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A quantitative and qualitative study

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1. INTRODUCTION

The possibility of considering non-competition interests under Article 101 TFEU and the manner in which that would occur are intrinsically linked with the objectives pursued by the Article. To paraphrase *Bork*,¹²⁷ the enforcement of Article 101 TFEU and the balancing framework cannot be made rational until one determines what the objectives of the Article are. This chapter explains why more than 60 years after the drafting of Article 101 TFEU, there is still no simple answer to this question. It illustrates that the content of competition law and the balancing framework are policy choices.¹²⁸ Favouring consensus over clarity, the EU institutions and the Member States have never identified the Article's objectives or created a defined balancing framework.

The chapter tackles this question from a historical perspective. It examines five aspects. First, Section 2 details the historical development of the balancing principles embedded in *EU primary law*. It shows that the Member States have not agreed on the objectives of the Article and the

¹²⁷ (Bork 1978), 50; Also see (Townley 2009), 11; (Witt 2016b), 77-79.

¹²⁸ (Bork 1978), 50; (Townley 2009), 11, 46; (Frazer 1990), 623.

room, scope, or method for balancing. Next, Section 3 focuses on *EU secondary law*. It explores how the Council and the Commission have shaped the procedural rules governing the application of Article 101 TFEU in general and balancing in particular. Section 4 investigates the *EU Courts'* role in filling the gaps in the law and interpreting the balancing rules. Finally, the chapter offers a historical overview of how balancing has been *applied in practice* by the Commission and NCAs. For this purpose, Section 5 discusses the development of the Commission's balancing practices. Section 6 examines the approaches of the five Member States examined in this dissertation, which have not always converged to the Commission's approach.

It should be pointed out that many of those topics have already been extensively discussed elsewhere. Therefore, this chapter lays out the necessary background for discussing the empirical findings that are presented in Chapters 3-8.

2. BALANCING IN EU PRIMARY LAW: MORE QUESTIONS THAN ANSWERS

2.1. Normative value of competition in the EU Treaties

The search for the objectives of Article 101 TFEU must begin by identifying the role of *competition policy* in the Treaties. There is no straightforward answer to this question. Although Article 3 TEU defines a list of broad and inter-related economic and social objectives for the EU, the promotion of competition is *not* one of those objectives. Until the Lisbon Treaty of 2009, the EU Treaties referred to "a system ensuring that competition in the internal market is not distorted" as one of the EU "activities".¹²⁹ Nevertheless, they did not detail the relationship between the various objectives and activities, nor how to resolve conflicts among them.¹³⁰

The vague wording of the Treaties has sparked a long discussion on the objectives of EU competition policy.¹³¹ That debate goes beyond the scope of this study. For the purpose of this dissertation, it is sufficient to note that EU Courts and legal scholarship often point to three possible constituent objectives, which have been accorded varying weights throughout the years.

¹²⁹ Article 3(1)(g) EC.

¹³⁰ (Lavrijssen 2010), 637.

¹³¹ For example see (Wesseling 2000), 77-113; (Motta 2004), 17-30; (Odudu 2006), 13; (Monti 2007), 23; (Parret 2009), 11; (Van Rompuy 2012), 52; (Maier-Rigaud 2012), 132; (Parret 2012), 65-68; (Lianos 2013); (Heide-Jorgensen 2013), 96-100; (Pérez & Scheur 2013); (Witt 2016b), 77-109; (Sauter 2016), 64-75.

The first objective of EU competition policy is the maintenance of economic freedom, which is drawn from an Ordoliberalism concept of competition policy. According to this objective, competition policy is a means for preserving a free society. This objective is to be achieved by eliminating private economic power concentrations, and more specifically by establishing and enforcing complete competition on markets. This theory runs counter to the neo-classical concept of competition, which is embedded in *laissez-faire* economic philosophy and limits intervention in markets. Ordoliberalism advocates for governmental intervention imposing obligations of fair conduct and suppressing economic power to safeguard economic freedom in the marketplace.¹³²

The second objective of EU competition policy is market integration. Unlike other jurisdictions' competition policies, EU competition law is a mechanism for integrating EU markets. Competition policy is a complementary measure to the EU free movement rules, ensuring that private firms will not re-establish national market divisions that were previously put in place by Member States' protectionist measures.¹³³

The third objective of EU competition policy is the promotion of economic welfare. According to this objective, EU competition policy is designed to ensure an efficient allocation of resources throughout the EU. As elaborated in Section 5 below, the objectives of economic freedom and market integration have played a significant role in directing the enforcement of EU competition policy in the past. Since the mid-1990s, however, EU competition policy has taken a turn, now focusing on economic welfare. There are various views as to the type of economic welfare EU competition policy should promote. Some argue that EU competition policy is or should be directed at the advancement of the total, aggregated welfare of all groups of citizens in the economy. Others maintain that it advances, or should advance, consumer welfare only.¹³⁴

The three above objectives of EU competition policy encompass various political-societal values, none of which is directly related to the competitive process or structure as such.¹³⁵ In other words, the protection of competition interests is only one *means* to achieve those three

¹³² On the Ordoliberalism objective of EU competition policy see, in particular, (Monti 2007), 22-24; (Maier-Rigaud 2012), 136; (Parret 2012), 66-68; (Lianos 2013), 24-28; (Pérez & Scheur 2013), 21-31; (Talbot 2016). On the German origins of Ordoliberalism see Section 6.2.1 below.

¹³³ On the market integration objective of EU competition policy see, in particular, (Gerber 1998), 334-391; (Monti 2007), 39-44; (Parret 2012), 65-66; (Lianos 2013), 14-15; (Pérez & Scheur 2013), 22, 26, 40-52.

¹³⁴ On the economic welfare objective of EU competition policy see, in particular, (Kjolbye 2004), 566; (Nazzini 2006), 504; (Gerber 2008), 1247; (Parret 2012), 14-16; (Witt 2016b), 80-83.

¹³⁵ (Andriychuk 2010), 155.

objectives,¹³⁶ which must be balanced against other economic and political non-competition interests. In fact, the three objectives reflect various theories of markets and societies and manifest different preferences towards the balancing of the economic, social and political objectives of the EU.¹³⁷

The debate about the objectives of EU competition policy was revived in the mid-2000s. In 2004, the (discarded) draft of the Treaty establishing a Constitution for Europe advocated enhancing the normative value of competition. It proposed to declare, for the first time, that “an internal market where competition is free and undistorted” is a stand-alone EU objective and not merely an “activity” aimed at achieving the other aims.¹³⁸ Yet, France opposed this change when the Lisbon Treaty was adopted in 2009. French President *Sarkozy* argued that competition should not be a means and an end unto itself, but rather a mechanism for the realisation of EU industrial policy.¹³⁹ Accordingly, not only was competition not included as an objective of the Lisbon Treaty, it was also no longer even mentioned as an “activity”. At the same time, the substantive reference to competition is still part of EU primary law. The Protocol on the Internal Market and Competition annexed to the Lisbon Treaty provides that the internal market “include [...] a system ensuring that competition is not distorted”.¹⁴⁰ Moreover, Article 119 TFEU specifies that EU economic policy follows “the principles of an open market economy with free competition”.

As a consequence, the normative implications of the change concerning competition in the Lisbon Treaty are disputed. On the one hand, scholars have listed several factors indicating that the change has no real impact, but is at most symbolic. They have stressed that the Protocol is an integral part of the Treaty and that the Treaty does not form a clear hierarchy between the various EU policies. The fact that competition is listed as neither an objective nor an activity has, therefore, not reduced its importance.¹⁴¹ Those scholars have also cited the CJEU, which has reaffirmed the legal value of competition policy by emphasizing that the Protocol is an

¹³⁶ This approach dates back to Smith’s economic theory detailed in an *Inquiry into the Nature and Causes of the Wealth of Nations* (1776). Accordingly, competitive markets are seen as a desirable framework for fostering welfare and growth. Also see (Pera 2008), 129-130.

¹³⁷ (Townley 2009), 48. Also see (Sufirin 2006), 953. Chapter 1, Sections 2 and 4.1 asserted that this justifies the narrow definition of competition interests used in this dissertation, and the use of the objective of Article 101 TFEU enforcement, rather than the objectives of EU competition policy, to measure the effectiveness of balancing.

¹³⁸ Draft Treaty establishing a Constitution for Europe (2004), Article 3(2).

¹³⁹ Quoted in (Drexel 2010), 663 and (Van Rompuy 2011), 2. Also see (Schweitzer 2007), 1.

¹⁴⁰ Protocol 27 on the Internal Market and Competition. Also see Article 51 TEU.

¹⁴¹ (Semmelmann 2008b), 32; (Lavrijssen 2010), 637.

essential part of the objectives of the Treaty.¹⁴² By the same token, scholars have noted that neither the competition law provisions of the Treaty nor secondary regulations were modified following the Lisbon Treaty.¹⁴³ As confirmed by *Kroes*, the European Commissioner for Competition at the time, the Lisbon Treaty upholds the existing status of competition.¹⁴⁴

On the other hand, other scholars have maintained that the change could be understood as a political declaration that competition policy has less weight compared to other EU policies. This position may affect the weight the competition enforcers ascribe to competition vis-à-vis other non-competition interests.¹⁴⁵

For the purpose of this dissertation, it is sufficient to note that the EU Treaties do not clearly define the objectives of EU competition policy. Those objectives are still contentious and subject to ongoing political and legal debate.

2.2. Article 101 TFEU wording and structure: Member States agree to disagree

A separate yet linked question relates to the *objectives of Article 101 TFEU*. This question moves away from examining the objectives of EU competition policy as a whole, and toward rationalising the objectives behind the EU's prohibition on anti-competitive agreements. The wording and structure of Article 101 TFEU are the results of lengthy negotiations preceding the adoption of the Rome Treaty of 1957.¹⁴⁶ It was settled upon by the national delegations attending the Messina conference of 1955.¹⁴⁷

The drafting of the Article was strongly influenced by French competition law. Being the only Member State having comprehensive competition rules at the time, French law served as a prominent model for Article 101 TFEU.¹⁴⁸ As elaborated below, the French law was based on a

¹⁴² C-52/09 *TeliaSonera* (2011), para 20; C-496/06 *Commission v Italy* (2011), para 60; T-456/10 *Animal feed phosphates* (2015), para 212; (Seidel & Federico Pace 2013), 4-5.

¹⁴³ (Mestmäcker 2000), 7-8; (Seidel & Federico Pace 2013), 637; (Kuenzler & Warloutzet 2013), 38-43.

¹⁴⁴ MEMO/07/250 Statement by European Commissioner for Competition Kroes on results of June 21-22 European Council - Protocol on Internal Market and Competition (2007).

¹⁴⁵ (Schweitzer 2007), 5; (Riley 2007), 2; (Graupner 2007), 96-97; (Townley 2009), 50; (Parret 2009), 8; (Prosser 2010), 318.

¹⁴⁶ On those negotiations, see (Forrester 2001), 30-39; (Sufrin 2006), 538-540; (Goyder 2009), 919-920; (Seidel & Federico Pace 2013), 78-94; *Modernisation White Paper* (1999), para 10-13.

¹⁴⁷ The Messina conference was a meeting of European foreign ministers aimed at setting up the intergovernmental committee. In 1956, the committee produced the Spaak Report, which laid the foundation for establishing the EEC in the Rome Treaty.

¹⁴⁸ (Seidel & Federico Pace 2013), 59, 62.

principle of abuse, and thus did not unequivocally prohibit all anti-competitive agreements. Instead, it used an *ex-post*, case-by-case analysis to determine if positive effects on economic development or on society could counterbalance an agreement's negative effect on prices. Thus, non-competition interests inherently influenced the scope of the French prohibition.¹⁴⁹

During the negotiations of the Rome Treaty, Germany was in the process of adopting its own competition law. Although the issue was subject to heated political debate, the German delegation advocated an EU law provision based on a *principle of prohibition*. That is to say, a *total prohibition* on any (horizontal) anti-competitive agreement, leaving no room for balancing.¹⁵⁰

The Netherlands proposed a third, intermediate model. It offered a compulsory notification system with provisional validity, analogous to its domestic competition regime at the time. According to this suggestion, while all agreements should have been notified to the Commission if an agreement was to be found abusive, its lack of validity would only be effective prospectively.¹⁵¹

The clash between the Member States' approaches was resolved by means of a compromise between the French and German methods: the wording of Article 101 TFEU closely followed the French proposal. Like the French law, Article 101 TFEU has a bifurcated structure that leaves room for balancing: Article 101(1) TFEU imposes a general ban prohibiting any anti-competitive agreement affecting trade between Member States,¹⁵² and Article 101(3) TFEU provides a structured framework for balancing.¹⁵³ The latter limits the general prohibition by stating "the provisions of paragraph 1 *may, however, be declared inapplicable*" if an agreement "contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not: (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives; (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question".

¹⁴⁹ On the French law and principle of abuse, see Section 6.1.1 below. Also see (Mestmäcker 2000), 223-224; (Seidel & Federico Pace 2013), 59, 62; (Kuenzler & Warlouzet 2013), 100, 103-104.

¹⁵⁰ On the German law and the principle of prohibition, see Section 6.2.1 below. Also see (Pace 2007), 65-66; (Mestmäcker 2000), 223-224; (Seidel & Federico Pace 2013), 60-61.

¹⁵¹ (Forrester 2001), 78.

¹⁵² "All agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market".

¹⁵³ (Faull & Nikpay 2014), 310. Also see Section 2.3 below.

At the same time, Article 101 TFEU was also inspired by the German approach. Based on the principle of prohibition it declares that an anti-competitive agreement is prohibited (Article 101(1) TFEU) and is automatically void (Article 101(2) TFEU). Article 101(3) TFEU sets an exception to the general prohibition, rather than defining the scope of the prohibition itself, as suggested by the principle of abuse advocated by the French.

