas Petit, 'The Development of Agencies at EU and National Levels: Conceptual Analysis and Proposals for Reform', Jean Monnet Working Paper, http://centers.law.nyu.edu/jeanmonnet/archive/papers/04/040101.pdf, 12–13.

[89] Smets and van Cayseele (n 13) 427, 432. See also Neven and Röller (n 13) 847.

problem here is that the effects doctrine might be too strong. Thus, centralisation might still be helpful, as it might allow arrangements that are welfare-enhancing overall, even if they have minor effects in some areas (that some states might prohibit if acting alone).

In any event, centralisation is not a panacea. First, centralisation is more likely to provide the most efficient results when the relevant geographical market(s) and the jurisdiction are the same. This ensures that the externalities are internalised within the area making the decision. However, centralisation can itself generate externalities where the jurisdiction is bigger than the area affected by the competition problem. As a result, the size of decision-maker needs to change depending on the specific problem that is being confronted. Hooghe and Marks explain the impact of the different territorial reach of various policy externalities:

> The core belief is that governance must operate at multiple scales in order to capture variations in the territorial reach of policy externalities. Because externalities arising from the provision of public goods varies immensely – from planet-wide in the case of global warming to local in the case of most city services – so should the scale of governance. Multi-level governance is necessary to internalise spill overs across jurisdictions while tailoring policy to local circumstances.[90]

Unlike the Member States, the EU institutions act for Europe as a whole. As a result, they may be more likely to internalise these 'externalities' than the Member States acting alone if the competition problem affects the whole of the EU. This should lead to more efficient outcomes, although efficiency may come at the expense of undermining important national preferences. However, as just noted, if only Member States A and B are affected, an EU-level enforcer may itself generate vertical negative externalities.[91] The EU might not investigate matters which do not affect the whole of the EU (or it might investigate, generating positive externalities); it might even encourage a large firm (in a local monopoly) that it thinks offers more competition across the entire EU. In this case, getting groups of the affected Member States together to jointly decide (in our case, Member States A and B) may be a better solution.[92]

Constantly organising enforcement into groups of the right size to reflect the affected areas can itself be costly (remember that markets may be larger or smaller than a Member State).

iii. Economies of Scale

Oates' decentralisation theorem is also undermined where there are important economies of scale and scope in the provision of the public good.[93] These economies might

[90] Liesbet Hooghe and Gary Marks, 'Types of Multi-level Governance' in Henrik Enderlein, Sonja Wälti and Michael Zürn (eds), *Handbook on Multi-Level Governance* (Edward Elgar, 2010) 17.

[91] Germany's regional competition authorities help to deal with problems of this nature internally.

[92] Budzinski suggests that the argument for decentralisation only applies where one Member State is affected, but a similar point could be made for some form of decentralised enforcement from this perspective if anything less than the whole EU is affected; Budzinski, 'An Economic Perspective' (n 62) 125.

[93] Oates (n 71) 37; and Richard Posner, 'Federalism and the Enforcement of Antitrust Laws by State Attorneys General' (2004) 2 *Georgetown Journal of Law and Public Policy* 5, 6.

There may also be diseconomies of scale where people move from one Member State to another for benefits that become more expensive for the new state to provide (although ch 5 argues that movements in

make it more efficient (cheaper per head) to provide the good to a large group of citizens rather than a smaller one (even if many in the larger population do not value the good so highly).

There are two key economies here: economies of scale; and transaction and administration costs.[94] Economies of scale might refer to fixed costs, like producing the information needed to make and then enforce the competition rules (such as drafting guidelines and building up human capital – eg, training judges and lawyers). These costs are high. There are also variable costs of applying the rules in each case, which are low in comparison.[95] In terms of transaction costs, it can cost firms a lot to have to undertake multiple merger filings or negotiate various remedies in different languages and different countries (the same applies to many other competition problems).[96] Costs arise from these various processes themselves, but they also cost a lot to co-ordinate. This creates costs for the various competition authorities as well (this may be justified, eg, if states seek different aims). Note that these costs hit efficient and inefficient arrangements alike[97] (although proper screening may reduce this). Given the amount of discretion that decision-makers have and the risks of regulatory capture, 'inefficient rules may increase legal uncertainty'[98] too.

What should the response be here? There are benefits in allocating competences upwards in order to generate fixed cost savings, but as the number of cases increases in a jurisdiction, the average cost of having a separate regime falls.[99] In terms of dynamic economies of scale, one might assume that more cases in a jurisdiction helps to generate a good body of case law, which increases predictability in the regime (in addition, case officers may get better the more cases that they do). Heine and Kerber note that while this hints at centralisation (at least in terms of the system of law, if not the enforcer), in order to generate these cases, there is also a risk of lock-in effects and unfortunate path dependencies (also see section III.B below).[100] Administration and transaction costs rise when more jurisdictions deal with the same case, both for the jurisdictions involved and also for the law firms and undertakings themselves. However, this does not imply centralisation; it merely implies having only one authority applying one set of substantive and procedural rules to the transaction.

great numbers, based purely on competition law differences, are unlikely for people or firms). Once again, the state that people are leaving could compensate the receiving state to cover the extra cost of its own citizens arriving there. Alternatively, one could try to exclude others (either from the new state or from the benefits in that state), but this is often not seen as a good thing for a society; Oates (n 71) 50–51.

[94] Chirico and Larouche (n 3) 482–83 also add information imperfections generated when the law looks the same in many places, but is applied differently, which might lead firms not to check with lawyers and so make mistakes.

[95] Van den Bergh (n 18) 366–67.

[96] Budzinski refers to 'additional costs for enterprises (multiple filings, fees, translations, dealing with different legal regimes, increasing length of the overall procedure, danger of cumulating or contradictory obligations and decrees, increasing legal uncertainty, etc) and additional costs for competition authorities (parallel review procedures of one and the same case)'; Budzinski, 'An Economic Perspective' (n 62) 125.

[97] Budzinski (n 7) 48–49.

[98] Van den Bergh (n 18) 374.

[99] Budzinski (n 7) 103.

[100] Klaus Heine and Wolfgang Kerber, 'European Corporate Laws, Regulatory Competition and Path Dependence' (2002) 13 *European Journal of Law and Economics* 47.

As we saw with externalities, there can be a tension between these economies and citizens' preferences. Furthermore, the costs and benefits do not fall on everyone equally. Economies of scale and reducing transaction costs are particularly important for large multi-nationals.[101] SMEs principally operating in national markets care less about them (the same is true of consumers, although they might care if they generate price rises). Any centralisation here is unlikely to be Pareto optimal, so one also needs to decide what to base one's decision on and explain this.[102]

In fact, the problem becomes yet more complicated because, given the presence of externalities and economies of scale, the logic could, once again, push us towards many different sized areas corresponding to the most efficient level to decide each public good. Taken literally, this could mean that one needs to decide everything at different levels.[103] These multiple levels of response also generate costs, as could allocating (and contesting) responsibility between them, co-ordinating their activity etc. 'As a result, allocation of tasks is – in reality – likely to be imperfect most of the time in most countries (or regions).'[104]

I will now look at the other three arguments that are commonly made in favour of diversity (experimentation and innovation, civic virtue and uncovering national preferences).

B. Experimentation and Innovation through Regulatory Competition

I start by reminding us of a particular disagreement that currently exists in EU competition law by way of an example. Then I discuss why diversity might be helpful here.[105]

Chapter 1 demonstrated many kinds of competition policy and enforcement disagreements.[106] In addition, there are adequacy problems as several intersecting environments change, including the following: firms innovate in terms of the kinds of arrangements that they use; new technologies might change the way things work; and economic and legal knowledge about competition policy changes.[107]

[101] 'There are reasons to doubt that the Member States copied the EC rules because of their superior quality as allocative efficiency enhancing mechanisms. The main argument in favour of adopting the EC rules was the strongly perceived need for legal certainty. This argument is used by pressure groups profiting from uniform rules across the EC'; van den Bergh (n 18) 371.

