

CONVERGENCE IN COMPETITION FINING PRACTICES IN THE EU

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Abstract

The need for increased convergence in the decentralized processes for public enforcement of EU competition law has received much recent attention. Yet, this debate lacks a convincing explanation as to why the goal of effective enforcement warrants further harmonization. Focusing on fining practices for competition infringements, this article explores possible justifications to explain convergence; the legal or other means by which harmonization could be achieved; and the choice of converged practices that might be implemented. Whilst the strict necessity for convergence is less obvious, the evolving structure of decentralized enforcement would arguably benefit from increased alignment. Key concerns identified are the need to balance consistency with flexibility, and the reflection of an EU-wide consensus on fining practice.

1. Introduction

Ensuring application of the substantive EU competitive rules, “effectively and uniformly,” is the key objective of competition enforcement under Regulation 1/2003.¹ The Regulation sought, explicitly, to decentralize the enforcement of EU competition law, thereby involving national competition authorities (NCAs) and national courts to a greater extent in the application of these rules.² In line with the orthodox division of competences for implementation of EU law, the NCAs apply the standard substantive rules – specifically, Articles 101 and 102 TFEU – by reference to procedures and sanctions

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1. Council Regulation (EC) No 1/2003 of 16 Dec. 2002 on the implementation of the rules on competition laid down in Arts. 81 and 82 of the Treaty (O.J. 2003, L 1/1) (hereafter “Regulation 1/2003”), Recital (1).

2. European Commission, White Paper on Modernisation of the Rules Implementing Arts. 85 and 86 of the EC Treaty (Commission Programme No. 99/027), published 28 Apr. 1999. See also Case T-355/13, *easyJet Airlines Co. Ltd v. European Commission*, EU:T:2015:36, para 36: “... one of the main objectives of Regulation No 1/2003 . . . is to establish an effective decentralized scheme for the application of EU competition rules.”

governed primarily by national law. This bifurcated arrangement is considered to work well,³ yet national procedural autonomy has clear limits in this field.⁴ Amongst the areas where there have been calls for greater effectiveness and uniformity, this article focuses, specifically, on the claimed necessity for “increased convergence of the basic rules for fines” imposed by NCAs in respect of breaches of EU competition law.⁵

The aims here are to explore why such convergence might be necessary and how it can be achieved. The broad task of “boosting enforcement powers” of NCAs is high on the Commission’s policy agenda, and has been the subject of a public consultation process concluding in February 2016.⁶ Yet, beyond appeals to general notions of effectiveness and the desire to create a “level playing field” for enforcement activity, the Commission has failed to articulate why, exactly, further EU level harmonization is merited. Put simply, it is not entirely clear why the existing framework under Regulation 1/2003 should be considered deficient and thus in need of reform. This article attempts to identify a more precise and convincing rationale for further legislative (or other) action leading to greater convergence, and to explore means by which this might be achieved. Whilst divergences exist with respect to many aspects of the decentralized enforcement framework, our focus is the fining practices of the various competition authorities across the EU. In addition to the fact that fines are, arguably, the most tangible and visible output of enforcement activity, the fining practices of the Commission, in particular, have been subject to much judicial scrutiny and academic discussion in recent years.⁷ Thus, fining practices are both of considerable practical importance in their own right and also provide a robust lens through which to examine the question of convergence more generally.

After discussing the broader context of competition fines (section 2) and delimiting the meaning of convergence in this area (section 3), three key aspects are examined. In section 4, three rationales that may be advanced to explain the necessity of increased convergence of fining policies are assessed: the principle of effectiveness; the existence of an agency relationship between the Commission and NCAs; and the need to achieve a “level playing field” for

3. See e.g. Wils, “Ten years of Regulation 1/2003: A retrospective,” 4 *Journal of European Competition Law and Practice* (2013), 293–301.

4. See section 4.1 *infra*.

5. Commission Staff Working Document, Enhancing competition enforcement by the Member States’ competition authorities: Institutional and procedural issues (SWD(2014) 231/2), published 9 July 2014 (hereafter “Enhancing competition enforcement”), para 77.

6. See European Commission Press Release IP/15/5998, “Antitrust: Commission consults on boosting enforcement powers of national competition authorities,” published 4 Nov. 2015.

7. For a survey of contentious issues, see Solek, “Administrative and Judicial Discretion in Setting Fines,” 38 *World Comp.* (2015), 547–570.

sanctions. Then, in section 5, the legal or other means by which convergence might be achieved, from voluntary efforts to Union legislation, are addressed. Finally, in section 6, we explore the choice of converged fining practices that may be implemented. Whilst the strict necessity for greater convergence may be less obvious than its desirability, the article suggests that the evolving structure of decentralized enforcement can accommodate and would arguably benefit from increased harmonization of fining practices. The key concerns in devising a converged approach, therefore, are to balance consistency with sufficient flexibility, and to reflect a EU-wide consensus on fining practices, not merely a top-down “re-centralization” of sanctions.

2. Fines for breach of EU competition law: The broader context

Before considering the question of further convergence of the decentralized processes of the NCAs, the issue of fines for breach of EU competition law needs to be placed within its broader context. Fines perform both deterrent and punishment-focused functions,⁸ with particular emphasis upon use of fines to dissuade and thus prevent future breaches by defendants (*specific* deterrence) and other economic actors (*general* deterrence).⁹ Article 103(2)(a) TFEU refers to fines as the primary means to “ensure compliance with the prohibitions laid down in Article 101(1) and Article 102 [TFEU]”. The ECJ has taken a robust view of this provision, asserting that the substantive competition rules “would be ineffective if they were not accompanied by enforcement measures provided for in Article [103(2)(a)] . . . there is an intrinsic link between the fines and the application of Articles [101 and 102 TFEU].”¹⁰ The Commission thus considers that, “[f]ines on undertakings are a central tool in the enforcement of the EU competition rules for both the Commission and the NCAs.”¹¹ Where Articles 101 or 102 TFEU have been breached, fines should normally be imposed as a sanction.¹²

Article 23 of Regulation 1/2003 empowers the Commission to levy fines for breach of these provisions. The Commission has supplemented its

8. Case C-429/07, *Inspecteur van de Belastingdienst/P/kantoor P v. X BV*, EU:C:2009:359, para 33; and “Enhancing competition enforcement”, cited *supra* note 5, para 62.

9. Communication from the Commission on quantifying harm in actions for damages based on breaches of Art. 101 or 102 of the Treaty on the Functioning of the European Union (O.J. 2013, C 167/19), para 1.

10. Case C-429/07, *X BV*, para 36 (emphasis added).

11. “Enhancing competition enforcement”, cited *supra* note 5, para 62.

12. Case C-681/11, *Schenker and Co. AG*, EU:C:2013:404, especially paras. 40 and 46.

acknowledged broad discretion in this regard¹³ with Guidelines that indicate more precisely the method to be followed in determining the amount of fines.¹⁴ The initial motivation for introduction of fining guidelines in 1998 was to increase the transparency and impartiality of the Commission's fining practices.¹⁵ The further revision of this guidance in 2006 had the effect, most notably, of leading to a significant uplift in the size of fines imposed.¹⁶

The 2006 Guidelines specify a two-step methodology in setting the amount of fines. First, the "basic amount" is determined: this depends upon the value of sales affected, plus the gravity and duration of breach.¹⁷ Secondly, the basic amount may be adjusted upwards or downwards, to take account of aggravating factors – such as recidivism, refusal to cooperate with the Commission's investigation, or playing a leadership role within a cartel – or mitigating factors – such as substantially limited involvement, negligent commission of the breach, or the influence of State regulation.¹⁸ The 2006 Guidelines also foresee the possibility that a fine may be further increased to ensure sufficient deterrence.¹⁹ Article 23(2) of Regulation 1/2003 imposes a legal maximum on any competition fine of 10 percent of total turnover in the preceding business year of defendant undertakings, which is replicated in the 2006 Guidelines.²⁰ Finally, "exceptional" reductions are permissible where, in view of the "specific social and economic context . . . imposition of the fine as provided for in these Guidelines would irretrievably jeopardize the economic viability of the undertaking concerned."²¹ In practice, this provision is interpreted narrowly.²²

Use of fining guidelines has approval of the Union courts, which praise, *inter alia*, the resulting increase in legal certainty.²³ In setting the amount of fines the Commission is bound to comply with the approach of the 2006 Guidelines, in order to respect the principles of equal treatment and legitimate

13. Case C-3/06 P, *Group Danone v. Commission*, EU:C:2007:88, para 25.

14. Guidelines on the method of setting fines imposed pursuant to Art. 23(2)(a) of Regulation No 1/2003 (O.J. 2006, C 210/2) (hereafter "2006 Guidelines").

15. Guidelines on the method of setting fines imposed pursuant to Art. 15 (2) of Regulation No 17 and Art. 65 (5) of the ECSC Treaty (O.J. 1998, C 9/3), p. 3.

16. Geradin, "The EU Competition Law Fining System: A Reassessment", *TILEC Discussion Paper No. 2011-052* (Oct. 2011), 13–15.

17. 2006 Guidelines, paras. 12–26.

18. 2006 Guidelines, paras. 28–29.

19. 2006 Guidelines, paras. 30–31.

20. 2006 Guidelines, paras. 32–33.

21. 2006 Guidelines, para 35.

22. See e.g. Case T-236/01, *Tokai Carbon v. Commission*, EU:C:2004:118, para 375.

23. Case C-3/06 P, *Group Danone*, para 23.

expectations.²⁴ Nonetheless, divergence from this methodology is permitted where considered necessary in view of “the particularities of a given case or the need to achieve deterrence”.²⁵ Pursuant to Article 31 of Regulation 1/2003,²⁶ the Court of Justice has unlimited jurisdiction with respect to judicial scrutiny of fines, with full power to cancel, reduce or increase the amount imposed. In doing so, the Union courts may “substitute their own appraisal for the Commission’s,”²⁷ something which occurs with frequency.²⁸ Indeed, there is evidence that judicial challenges to the calculation of fines are more likely to succeed than against substantive findings of infringement,²⁹ although this may be reflect, primarily, the margin of discretion afforded to the Commission in substantive assessments. This plenary power of review is an important procedural safeguard to ensure effective judicial protection, given that it is an administrative agency – the Commission – rather than an independent judicial tribunal that imposes fines in the first instance. Although Article 23(5) of Regulation 1/2003 states that decisions imposing fines “shall not be of a criminal law nature,” the very substantial levels of fines imposed nowadays arguably fall within the purview of criminal law, with its attendant protections for rights of defence etc. Accordingly, the competence of the Union courts to engage in full merits review is vital to ensure compatibility with Article 6 of the ECHR and Article 47 of the EU Charter of Fundamental Rights.³⁰ Nonetheless, in reviewing competition fines, the Union courts too appear reluctant to depart from the methodology of the Commission’s Guidelines.³¹

Current EU law is less prescriptive when it comes to fines imposed for infringements at Member State level. A key innovation of Regulation 1/2003 was to empower – indeed, to *require* – the NCAs to apply Article 101 and 102

24. See Joined Cases C-189, 202, 205–208 & 213/02 P, *Dansk Rørindustri and Others v. Commission*, EU:C:2005:408, para 211, and Case T-38/02, *Groupe Danone v. Commission*, EU:T:2005:367, para 523.

25. 2006 Guidelines, para 37. Confirmed, *inter alia*, in Case C-194/14 P, *AC-Treuhand*, EU:C:2015:717, paras. 65–67.

26. Echoing the general power granted to the Union Courts pursuant to Art. 261 TFEU.

27. C-199/11, *Europese Gemeenschap v. Otis NV and Others*, EU:C:2012:684, para 62.

28. See e.g. Tridimas and Gari, “Winners and Losers in Luxembourg: A statistical analysis of judicial review before the European court of Justice and the Court of First Instance (2001–2005)” 35 *EL Rev.* (2010), 131–173.

29. Camesasca, Ysewyn, Weck and Bowman, “Cartel Appeals to the Court of Justice: The Song of the Sirens?” 4 *Journal of European Competition Law and Practice* (2013), 215–223.