Still, the wording of Article 101 TFEU has left many issues unresolved. In particular, the Member States have avoided taking controversial decisions on how to balance competition and non-competition interests: At a substantive level, the Article does not define the *types of relevant benefits, method of balancing, or intensity of control*; at a procedural level, although Article 101(3) TFEU states that the prohibition “may, however, be declared inapplicable”, it does not specify *whom* should make such a declaration, or *when*. The substantive aspects are detailed in the next section, and the procedural aspects are elaborated in Section 3 below.

2.3. Substantive aspects: the four conditions of Article 101(3) TFEU

The wording of Article 101(3) TFEU lays out the substantive framework for balancing under Article 101 TFEU. An anti-competitive agreement that is otherwise prohibited by Article 101(1) TFEU can only be accepted if all four conditions of Article 101(3) TFEU have been met.¹⁵⁴ Hence, an agreement must (i) produce benefits; (ii) allow consumers a fair share of those benefits (iii) be limited to restrictions that are indispensable for attaining such objectives; and (iv) must not eliminate competition in the relevant markets. This section demonstrates that each of the four conditions was drafted in ambiguous terms, leaving the competition enforcers wide discretion to balance in a specific case.

2.3.1. First condition: benefit

The first condition of Article 101(3) TFEU stipulates that an agreement must contribute “to improving the production or distribution of goods or to promoting technical or economic progress”. This is known as the *benefit* resulting from an agreement. This condition raises two important sets of questions.

¹⁵⁴ The four conditions are cumulative and exhaustive. That is, all of them must be fulfilled for an exemption to be applicable, and once they have been met an exception may not be made dependent on any other condition. See C-43/82 and C-63/82 VBVB/VBBB (1984), para 61; T-185/00 Eurovision (2002), para 86; T-17/93 Ford-Volkswagen (1994), para 85; T-213/00 Far East Trade Tariff Charges and Surcharges Agreement (FETTCSA) (2003), para 226. Also see Commission Article 101(3) Guidelines (2004), para 42.

First, the Article does not clearly define the *nature* of benefits that fall within the scope of the first condition. Some types of benefits are clearly covered by the Article. This includes cost-efficiencies related to production and distribution chains (“improving the production or distribution”), development of new technologies and products (“technical progress”), and economic growth (“economic progress”). Yet, the consideration of less quantifiable non-competition interests is more equivocal. Article 101(3) TFEU does not indicate if industrial policies (e.g. protection of the national or the common market, development of industries, employment) or political policies (e.g. culture, preservation of traditional forms of trade) may also constitute a relevant benefit.

Second, the Article does not define the relevant *beneficiaries*.¹⁵⁵ It does not specify, for instance, whether only direct benefits to direct consumers should be considered or whether indirect benefits to consumers in other markets or to society as a whole should also play a role.

The answer to these questions bears a significant impact on balancing. Accepting broad types of benefits for a wide group of beneficiaries reserves a greater role for non-competition interests and *vice versa*. To structure the discussion, this dissertation follows the categorisation of benefits offered by a group of experts and summarized by the OFT. Combining the above two questions, it differentiates between three categories of benefits:¹⁵⁶

Direct economic benefits are cost and qualitative efficiencies that occur to direct or indirect users of the product or service covered by the agreement. These benefits either directly affect prices or directly provide additional non-price value for consumers, such as new products, better quality or greater product variety.¹⁵⁷

Indirect economic benefits are cost and qualitative efficiencies that do not occur in the market in which the agreement takes place or has a direct impact. Such benefits arise, for example, in two-sided markets. An agreement concluded on one side of the market could produce indirect benefits for consumers on the other side of the market.¹⁵⁸

Finally, *non-economic benefits* are not directly related to the characteristics of the product or service of the agreement in question. These benefits are non-pecuniary and are often more subjective than direct or indirect economic benefits. They include cultural interests,

¹⁵⁵ OFT Roundtable on Narrow versus Broad Definition of Benefits (2010), para 1.6.

¹⁵⁶ OFT Roundtable on Narrow versus Broad Definition of Benefits (2010), para 3.3-3.17.

¹⁵⁷ OFT Roundtable on Narrow versus Broad Definition of Benefits (2010), para 3.3-3.9.

¹⁵⁸ OFT Roundtable on Narrow versus Broad Definition of Benefits (2010), para 3.10-3.13.

environmental benefits (that are not directly valued by consumers within the relevant market), financial stability or the promotion of national or international interests.¹⁵⁹

The differences between the three categories can be illustrated by the example of an agreement between manufacturers of paper used for printing journals by which they agree to combine production means, set a minimum price for the paper sold, and move to greener production methods.¹⁶⁰ Undoubtedly, a reduction in the paper price due to economies of scale is a benefit that may be considered under Article 101(3) TFEU (direct economic benefit). Benefits to the journals' advertisers may also possibly be taken into account. For example, a reduction in the price of paper could lead to a reduction in the price of journals. Subsequently, the number of subscribers might increase, rendering advertisements more effective (indirect economic benefit). Finally, the agreement could also generate indirect environmental benefits for society as a whole. For example, greener production means could decrease tree-cutting and pollution (non-economic health and environmental benefits).

The distinction between the various categories of benefits is not dichotomous; they can be placed on a scale depending on the degree of remoteness. Benefits generated to remote beneficiaries are more likely to be characterised as an indirect economic benefit than as a direct economic benefit. Moreover, a high degree of remoteness makes a benefit more intangible, and hence more similar to a non-economic benefit.¹⁶¹

On a side note, it should be observed that the term "benefits" is not identical to the notion of "non-competition interests" as defined in this dissertation.¹⁶² Non-competition interests describe the type of *policy* promoted by an agreement (e.g. environmental or employment). The notion of benefits refers to the *case-specific* improvement resulting from an agreement. The promotion of a single non-competition interest might produce various types of benefits. For example, an agreement that stimulates environmental policy might create direct economic benefits (e.g. quality improvements in the form of green credentials), while another agreement might produce non-economic environmental benefits enjoyed by society as a whole (e.g. reducing pollution).

¹⁵⁹ OFT Roundtable on Narrow versus Broad Definition of Benefits (2010), para 3.14-3.17.

¹⁶⁰ This example is based on the one presented in OFT Roundtable on Narrow versus Broad Definition of Benefits (2010), para 3.13.

¹⁶¹ OFT Roundtable on Narrow versus Broad Definition of Benefits (2010), para 3.13.

¹⁶² For a definition of non-competition interests see Chapter 1, Section 2.

2.3.2. *Second condition: fair share*

The second condition of Article 101(3) TFEU states that an agreement must allow “consumers a fair share of the resulting benefit”. This condition also raises two sets of questions.

The first set of questions relates to what constitutes a *fair share*. The Article does not specify a quantitative definition of fair share. It is unclear if consumers can only be compensated for the anti-competitive harms or if the overall effects of an agreement should be positive. Should consumers receive a fair share of each type of benefit?¹⁶³ Article 101(3) TFEU, likewise, does not stipulate how different types of benefits should be weighted. For example, can an increase in prices be compensated by improved quality? And if so, what degree of improvement is sufficient?¹⁶⁴ The answers to those questions outline the limits of balancing. A broad definition of fair share, which allows offsetting benefits and competitive harm across groups of consumers and between different types of benefits, broadens the discretion of competition enforcers to balance competition and non-competition interests.

The second set of questions centres on the definition of *consumers*. The Article does not specify if each consumer must be individually compensated or whether benefits to a group of consumers can compensate for the harm caused to another group.¹⁶⁵ Similarly, the Article does not explain if the benefits and costs within each affected relevant market should be considered separately (i.e. for each group of consumers) or aggregated across all affected markets. If two separate geographic markets are affected by an agreement, and the gains in one market significantly outweigh the harm done in the other, should one aggregate the two sets of costs and benefits in order to examine the agreement (i.e. cross-subsidisation of consumers groups)?¹⁶⁶

The definition of consumer also relates to the issue of future consumers. For instance, can the calculation of the fair share incorporate gains enjoyed by future consumers? Are inter-generational benefits sufficient to compensate anti-competitive harm inflicted on present consumers? And if so, how should a discount rate be applied to future benefits?¹⁶⁷

Constructing the notion of relevant consumers quite broadly increases the likelihood that non-competition interests could offset anti-competitive harm. Instead of compensating each

¹⁶³ (Van Rompuy 2012), 264.

¹⁶⁴ (Nicolaidis 2005), 137.

¹⁶⁵ (Van Rompuy 2012), 264.

¹⁶⁶ OFT Roundtable on Narrow versus Broad Definition of Benefits (2010), para 4.1.

¹⁶⁷ OFT Roundtable on Narrow versus Broad Definition of Benefits (2010), para 5.1.

consumer for the specific harm caused to him or her, the harm could be countered by benefits to other consumers, consumers in other markets, future consumers or society as a whole.

2.3.3. *Third condition: indispensability*

The third condition of Article 101(3) TFEU states that an agreement must not impose “restrictions which are not indispensable to the attainment of these objectives”. This means that the restrictions of competition must be indispensable to the attainment of the benefits (i.e. to the improvement of production or distribution or to the technical and economic progress).

The Article does not explain which features of indispensability are required. As early as *Grundig-Consten (1966)*, the CJEU pointed to two aspects of this condition:¹⁶⁸ First, the Court maintained that there should be a *causal link* between the restrictions on competition and the benefit. The restriction must contribute to the realisation of the benefit. Second, the Court clarified that indispensability entails balancing.¹⁶⁹ An agreement may be exempted only if it generates benefits large enough to compensate the distortion of competition. This also means that the applicability of Article 101(3) TFEU might be limited in time. An agreement is exempted only as long as the restriction is necessary to realise the benefits. The third condition of Article 101(3), therefore, contains a *proportionality test*.¹⁷⁰ Accordingly, strict application of the indispensability condition makes it difficult to accept any anti-competitive measure, and *vice versa*.

2.3.4. *Fourth condition: elimination of competition*

The final condition of Article 101(3) TFEU stipulates that an agreement must not afford undertakings “the possibility of eliminating competition in respect of a substantial part of the products in question”. The interpretation of the fourth condition is particularly ambiguous and has changed over the years. In the past, the prevailing view was that the condition was closely linked to the concept of dominance. According to this interpretation, undertakings having a large market share were automatically in breach of the fourth condition and could never be exempted under Article 101(3) TFEU.¹⁷¹ Hence, non-competition interests could not be examined if they were included in an agreement involving dominant undertakings.

¹⁶⁸ Joined cases C-56/64 C-58/64 *Grundig-Consten (1966)*, 348.

¹⁶⁹ Also see (Nicolaidis 2005), 134-138.

¹⁷⁰ (Goyder 2009), 152-152; (Sauter 2014), 329.

¹⁷¹ In 30979 31394 *Decca Navigator System (1988)*, para 122, the Commission held that an agreement that arises from abuse of a dominant position could not benefit from Article 101(3) TFEU. This seemed to apply regardless of the four conditions, which were analysed separately. Also see (Nicolaidis 2005), 140.

Towards the 2000s, the interpretation shifted to a more economic-based analysis.¹⁷² The fourth condition of Article 101(3) TFEU was seen as *ascribing weights* to the balance between competition and non-competition interests. Namely, the condition was seen as a declaration that the protection of rivalry and the competitive process are prioritised over other benefits. Short-term benefits arising from an anti-competitive agreement cannot prevail over a long-term harm to the competitive process.¹⁷³ This reading allows dominant undertakings to benefit from Article 101(3) TFEU.

The above demonstrates that, although the four conditions of Article 101(3) TFEU establish the substantive framework for balancing under Article 101 TFEU, they do not provide a detailed substantive balancing regime. The four conditions were drafted in broad terms, leaving each competition enforcer a wide margin of discretion to decide *whether* to take non-competition interests into account, *what types of benefits* to consider, and *how*. As the next section shows, in the past, these gaps were primarily filled by the practices of the Commission. Since May 2004, however, NCAs and national courts have also influenced the balancing exercise.

3. BALANCING IN EU SECONDARY LAW: BETWEEN NOTIFICATIONS AND SELF-ASSESSMENT

The vague wording of Article 101 TFEU not only leaves the substantive elements of the Article open to interpretation, but also the applicable procedural framework.¹⁷⁴ This section shows that the Treaties have entrusted the Council with a choice between an *ex-ante* authorisation system versus a directly applicable *ex-post* exception enforcement system, and between a centralised or decentralised regime.¹⁷⁵ Section 5 reveals that those procedural choices have had a tremendous influence on the substantive aspects of balancing.

¹⁷² The old interpretation was explicitly rejected by the GC in T-191/98 *Atlantic Container Line* (2003). The Court explained that such an interpretation was inconsistent with EU competition theory and Article 102 TFEU, in which being dominant is not regarded as harmful to competition in itself. The Court stated that an agreement between undertakings having a dominant position could be exempted, as “the prohibition on eliminating competition is a narrower concept than that of the existence or acquisition of a dominant position” (para 330). The Commission Article 101(3) Guidelines (2004), para 106, which were adopted shortly after the judgment, follow an effect-based approach to the fourth condition. They explain that it is possible to exempt a restrictive agreement involving a dominant undertaking if it has little effect on competition and therefore does not lead to substantial elimination of competition, provided that it does not constitute an abuse under Article 102 TFEU. See Chapter 3, Section 4.4.1.

¹⁷³ Commission Article 101(3) Guidelines (2004), para 105.