[102] Cseres (n 88) s B (speaking about substantive and procedural rules).

[103] Not only that, but different manifestations of the same public good might also require different levels of response – eg, for the environment, one need only think of global warming (a global response would be best) and pollution of a river basin (where an adequate response might only be needed in the area of the river basin).

[104] Geys and Konrad (n 6) 42–43. Similarly, see World Bank (n 67) 115.

[105] On this topic, see also Kovacic and Hyman (n 53) 8, although the agencies may end up competing with each other for finance, which might push them to focus on their parochial interests rather than society's well-being; Posner (n 93) 6; Cseres (n 88) s B (speaking about substantive and procedural competition rules); Budzinski (n 19) 11–17; Budzinski, 'Pluralism of Competition Policy Paradigms' (n 62) 3–24; and Budzinski, 'An Economic Perspective' (n 62) 126. More generally, in relation to EU company law, see Deakin (n 43); and Peer Zumbansen, 'Spaces and Places: A Systems Theory Approach to Regulatory Competition in European Company Law' (2006) 12 *European Law Journal* 534.

[106] See also the text around n 60.

[107] Budzinski (n 7) 71–72; Budzinski (n 19) 15; Budzinski, 'Pluralism of Competition Policy Paradigms' (n 62) 29; and Budzinski, 'An Economic Perspective' (n 62) 126.

One important example of a disagreement relates to how much competition is optimal to encourage innovation and (ultimately) consumer welfare. It is a complicated issue which economists disagree about. Firms with market power may have less incentive to innovate, while firms in competitive markets may have an incentive because successful firms can reduce their prices/improve quality, forcing their less efficient rivals to exit. However, this is not a linear relationship. The incentives for firms to innovate are not only determined by the existence of competition; also relevant is a firm's own ability to appropriate the results of its investment. Strong competition reduces the chances of this and thus the incentive to innovate. So, an intermediate level of competition is often optimal for encouraging innovation and, ultimately, consumer welfare. Yet, Motta says that it is hard 'to use this result for practical policy purposes, for instance to choose the "right" level of competition'.[108]

This disagreement is of great practical significance in EU competition law.[109] The NCA in the Netherlands did a study asking NCAs, and others, what emphasis they placed on innovation in their consumer welfare analysis. There was no consensus about the answer.[110] What makes it even harder for firms is that there is little clarity about where the differences lie and why.

Motta is right that generating reliable answers to questions like this is hard. Yet, they are needed and relevant in many competition cases. So, how can we improve our chances of solving these puzzles? One might turn to economic theory, and there are many of them.[111] In competitive federalism, which is discussed in more detail in Chapter 5, competition between different systems (for citizens and for firms, and thus employment and tax revenues, for example) pushes competition authorities, amongst others, to improve their efficiency, including through innovation. In the end, we are likely to see increasing uniformity between systems, as they converge around the 'best solutions' to the various problems of the day (such as the optimal level of competition and innovation). In this mindset, enabling diversity between competition authorities encourages many of them to experiment and innovate. This should give us a greater chance of getting better answers to problems like this. Having said that, many now say that there are no best answers, only better answers, which can constantly be improved over time (as economic schools battle it out).[112]

However, there are many different theories of regulatory competition too. Deakin describes a second theory: reflexive harmonisation. He explains that this theory:

> [B]egins with the idea that competition is not so much a state of affairs in which welfare is maximised, but a process of discovery through which knowledge and resources are mobilised, the end point of which cannot necessarily be known. This type of competition depends on norms that establish a balance between 'particular' and 'general' mechanisms … between, that is, the autonomy of local actors, and the effectiveness of mechanisms for learning based on experience and observation.[113]

[108] Massimo Motta, *Competition Policy: Theory and Practice* (Cambridge University Press, 2004) 57.

[109] Alexander Italianer, 'Défis de la politique de la concurrence' (Cercle des Européens, 2012) discusses some cases where the impact upon innovation was important.

[110] NMa and ICN, *Competition Enforcement and Consumer Welfare: Setting the Agenda* (2011) 11–14, 25–31.

[111] See, Ha-Joon Chang, *Economics: A User's Guide* (Penguin, 2014) ch 3.

[112] Chapter 7 discusses two mechanisms for NCAs to innovate: copying others (exploitation) and doing one's own research (exploration). It suggests how to reach a more optimal balance between the two.

[113] Deakin (n 43) 444.

Reflexive harmonisation prioritises experimentation and mutual learning. For Hayek and Popper, this makes sense because of fundamental limitations in our knowledge, particularly:

> [I]n regard to the appropriate rules for human societies. *Popper* emphasised the fallibility of human knowledge and, therefore, characterised the growth of knowledge as the outcome of processes of trial and error … *Hayek* … elaborated extensively on the fundamental knowledge problems that policy makers have to face, leading him to a profound scepticism regarding the capability of governments to influence successfully the outcome of market processes.[114]

This knowledge problem means that academics, citizens and states cannot know the best rules in advance.[115] Imagine that a central regime chose (using the best knowledge available at that time) one answer to a specific problem (like the optimal amount of competition for innovation in a market). As the best theory is unclear, the one it chooses 'might be inferior and no corrective mechanism (comparative performance of other regimes relying on different theories) is available anywhere'.[116] Or the number of alternative theories might have been significantly reduced in similar systems to the one at issue. Fundamental knowledge problems raise an additional reason to worry about uniformity through such choices. This means that we need diversity:

> One essential prerequisite is the preservation of local-level diversity, since without diversity, the stock of knowledge and experience on which the learning process depends is necessarily limited in scope.
>
> The observation that 'hidden in the historical experience of economic integration, there is … a very important aspect of 'system dynamics' … might seem to rule out substantial harmonising legislation, and, indeed, it was advanced with precisely this goal in mind … In the vein of a neo-Austrian or Hayekian economic analysis, intervention with the aim of curing so-called imperfections that prevent the market from arriving at an optimal allocation, if not simply beside the point, is actively harmful. These 'imperfections', which are simply the differences between systems, are the very basis on which learning can take place in a federal order. In this sense, diversity of national systems is an objective in its own right. It is only on the basis of diversity that a wide range of potential solutions to common regulatory problems can emerge.[117]

Under this framework, diversity of national systems is an objective in its own right. Where different states have diverse competition laws or diverse interpretations of the

[114] Kerber and Budzinski (n 57) 418. See also Wolfgang Kerber, 'Inter-jurisdictional Competition within the European Union' (1999–2000) 23 *Fordham International Law Journal* 217, s 225.

[115] This might be because of rent-seeking by firms or others (those in favour of independent NCAs seem to think that this is a major problem; see ch 3). There may also be knowledge problems (as Motta also acknowledges; see the text around n 121).

[116] Budzinski (n 7) 71.