30. Opinion of A.G. Sharpston in Case C-272/09 P, *KME Germany AG et al. v. Commission*, EU:C:2011:63, paras. 63–70, and Case C-199/11, *Otis*, para 63.

31. Lianos, Jenny, Wagner-von Papp, Motchenkova and David, “Judicial Scrutiny of Financial Penalties in Competition Law: A Comparative Perspective”, *CLES Research Paper Series* 4/2014 (May 2014), available at <papers.ssrn.com/sol3/papers.cfm?abstract_id=2542993>, 35.

TFEU, alongside national competition laws, in cases where anti-competitive conduct has a potential effect on trade between Member States. Yet Regulation 1/2003 engages in only light touch harmonization of domestic procedural rules, including rules on sanctions. Thus, Article 5 of Regulation 1/2003 – “a very rudimentary rule”³² – specifies that the NCAs “may take . . . decisions . . . imposing fines, periodic penalty payments or any other penalty provided for in their national law,”³³ – a provision that, despite its slightly ambiguous wording, can be interpreted to require the availability of fining powers.³⁴ EU law furthermore requires, more generally, that sanctions imposed by Member States to remedy breach of substantive EU law must be effective, proportionate and dissuasive.³⁵ At present, however, it is for each individual Member State to determine how, precisely, competition fines are calculated.

Thus, importantly, there is no EU level harmonization of how the calculation of fines is carried out, nor of the relevant factors to be taken into account in performing this task. Accordingly, NCAs may differ in their approaches to calculation of the basic amounts of fines, to adjustments for aggravating, mitigating and other relevant considerations, and to attribution of liability for fines to responsible legal entities. In some Member States, it is even the case that the NCA may not have the legal power to impose fines itself, but instead must bring enforcement actions before domestic courts with fining jurisdiction.³⁶ Challenges against fines occur through national structures for judicial review, while, in several Member States, fining powers are complemented by alternative sanctions, such as criminalization. Consequently, although the NCAs enforce the same substantive rules across the EU, the procedures for imposition and review of sanctions, and even the level and types of sanctions that may be imposed, vary widely.

Such heterodoxy is explainable by virtue of the general principle of national procedural autonomy, according to which, “in the absence of [EU] rules on

32. Commission Staff Working Paper, Report on the functioning of Regulation 1/2003 (SEC(2009)574 final), published 29 Apr. 2009 (hereafter “2009 Report”), para 197.

33. Regulation 1/2003, Art. 5.

34. This interpretation is supported, particularly, by the judgments in Case C-375/09, *Prezes Urzędu Ochrony Konkurencji i Konsumentów v. Tele2 Polska sp. z o.o., devenue Netia SA.*, EU:C:2011:270, referring to “empowerment” of NCAs pursuant to Art. 5 – and, conversely, the fact that NCAs are not empowered to take decisions outside the scope of that provision (paras. 21 and 27) – and in Case C-681/11, *Schenker*, particularly para 35, which refers, from the perspective of NCAs, to “the measures of application which are provided for by [Art. 5 of Regulation 1/2003]”. A contrary conclusion is, however, reached by Frese, *Sanctions in EU Competition Law*, (Hart Publishing, 2014), p. 13.

35. “Enhancing competition enforcement”, para 62; citing Case C-68/88, *Commission v. Greece*, EU:C:1989:339, paras. 23–25.

36. “Enhancing competition enforcement”, paras. 10–11.

this subject, it is for the domestic legal system of each Member State to designate the courts having jurisdiction and to determine the procedural conditions governing actions at law intended to ensure the protection of the rights which citizens have from the direct effect of [EU] law”.³⁷ Given the relative lack of EU level harmonization of the mechanisms and rules for enforcement of EU law, there is reliance upon – and deference to – domestic institutional arrangements and procedures. Such deference is not unqualified: the rules governing actions for safeguarding an individual’s rights under EU law must be no less favourable than those governing similar domestic actions (principle of *equivalence*) and must not render practically impossible or excessively difficult the exercise of rights conferred by EU law (principle of *effectiveness*).³⁸ In the context of competition enforcement at national level, the latter has proved potent as a basis for intervention.³⁹ Moreover, the notion of national procedural sovereignty does not preclude bottom-up convergence by Member States coalescing around a “European model,” nor does it prevent the Union legislature from subsequently requiring greater harmonization of procedural rules. Nonetheless, provided that domestic structures for competition fines respect the requirements of equivalence and effectiveness, considerable variance across the 28 distinct Member State regimes is permissible, and arguably unavoidable, absent further harmonization.

Two further centripetal forces must be noted. First, the European Competition Network (ECN), which comprises both NCAs and the Commission, provides “a forum for discussion and cooperation in the application and enforcement of [EU] competition policy.”⁴⁰ Expressly anticipated by Regulation 1/2003,⁴¹ the operation of the ECN is codified in a Commission Notice, which sets out, in particular, principles to guide the allocation of cases between members.⁴² Operation of the ECN is viewed as a particular success of the decentralized framework,⁴³ and it provides an important forum for coordination between NCAs⁴⁴ and general policy discussions.⁴⁵ Secondly, the Association of European Competition Authorities

37. Case 33/76, *Rewe-Zentralfinanz eG and Rewe-Zentral AG v. Landwirtschaftskammer für das Saarland*, EU:C:1976:188, para 6.

38. Case C-453/99, *Courage Ltd v. Bernard Crehan*, EU:C:2001:465, para 29.

39. See section 4.1 *infra*.

40. Commission Notice on cooperation within the Network of Competition Authorities (O.J. 2004, C 101/43) (hereafter “ECN Notice”), para 1.

41. See e.g. Regulation 1/2003, recitals 15–18.

42. ECN Notice, particularly paras. 5–30.

43. Kekelekis, “The European Competition Network (ECN): It does actually work well,” *EIPASCOPE 2009/1* 35.

44. Mateus, “Ensuring a more level playing field in competition enforcement throughout the European Union”, 31 *ECLR* (2010), 514–529, at 517.

45. Opinion of A.G. Mazak in Case C-375/09, *Tele2*, EU:C:2010:743, para 37.

(ECA) is a discussion forum for competition authorities in the European Economic Area, and thus encompasses the members of the ECN. Less formalized and of less day-to-day importance than the ECN, it has a notable achievement for our purposes: the issuance, in 2008, of best practice guidelines for fining.⁴⁶ As discussed below, the ECA fining principles have proved influential for amendments of NCA practice.

Finally, it is worth noting that fining practices are not the only issue in respect of which there is a potential need for greater harmonization. Indeed, in its 2014 Review of Regulation 1/2003, the Commission considered a wide range of areas where at least some Member States maintain suboptimal enforcement structures: from agency independence and adequacy of resources; to the availability of investigatory tools such as dawn raids; to leniency programmes; to decision-making powers and the ability to take necessary measures to conclude competition cases.⁴⁷ Thus, divergences in the mechanics of fining are only one element of a decentralized enforcement framework that, to borrow an analogy from a recent Editorial Comment in this Journal, may be in need of more comprehensive “family therapy” to address emergent growing pains.⁴⁸

3. The concept of convergence in fining policies

We turn now to consider precisely this issue of “increased convergence”⁴⁹ of NCA fining practices. The meaning of convergence in this context must first be explored. In essence, the Commission has been concerned, for some time, about appreciable differences in the calculation and levels of fines imposed by NCAs.⁵⁰ Although there is “a high level of voluntary convergence in the manner fines are being determined . . . with a large majority of authorities operating a similar basic methodology, . . . significant divergences still exist with regard to specific steps in the fines calculation”.⁵¹ As mentioned above, the precise method by which competition fines are calculated, and the factors that are taken into consideration, differ widely across the practices of the

46. European Competition Authorities, ECA Working Group on Sanction, *Pecuniary sanctions imposed on undertakings for infringements of antitrust law: Principles for convergence*, published May 2008 (hereafter “ECA Principles”).

47. “Enhancing competition enforcement”, cited *supra* note 5.

48. Editorial Comment, “Public enforcement of EU competition law: Why the European antitrust family needs a therapy” 52 *CML Rev* (2015), 1191–1200.

49. See *supra* note 5.

50. 2009 Report, para 204; reiterated in Commission Staff Working Document, Ten Years of Antitrust Enforcement under Regulation 1/2003 (SWD(2014) 230/2), published 9 Jul. 2014, para 216.

51. “Enhancing competition enforcement”, paras. 68–71.

various NCAs and not all authorities can impose fines directly. Consequently, in its 2014 Review, the Commission argued that it is “necessary to ensure that all NCAs have effective powers to impose deterrent fines on undertakings and on associations of undertakings”,⁵² and this might require, inter alia, better alignment of the basic rules for fines.⁵³

The Commission’s call for increased convergence thus occurs against a background where considerable alignment of fining practices has *already* been achieved, primarily as a result of bottom-up efforts by Member States. Van Cleynenbreugel observed that, in the classic understanding of the term, “[c]onvergence in and of itself implies a gradual alignment of national legal regimes.”⁵⁴ The 2014 Review identified a number of areas where alignment has occurred, including: use of a basic amount premised on value of sales affected; consideration of aggravating and mitigating circumstances; possible increases for deterrence; and use of a legal maximum for fine amounts.⁵⁵ The influence on voluntary convergence of the Commission’s fining practices is unmistakable, particularly in respect of the broad contours of developments at national level.

Accordingly, “increased convergence”, in the sense of the term deployed by the Commission, must mean something more than the widespread – if piecemeal – approximation of fining practices across Member States that has occurred to date. Thus, the 2014 Review identified notable continuing areas of divergence with respect to the specific mechanics of the fining practices employed by the NCAs, including: the bases used for calculating the basic amount of fines; the methods to take account of gravity and duration; interpretation of the maximum amount of fines; and the concept of undertaking, all of which could impact upon the actual amount of fines imposed.⁵⁶ Therefore, convergence as the term is used here must require greater consistency with respect to the specific rules/practices adopted, or the degree of take-up by Member States, or both.

Yet it is difficult – and, some might suggest, counterproductive – to suggest that convergence should equate to full uniformity in respect of the precise amount of fines. A degree of uncertainty is an integral element of the fining process as it is presently conceived of within the EU. As Advocate General Kokott has argued, “[t]he calculation of fines is not a mechanical process by which it is possible . . . to predict the fine down to the last decimal point”.⁵⁷

52. “Enhancing competition enforcement”, para 77.

53. *Ibid.*

54. van Cleynenbreugel, “Institutional assimilation in the wake of EU competition law decentralisation”, 8 *Competition Law Review* (2012), 285–312, at 300.

55. “Enhancing competition enforcement”, paras. 69–70.

56. “Enhancing competition enforcement”, paras. 71–76.

57. Opinion of A.G. Kokott in Case C-439/11 P, *Ziegler*, EU:C:2012:800, para 120.

The justification for such in-built uncertainty is the need to counter strategic behaviour by would-be antitrust infringers: that is, if undertakings can make rational *ex ante* calculations of the expected amount of any competition fine should anti-competitive conduct be discovered, fines may be conceived of more readily as a “cost of doing business,” and thus their deterrent effect would be diminished.⁵⁸ The plausibility of this argument may be questioned, particularly as it conflicts with the “rational actor” model that underlies the Commission’s own leniency programme.⁵⁹ Yet, under the current approach to fines at EU level, increased convergence cannot translate into excessive predictability or even predetermined amounts for fines, insofar as this would be self-defeating. As discussed, even within the relatively prescriptive framework of the 2006 Guidelines there is considerable scope for discretionary judgement, and thus variance in outcome.⁶⁰ Insofar as the Commission’s approach presents the most likely model for “Europeanization” – a not-uncontroversial suggestion, as considered below – then full uniformity in the amount of fines, as opposed to the mechanics of fining practices, appears to be anathema. It may, thus, be more appropriate to speak of coherence as opposed to uniformity of decentralized fining practices.⁶¹

Nonetheless, increasing convergence makes sense when viewed in light of the centralizing tendencies of EU competition law more generally – despite the apparent decentralizing logic of Regulation 1/2003.⁶² Lasserre locates the desire for greater coherence of sanctions within a broader ambition to secure “consistency, effectiveness and predictability of EU competition law enforcement,”⁶³ while Cengiz has described the pursuit of consistency as “almost . . . a dogma” here.⁶⁴ Accordingly, convergence in fining might be

58. Frese, *op. cit. supra* note 34, p. 107, and Lianos, Jenny, Wagner-von Papp, Motchenkova and David, “An Optimal and Just Financial Penalties System for Infringements of Competition Law: A Comparative Analysis”, *CLES Research Paper Series 3/2014* (May 2014), available at <papers.ssrn.com/sol3/papers.cfm?abstract_id=2542991>, at 65–66.