¹⁷⁴ (Wils 2004a), 10; (Goyder 2009), 4041; (Seidel & Federico Pace 2013), 63; (Kuenzler & Warloutzet 2013), 110-111; Modernisation White Paper (1999), para 12-13, 18.

¹⁷⁵ Article 103 TFEU. Also see Modernisation White Paper (1999), para 12-13. Notably, the wording of Article 101 TFEU is significantly different from the equivalent Article 65(4) ECSC Treaty, specifying

3.1. Notification-centralised regime of Regulation 17/62

The procedural framework for applying Article 101(3) TFEU balancing was first clarified in 1962 with the adoption of Regulation 17/62. As with the adoption of Article 101 TFEU itself, this too was the product of “extremely tense”¹⁷⁶ negotiation between the French and German delegations. Whilst France was prominent in the drafting of Article 101 TFEU itself, this time around the German approach prevailed.

France (supported by Luxemburg) had proposed that a declaration of inapplicability under Article 101(3) TFEU should be based on self-assessment with *ex-post* control, corresponding with the principle of abuse that guided its domestic law.¹⁷⁷ This was not only inspired by competition concerns; it was also motivated by the political aim of avoiding a “too rigid” supervision of cartels.¹⁷⁸

The German delegation (supported by the Netherlands, Belgium, and the Commission) pursued a different approach. After its proposal for a total prohibition on cartels in Article 101 TFEU had been rejected, Germany strove to ensure a strict *ex-ante* application of EU competition rules similar to its own national system.¹⁷⁹ Moreover, the German delegation rejected the French proposal as incompatible with the wording of Article 101 TFEU. It noted that the phrase “may, however, be declared inapplicable” required a constitutive decision for exemption.¹⁸⁰

Regulation 17/62 reflected a notification and authorisation system based on the German approach. The Regulation introduced a centralised system by which all agreements need to have been notified to the Commission prior to their implementation. Hence, the Commission had exclusive competence for balancing under Article 101(3) TFEU.¹⁸¹

The Member States also debated the level of involvement they would retain in enforcement. On the one hand, France aimed to safeguard the role of national governments. It demanded that the Commission and the affected Member States take infringement decisions jointly and

“the High Authority shall have sole jurisdiction [...] to rule whether any such agreement [...] is compatible with this Article”.

¹⁷⁶ As described by von der Groeben, the first Competition Commissioner. See (der Groeben 1987), 108.

¹⁷⁷ (der Groeben 1987), 109; (Seidel & Federico Pace 2013), 70; (Wesseling 2000), 20; (Wilks 2005), 434; (Sufrin 2006), 923.

¹⁷⁸ (der Groeben 1987), 109.

¹⁷⁹ (Wesseling 2000), 20; (Pace 2007), 71.

¹⁸⁰ (Sufrin 2006), 923; (Seidel & Federico Pace 2013), 70. This criticism was repeated with the adoption of Regulation 1/2003, as detailed in Section 3.3.1 below.

¹⁸¹ Articles 4(1) and (2) of Regulation 17/62 set a very limited exception to bilateral agreements on distribution of goods and licensing of technology. Also see Modernisation White Paper (1999), para 1-4, 17.

that Member States have veto powers via an Advisory Committee. Similarly, France objected to granting the Commission independent investigation and fining powers.¹⁸² On the other hand, the German proposal, which had been adopted by the Regulation, granted the Commission complete independence. An Advisory Committee, an *ad hoc* body composed of officials appointed by the Member States, had only advisory, non-binding powers.¹⁸³

Notably, the Commission's independence and monopoly to apply Article 101(3) TFEU were based on the assumption that it was the only actor capable of employing the discretionary balancing powers in a coherent and uniform manner. Other enforcers, it was feared, would incorporate domestic non-competition interests into their decisions.¹⁸⁴ This position was summarised in the Commission's policy report in 1993, noting: "the grant of a derogation from the ban on restrictive agreements requires assessment of *complex economic situation and the exercise of considerable discretionary power*, particularly where *different objectives of the EC Treaty are involved*. This task *can only be performed by the Commission*."¹⁸⁵ The strength of this assumption should not be underestimated. *Ehlermann*, the Director-General of DG COMP until 1995, described the Commission's monopoly as "natural" and "almost a religious belief".¹⁸⁶

3.2. Blessing and curse: consequences of Regulation 17/62

The consequences of Regulation 17/62 are well documented.¹⁸⁷ Shortly after it was issued, the Commission was flooded with an unmanageably large number of notifications. The Commission had to process more than 34.500 notifications requesting a negative clearance (i.e. declaring that Article 101(1) TFEU did not apply) or an individual Article 101(3) TFEU exemption.¹⁸⁸ The large number of notifications was reinforced by the Commission's and CJEU's broad interpretation of Article 101(1) TFEU. They constructed the notions of "restriction of

¹⁸² (der Groeben 1987), 109; (Wesseling 2000), 20; (Seidel & Federico Pace 2013), 70-71, 78-83.

¹⁸³ Regulation 17/62, Article 10 as replaced by Regulation 1/2003, Article 14. Also see (Seidel & Federico Pace 2013), 77, 82.

¹⁸⁴ Modernisation White Paper (1999), para 17. Also see (Temple Lang 1998), 3; (Wils 2004a), 14-17; (Wils 2005), 6-7; (Gerber 2008), 1239; (Ehlermann 2000), 537-538; (Jones 2010), 787-788; (Sauter 2016), 41-42.

¹⁸⁵ Emphasis added. Policy report 1993, para 190.

¹⁸⁶ (Ehlermann 2000), 537-538.

¹⁸⁷ In particular, see (Van Bael 1986), 62-63; (Temple Lang 1998), 3, 4-5; (Ehlermann 2000), 541; (Riley 2003a), 614; (Wils 2005), 5-7; (Sufirin 2006), 917-918; (Gippini-Fournier 2008), 5-8; (Goyder 2009), 52-53, 613-615; (Jones 2010), 789-790; (Temple Lang 2014), 3.

¹⁸⁸ Modernisation White Paper (1999), para 25; (Korah 1981), 15; (Ehlermann 2000), 541; (Goyder 2009), 40; (Temple Lang 2014), 3.

competition" and "trade between Member States" so broadly that they included almost any restriction imposed on undertakings' commercial freedom.¹⁸⁹

Faced with the enormous number of notifications, the Commission quickly developed several tools to avoid having to apply a full competition analysis in each case.¹⁹⁰ First, as early as 1967, the Commission had introduced the first Block Exemption Regulation (BER) on Distribution Agreements.¹⁹¹ The BER exempted categories of agreements *en bloc*, depending on their form (i.e. if they contained certain provisions and omitted others). The BER relieved the Commission from the duty of undertaking case-by-case balancing, and significantly reduced its backlog of cases.¹⁹² In fact, out of the 40.000 notifications received by the Commission during the first years of Regulation 17/62, 25.000 were settled by the BER.¹⁹³

Second, the Commission had issued notices indicating that certain agreements were not prohibited under Article 101(1) TFEU. Such notices on patent licensing, cooperation between undertakings, and the *de minimis* rule have expressed a form of balancing.¹⁹⁴

Third, from the early 1970s, the Commission had developed an informal instrument in the form of so-called comfort letters. A comfort letter is an administrative letter signed by a Commission official stating that no action will be taken with respect to a particular agreement.¹⁹⁵ Following the issuance of such a letter, the Commission terminates the proceedings without adopting a formal decision. The Commission has used comfort letters to deal with agreements which "at first sight raise no problems with respect to the rules of competition and do not require a formal decision."¹⁹⁶ Initially, comfort letters were only employed for negative clearance, but since the mid-1980s they have been extended to Article 101(3) TFEU exemptions.¹⁹⁷ Notably, comfort letters are not binding on national courts, NCAs, or third parties.¹⁹⁸ However, since the 1980s, in an effort to increase their legal authority, the

¹⁸⁹ See Chapter 5, Section 1.1 and Chapter 8, Section 5.4, respectively.

¹⁹⁰ (Ehlermann 2000), 541; (Goyder 2009), 40-53, 613-615.

¹⁹¹ Regulation 67/67 on Distribution Agreements.

¹⁹² Policy report 1968, 43; policy report 1971, 41.

¹⁹³ Policy report 1979, 16.

¹⁹⁴ Policy report 1971, 101. Also see Chapter 5, Sections 3.5, 3.4, and 3.6, respectively.

¹⁹⁵ (Van Bael 1986), 63; (Temple Lang 1994), 566-567; (Norberg 2007), 525.

¹⁹⁶ Policy report 1981, para 15.

¹⁹⁷ Policy report 1983, 13.

¹⁹⁸ This was clarified by the CJEU in C-253/78 C-3/79 Procureur de la République (1980), para 13 and C-31/80 L'Oréal (1980), para 11-12.

Commission has begun to publish the essential contents of the notified agreements in the official journal and invited comments from third parties.¹⁹⁹

Fourth, the Commission closed proceedings by accepting voluntary commitments.²⁰⁰ For this purpose, the Commission has employed its exclusive power to apply Article 101(3) TFEU to invite undertakings to modify their agreements. Those modifications have been incorporated into both formal and informal decisions to “secure a practical solution to a competition problem”.²⁰¹

By virtue of combining the four above measures, more than 95% of Articles 101 and 102 TFEU proceedings under Regulation 17/62 have been resolved by means of informal measures.²⁰² Those cases have often gone unpublished. *Van Bael* has estimated that only 4% of the informal proceedings have been mentioned, even briefly, in the Commission’s policy reports or press releases.²⁰³ This has led the enforcement regime of Regulation 17/62 to be perceived as being “both a blessing and a curse”.²⁰⁴

On the one hand, the centralised-enforcement regime has facilitated an EU culture of competition. At a time when most Member States did not have robust competition laws, it empowered the Commission to apply uniform rules throughout the EU.²⁰⁵ Moreover, the combination of BERs, notices, comfort letters and informal commitments had empowered the Commission to monitor the development of competition policy. The Commission had not only enforced competition law to correct specific infringements but had also regulated the activities of undertakings and the functioning of markets.²⁰⁶

On the other hand, the enforcement regime suffered from serious procedural and substantive flaws. At the procedural level, the Commission was never able to totally eliminate its backlog of cases, especially as it gradually began to assess more complicated infringements.²⁰⁷ Most

¹⁹⁹ Policy report (1981), para 15; also see (Van Bael 1986), 78-79.

²⁰⁰ Policy report 1982, 59; (Korah 1981), 15; (Van Bael 1986), 63. Also see Chapter 7, Section 2.

²⁰¹ (Bailey 2016), 115.

²⁰² The statistical information extracted from the Commission’s policy reports is reproduced in (Van Bael 1986), 61. Also see Policy report 1971, 24; Policy report 1976, 11; Policy report 1999, 26; (Forrester 1994), 469; (Wesseling 2000), 22-23.

²⁰³ (Van Bael 1986), 64-65.

²⁰⁴ In the words of (Wilks 2005), 434.

²⁰⁵ Modernisation White Paper (1999), para 4.

²⁰⁶ (Van Bael 1986), 62; (Wils 2005), 5-7; (Bailey 2016), 114. Also see Section 5.2.1 below and Chapter 3, Section 4.3.

²⁰⁷ Policy report 1996, 24; policy report 1999, 20.

decisions were informal in nature, lacking sufficient transparency and fully binding effect.²⁰⁸ Reform became pressing in light of the gradual enlargement of the EU, and particularly the significant accession of ten Central and European Member States in 2004.²⁰⁹ Under those circumstances, the notification system of Regulation 17/62 had simply become unmanageable.

At the substantive level, the Commission's scarce resources were used to manage notifications rather than investigate complaints or pursue *ex officio* procedures. In fact, by the late 1990s, only 0.5% of the agreements notified to the Commission ended in a prohibition decision.²¹⁰ In the more than 40 years of application of Regulation 17/62, there have been only 9 decisions in which a notified agreement was prohibited without a complaint having been lodged against it.²¹¹ At the Member States level, the NCAs have rarely dealt with infringement of Article 101 TFEU. Although around half of the NCAs were formally competent under their national laws to apply Article 101(1) TFEU, the Commission's monopoly to apply Article 101(3) TFEU had discouraged them from doing so.²¹² Reform was vital to allow the Commission to refocus its enforcement priorities to combat the most serious restrictions on competition.²¹³ In parallel, the justification for the Commission's monopoly for granting Article 101(3) TFEU exemptions weakened. Over the years, the Commission developed EU competition policy and Member States adopted national competition laws and set up specialised authorities to implement them.²¹⁴

To conclude, the procedural regime of Regulation 17/62 has had mixed effects for balancing. It has allowed the Commission to resolve conflicts between competition and non-competition interests in an *ex-ante*, centralised and fairly independent manner. Meanwhile, this enforcement regime has not had the effect of pressuring the Commission to adopt a clear and comprehensive balancing framework. Those effects on the balancing are examined in Section 5 below.

²⁰⁸ Policy report 1981, 27-28; Policy report 1982, 38; Policy report 1983, 61-62; Policy report 1984, 13; (Ehlermann 2000), 541, 554; (Wilks 2005), 436; (Norberg 2007), 525.

²⁰⁹ Modernisation White Paper (1999), para 40-42. Also see Policy report, 1994, 18; Policy report 1995, 7, 45; Policy report 1996, 24; Policy report 1997, 7, 89; Policy report 2000, 11; Policy report 2001, 4.

²¹⁰ Policy report 1999, 9. Also see Modernisation White Paper (1999), para 43.

²¹¹ Modernisation White Paper (1999), para 77.

²¹² (Wils 2004a), 24; (Blanco 2006), 44.

²¹³ Report on the Functioning of Regulation 1/2003 (2009), para 3.

²¹⁴ (Temple Lang 1998), 4; (Ehlermann 2000), 554.