[117] Deakin (n 43) 444. 'From the evolutionary perspective of Popper, parallel processes of experimentation with mutual learning can be understood as evolutionary processes of variation, retention and selection, leading to the sifting of superior solutions and, therefore, to a growth of knowledge (Karl Popper, *Objective Knowledge: An Evolutionary Approach* (Oxford University Press, 1972)). For a very similar notion, see Hayek's theory of cultural evolution: Friedrich Hayek, *Law, Legislation and Liberty* (Routledge, 1973)', Kerber and Budzinski (n 57) 418. See also van den Bergh (n 18) 371–72. It may also be inefficient to have only one theory; Budzinski (n 7) 112.

same law, then it may be possible to observe and compare them. In the words of Kerber and Budzinski:

> [G]overnments, competition authorities staff, and citizens (as voters) can use the experiences of other countries to reassess their own competition regimes. This allows for correcting errors, imitating superior rules, enforcement mechanisms, theories and practices, or simply avoiding mistakes that others have made.[118]

We can never be sure that we know the best practices. Thus, the system must remain open to these different opinions and theories. In the words of Budzinski:

> Decentralisation of competences enhances both the reaction flexibility (resonance ability) and the innovation permeability (openness to knowledge inflow) of the competition regime. The reason is not that each local agency and institution is inherently more adaptable. Instead, the decisive effect is that institutional and agential *diversity* (i) offers additional channels for the injection of new ideas and (ii) allows for mutual learning due to parallel experimentation with different practices, concepts, ideas, institutional solutions, etc.[119] The existence and interaction of a horizontal (ie on the same jurisdictional level) and vertical (ie on upstream or downstream jurisdictional levels) variety and plurality represents an evolutionary value.[120]

The competition authorities in Europe seem to be afraid of disagreements and difference. Yet, if they could acknowledge that they are operating at the limits of economic knowledge and explain what they are doing and why, this would help firms to predict what a particular competition authority is likely to do in a specific case. It would also help competition authorities to learn from each other.[121] Allowing NCAs to embrace diversity will facilitate new channels for injecting fresh ideas and mutual learning when these results work. This can be important where economics does not provide us with the answers (such as the trade-off between innovation and competition). It is also helpful in other areas of disagreement or uncertainty.

We have seen that diversity allows different experiments, and this can be helpful for another reason. Hawk and Beyer add that if these experiments go wrong in one state, then it will not affect the whole country, just that state. The entire business community:

> [C]an be affected when the central enforcers undergo a policy shift. The effects of such a shift could not be tempered without a co-ordinated group of local enforcers that work with each other as well as with the central enforcement authority.[122]

[118] Kerber and Budzinski (n 57) 419.

[119] A uniform, centralised regime, on the other hand, can theoretically only test alternative practices sequentially. This slows down learning processes about best practices and benchmarks. Moreover, sclerotic institutions that refuse to deal with innovation are more probable in centralised regimes.

[120] Budzinski, 'An Economic Perspective' (n 62) 126–27. Similarly, see Meessen (n 76) 21; Budzinski, 'Pluralism of Competition Policy Paradigms' (n 62) 29–30; and van den Bergh (n 18) 366.

[121] Note that this sharing could also be a two-way process. It is not just the Commission that can teach others; NCAs have things to teach too. For example, there the costs and benefits of a criminal enforcement regime, or the benefits of giving access to the file in commitment decisions (unlike the Commission, some NCAs do this).

[122] Barry Hawk and Jeffrey Beyer, 'Lessons to Be Drawn from the Infra-national Network of Competition Authorities in the US: The National Association of Attorneys General (NAAG) as a Case Study' in Ehlermann and Atanasiu (n 5) 109–10. Similarly, see Judge Brandeis, in a minority judgment in *New State Ice Co v Liebmann* 285 US 262 (1932) 310–11.

While uniform rules can lower costs, the focus should be on whether this outweighs the benefits of experimentation.[123] In other words, potential gains from these areas must be measured against the costs outlined in section II above.

C. Civic Virtue and Related Issues

De Tocqueville writes that, in America, they sought to infuse political life throughout the territory in order to maximise the possibilities for individuals to act politically.

I do not think that this is an important effect of decentralisation in competition law in Europe. In order to explain why, I need to outline what de Tocqueville thought in a little more detail. He wanted to maximise the possibilities for individuals to act politically because men 'learn at such times to think of their fellow man from ambitious motives; and they frequently find it, in a manner, their interest to forget themselves'.[124]

There are four inter-linked intuitions at work for de Tocqueville: voice and virtue; not everyone can get involved in central politics; people care more about local issues; and even if local issues are not as important as central issues, they are important.

First, as regards voice and virtue, the point is that public office is important because it helps give people a voice and develops their intellect and civic responsibility. If this is right, then perhaps working in a competition authority is one way of helping citizens to develop their virtue. Perhaps regional competition authorities could help to make more of these roles available, helping more workers to become virtuous.

De Tocqueville believed that when we became involved in public life, we become less selfish and more mindful of our place in the community as a whole. On the other hand, when the centre controls local interests, then even if it is more efficacious than a decentralised system, he thought it repugnant. This is because central control does not make us responsible for our acts and free in our selection of the best path to follow:

> It profits me but little, after all, that a vigilant authority always protects the tranquillity of my pleasures and constantly averts all dangers from my path, without my care or concern, if this same authority is the absolute master of my liberty and my life, and if it so monopolises movement and life that when it languishes everything languishes around it, that when it sleeps everything must sleep, and when it dies the state itself must perish.[125]

De Tocqueville is literally talking about people getting directly involved in the political process, for example, as politicians (or, from our perspective, in NCAs as competition officials), and taking control of their own destiny. It is possible that this is a good way for people to develop their virtue and voice. However, it is possible for people to pursue this power in order to act selfishly in such roles too. There is not necessarily a connection between participation and the development of a virtuous life.[126] The environment in which one finds oneself (if we expect others to be fair and believe that there is an

[123] Stephen Wilks, 'Agencies, Networks, Discourses and the Trajectory of the European Competition Enforcement' (2007) 3 *European Competition Journal* 426; and Oliver Budzinski, 'Monoculture versus Diversity in Competition Economics' (2008) 32 *Cambridge Journal of Economics* 295.

[124] Alexis de Tocqueville, *Democracy in America*, vol II (Vintage Books, 1945) 110.

[125] ibid 92.

[126] Naomi Klein, *No is Not Enough* (Allen Lane, 2017).

expectation that we will all act fairly, for example)[127] may be important, perhaps more important, for developing civic virtue than mere public service.[128]

Nevertheless, let us assume that we do want to encourage more people into the competition authorities (and other forms of public service). Perhaps, in large states, not everyone can get involved in central government because there are insufficient roles. This is de Tocqueville's second point: might decentralisation create more, and different, roles allowing more of us to contribute to society? He writes that in the American townships:

> [P]ower has been distributed with admirable skill, for the purpose of interesting the greatest possible number of persons in the common weal. Independently of the voters, who are from time to time called into action, the power is divided among innumerable functionaries and officers, who all, in their several spheres, represent the powerful community in whose name they act. The local administration thus affords an unfailing source of profit and interest to a vast number of individuals.[129]

The idea is that if there are two levels of 'government', there should be more roles for people to fight for and more debates over these roles. If we look at what has happened in the EU, in 1998, 153 people were involved in competition enforcement in the Commission, while 1,222 were doing this in the NCAs.[130] The more complete decentralisation of the enforcement of EU competition law in 2004 likely saw an increase in those working in competition enforcement in the NCAs. In addition, the NCAs have become the primary enforcers of competition cases under Articles 101 and 102 TFEU compared to the Commission, at least in terms of the number of competition decisions that they concluded.[131] However, not many people are involved in competition work compared to the EU population as a whole (about 400 million). So, this effect is unlikely to be large, unless it is replicated in other areas.

In any event, central government could create more roles if this were considered to be expedient.[132] Given the explosion of competition cases by the NCAs, this does not hint at a lack of belief in competition. It may be more of a desire to retain greater control over competition decision-making (perhaps to protect diversity). In part, the Commission's failure to create more roles is not through a lack of will, but because of budgetary constraints imposed upon it by the Member States. These constraints could, of course, be relaxed (by the Member States). This seems unlikely. Some say that they have used finance as a way of indirectly controlling the Commission.

Yet, perhaps the issue is not so much about people working in the local competition authority as about citizens being interested in their NCA's work and seeking to control it. The IMF has said that increased fiscal decentralisation, in itself, is an important means

[127] Cristina Bicchieri, *The Grammar of Society: The Nature and Dynamics of Social Norms* (Cambridge University Press, 2006) ch 3; and Dan Ariely, *Why We Think it's OK to Cheat and Steal (Sometimes)* (2009), available at https://www.youtube.com/watch?v=nUdsTizSxST.