59. For a perceptive discussion of these conflicting trends, see Stephan and Nikpay, “Leniency theory and complex realities”, *CCP Working Paper 14–8* (2015).

60. Most obviously, in the explicit acceptance of potential divergence from the general methodology in para 37 of the 2006 Guidelines, cited *supra* note 14.

61. A distinction explored by A.G. Mengozzi in his Opinion in Case C-429/07, *X BV* EU:C:2009:130 - albeit the sometimes nebulous division between these concepts was acknowledged.

62. “[C]ontrary to what is said on the tin, the effects of Modernisation are more complex than pure decentralization and it brings together both centripetal and centrifugal forces”: Cengiz, *Antitrust Federalism in the EU and the US* (Routledge, 2012), p. 187.

63. Lasserre, “The Future of the European Competition Network,” Speech to the 21st St. Gallen International Competition Law Forum ICF, May 15–16 2014, available at <papers.ssrn.com/sol3/papers.cfm?abstract_id=2567620>.

64. Cengiz, *op. cit. supra* note 62, p. 118.

viewed as a necessary component of coherent decentralized enforcement, whereby there are a “multitude of enforcers throughout the EU,”⁶⁵ yet where each applies the same rules to broadly equivalent – and appropriate – effect.

4. The rationale for convergence in fining under EU law

The notion of increased convergence thus suggests a more coordinated (or even mandated) effort with respect to the methods by which competition fines are determined – with, consequently, increased similarity in fines levied across the EU. As such, it implies a concomitant departure from the norm of national procedural autonomy that has governed decentralized enforcement to date: so that centralized Union rules are substituted, to a greater or lesser extent, for diverse pre-existing national practices. Such a departure is not entirely unusual: for instance, in the context of the (notably prescriptive) directives on liberalization of EU electricity and gas markets, national regulators must be empowered to impose penalties for non-compliance with regulatory obligations, up to a *specified* maximum of 10 percent of annual turnover.⁶⁶ What is less clear, in the antitrust context, is the underlying rationale justifying the need for greater convergence of fining practices. The Commission, for its part, has sought to explain its tentative proposals for further harmonization on the basis of a general need “to ensure the effective enforcement of EU competition rules by the NCAs”.⁶⁷ Yet, it is not immediately obvious why greater convergence or even uniformity in terms of sanctions is necessary to render EU law fully (or more) effective, and/or how it may achieve that objective. In this section, we consider a number of potential rationales for convergence, offering an assessment of both the apparent necessity and desirability of further harmonization of fining practices across the EU on these bases.

4.1. *Arguments against convergence*

First, however, it is useful to note certain arguments *against* convergence, which reinforce the need for a convincing rationale for greater harmonization in this context. A basic objection is that there is nothing so special about competition law sanctions to merit further incursions into the conventional

65. “Enhancing competition enforcement”, cited *supra* note 5, para 42.

66. See Directive 2009/72/EC concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC (O.J. 2009, L 211/55), Art. 37(4)(d), and Directive 2009/73/EC concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC (O.J. 2009, L 211/94), Art. 41(4)(d).

67. “Enhancing competition enforcement”, para 6.

procedural sovereignty of Member States. Whereas, for instance, discrepancies between NCA leniency programmes may have direct negative effects on the system of decentralization, diversity amongst national sanctioning rules is less capable of frustrating these arrangements.⁶⁸ The principle of national procedural autonomy has been required to yield at numerous instances in competition enforcement, yet each departure has been grounded in broader arguments about the effectiveness of the application of EU competition law generally. The extent to which such an argument might succeed is considered below.

A second objection is based on the concept of regulatory competition, namely the process of rivalry between legislators or enforcers in different jurisdictions to produce the optimal regulatory framework. This suggests that the “best” fining practices are likely to emerge through a process of trial and error, whereby the testing of different solutions in diverse situations enables the most effective principles to be uncovered. Thus, Cseres has argued that, insofar as a single “converged” enforcement standard that encompasses all EU competition authorities is required, its development should occur organically through a competitive process, so that the most effective and/or efficient rules emerge.⁶⁹ Conversely, the type of top-down convergence envisaged by the Commission may rule out future “national experiments” in terms of fining procedures,⁷⁰ and thus may hinder beneficial “regulatory innovation”.⁷¹ This objection links particularly to the choice of converged standards, an issue considered further in section 6 below.

The desire to preserve scope for national preferences within the otherwise uniform enforcement structure provides another argument against mandatory convergence. Writing primarily from the standpoint of substantive EU competition law, Townley has argued in favour of so-called “coordinated diversity”, namely the idea that while the Union courts may dictate the law, the Commission and NCAs should be permitted to “experiment in the gaps” around these rules.⁷² Specifically, he argued that a degree of diversity in implementation is the most effective means to address continuing differences about the “aims and methods” of EU competition enforcement,

68. Van Oers, “Fines and the reform of European Competition Law: The view of a National Competition Authority” in Dannecker and Jansen (Eds.), *Competition Law Sanctioning in the European Union* (Kluwer Law International, 2004), p. 184.

69. Cseres, “Comparing laws in the enforcement of EU and national competition laws”, 3 *European Journal of Legal Studies* (2010), 7–44.

70. Frese, *op. cit. supra* note 34, p. 248.

71. Frese, *ibid.*, p. 253.

72. Townley, “Coordinated diversity: Revolutionary suggestions for EU competition law (and for EU Law, too),” 33 *YEL* (2014), 194–244, at 243.

accommodating (to a degree) national preferences whilst enabling the development and sharing of best practices.⁷³ Frese, focusing more narrowly on sanctions, put the issue in pointedly economic terms: decentralization of fining allows Member States to provide for sanctioning powers that satisfy domestic demand.⁷⁴ This is important insofar as there is a cultural dimension to sanctions.⁷⁵ Again, this objection links closely to the choice of standards, considered below.

Finally, there is an argument that “one size fits all” solutions do not always succeed across a variety of Member States with different institutional frameworks and legal traditions. For example, writing in the context of newer Member States, Cseres argues that the almost-direct transplantation of the Commission’s procedural rules and soft-law instruments for competition enforcement has not worked well in practice.⁷⁶ This objection relates both to the choice of standards and the legal or other means by which convergence is implemented, and may sound a more general warning in relation to the practical possibilities of greater harmonization of processes in the absence of a fully federal enforcement structure.

4.2. *Arguments in favour of convergence*

Though one should bear these objections in mind, nonetheless, increased convergence is firmly on the Commission’s agenda. Three potential explanations for the claimed need for further harmonization of existing decentralized fining practices will be explored: the principle of effectiveness; the possible existence of an agency relationship between the Commission and NCAs; and a “level playing field” argument reflecting the principle of equality. Notably, each possible rationale focuses upon a different element of the decentralized enforcement framework: emphasizing the requirements of substantive competition law, the role of Member States, and the position of defendant undertakings, respectively. It will be suggested that, ultimately, none of these would-be justifications presents an overriding case for the necessity of further convergence – but that does not mean that harmonization is not desirable here.

73. Townley, *op. cit. supra* note 72, at 221.

74. Frese, *op. cit. supra* note 34, p. 23.

75. Frese, *ibid.*, p. 256.

76. Cseres, “The European Competition Network as experimentalist governance: the case of the CEECs” Conference paper for the ECPR Standing Group on Regulatory Governance Conference, Barcelona, 25–27 June 2014, available at <reggov2014.ibe.org/bcn-14-papers/34-35.pdf> (accessed 12 Feb. 2016), at 16–17.

4.2.1. *The principle of effectiveness*

Since the Commission has explicitly linked the need for further convergence to the effective enforcement of EU competition law, it is logical to begin by considering the principle of effectiveness. As noted, effectiveness is one of two qualifying principles that condition the realization of EU law at domestic level. Specifically, effectiveness requires that Member States should not make the exercise of rights conferred by EU law practically impossible or excessively difficult.⁷⁷ In relation to sanctions imposed for breach of EU law, although generally Member States retain discretion in this regard, any sanctions imposed must be sufficiently “effective, proportionate and dissuasive.”⁷⁸ The principle of effectiveness also links up to the fundamental right to effective judicial protection, guaranteed by the EU Charter of Fundamental Rights,⁷⁹ and relevant to both defendants and victims in the competition context. At its core, the principle of effectiveness thus demands the availability of sufficiently robust national enforcement structures so that Member States can discharge their overarching obligation to secure the meaningful application of EU law within the domestic system.

As a legal principle – and particularly as it has been deployed by the Court of Justice – effectiveness has had a profound influence on the development of competition enforcement. Most notably, in *Courage* the Court invoked the “full effectiveness” of EU competition law to derive a distinct right for private parties to claim damages for losses caused by breach of the competition rules,⁸⁰ the potency of which has been reiterated repeatedly.⁸¹ Effectiveness has also made inroads in public enforcement. The language of effectiveness – specifically, effective application of EU competition law – permeates the entire text of Regulation 1/2003.⁸² Building upon this textual priority, in *VEBIC* the Court spoke of “the specific obligation on national competition authorities under . . . Regulation [1/2003] to ensure the effective application of Articles 101 TFEU and 102 TFEU.”⁸³ Although Article 35 of Regulation

77. Case C-453/99, *Courage*, para 29.

78. Case C-68/88, *Commission v. Greece*, para 24.

79. See e.g. Case C-432/05, *Unibet (London) Ltd*, EU:C:2007:163, particularly paras. 42–43.

80. Case C-453/99, *Courage*, para 26.

81. See e.g. Case C-295/04, *Vincenzo Manfredi v. Lloyd Adriatico Assicurazioni SpA*, EU:C:2006:461, paras. 60 and 90; Case C-557/12, *Kone AG and Others v. ÖBB-Infrastruktur AG*, EU:C:2014:1317, paras. 21 and 33; Case C-360/09, *Pfleiderer AG v. Bundeskartellamt* EU:C:2011:389, para 24, and Case C-536/11, *Bundeswettbewerbshörde v. Donau Chemie AG*, EU:C:2013:366, para 31.

82. See Recitals 1, 2, 5, 6, 8, 12, 19, 25, 26, 28, 30 and 34, and Arts. 7 and 35 of Regulation 1/2003.

83. Case C-439/08, *Vlaamse federatie van verenigingen van Brood- en Banketbakers, Ijsbereiders en Chocoledebewerders (VEBIC) VZW*, EU:C:2010:739, para 58.

1/2003 permits the domestic legal order to determine the structure and procedures of NCAs, the principle of effectiveness can nonetheless be invoked to expand, curtail or guide national enforcement jurisdiction to realize this objective.⁸⁴ In *VEBIC*, it thus generated a right for the Belgian NCA to participate in judicial proceedings against its own decisions, even though no such competence existed under national law.⁸⁵

Effectiveness was similarly a core concern in *X BV* and *Schenker*, both of which addressed the issue of competition fines. *X BV* involved efforts by the Commission to intervene in a domestic tax case, pursuant to Article 15(3) of Regulation 1/2003. In articulating an expansive right of intervention, the Court of Justice put effectiveness at the forefront, holding that, “[t]he effectiveness of the penalties imposed by the national or [Union] competition authorities on the basis of Article [103(2)(a) TFEU] is therefore a condition for the coherent application of Articles [101 or 102 TFEU.]”⁸⁶ *Schenker* is of even greater relevance. Here, the Court considered the circumstances in which NCAs might impose competition fines, or, conversely, decline to do so. Adopting a markedly restrictive approach to the apparent discretion of NCAs, it made repeated references to “the effectiveness of European Union law,”⁸⁷ the need “to ensure that Article 101 TFEU is applied effectively in the general interest,”⁸⁸ and the requirement of its “effective and uniform application”.⁸⁹ Accordingly, the Court curtailed the ostensibly broad sovereignty of NCAs – specifically, by limiting the circumstances where NCAs might refrain from imposing fines – in order to uphold the overriding (albeit amorphous) aim of effectiveness. In doing so, moreover, the Court arguably drew an implicit link between the ultimate goal of effective enforcement and the need for a degree of equivalence across the discrete institutional structures that comprise the decentralized framework under Regulation 1/2003.