3.3. Modernisation of competition law

3.3.1. *Origin and reactions to the White Paper*

By the mid-1990s, there was a clear need for a reform to increase the effectiveness of Article 101 TFEU enforcement.²¹⁵ The establishment of the Modernisation Group in 1997 marked the first step towards reform. Consisting of approximately a dozen Commission officials, the Group's work was kept secret, even within the Commission itself.²¹⁶

The Group's recommendations were presented in the Modernisation White Paper of 1999. It advocated a radical, and largely unforeseen, three-pronged reform.²¹⁷ The *procedural* pillar of modernisation proposed a shift towards a self-assessment system, in which Article 101(3) TFEU is reviewed *ex-post* by the competition enforcers. Under the *institutional* pillar of modernisation, the Commission gave up its monopoly to apply Article 101(3) TFEU in favour of decentralised enforcement. Finally, the *substantive* pillar of modernisation introduced economic thinking to EU competition law. The effects of those three pillars on balancing are detailed in Section 5.4 below.

While the Modernisation White Paper had generally received positive reactions,²¹⁸ it did encounter some opposition. Germany, in particular, expressed strong disagreement with the White Paper. While acknowledging that procedural reform was necessary, the German Monopolies Commission²¹⁹ submitted that such a reform required a Treaty amendment. It argued that the positive wording of Article 101(3) TFEU ("may, however, be declared inapplicable") does not support a self-assessment system. Similarly, it maintained that a decentralised self-assessment system contradicts the CJEU's case law declaring that Article 101(1) TFEU has direct effect. According to the Monopolies Commission, the proposed enforcement regime granted the Member States discretion to apply Article 101(3) TFEU in a

²¹⁵ Also see Policy report 1999, 25-26; Policy report 2000, 30; Policy report 2003, 4, 20.

²¹⁶ (Norberg 2007), 527-528; (Wils 2013), 294.

²¹⁷ (Sufirin 2006), 918; (Wils 2013), 294. Notably, the German government and German NCA requested that the Commission share its monopoly to grant exceptions. The more radical solution of shifting to a self-assessment system, however, was rarely suggested or discussed. See (Ehlermann 1996), 90; (Ehlermann 2000), 541-542.

²¹⁸ (Wils 2013), 295. On the process and Member States' reactions to the proposal, see (Kassim & Wright 2009), 746-749.

²¹⁹ The German Monopolies Commission was established by the Second Amendment of the German Competition Act of 1973 to oversee and report on competitive conditions and to play an occasional role in merger review. The Monopolies Commission is an independent expert committee that advises the German government and legislature in areas of competition policy-making, competition law, and regulation. See German Competition Act, Articles 44-47.

manner that denies the conditions for direct effect.²²⁰ It also believed that the shift from a notification to a self-assessment system was unnecessary to deal with the Commission's excessive workload. Rather, this could have been resolved by a more efficient allocation of resources or modification of the existing system (e.g. a decentralised notification system).²²¹

The German Monopolies Commission further highlighted that the Commission's sole power to grant Article 101(3) TFEU exemptions served an important balancing aim. It ensured uniform application of the exemption criteria "in view of the great differences between the national competition laws and the legal and economic policy ideas of Member States".²²² The Monopolies Commission submitted that only the Commission had both the mandate and the ability to reconcile the conflicts of interest, holding that: "this is essentially a political act, whose subject matter is the weighing up of incommensurable factors."²²³ In fact, the Monopolies Commission was concerned that the new priority-setting powers granted to the Commission pursuant to the regime would give rise to political considerations. For instance, opening or withdrawing procedures could be guided by industrial policy rather than by pure competition interests.²²⁴

A designated Committee of the UK House of Lords raised similar concerns, although the UK government was more supportive of the Commission's modernisation proposal.²²⁵ Nevertheless, given the overall positive reactions to the Modernisation White Paper, in 2000 the Commission submitted to the Council a legislative proposal for the reform.²²⁶ The proposal was worded similarly to the version finally adopted by virtue of Regulation 1/2003. Yet, as the next section reveals, it was different in one important respect: the relationship between EU and national competition laws.

3.3.2. *Point of contention: EU and national competition laws*

The decentralisation of enforcement has generated new questions as to the relationship between EU and national competition laws. The Commission, Council, European Parliament, and industry representatives were concerned that decentralised enforcement would lead to the re-

²²⁰ German Monopolies Commission, "Cartel Policy Change in the European Union?" (2000), 16-21.

²²¹ German Monopolies Commission, "Cartel Policy Change in the European Union?" (2000), 45-47; (Bdge 2001), 68; also see (Ehlermann & Atanasu 2001), 18.

²²² German Monopolies Commission, "Cartel Policy Change in the European Union?" (2000), 37.

²²³ German Monopolies Commission, "Cartel Policy Change in the European Union?" (2000), 37.

²²⁴ German Monopolies Commission, "Cartel Policy Change in the European Union?" (2000), 40. This is discussed in Chapter 8, Section 4.

²²⁵ The House of Lords Select Committee on European Union 4th Report, Session 1999-2000: Reforming EC competition Procedures, para 11, 150.

²²⁶ Proposal for a Council Modernisation Regulation (2000). Also see Policy report 1999, 8.

nationalisation of EU competition policy.²²⁷ They highlighted that the enforcement regime must ensure that Article 101 TFEU is applied in a uniform manner throughout the EU, despite differences in national competition laws and traditions.²²⁸

To accommodate such concerns, the legislative proposal for Regulation 1/2003 originally suggested that national competition laws would not apply to agreements that fall within the scope of Article 101 TFEU.²²⁹ In other words, EU and national competition laws would not be applied in parallel. Nevertheless, this provision drew significant opposition from a number of Member States. In fact, it proved to be the most contentious point in the Council's deliberations.²³⁰

A compromise was ultimately found in the form of Article 3 of Regulation 1/2003. The Article introduced a duty for the *parallel application* of EU and national laws. It has obliged NCAs and national courts to apply EU competition law when applying national competition law to agreements falling within the scope of application of Article 101 TFEU, that is, agreements having an effect on trade between Member States (the primacy rule of Article 3(1)). It further establishes the primacy of EU law by holding that the application of national competition law may not lead to the prohibition of an agreement that is not prohibited under Article 101 TFEU (the convergence rule of Article 3(2)).²³¹

3.3.3. *Commission's and NCAs' role under Regulation 1/2003*

Regulation 1/2003 empowers the Member States to apply Article 101(3) TFEU directly. Although it entrusted the NCAs with the power to *apply* EU competition rules, the development of competition *policy* still remains the Commission's prerogative. This is reflected by various provisions of the Regulation:²³²

²²⁷ Council's Progress Report on Proposal for Modernisation (2001), para 10; Commission's Staff Working Paper on Proposal for Modernisation (2001), para 11; Committee on Economic and Monetary Affairs Report on Proposal for Modernisation (2000), 22. Also see (Temple Lang 1998), 13-15; (Wils 2013), 295.

²²⁸ Those differences are presented and discussed in Section 6 below.

²²⁹ Proposal for a Council Modernisation Regulation (2000), Preamble 8 and Article 3. The Article states "where an agreement, a decision by an association of undertakings or a concerted practice within the meaning of Article [101 TFEU] or the abuse of a dominant position within the meaning of Article [102 TFEU] may affect trade between Member States, Community competition law shall apply to the exclusion of national competition laws". This provision was not reproduced in Regulation 1/2003.

²³⁰ Staff Working Paper on Article 3 - The Relationship Between EU and National Law (2001). Also see (Kassim & Wright 2009), 746-749; (Wils 2013), 295.

²³¹ Also see policy report 1971, 105-106; (Faull & Nikpay 2014), 101-112. The implications and limitations of this parallel application are examined in Chapters 6 and 8.

²³² (Kingston 2001), 334; (Sauter 2016), 173-174.

First, only the Commission can adopt a *positive decision*, that is, a formal decision explaining why an agreement is not in breach of Article 101(1) TFEU or fulfil the conditions of Article 101(3) TFEU.²³³ The NCAs can only find that there are *no grounds for action* on their part when, on the basis of the information in their possession, the conditions for Article 101 TFEU have not been met.²³⁴ As confirmed by the CJEU in *Tele2Polska (2011)*, the NCAs do not have the power to formally declare that Article 101 TFEU is inapplicable.²³⁵ The difference between positive and no-ground-for-action decisions is important: only the Commission can reach a binding conclusion on the application of Article 101 TFEU, and thus on balancing. NCAs can simply explain why an investigation was discontinued, while the Commission or another NCA may reach a different decision in the future.²³⁶ Nevertheless, no-ground-for-action decisions are significant. As demonstrated by the empirical findings presented throughout this dissertation, NCAs have used those decisions to shape and clarify Article 101 TFEU balancing principles.²³⁷

Second, Regulation 1/2003 safeguards the Commission's role in ensuring the consistent application of EU competition law. The Regulation set the ground for the European Competition Network (ECN), a forum for informal contact and consultation between the Commission and NCAs on enforcement policy aimed at avoiding divergent application.²³⁸ The Commission has a central role to play in this network. In particular, Article 11(3) and (4) of the Regulation obliges NCAs to inform the Commission before commencing a first formal investigative measure, adopting a decision requiring an infringement brought to an end, accepting commitments, or withdrawing a benefit conferred by a BER.²³⁹ Subsequent to those notifications, the Commission may initiate its own proceeding while relieving the NCA of its competence to apply Article 101 TFEU to such case.²⁴⁰ According to the Commission's and Council's declaration, the Commission will only do so in exceptional cases, if NCAs are about to issue conflicting decisions in a single case, when a decision "is obviously in conflict with consolidated case law" or when a decision

²³³ Regulation 1/2003, Article 10. The Commission will adopt those decisions of its own initiative where the EU "public interest" requires.

²³⁴ Regulation 1/2003, Article 5.

²³⁵ C-375/09 *Tele2 Polska* (2011).

²³⁶ Such conflicts are discussed in Chapter 3, Section 6.

²³⁷ See Chapter 8, Section 6. Also see (GCLC Annual Conference 2010), 47-48; (Bailey 2016), 119.

²³⁸ Regulation 1/2003, Preamble 15-18 and Article 11; Council and the Commission ECN Statement (2004), para 3. On the purpose and functioning of the ECN also see (Wils 2005), 62-67; (Goyder 2009), 528-530; (Firat Cengiz 2010); (Monti 2014); (Sauter 2016), 146-158.

²³⁹ This applies only to agreements affecting trade between Member States.

²⁴⁰ Regulation 1/2003, Article 11(6). The Commission shall initiate proceedings where an NCA is already acting on a case following prior consultation with the relevant NCA.

has “significant divergence” with respect to the facts. The Commission may also initiate proceedings when its decision is necessary for the development of EU competition policy.²⁴¹ In practice, however, the Commission has not formally initiated such proceedings.²⁴²

Third, in a similar vein, Article 15(3) of Regulation 1/2003 entrusts the Commission with the submission of *amicus curiae* briefs on its own initiative in proceedings taking place before national courts when the coherent application of Article 101 TFEU so requires.²⁴³

In conclusion, this section has demonstrated that EU secondary law indirectly affects balancing by dictating the actors that may do so, and the relevant point in time. Yet, EU secondary law has not established any substantive criteria for balancing. It has not defined what types of benefits can be taken into account, the balancing method, or the intensity of control. The next section shows that the EU Courts have played an important role in filling some of these gaps, especially prior to modernisation.

4. EU COURTS’ ROLE IN SHAPING BALANCING

Over the years, the EU Courts have played an important role in developing certain balancing principles. As elaborated throughout the dissertation, the EU Courts have shaped balancing in two types of proceedings:

First, CJEU preliminary rulings have interpreted various aspects of balancing.²⁴⁴ To this end, preliminary rulings have facilitated a dialogue between the CJEU and national courts seeking guidance on the appropriate scope of balancing. The CJEU has advised national enforcers in matters such as the objectives of Article 101 TFEU, the types of benefits that can be taken into account when applying the various balancing tools, and the balancing method.

²⁴¹ Council and the Commission ECN Statement (2004), para 21.

²⁴² Commission Staff Working Paper Accompanying the policy report 2010, 107; Report on the Functioning of Regulation 1/2003 (2009), para 256.

²⁴³ On the application of Article 15(3) of Regulation 1/2003 see Modernisation White Paper (1999), para 107; Report on the functioning of Regulation 1/2003 (2009), para 283-290; Report on the functioning of Regulation 1/2003 (2014), para 22; (Wright 2008), 16-17; (GCLC Annual Conference 2010), 358-376; (Sauter 2016), 178-187.

²⁴⁴ Article 267 TFEU. On the role of preliminary rulings in competition law see (Rodger 2008); (Simmelmann 2008b), 44; (Sauter 2016), 171-194; (Kalintiri 2016), 44; (Toader 2017).

Second, the CJEU, and since 1988 also the GC, have examined appeals against the Commission's balancing decisions.²⁴⁵ The Commission's decisions have been reviewed by the GC on points of fact and law, and, subsequently, by the CJEU on points of law. The EU Courts apply two standards of judicial review. A full merit review guides the assessment of fines imposed by the Commission for an Article 101 TFEU infringement.²⁴⁶ A marginal review is used to assess the application of the Article itself. This entails that the Courts only examine the relevance of the facts, and the legal consequences the Commission deduces therefrom.²⁴⁷ The marginal review standard also demands that if a court annuls the Commission's decision, the case is referred back to the Commission. Unlike many other national administrative courts, the EU Courts do not substitute their appreciation of the facts for that of the Commission. They do not decide whether to grant an exemption.²⁴⁸

The marginal review standard of the Commission's decisions (excluding the imposition of fines), has a number of justifications. It has been linked to the Commission's central role in developing competition policy and ensuring compliance with competition rules.²⁴⁹ It was also explained by the complex evaluation of economic matters involved in applying Article 101 TFEU, which necessarily implies a degree of discretion. Finally, it has also been vindicated by the need to maintain uniform application of Article 101(3) TFEU.

