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Coding non-competition interests under Article 101 TFEU

A quantitative and qualitative study

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INTRODUCTION AND METHODOLOGY

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1. INTRODUCTION

1.1. Research question and approach

"I have never known much good done by those who affected to trade for the public good", stated *Adam Smith* in his 1776 *Wealth of Nations*, "it is an affectation, indeed, not very common among merchants, *and very few words need be employed* in dissuading them from it."¹ While Smith's work has fundamentally inspired the economic theory underlying (EU) competition law, this statement does not reflect the EU state of affairs. On the contrary, much ink has been spilled over the question of whether - and, if so, how - non-competition interests should or could be taken into account to justify an otherwise anti-competitive agreement prohibited by Article 101 TFEU. For lack of a better term, this process is referred to in this dissertation as the *balancing* of competition and non-competition interests ("balancing").²

The story behind Article 101 TFEU balancing is to a large extent the tale of the development of EU competition law and policy itself.³ It can be traced as far back as 1957 when Article 101 TFEU (ex. Articles 85 EEC and 81 EC) was first included in the Rome Treaty establishing the European Community. The vague wording of the Article suggests that there is room for consideration of non-competition interests, but it details neither the precise extent of such balancing nor the test guiding it. Over the years, the Council, Commission, EU Courts, and European Parliament have repeatedly endorsed consideration of non-competition interests – such as employment, environment, and culture – within the enforcement of Article 101 TFEU. They have emphasised that EU competition law is not an end unto itself, but rather an instrument for achieving the EU Treaty's economic and social goals.⁴ Despite this, the rationale, method, and limits for considering non-competition interests remain persistently subject to political discussion. Favouring consensus over clarity, the EU institutions and the Member States have never codified the Article's goals or defined a comprehensive balancing framework in EU primary or secondary law.

¹ Emphasis added. (Smith, 1776), 572.

² On the different types of balancing processes in EU competition law see Section 4.1.2 below and (Nicolaidis 2005), 125-126.

³ This is elaborated in Chapter 2.

⁴ For example, former Competition Commissioner (van Miert 1993), 1. Also see *Ibid.*

At the same time, in the past, this practice had rather limited consequences. The narrow competences of the EU in its early years resulted in comparably narrow areas of conflict between competition and non-competition interests. Moreover, the enforcement structure was well suited to address those conflicts. Under the old enforcement regime of Regulation 17/62, all agreements were notified to the Commission prior to their implementation. The Commission balanced competition and non-competition interests in a centralised and *ex-ante* manner. Although the Commission did not develop a set of balancing principles, it followed a fairly predictable form-based approach. It permitted certain types of restrictions and prohibited others according to formalistic rules of thumb.

Therefore, the debate over the role of non-competition interests was only revived around the turn of the millennium, when the Commission advocated a comprehensive three-pillared reform to the enforcement of EU competition law (the “modernisation”). As elaborated below, each of the three pillars of modernisation raised fundamental questions as to the role of non-competition interests in the enforcement of Article 101 TFEU.⁵

Under the first *substantive pillar of modernisation*, the Commission adopted a set of guidelines and notices introducing more stringent economic thinking to EU competition law and policy. Those policy papers offered a new interpretation of Article 101 TFEU, which considerably reduced the role of non-competition interests under the Article. According to this new approach, Article 101 TFEU must be understood as directed at the protection of competition as a means of enhancing consumer welfare. Subsequently, many non-competition interests that had previously been taken into account under Article 101 TFEU were no longer applicable in the Commission’s view, at least to the extent they could not be expressed in efficiency or monetary terms.

The Commission’s new approach encountered a two-front opposition: First, from a constitutional perspective, the compatibility of the Commission’s new approach with EU law is at the very least questionable. The limited role of non-competition interests cannot be squared with the EU Courts’ earlier case law on balancing. Legally-hierarchically, the Commission is not competent to alter the substantive scope of the EU competition provisions by means of soft-law policy papers. Second, from a political perspective, the development of the EU has created new areas of conflict between competition and non-competition interests. In particular, as more and more traditionally public sectors of the economy become subject to EU competition law, the

⁵ The three pillars of modernisation and their effects on balancing are elaborated in Chapter 2, Section 5.4.

Commission has to balance the protection of competition against the Member States' sovereignty as a reflection of their national public interests. The tension between competition and non-competition interests grew following the economic crisis of 2008 and the EU's political crisis at the beginning of the 2010s, bringing to the forefront new questions about the desirable boundaries of EU competition law.

To make matters even more complicated, the balancing also transformed in the wake of the procedural and institutional pillars of modernisation. In parallel with the substantive modernisation, Regulation 1/2003, which entered into force in May 2004, swept away the old centralised notification regime in favour of radical institutional and procedural reform. Under the *institutional pillar of modernisation*, the enforcement of Article 101 TFEU was decentralised; national competition authorities ("NCAs") and courts were entrusted with powers allowing them to fully apply Article 101 TFEU. To this end, NCAs exercise discretionary powers to balance competition and non-competition interests. Since the Commission's notices and guidelines are binding on the Commission alone, NCAs may adopt diverging interpretations where EU primary and secondary laws or the EU Courts' case law do not prescribe otherwise and subject to the duty of sincere cooperation anchored in Article 4(3) TEU.⁶ NCAs enjoy a wide margin of discretion to shape their national approaches to balancing on the basis of their respective legal, economic, and social traditions. Accordingly, this decentralisation, coupled with the lack of a clear balancing framework, bears the serious risk that Article 101 TFEU is not enforced in a uniform manner across the EU.

The *procedural pillar of modernisation* further aggravates this risk. Under the realm of Regulation 1/2003, undertakings no longer give notification of their agreements prior to implementation. Rather, undertakings must self-assess the compatibility of their agreements with Article 101 TFEU, and particularly, evaluate whether non-competition interests can justify an otherwise anti-competitive agreement. This self-assessment regime is based on the assumption that the principles governing the enforcement of Article 101 TFEU are sufficiently clear. In such circumstances, the lack of a coherent and uniform framework to guide balancing runs counter to the very premise of the self-assessment regime, thereby raising serious concerns about legal uncertainty and fragmentation weaknesses.

⁶ The impact of Article 4(3) TEU on the Member States' and national enforcers' discretion to adopt diverging balancing interpretations is further discussed in Chapter 3, Section 6.3.1 and Chapter 5, Section 2.2.

Against this background, this dissertation addresses the following research questions: *How has the balancing of competition and non-competition interests in the enforcement of Article 101 TFEU evolved between 1958 and 2017? How has this evolution affected the objectives of the enforcement, namely its effectiveness, uniformity, and legal certainty?*

Admittedly, an impressive array of legal scholarship has already explored the role of non-competition interests under Article 101 TFEU and the shift in the Commission's approach from doctrinal, historical, constitutional and economic perspectives.⁷ Yet, thus far only limited attention has been given to the manner in which the EU and national competition enforcers have actually administered this balancing. Studying balancing as it is applied in practice is especially important given the lack of a clear EU balancing framework. Under those circumstances, the dissertation asserts that the rules governing balancing must be deduced from the enforcement of Article 101 TFEU by the various competition enforcers.

To overcome this gap, the dissertation takes a novel combination of empirical, doctrinal, and normative approaches. The *first empirical stage* applies systematic content analysis ("coding") to *all* Article 101 TFEU proceedings investigated by the Commission, EU Courts and the NCAs and courts of five representative Member States⁸ (the "competition enforcers") - from the creation of the EEC in 1958 through 2017. Covering *more than 3100 proceedings*, the empirical insights offer a systematic quantitative and qualitative overview of balancing as applied in practice. As elaborated in Section 3.1 below, this empirical approach not only assists in identifying explicit forms of balancing in which the competition enforcers have overtly considered non-competition interests; it also sheds light on the so-called "dark matter" of balancing, namely the invisible forms of balancing triggered by the institutional setup and specific procedures of the competition enforcers. In particular, the dissertation uncovers balancing that has taken place in the course of the competition enforcers' detection of infringements, selection of enforcement targets, choice of legal instruments, and imposition of remedies.

⁷ For example, see (Frazer 1990); (Gyselen 1994); (Wesseling 1999), 77-113; (Ehlermann 2000); (Mortelmans 2001); (Schmidt 2001); (Monti 2002); (Gyselen 2002); (Odudu 2006), 160-174; (Sufrin 2006), 933-936; (Monti 2007), 88-123; (Schweitzer 2007); (Sammelmann 2008a); (Townley 2009), 141-176; (Parret 2009); (Petit 2009), 6-9; (Vedder 2009); (Lavrijssen 2010); (Prosser 2010); (Kingston 2011), 97-194; (Ginsburg & Haar 2012); (Witt 2012); (Gerber 2012); (Van Rompuy 2012); (Kieran 2013); (Lianos 2013); (Aleksander 2014); (Gerbrandy 2015); (Witt 2016b), 160-174; (Sauter 2016), 64-75; (Bailey 2016); (Claassen & Gerbrandy 2016); (Talbot 2016); (Schinkel & Spiegel 2016); (Kloosterhuis 2017).

⁸ The five Member States are France, Germany, Hungary, the Netherlands, and the UK. On the jurisdiction selection, see Section 3.2.2 below.

This empirical analysis relies on a functional comparative law approach.⁹ Hence, it acknowledges that EU competition law is applied by different enforcers, which vary in their legal and political structures, competencies and interpretations of the law. The comparative approach is sensitive to the implication of such diversity in the decentralised enforcement regime of EU competition law.

The *second doctrinal stage* builds on the empirical findings as a baseline to identify the modalities underlying the balancing practices of the EU and national enforcers.¹⁰ Aiming at answering the first part of the research question (“how has the balancing evolved between 1958-2017”), it lays down a comprehensive description of the development of the principles, rules, and concepts governing balancing over the years and across the Member States.

Finally, the *third normative stage* critically evaluates the balancing practices. Aiming to answer the second part of the research question (“how has this evolvement affected the objectives of the enforcement”), it approaches this exercise from an internal perspective. Accordingly, the dissertation uses the objectives of Article 101 TFEU enforcement as the standard for appraisal of the competition enforcers’ balancing practices.¹¹ Those objectives are stated in Regulation 1/2003, which is aimed at ensuring the effectiveness, uniformity, and legal certainty of enforcement (“normative benchmarks”).