Together, these cases demonstrate that the notion of the effective application of competition law may pertain both to the practices of the NCAs generally and, more specifically, to any fines imposed for breach. It is clear, therefore, that effectiveness is a pivotal principle here. The question, thus, is whether the obligations imposed by effectiveness alone may be sufficient to mandate harmonization of the detailed methods of fining practices amongst NCAs, as the Commission appears to envisage.

An effectiveness argument could be constructed as follows: when NCAs impose fines for breach, such fines must be sufficiently effective,

84. Case C-439/08, *VEBIC*, para 57.

85. Case C-439/08, *VEBIC*, para 59.

86. Case C-429/07, *X BV*, para 37.

87. Case C-681/11, *Schenker*, para 36.

88. Case C-681/11, *Schenker*, para 46.

89. Case C-681/11, *Schenker*, paras. 47 and 49.

proportionate and dissuasive. Fines must therefore be set at a level proportionate to the breach concerned, with sufficient deterrent impact, and the effect of which ensures effective application of competition law. The same substantive prohibitions apply across jurisdictions, and there is broad agreement about the factors that inform determination of fines. Thus, effectiveness may require not merely the levying of fines at some generally appropriate overall level, but, rather, that a more precise fine be imposed which reflects the relevant elements of the breach concerned. To achieve this degree of coherence, increased convergence of the methodology of calculating fines is necessary in order “to ensure that all NCAs have effective powers to impose deterrent fines”.⁹⁰ That is, to the extent that the precise calculation of the “correct” – and, thus, sufficiently effective – fine must necessarily reflect various specific factors, it is necessary to ensure that all enforcers are empowered (indeed, obliged) to take such elements into account in the determination of competition fines. In a decentralized enforcement structure with multiple parallel enforcers, in particular, there is compelling need for concrete coordination mechanisms to secure effective application across the EU.⁹¹ A parallel might be drawn to the detailed legislative harmonization of fining powers of energy regulators⁹² – an unusual step linked expressly to a desire to increase the effectiveness of domestic regulation to support development of the internal energy market.⁹³

The difficulty with this argument, however, is that it is not immediately obvious *why* fines ought to be calculated in a uniform manner across the discrete enforcement practices of numerous competition enforcers in order to secure effective enforcement of competition law. In the competition context, the principle of effectiveness has typically operated at a higher, more abstract level, although this is perhaps because it has often been the Court (not the Commission) that has taken the lead as “supranational standard-setter” here.⁹⁴ Most frequently, effectiveness has applied to prevent Member States from applying domestic rules with contradictory effect, while the Court has generally refrained from specifying the precise rule to be applied instead.⁹⁵ That is, the notion of the effective application of competition law has been

90. “Enhancing competition enforcement”, para 77.

91. See, to this effect, the Opinion in *X BV*, para 41.

92. See *supra* note 66.

93. See Directive 2009/72/EC Recital (33), and Directive 2009/73/EC, Recital (29).

94. Van Cleynenbreugel, *op. cit. supra* note 54, at 290.

95. For example, in Case C-439/08, *VEBIC*, effectiveness simply required that the NCA be empowered to participate in judicial proceedings; it retained discretion as to whether to exercise that right (see para 60). Similarly, in Case C-681/11, *Schenker*, effectiveness imposed certain constraints on the fining powers of the NCA, yet it too retained a considerable margin of discretion in exercising those powers.

relied upon primarily to articulate the parameters of domestic competition enforcement in broad (often negative) terms, rather than to specify (positive) national rules.⁹⁶

As the continued reliance on the doctrine of national procedural autonomy as the default approach to enforcement of EU law demonstrates, the mere fact of diversity in procedural terms does not imply incompatibility with substantive EU law. This is so, even if we consider the potential use of the effectiveness principle as an affirmative basis for harmonizing legislation, and not merely as a judicial tool by which to strike down or modify inadequate national measures. Thus, it is plausible that the principle of effectiveness might be breached where a NCA is not equipped with sufficient sanctioning powers to impose a meaningful penalty in response to an infringement of EU competition law; it is rather less plausible that the mere fact that different agencies adopt different approaches to the calculation of such a penalty, in itself, could impair the effective enforcement of EU competition law.

At most, therefore, effectiveness would appear to provide good grounds for requiring all Member States to equip their NCAs with sufficiently robust sanctioning powers. Yet, in the absence of convincing evidence that disparate fining practices substantially hinder the decentralized application of the competition rules in a meaningful manner – as distinct from the fairness point, considered below – the general principle of effectiveness appears to provide an insufficient mandate for a more general harmonization of the mechanics of fining practices across the EU. Specifically, it rather begs the question to assume that the principle of effectiveness mandates greater alignment of fining practices without explaining more fully how the latter engages the former. Thus, it is suggested that the rationale for any deeper form of convergence, beyond merely imposing a minimum level of sanctioning power for NCAs, must be sought elsewhere.

4.2.2. *NCAs as agents of the European Commission*

The second potential justification thus focuses on the constitutional structure of EU competition enforcement. Specifically, it posits an agency relationship between NCAs and the Commission with respect to national enforcement. The notion that the NCAs act as “agents” of the Commission is one that has found favour with commentators, but generally in a non-technical sense, to connote the expansion of enforcement jurisdiction under Regulation 1/2003.⁹⁷ Here,

96. See also Editorial Comment, *op. cit. supra* note 48, at 1196.

97. See e.g. Frese, *op. cit. supra* note 34, pp. 45–46. Conversely, political scientists are more likely to describe the Commission as agents of the Member States in this context: see, e.g., Lehmkuhl, “On Government, Governance and Judicial Review: The Case of European Competition Policy”, 28 *Journal of Public Policy* (2008), 139–159.

by contrast, we consider the idea that NCAs act as agents in a “truer” sense, i.e. that domestic enforcement of EU competition law takes place *on behalf of* the Commission, so that, for these purposes, the activities of the NCAs might be assimilated to the Commission’s enforcement jurisdiction. As a result, this argument suggests, the NCAs should be bound not only to apply substantive competition law, as is clear from Regulation 1/2003, but also to adhere to the procedural rules and standards of the Commission in its enforcement practice, including its approach to calculation of fines.

In order to explain this argument further by analogy, it is necessary to expand upon the concept of agency within EU competition law. Agency arises where one party has continuing authority to transact business on behalf and in the name of another.⁹⁸ The existence of such a relationship between two economic entities – principal and agent – provides an exception to the prohibition on anti-competitive agreements between undertakings in Article 101(1) TFEU.⁹⁹ Where there is sufficient “economic unity” between economic actors, only a single undertaking exists.¹⁰⁰ Two interlinked features of agency bring it within the purview of the broader single economic entity doctrine: the absence of a competitive relationship between principal and agent, and the ability of the principal to determine the policy that the agent intends to adopt on the market.¹⁰¹ Agents are thus considered to “operate as auxiliary organs forming an integral part of the principal’s undertaking,”¹⁰² losing their own distinctive “character as independent traders”.¹⁰³ Moreover, the principal may dictate the market conduct of its agent – for example, setting prices – without triggering application of Article 101(1) TFEU, because this is viewed as unilateral conduct.¹⁰⁴

The significance of classifying the NCAs as “agents” of the Commission, in a sense broadly equivalent to the agency concept, is to provide a rationale for convergence: specifically, it suggests that NCAs should apply the Commission’s well-developed framework for calculation of competition fines. Under this viewpoint, Regulation 1/2003 delegates some of the Commission’s *own* enforcement jurisdiction; so that, when NCAs enforce EU competition law, they act *as if they are the Commission*. By analogy with the antitrust case law, the NCAs are auxiliary organs of the Commission with

98. Odudu and Bailey, “The Single Economic Entity Doctrine in EU Competition Law”, 51 CML Rev. (2014), 1721–1758, at 1734.

99. See e.g. C-217/05, *Confederación Española de Empresarios de Estaciones de Servicio (CEEES) v. Compañía Española de Petróleos SA*, EU:C:2006:784.

100. C-217/05, *CEEES*, para 42.

101. Odudu and Bailey, *op. cit. supra* note 98, at 1726–27.

102. C-217/05, *CEEES*, para 43.

103. *Ibid.*, para 43.

104. *Ibid.*, para 44.

respect to decentralized application of the competition rules, whose activities thus form an integral part of the Commission's enforcement mission. Much as a principal may dictate the economic behaviour of its agent, the Commission may set the parameters of domestic enforcement activity to the extent that NCAs act with delegated authority. The logic of agency suggests that harmonization of sanctions is not merely permissible but actually essential insofar as the outcome of NCA enforcement should be *as if* enforcement is by the Commission.

Can the NCAs be viewed as agents in this sense? On the one hand, from the outset it was clear that, although Regulation 1/2003 sought to decentralize and expand EU competition enforcement, it did not challenge the Commission's "leading role".¹⁰⁵ The pre-eminence of its position is perhaps most obvious by reference to Article 11(6) of that regulation, under which, "[t]he initiation by the Commission of proceedings...shall relieve the competition authorities of the Member States of their competence to apply Articles [101 and 102 TFEU]." The NCAs thus lose their power to apply EU competition law where the Commission chooses to act,¹⁰⁶ albeit the loss of jurisdiction is temporary.¹⁰⁷ The Commission's priority is reinforced by Article 16 of Regulation 1/2003, which holds that NCAs and national courts cannot take decisions that run counter to Commission decisions applying Articles 101 or 102 TFEU – a structural inequality, insofar as the Commission is not bound by equivalent domestic decisions.¹⁰⁸

On the other hand, Regulation 1/2003 expressly empowers the NCAs to apply Articles 101 and 102 TFEU, seemingly in their own right,¹⁰⁹ and describes the existence of concurrent jurisdiction as "a system of parallel powers"¹¹⁰ – in contradistinction to delegated or derived powers. "Close cooperation" between the Commission and the NCAs is mandated,¹¹¹ implying greater reciprocity than one expects from an agency relationship. A political (i.e. non-legally binding) Joint Statement of the Council and Commission goes even further, asserting that, "cooperation between the NCAs and the Commission takes place on the basis of *equality*, respect and

105. 1999 White Paper, cited *supra* note 2, p. 5. See also Opinion in Case C-375/09, *Tele2*, para 47.