Despite the marginal standard of review, the empirical findings show that, prior to modernisation, the EU Courts, and especially the CJEU, held the reins in the development of balancing principles. In a series of landmark cases, the CJEU filled certain gaps in EU primary and secondary law concerning balancing. The Courts engaged in complex evaluations to influence the types of benefits that could be taken into account under the Article, the balancing method, and the development of new balancing tools. The GC played a similar role in influencing balancing, especially with respect to Article 101(1) TFEU balancing tools, albeit to a lesser extent than the CJEU.

²⁴⁵ Article 263 TFEU. On judicial review on the Commission's application of Article 101 TFEU, also see (Bailey 2004); (Meij 2009); (Schweitzer 2013); (Paz 2014); (Prek & Lefèvre 2016); (Sauter 2016), 188-191; (Kalintiri 2016), 188-191.

²⁴⁶ Article 261 TFEU in combination with Regulation 1/2003, Article 31.

²⁴⁷ C-56/64 C-58/64 Grundig-Consten (1966), 347. Also see Joined cases C-8/66 C-9/66 C-10/66 C-11/66 Noordwijks Cement Accoord (1967), 92; C-17/74 Transocean Marine Paint Association (1974), para 16; C-71/74 Frubo (1975), para 42-43; T-9/93 Langnese-Iglo (1995), para 140; (Evans 1981), 435; (Bailey 2004), 1327-1328, 1347; (Sauter 2016), 188-191; (da Cruz 2018), 2-3.

²⁴⁸ (Witt 2016b), 75-76; (Sauter 2016), 188.

²⁴⁹ T-29/92 Building and Construction Industry in the Netherlands (1995), para 287.

As elaborated in the following chapters, the CJEU and GC have differed in their approaches to balancing.²⁵⁰ Historically, the CJEU has facilitated the consideration of a wide array of economic and non-economic benefits under Article 101 TFEU. As early as the 1960s, it promoted a more case-specific application of Article 101 TFEU which took into account the effects of an agreement on other public policies.²⁵¹ The Court annulled a number of the Commission's decisions, finding that it had failed to adequately reflect the specific circumstances of the case. The GC, however, was generally more positive towards the Commission's approach. It called for a more market-based analysis in applying Article 101 TFEU and had typically accepted the Commission's balancing decisions.

The next section illustrates that while the EU Courts have not produced a detailed balancing framework, their case law has had an immense influence on the scope of Article 101 TFEU balancing, to a degree by which it is difficult to separate the EU Courts' approach to balancing from the development of the Commission's approach. The next section also reveals that the modernisation has marked a change in the EU Courts' role. Following modernisation, the EU Courts have played only a marginal role in shaping balancing principles, mostly in reaction to the Commission's practices. Although the Courts, and especially the CJEU, have not fully endorsed the Commission's more economic approach and its attempts to introduce a consumer welfare-based interpretation of Article 101 TFEU, they have not taken a clear stand on those matters.

5. BALANCING IN PRACTICE I: THE COMMISSION'S APPROACH

This section provides a historical overview of the Commission's approach to Article 101 TFEU balancing as applied in practice. It details the development of the objectives and focus of enforcement.²⁵² An orderly review of such developments calls for distinguishing between different enforcement periods. This dissertation roughly follows the periodisation established by previous scholars:²⁵³ (i) the foundation period (1962-1977), from the entry into force of Regulation 17/62 to the *Metro I* judgment; (ii) the workable competition period (1978-1987), from *Metro I* to the signing of the SEA; (iii) the economic social and political EU era (1988-April 2004), from the SEA up until the entry into force of Regulation 1/2003; and (iv) the post-modernisation era (May 2004-2017).

²⁵⁰ Also see (Sauter 2016), 191-192.

²⁵¹ With respect to Article 101(3) TFEU see Chapter 3, Sections 3.3.1 and 5; and with respect to Article 101(1) TFEU see Chapter 5, Section 2.1. Also see (Jones 2010), 791; (Gerard 2012), 36-38.

²⁵² On this development, see also (Gerber 1998); (Wesseling 2000); (Gerber 2008); (Van Rompuy 2012), 137-203; (Patel & Schweitzer 2013); (Witt 2016b); (Sauter 2016), 27-60.

²⁵³ (Gerber 1998), 335-369; (Wesseling 2000), 9; (Van Rompuy 2012), 122; Pérez (2013).

It should be emphasised that this periodisation has been used to provide a sense of time structure, and should not be taken too strictly.²⁵⁴ It offers an analytical guide for understanding changes in the modalities of balancing. It is also supported by the empirical findings, which point to changes in balancing patterns and are elaborated throughout the dissertation.

5.1. First enforcement period (1962-1977): the foundation period

5.1.1. Balancing guided by Keynesian theories

The Commission began enforcing Article 101 TFEU with the adoption of Regulation 17/62, with its first decisions being handed down two years later, in 1964. During the first enforcement period, the Commission applied Article 101 TFEU very carefully. It focused on minor cases centred on jurisdictional and procedural issues. It refrained from imposing fines for infringements, only levying its first fine in 1969.²⁵⁵

Nevertheless, the Commission's practices during those first years should not be undervalued. It set the theoretical basis for enforcement, which guided its decisions for decades to come.²⁵⁶ In particular, the Commission was openly and increasingly inspired by Keynesian economic theories. According to the Keynesian theory of competition, free market forces are not the only source of economic development. Market forces should be limited to promote other public interest values, such as industrial and social policy. Thus, Keynesian theories advocate the use of planning (planification) and neo-corporatism in the market.²⁵⁷

Based on this theory, from its inception and until the late 1970s, EU competition policy chiefly served as a mechanism for completing the internal market and developing EU industrial policy. As observed by various scholars²⁵⁸ and affirmed by the empirical findings presented in Chapter 3, the balancing under Article 101(3) TFEU exemplified strong neo-mercantilist and protectionist traits. The Commission tolerated significant distortions of competition in favour of promoting industrial and social policy in general and market integration in particular.²⁵⁹

²⁵⁴ Also see (Van Rompuy 2012), 122.

²⁵⁵ Policy report 1969, 59.

²⁵⁶ (Gerber 1998), 353; (Goyder 2009), 65-66.

²⁵⁷ (Buch-Hansen & Wigger 2010), 29; (Pérez & Scheur 2013), 21.

²⁵⁸ (Hawk 1972), 232; (Frazer 1990), 611-612; (Sauter 1997); (Gerber 1998), 347-348, 354; (Wesseling 2000), 32; (Buch-Hansen & Wigger 2010), 28-32; (Van Rompuy 2012), 142-144; (Pérez & Scheur 2013), 28-29; Pérez (2013), 19.

²⁵⁹ (Buch-Hansen & Wigger 2010), 28-32. Also see (Pérez & Scheur 2013), 28-29.

Maan Sassen, the second European Commissioner for Competition, who took office in 1967, led this approach.²⁶⁰ He asserted that protection of the competitive process should not enjoy priority over political considerations linked to the prominence of EU firms. Along those lines, the Commission's policy report stated: "the Commission's policy necessarily consisted in preserving effective competition in the common market while at the same time encouraging schemes for cooperation, reorganisation and combination calculated to render Community enterprises as competitive as possible both inside and outside the Common Market. A competition policy on these lines is a first essential to the success of the industrial policy".²⁶¹ The three successors of Sassen, who were consecutively in office until 1985, followed a similar approach.²⁶² They envisioned a "modified" free market system in which economic values are not the sole criteria guiding competition policy.²⁶³ They expressly acknowledged that social interests often demand different results than those prescribed by purely market forces.²⁶⁴

5.1.2. *Market integration as the primary aim*

Based on the above, market integration was the main objective of EU competition policy during the first enforcement period. As observed by *Hawk*, market integration played a double role in the enforcement of Article 101 TFEU:²⁶⁵

On the one hand, the Commission overtly declared that it would direct its enforcement efforts to fighting agreements that had the most negative impact on cross-border trade, rather than on competition as such.²⁶⁶ Accordingly, it concentrated on vertical restraints that separated or protected national markets. This stood in contrast with the practices of most other competition law jurisdictions that targeted horizontal agreements, which are perceived as a serious form of distortion of competition. The US and German competition laws at the time, for

²⁶⁰ (Pérez & Scheur 2013), 32.

²⁶¹ Policy report 1970, 17.

²⁶² (Pérez & Scheur 2013), 33-37.

²⁶³ Policy report 1971, 12-13; Policy report 1972, 11. Also see (Hawk 1972), 232; (Buch-Hansen & Wigger 2010), 29; (Witt 2016b), 93-102.

²⁶⁴ Policy report 1971, 17.

²⁶⁵ (Hawk 1972), 231.

²⁶⁶ Policy report 1971, 15-16. (der Groeben 1961), 25, the first European Commissioner for Competition, explicitly noted that "priority will have to be given to the abolition of those types of cartels whose effects resemble those of customs duties and quotas, that is to-say those which prevent or impede the establishment of common markets. They include in particular international price, quota and cartels dividing the Common market as well as export and import cartels regulating trade between Member States". Also see Policy report 1969, 26-27; Policy report 1974, 29; (Wesseling 2000), 23; (Van Rompuy 2012), 151.

instance, did not prohibit vertical agreements at all.²⁶⁷ The Commission paid considerably less attention to horizontal agreements.²⁶⁸ The few horizontal agreements examined were prohibited only when they impeded market integration in addition to competition (e.g. geographic market-sharing).²⁶⁹ The focus on market integration was also evident from the remedies imposed for infringements. Agreements involving serious restrictions of competition (e.g. price and quotes fixing or export bans), were settled by accepting voluntary commitments or attaching conditions without imposing fines if they did not impede market integration.²⁷⁰

On the other hand, the Commission exempted agreements that did not hinder cross-border activity or promote EU industrial policy, even when they considerably restricted competition. In fact, the empirical findings demonstrate that all of the horizontal cooperation agreements examined by the Commission during the first enforcement period were either found to fall outside the scope of Article 101(1) TFEU or were exempted under Article 101(3) TFEU if they did not impede market integration.²⁷¹ Informed by Keynesian theory, the Commission took into account industrial policy interests aimed at growth, regional cohesion, and employment.²⁷² Those decisions reflected a political choice. They promoted strategic economic sectors and the use of “fair” business practices over the promotion of competition as such.²⁷³

5.2. Second enforcement period (1978-1987): workable competition

5.2.1. Workable competition standard and regulatory balancing

The emphasis on market integration guided the application of Article 101 TFEU well into the 1990s. During the second enforcement period, however, the Commission shifted its reasoning from *establishing* the single market towards *regulating* it.²⁷⁴

This trend was marked by the CJEU’s judgment in *Metro I* (1977). As detailed in Chapter 3 Section 3.3.1, the Court declared that Article 101 TFEU is not necessarily guided by a standard of *perfect* competition. Instead, it introduced the notion of *workable* competition, that is to say, a degree of competition “necessary to ensure the observance of the basic requirements and the

²⁶⁷ (Gerber 1998), 354; (Hawk 1995), 973.

²⁶⁸ (Gerber 1998), 354; (Hawk 1995), 981; (Goyder 2009), 69; (Witt 2016b), 118.

²⁶⁹ Policy report 1971, 25, 28. Also see Annex 2.1.

²⁷⁰ 642 Papier mince (1972); 26825 PRYM-BEKA (1973); 26603 Rank/Sopelem (1974); 27073 Bayer/Gist-Brocades (1975); 27093 De Laval/Stork (1977).

²⁷¹ See Chapter 3, Section 4.2.

²⁷² (Sauter 1997), 1.

²⁷³ (Sauter 1997), 2.

²⁷⁴ (Frazer 1990), 612; (Wesseling 2000), 33.

attainment of the objectives of the Treaty".²⁷⁵ According to the Court, a lower degree of competition may be optimal where an agreement is necessary for the pursuit of an economic or social objective.²⁷⁶ The workable competition standard does not have the same solid economic-theoretical foundation as the perfect competition theory. Applying it necessitates a value judgment to strike a balance between competition, economic, and social objectives.²⁷⁷

The workable competition standard resulted in incoherent balancing. Instead of following a uniform set of balancing principles, such principles were modified according to the desired degree of competition in each market.²⁷⁸ Those differences were particularly visible when the Commission had first applied Article 101 TFEU to agreements subject to specific sector regulation, such as banking and insurance.²⁷⁹ The workable competition standard also guided the BERs adopted during that period, which applied to specific sectors rather than to types of restrictions.²⁸⁰ The flexibility and discretion embedded in the workable competition standard vested the Commission with powers to apply Article 101 TFEU as a market-building tool. The Commission used the Article not only to correct infringements of Article 101 TFEU but also as a means to regulate and promote EU industry.²⁸¹

This regulatory role of Article 101 TFEU, in turn, encouraged the European Parliament to join the debate on balancing.²⁸² The Parliament advocated a broader role for non-competition interests under Article 101(3) TFEU. In *VBVB/VBBB (1981)*, for example, the Commission prohibited a price-fixing agreement between Dutch and Flemish book associations.²⁸³ Prior to the adoption of the decision, the Parliament had stated that "exclusively economic criteria *should not apply* to the book industry and trade because of the specific nature of books as products which directly affect *the interests of the citizen in the cultural, educational and information field*". According to the Parliament, Article 101(3) TFEU should be interpreted "in the light of the cultural and educational aspects of books".²⁸⁴ In recognition of the Parliament's resolution, the Commission gave the associations an extension to bring the anti-competitive

²⁷⁵ C-26/76 Saba (1977), para 20-21.