1.2. Six balancing tools

Traditionally, Article 101(3) TFEU has been seen as the main Treaty provision for balancing competition and non-competition interests within Article 101 TFEU. However, Article 101(3) TFEU is certainly not the only legal tool to take account of non-competition interests. In fact, the empirical findings presented in this dissertation show that Article 101(3) TFEU, far from being the primary balancing tool, can be classified as one of six different types of *balancing tools*.

The dissertation examines *substantive balancing tools*, including (i) Article 101(3) TFEU individual exemptions/exceptions; (ii) Block exemption regulations (“BERs”); and (iii) Article 101(1) TFEU exceptions. These substantive balancing tools have been the focus of most previous scholarship.

⁹ On the functional method of comparative law see (Zweigert & Kötz 1992).

¹⁰ (Smits 2017), 5.

¹¹ The notion of the internal perspective of law, also known as the internal aspect of law, was developed in the work of Hart. See (Hart & Green 2012), 98-99, 314.

In addition, the dissertation studies how non-competition interests are being taken into account using *national balancing tools*, namely via (iv) unique national exceptions to Article 101 TFEU that originate from Member States' rules.

Finally, the dissertation assesses *procedural balancing tools* embedded in (v) the remedies imposed for an Article 101 TFEU infringement, which include accepting commitment or moderating fines; and (vi) priority setting choices of the various competition enforcers. Supported by empirical evidence, the dissertation submits that balancing not only takes place when applying Article 101 TFEU but also when a choice is made *not to apply* the Article to agreements that generate certain non-competition benefits.

The choice between the various balancing tools is not neutral. Each tool assigns a different weight and function to non-competition interests. In particular, the dissertation identifies three aspects in which balancing differs across the range of balancing tools: First, the *types of benefit* that can be taken into account (i.e., only economic efficiencies, or also broader non-economic benefits for society as a whole); second, the *types of balancing process* (i.e., the legal or economic standard for weighing competing interests); and third, the *intensity of control* (including evidential requirements). The dissertation, as the next section demonstrates, is structured around those six balancing tools.

1.3. Structure

The dissertation is structured as follows. *Chapter 1* introduces the research topic and context and sets out the definitions and the methodology guiding the dissertation. It justifies the narrow definition of competition interests advocated by this dissertation and elaborates on the scope and design of the empirical study. In addition, it defines the normative benchmarks that are used throughout the dissertation to evaluate the empirical findings.

Chapter 2 provides a historical overview of the development of Article 101 TFEU balancing to frame and identify the uncertainties surrounding it. The chapter begins with the EU primary and secondary law provisions, illustrating that they do not prescribe a clear balancing framework. Against this backdrop, the chapter shows that the balancing principles have been greatly shaped by the practices of the Commission and EU Courts. It affirms that the development of the balancing principles is best understood by sorting the practices into four enforcement periods, which are then explored throughout the empirical chapters of the dissertation. In addition to the developments at the EU level, the chapter devotes special

attention to the competition law setup and balancing approaches of each of the five Member States examined in the dissertation.

Chapters 3-8 present and evaluate the empirical findings. Each chapter provides an empirical and legal overview of one balancing tool, mapping the quantitative and qualitative aspects of balancing as applied in practice. It highlights the frequency of invoking and accepting the balancing tool, and analyses the three aspects of each balancing tool, namely the type of benefits that were taken into account, the balancing process, and the intensity of control. Moreover, each chapter examines the role of EU and national courts in scrutinising the application of the balancing tools. It illustrates that the courts have adopted diverse approaches to balancing, which have in turn left the Commission and NCAs with different levels of discretion to balance. Finally, each chapter evaluates the balancing practices against the normative benchmarks.

Chapters 3-5 first detail the enforcement of the *substantive balancing tools*. *Chapter 3* studies the enforcement of Article 101(3) TFEU individual exemptions/exceptions. It reveals a great divergence in the frequency with which the Commission, NCAs, and EU and national courts have invoked and accepted the Article 101(3) TFEU balancing tool, as well as their interpretations of the types of relevant benefits, the balancing process, and the intensity of control. Moreover, it uncovers the “death” of Article 101(3) TFEU exceptions in the Commission’s practice following modernisation.

Chapter 4 focuses on the balancing embedded in BERs. It submits that although the function of BERs is usually perceived as a means for reducing the administrative workload, they have also been used as a tool to balance competition and non-competition interests.

Chapter 5 is dedicated to Article 101(1) TFEU balancing tools. It shows that unlike most of the balancing tools that are based on EU primary or secondary law and which were largely developed by the Commission, the balancing tools of Article 101(1) TFEU are predominantly derived from the CJEU’s case law. This chapter reveals that the CJEU introduced those tools to counterbalance the Commission’s broad interpretation of what constitutes a restriction of competition falling within the ambit of Article 101(1) TFEU. The CJEU has held that agreements restricting the commercial freedom of parties might escape the prohibition of Article 101(1) TFEU if they are necessary for attaining social or efficiency-related goals.

In short, Chapters 3-5 demonstrate that prior to the modernisation, those substantive balancing tools facilitated much of the balancing debate. Yet, following modernisation, they have rarely been invoked or accepted. Nevertheless, this does not mean that non-competition interests no longer play a role. Rather, Chapters 6-8 reveal that the balancing has only *shifted* to national and procedural balancing tools.

Accordingly, *Chapter 6* studies the balancing entrenched in unique national rules of the Member States. Those *national balancing tools* bear significantly on balancing in the decentralised enforcement era, during which almost 90% of Article 101 TFEU proceedings have taken place in front of NCAs. Despite its limited length, this chapter is essential for highlighting the doubts about the compatibility of those national exceptions with EU competition law, a topic that has been largely overlooked by legal scholarship.

Chapters 7 and 8 examine the *procedural balancing tools*. *Chapter 7* maps balancing by way of imposing remedies, i.e. accepting commitments or moderating fines for an infringement. It demonstrates that, at times, the remedies imposed have gone beyond what was essential for the achievement of punitive, restorative or deterrence objectives, so as to give weight to non-competition interests. In fact, the empirical findings presented in this chapter illustrate that, following modernisation, the consideration of many non-competition interests that had previously been examined by applying the substantive balancing tools of Articles 101(1) and (3) TFEU, has shifted to the procedural stage of imposing remedies.

Chapter 8 investigates balancing by setting enforcement priorities. Setting enforcement priorities is an inherent feature of any administrative action. It is a necessary precondition for allowing the Commission and NCAs to make effective use of their scarce resources to ensure effective enforcement of Article 101 TFEU. At the same time, enforcement choices are not just about achieving compliance with Article 101 TFEU but are also for determining the scope and boundaries of the Article. To this extent, this chapter shows that the transition from a prior-notification to a self-assessment enforcement regime has entrusted the Commission and NCAs with a new balancing tool in the form of their priority-setting powers.

Finally, *Chapter 9* concludes and reflects on the empirical findings presented in the previous chapters. It reveals a remarkable three-fold shift in the role of non-competition interests in the post-modernisation era: first, a *shift in the types of balancing tools* employed in practice, reflecting a transition from substantive to procedural balancing tools; second, a *shift in the locus*

of the balancing tools, from EU- to Member States-based balancing; and third, a *shift from an active to a passive role of the EU Courts* in shaping the balancing principles. The chapter maintains that while the modernisation of EU competition law might have been successful in general, its effect on balancing has been counterproductive. More specifically, it has hindered the attainment of the very objective of Regulation 1/2003, that is, effective, uniform and legally certain balancing.

1.4. Contribution to the literature

This dissertation contributes to the existing scholarship on the role of non-competition interests under Article 101 TFEU in four ways: First, it examines the *role of non-competition interests on the basis of a quantitative and qualitative empirical data*. As mentioned, despite the extensive legal scholarship on this topic,¹² thus far only very limited attention has been given to the manner in which EU and national competition enforcers have actually administered this balancing in practice.

Second, the dissertation advances the very limited *empirical study of EU law in general, and EU competition law in particular*.¹³ To this end, this is the first study to present a complete qualitative and quantitative analysis of Article 101 TFEU proceedings.¹⁴ This analysis identifies trends and draws conclusions that cannot be observed in a framework of positive or normative legal studies, which are based on anecdotal evidence and case studies.

Third, the dissertation sheds new light on *national balancing practices*. The study of national enforcement is particularly significant following the entry into force of Regulation 1/2003, by which the vast majority of the public enforcement of Article 101 TFEU – and, consequently, of balancing - takes place in front of NCAs.¹⁵ Nevertheless, to date, national practices have been predominantly overlooked. Most of the scholarship has been confined to the balancing prescribed at the EU level, as applied by the Commission and EU Courts.¹⁶ The dissertation provides a unique perspective on the enforcement challenges in the era of decentralised enforcement.

¹² See footnote 7 above.

¹³ As elaborated in Section 3.1 below.

¹⁴ There is some quantitative empirical research on the enforcement of Article 101 TFEU. For example, (Carree et al. 2010) surveyed Commission decisions, and (Massadeh 2015) examined the practices of UK, French and German NCAs. In addition, (Colomo 2018) undertook a comprehensive study of the Commission and EU Courts formal enforcement practices.

¹⁵ See Chapter 2, Section 5.4.1.

¹⁶ See footnote 7, and (Gerber 2012), 89-91.

Fourth, the dissertation offers an all-inclusive overview of *substantive and procedural balancing tools*. While most of the previous scholarship has been confined to the balancing embedded in the substantive balancing tools of Article 101(1) and (3) TFEU, the dissertation also studies the invisible balancing entrenched in setting the enforcement priorities and remedies (the so-called “dark matter” of balancing).¹⁷

With the combination of the above four contributions, the dissertation establishes a fundamental point of reference for reflection on or reforming existing balancing practices. The next section sets the scene for the rest of the dissertation: It defines and justifies the definition of competition and non-competition interests used for the purpose of this dissertation.