106. Case C-17/10, *Toshiba Corporation and Others v. Úřad pro ochranu hospodářské soutěže*, EU:C:2012:72, para 70.

107. Case C-17/10, *Toshiba*, para 79.

108. Confirmed in Case C-375/09, *Tele 2* and Case T-402/13, *Orange v. European Commission*, EU:T:2014:991.

109. Regulation 1/2003, recital (6) and Art. 5.

110. Regulation 1/2003, recitals (22) and (31).

111. Regulation 1/2003, Art. 11(1).

solidarity.”¹¹² Thus, in the 2014 Review, the Commission described the NCAs as “an essential pillar of the application of the EU competition rules,”¹¹³ reinforcing the idea of a standalone rather than subservient existence. The autonomy of the discrete elements of the ECN system was similarly emphasized in the *DHL* judgment.¹¹⁴

The operation of the ECN may belie this ostensible equality, yet it does not support an agency relationship as such. Most commentators agree that the ECN has a hierarchical structure – in fact if not in law – in which the leading policy role is afforded to the Commission.¹¹⁵ This primacy is underlined by the enforcement priority afforded by Article 11(6) of Regulation 1/2003: although the ECN operates on the basis that “each network member retains full discretion in deciding whether or not to investigate a case,”¹¹⁶ the Commission is the only one that may wrest jurisdiction if it chooses. Thus, Lasserre spoke about a “hub and spoke” structure, with the “hub” role given to the Commission, at least in its earlier stages.¹¹⁷ Conversely, as the ECN evolved, many of its activities have become more horizontal.¹¹⁸ Recent cases before the General Court confirm and illustrate the Commission’s pre-eminence, but suggest considerable deference to national enforcement where appropriate.¹¹⁹

Therefore, although the Commission enjoys a notable degree of priority and centrality, it is not possible to conclude that this amounts to an agency relationship in the sense required. As Mateus described, the existing arrangement is pitched between two extremes: a fully centralized approach involving a federal agency with a network of delegations in each Member State, representing the federal body; versus a totally decentralized approach involving only the NCAs and some co-ordinating body for EU-wide cases.¹²⁰ Neither represents the current structure – NCAs do not have fully free rein with respect to enforcement, but nor are they bound entirely by the

112. Joint Statement of the Council and of the Commission on the Functioning of the Network of Competition Authorities (15435/02 ADD 1), published 10 Dec. 2002, para 7 (emphasis added).

113. “Enhancing competition enforcement”, para 6.

114. Case C-428/14, *DHL Express (Italy) Srl*, EU:C:2016:27.

115. See, particularly, Townley, op. cit. *supra* note 72, at 222–225; also Cseres, op. cit. *supra* note 69; Cengiz, “Multi-level governance in competition policy: The European Competition Network” 35 *EL Rev.* (2010), 660–677, at 664.

116. ECN Notice, para 5.

117. Lasserre, op. cit. *supra* note 63, p. 1

118. Cseres, op. cit. *supra* note 76, p. 12.

119. See e.g. Case T-355/13, *easyJet* and Case T-201/11, *Si.mobil telekomunikacijske storitve d.d. v. European Commission*, EU:T:2014:1096, and contrast the greater emphasis on primacy exhibited by the Commission in Case T-402/13, *Orange*.

120. Mateus, op. cit. *supra* note 44, at 515–516.

Commission. Therefore, there is insufficient evidence to maintain that the hierarchical nature of the relationship between the Commission and NCAs mandates a single uniform approach to fining across the numerous enforcers, national and supranational, which are empowered to apply EU competition law at present.

4.2.3. A “level-playing field” and the principle of equality

The third and final argument to consider is the need for a so-called “level playing field” in fining practices across the EU, primarily to benefit defendants.¹²¹ The pursuit of a more level playing field for economic actors is a core goal for the revised enforcement framework under Regulation 1/2003: both by expanding the reach of uniform EU competition law, as distinct from disparate national rules; and ensuring a more consistent application of those prohibitions by various enforcers.¹²² This argument was also prominent in the passage of the Antitrust Damages Directive 2014/104, both in respect of victims of competition breaches *and* undertakings that infringe competition law.¹²³ The notion of a level playing field, here, implies a degree of homogeneity with respect to fines imposed by the various NCAs, which necessarily requires further convergence in comparison with existing approaches. This argument has two components: first, the need for greater clarity and certainty with respect to fines that may be imposed for breach of EU competition law across different jurisdictions; and second, a more abstract notion, grounded in the principle of equality, that equivalent breaches should attract equivalent punishment. Whilst the first aspect provides a relatively weak rationale for convergence, it is suggested that the principle of equality is a more convincing justification for harmonization in this context.

First, the notion of a level playing field engages the principle of legal certainty, which requires, *inter alia*, that rules of EU law must enable those

121. See European Commission Press Release IP/15/5998, “Antitrust: Commission consults on boosting enforcement powers of national competition authorities,” published 4 Nov. 2015.

122. Proposal for a Council Regulation on the implementation of the rules on competition laid down in Arts. 81 and 82 of the Treaty and amending Regulations (EEC) 1017/68, (EEC) 2988/74, (EEC) 4056/86 and (EEC) 3975/87 (COM(2000)582 final), published 27 Sept. 2000, pp. 7–8.

123. European Commission, Proposal for a Directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union (COM(2013)404 final), published 11 June 2013, p. 20, and Directive 2014/104/EU of the European Parliament and of the Council of 26 Nov. 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, O.J. 2014, L 329/1, recitals (9) and (10).

concerned to know, *ex ante*, the extent of obligations imposed on them.¹²⁴ Thus, it might be argued that undertakings are entitled to know in advance, as a counterpart to the substantive competition prohibitions, how public enforcers would address any breaches, including with respect to fines. Lasserre has spoken about “the blurred message sent out to the business community as well as to consumers,” insofar as the same substantive rules may see imposition of very different sanctions by public enforcers across different jurisdictions.¹²⁵ Such ambiguity is heightened by the largely discretionary nature of case allocation under the ECN Notice, which makes it difficult for undertakings to predict in advance the competition agency (or agencies) that may address their case.¹²⁶ Increasing legal certainty by reducing differences between the approaches in different Member States was also an express objective of the Antitrust Damages Directive 2014/104, albeit that legislation focused upon ensuring that consumers may exercise their right of private action where appropriate.¹²⁷

An argument based on legal certainty is weak in this context, however. Regulation 1/2003 – and especially Article 3 thereof, which establishes when and to what extent EU competition law is applied by NCAs – has clarified, largely, the substantive legal rules that apply to market behaviour, while the case law of the ECJ and General Court and policy guidance issued by the Commission expand upon the content of those prohibitions. Undertakings are, to a large extent, already aware of the limitations placed on economic freedom by EU competition law. Moreover, it is firmly established that breach of these provisions normally attracts a fine,¹²⁸ unless commitments are accepted in lieu.¹²⁹ Thus, the obligations imposed by EU law – and the possibility of sanctions – are generally known. The fact that the precise fine that may be levied is unforeseeable in advance is not a legal certainty problem, but is instead an inherent characteristic of antitrust fining practices. As the Union courts acknowledge, the adoption of fining guidelines by many competition agencies has increased certainty and clarity *ex ante* as to the likely fine to be imposed *ex post*.¹³⁰ To the extent that uncertainty continues, inevitably, to

124. See Case C-158/06, *Stichting ROM-projecten v. Staatssecretaris van Economische Zaken*, EU:C:2007:370, para 25.

125. Lasserre, *op. cit. supra* note 63. Conversely, one may argue that consumers, at least, know and care relatively little about antitrust sanctions, and so any uncertainty here is a minor concern.

126. See also Ost, “From Regulation 1 to Regulation 2: National enforcement of EU cartel prohibition and the need for further convergence” 5 *Journal of European Competition Law and Practice* (2014), 125–136, at 131.

127. Antitrust Damages Directive 2014/104, particularly Recital (9).

128. Case C-681/11, *Schenker*, para 40.

129. See Regulation 1/2003, Arts. 5 and 9.

130. See *supra* note 23.

exist, we might question whether infringing undertakings have any *legitimate* claim for greater certainty regarding the consequences of unlawful actions: much as Advocate General Kokott doubted, in her Opinion in *Kone*, whether we should worry about “black sheep” being dissuaded from participation in the internal market due to a robust right of private action.¹³¹

Yet, where the level playing field argument is understood as requiring equal punishment in terms of fining, and thus links to the principle of equality, it becomes more compelling. As a general principle of EU law, equality – also known as equal treatment or non-discrimination – requires, essentially, that comparable situations not be treated differently and that different situations not be treated the same.¹³² Applying this logic to competition fines, this suggests the need for a degree of equivalence and consistency with respect to punishment of similar infringements, and, conversely, principled divergence with respect to dissimilar breaches. This is particularly so given that, when NCAs enforce EU competition law, they apply the same uniform rules and must follow the interpretations of the Court of Justice¹³³ and the Commission.¹³⁴ Much as the 10 percent turnover cap for competition fines arguably reflects some view of the *cardinal* or absolute proportionality of sanctions,¹³⁵ consistency in the calculation of individual fines is necessary to ensure *ordinal* or relative proportionality in such cases.¹³⁶

Unlike the situation where NCAs apply domestic competition law, enforcement activity by different NCAs and the Commission pursues the same end.¹³⁷ As a matter of substantive antitrust, it is possible for different NCAs to find that different undertakings have committed, effectively, the *same* infringements. It is generally acknowledged that the severity of any competition breach depends upon, *inter alia*, whether it might be classified as hardcore or non-hardcore, alongside its market impact.¹³⁸ To the extent that it

131. Opinion of A.G. Kokott in Case C-557/12, *Kone AG and Others v. ÖBB-Infrastruktur AG*, EU:C:2014:45, para 68.

132. Joined Cases 117/76 & 66/77, *Ruckdeschel*, EU:C:1977:160, para 7; for a recent restatement in the competition context, see Case C-580/12 P, *Guardian Industries v. Commission*, EU:C:2014:2363, para 51.

133. Case C-226/11, *Expedia Inc. v. Autorité de la concurrence and Others*, EU:C:2012:795.

134. Regulation 1/2003, Art. 16(2).

135. Cardinal proportionality requires that a reasonable proportion be maintained between overall levels of punitiveness and the gravity of an offence: see von Hirsch, “Proportionality in the philosophy of punishment”, 16 *Crime and Justice* (1992), 55–98, at 83.

136. Ordinal proportionality requires that penalties be scaled according to the comparative severity of individual offences: see von Hirsch, *op. cit. supra* note 135, at 79.

137. Contrast the approach in Case 14/68, *Walt Wilhelm*, EU:C:1969:4, particularly paras. 3 and 11.

138. See the extended discussion of the components of competition fines in Lianos et al., *op. cit. supra* note 58.

is possible to identify consistent criteria to determine the appropriate level of fines, where NCA sanctioning practice varies widely in respect of equivalent breaches then, arguably, equality is not respected. That is, although undertakings are in comparable situations – for example, of a similar size, with equivalent gravity of breach, and/or the value of sales affected is similar – unequal treatment arises due to variance in sanctions. Surveying fining practices across the NCAs and the Commission, Geradin criticized the absence of “any valid justification” for the imposition of different sanctions for breach of the same prohibitions, depending solely on the enforcement agency involved.¹³⁹ At its core, the equality objection is fairness-based: as Dannecker & Kortek put the point robustly, “it contradicts any sense of fairness that different sanctions are provided for offences against the same provisions”.¹⁴⁰

This conclusion may be challenged in several ways. In the context of general criminal law, for instance, it is undeniable that different jurisdictions can impose different penalties for largely similar crimes. Indeed, it can even be the case – as in Germany, for instance – that different judicial institutions within the same federal system may impose different levels of punishment for equivalent crimes.¹⁴¹ Yet, the mere fact that such apparent unfairness exists in other areas of law enforcement does not excuse or legitimate its existence in competition law.

The remedial practice of the European Court of Human Rights provides a further challenge to the notion that the principle of equality requires equal fining levels across a multitude of jurisdictions with different social and market conditions. The ECtHR adjudicates on human rights breaches of often-equivalent severity by sovereign States that are equal in status under international law, with the power to award “just satisfaction” where appropriate. When awarding damages, however, it has sometimes differentiated between breaches committed by richer and poorer State parties, reflecting relative differences in the value of money.¹⁴² Applied to the competition context, this rationale might support the argument that fines should vary across Member States to reflect differing market sizes and underlying social and economic circumstances. Yet, the logic of this

139. Geradin, *op. cit. supra* note 11, p. 35.

140. Dannecker and Kortek, “General Report” in Dannecker and Jansen (Eds.), *Competition Law Sanctioning in the European Union* (Kluwer Law International, 2004), p. 99.

141. See e.g. Hörnle, “Moderate and non-arbitrary sentencing without guidelines: The German Experience,” 76 *Law and Contemporary Problems* (2013), 189–210, at 201–2, albeit “[t]he differences are not that pronounced.”