²⁷⁶ Also see policy report 1979, 10; Policy report 1981, 11; Policy report 1982, 9.

²⁷⁷ (Jacquemin 1999), 18.

²⁷⁸ (Gerber 1998), 356; (Wesseling 2000), 36-37.

²⁷⁹ Policy report 1983, 59; Policy report 1984, 13. Also see Chapter 3, Section 4.3.

²⁸⁰ See Chapter 4, Section 3.2.3.

²⁸¹ See Chapter 3, Section 4.3.1.

²⁸² Policy report 1981, 102; Policy report 1982, 16-20.

²⁸³ 428 VBVB/NBVB (1981), para 49-51.

²⁸⁴ Emphasis added. Resolution of 13.2.1981 on book prices, OJ C 50,9.3.1981, 103-104, para 1 and 5.

agreement to an end. It wished to resolve the matter informally by asking the associations to submit proposals for a system compatible with the rules of competition.²⁸⁵

As the room for balancing within the application of EU competition law expanded, other stakeholders also asked to be involved. Since 1981, the Economic and Social Committee, for instance, has been involved in inter-institutional discussions regarding competition policy in terms of both general policy and specific matters.²⁸⁶

5.2.2. *Balancing in times of economic crisis*

The workable competition standard was also prominent in applying Article 101 TFEU to agreements affected by the EU economic crisis of the mid-1970s. The crisis profoundly changed the economic and political context of EU competition policy. Against the backdrop of a decrease in economic activity and an increase in unemployment, market integration was no longer seen as the sole aim of EU economic policy. The Commission faced political pressure to take active measures for the protection of the Member State economies and to strengthen the competitiveness of European firms.²⁸⁷ The Commission advocated a “flexible” application of competition rules in times of crisis.²⁸⁸ It mostly refused to exempt agreements that directly set prices or quotes or hindered market integration. Yet, it exempted, under Article 101(3) TFEU other agreements that protected national industries against foreign competition or the national economy. The empirical findings presented in the following chapters illustrate that the effects of the financial crisis were also taken into account in the balancing tools of Articles 101(1) TFEU and at the remedy stage.²⁸⁹

The workable competition standard empowered the Commission to regulate the markets and adjust competition policy to different, changing situations. For the very same reasons, however, it also impeded the development of a clear balancing regime for application of Article 101 TFEU.²⁹⁰ The balancing principles greatly remained case-specific.

²⁸⁵ Policy report 1981, 56.

²⁸⁶ Policy report 1982, 19-20. The Committee is an advisory body to the Commission, Council and Parliament, representing workers' and employers' organisations and other interest groups. See <http://www.eesc.europa.eu/en/about#downloads>.

²⁸⁷ Policy report 1977, 10; policy report 1979, 9; policy report 1980, 9; policy report 1981, 12-13; policy report 1983, 11; policy report 1984, 12; policy report 1985, 11; policy report 1988, 13; (Gerber 1998), 356; (Wesseling 2000), 34; (Van Rompuy 2012), 148.

²⁸⁸ Policy report 1985, 12; (Wesseling 2000), 36-37; (Motta 2004), 27; (Van Rompuy 2012), 152-153.

²⁸⁹ See Chapter 5 Section 3.6 and Chapter 7 Section 3.2.2, respectively.

²⁹⁰ As admitted by the Commission itself in policy report 1984, 16.

5.3. Third enforcement period (1988-April 2004): economic, social and political EU

5.3.1. Sectoral approach

The third enforcement period was embarked upon with the entry into force of the Single European Act (SEA) in 1987, followed by the Maastricht Treaty on European Union of 1992. The SEA represented a political commitment of the Member States to comply with various actions intended to complete the internal market by 1992. The two Treaties involved regulation of new sectors (e.g. banking), in combination with delegation, self-regulation, and privatisation (e.g. in the transport, telecommunications and energy markets). The combination of those measures subjected new sectors and policies to the EU to market forces. During the first two enforcement periods, Article 101 TFEU was enforced only against agreements between purely private undertakings. The Member States, consequently, remained competent to pursue public policies at the expense of competition. Yet, the new Treaties blurred the dividing line between private and state conduct. They increased the competencies and the objectives of the EU beyond economic integration, towards social and political integration.²⁹¹

Subsequently, from the third enforcement period, the Commission expended the reach of Article 101 TFEU enforcement to regulated and liberalised markets in which "a competitive environment is not yet fully established".²⁹² Moreover, competition had a role in ensuring that liberalisation and deregulation would realise their expected economic and social advantages.²⁹³ Hence, although the Commission continued to refer to competition as a means for economic integration, it highlighted its social and political implications.²⁹⁴

This promoted the adoption of a *sectoral approach* to Article 101 TFEU. The workable competition premise of the second enforcement period was utilised during the third enforcement period to alter the application of Article 101 TFEU balancing tools depending on the sector concerned.²⁹⁵ In turn, the shift from market integration to a broader economic, social, and political EU agenda required modifying the way balancing took place. Chapters 3 and 5 show that the Commission and CJEU took two diverging approaches to do so. The

²⁹¹ (Sauter 2016), 78; (Gerber 1994), 137-138; (Wesseling 2000), 41-42; (Van Rompuy 2012), 160-161; (Simmelmänn 2008b), 32.

²⁹² Policy report, 2000, 21.

²⁹³ (Wesseling 2000), 41; (Geradin 2000), ix-xii; (Bellamy & Child 2013), 885-886; (Eckert 2018), 1.

²⁹⁴ (Wesseling 2000), 48; (Van Rompuy 2012), 161.

²⁹⁵ (Bellamy & Child 2013), 885-886.

Commission broadened the types of benefits that could be taken into account in the enforcement of Article 101(3) TFEU to include a wide variety of social and political policies. The CJEU also balanced under Article 101(1) TFEU. It gradually created new balancing tools, which are not explicitly pronounced in the Treaties, to weigh interests related to state or public powers and efficient market outcomes.

5.3.2. *Policy-linking clauses*

The SEA and the Maastricht Treaties introduced so-called *policy-linking* or *cross-sectional* clauses to EU law. Those clauses require EU institutions to consider certain public policies when enforcing EU policies. The first three policy-linking clauses in the SEA concerned industrial, cohesion, and environmental policies.²⁹⁶ The Maastricht Treaty added also health, culture, consumer protection, development cooperation, education, employment, and equality between men and women.²⁹⁷ The policy-linking clauses granted a formal status to the above non-competition interests and formalised the obligation to balance them against competition interests.²⁹⁸ They instruct the Commission and EU Courts (as EU institutions) to consider certain social policies within the application of Article 101 TFEU (as an EU policy).

Nonetheless, the clauses do not explain *how* such balancing should take place. They do not form a clear hierarchy or provide mechanisms to solve conflicts between the various policies.²⁹⁹ Moreover, the empirical findings presented in this dissertation show that the competition enforcers have rarely relied on the policy-linking clauses as a normative source guiding balancing. Similarly, they did not give priority to interests protected by the policy-linking clauses over competition or other non-competition interests.³⁰⁰ Accordingly, the empirical findings demonstrate that the introduction of the policy-linking clauses during the third enforcement period did not impact balancing in practice.

²⁹⁶ Articles 130, 130a, 130r EC.

²⁹⁷ Articles 3, 126-130 EC. Also see Agreement on Social Policy (1992), Article 2.

²⁹⁸ Policy report 1993, 51, 87; (Gerber 1998), 371; (Simmelmänn 2008b), 32.

²⁹⁹ For instance, (Kingston 2010), 789 points to three possible interpretations: first, a “weak” obligation to consider the policies protected by the policy-linking clauses. As a result, the competition enforcer has a wide discretion to decide whether to adjust the application of Article 101 TFEU to fulfil such policy; second, an obligation to pursue the protected policy in a systematic way. This obliges the competition enforcer to choose from the available friendlier options for attaining the protected policy; and third, a “strong” obligation that always gives priority to protected policy over conflicting competition interests. Also see (Simmelmänn 2008a), 141; (Lavrijssen 2010), 637.

³⁰⁰ See Chapter 3, Sections 3.3.3.

5.3.3. *First seeds of the more economic approach*

Until the mid-1990s, the Commission's overall approach to Article 101 TFEU was form-based. The competition analysis hinged on identifying certain *forms* of restrictions imposed on the commercial freedom of undertakings, rather than on their *actual effects*. Over the years, this policy has encountered growing criticism.³⁰¹ This was especially highlighted when the Commission's decisions clashed with its US counterpart in cases with an international dimension, such as in the (in)famous *GE/Honeywell* merger.³⁰² It became evident that EU and US law did not adhere to the same substantive principles.

By the mid-1990s the Commission responded to this criticism with an increasing use of economic theory and tools for applying Article 101 TFEU. The driving force behind this more economic approach was Commissioner *Mario Monti*. Being the first Competition Commissioner with an economic rather than a legal background, he introduced new procedural and substantive changes, earning him the epithet "great reformer."³⁰³

The shift to a more economic approach was first marked by the adoption of the new vertical BER in 1999. The BER and most of the BERs adopted since, centred on the market power held by the undertakings, and on economic principles.³⁰⁴ This approach was extended to individual exemptions in the Commission's Vertical Guidelines of 2000. The Guidelines declared that only benefits that "can improve economic efficiency" or produce "efficiency-enhancing effects" can be examined under Article 101(3) TFEU.³⁰⁵ Section 5.4.2 below shows that the Modernisation White Paper (1999) took a similar approach. Similarly, the Commission Horizontal Guidelines adopted two years later affirmed that Article 101(3) TFEU relates to "economic benefits"³⁰⁶ and "efficiency gains",³⁰⁷ calling for greater emphasis on "economic criteria".³⁰⁸

³⁰¹ For instance, (Hawk 1988); (Hawk 1995); (Gerard 2012), 20-22; (Peeperkorn 2016), 393-395; (Witt 2016b), 10-25.

³⁰² In 2001, both the US and EU competition enforcers investigated a proposed merger between two US undertakings. While the merger was cleared in the US, subject to modifications, the Commission prohibited it. The Commission's decision was heavily criticised as based on outdated economic theory and protectionist motives. It was claimed that EU competition law protected competitors, rather than competition. See, for instance, (Morgan & McGuire 2004); (Gerber 2008), 1254; (Witt 2016b), 14, 18.

³⁰³ (Witt 2016b), 35.

³⁰⁴ See Chapter 4, Section 4.

³⁰⁵ Commission Vertical Guidelines (2000), para 6-7.

³⁰⁶ Commission Horizontal Guidelines (2001), para 3-4, 12, 32, 34.

³⁰⁷ Commission Horizontal Guidelines (2001), para 10.

³⁰⁸ Commission Horizontal Guidelines (2001), para 6.

Nevertheless, the Commission did not articulate an exact method for applying the more economic approach or its implications. In 1999, at the beginning of his period in office, Monti referred to the more economic approach essentially as the use of economic tools in competition assessment.³⁰⁹ Accordingly, the Commission placed more emphasis on the generic benefits of competition policy such as economic efficiency and consumer welfare rather than on market integration.³¹⁰ It used economic norms and methods to interpret the data it encountered and to decide cases.³¹¹ Towards the end of the third enforcement period, the Commission also appointed a Chief Economist to provide economic advice on all competition matters.³¹²

The more economic approach also guided the Commission's enforcement priorities. Whilst during the first two enforcement periods it had focused on practices hampering market integration, starting in the mid-1990s the Commission identified the fight against cartels as an enforcement priority. It declared that cartels were the most harmful agreements to consumers and the European economy in general.³¹³ For this purpose, in 1996 it issued its first leniency notice aimed at incentivising undertakings to reveal secret cartels. Modelled on the similar US and Canadian policies, the notice allows fines imposed for participation in cartels to be reduced or waived.³¹⁴

Remarkably, during the third enforcement period, the more economic approach did not prevent the Commission from continuing to examine broader types of benefits under Article 101(3) TFEU.³¹⁵ This was evident from the Commission's decisions, its policy papers, and Commissioner Monti's public statements: First, as shown in Chapter 3 Section 3.3, until the end of the third enforcement period the Commission took into account a broad array of economic and non-economic benefits in its enforcement practices. In fact, the empirical findings show that they were more prominent in the Commission's decisions than ever before.

³⁰⁹ (Monti 2000b), 2; (Witt 2016b), 55-57 and the many sources referred to there.

³¹⁰ Policy report 2000, 21; Policy report 2002, 20; (Van Rompuy 2012), 171.

³¹¹ As elaborated in Chapter 3. Also see (Gerber 2008); (Gerber 2009), 27; (Witt 2016b), 7-39; Policy report 2010, 4-7.

³¹² Policy report 2003, 5, 20; Policy report 2004, 16.

³¹³ Policy report 1996, 27; Policy report 1999, 31; Policy report 2000, 35; Policy report 2001, 24, 30. Also see (Van Rompuy 2012), 171-172.

³¹⁴ Commissions Leniency Notice (1996). The notice was amended in 2002 and 2006 to increase the transparency and certainty of the conditions for fines reduction. Also see Policy report 2001, 24, 30; Policy report 2002, 26-27; Policy report 2003, 24; Policy report 2013B, 19; (Kovacic 2015); (Wils 2016).

³¹⁵ See Chapter 3, Section 3.3.