[128] Treisman (n 2) 163–64.

[129] Alexis de Tocqueville, *Democracy in America*, vol I (Vintage Classics, 1990) 67.

[130] Commission, *First Biennial Report on the Application of the Principle of Mutual Recognition* (1999) 20.

[131] The NCAs adopted 88 per cent of all such decisions between 1 May 2004 and 31 December 2012; Wouter Wils, 'Ten Years of Regulation 1/2003 – A Retrospective' (2013) SSRN, 8. Similarly, see Commission (n 54) para 24.

[132] Treisman (n 2) 157–58.

of increasing democratic participation in the decision-making process.[133] However, as things currently stand in the EU, the Commission and the NCAs and courts are not elected officials. Chapter 3 shows that great efforts have been made to insulate them from political interference. I discuss these issues in more detail in that chapter, but my assumption here is that the direct effects referred to by the IMF do not operate in the competition arena in Europe (and that this is increasingly discouraged).[134]

The third intuition is that people may care more about local issues and thus be less interested in the Commission (centre) than the NCAs (local). By way of contrast, when discussing decentralisation *within* a state, Treisman says that citizens are often less interested in local issues. For example, he notes that defence is important and is normally decided centrally.[135] This is probably because he defines 'local' as the things done by a region within a country (he counterposes the US and its states). In the EU, things are different. Many people do get involved in national politics; in fact, significantly more than those involved at the EU level (see below). This is unsurprising – the issues that the Member States deal with, such as re-distribution between social groups, defence and policing, are not considered trivial. In fact, research has found that to many, it is the EU and its politics that lack political salience.[136] In addition, as we will see below, citizens' primary allegiance is often to their Member State. Even though this might not be true in competition cases (Commission decisions can have important effects in many Member States and often the EU as a whole), competition awareness may be 'contaminated' with a general EU malaise.

It is certainly possible in competition law in Europe, as de Tocqueville hints more generally, that citizens show more interest in local matters. Citizens, or at least certain groups of citizens, have been slow to transfer their allegiance from the Member States to the EU:

> Almost four out of ten Europeans continue to define themselves only by their nationality … an increased majority of Europeans define themselves by their nationality and as Europeans (49%) … Just 6% … mentioned 'European and (NATIONALITY)'. Only 3% … of the people polled mentioned 'European only'.[137]

National identity remains extremely important in the EU. In part this may be because of the (relative) importance and legitimacy of the Member States. It is probably also due to a lack of understanding of the benefits of the EU and what it achieves for us. National participation may well reduce, or at least retard, our willingness to develop civic virtue at the EU level.

[133] Jonathan Perraton and Peter Wells, 'Multi-level Governance and Economic Policy' in Bache and Flinders (n 44) 185.

[134] Indirect pressure might be brought to bear on NCAs and the Commission by pressuring the democratically elected officials that select and retain their staff. There have been many instances of political interference in the EU. However, my working assumption is that indirect political pressure of this nature is no longer such a powerful lever.

[135] Treisman (n 2) 158–59.

[136] Sophie Duchesne, 'Social Gap: The Double Meaning of "Overlooking"' in Sophie Duchesne et al (eds), *Citizens' Reactions to European Integration Compared: Overlooking Europe* (Palgrave Macmillan, 2013).

[137] Eurobarometer, *European Citizenship*, (2012) Standard Eurobarometer 77, p 24, available at http://ec.europa.eu/public_opinion/archives/eb/eb77/eb77_citizen_en.pdf.

However, this may not matter for the purposes of this argument. Treisman argues that even if citizens do care more about local issues, this point is irrelevant because: 'Local issues will exist regardless of the system of government. If people mobilise to lobby about local issues under decentralisation, they will mobilise to lobby about the same issues under centralisation.'[138]

Logically, local issues will exist regardless of the mode of government. However, it may be a leap too far to say that people will lobby the centre about the same things as they lobby for locally. One has to consider the costs, as well as the benefits, for citizens. Costs could be higher if it were harder to lobby central officials. For example, this may be less convenient.[139]

One also has to consider the costs and benefits of the politicians to listen and act. These are discussed below. It may also be difficult to explain local peculiarities to the centre. Perhaps those from the regions may not even be aware that local peculiarities are present (in which case they would not raise their 'special' context). An equally accountable centre may have a similar interest in responding to these regional interests and making it easy to protest. We will see below that, even if this is true, the centre is less accountable than the Member States and is often considered less legitimate too.

The fourth intuition was that even if central issues were more important than local issues (which they do not seem to be in the EU in any event), it would not necessarily follow that local issues were unimportant to citizens. Does local government do a better job of dealing with local issues than central government? This might be, for example, because it cares more about these issues. We look more closely at this issue below.

In conclusion, I do not find the arguments on civic virtue particularly convincing or relevant in the competition law arena. It seems unlikely that this is pushing (or encouraging) people to work in, or seek to control, their local NCA. However, this could (and, in my opinion, should) change if competition law becomes re-politicised (see the discussion in Chapter 3).

D. Uncovering and 'Enforcing' Diverse National Preferences

According to the World Bank, a classic argument in favour of decentralisation:

> [I]s that it increases the efficiency and responsiveness of government … Locally elected leaders know their constituents better than authorities at the national level and so should be well positioned to provide the public services local residents want and need. Physical proximity makes it easier for citizens to hold local officials accountable for their performance … Finally, if the population is mobile and citizens can 'vote with their feet' by moving to another jurisdiction, decentralization can create competition among local governments to better satisfy citizens' needs.[140]

[138] Treisman (n 2) 159.

[139] Perhaps one has to travel to a more distant central location (Brussels) or it is harder to get central politicians to take an interest in local issues due to the many competing issues that they have to deal with. It may also be more costly – eg, there may be different language or legal traditions. Perhaps one is more comfortable talking to local authorities; Commission (n 130) para 46 makes a similar point.

[140] World Bank (n 67) 108.

The first argument is that locally elected leaders know their constituents better and so are able to provide the things that they want and need. I call this the efforts of local leaders, and examine it in section III.D.i below. Second, local citizens might be more able to hold local politicians accountable than central politicians. I call this local citizens' knowledge and examine it in section III.D.ii below. The third argument, about competition between systems, is examined in Chapter 5.

A key problem is that evidence for (or against) any of these propositions is scarce. There is not perfect information either on the demand or the supply side here. As Oates explains, 'the literature has shown us that optimal "procedures" or institutions are likely to be quite different from those in a setting of perfect information'.[141] This is because proving relevant causal relationships is hard, and efficiency and responsiveness are not easy to measure.[142]

i. The Efforts of Local Leaders

There are three inter-woven arguments here: technical problems; local people hiding their preferences; and the incentive on local politicians to seek out the will of local people. I will examine these in turn.

a. Technical Problems

It might be technically difficult to collect local information. Local governments may have a cost advantage when doing this. The cost advantage might arise due to knowledge of language or other local 'conditions' (such as which issues might be important, which questions to ask and to whom). Information is also 'naturally' decentralised. 'Local communities know more about their own tastes and resources than a central government does … Therefore, decisions made by local policy makers will be better informed than those made by the proverbial "faceless bureaucrats" in the nation's capital.'[143]

When solutions are applied at a local level, some say that the relevant actors better understand the conditions affecting implementation and can better tailor solutions to the specific context. The national administrations of France, Britain and Germany all decentralise administrative control for this reason (and to encourage more experimentation).[144]

Similar arguments have been made by the US and German competition authorities. For example, in the US system, the states and the federal authorities enforce some federal competition rules (sections 1 and 2 of the Sherman Act 1890). Hawk and Beyer support

[141] Wallace Oates, 'Toward a Second-Generation Theory of Fiscal Federalism' (2005) 12 *International Tax and Public Finance* 356.