2. COMPETITION AND NON-COMPETITION INTERESTS: A DIALECTIC APPROACH

The term *competition interests* is used in this dissertation in a narrow sense. It refers to the *protection of the competitive process and competitive structure as such*.¹⁸ Competition interests thus reflect an objective and independent economic value. This definition matches the premise of Regulation 1/2003, which declares that the objective of Article 101 TFEU is “the protection of competition on the market”.¹⁹

All other interests are referred to as *non-competition interests*. These interests include economic and non-economic values such as consumer welfare, economic efficiency, industrial policy, growth, market and social stability, market integration, environment, and culture. Hence, as further elaborated in Chapter 2, non-competition interests include both economic and non-economic benefits.²⁰ In particular, interests that are often attributed to the *objectives of EU competition policy*, namely economic freedom, market integration, and welfare, are classified as non-competition interests. Chapter 2 further shows that those three objectives encompass various political-societal values, none of which are directly related to the competitive process or structure

¹⁷ As elaborated in Chapter 8 and Section 3.1 below.

¹⁸ Competitive process relates to the dynamic interaction of firms during a specified time frame. Competitive structure refers to a static state of a market during a specific period in time. See (Nazzini 2011), 15.

¹⁹ Regulation 1/2003, Preamble 9. Also see Chapter 2, Section 7.

²⁰ See Chapter 2, Section 2.3.1. That section demonstrates that this definition matches the classification of benefits drawn up by a group of experts and summarised by the OFT Roundtable on Narrow versus Broad Definition of Benefits (2010). A similar definition is also followed by the UNCTAD report on Coherence Between Competition and Government Policies (2011), 3, which defines competition as “the pressure exerted in the market by different players in search of market shares and profits. It is a game of outdoing one another in winning customers, so that customers will purchase a given company’s goods or services”.

as such. The protection of competition interests is one means to achieve these outcomes or objectives, which might need to be balanced against other non-competition interests.²¹

This narrow definition of competition interests reflects a so-called *dialectic approach* to competition law, advocated by and detailed in the work of *Andriychuk*.²² Dialectics is a method of legal reasoning in which controversy between norms is considered inevitable and productive. Instead of searching for a definition of competition interests that reconciles the different objectives of Article 101 TFEU and of EU competition policy as a whole, the dialectic approach focuses on the discourse between the different objectives. Inconsistency between those social and economic objectives is regarded, in and of itself, as an engine that stimulates the development of competition law.²³ The manner in which competition interests interact with non-competition interests is used to reflect on the internal conflicts within the law and to understand the scope of Article 101 TFEU.

Notably, the dialectic approach to the definition of competition interests used in this dissertation departs from those used in previous scholarship on the role of non-competition interests in Article 101 TFEU. Many studies have incorporated into the notion of competition interests, or a comparable term, not only the protection of the competitive process and structure but also some of the objectives of EU competition policy and particularly economic welfare. Those definitions centre on the *outcomes or effects* of competition, and not on the competitive *structure and process* as such. For instance, *Semmelmann, Townley, and Van Rompuy* classify efficiency-related considerations as competition interests.²⁴ *Monti* opts for an even broader definition, including, in addition to efficiency, economic freedom and market integration.²⁵

These broad definitions represent a *holistic approach*. They do not focus on the core objective of Article 101 TFEU, namely the promotion of competition process and structure. Instead, they define competition interests with reference to the overarching objectives of the

²¹ See Chapter 2, Section 2.1.

²² See in particular, (Andriychuk 2010) and (Andriychuk 2012).

²³ (Andriychuk 2010), 156-157; (Lianos 2013), 30.

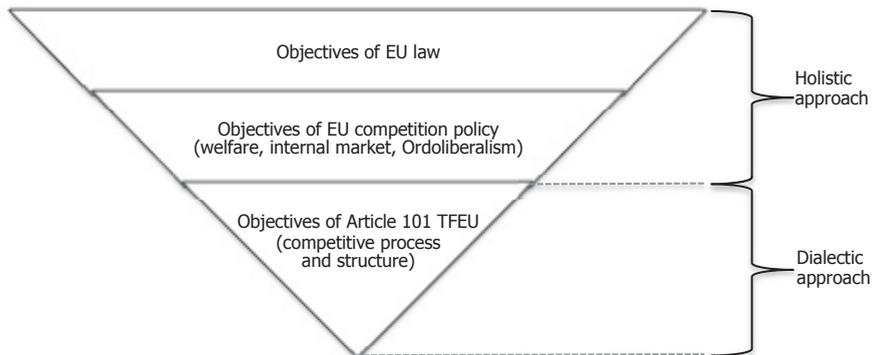
²⁴ (Semmelmann 2008b), 17 defines "non-competition goals" as those characterised by an absence of a cost-benefit analysis as their driving force; (Townley 2002), 1059 uses the term "public policy" to refer to all considerations relating to the collective goals of EU law, as identified by the Treaties. In (Townley 2009), 1 he defines the term "public policy objectives" by means of a particular negation to encompass all public policy objectives with the exception of economic efficiency; (Van Rompuy 2012), 8 defines "non-efficiency considerations" as a catchall concept covering any consideration that cannot be strictly confined to economic efficiency.

²⁵ (Monti 2002), 1064.

EU in general, and EU competition policy in particular.²⁶ Under a holistic approach, the definition of competition interests reflects an internal balance between the different economic and social objectives of EU competition policy. Unlike the dialectical approach, such a holistic definition entails a policy choice. It seeks to build up a harmonious homogenous hierarchy between the different objectives. Accordingly, agreements are classified as promoting competition interests to the extent they help attain a certain outcome, for instance, enhancing welfare, promoting the single market or protecting individual freedoms.

The differences between the dialectic and holistic approaches are illustrated by Figure 1.1. The figure shows that a dialectic approach defines competition interests and assesses balancing with reference to the narrow objective of Article 101 TFEU, i.e. the protection of the competition process and structure itself. In comparison, a holistic approach focuses on the general function the provision serves in the EU legal order.

Figure 1.1: Dialectic and holistic approaches



The objectives of EU competition policy are detailed in Chapter 2 Section 2.1 and the objectives of Article 101 TFEU in Chapter 2 Section 7

A dialectic approach to competition interests offers various advantages for the purpose of this dissertation. The definition provides a solid theoretical framework for assessing balancing. A dialectic approach is based on the assumption that no economic or legal theory is sufficiently rigid to provide a precise description of balancing practices. Because the objectives of EU competition policy are policy preferences that cannot be prioritised by objective economic models,²⁷ a reliance on a holistic approach could not provide an unequivocal yardstick to reconcile the clashing interests.

²⁶ (Andriychuk 2012), 359.

²⁷ (Lianos 2013), 3; (Talbot 2016), 264.

Instead of trying to *resolve* conflicts between competition and non-competition interests, a dialectic approach aims to *understand* the manner competition is balanced vis-à-vis other interests.²⁸

A dialectical approach also corresponds to the systematic content analysis methodology deployed in this dissertation and detailed in Section 3 below. A dialectical approach deconstructs the legal and economic notions guiding balancing into basic building blocks, which can be recorded empirically. Because a dialectical approach defines competition interests as a self-standing value, competition and non-competition interests can be accurately identified. A holistic approach, on the other hand, is unsuitable for a systematic content analysis. Since the three objectives of EU competition policy are broad and vague, a holistic definition requires discretion in deciding how to classify an agreement. As *Ezrachi* aptly observed, it is possible to broaden the objectives of EU competition policy to include almost every interest. Comparing the characteristics of competition law to a sponge, he notes: “the ability to stretch or narrow its [competition law’s] application and harness it, at times, to protect a wide range of social goals. They illustrate the possible ‘instrumentalisation’ of competition law: advancing goals which may go beyond the competitive process as understood by many. When coupled with politically dependent enforcement structures, *the ‘sponge’ may well become arbitrary and less predictable.*”²⁹

Moreover, a holistic approach cannot empirically capture situations of conflict amongst the three objectives of EU competition policy themselves. For instance, a price-fixing agreement between manufacturers from several Member States might be classified as anti-competitive since it increases prices and impedes consumer welfare (the welfare objective) but pro-competitive since it makes it easier to trade across borders (the market integration objective). Therefore, a holistic approach is unsuitable to pinpoint and categorise balancing between the three objectives.

Finally, a dialectical approach to competition interests is also better suited to capture the differences between the balancing practices of the EU and national enforcers. There is no consensus among the Member States that the three objectives of EU competition policy guide the enforcement practices of their NCAs.³⁰ A prominent example is Germany, which declares that it focuses on the competitive process rather than on the consumer welfare standard

²⁸ (Andriychuk 2010), 156-157; (Lianos 2013), 30.

²⁹ Emphasis added. (Ezrachi 2016), 59.

³⁰ See Chapter 2, Section 6 and Chapter 3, Section 6.2.3. Also see ICN Competition Enforcement and Consumer Welfare (2011), 6-8.

advanced by the Commission.³¹ Therefore, a holistic definition classifying the three objectives as competition interests may go against national interpretations. A narrow definition of competition interests provides a more nuanced analysis of national practices.

In any event, it must be emphasised that the dialectic approach to the definition of competition interests does not deny that the three objectives of EU competition policy, or any other interest for that matter, are or should be the overarching aims of EU competition policy, or of Article 101 TFEU. It merely recognises, from a methodological point of view, that the objectives might not be entirely consistent with the promotion of competition interests or with one another. All non-competition interests, including the three objectives of EU competition policy, are recorded in the empirical study. The dialectical approach, consequently, does not preclude including or excluding them from further analyses.

3. SYSTEMATIC CONTENT ANALYSIS

In his 1928 inaugural address as President of the American Association of Law Schools, *Oliphant* called for reliance on empirical methods to study the function of US law. "Our case material is a gold mine for scientific work", he observed, yet "it has not been scientifically exploited".³² From the late 1950s, American scholars have used empirical methods to explore legal questions, resulting in an impressive collection of studies.³³ This stream of legal scholarship is rooted in Legal Realism, which rejects Legal Formalism's search for independent doctrines of law that constrain legal actors.³⁴ No such parallel development took place in Europe. *Oliphant's* statement still holds true for the legal study of EU law in general, and of EU competition law in particular. Beyond its direct contribution to the study of the research questions, therefore, this dissertation aspires to support the empirical endeavour of understanding EU competition law.