Second, while referring to the benefits of the first condition of Article 101(3) TFEU as “efficiencies”, the Vertical and Horizontal Guidelines explicitly left room for consideration of non-economic benefits.³¹⁶ The Commission Vertical Guidelines (2000) mention market integration as one of the objectives of Article 101 TFEU,³¹⁷ and the Commission Horizontal Guidelines (2001) specifically accept environmental agreements benefiting society as a whole.³¹⁸

Third, in public statements, Monti emphasised the need to balance competition and non-competition interests. He rejected *laissez-faire* capitalism as the standard for EU competition law in favour of a social market economy in which social standards and other objectives of society are respected.³¹⁹ Monti compared Article 101(3) TFEU to the public interest defence in the area of free movement of goods, in which broad policy considerations are relevant.³²⁰ He affirmed that non-economic benefits to future consumers were compatible with EU competition law. In particular, he stated, “that environmental concerns *are in no way contradictory with competition policy* [...] provided that restrictions of competition are proportionate and necessary to achieving the environmental objectives aimed at, *to the benefit of current and future generations*”.³²¹

In 2004, towards the end of his time in office, Monti first suggested that the more economic approach went beyond the introduction of economic instruments. He pointed to a substantive shift according to which competition policy focuses on *consumer welfare*.³²² As described in the next section, this considerably limited the scope for balancing under Article 101(3) TFEU. This section, however, has suggested that this was perhaps not the original intention when introducing the more economic approach.³²³ The more economic approach did not initially aim to limit the scope for consideration of non-competition interests under Article 101 TFEU but, rather, was confined to introducing new economic thinking and tools for competition analysis.

³¹⁶ Also see (Sauter 2016), 43-44.

³¹⁷ Commission Vertical Guidelines (2000), para 7 states that “market integration is an additional goal of EC competition policy. Market integration enhances levels of trade in the Community. Companies should not be allowed to recreate private barriers between Member States where State barriers have been successfully abolished”.

³¹⁸ Commission Horizontal Guidelines (2001), para 10.

³¹⁹ (Monti 2000a).

³²⁰ (Monti 2000c).

³²¹ Emphasis added. Commission Press Release IP/00/148 of 11.2.2000.

³²² (Monti 2004).

³²³ (Witt 2016b), 55-57.

5.4. Fourth enforcement period (May 2004-2017): post-modernisation era

The previous sections have demonstrated that up until the third enforcement period, the Commission and EU Courts followed a case-by-case approach to balancing. While they regularly emphasised the possibility, and even the duty, to balance competition against a variety of social and political interests, they did not establish a clear balancing framework under Article 101(3) TFEU. Nevertheless, the lack of a set of well-defined legal or economic balancing tools had rather limited consequences prior to May 2004. Under the realm of Regulation 17/62, conflicts between competition and non-competition interests were balanced *ex-ante* and resolved in a centralised and fairly independent manner by the Commission. This dramatically changed with the introduction of Regulation 1/2003. As elaborated below, each of the three aspects of modernisation altered the balancing principles and created a pressing need for a clearly defined regime.

5.4.1. Institutional pillar of modernisation (decentralisation)

Regulation 1/2003 entrusted the NCAs, for the first time, with the power to apply Article 101 TFEU as a whole. The motivation for decentralisation, as mentioned, was essentially a pragmatic one. In the enlarged EU, the Commission could not effectively enforce Article 101 TFEU alone.³²⁴ Indeed, from May 2004 to 2017, 89% of the investigations for infringements of Articles 101 and 102 TFEU were carried out by NCAs.³²⁵

In addition to this pragmatic motive, the Modernisation White Paper also ascribed a substantive aim to decentralisation. The Commission stressed a *political* objective in the form of “bringing the decision-making process closer to citizens [...] to ensure that that the citizens of Europe view competition policy in a positive manner and recognise it as playing an important role in their daily lives”.³²⁶ Allowing consumers to address NCAs and national courts was perceived as a step toward improving EU citizens’ perception of competition policy. Decentralisation was essential to provide the Commission with “strong political support” for its competition policy.³²⁷

³²⁴ See Section 3.2 above.

³²⁵ This calculation is based on the ECN data, available at: <http://ec.europa.eu/competition/ecn/statistics.html>.

³²⁶ Policy report 1999, 10.

³²⁷ Policy report 1999, 21.

Bringing the decision-making process closer to citizens, however, carried an inherent risk. As the NCAs and national courts became the mediators of the economic and political forces that shape EU competition policy, they influenced the way in which the policy was applied.³²⁸ Faced with the lack of a clear framework, balancing became subject to the discretion of each national enforcer, to its institutional, procedural, and political characteristics and competition culture. The empirical findings presented throughout this dissertation reveal that in such settings, the unclear role of non-competition interests has endangered the effectiveness, uniformity, and legal certainty of balancing under the new enforcement regime. Section 3.3 above has already shown that the Commission had attempted to respond to this risk by enacting a set of information and cooperation mechanisms to resolve conflicts arising between the competition enforcers.³²⁹ The following sections further illustrate that the Commission had also altered the substantive competition rules to limit the discretion of the competition enforcers to account for non-competition interests under Article 101 TFEU.

5.4.2. *Substantive pillar of modernisation (1): White Paper*

From the very inception of the Modernisation White Paper, the Commission was concerned that decentralised enforcement would result in the incorporation of politically induced national non-competition interests into the application of Article 101(3) TFEU. While DG COMP is generally free from political interference in the enforcement of individual cases, not all NCAs are equally independent. Some NCAs are institutionally and politically independent of their governments, whilst others are considerably less so.³³⁰

To avoid undue national influence, the Modernisation White Paper has reframed Article 101(3) TFEU into an “objective” tool facilitating economic assessment that is devoid of political considerations.³³¹ It explained that Article 101(3) TFEU was intended “to provide a legal framework for the *economic assessment* of restrictive practices and *not to allow* application of the competition rules to be set aside *because of political considerations*.”³³²

³²⁸ (Maher 2002), 224; (Simonsson 2010), 111.

³²⁹ Modernisation White Paper (1999), para 103; Council and the Commission ECN Statement (2004), para 1. Also see Regulation 1/2003, Preamble 9.

³³⁰ ECN+ Directive Proposal (2017), Explanatory Memorandum, 2; (Temple Lang 1998); (Riley 2003), 659; (Guidi 2016), 93-136. See Chapter 8, Section 7.

³³¹ (Townley 2002), 1092; (Komninos 2005), 17; (Sufrin 2006), 964; (Monti 2007), 21; (Cseres 2007), 169; (Petit 2009), 6; (Townley 2009), 80; (GLC Annual Conference 2010), 82; (Van Rompuy 2012), 257.

³³² Emphasis added. Modernisation White Paper (1999), para 57. Also see para 72.

Commentators quickly pointed out that the new interpretation of Article 101(3) TFEU was incompatible with the Commission's and the CJEU's previous case law, which reserved significant room for non-competition interests under that provision.³³³ *Ehlermann*, the former Director General of DG Competition, suggested a restricted interpretation of the Modernisation White Paper, explaining: "It would probably be an exaggeration to assume that, according to the Commission, non-economic considerations are to be totally excluded from the balancing test required by Article [101(3) TFEU]. Such an interpretation *would hardly be compatible with the Treaty*, the Court of Justice's case law, and the Commission's own practice. However, the passage quoted is a clear indication that non-competition-oriented political considerations should not determine the assessment under Article [101(3) TFEU]".³³⁴

Similarly, while the German Monopolies Commission agreed with the White Paper's substantive merits, it considered it to be incompatible with EU law. It stated: "in the White Paper the Commission attempts to *tone down the significance of a discretionary process* of weighing up in the frame of exemption decisions [...] No matter how much such a viewpoint should be welcomed *the Commission is neither empowered nor able* to issue a binding interpretation of the EC Treaty."³³⁵

5.4.3. *Substantive pillar of modernisation (2): Commission's guidelines*

Despite this criticism, the Commission took yet another step to limit the scope of Article 101(3) TFEU balancing in the guidelines it adopted from May 2004 onwards. Up until that time, the Commission had stipulated that the first condition of Article 101(3) TFEU was fulfilled when an agreement produced "benefits".³³⁶ Although the Commission's policy papers from the end of the 1990s onward introduced elements of economic efficiency to the application of Article 101(3) TFEU, they explicitly left room for non-economic benefits.³³⁷ During the fourth enforcement period, however, the Commission's policy papers no longer referred to Article 101(3) TFEU as involving "benefits". Instead, Article 101(3) Guidelines of 2004 first rebranded the Article as

³³³ (Schweitzer 2007), 9; (Townley 2009), 178-181; (Jones 2010), 791; (Townley 2011), 448; (Van Rompuy 2012), 255-256; (Gerard 2012), 36-38; (Baarsma & Rosenboom 2015), 404; (Witt 2016b), 261-295.

³³⁴ Emphasis added. (Ehlermann 2000), 54. Also see (Jones 2010), 791; (Van Rompuy 2012), 255-256.

³³⁵ Emphasis added. German Monopolies Commission, "Cartel Policy Change in the European Union?" (2000), para 52.

³³⁶ Commission Vertical Guidelines (2000), para 5, 62, 136; Commission Horizontal Guidelines (2001), para 3, 4, 12, 32-35, 68, 102, 132, 151, 169, 192.

³³⁷ See Section 5.3.3 above.

limited to “objective economic efficiencies”,³³⁸ and then increased the evidential requirement necessary to prove such efficiencies.³³⁹

Article 101(3) Guidelines were also the first to introduce the notion of *consumer welfare* as the primary aim of EU competition policy in general, and Article 101(3) TFEU in particular. They declared that the aim of EU competition rules was to protect competition “as a *means of enhancing consumer welfare* and of ensuring an efficient allocation of resources.”³⁴⁰ In parallel, they discarded market integration as an objective of EU competition policy.³⁴¹

The Guidelines, together with the Modernisation White Paper, clearly deviate from the Commission’s and EU Courts’ previous case law. Many non-economic benefits that had been taken into account until the third enforcement period – such as social benefits, industrial policy or environmental consideration - were no longer applicable, in the Commission’s view.

Although this is often attributed to the more economic approach, scholars have also explained the change in the guidelines as prompted by the fear that the decentralisation of enforcement would induce national enforcers to tolerate unlawful agreements on national public policy grounds.³⁴² As *Sufrin* put it, “this exclusion of public interest considerations from Article [101(3) TFEU] is partly a matter of principle but largely a matter of pragmatism”.³⁴³ The narrow definition of relevant non-competition interests serves as a safeguard against national protectionism. By transforming Article 101(3) TFEU into a purely economic efficiency norm, the Commission had limited the discretion of national competition enforcers to incorporate non-competition interests.

Other scholars have linked the Commission’s narrow approach to the direct applicability of Article 101(3) TFEU in the new regime.³⁴⁴ Direct applicability, as a concept of EU law, requires that the legal provision be clear, precise, and unconditional. According to this interpretation, the narrow approach to Article 101(3) TFEU is warranted to reduce the margin of discretion in the application of the provision, to allow it to be applied under the realm of Regulation 1/2003.

³³⁸ Commission Article 101(3) Guidelines (2004), para 50, 59. Also see para 33, 43, 48-72.

³³⁹ See Chapter 3, Section 4.4.

³⁴⁰ Emphasis added. Commission Article 101(3) Guidelines (2004), para 33.

³⁴¹ Market integration is portrayed in the Commission Article 101(3) Guidelines (2004), para 13 as a parallel policy to competition law. On the other hand, in 40023 *Cross-border access to pay-TV* (2016), para 38 the Commission referred to market integration noting that “an agreement which might tend to restore the divisions between national markets is liable to frustrate the Treaty’s objective of achieving the integration of those markets through the establishment of a single market”.

³⁴² (Sufirin 2006), 964; (Sommelmann 2008b), 39; (Petit 2009), 6; (Van Rompuy 2012), 257.

³⁴³ Emphasis added. (Sufirin 2006), 964; Also see (Cseres 2007), 169.

³⁴⁴ (Schweitzer 2007), 8; (Sommelmann 2008a), 196-198.

While not admitting as much explicitly, the Commission acknowledged that Article 101(3) Guidelines entailed a new interpretation of the Article. The Guidelines declare that “with regard to a number of issues, the present guidelines outline the current state of the case law of the Court of Justice. However, the Commission also intends to explain its policy with regard to issues that have not been dealt with in the case law, or that are subject to interpretation”.³⁴⁵ To align the Commission’s new interpretation with the Commission’s and EU Courts’ previous case law, Article 101(3) Guidelines left some room for the consideration of non-economic benefits by concluding: “goals pursued by other Treaty provisions can be taken into account to the extent that they can be subsumed under the four conditions of Article [101(3)]”.³⁴⁶ This provision, in fact, imposes two additional cumulative conditions for granting an Article 101(3) TFEU exception on the basis of non-economic benefits.³⁴⁷ First, only interests that can be ascribed to the “goals pursued by other Treaty provisions” could be relevant. Second, these interests can only be taken into account to the extent they can be “subsumed” by the four conditions of Article 101(3) TFEU. This, in conjunction with the general spirit of the Guidelines, suggests that non-competition interests could only be taken into account under Article 101(3) TFEU if they could be reckoned as economic efficiency gains. The legal and normative difficulties of those two conditions are further discussed in Chapter 3 Section 3.4.

5.4.4. *Substantive pillar of modernisation (3): consumer welfare*

As mentioned above, the Commission’s Article 101(3) Guidelines introduced the notion of consumer welfare as the aim of Article 101(3) TFEU. From an economic-theoretical perspective, consumer welfare is calculated by aggregating the consumer surplus of all relevant consumers. The consumer surplus is the difference between the amount that the consumer was willing to pay for a particular product (consumers’ valuations) and the amount that consumers actually paid for that product. This economic definition takes into account only the effects reflected in supply and demand curves, namely price and quantity. It does not include economic aspects that consumers might value such as quality, innovation, or the existence of verity of products. It

³⁴⁵ Article 101(3) Guidelines (2004), para 7.