142. See e.g. the discussion in Law Commission and Scottish Law Commission, *Damages under the Human Rights Act 1998* (Law Com No.266/Scot Law Com No.180/Cm 4853), published Oct. 2000, particularly para 3.11.

differential approach does not conflict with greater convergence. On the one hand, damages awarded by the ECtHR aim at *restitutio in integrum*, that is, to return the claimant to the position that he/she was in before breach,¹⁴³ which is inherently likely to vary across a variety of domestic circumstances. On the other, current competition fining practices in most EU jurisdictions base the starting amount of fines on the value of sales affected, which, again, inevitably varies depending upon the size and value of the market(s) concerned plus the market share of defendants. In this manner, the “conventional” approach to competition fines already accounts for economic differences across the internal market.

The claim that the principle of equality provides a convincing rationale for greater alignment of fining practices across EU competition enforcement is not quite the same as arguing that it necessitates harmonization as a matter of law. To the extent that issues of equality have arisen with respect to competition fining practices to date, the principle has generally been invoked as a shield against fines levied by the Commission. It is thus typically deployed to ensure that, where several entities are each fined for participation in a single breach, the bases used for calculation of fines are equivalent.¹⁴⁴ Conversely, beyond the Commission’s duty to respect its own guidelines, the principle of equality has not been applied to require that any particular level of fines be imposed in comparison with other breaches.¹⁴⁵ In *Compagnie générale maritime*, the General Court asserted that “[t]he principle of equality of treatment cannot be invoked where there is illegality,” so that the fact that the Commission did not impose fines in respect of one competition infringement did not prevent fines being imposed on perpetrators of similar breaches.¹⁴⁶ That is to say: where an undertaking violates Article 101 or 102 TFEU, the principle of equality does not appear to generate any entitlement, in law, to a specific “ordinal” level of sanctions, even in comparison with equivalent breaches.

Following this logic, it is difficult to conclude that, if viewed purely in terms of its strict legal requirements, the principle of equality provides a convincing justification for more detailed harmonization of the framework deployed when setting competition fines. Nonetheless, such a development may be viewed as highly desirable,¹⁴⁷ particularly in light of the risk of unequal

143. *Ibid.*, para 3.19.

144. See e.g. Cases C-628/10 P & C-14/11 P, *Alliance One International*, EU:C:2013:606, and Case C-580/12 P, *Guardian Industries*.

145. Discussing the (limited) effect that the principle of equality has in the context of competition enforcement, see Voss, “The principle of equality: A limit to the Commission’s discretion in EU competition law enforcement?” (2013) *Global Antitrust Review*, 149–166.

146. Case T-86/95, *Compagnie générale maritime v. Commission*, EU:T:2002:50, para 242.

147. See e.g. Mateus, *op. cit. supra* note 44, at 526.

treatment – of basic unfairness, essentially – where similarly situated undertakings are subject to widely differing fining practices for breach of the same EU level prohibitions.¹⁴⁸ In determining whether further convergence should be pursued, it is necessary to balance the expected benefits of harmonization – greater coherence and fairness in implementing competition law – against the possible disadvantages considered above, as well as the reality that harmonization of domestic procedures is the exception within the EU framework. Although greater uniformity would generate certain advantages, it is not yet clear that these benefits would merit the considerable efforts that may be required to achieve further harmonization, nor that this is a situation where reliance upon national procedural autonomy is obviously deficient.

5. Mechanisms to achieve convergence

Having concluded that greater convergence in terms of fining practices may be desirable on balance, yet without finding any overriding explanation for its necessity as such, we turn to consider how this might be achieved. Three possible mechanisms, of increasing levels of ambition, are considered: voluntary convergence; convergence through Commission action; and convergence through Union regulation.

5.1. *Voluntary convergence*

Voluntary convergence occurs where “Member States decide to align their procedures and/or sanctions with a common EU model, despite the absence of harmonization by legislation.”¹⁴⁹ It is akin to self-regulation: Member States relinquish a certain quantity of national procedural autonomy by bringing their domestic frameworks into line with the centralized archetype. Voluntary convergence is, largely, a bottom-up rather than top-down process, relying upon efforts by individual Member States.¹⁵⁰ Nonetheless, it requires a degree of centralization, insofar as individual Member States necessarily coalesce around identifiable central standards. In the context of decentralized competition enforcement, moreover, the Commission often takes a proactive role in encouraging this ostensibly organic process to occur.¹⁵¹

148. See also Editorial Comment, *op. cit. supra* note 48, 1195.

149. “Enhancing competition enforcement”, para 48.

150. See e.g. Van Cleynenbreugel, *op. cit. supra* note 54, at 299–300.

151. Cseres, *op. cit. supra* note 69; Cseres, *op. cit. supra* note 76, pp. 14 and 19.

Considerable voluntary convergence of fining practices has already taken place, as the Commission recognizes.¹⁵² Numerous drivers of convergence can be identified: the effects of decentralization under Regulation 1/2003; comparisons with Commission procedures and those of peer NCAs; and cooperation through the ECN.¹⁵³ Indeed, Cengiz posits “a symbiotic relationship between the EU competition rules and the national procedural regimes . . . [that has] accelerated the process of voluntary harmonization.”¹⁵⁴ Frese, viewing the prospects of voluntary convergence in a particularly positive manner, suggests that, eventually, all disparities between NCA fining practices “may have levelled out as a result of ECN co-ordination.”¹⁵⁵ Voluntary convergence has much to recommend it: it respects and harnesses the sovereignty of Member States; it avoids the need for centralized political agreement, and thus the likely necessity for compromise; and the solutions adopted may well (though not inevitably) prove a better fit within the adoptive system.

As a vehicle by which to achieve convergence as envisaged here, however, reliance upon voluntary efforts has obvious limits. In particular, the absence of coordination or compulsion with respect to existing centripetal forces means that, almost unavoidably, voluntary convergence lacks the uniformity of outcome that the Commission appears to anticipate. Unless there is both a defined central standard and some coercion or necessity in terms of achieving this goal, it is unlikely that, with 28 domestic enforcement systems, such consistency is achievable.¹⁵⁶ This is borne out by experiences to date. At present, multiple centripetal forces already exist within the decentralized structure, including the activities of the ECN and ECA, alongside the presence of the Commission’s enforcement framework as a would-be archetype. Yet reliance upon voluntary convergence has not brought full consistency. Thus, as the 2014 Review notes, although there has been significant voluntary alignment of Member State procedures since the advent of Regulation 1/2003,¹⁵⁷ the degree of convergence differs, and divergence continues to exist even in relation to fundamental powers.¹⁵⁸ Moreover, the absence of any binding interpretation of the underlying concepts means that divergences may re-emerge when these rules are applied (or, especially, challenged judicially)

152. See *supra* note 55.

153. Cseres, *op. cit. supra* note 69, and Frese, *op. cit. supra* note 34, p. 216.

154. Cengiz, *op. cit. supra* note 62, p. 100.

155. Frese, *op. cit. supra* note 34, p. 245.

156. See also Editorial Comment, *op. cit. supra* note 48, 1195.

157. “Enhancing competition enforcement”, cited *supra* note 5, para 48.

158. *Ibid.*, para 60.

at national level.¹⁵⁹ If the Commission wishes to exceed what has been achieved to date, simply waiting for Member States to coalesce around some amorphous preferred standard is unsuitable.

5.2. *Convergence spearheaded by Commission action*

In light of the limited prospects of success for further voluntary convergence, to what extent might the Commission, acting alone, mandate greater convergence? As explained above, despite the decentralizing objectives of Regulation 1/2003, the Commission retains a central – arguably, hierarchically superior – position within the enforcement structure of EU competition law. Moreover, within this framework, the Commission has an acknowledged “special role . . . in ensuring the consistent application of the competition rules.”¹⁶⁰ Conversely, as the Court of Justice has recently clarified, the ECN does not have the power to adopt legally binding rules.¹⁶¹ Given the Commission’s contention that increased convergence is necessary, the question is whether it has the capacity itself to require such harmonization.

The key difficulty is that the Commission does not possess a full range of coercive powers in the sphere of competition, in order to impose deviation from the Member State prerogative of national procedural autonomy. Most obviously, it lacks a “hard” legislative power that would enable it to enact legislation requiring the NCAs to adopt harmonized fining practices. Article 106(3) TFEU, the most extensive legislative power of the Commission in the realm of competition, empowers it to adopt Directives or Decisions addressed to Member States, but only in respect of implementation of the first and second paragraphs of that provision. Any such legislation requires a plausible link to the application of competition law to public undertakings, undertakings granted special or exclusive rights by the State, and/or provision of services of general economic interest. This necessary connection provides little scope for use of Article 106(3) TFEU as a legal basis for legislating in respect of fining powers more generally.

Additionally, although the Commission’s enforcement guidance binds its *own* practices, these obligations do not extend to enforcement by NCAs.¹⁶² A distinction thus exists between substantive competition law, which unquestionably is binding at Member State level, and rules of a more procedural nature that condition the application of Articles 101 and 102

159. A problem discussed at length by Ost, *op. cit. supra* note 126.

160. 1999 White Paper, cited *supra* note 2, p. 31.

161. Case C-428/14, *DHL*, para 32.

162. See, e.g. Case C-226/11, *Expedia*, paras. 24–31.

TFEU by the Commission, which do not bind NCAs as such.¹⁶³ Consequently, although the Commission has adopted relatively comprehensive guidelines that shape and limit its own practice, the existence of such guidance has no mandatory effect on NCAs. Moreover, in the absence of more general legislative powers for the Commission – beyond the specificities of Article 106(3) TFEU – it has limited options, acting alone, to impose its preferred fining mechanics on Member States.

Perhaps the strongest antitrust-specific power of the Commission, and certainly the one that emphasizes its hierarchically superior position within the enforcement framework, is its prerogative of enforcement priority, reflected in Article 11(6) of Regulation 1/2003. Article 11(6) explicitly anticipates that the Commission may initiate proceedings where a case is being dealt with by a NCA, and its second sentence confirms that the Commission retains the power (and priority) to do so, although it must consult – but not obtain the consent of – the NCA concerned. This power is complemented by an obligation upon NCAs, under Article 11(4) of the Regulation, to inform the Commission at least 30 days in advance of, *inter alia*, any contemplated infringement decision – with, concomitantly, the likelihood of fines being imposed. This raises the possibility that the Commission might invoke its power of priority to initiate EU level infringement proceedings, and thereby short-circuit ongoing national proceedings where it deems the anticipated fine to be inappropriate.¹⁶⁴

As a means of securing increased convergence this is, undoubtedly, a circuitous one. Yet, were the Commission to deploy its powers in this manner occasionally, this could, in theory, bring two benefits. First, where a contemplated fine diverges markedly from standard EU-wide practice, it would provide a means by which to prevent such outliers from taking effect. Secondly, future fining by NCAs would take place in “the shadow of hierarchy,” that is, against a background where it is known that overt deviations might prompt Commission intervention.¹⁶⁵ This could have considerable dissuasive effect, and thus prompt further bottom-up convergence. Indeed, the ECN Notice expressly anticipates use of Article

163. Specifically in the context of the Commission’s *de Minimis* Notice, see Case C-226/11, *Expedia*, particularly para 33. A similar logic applies with respect to the effects of leniency programmes: see, e.g., Cases C-360/09, *Pfleiderer*, para 21; and Case C-557/12, *Kone*, para 36.

164. See the General Court’s view of these provisions read together in Case T-402/13, *Orange*, para 35.

165. For further exploration in the context of EU governance, see Héretier and Lehmkuhl, “The shadow of hierarchy and new modes of governance” 28 *Journal of Public Policy* (2008), 1–17.