The dissertation adheres to one form of empirical legal research, that is, a systematic content analysis of Article 101 TFEU proceedings. Systematic content analysis of legal texts can be described as a hybrid of traditional legal methodologies and empirical research, or as a unique legal empirical methodology.³⁵ It consists of recording features of legal documents - in

³¹ (Heitzer 2008), 3.

³² (*Oliphant 1928*), 161.

³³ (Hall & Wright 2008), 68-69.

³⁴ (Hall & Wright 2008), 77-79. More generally see (*Oliphant 1928*).

³⁵ (Hall & Wright 2008), 64.

this dissertation: decisions and judgments - and drawing inferences about their use and meaning. This technique is also labelled as *coding*.³⁶

Because systematic content analysis is a technique rarely used in European legal scholarship, it may be worth dedicating a few words to the methodology guiding the coding and the design of this study. For this purpose, after presenting the promises and pitfalls of systematic content analysis, this section describes the best practices of such method as identified by *Hall and Wright*.³⁷ According to those best practices, this study is based on the following three stages: (i) case selection: creating a database of cases on the basis of robust selection criteria; (ii) coding: coding cases in a consistent and reliable manner, according to pre-defined protocol; and (iii) reflection: drawing inferences from the coding process on the basis of normative benchmarks. This section discusses the first two stages. The normative benchmarks are detailed in Section 4 below.

3.1. Promises and pitfalls of systematic content analysis

This dissertation applies systematic content analysis to identify the modalities of balancing competition and non-competition interests in public enforcement proceedings involving Article 101 TFEU. One of the unique characteristics of content analysis, which distinguishes it from other more qualitative or interpretative methodologies, is its attempt to meet the standards of scientific research methods. Systematic content analysis offers a scientific understanding of the balancing practices themselves, by way of generating falsifiable and reproducible knowledge about the competition enforcers' practices.³⁸ It provides a tool for testing hypotheses on the basis of theory, ensuring the reliability, validity, and generalizability of the results. In this dissertation, it assists in identifying previously unnoticed balancing patterns, which are further interpreted using doctrinal and normative methodologies.³⁹ Moreover, it is used to verify or refute theories on balancing that have been based on anecdotal or subjective studies.⁴⁰

Systematic content analysis provides an analytical method for understanding large numbers of proceedings. This is based on the assumption that each of the proceedings has roughly the same value. It therefore represents a departure from traditional legal analysis, which tends to focus on leading cases or precedent. This methodology views the decisional practices of

³⁶ (Kort 1963), 134; (Tyree 1981); (Hall & Wright 2008), 64. See more generally on the method of systematic content analysis in (Neuendorf 2017).

³⁷ (Hall & Wright 2008), 79, 100-120.

³⁸ (Hall & Wright 2008), 64; (Neuendorf 2017), 16-17.

³⁹ (Hall 2011), 64, 99.

⁴⁰ (Hall & Wright 2008), 100.

competition enforcers as not only a reflection of the law *but rather as the law itself*.⁴¹ This dissertation asserts that this is predominantly true with respect to the enforcement of EU competition law. As detailed in Chapter 2, the wording of the Treaty tells us little about the particularities of balancing, and the EU Courts have not yet supplied an overall balancing framework. Similarly, the non-binding Commission's guidelines and notices outline only a general normative perspective. In the absence of a designated balancing framework, the balancing rules are substantially reflected by case law. Especially under Regulation 1/2003's self-assessment regime, undertakings evaluate their compliance with EU competition rules essentially pursuant to Commission, NCA, and court practices.⁴²

At the same time, it is important to acknowledge the limitations inherent to content analysis and hence of this dissertation. First, content analysis is not designed to predict or explain the outcomes of proceedings. It does not study causality. It uses the details gleaned from decisional practices to *understand* the body of case law.⁴³ This research method is also known as *descriptive statistics*.⁴⁴

Second, content analysis is restricted to the endogenous information extracted from the examined proceedings, without reference to exogenous data. In other words, the empirical findings do not contain considerations that are not reflected within the wording of the cases. Admittedly, this is an important limitation of this dissertation. Yet, as already mentioned, analysis of the cases merits an important study; they represent the law in practice and are the main source of information directing undertakings' conduct. The cases demonstrate the factual and analytical richness of questions that come before competition enforcers and courts, how undertakings structure their arguments, and how the enforcers reason their decisions.⁴⁵

Third, another limitation of any content analysis of case law relates to the fact that not all infringements result in a reasoned administrative act. While the database of cases purports to cover all public enforcement of Article 101 TFEU,⁴⁶ aspiring to encompass all consideration of non-competition interests, it cannot fully code infringements that did not end with a reasoned

⁴¹ (Hall & Wright 2008), 78, 84-86.

⁴² (GCLC Annual Conference 2010), 19, 58-76.

⁴³ (Hall 2011), 12. For a critic of the use of content analysis to predict outcomes see (Tyree 1981).

⁴⁴ (Neuendorf 2017), 244-245.

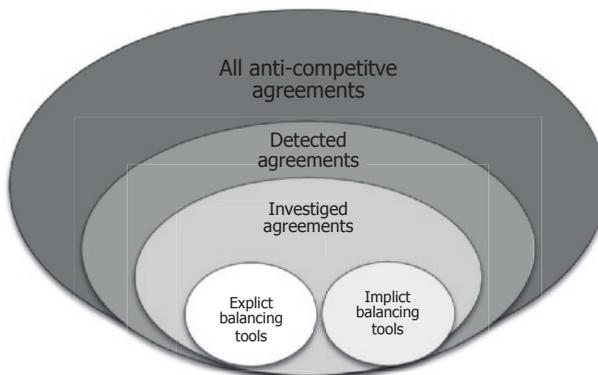
⁴⁵ (Lawlor 1968), 107; (Hall 2011), 3-4.

⁴⁶ The composition of the database of cases is elaborated in Section 3.2 below.

decision.⁴⁷ There are several types of Article 101 TFEU infringement that have not been recorded in the database: the database does not include information on undetected infringements, which are estimated to be the vast majority of anti-competitive agreements;⁴⁸ the database does not record detected infringements if no administrative procedure was initiated or if the investigation was dropped without publication; finally, the database holds only partial information on cases in which competition enforcers did not issue an Article 101 TFEU decision on the merits. Balancing by means of alternative instruments (e.g., sector regulation, markets-work) or procedural balancing tools (e.g., commitments or fines), is not fully reflected in the database. Consequently, it must be acknowledged that there is a large body of unidentified "dark-matter" Article 101 TFEU infringements. This caveat applies to the use of the database and what can be learned from it.⁴⁹

This dark-matter, referred to by *Davies and Ormosi* as the "known unknowns"⁵⁰ and summarised by Figure 1.2, may certainly involve balancing. Of the totality of anti-competitive agreements in the EU market, only agreements handled by explicit balancing tools are fully represented in the database.

Figure 1.2: The "dark matter" of balancing⁵¹



Despite this limitation, the dark matter is a noteworthy subject of study in itself. As demonstrated in Chapter 8, the choices competition enforcers make when devising detection policies, setting enforcement targets, choosing which legal instrument to apply to a case, and

⁴⁷ (Davies & Ormosi 2010), 34-35.

⁴⁸ For example (Combe et al. 2008) estimated detection chance between 12.9% and 13.2%. See also: (Davies & Ormosi 2010), 43; (Davies & Ormosi 2013).

⁴⁹ (Carree et al. 2010), 98.

⁵⁰ (Davies & Ormosi 2013), 4.

⁵¹ The proportions depicted for the various types of agreements are merely for purposes of illustration.

shaping the remedies, are an independent form of balancing. This balancing tool is particularly significant since it is often implicit and overlooked. By identifying the entire scope of enforcement activities, the empirical exercise in this dissertation yields important conclusions also on the areas that have remained untouched by EU competition enforcement and in which anti-competitive agreements are *de facto* tolerated. The database thus allows evaluation of the balancing practices not only on the basis of observed cases, but also on the basis of unobserved cases.⁵²

3.2. The database: case selection and definitions

The cases in the database were selected by applying methodical selection criteria, yielding a sufficiently large and representative sample of over 3100 cases. It is based on a robust, *a priori* selection method that allows drawing conclusions about the entire population of Article 101 TFEU proceedings across the EU, while safeguarding against selection bias.⁵³ As demonstrated below, the proceedings are essentially homogenous; they involve the public enforcement of Article 101 TFEU or closely related national equivalents. Differences that potentially impede uniformity are controlled for (e.g., between the Commission's and NCAs' institutional and procedural setup; differences in enforcement before and after entry into force of Regulation 1/2003; differences between by-object and by-effect infringements).

The following sections outline these selection criteria and clarify some of the definitions used throughout the dissertation. The latter are also summarised in the Table of Definitions found at the beginning of this dissertation.

3.2.1. Legal provisions

The database comprises all public enforcement proceedings involving Article 101 TFEU. It also covers the identical versions of the Article in previous European Treaties (Articles 81 EC and 85 EEC) and in the Agreement on European Economic Area (Article 53 EEA). Unless explicitly stated otherwise, references to Article 101 TFEU should be understood as references to those other identical provisions. Proceedings involving the enforcement of Article 101 TFEU and those identical provisions are labelled collectively as *EU cases*.

⁵² (Davies & Ormosi 2013), 4.

⁵³ (Epstein & King 2002), 54; (Webley 2010), 933.

In addition, the database encompasses the public enforcement proceedings of the national provisions equivalent to Article 101 TFEU.⁵⁴ The database includes cases in which both Article 101 TFEU and the national equivalent were applied and cases where only the national provision was applied. Those proceedings are referred to as *mixed-cases* and *purely national cases*, respectively. EU cases, mixed-cases, and purely national cases are labelled collectively in this dissertation as *Article 101 TFEU proceedings*. Hence, this terminology is used as shorthand to refer to the enforcement of both the EU and/or the national equivalent provisions.