[142] World Bank (n 67) 108.

[143] Treisman (n 2) 210. Similarly, see de Tocqueville (n 129) 90; World Bank (n 67) 111; and Pelkmans (n 7) 9.

[144] Peter Lindseth, 'Delegation is Dead, Long Live Delegation: Managing the Democratic Disconnect in the European Market-Polity' in Christian Joerges and Renaud Dehousse (eds), *Good Governance in Europe's Integrated Market* (Oxford University Press, 2002) 154; for similar EU trends, see 155. See also Miguel Poiares Maduro, *We, the Court: The European Court of Justice and the European Economic Constitution* (Hart Publishing, 1998) 113–26.

this decentralisation, saying that a central enforcement agency 'lacks the sensitivity of state enforcers to local concerns. Many effects that may appear to a central enforcer to be minimal, might be more significant to local enforcers because the markets affected might be primarily local ones'.[145]

Certainly, many believe that there are important information asymmetries here. One only needs to consider the issue of secret cartels to reflect upon the importance of knowledge. That said, in relation to gathering the raw data, is there an advantage to being local? Some think that if officials live in the local community, they will pick this information up merely by being there. They will see things and citizens will readily come to them with information.

There are three potential problems with this intuition. First, while existing local knowledge is important, it may not be enough to make a difference. Personal observations may be misleading – for example, there may be no potholes on the streets where the politicians live, but maybe this is a coincidence or (even worse) maybe officials intentionally prioritise road maintenance on the politicians' streets. So, even if you are in the locality, you will know your own experience, but you also need to gather data on the impressions of others (because they may have different priorities or concerns). The World Bank has evidence of decentralisation that works (in that it increases efficiency and the cost-effectiveness of targeting) and also of other projects that do not work. Apparently, successful projects suggest 'that local officials have access to social networks that help them identify the truly needy. But this may not be the case in very large jurisdictions'.[146] It is not clear to me what access to (often secret) anti-competitive networks local competition officials would be likely to have. This may be a red herring. It is possible that local officials would be more tuned into local businesses that might be suffering from anti-competitive arrangements. I doubt that this kind of information is helpful very often. In any event, it seems that the larger the local area and the more heterogeneous it is (both in terms of citizens' preferences and the local context), the less local knowledge will count.

The second potential problem with the *local is better* intuition is that local competition officials will have to make lots of decisions every day, many of them outside of their own field of experience. They will not be able to pick up information without incurring costs for all of these. That said, easier access to local social networks may facilitate this exercise, as well as making it cheaper.

The final critique of the *local is better* intuition is that if local social networks are so important, central government should be able to replicate them with local agents:

> [There] is no reason, in principle, why a central authority could not make use of a variety of channels to assemble needed information on local conditions. But such activities are not costless, and … the failure of central authorities to obtain such information must reflect its lesser value to central, than to local, public agents.[147]

[145] Hawk and Beyer (n 122) 109. For similar arguments in other systems and more generally, see Ulf Böge, 'The Bundeskartellamt and the Competition Authorities of the German Länder' in Ehlermann and Atanasiu (n 5) 111 (Germany); Commission (n 130) para 46 (EU); van den Bergh (n 18) (EU); Neven and Röller (n 13) 847; and Smets and van Cayseele (n 13) 432 (generally).

[146] World Bank (n 67) 111.

[147] Oates (n 141) 359. Similarly, see Treisman (n 2) 211–12.

So, local information might be less valuable to central authorities than local authorities. This implies that central authorities might be less accountable to local constituencies. In addition, Seabright has suggested one reason why this might not be *possible* for central government to achieve through an incomplete contracts model (even if they cared). Citizens cannot be sure that 'politicians and bureaucrats' will act in their interests. Often citizens cannot directly observe their actions, but also, while the *outcomes* of those actions may be observable, they will not be verifiable. Outcomes may not be verifiable, either because:

> [The] information is too complex to be specified in a legally watertight way, or because it may not be observable by third parties charged with enforcement such as the courts. For example, citizens may know whether they feel better off as a result of a certain policy, but it may be impossible for the courts to establish this. The policy may therefore be subject to electoral review but not to judicial review, which will be limited to considering more narrowly specified issues of legality of procedure.[148]

In Seabright's simplified model, we see an important trade-off once again, which he explains like this:

> Centralisation allows government to reap benefits from the coordination of policies between jurisdictions [perhaps due to externalities, problems of homogeneity etc; see above]. However, it has a potential cost, namely the diminished accountability of government to the wishes of any particular region or locality. This *diminished accountability has a precise sense in the model: it is the reduced probability that a region will be able to choose to elect or reject a government at election time purely according to its own view of the government's performance.* This reduced accountability may diminish the incentive of the government to act in the interests of that region. And it is a direct consequence of the fact that each region's welfare is non-verifiable; there is no way to reward or punish a government according to its performance except by deciding whether or not to re-elect it.[149]
>
> (1) This argument should be distinguished from one that appeals to yardstick competition as a benefit of decentralisation … Yardstick competition may help voters to know whether they should seek to replace their governments; the present argument, by contrast, assumes that voters' information does not in itself affect their wish to replace their government (which is instead determined by the exogenous availability of an alternative government), and instead examines the impact of decentralisation on their *ability* to do so. (Emphasis added)

Seabright's argument is important where the regions require different policies (or are differently satisfied with these policies; think of our national preferences discussion above). Central government could undertake a policy where it treats different regions differently, but the inability to have complete contracts means that this will only work for 'variables that are fully observable by all parties, not for variables that are only partially observable'.[150]

[148] Paul Seabright, 'Accountability and Decentralisation in Government: An Incomplete Contracts Model' (1996) 40 *European Economic Review* 64.

[149] ibid 65–66.

[150] ibid 66. A few other important results also follow: those in power do not necessarily have the same incentives vis-a-vis centralisation and decentralisation as their citizens. Thus, one should not necessarily be guided by the views of the competition experts here. Second, it is clear that what is best is sensitive to the amount of importance given to accountability or satisfaction (and these things are themselves hard to quantify).

In any event, even if local authorities are more accountable to their local populations, this might not be true of independent courts and NCAs (although Seabright extends his findings to them as well).[151] The question is whether they would have sufficient incentive and interest in the locality to really listen. This depends on the specific context at issue as well as the individuals involved. The World Bank examples referred to above do show decentralisation sometimes working and improving upon centralisation. This may happen in the EU too. However, both the Commission and many NCAs have limited accountability, which may make them less responsive.[152] To put it another way, this lack of accountability may mean that competition authorities in Europe are more willing to pursue their own version of the common good without asking citizens. Obviously, the answer to this question is linked to the amount of independence of the NCAs, which is something that we will discuss in Chapter 3.

We have seen that central authorities may have additional problems when trying to gather local information on *local policies*. However, as Oates points out, presumably the same applies to the ability of central authorities to collate local information on local views of *central policies* too (as well as the value of any side-payments). It may be that central authorities care more about central problems and so will work harder to get them right, or perhaps some effort is better than nothing, and so they just do what they can. However, this raises several basic information problems for central authorities. They should not be ignored.[153]

A related argument is that when decision-making is local, this may introduce another tier of bureaucracy that adds expense to the competition assessment.[154] Certainly, there are expenses when the NCAs decide cases as the issues involved and their proposed decisions must be communicated throughout the network. Having said that, sharing of this nature also has the benefit of spreading learning and contributing to the creation of a network identity. In addition, this kind of exercise would have to take place if a central authority were administering the system and wanted to ensure consistency within its different case teams.