11(6) where there is a need “to develop [EU] competition policy . . . to ensure effective enforcement”.¹⁶⁶

For two reasons, however, this theoretical possibility provides a weak basis to achieve convergence. First, the power to usurp the NCAs contained in Article 11(6) is an exceptional one, to be exercised sparingly by the Commission.¹⁶⁷ It is unlikely, in circumstances where the NCA’s substantive assessment with respect to application of Article 101 or 102 TFEU presents no problem, that the Commission would deem the matter sufficiently compelling to intervene simply because it disagreed with the mechanics of the calculation of the fine. The fact that there is already a degree of convergence with respect to fining practices makes it less likely, additionally, that a fine so egregiously out of line with the Commission’s own preferred approach might arise. As the General Court observed in *easyJet*, primary responsibility for reviewing decisions taken by NCAs should lie with national courts rather than the Commission;¹⁶⁸ this logic extends to the acceptability of fines. Unless the approach to Article 11(6) changes radically – and, for reasons both of comity and feasibility, this appears unlikely – it is doubtful whether this theoretical possibility would become practical reality. Second, again to the extent that rather detailed convergence is required, this approach is unlikely to secure full consistency in fining practices. Although the “shadow of hierarchy” concept may bring a harder edge to the effects, essentially this remains a situation of would-be voluntary convergence, which, as discussed, is likely to be insufficient here.

Finally, within the EU constitutional structure, the Commission possesses, almost exclusively, the right of legislative initiative. It is within this context that it may have the greatest likelihood of success in terms of increasing convergence – even though the Commission itself may not be involved in the formal legislative process in such circumstances.

5.3. *Convergence through Union legislation*

Thus, we turn to the option of convergence through concrete “hard” law: namely, the possibility that Union legislation might be enacted to oblige Member States to align fining practices. In addition to providing the strongest basis for comprehensive and consistent alignment, mandatory EU legislation may be the only means by which NCAs in certain Member States can be empowered fully to impose administrative fines for antitrust infringements.¹⁶⁹

166. ECN Notice, para 54(b).

167. See e.g. ECN Notice, paras. 50–54, and Case T-402/13, *Orange*, paras. 38–39.

168. Case T-355/13, *easyJet*, para 39.

169. In particular, Ireland: see “Enhancing competition enforcement”, para 53.

Several aspects must be considered: the potential legal bases for legislation, and whether further regulation would prove legally feasible or politically acceptable here.

5.3.1. *Legal bases*

Article 103(1) TFEU empowers the Council to enact “appropriate regulations or directives to give effect to the principles set out in Articles 101 and 102 [TFEU],” acting on a proposal from the Commission and after consultation with the Parliament. This legal basis is sufficiently broad to encompass harmonization of fining practices; indeed, Article 103(1) provided the legal basis for (relatively minimalist) harmonization under Regulation 1/2003. Insofar as there is an “intrinsic link” between application of substantive competition law and the imposition of fines,¹⁷⁰ such legislation appears to fall squarely within the purview of Article 103(1) TFEU. The key objection is, however, that it omits the Parliament from the legislative process, an omission that proved fatal in the context of the Antitrust Damages Directive 2014/104.¹⁷¹ Given that the envisaged legislation would necessarily impose detailed requirements on NCAs, and thus represent a considerable incursion into the domain of national sovereignty, it might be considered “undemocratic” to exclude the Parliament. Certainly, such a prospect was seen as politically untenable in the context of the Antitrust Damages Directive. Conversely, it might be argued that the subject matter of the proposed legislation here is more technical in nature, and thus unlikely to expose the sort of intra-Union disparities or generate the degree of controversy that arose in relation to the Damages Directive, which affected more politically sensitive aspects of private law.

An alternative legal basis could be found in Article 114 TFEU, which allows for “approximation” of Member State laws that “have as their object the establishment and functioning of the internal market.” Article 114 TFEU involves both the Council and the Parliament,¹⁷² and provides a wide-ranging basis for harmonization. Nonetheless, it requires that the legislation at issue demonstrate some reasonably plausible connection to the development of the internal market.¹⁷³ In the context of the Antitrust Damages Directive 2014/104, such a link was posited by virtue of the need to develop a level

170. See *supra* note 10.

171. Barling, “Collective redress for breach of competition law: A case for reform?”, *Competition Law Journal* (2011), 5–20, at 15.

172. Art. 114(1) TFEU.

173. As emphasized in Case C-376/98, *Germany v. Parliament and Council* (“*Tobacco Advertising I*”), EU:C:2000:544.

playing field for market participants.¹⁷⁴ The speculative claim that national variations with respect to private damages actions might operate as a disincentive to establishment and provision of services in Member States with more robust regimes for private competition enforcement can be queried,¹⁷⁵ yet it suggests that a relatively low threshold for plausibility in terms of reliance upon Article 114 TFEU is accepted.¹⁷⁶ Here, although somewhat abstract and tenuous in nature, it might be argued that greater coherence (and consistently adequate levels) in terms of fining across the Member States may enhance the effectiveness of Articles 101 and 102 TFEU, and thus further help secure the open and undistorted competition that underpins the internal market.

Finally, an additional potential legal basis might be provided by Article 116 TFEU, which empowers the Parliament and Council to enact legislation under the ordinary procedure where “a difference between the provisions laid down by law, regulation or administrative action in Member States is distorting the conditions of competition in the internal market and . . . the resultant distortion needs to be eliminated”. Intended as a “positive integration platform for the EU’s competition policy,” little use has been made of this legal basis to date despite its early inclusion within the Treaty framework.¹⁷⁷ However, its textual specificity would appear to make it a relatively strong candidate here, should the link to the functioning of the internal market as required by Article 114 TFEU prove simply too tenuous in this instance.

Articles 103(1), 114 and 116 TFEU each allow for adoption of either regulations or directives to secure greater convergence. It is suggested, however, that a regulation would be most appropriate to achieve the degree of harmonization required. In particular, the mechanics of devising and imposing fines are technical and specific: for this sort of task, the more prescriptive approach of harmonizing by regulation is usually preferable. As the Antitrust Damages Directive demonstrates, harmonization by directive can leave considerable leeway for national divergences, even where the same broad structures are in place:¹⁷⁸ this is essentially the situation that exists at present with respect to NCA fining practices, and which the Commission

174. Antitrust Damages Directive 2014/104, recitals (8)-(10).

175. See e.g. the earlier critique in Dunne, “*Courage* and compromise: The Directive on Antitrust Damages”, 40 *EL Rev.* (2015), 581–597, particularly at 582.

176. See e.g. Weatherill, “The limits of legislative harmonization ten years after *Tobacco Advertising*: How the Court’s Case Law has become a ‘Drafting Guide’”, 12 *German Law Journal* (2011), 827–864.

177. Schütze, *An Introduction to European Law*, 2nd ed. (Cambridge University Press, 2015), p. 249.

178. See Dunne, *op. cit. supra* note 175.

deems unacceptable. Conversely, the decision to proceed by directive rather than regulation may demonstrate greater respect for – and deference to – Member State sovereignty, and thus may be more acceptable, both in terms of the legal principles of subsidiarity and proportionality, and in order to generate political support. It is to these latter issues we now turn.

5.3.2. *Subsidiarity and proportionality*

Assuming a legitimate underlying policy objective, the principles of subsidiarity and proportionality impose additional requirements on EU legislative activity. The principle of subsidiarity mandates that, when enacting legislation, “the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.”¹⁷⁹ Whilst “the establishing of the competition rules necessary for the functioning of the internal market” is an exclusive competence of the EU,¹⁸⁰ so that the principle of subsidiarity may be of limited application,¹⁸¹ past legislative practice indicates that subsidiarity is relevant to competition enforcement at national level.¹⁸² Indeed, the principle of subsidiarity has been linked to the decentralizing logic of Regulation 1/2003 more generally.¹⁸³ Applying subsidiarity in this instance, it is arguable that its requirements are satisfied. In particular, the preceding discussion demonstrated that voluntary convergence, taking place on a Member State-by-Member State level, is unlikely to result in the degree of consistency that the Commission considers necessary. To the extent that a single “EU” approach is required, both theory and practice to date suggest that this must be devised and implemented, top-down, at EU level.

For similar reasons, the principle of proportionality would also, arguably, be satisfied. Pursuant to Article 5(4) TEU, proportionality requires that “the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties.” Jurisprudential formulations are more extensive: proportionality requires that the means chosen to achieve a legitimate aim must be necessary, suitable, the least restrictive amongst the available alternatives, and cannot entail a disproportionate disadvantage

179. Art. 5(3) TEU.

180. Art. 3(1)(b) TFEU

181. The wording of Art. 5(3) TEU suggests that subsidiarity does not limit the EU’s legislative capacity with respect to subject-areas within its exclusive competence.

182. See Regulation 1/2003, recital 34, and the Damages Directive 2014/104, recital 54. Note, however, the opposing view of Cengiz, *op. cit. supra* note 62, pp. 79–80.

183. Frese, *op. cit. supra* note 34, p. 8.

relative to the aims pursued.¹⁸⁴ Again, given the limitations of voluntary convergence, some measure of centralized coordination is clearly necessary in order to achieve the extent of harmonization desired. As a means by which to achieve this aim, a regulation or relatively prescriptive directive appears to be a suitable instrument, particularly since it is possible, in theory, to achieve uniformity in terms of both implementation and the content of the rules to be applied. Finally, the preceding discussion of means by which to achieve convergence suggests that there are unlikely to be less restrictive – whilst equally effective – alternatives available. If we accept that convergence is a legitimate goal, then proceeding by way of EU level legislation is a proportionate response.

5.3.3. *Desirability of convergence*

What may be more difficult, however, is to generate the necessary political support. In particular, we return to a fundamental objection noted above: that existing disparities with respect to fining practices may not provide a sufficiently compelling problem so as to merit such a notable incursion into national procedural sovereignty, or even a worthwhile use of (relatively scarce) legislative time. Insofar as the ECN, and the decentralized enforcement framework more generally, are premised upon equality between the Commission and the NCAs in the application of EU competition law, re-centralization of fining practices at EU level might be perceived as an attempt to undermine the autonomy and authority of the Member State agencies. Even if fining practices are to be construed, on the basis of the effectiveness argument, as comprising an integral aspect of the substantive antitrust prohibitions, it is not immediately obvious that the Member States will be prepared to cede jurisdiction. In the energy markets example, discussed above, greater harmonization had a strong ideological dimension linked to an emphatic (though not universal) belief in the necessity of liberalization. By contrast, it was as a result of political disagreements at Council level that the division of labour between NCAs and the Commission was not addressed in greater detail in Regulation 1/2003 itself.¹⁸⁵ Accordingly, achieving increased convergence requires a political commitment to, and acceptance of, greater centralization on the part of the Member States, in addition to the readily apparent enthusiasm of the Commission.

184. Case C-331/88, *The Queen v. Minister of Agriculture, Fisheries and Food and Secretary of State for Health*, ex parte *Fedesa*, EU:C:1009:391, para 13.

185. Hossenfelder, “Reform of European Competition Law: Changes in the cooperation between competition authorities and the effects on the sanctioning system” in Dannecker and Jansen (Eds.), *Competition Law Sanctioning in the European Union* (Kluwer Law International, 2004), p. 171.

6. The contours of convergence: Which standards?

Accepting that increased convergence may be desirable and feasible, perhaps the most contentious outstanding issue is the shape that such convergence might take. Given that this requires the identification and adoption of a defined single standard, what rules should be mandated to govern future fining practices, and how should these rules take effect?

The most straightforward approach, and one which appears to find greatest favour in competition jurisdictions internationally, is the adoption of uniform guidelines to inform and shape fining practices across the EU.¹⁸⁶ The use of fining guidelines would generate a degree of coherence in terms of the methodology applied by public enforcers, leading (at least in theory) to greater consistency in levels of fines imposed. Fining guidelines should, therefore, increase both convergence and certainty. Most NCAs already utilize some form of defined fining methodology,¹⁸⁷ so that, in most instances, what would be required is simple alignment of existing disparate practices. Moreover, many of the critiques of sentencing guidelines, particularly as these exist in the context of criminal law,¹⁸⁸ appear less relevant in relation to administrative fines levied upon economic undertakings with no question of custodial sentences, and where unlimited judicial discretion is arguably less necessary or defensible.