The inclusion of purely national cases in the database has a three-fold aim. First, NCAs and EU and national courts have mostly ascribed virtually identical meaning to the EU and national prohibitions. They apply them interchangeably or without clearly distinguishing between the two, even when the wording of a national prohibition differs from its EU counterpart.⁵⁵ This has led the CJEU to declare that it is competent to issue preliminary rulings on the interpretation of the national equivalent prohibitions even in purely national cases.⁵⁶ Therefore, balancing principles that have been developed in national cases also inform the balancing applicable to Article 101 TFEU. Second, the inclusion of purely national cases is required to account for cases that gave no indication of whether they were based on the EU or the national provisions.⁵⁷ Finally, as elaborated in Chapter 8 Section 5.4, purely national cases provide insight into the application of the effect on trade criterion and the extent to which it has been used for balancing purposes.

3.2.2. Jurisdiction selection

The database is comprised of all proceedings held before the Commission and the NCAs of France, Germany, Hungary, the Netherlands and the UK. In addition, it includes the decisions of EU and national courts in appeals and the preliminary rulings of the CJEU. The Commission, NCAs, EU and national courts are collectively referred to in this dissertation as the *competition enforcers*.

⁵⁴ French Competition Act, Articles L420-1, L420-3, L420-4; German Competition Act, Articles 1-3; Dutch Competition Act, Articles 6-10; UK Competition Act, Sections 2-18; Hungarian Competition Act, Articles 11-20.

⁵⁵ This is further discussed in Chapter 2, Section 6 and Chapter 3, Section 6.4.

⁵⁶ For example, in C-32/11 Allianz (2013), para 20-23; C-413/13 FNV (2014), para 17-20.

⁵⁷ See Table 1.1 below and Figure 8.6.

The five Member States studied were chosen from among the EU twenty-eight Member States by employing a purposive-heterogeneous selection method. In other words, the selection aimed to capture a wide range of approaches to the balancing of competition and non-competition interests.⁵⁸ The five Member States represent a wide spectrum of legal and economic structures, traditions, and approaches to competition policy and balancing. The heterogeneous sample demonstrates how the consideration of non-competition interests differs across jurisdictions and highlights the difficulties of balancing in the EU multi-governance enforcement regime.

France, Germany,⁵⁹ and the UK⁶⁰ were selected since they are the Member States that have exercised the greatest influence on the substantive and procedural development of EU competition law and balancing. As detailed in Chapter 2, each of those Member States has advocated for a distinct balancing regime stemming from their domestic competition law traditions. To a large extent, EU competition law could be understood as representing a compromise between those varying approaches.⁶¹

The Netherlands was chosen in light of its vibrant national debate on the role of non-competition interests under EU and national competition law. The Netherlands generally supports the consideration of broad, non-economic benefits in competition law enforcement, especially in the field of sustainability. The Dutch legislator has specifically acknowledged that non-competition interests should play a role in EU and national competition law enforcement.⁶²

Hungary was selected to include the balancing challenges encountered by the eastern and central European Member States that have joined the EU since 2004. As elaborated in Chapter 2 Section 6.5, upon accession to the EU, those new Member States had to transform from

⁵⁸ (Ritchie, Lewis, Nicholls, & Ormston, 2013), 113-114.

⁵⁹ In Germany, only federal cases handled by the Bundeskartellamt are included in the database. Cases of the Supreme Land Authorities dealing with cartels in which the effect of the restrictive conduct does not extend beyond the territory of a Land (in the meaning of Article 48 of the German Competition Act) are not included.

⁶⁰ The UK follows a concurrency model, which prescribes different authorities and procedural and substantive rules according to the sector examined. Therefore, in addition to the OFT/CMA cases, the database includes Article 101 TFEU proceedings of the Office of Communications, the Gas and Electricity Markets Authority, the Water Services Regulation Authority, the Office of Rail Regulation, the Northern Ireland Authority for Utility Regulation, the Civil Aviation Authority, and the health care sector regulator for England (NHS Improvement, formerly Monitor). On the UK concurrency model see Chapter 2, Section 6.4.3.

⁶¹ (Van Rompuy 2012), 134; (Kuenzler & Warloutzet 2013), 91; (Talbot 2016), 269.

⁶² See Chapter 3, Section 6.2.2.

centrally-planned to market economies and, within a short period of time, enact new competition laws and develop new cultures.⁶³ Moreover, as transitional economies, they had to overcome structural weaknesses to ensure effective competition law enforcement.⁶⁴ Particularly due to the fact that those significant legal and economic changes were a result of external forces rather than organic-internal competition culture, they raised questions about the appropriate balance of competition and other public policy considerations, and the treatment of newly liberalised sectors.⁶⁵ Finally, Hungary provides an example of balancing against a backdrop of strong, politically-influenced government influence over the administrative discretion of the NCA. This trend became evident following the 2010 national elections, at which time the newly elected right-wing government passed a series of laws that have been criticised as undermining the rule of law, at both the domestic and EU levels.⁶⁶

3.2.3. *Sources of information*

The database includes all enforcement actions of Article 101 TFEU, published in the form of a decision, formal or informal opinion, press release available on the competition enforcers' websites, or reference in an annual report. Both formal and informal proceedings are included. The database covers proceedings related to infringements,⁶⁷ inapplicability decisions,⁶⁸ settlements,⁶⁹ formal or informal commitments,⁷⁰ decisions not to investigate or to terminate investigations,⁷¹ and formal or informal opinions on the conduct of a specific undertaking (as opposed to general or sectoral guidelines or advocacy).⁷²

The database includes only aggregate data on the Commission's so-called comfort letters.⁷³ While comfort letters go largely unpublished, aggregate data indicating the date,

⁶³ (Geradin & Henry 2004), 2; (Pittman 2004).

⁶⁴ (Geradin & Henry 2004), 25; (Tóth 2004).

⁶⁵ (Katalin Cseres 2007), 465-467; (Kovács & Reindl 2013), 38.

⁶⁶ (Ziegler & Horváthy 2017), 33-37.

⁶⁷ Regulation 1/2003, Article 7; Regulation 17/1962, Article 3.

⁶⁸ Regulation 1/2003, Article 10; Regulation 17/1962, Articles 2 and 6. See Chapter 8, Section 6.

⁶⁹ Commission's Settlement Notice (2008). See Chapter 2, footnote 356.

⁷⁰ Formal commitments refer to proceedings pursuant to Article 9 of Regulation 1/2003. Informal commitments refer to cases in which after undertakings had agreed to voluntarily end the infringement, the competition enforcer decided there was no grounds to continue the proceedings. See Chapter 7, Section 2.1.

⁷¹ See Chapter 8, Section 4.

⁷² See Chapter 8, Section 5.3.

⁷³ On comfort letters, see Chapter 2, Section 3.2 and Chapter 8, Section 5.3.

name of the case and the result of the Commission's preliminary assessment is available going back to 1990.⁷⁴

The inclusion of all types of Article 101 TFEU public enforcement proceedings is warranted by the functional approach of comparative law⁷⁵. This is based on the assumption that rules that have the same function or effect may take different forms in various jurisdictions. In the context of EU competition law, it must be considered that EU and national competition enforcers are subject to different procedural rules and follow different practices (different forms) when enforcing the same legal provision of Article 101 TFEU (same function).⁷⁶ A comparative overview of Article 101 TFEU enforcement, therefore, must take into account all the forms in which public enforcement proceedings have been issued.

3.2.4. *Types of proceedings and time frame*

The database includes public law enforcement actions, as well as appeals on those actions. In addition, it covers CJEU preliminary rulings that specify Article 101 TFEU in the questions referred to the Court. Criminal, civil, procedural, and interim procedures are excluded from the database. Those proceedings are governed by procedural rules that significantly vary across the Member States. In those cases, differences in balancing may be associated with procedural aspects rather than disparate enforcement of Article 101 TFEU.

The database provides a complete overview of all Article 101 TFEU proceedings since the foundation of the European Economic Community in 1958 up to 2017. This includes Commission decisions and CJEU preliminary rulings rendered from the entry into force of the Treaty of Rome (1 January 1958), and NCA decisions following the entry into force of Regulation 1/2003 (1 May 2004). In addition, the database covers all EU and national courts appeals on the above decisions. The cut-off date of this dissertation is 31 May 2018. Therefore, it includes only decisions that were rendered before 31 December 2017 and published by 31 May 2018.

Table 1.1 summarises the number of Article 101 TFEU proceedings included in the database, according to their enforcement period,⁷⁷ competition enforcer, and legal provision.

⁷⁴ The data is available in the Commission's website: http://ec.europa.eu/competition/antitrust/cases/comfort_letter.html.

⁷⁵ (Zweigert & Kötz 1992), 32-47.

⁷⁶ On the functional comparative law approach in EU competition law see (Larouche 2013), 158; (Cseres 2014), 41.

⁷⁷ As mentioned, the four enforcement periods are defined in Chapter 2, Section 5.

Table 1.1: Database of cases

Enforcement period/ competition enforcer	Commission/NCA				Courts
	Total	EU and mixed- cases	Purely national cases	Legal provision not mentioned	
EU level					
First enforcement period (1962-1977)	108				49
Second enforcement period (1978-1987)	127				75
Third enforcement period (1988-April 2004)	331				305
Fourth enforcement period (May 2004-2017)	170				570
National level					
France	357	156	177	24	103
Germany	170	57	19	94	40
Hungary	174	56	117	1	134
The Netherlands	192 ^{78,79}	67	88	37	102
UK	70	33	30	7	24

3.3. Coding Book

The dissertation employs classic content analysis⁸⁰ to record both the quantitative and qualitative aspects of the cases included in the database. The coding is based on a designated *coding book*⁸¹ developed for the purpose of this dissertation on the basis of an extensive literature review. The coding book offers a systematic and reproducible method for reducing the text of the cases to pre-determined codes representing the various balancing aspects.

The coding book defines 41 variables. Each variable describes a feature of the case or of the balancing. The variables include details of case identification (date, case number, competition enforcer), the undertakings, substantive aspects of balancing (the non-competition interest

⁷⁸ This figure includes reassessment proceedings of the Dutch NCA's decisions by an advisory committee. This procedure is detailed in Chapter 2, Section 6.3.3.