While the raw data might be locally stored, the knowledge of what to do with that data may not be (ie, the principles of public management).[155] There is another problem, which is that if we keep the information local, then we may miss patterns happening in different localities:

> Power may be localised, but knowledge, to be most useful, must be centralised; there must be somewhere a focus at which all its scattered rays are collected, that the broken and coloured lights which exist elsewhere may find there what is necessary to complete and purify them. To every branch of local administration which affects the general interest there should be a

This makes it hard to advocate uniformity or diversity as a general rule. Seabright's argument also means that 'accountability improves government's performance even when all regions have the same preferences' (ibid 66). See also Oates (n 141) 358. Finally, in 'some policy areas the allocation of power can be decided on a case-by-case basis if it is possible to measure the approximate magnitude of spillovers. European merger policy provides a good example of such a case-by-case allocation in action'. Seabright (n 148) 65–66.

[151] De Visser (n 5) 349–50.

[152] World Bank (n 67) 121 explains the importance of accountability.

[153] Oates (n 141) 359.

[154] Hawk and Beyer (n 122) 109. Similarly, see Treisman (n 2) 213.

[155] There may be local solutions that would not work elsewhere. I discuss these below.

> corresponding central organ … even if that functionary does no more than collect information from all quarters, and bring the experience acquired in one locality to the knowledge of another where it is wanted.[156]

Having said that, it may also be possible for local governments to co-ordinate their information gathering, compare notes and overcome such issues without help from the centre,[157] and certain policies may have different impacts in the various national contexts. NCAs and the Commission have quite strong information-gathering powers and are able to bring many incentives to bear on firms to either admit their own competition infringements (leniency) or to report others. So, while firms are often keen to hide competition infringements, the gathering of local information may be less of a problem in that context. In addition, to the extent that NCAs do have informational advantages over the Commission, the latter has the power to ask them to gather information on its behalf.[158] This intermediate solution between full decentralisation and full centralisation might help to bridge any gap.[159]

b. Local People Hiding Their Preferences

Local people can hide their preferences for public goods and, sometimes, even their incomes. This is a free-rider problem. In the words of Tiebout, 'there is no mechanism to force the consumer-voter to state his true preferences; in fact, the "rational" consumer will understate his preferences and hope to enjoy the [public] goods while avoiding the tax [or other cost]'.[160]

So, for example, people might claim that certain public goods are desirable and yet maintain that others can better afford to pay for them. Can local governments break through this 'dissimulation' more easily than central government?

There are two suggested mechanisms. First, people might be more willing to declare things truthfully to local authorities if they think that they are more efficient than central authorities. This argument was originally made comparing French (politically accountable) local authorities with the French monarchy. Such an assumption might have been appropriate in that context. There is no information that local authorities are generally more efficient (although we have seen that they may be more accountable). In our EU context, NCAs may be (or could be made; see Chapter 3) more accountable to local desires than the Commission. That was certainly an argument that the Commission made in relation to its decentralisation project for competition law.[161] This might theoretically make them more efficient, although I have seen no studies demonstrating that they are more efficient.

[156] John Stuart Mill, *Representative Government* (Hayes Barton Press, 1949) 186. See also Treisman (n 2) 213.
[157] Treisman (n 2) 210.
[158] Articles 11 and 12 of Council, Regulation (EC) No 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (2003).
[159] Given the risk of regulatory capture (if this is more prevalent at the national level), as well as the risk of NCAs cheating in favour of their own stakeholders, some have suggested that it might be better to encourage NCAs to co-operate amongst themselves, with the Commission serving as the ultimate control and arbiter between them; van den Bergh (n 18) 365, 370.
[160] Charles Tiebout, 'A Pure Theory of Local Expenditures' (1956) 64 *Journal of Political Economy* 416, 417.
[161] Commission (n 130) para 46.

Secondly, if there is competition between localities then people might move to find the one that they like best. This competition may make local places more efficient. It also gets citizens to reveal their preferences. However, we will see in Chapter 5 that there are many rigorous conditions required for this to come true. And even if they were there, we may be able to achieve the same benefits through administrative decentralisation.

c. Incentive on Local Politicians to Seek out the Will of the People

Some believe that local governments (for us NCAs) are more motivated to seek information about national tastes and conditions than their EU counterparts. It is often said that 'state and local governments, being closer to the public, tend to be more responsive, accountable and aware of the preferences of their constituents than the central government'.[162]

As a general proposition, Treisman argues, it is hard to believe that governments will be more motivated to seek out local preferences either centrally or locally[163] (even though many have this strong intuition). The incentive here depends on other things like the value of holding public office, the effectiveness of search methods (see above) and competition for office.[164] In any event, if seeking out the will of local people were considered important in a centralised model, then the value could be changed (for example, the wages could be raised if we did not feel that we were getting good candidates who cared about these things).

Having said that, interesting research by Brewer, Selden and Facer probes the motivations of individuals working in public service. They criticise reforms of public administration that focus on consequentialist motivations of public service. Such reforms, they say:

> [E]mphasise instrumental goals such as efficiency and productivity, they reduce the roles of public employees to suppliers and of citizens to consumers, and they drone about the limitations of government. In sharp contrast, public employees emphasize the possibilities of government; they describe public service as an important process that involves serving others and the nation. We are left with vivid images of people helping people – not principals and agents chasing customers.[165]

We have seen that Triesman assumes that public servants are motivated by consequentialist goals too. When they examined the actual motives of people in public service generally, Brewer, Selden and Facer found four different conceptions of public service that seemed to motivate these public servants. They found that the 'desire for economic rewards is not a defining feature of' any of these conceptions. Furthermore, the four conceptions:

> [D]iffer in their *scope of concern*. Samaritans are concerned about other individuals, communitarians about their community, patriots about the nation, and humanitarians about

[162] Geys and Konrad (n 6) 35. Similarly, see Treisman (n 2) 217.
[163] Treisman (n 2) 218.
[164] ibid 222.
[165] Gene Brewer, Sally Coleman Selden and Rex Facer, 'Individual Conceptions of Public Service Motivation' (2000) 60 *Public Administration Review* 262.

> humankind. While the scope of concern is graduated across the four types, it is not cumulative. Individuals with broader scopes of concern do not necessarily internalize the views of those with narrower scopes of concern.[166]

By manipulating the types 'conceptions' of public servants within an organisation (such as the Commission or an NCA), one may be able to create an environment where people are more motivated to help their local community (here the Member State) than the centre (the EU as a whole) or vice versa. I will discuss this further in Chapters 3, 6 and 8.

ii. Local Citizens' Knowledge

Political representatives are tasked with acting in society's best interests. It is only possible to hold them to account if we can see what they have done, compare it with what we wanted and then punish them if they did not act as we would have liked. The question is whether this task is easier with local rather than central politicians.

The first issue, then, is how transparent competition actions (particularly the decisions) are of the national vis-à-vis the EU authorities. and are nationals better informed about what the national authorities are doing than they are about the EU? Some say that we merely notice what is going on around us. For example, without giving reasons, Neven and Röller say that 'citizens and voters may have less information about the operation of centralised institutions than about those of their own country or region, so there may be less political pressure to ensure that these institutions function well'.[167]

If this is true, then proximity to the decision-maker may be better. Yet, just because I know whether they have cleaned my street does not mean that I know whether they have cleaned the street next door. Things of this nature are hard to monitor; it takes a lot of time and effort. Even where evidence is made available publicly (as is the case for competition decisions by the Commission or the NCAs), the abundance of information can sometimes make it hard to conduct a proper check. The problem is even greater where other languages come into play. Yet, help is at hand. The World Bank says: 'A multitude of actors outside the public sector – grassroots organisations, unions, universities, philanthropic foundations, user groups, non-governmental organisations … and neighbourhood associations – influence public performance. Among other things, they can help hold local governments accountable.'[168]

Newspapers and other watchdogs often check for problems or maladministration, so they provide some assistance here. They are likely to be more extensive in their monitoring when there are more of them and they are more determined.[169] This is most likely to be where the stakes are higher, which is often on the national stage, given that this is where most important power still rests. Furthermore, given our continued strong association with our Member States and the fact that newspapers and other media outlets are often organised along national lines, it is likely that people are more familiar with the issues in their country than those more generally in the EU or in other Member States (although competition news services, such as MLex, are changing this). In reality,

[166] ibid 261.
[167] Neven and Röller (n 13) 847.
[168] World Bank (n 67) 121–22.
[169] Treisman (n 2) 166.

competition policy and enforcement are not, in general, of high salience throughout the EU, so there is often little interest (similarly, help might be obtained from the reports of other competition authorities[170] and interest groups;[171] however, they rarely improve the democratic legitimacy of competition work).