The first, most obvious model that might inform the development of centralized guidance is the Commission's own fining practice under its 2006 Guidelines. Use of Commission practice as a benchmark for comparison of competition enforcement processes across the EU is a common occurrence,¹⁸⁹ which fits with an established process of "Europeanization" of competition law, whereby, frequently, centralized EU procedures provide the model for domestic enforcement arrangements.¹⁹⁰ Whilst there is no single recognized international "best practice," the Commission's approach might credibly be seen as illustrative of the best practices globally.¹⁹¹ For its part, following the 2006 reforms, the Commission takes the view that the revised Guidelines work well, and it has no apparent plans for further revision.¹⁹² Clearly, from a

186. See e.g. the finding of Lianos et al., *op. cit. supra* note 58.

187. Commission Staff Working Document, Ten Years..., cited *supra* note 50, para 216.

188. See e.g. Stith and Cabranes, *Fear of Judging: Sentencing Guidelines in the Federal Courts* (University of Chicago Press, 1998), and Ashworth and Roberts, *Sentencing Guidelines: Exploring the English Model* (OUP, 2013).

189. Cseres, *op. cit. supra* note 69.

190. Cseres, *op. cit. supra* note 76, and Cengiz, *op. cit. supra* note 62, pp. 128–129.

191. Lianos et al., *op. cit. supra* note 58, pp. 12–14 and 127.

192. Commission Staff Working Document, Ten Years..., cited *supra* note 50, paras. 212–213.

practical – if not exactly a principled – perspective, simply adopting the EU level rules on sanctioning would provide the quickest and most straightforward means by which to realize greater convergence.¹⁹³ Moreover, the 2006 Guidelines are underpinned by a well-developed jurisprudence of the Union courts, which have elaborated upon the concepts and requirements within the Guidelines, thus increasing certainty and consistency.

It is not the case, however, that Commission practice should be accepted unquestioningly as the default.¹⁹⁴ First, the methodology set out in the 2006 Guidelines has received criticism from many commentators, particularly practitioners. Objections include its unpredictability;¹⁹⁵ the proportionality of sanctions, given the very high level of fines imposed;¹⁹⁶ and the (allegedly undue) deference afforded to the Commission when sanctions are challenged before the Union courts.¹⁹⁷ These critiques are, likewise, reflected to an extent in Member State practice, in which cases of deliberate and informed divergence can be identified.¹⁹⁸ The recurrent use of indicative percentage fines in Member State practice, for instance, suggests that NCAs may prefer a somewhat less Delphic approach to the formulation of fines than the Commission. This links to a further objection, turning upon the regulatory competition concept: namely, that the centrality (and perceived superiority) of the 2006 Guidelines may obstruct regulatory innovation, insofar as any deviation is perceived as misguided, regardless of its substantive merits.¹⁹⁹

An alternative basis for alignment may be found, instead, in the ECA Principles.²⁰⁰ As noted above, in 2008 the ECA devised and adopted model guidance for NCAs on fining, which, moreover, has prompted or informed subsequent voluntary revisions to the fining practices of numerous NCAs.²⁰¹ The key advantage of the ECA Principles is that, because they were devised in

193. See also Dannecker and Körtek, *op. cit. supra* note 140, pp. 99–100.

194. A viewpoint supported by, *inter alia*, Ost, *op. cit. supra* note 126, at 135.

195. Geradin, *op. cit. supra* note 11, pp. 31–36; Solek, *op. cit. supra* note 7; and Gilliams, “Proportionality of EU competition fines: Proposal for a principled discussion” 37 *World Comp.* (2014), 435–458, at 451.

196. Gilliams, *op. cit. supra* note 195; Forrester, “A challenge for Europe’s judges: The review of fines in competition cases”, 36 *EL Rev.* (2011), 185–207, at 206–207.

197. Forrester, *op. cit. supra* note 196.

198. For example, prior to its adoption of standalone fining guidelines in Oct. 2014, the Italian Competition Authority applied the Commission’s guidelines. The new guidelines are modelled primarily on the ECA Principles, and thus involve numerous departures from the 2006 Guidelines: see Ammassari, “Guidelines on the method of setting fines for infringements of competition rules: Key issues”, 3 *Italian Antitrust Review* (2014), 231–234.

199. Frese, *op. cit. supra* note 34, p. 255.

200. Principles developed by the Association of European Competition Authorities, cited *supra*, note 46.

201. See e.g. Lasserre, *op. cit. supra* note 63; Ammassari, *op. cit. supra* note 198; “Enhancing competition enforcement”, para 63.

a largely decentralized process involving input from numerous NCAs, they may reflect more accurately the existing consensus across the EU with respect to fining practices at national level. By incorporating these principles into a hard law instrument, the vagaries and inconsistencies of reliance upon voluntary convergence may be avoided.

It is difficult to anticipate, however, that more widespread adoption of the ECA Principles, as these exist currently, might generate the increased convergence desired by the Commission. Consensus, in this instance, also means compromise. Specifically, the ECA Principles reflect “general principles shared by the European Competition Authorities,” some of which are pitched at a notably high or abstract level, and many of which allow NCAs considerable flexibility with respect to specific rules adopted.²⁰² For example, the ECA Principles recommend the adoption of a maximum statutory fine, but do not specify the appropriate figure or percentage.²⁰³ Similarly, the ECA Principles suggest that the value of sales affected provides an “appropriate” (but not a necessary) basis for calculation of fines, but are notably vague in terms of how this value is to be calculated, and give little guidance as to what percentage of value of sales should be applied in particular circumstances.²⁰⁴ Thus, while adoption of the ECA Principles may provide a useful starting point from which NCAs can coordinate the broad brushstrokes of their fining practices, as currently formulated they are insufficiently precise and/or prescriptive to result in coherent alignment of the mechanics of fining across the EU. Moreover, the absence of judicially defined, binding interpretations as to the meaning of the provisions contained in the ECA Principles, coupled with their abstract nature, may lead to divergent interpretations of ostensibly harmonized concepts,²⁰⁵ and thus would likely require clarification from the Union courts.

It is suggested, instead, that any effort to increase convergence should reflect the benefits of both the Commission and ECA approaches. The content of the rules adopted should be sufficiently detailed to ensure that the same

202. See also the criticisms of Heimler and Mehta, “Violations of Antitrust Provisions: The Optimal level of Fines for Achieving Deterrence”, 35 *World Comp.* (2012), 103–119, who argue that the ECA Principles fail to address the problems of practical implementation.

203. ECA Principles, paras. 5–6.

204. ECA Principles, paras. 7–8.

205. For example, although a 10% turnover threshold was introduced in Germany in 2005 to bring antitrust fining practices in line with the Commission’s approach, the Federal Court of Justice interpreted the cap as a maximum fining level, which had the effect, in practice, that fines reaching that level can only be imposed only for the most egregious breaches: see Lianos et al., *op. cit. supra* note 58, pp. 156–158. See also the concerns raised by the Commission with respect to “significant divergences in the practical application of even largely corresponding provisions” by NCAs in its 2009 Report, para 204.

methodology and parameters apply across the EU. Whilst it may be necessary to incorporate a degree of flexibility, in order to enable NCAs to reflect local circumstances that may impact upon the operation or impact of sanctions within their jurisdiction,²⁰⁶ this should occur within the context of the agreed methodology. Member States should be fully involved in devising the details of convergence: any simple assumption that the 2006 Guidelines necessarily reflects superior practice is inappropriate. It might, therefore, be advisable to establish a working group on fining practices at EU level to delimit the agreed principles, including Member State representatives.²⁰⁷ It is important to reach agreement on all aspects of the fining calculation, including more peripheral elements such as determining the parameters of the undertaking subject to the fine (particularly problematic in the context of large organizations with multiple subsidiaries), and the interaction with leniency programmes.²⁰⁸ Devising optimal principles for sanctioning can be informed by economic learning,²⁰⁹ yet, ultimately, the choice of determinants for fining practice – for example, selection of a particular percentage turnover cap – is essentially abstract in nature,²¹⁰ and thus necessitates certain policy-based as opposed to purely legal choices.

Finally, it is necessary to consider how such principles should take effect within national systems. As the discussion in section 5 demonstrated, in order to secure a sufficiently coherent and meaningful increase in convergence, any guidelines enacted must have legally binding effect at Member State level. That is, NCAs (and the Commission) must be legally obliged to follow these principles in their fining practices in response to breaches of EU competition law. A broadly consistent application of the mechanics of fining is necessary to ensure that all fines imposed take account of the same relevant factors in determination of the magnitude of any penalty, and also to reflect a consistent approach to policy questions such as the need for deterrence, the liability of parent undertakings, and the extent to which broader social considerations may affect fines imposed. As discussed, the relatively prescriptive nature of this task suggests that harmonization by Regulation is perhaps the most straightforward approach. However, use of a Directive in this instance may

206. Lianos et al., *op. cit. supra* note 58, p. 107.

207. In contradistinction to the working group that preceded Regulation 1/2003, which comprised only Commission officials: see Wils, *op. cit. supra* note 3, at 293–294.

208. In relation to the latter, the ECN has devised a Model Leniency Programme, most recently revised in Nov. 2012, available at: <ec.europa.eu/competition/ecn/mlp_revised_2012_en.pdf>.

209. See e.g. Heimler and Metha, *op. cit. supra* note 201; Connor and Lande, “How high do cartels raise prices? Implications for optimal cartel fines”, 80 *Tulane Law Review* (2005), 513–570.

210. Lianos et al., *op. cit. supra* note 58, p. 37.

create greater scope for a more nuanced incorporation of fining principles into the domestic administrative structure.

Yet, as our assessment in section 3 of the ambiguous merits of certainty illustrated, calculation of competition fines is not an exact science. As cases such as *AC-Treuhand* demonstrate,²¹¹ an overly rigid application of any fining guidelines could result in fines set at inappropriate levels in certain instances. Therefore, whilst greater convergence will only be possible if competition authorities are legally obliged to align the mechanics of fining practice, there is a converse need to retain a degree of flexibility in law within any harmonized framework, both in order to tailor fines to specific situations and to avoid excessive predictability. Accordingly, any mandatory fining guidelines must allow for the exercise of discretion by NCAs in individual cases, and, potentially, even permit a departure from the specified principles in exceptional individual cases. In order to ensure that such discretion is not misused, NCAs should be obliged to explain and justify any departure from the approach of the guidelines with a sufficiently comprehensive statement of reasons in each instance.²¹²

7. Conclusions

This article has considered the prospects and options for achieving increased convergence with respect to fining practices of the NCAs and the Commission in response to antitrust violations across the EU. Undoubtedly, convergence must connote greater coherence and consistency in the approach to calculation of fines by diverse public enforcers, but it cannot require full uniformity of fining levels as such. Although it is difficult to maintain that convergence is *required* as a matter of EU law, its desirability is less contentious. In particular, a fairness-focused argument premised on the principle of equality supports greater convergence in order to ensure more equal treatment of defendants where the same substantive competition rules are applied by parallel enforcers.

Although considerable convergence has occurred organically, this article concluded, as the Commission itself has done, that increased convergence of the degree envisaged is likely to require a more concrete mandatory solution. On the one hand, this would represent a departure from the existing norm of a decentralized enforcement framework where the Member States are, ostensibly, equal partners with the Commission. On the other, calculation of competition fines is, largely, a technical task, arguably triggering fewer

211. Case C-194/14 P, *AC-Treuhand*.

212. Case C-194/14 P, *AC-Treuhand*, paras. 68–69 in particular.

concerns regarding national sovereignty than other areas of antitrust (such as private enforcement). On balance, it is submitted that increased convergence is achievable and advantageous both to the EU and to the NCAs.

What is less immediately obvious is the choice of standards to be adopted: the notion of the effective application of EU competition law, though powerful in many respects, provides little indication of which level of sanctions is required. Whilst the basic framework of fining methodology is relatively uncontroversial, it is clear that, for the further convergence to emerge, there must be agreement on more than the broadest contours of fining practice. Accordingly, across the various public enforcers, there is a need for consistency in terms of the more mechanical aspects of fining, even though distinct breaches prosecuted by diverse enforcers may still attract differing fines. Once the case for increased convergence has been made successfully at a political level, it is vitally important to develop a workable framework that can guide sanctioning across a multitude of differently situated enforcers, balancing the need for flexibility and sufficient consistency in practice. These are the key challenges ahead.