⁷⁹ For methodological reasons, a special coding protocol was applied to coding the so-called Dutch construction cartel cases. In 2001, following numerous complaints, the Dutch NCA investigated anti-competitive agreements in various sectors of the Dutch construction industry. These investigations were supported by over 480 leniency applications, which in 2005 led to the imposition of fines on about 1,400 firms. Given the immense magnitude of those cases, the NCA instigated a special fast-lane procedure in which undertakings agreed to waive their right to contest the legal and factual claims of the NCA in favour of a 15% fine reduction. This procedure, and its interesting legal implications, are explored by (Gerbrandy & Lachnit 2013). Coding all of those proceedings separately would have created distortions in the data, especially since they are significantly higher in number than all of the other NCAs' enforcement activities combined. Therefore, the Dutch construction cartel cases were aggregated and coded as 11 independent cases. This categorisation was based on the case identification number allocated by the Dutch NCA, which identified 11 sectors in the construction industry in which the infringements took place.

⁸⁰ (Webley 2010), 12.

⁸¹ See Annex B for a list of the coding book variables. The full coding book is available upon request from the author.

examined, its normative legal source, the types of benefits, and the balancing method), and on the outcome and remedy imposed. Each variable has been assigned with a pre-determined closed-list of value labels (in the form of a number or letters) that symbolically represent possible variations of each variable. The value labels are exhaustive, mutually exclusive, and also account for missing values. As is customary in legal systematic content analysis, the coding has been restricted to the legal assessment part of the proceedings.⁸² Consequently, in the event a competition enforcer failed to address an argument presented by an undertaking, it was not recorded.

The coding book ensures the validity of the coding as a reliable basis for drawing normative conclusions about the enforcement of EU competition law.⁸³ The validity and reliability of the coding are inherently linked to the type of content that has been coded. Most of the variables defined by the coding book provide a quantitative description of *manifest content*,⁸⁴ namely of content that is on the surface, and hence is easily observable and countable without need for interpretation (e.g. the number of cases that invoked Article 101(3) TFEU, or the number of cases that were concluded by way of settlement). Because this type of coding is essentially comprised of clerical recording, it is the most reliable and valid type of content analysis.⁸⁵

A smaller number of variables involve *latent pattern content*.⁸⁶ These variables are more qualitative in nature, focusing on patterns identified in the text itself. As such, this coding left some room for the coders' judgment. The coding of the application of certain legal doctrines, such as the proportionality tests of Article 101(1) and (3) TFEU, merited such a value judgment. Yet, the coding book has strived to limit the value judgment inherent to such interpretations, and hence to increase the reliability of the coding, by providing detailed and unequivocal criteria for coding on the basis of a detailed literature overview.⁸⁷

The validity and reliability of the coding were also ensured by the use of *overlapping coding*.⁸⁸ Accordingly, two independent coders separately and simultaneously coded 10% of the cases in the database to ensure the coding replicability.

⁸² See, for example, (Niblett, Posner, & Shleifer, 2008), 332.

⁸³ (Potter & Levine-Donnerstein 1999), 259.

⁸⁴ (Potter & Levine-Donnerstein 1999), 259; (Neuendorf, 2017), 31-33, 170-171.

⁸⁵ (Potter & Levine-Donnerstein 1999), 261.

⁸⁶ (Potter & Levine-Donnerstein 1999), 259; (Neuendorf, 2017), 31-33, 170-171.

⁸⁷ (Potter & Levine-Donnerstein 1999), 261.

⁸⁸ On overlapping coding as a measure for ensuring the validity and reliability of content analysis see (Neuendorf, 2017), 41-42.

The coding book design draws inspiration from The Framework Approach developed in the 1980s by the UK National Centre for Social Research.⁸⁹ Created to facilitate large-scale applied policy research, The Framework Approach is used to classify and organise data according to key themes and concepts. Each concept is charted by completing a matrix in which each row represents an observation (in this dissertation, an Article 101 TFEU proceeding), and each column a subtopic (in this dissertation, an aspect of balancing). The charts are used to examine the data for patterns and connections across columns (with regard to each case) and across rows (with regard to each aspect of balancing). In line with The Framework Approach, the data management stage and the interpretation stage were sequential in the dissertation, not concurrent. The empirical stage merely documented and organised the data, whereas the interpretation stage involved consideration of exogenous sources (e.g. literature, policy papers and interviews with experts) and was based on the normative benchmarks described in the next section. Yet, differing from The Framework Approach, the coding book has been based on numerical value labels instead of summarised decision texts. This choice was essential in light of the large number of cases examined (N≈3100), which excludes the consideration of large texts during the interpretation stage.

4. NORMATIVE BENCHMARKS

This dissertation evaluates the balancing practices, as identified by the empirical findings, against the normative benchmarks of the objectives of Article 101 TFEU enforcement. Those objectives are specified in Regulation 1/2003, stating that enforcement must ensure *effectiveness, uniformity, and legal certainty*.⁹⁰

This evaluation assesses the manner in which competition enforcers have exercised their *discretion* to account for non-competition interests when enforcing Article 101 TFEU. A competition enforcer, like any other administrative authority, can be said to have discretion whenever the law leaves it a certain amount of freedom to choose among various possible

⁸⁹ (Ritchie, Lewis, Nicholls, & Ormston, 2013), 282-283. The Framework Approach was used in many qualitative studies designed to evaluate and reform public policies, for instance in (Oram 2011); (Heath et al. 2012); (Gale et al. 2013); (Barn & Kumari 2015), including EU policies, for instance in (Farmer, Philip, King, Farrington, & Macleod, 2010); (Mohammad, 2012); (McCarthy, Zeegers Paget, & Barnhoorn, 2013); (Yardley et al., 2006).

⁹⁰ Regulation 1/2003, Preamble 1, 3, 22; Modernisation White Paper (1999). para 44-51. Those objectives also guided the old enforcement regime governed by Regulation 17/62. See Regulation 17/62, Preamble; Modernisation White Paper (1999), para 3-4, 6, 16-18, 24.

courses of action.⁹¹ There is room for discretion when the applicable legislative, constitutional, and case law has not laid down rules that fully specify which course of action the enforcer must take. Administrative discretion, therefore, determines the boundaries of the day-to-day enforcement of Article 101 TFEU in general, and of balancing in particular.

Discretion is a matter of degree. An enforcer has either narrower or wider discretion according to the extent to which the law circumscribes the range of possible choices. The law can limit such a range, for instance, by excluding certain courses of action, prescribing the objectives to be pursued, or requiring that certain elements be considered during the decision-making process.⁹² As the following chapters illustrate, the six balancing tools left the competition enforcers with varying levels of discretion for balancing. Moreover, the degree of discretion depended on the extent to which the reviewing courts could substitute their own judgment for that of the Commission or the NCAs, and the extent to which they choose to do so in practice. An enforcer had discretion only insofar as the reviewing court was willing to defer to its interpretation, rather than fully supplant the interpretation of the enforcer with its own.⁹³

The following sections define the normative benchmarks. It must be noted that all three benchmarks are presented on a scale. A position at the high end of the scale means that the benchmark has been met to a high degree, less so at the opposite end. The degree to which the application of each of the balancing tools has met the normative benchmarks is detailed at the end of Chapters 3-8, and further assessed in Chapter 9.

4.1. Effectiveness

Regulation 1/2003 declares that Article 101 TFEU must be applied “effectively” across the EU.⁹⁴ Nevertheless, it does not offer a specific standard by which this effect should be measured. It merely specifies that the enforcement system must ensure that competition in the market is not distorted, guarantee rigorous enforcement, and allow the Commission to refocus its enforcement efforts on combatting the most serious restrictions of competition.⁹⁵ Hence, the precise meaning of effectiveness in the context of Regulation 1/2003 remains unclear.

⁹¹ On administrative discretion see: (Galligan 1990), 1-2; (Wils 2011), 354; (Mendes 2014), 7.

⁹² (Galligan 1990), 6-7; (Wils 2011), 354.

⁹³ (Galligan 1990), 9; (Wils 2011), 355-356.

⁹⁴ Regulation 1/2003, Preamble 1; Modernisation White Paper (1999), para 11, 43-47. On effectiveness in Regulation 1/2003 also see (Simonsson 2010), 17-18.

⁹⁵ Regulation 1/2003, Preamble 3. Also see Modernisation White Paper (1999), para 11, 43-47.

This dissertation ascribes a substantive element to effectiveness. This definition is inspired by *Galligan's* writing on the effective use of discretion in the process of administrative decision-making.⁹⁶ According to Galligan, the effectiveness of an administrative action refers to the degree by which it contributes to realising the statutory goal of such action.⁹⁷ When applied to the act of balancing, this definition entails that effectiveness is assessed in reference to the objectives of Article 101 TFEU.⁹⁸ Balancing is considered effective if it ensures that competition in the internal market is not distorted, and is ineffective if it fails to achieve that outcome.⁹⁹

As Galligan points out, although the statutory goal is the focal point of the administrative action, the effective achievement of such a goal is not a simple matter of finding a suitable means to achieving a given end. It would be unrealistic to assume that a simplistic, technical relationship exists between a specified goal and the means adopted for its achievement. Rather, the administrative authority's action is always affected by other policy goals, as well as by the need to accommodate procedural and financial constraints. Therefore, an administrative action is likely to achieve a more modest level in pursuit of the overall statutory goal.¹⁰⁰ For the purpose of this dissertation, the definition of effectiveness acknowledges that enforcement of Article 101 TFEU does not purely aim to protect competition interests. A competition enforcer must take other non-competition interests into account, in addition to being bound by procedural and institutional constraints. The effectiveness of balancing should thus be thought of as an ideal. The closer the means adopted arrives at achieving the objectives of Article 101 TFEU, the more effective the balancing is.

The dissertation identifies three criteria to measure the effectiveness of balancing. These relate to the types of benefits balanced against the competition interests, the process of balancing, and the types of the remedy sought by balancing. As elaborated below, balancing is more effective when deviations from the objective of Article 101 TFEU are more limited. Inspired by Galligan's model,¹⁰¹ this is illustrated in Figure 1.3.