One benefit of decentralisation is that one is likely to see several local entities (the NCAs and the Commission) with largely similar powers performing in potentially very different ways. Given that so much case knowledge and information is never made public (there is an asymmetry between the public and the authorities), the ability to compare authorities (through reading their decisions, media appraisal and other civil society work) might make it easier for citizens to see who is performing well.[172] Nevertheless, the weight that citizens place on competition work, when electing national politicians, does not seem to be high.

Where the relevant authority is providing a non-excludable public good (this is often the case in competition assessments; think of factors such as competition and environmental protection or the administration of justice) that the majority of voters value, it might be better to devolve responsibility for the provision of these goods to local authorities (the NCAs) rather than to look after them centrally (the Commission). This could be true if the relevant public goods were non-excludable at the national level, but not at the EU level.[173] This may be true of competition decisions where the relevant markets are national, or smaller, or where the environmental or other impacts are national, or different in different Member States (see above).[174] In such cases, national voters may be able to push more efficient action by NCAs because the central authorities could play local regions off against each other. However, this depends on competition and these other factors being considered of sufficient importance in national elections, which might not always be true (see above).

[170] The views of other NCAs and the Commission on each other's work may also be influential. Unfortunately, given the nature of this tight, epistemic community, these actors are unlikely to fundamentally challenge each other publicly (see ch 3). Furthermore, policy networks do not always lead to learning. In fact, centralised systems of standard setting should be seen as regulatory cartels, which 'like any other form of collusion between competitors, inhibit the operation of the market, raise prices, and reduce economic efficiency. Such intervention should therefore be eliminated or narrowed to the greatest extent possible'. Daniel Esty and Damien Geradin, 'Regulatory Co-opetition' in Daniel Esty and Damien Geradin (eds), *Regulatory Competition and Economic Integration* (Oxford University Press, 2001) 33. It may also be possible for a similar competitive mechanism to be produced under administrative decentralisation; Treisman (n 2) 168. Chapter 4 discusses this in more detail.

[171] Van den Bergh argues that one also needs to consider the location and power of interest groups: 'Decentralisation does a better job in mitigating the risk of regulatory capture than is often assumed. Of course, the relative strength of the interest groups will differ across countries and industries. If agencies are captured by national interests, supranational bodies will be able to reach more objective decisions. If lobbies represent sector rather than national interests, centralisation by itself will not cure the problem. Centralisation may weaken the power of some interest groups (eg middle class retailers), but other groups may gain when competition policy is centralised (eg farmers). Some interest groups (eg insurance companies) appear to be equally powerful both at the supranational and at the national levels, although there may exist some differences across Member States.' Van den Bergh (n 18) 381. Section II in ch 3 explains why engaging interest groups are unlikely to lead to higher legitimacy, although it might mean better decisions.

[172] Timothy Besley and Anne Case, 'Incumbent Behavior: Vote-Seeking, Tax-Setting, and Yardstick Competition' (1995) 85 *American Economic Review* 25 (US states and tax competition); and Neven and Röller (n 13) 847 (competition).

[173] Treisman (n 2) 178–79.

[174] Neven and Röller (n 13) 847.

Our second issue was the ability of local citizens to punish badly performing national actors compared to their European counterparts (in our example, the European Commission). More generally, Oates reports that some principal-agent models prefer decentralisation (even where the regions have homogeneous preferences) because of the greater accountability under a decentralised system (see above).[175] However, in the absence of evidence to the contrary, there seems to be very little political accountability from competition authorities to citizens in Europe. Most EU official jobs are not elected and the same applies in most NCAs.[176] They implement very openly worded competition provisions, often selecting their own goals and methods with little oversight (except from the courts), in what is a highly re-distributive area. So, neither seems likely to seek out the will of the people; in fact, this seems to be the institutional design.[177]

Finally, if accountability is reflecting the preferences of the majority of voters, an important question here is: which majority? Does this mean the majority in the Member State or in the EU as a whole? If we focus on one at the expense of the other, does this make us less accountable?[178] A key point may be whether citizens see the issue in question as something that only concerns those in the territory where it is occurring or as something that concerns all those in the EU. This is an issue of externalities. As noted above, some aspects of an arrangement may affect just one Member State, while other aspects have much wider effects. This further complicates the position here. The answer is likely to include a political assessment of who citizens think has legitimacy to decide certain issues such as whether the re-distribution of any surplus is desirable and, if so, how much to allocate to which other actors. In this regard, one must not forget that the Member States remain central political actors, and the primary allegiance of most citizens primarily remains with them (see also the discussion of this in section III.A). In part, this means that NCAs are likely to be given more leeway (at least by the citizens of their state) when re-distributing in their decisions, compared to the Commission.

One interim solution might be co-operation between various NCAs rather than one EU regime. But one would need systems for overcoming jurisdictional conflicts (including in merger control) as well as power asymmetries, and, ultimately, there might still be incoherence. In addition, it is unclear why powerful states would accept this (they can get what they want anyway) and weak states may be suspicious that they were being tricked.[179]

[175] Oates (n 141) 358.

[176] The exception to this is Members of the European Parliament. However, the European Parliament does not have much power in the EU legal order and this is particularly true in terms of the impacts on EU competition law, where it has almost no voice (see arts 103–105 TFEU). The European Parliament could be given more power, which could raise the legitimacy of the EU legal order (see the discussion in the Introduction). Having said that, given that the main political unit is still the Member States for many of the competition matters discussed in this volume, such a shift might even undermine the legitimacy of the EU legal order.

[177] Given that neither the DG COMP nor those working in the NCAs are normally elected, any power must be derived through other political actors. It is likely that the signals are likely to be even weaker than on direct EU and national politicians. These issues are discussed in more detail in ch 3. More generally on the ambiguity of interest in local and central elections, see Fesler (n 3) 546–48.

[178] ibid 552–53; Treisman (n 2) 180.

[179] Budzinski (n 7) 53, 65.

IV. Conclusion

This chapter has explored the advantages and disadvantages of imposing one uniform, substantive interpretation of Article 101 TFEU (anti-competitive arrangements) and Article 102 TFEU (abuse of a dominant position) throughout the EU. The counterfactual employed was to allow divergent understandings of these articles in different Member States. The idea was to use this as an illustration of the wider issues about the socio-economic and political benefits of greater diversity in competition law in Europe more generally.

The Introduction to this book showed widespread support for uniform interpretations of competition provisions throughout the EU. There is plenty to be said for this. Uniformity has economic and political benefits (a sense of community and belonging, re-established and reinforced at the European level). Divergent national rules (including divergent national interpretations of EU competition rules) can have major efficiency costs, although they are hard to estimate. In theory, they can undermine the full benefit of comparative advantage, reduce competition between firms (raising margins) and reduce consumer choice. It may be that only EU law can create anything like a level playing field; uniformity should also prevent (or reduce) forum shopping and artificial distortions of capital flows.