⁹⁶ (Galligan 1990).

⁹⁷ (Galligan 1990), 129.

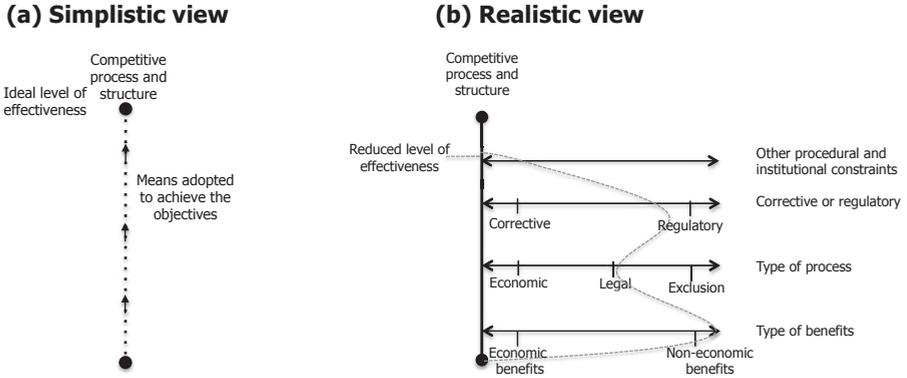
⁹⁸ For a similar definition of effectiveness see (Ehlermann 2000), 561-562; (Cengiz 2009), 5, 7-9; (Kovacic et al. 2011), 30-31; (Cleynenbreugel 2014), 1383; (Nazzini 2014), 282-283; and inexplicitly in German Monopolies Commission, "Cartel Policy Change in the European Union?" (2000), para 73, (Blanco & De Pablo 2012).

⁹⁹ On the objectives of Article 101 TFEU see Chapter 2, Section 7.

¹⁰⁰ (Galligan 1990), 113.

¹⁰¹ (Galligan 1990), 113.

Figure 1.3: Effectiveness of balancing



This figure demonstrates that, unlike the simplistic view (a), the enforcement of Article 101 TFEU in practice, and hence of balancing, is not purely aimed at promoting competition interests. The realistic view (b) takes non-competition interests into account as well as procedural and institutional constraints. Therefore, effective balancing is seen as protecting competition interests to a high degree, rather than at a perfect level

Before defining the three criteria used to measure the effectiveness of balancing, one should keep in mind two caveats to the proposed definition of effectiveness. First, the definition examines only the effectiveness of balancing in protecting competition interests. It does not evaluate the degree to which balancing has successfully promoted non-competition interests. While this is undoubtedly important, the protection of non-competition interests cannot be directly deduced by coding Article 101 TFEU proceedings.

Second, it should be acknowledged that the proposed substantive definition is not the only possible definition of effectiveness in the sense of Article 1/2003. For example, effectiveness could also be defined in quantitative terms, namely the number of Article 101 TFEU enforcement proceedings. According to this definition, which guided the Commission’s assessment of the application of Regulation 1/2003,¹⁰² more proceedings means greater effectiveness. Other scholars have suggested that effectiveness should be seen as an application of the general EU principle of equivalence and effectiveness. According to this approach, the enforcement of Article 101 TFEU must not be made virtually impossible or excessively difficult by national procedural rules.¹⁰³ Yet, such approaches are not suitable for the purposes of this dissertation, as they do not offer any relevant normative benchmark for assessing balancing.

¹⁰² Report on the Functioning of Regulation 1/2003 (2009), para 18; Report on the Functioning of Regulation 1/2003 (2014), para 43-44.

¹⁰³ (Sauter 1997), 16.

4.1.1. *Types of benefits*

The first criterion for assessing the effectiveness of balancing centres on the types of benefits being balanced against competition interests. As elaborated in Chapter 2 Section 2.3.1, such benefits are positioned between two opposite ends of a scale. At one end, a competition enforcer can consider *direct economic benefits*, namely, cost and qualitative efficiencies that either directly affect prices or directly provide additional non-price value for consumers. To this end, the enforcer takes only interests that impact the functioning of markets into account. Accordingly, the anti-competitive effects of an agreement are balanced against other interests relating to the shape and the operation of the affected markets, such as efficiencies or innovation.

At the other end of the scale, a competition enforcer can take *non-economic benefits* into account, i.e. benefits not directly related to the characteristics of the product or service in question. Such benefits are non-pecuniary and are often more subjective than economic benefits. This balancing is not limited to market-driven interests. The anti-competitive effects of an agreement are balanced against other societal and regulatory policies, such as the agreement's effect on employment, social cohesion or the environment. The choice of the level of protection of those benefits is an expression of a policy preference. Such a preference can be determined by the competition enforcer or might be encoded in legislative or executive acts limiting the application of EU competition law.

Economic benefits are closer in nature to the objectives of Article 101 TFEU, namely the promotion of competition. Therefore, balancing that is confined to economic benefits is generally more effective in protecting competition as compared to balancing which takes broader non-economic benefits into account.

4.1.2. *Process of balancing*

The second criterion for assessing the effectiveness of balancing focuses on the process, or method, of balancing. This criterion is based on the classification offered by *Townley*, which distinguishes three types of balancing processes:¹⁰⁴

First, an *economic balancing process* uses economic principles to compare the quantifiable impact of an agreement on competition against its quantifiable effect on non-competition interests. This balancing is based on an economic cost-benefit analysis. It aims to ensure the

¹⁰⁴ (Townley 2009), 6-7, 28-29. Townley uses slightly different terminology, referring to market balancing, mere balancing, and exclusion.

maximisation of consumer welfare, or of an alternative economic concept. Therefore, applying economic balancing to a specific case does not require the prioritisation of one type of interest over another. Rather, the effects of both competition and non-competition interests on consumer welfare can be expressed in monetary terms. If the welfare generated by non-competition interests offsets the harm caused by an anti-competitive agreement, the agreement will be permitted, and *vice versa*.

Second, a *legal balancing process* is not linked to an economic welfare assessment. Competition and non-competition interests are balanced by means of a legal proportionality analysis. The competition enforcers examine whether an anti-competitive agreement has gone beyond what is required to attain a legitimate non-competition interest and whether the claimed benefits exceed the harm to competition interests. The decision to recognise a non-competition interest as legitimate and the weighing of competing interests are at the competition enforcer's discretion. Consequently, legal balancing provides a more abstract analysis compared to the economic balancing process.

Third, balancing can take place by way of *exclusion*. The two balancing processes described above are based on a compromise, reconciling competition and non-competition interests. The anti-competitive harm is weighed against the promotion of non-competition interests. Exclusion, on the other hand, resolves clashes between competition and non-competition interests by promoting one interest and ignoring the other. For example, Chapter 5 Section 2.2 shows that the mere involvement of a Member State in an agreement has sometimes been used by the CJEU as justification for altogether excluding the application of Article 101(1) TFEU, irrespective of the agreement's actual impact on competition.

In general, economic and legal balancing processes ascribe greater weight to competition interests in comparison with exclusion. Therefore, they are more likely to safeguard the effectiveness of a balancing tool.

4.1.3. *Corrective or regulatory balancing*

Finally, the effectiveness of balancing also depends on the type of remedy pursued. In this regard, a distinction is made between corrective and regulatory balancing.¹⁰⁵

¹⁰⁵ (Townley 2009), 42-43; (Lavrijssen 2010), 655; (Colomo 2010), 263; (Gerard 2013), 18-22.

Corrective balancing aims to restore the situation that would have occurred in the absence of the anti-competitive agreement. Accordingly, corrective balancing takes non-competition interests into account only to the extent required to ensure that the rights of consumers, undertakings, and third parties are not adversely affected by enforcement of Article 101 TFEU against a specific agreement. A corrective tool does not promote non-competition interests any more than is required to remedy the specific competitive harm.

Regulatory balancing, on the other hand, uses the enforcement of Article 101 TFEU as a means to regulate markets and promote interests that are not directly related to the anti-competitive behaviour of the undertakings concerned.¹⁰⁶ A regulatory tool might protect non-competition interests even where no harm has been caused to competition interests, or in a disproportionate manner; it could use Article 101 TFEU to prevent an agreement harming other public policies. For instance, a competition enforcer might invoke Article 101 TFEU to prohibit an agreement that impedes market integration or public health even if such an agreement *does not* have a significant negative impact on competition. Moreover, a regulatory tool can be used to permit an agreement that significantly harms competition but promotes other public policies. For instance, the balancing might tip in favour of a price-fixing agreement that generates environmental benefits. In such cases, non-competition interests are used to circumvent the prohibition of Article 101(1) TFEU, despite a significant competitive harm.

Corrective balancing, which focuses on the competitive harm caused by a specific agreement, is more effective as compared to regulatory balancing because it limits the scope of consideration of non-competition interests. Combining the three criteria of effectiveness, the first benchmark can be defined as follows:

Effectiveness: balancing is more effective, as a matter of degree, the more it guarantees that competition in the internal market is not distorted. Accordingly, balancing is more effective when it takes economic benefits into account, is guided by an economic balancing process and pursues a corrective balancing aim, in comparison with balancing that is guided by non-economic benefits, follows an exclusionary process and pursues a regulatory aim.

¹⁰⁶ The regulatory function of Article 101 TFEU is also elaborated in Chapter 2, Sections 5.2.1 and 5.3.1.

4.2. Uniformity

The second benchmark relates to the multi-level nature of the enforcement regime of Regulation 1/2003. As previously mentioned, following the decentralisation of enforcement in May 2004, the Commission and NCAs apply Article 101 TFEU in parallel. The pursuit of a uniform application is a core objective of Regulation 1/2003. To this end, the Commission stressed in its Modernisation White Paper that the multi-governance enforcement regime should not compromise the creation of a single corpus of rules to be developed and applied in the same manner throughout the EU.¹⁰⁷

The uniform enforcement of Article 101 TFEU, and hence of balancing, has two aspects. First, and quite naturally, decentralised enforcement must not lead to the adoption of *conflicting decisions* by two or more competition enforcers with respect to *a single agreement*.¹⁰⁸ For the purposes of this dissertation, this means that two or more competition enforcers should not reach different outcomes when applying balancing to the same agreement. As elaborated in Chapter 2 Section 3.3.3, Regulation 1/2003 introduced various coordination mechanisms to mediate this risk. Nevertheless, this has not completely prevented contradictory balancing decisions. A recent example is the famous *Booking.com* saga in which, as detailed in Chapter 3 Section 6.3.1, the German NCA issued a conflicting decision regarding an agreement that had been examined by 25 other NCAs.

The second aspect of uniformity refers to the *consistent enforcement of Article 101 TFEU* by the various competition enforcers. Regulation 1/2003 pursues the creation of a level playing field on which the Article is applied in a similar, if not identical, manner across the EU. This can be seen as linked to the principle of equality.¹⁰⁹ As a general principle of EU law, equality entails that comparable situations will not be treated differently and that different situations will not be treated the same.¹¹⁰ Applying this principle to balancing suggests a degree of equivalence and consistency in the types of benefits, balancing processes, and intensity of control applied to similar situations.¹¹¹

¹⁰⁷ Modernisation White Paper (1999), para 11, 24; On uniformity in Regulation 1/2003 also see (Simonsson 2010), 10-16; (Blanco & De Pablo 2012), 91-104; (Adinolfi 2015), 68-100.

¹⁰⁸ Regulation 1/2003, Article 16 and Preamble 1, 22; Modernisation White Paper (1999), para 44, 47.

¹⁰⁹ For example, see (Dunne 2016), 475.

¹¹⁰ Charter of Fundamental Rights, Articles 20. According to settled case law, this principle requires that comparable situations must not be treated differently and that different situations must not be treated in the same way, unless such treatment is objectively justified. See C-580/12P *Guardian* (2014), para 51.

¹¹¹ For instance, Commissioner Monti stressed that the competition enforcers must follow "sufficiently similar" approaches when applying Article 101(3) TFEU. See (Monti 2000d), 14.

Achieving this aspect of uniformity is less self-evident. In the absence of a harmonised EU framework on the substantive and procedural aspects of balancing, Member States are allowed to craft national rules, methods, and approaches. This arouses a significant risk of fragmentation. It impedes the level playing field across the EU, exposing undertakings to multiple procedural and substantive balancing standards.¹¹² The second normative benchmark thus reads:

Uniformity: A uniform balancing avoids reaching conflicting decisions with respect to the same agreement. Moreover, the competition enforcers must balance in a consistent manner by following similar balancing principles in similar situations, so as to ensure a level playing field across the EU.

4.3. Legal certainty

Regulation 1/2003 and the Modernisation White paper emphasise that the enforcement of Article 101 TFEU must take place in compliance with the principle of legal certainty.¹¹³ The Modernisation White Paper asserts that the switch to a self-assessment regime was based on the premise that, after 35 years of enforcement, EU competition law had been clarified and thus become more predictable for undertakings. As the scope of Article 101 TFEU became more predictable, *ex-ante* analysis by the Commission was rendered unnecessary.¹¹⁴ At the same time, enforcement of Article 101 TFEU must endeavour to ensure a reasonable level of legal certainty. The rules must be defined as clearly as possible to allow undertakings to self-assess their restrictive practices.¹¹⁵

Legal certainty is a principle common to the constitutional systems of the Member States, is recognised by the EU Courts, and is entrenched within the rule of law.¹¹⁶ It entails that undertakings should be able to know in advance what legal consequences will flow from their actions. This dissertation identifies three criteria of such legal certainty. These relate to the transparency of the balancing rules, the predictability of the balancing outcomes, and the competition enforcers' degree of discretion.

¹¹² (GCLC Annual Conference 2010), 316-318 points to the double procedural standard in enforcement proceedings under Regulation 1/2003.

¹¹³ Regulation 1/2003, Preamble 22, 38; Modernisation White Paper (1999), para 48-51.

¹¹⁴ Modernisation White Paper (1999), para 48.

¹¹⁵ Modernisation White Paper (1999), para 48-51.

¹¹⁶ See C-13/61 Bosch (1962), 52. Also see (Raitio 2003), 125; (Stefan 2012), 891.

Notably, all three criteria of legal certainty could also be linked to the uniformity benchmark. The obligation to balance in a sufficiently similar manner is not only directed at ensuring a level playing field but also aimed at allowing undertakings to predict the scope of Article 101 TFEU and the room it leaves for non-competition interests.¹¹⁷ This is especially true since Regulation 1/2003 does not give unequivocal rules for case allocation.¹¹⁸ Therefore, undertakings often cannot predict to a sufficient degree of certainty which enforcer would handle their case. Nevertheless, to avoid repetition, treatment of the legal certainty benchmark will focus on aspects of legal certainty that are not directly related to uniformity.

4.3.1. *Transparency*

Ensuring legal certainty under the *ex-post* self-assessment enforcement regime of Regulation 1/2003 heavily depends on the existence of clear and transparent legal rules. In the context of balancing, legal certainty requires a transparent balancing regime in which the role of non-competition interest is clearly defined.¹¹⁹ In particular, the competition enforcers should actively communicate the legal rules and their application in each case.

4.3.2. *Predictability*

Undertakings must be able to predict to a sufficient degree of certainty whether an agreement violates Article 101 TFEU and if, and how, balancing will be administered.¹²⁰ The predictability of balancing encompasses notions of both legitimate expectations and non-retroactivity (or non-retrospectively) of the law.¹²¹ Especially under the self-assessment regime, legal certainty requires a high degree of predictability for the outcome of balancing in a particular case. For this purpose, the competition enforcers must develop consistent and durable balancing methods, worthy of respect over time.¹²² The balancing should not be applied on an *ad-hoc* basis, or fluctuate frequently.

¹¹⁷ On the link between uniformity and legal certainty, see for example, C-234/89 *Delimitis* (1991), para 47; C-461/03 *Gaston* (2005), para 21.

¹¹⁸ Regulation 1/2003, Articles 11-13 and 22 and the Council and the Commission ECN Statement (2004) enact a set of flexible instruments to allocate cases. Also see (Wils 2004a), 44-47.

¹¹⁹ (Townley 2009), 42; (Lavrijssen 2010), 655-656.

¹²⁰ (Hawk & Denaeyer 2001), 124, 130; (Townley 2009), 235; (Peepkorn 2016), 390.

¹²¹ UNCTAD report on the Relationship Between Competition Authorities and Judiciaries (2016), 2.

¹²² Compare to (Kovacic et al. 2011), 37.

EU and national Courts have an important role in securing this aspect of legal certainty. Legal certainty is enhanced when judges and the Commission reach coherent decisions, which can then serve to help undertakings predict the outcome of future cases.¹²³

4.3.3. *Discretion*

Finally, the legal certainty of balancing is also dependent on the degree of *discretion* necessary to apply a certain balancing tool. As mentioned previously, administrative discretion can be defined as the degree of freedom an enforcer has to choose between different possible courses of action.¹²⁴ The degree of discretion is determined by the extent to which the relevant legislative and constitutional frameworks and the applicable case law have directed or codified such a choice.

For this purpose, this dissertation differentiates between general balancing standards and precise balancing rules.¹²⁵ *Precise balancing rules* apply equally and consistently to all agreements. Once it has been determined that a certain agreement lies within a relevant category, a predetermined-categorical rule applies that limits the discretion of the competition enforcer (i.e. a BER). A precise balancing rule promotes legal certainty as it offers a rigid set of balancing principles. A *general balancing standard*, on the other hand, employs indeterminate terms by referring for example to the purpose of a regulation or to a vague consumer welfare standard. The outcome of balancing in a specific case is essentially based on the discretion of the competition enforcer and is, therefore, less certain. Hence, general balancing standards that are vague or opened-textured leave more room for discretion compared to precise balancing rules.

Combining the above three criteria of legal certainty, the third benchmark can be defined as follows:

Legal certainty: A balancing promotes legal certainty when the balancing framework is transparent and predictable, and constructed in a manner that allows undertakings to self-assess their conduct. A precise balancing rule is more likely to promote legal certainty compared to a general balancing standard.

¹²³ UNCTAD report on the Relationship Between Competition Authorities and Judiciaries (2016), 2.

¹²⁴ On the definition of discretion see the opening of Section 4 above.

¹²⁵ Based on (Raban 2010), 175. Also see (Galligan 1990), 6-7; (Wils 2011), 354.

4.4. Trade-off between normative benchmarks

It must be emphasised that all three normative benchmarks cannot be fully realised at once. For instance, balancing on the basis of economic benefits and a process aimed at correcting the market (i.e. is highly effective), will almost always allow some degree of flexibility and discretion (i.e. a lower degree of legal certainty, and perhaps uniformity). Similarly, given the inherent limitations of human foresight and language, it might be impossible to formulate a precise balancing framework that consistently achieves its purpose. Precise rules can lead to arbitrary results in practice.¹²⁶ Accordingly, a tightly formulated balancing tool that entails a limited degree of discretion or national deviation (i.e. is certain and uniform), might hamper the effectiveness of balancing.

This introduces yet another layer of balancing to the equation. Balancing between the various objectives of Regulation 1/2003. With this in mind, this dissertation assesses the level at which balancing meets each normative benchmark separately, rather than in aggregated form. This is summarised at the end of each of the empirical Chapters 3-8 in a radar (spider) chart. Radar charts are a way of comparing multiple variables, which in our case are the sub-components of the normative benchmarks defined in this section. Each variable is provided with an axis that starts from the centre, varying from 0 (low compliance) to 3 (high compliance). This method of presentation reflects the trade-offs between normative benchmarks and reflects the degree to which balancing meets the normative benchmark and the trade-off occurring prior to and following modernisation.

To conclude, this chapter has laid the methodological basis that guides this dissertation. Before moving ahead to discuss the empirical results on the application of the six balancing tools and their fulfilment of the normative benchmarks, the next chapter places the debate on balancing in an appropriate historical EU context by providing a historical overview of the development of balancing under Article 101 TFEU.

¹²⁶ (Wils 2011), 355-356.