Having said that, some of these benefits could be exaggerated. For example, uniform interpretation of competition law in Europe is unlikely to be an important contributing factor in lowering barriers between Member States (especially as competition assessments have to consider the legal and economic context throughout the EU in every deal). Uniformity also requires common enforcement policies and penalties,[180] and it is hard to resolve the unevenness in legal and practical implementation, even if it were desirable to do so.

In fact, as we have seen, diversity can have many benefits too. This is widely acknowledged in European law more generally,[181] but the same is also true in competition law in Europe. Given more freedom to come to diverse interpretations, Member States can better act:

> [I]n accordance with their own constitutional traditions and procedural and substantive rules when administering Community rules … accordingly, whereas centralised governance has the virtue of homogeneity, decentralised governance brings the benefits of proximity, flexibility and diversification – the virtue of heterogeneity. Policies are executed at the same level as

[180] 'Weak enforcement of antitrust rules or intellectual property rights in one nation may have a negative impact on the profits of foreign-based producers whose products are thereby squeezed out of the market. To the extent that these spillover effects are not based on market-clearing effects, but rather driven by strategic behaviour, suboptimal results must be anticipated.' Esty and Geradin (n 170) 34. See also Robert Baldwin, 'Regulatory Legitimacy in the European Context: The British Health and Safety Executive' in Giandomenico Majone (ed), *Regulating Europe* (Routledge, 1996) 100–01 (eg, the UK and Germany on health and safety rules for lorry drivers).

[181] 'For example, more decentralised jurisdictions can better reflect heterogeneity of preferences among citizens [assuming that this is jurisdictionally captured] … Multiple jurisdictions can facilitate credible policy commitments … Multiple jurisdictions allow for jurisdictional competition … And they facilitate innovation and experimentation.' Gary Marks and Liesbet Hooghe, 'Contrasting Visions of Multi-level Governance' in Bache and Flinders (n 44) 16.

> where the beneficiaries of that policy, or those subject to it, are located. Member States are able to adopt solutions that match local preferences. In particular, they can experiment with rules, processes and enforcement, allowing the emergence of 'better' solutions than those currently in place. Deregulation moreover yields access to a regulatory capacity far greater than that available to the Community. Finally, the default nature of decentralised governance renders this the model politically most acceptable.[182]

The economic benefits from facilitating trade within the EU are not the only values in our system. To the extent that EU law impinges upon the ability of Member States to organise competition in the way that best fits with their economic system and to achieve the public health (or other) aims that they desire, it generates (potentially) substantial costs. If regulatory activity, such as competition policy, is solely transferred to the EU, both it and the Member States may also end up with less legitimacy (see Chapter 3).

Diversity in competition enforcement in Europe may also be considered particularly beneficial where it leads to more flexibility and permeability to different ideas. In addition, diversity allows rules to be made more easily. Everyone's agreement is not needed. Within limits (including legal limits; see Part C), the relevant actors can strike the balance that they think is appropriate. This helps to avoid deadlock and facilitates joint work towards a common solution in the end by demonstrating the efficacy of an NCA's solutions to others.[183] In turn, this facilitates more transparent decisions. The cost of mistakes is also reduced. Bad choices mainly affect the Member State concerned rather than undertakings (and consumers) throughout the whole EU. Furthermore, diversity allows greater options going forward, which facilitates modification and re-negotiation as circumstances change. It also accommodates diverse legal systems and helps us to better cope with uncertainty.[184]

The outcome of this uniformity/diversity debate will tell us something about the EU's values (we might think about this as the balance between the market and other values). It also tells us something about an institutional choice at the heart of the EU (who should decide on the appropriate balance between the market and other values, the Member States or the EU). We are not trying to create a homogeneous European space. The Treaty on European Union makes it clear, in its Preamble, that while we are trying to deepen the solidarity between the peoples of Europe, we also respect 'their history, their culture and their traditions'. It is precisely Europe's falling out of line with national interests that led to the European Convention and the EU's later problems of legitimacy. It is time to re-consider this balance.

In fact, homogeneity can be a curse. Paradoxically, diversity can be 'a pre-condition for preservation of identity'[185] and liberate European competition authorities to openly

[182] De Visser (n 5) 19.

[183] Similarly, on the open method of co-ordination, see David Trubek, Patrick Cottrell and Mark Nance, '"Soft Law", "Hard Law" and EU Integration' in Gráinne de Búrca and Joanne Scott (eds), *Law and New Governance in the EU and the US* (Hart Publishing, 2006) 78.

[184] ibid 74. Once again, they discuss the open method of co-ordination, but similar points seem relevant in competition law generally, and for EU competition law and the ECN in particular.

[185] Oliver Gerstenberg and Charles Sabel, 'Directly-Deliberative Polyarchy: An Institutional Ideal for Europe?' in Christian Joerges and Renaud Dehousse (eds), *Good Governance in Europe's Integrated Market* (Oxford University Press, 2002) 291–92.

experiment with different aims and methods, which is especially important for resolving uncertainty. Network members become public laboratories.[186] Sharing outcomes generates a rich pool of learning experiences.[187] Comparing results against the best performers and re-defining aims or methods when those used by others are better should more rapidly lead to better practice and harmonisation[188] or, at least, informed divergence.[189]

This chapter argues that while uniformity has many benefits, so too does diversity (particularly as regards national preferences and encouraging innovation and experimentation), such that more diversity should be encouraged, rather than less. From the perspective of political science and economics, we have seen that it is hard to make general and permanent conclusions about precisely how much we need of each. Thus, an optimal system needs to be flexible enough to take account of both, in different issues and contexts.

Part B examines the mechanisms that allow for successful diversity. It is not enough that, theoretically, diversity is better if the mechanisms that should produce these improvements do not work in the competition arena. Before that, Chapter 3 looks at the independence of NCAs. Today, the conventional wisdom is that they should be independent. However, given the highly re-distributive nature of competition policy and enforcement, I argue that, in many systems, NCAs need more political input, not less (although this probably also depends on the socio-political and economic context of each Member State). In addition, Chapter 3 discusses the incentives of so many in the competition community to so overwhelmingly favour (independence and) uniformity in competition policy and enforcement in Europe.

[186] Fingleton in Ehlermann and Atanasiu (n 5) 180, although he assumes that these will only be competition considerations; similarly, see Böge in Ehlermann and Atanasiu (n 5) 167; Wouter Wils, *The Optimal Enforcement of EC Antitrust Law* (Kluwer Law International, 2002) 146; and Wils (n 65) 17, but *cf* 44–46.

[187] Similarly, see Claire Kilpatrick, 'New EU Employment Governance and Constitutionalism' in de Búrca and Scott (n 183) 125 (employment); Catherine Barnard and Simon Deakin, 'Market Access and Regulatory Competition' (The Legal Foundations of the Single Market: unpacking the premises, 2001) 4 (free movement). In different institutional settings, see de Visser (n 5) 349–50.

[188] Eberlein (n 60) 146–47; de Visser (n 5) 239; and Imelda Maher and Oona Ştefan, 'Competition Law in Europe: The Challenge of a Network Constitution' in Dawn Oliver, Tony Prosser and Richard Rawlings (eds), *The Regulatory State: Constitutional Implications* (Oxford University Press, 2010) 185. Similarly, for the OMC, see Trubek, Cottrell and Nance (n 183) 89.

[189] Budzinski, 'Pluralism of Competition Policy Paradigms' (n 62) 25–30; Donahue and Pollack (n 60) 75; and Charles Sabel and Jonathan Zeitlin, 'Learning from Difference: The New Architecture of Experimentalist Governance in the EU' in Charles Sabel and Jonathan Zeitlin (eds), *Experimentalist Governance in the European Union: Towards a New Architecture* (Oxford University Press, 2010) 4.