³⁴⁶ Commission Article 101(3) Guidelines (2004), para 42. Interestingly, in the draft version of Article 101(3) Guidelines (2003), para 38 the Commission seemed to advocate an even narrower reading. After presenting the two new conditions it added that “[i]t is not, on the other hand, the role of Article [101 TFEU] and the authorities enforcing this Treaty provision to allow undertakings to restrict competition in pursuit of general interest aims”. This wording would have further limited balancing under Article 101(3) TFEU. Also see (Townley 2009), 78.

³⁴⁷ (Van Rompuy 2012), 255-256.

also does not include non-economic benefits. Therefore, the purely economic definition of consumer welfare is of limited use in practice.³⁴⁸

Like the policy papers and decisional practices preceding them, the Commission's Guidelines have once again refrained from laying down a detailed standard to govern Article 101(3) TFEU balancing. The Commission has merely declared that the Article is based on a consumer welfare standard. It did not explain a method to account for non-competition interests under the Article. In fact, the Commission had consciously left this question open, proclaiming that it was case specific.³⁴⁹ As *Daskalova* proficiently observes,³⁵⁰ it is ironic that the meaning of consumer welfare remains unclear when one of the reasons for its introduction into Article 101(3) TFEU was to bring legal certainty and uniformity to a decentralised regime.

The EU Courts, too, have not clarified this issue. They did not issue detailed judgments explaining whether they had accepted the Commission's notion of consumer welfare as a standard for applying Article 101(3) TFEU, and if so, how it ought to be applied. In fact, in *T-Mobile (2009)* and *GlaxoSmithKline (2009)*, the CJEU actually left open the question of whether consumer welfare was at all the legal standard for Article 101(3) TFEU.³⁵¹ Passing on a valuable opportunity to clarify the matter, the Court ambiguously stated that the Article "like the other competition rules of the Treaty, is designed to protect not only the immediate interests of individual competitors or consumers but also *to protect the structure of the market and thus competition as such.*"³⁵²

The unclear role and scope of the consumer welfare standard created much uncertainty about balancing in the post-modernisation era. This uncertainty was amplified because the standard is mostly absent from the Commission's decisional practice. Chapter 3 Section 4.4.1 shows that despite the importance of the standard in the Commission's policy papers, consumer

³⁴⁸ (Motta 2004), 18

³⁴⁹ ICN Competition Enforcement and Consumer Welfare (2011), 27; (Kalbfleisch 2011), 111-112; (Lianos 2013), 16; (Daskalova 2015), 144-151; (Gerbrandy 2015), 771-772

³⁵⁰ (Daskalova 2015), 133

³⁵¹ C-08/08 *T-mobile* (2009); C-501/06P C-513/06P C-515/06P C-519/06P *GlaxoSmithKline* (2009). See Chapter 3, Sections 5.3.2 and 6.2 for the approach of the EU Courts and NCAs, respectively.

³⁵² C-8/08 *T-mobile* (2009), para 38. Notably, the Court deviated somewhat from the opinion of Advocate General Kokott who stated that competition interests are the primary aim of the competition rules: "Article [101 TFEU], like the other competition rules of the Treaty, is not designed only or primarily to protect the immediate interests of individual competitors or consumers, but to protect the structure of the market and thus competition as such (as an institution)" (Opinion of Advocate General Kokott C-8/08 *T-mobile*, para 58). Unlike the AG's opinion, the Court left some room to account for the interests of individual competitors and consumers (efficiency interests).

welfare is rarely mentioned in the Commission's decisions, and is almost never defined.³⁵³ It is unsurprising, therefore, that national enforcers have adopted divergent interpretations in this regard.³⁵⁴ Finally, the uncertainty surrounding the consumer welfare standard has increased because Article 101(3) TFEU nearly disappeared from the decisional practice of the Commission after May 2004. The empirical findings presented in Chapter 3 Section 2 reveal that the Article was never accepted and seldom discussed by the Commission following modernisation.

5.4.5. *Procedural pillar of modernisation: self-assessment and priority setting*

The disappearance of Article 101(3) TFEU from the Commission's decisional practice might initially be seen as proof that non-competition interests no longer play a role in the enforcement of Article 101 TFEU, or at least in the Commission's practice. This conclusion, nevertheless, is *not* supported by the empirical findings. In its place, the empirical findings presented throughout the dissertation indicate that during the fourth enforcement period the consideration of non-competition interests shifted from the *substantive balancing tools* of Article 101 (1) and (3) TFEU to various *procedural and national balancing tools*.

First, the empirical findings uncover that non-competition interests are embedded in the competition enforcers' selection of detection instruments, enforcement targets, and instruments. Remarkably, the procedural pillar of modernisation entrusted the competition enforcers with the power to set their own enforcement priorities.³⁵⁵ Whereas under the old notification regime the Commission examined all notified agreements, under the new self-assessment regime of Regulation 1/2003 the competition enforcers could allocate their own enforcement efforts. Chapter 8 illustrates that the competition enforcers have made use of their new priority-setting powers to account for non-competition interests. They have directed their enforcement efforts to clear-cut infringements of Article 101 TFEU, often by use of leniency applications and/or settlements³⁵⁶ which are unlikely to be justified by overriding non-competition interests. The

³⁵³ In addition, the Commission's staff working paper accompanying its 2017 policy report does not mention consumer welfare in the context of Article 101(3) TFEU at all. Rather, it maintains that a restrictive agreement might be allowed under Article 101(3) TFEU "if it ultimately fosters *competition*" (page 3, Emphasis added).

³⁵⁴ See Section 6 below.

³⁵⁵ Regulation 1/2003, Preamble 18; Modernisation White Paper (1999), para 45.

³⁵⁶ The EU settlement procedure first came into force in July 2008. Undertakings may choose to acknowledge their involvement in the cartel, the precise nature of their infringement, and their liability for the infringement in favour of a 10% fine reduction. Settlements aim to simplify the administrative proceedings and allow the Commission to devote its resources to other cases. See

competition enforcers have rarely adopted positive decisions or given individual informal guidance.³⁵⁷ Rather, agreements that raise balancing questions have mostly been resolved by closing the investigation into a case altogether. The competition enforcers' selection of cases, therefore, has left very limited room for the use of substantive balancing tools.

Second, the competition enforcers have taken non-competition interests into consideration when accepting formal and informal commitments and imposing fines for infringements. This type of procedural balancing tool is elaborated in Chapter 7.

Third, the NCAs and national courts have made use of national balancing tools instead of the substantive balancing tools of Articles 101(1) and (3) TFEU. Those unique national exceptions are considerably different from the EU-based balancing tools. They might indeed result in the fragmentation of applicable competition rules across the EU. These unique national balancing tools are elaborated in Chapter 6.

The shifts in balancing brought about by the three pillars of modernisation have created many ambiguities concerning the role of non-competition interests of Article 101 TFEU in the post-modernisation era. As a result, and as will be demonstrated in the next chapters, many aspects of balancing remain unclear today, more than 15 years after the adoption of Regulation 1/2003.

6. BALANCING IN PRACTICE II: FIVE MEMBER STATES

This section provides a short summary of the historical development of the approaches taken to balancing by five Member States. Those national approaches are significant in light of the mutually determinative connection between national and EU-level balancing. The Member States *are affected* by EU balancing rules when NCAs and national courts implement the balancing rules in practice. In parallel, the Member States *affect* balancing in two ways. First, they take an active part in shaping the balancing rules contained in EU primary and secondary law. As discussed above, the role of non-competition interests under Article 101 TFEU is the result of ongoing negotiation between the Member States and the EU institutions. Second, national approaches affect the

Regulation 622/2008 on Settlement Procedure; Commission Settlement Procedure Notice (2008); Policy report 2008, 6.

³⁵⁷ A formal positive decision was described in Section 3.3.3 above. An informal guidance letter can be issued at the request of undertakings in cases posing novel legal questions. The letter is not binding, and has the same legal effect as negative clearance decisions under the old notification regime. See Modernisation White Paper (1999), para 89; Commission Informal Guidance Notice (2004). Also see policy report 2004, 22; (Gippini-Fournier 2008), 53-56.

application of balancing. The empirical findings presented in Chapters 3-8 illustrate that the NCAs have followed divergent interpretations of the Article 101 TFEU balancing tools and adopted unique national balancing rules that influence the way balancing is administered by national enforcers.

This section, therefore, provides background information for understanding both the development of the balancing tools and their implementation in practice. Each section describes the origins of the national competition legislation, the national provision equivalent to Article 101 TFEU, the standard for balancing (e.g. type of consumer welfare standard) and the institutional and procedural structure of the national enforcement system. In addition, each section details the appeals procedure against the NCA's decisions. They show that national appeals systems differ in the characteristics of the relevant appellate body (i.e. civil/administrative court or a specialised tribunal) and its competence (i.e. full/limited review of legal/factual elements).³⁵⁸

6.1. France

6.1.1. Origins of national competition law

The roots of French competition law can be traced back to the French revolution.³⁵⁹ At the beginning of the 19th century, French competition rules were entrenched in human-rights thinking rather than based on economic motives. They prohibited forms of horizontal price fixing, which were viewed as hindering equal access to commercial life and a violation of the right to equality among men.³⁶⁰ Those early laws enacted a competition system based on the *abuse principle*, which guided French competition law for many decades to come.³⁶¹

During the Second World War, France progressively became a controlled economy, characterised by extensive governmental control and cartelisation. New laws fostered and imposed forms of mandatory cartelisation.³⁶² Even when France formally ceased to be an authoritarian corporative state in 1946, the government's pivotal role in the economy

³⁵⁸ On the standards of judicial review of NCA decisions see (Graham 2009); (Essens et al. 2009); ECN Decision Making Powers Report (2012), 19-28.

³⁵⁹ (Riesenfeld, 1960), 578; (Kuenzler & Warlouzet 2013), 93.

³⁶⁰ See French Chapelier Law of 1791, Article 1; French Penal Code of 1810, Article 419.

³⁶¹ (Riesenfeld, 1960), 577; (Kuenzler & Warlouzet, 2013), 93, 105. On the abuse principle see Section 2.2 above.

³⁶² French Law on the Organization of the Nation in Time of War of 1938 and French Law on Provisional Organization of Industrial Production of 1940. Also see (Riesenfeld, 1960), 579; (Kuenzler & Warlouzet, 2013), 94.

persisted.³⁶³ The French competition regime adopted in the mid-1950s, correspondingly, focused on price control and the limitation of practices negatively affecting prices.³⁶⁴

Since the 1980s, France has gradually transformed into a more market-based economy. The government has opened markets up to competition and privatised many state-owned companies while retaining control over certain companies and industries.³⁶⁵ In 1986, the Ordinance on Competition and Freedom of Prices established modern French competition policy³⁶⁶ and was codified in 2000 in Book IV of the Commercial Code.

6.1.2. *National equivalent of Article 101 TFEU and consumer welfare standard*

As mentioned, 1950s French competition law served as the model for Article 101 TFEU.³⁶⁷ In its present version, Article L. 420-1 of the French Commercial Code contains an absolute cartel ban. Like Article 101(1) TFEU, it prohibits any agreement having the aim or effect of preventing, restricting, or distorting the free play of competition in a market. Article L. 420-4 lays down three exceptions to the general prohibition: a regulated-conduct defence, the possibility of issuing BERs, and a provision similar to Article 101(3) TFEU.³⁶⁸ The latter is broader in scope than Article 101(3) TFEU. Its wording covers wide-ranging policy considerations including those that benefit society as a whole. Notably, the French exceptions are not drafted in the form of exemptions but rather detail the scope of the prohibition itself. As such, they reflect the distinction between “good” and “bad” cartels recognised under the principle of abuse.

The French NCA declares that it enforces Article 101 TFEU on the basis of a *long-term consumer welfare* standard, which is broadly construed. It assumes that intermediate objectives (such as enhancing the competitive process, stimulating efficient allocation of resources and preventing unchecked market power) foster consumer welfare in the long run.³⁶⁹ Competition is therefore not an end unto itself, but a means to safeguard the market economy alongside other public policies.

³⁶³ (Riesenfeld, 1960), 579; (Kuenzler & Warloutzet, 2013), 94.

³⁶⁴ French Price Decree No. 53–704 of 1953; French Price Ordinance No. 54–97 of 1954, Article 50. Also see (Kuenzler & Warloutzet, 2013), 99-101.

³⁶⁵ French Ordinance No. 86-1243 of 1986 on competition and freedom of prices. Also see (Jenny 1990), 317; (Souam 1998), 207; (Mehta, 2006), 378.

³⁶⁶ French Ordinance No. 86-1243 of 1986 on competition and freedom of prices.

³⁶⁷ See Section 2.2 above. The 1954 Ordinance focused on practices having effect on prices. The 1986 Ordinance expended this prohibition also to other forms of restriction of competition.

³⁶⁸ Those exceptions are elaborated in Chapter 5, Section 4.1; Chapter 4, Section 5.1.3; and Chapter 3 Section 6.2.2, respectively.

³⁶⁹ See Chapter 3, Section 6.2.2.

6.1.3. National enforcement system

Like the EU system following modernisation, the post Second World War French system was based on a self-assessment system that did not require prior authorisation. Unlike many other Member States, France maintained its self-assessment regime even after Regulation 17/62 opted for an EU notification and exemption system. Regulation 1/2003 thus drew the EU enforcement system closer to the French one.

The French enforcement system of the mid-1950s was highly susceptible to political interference. It was based on a two-tier review: the competition assessment was performed by the *Commission technique des ententes*, an independent specialist body with merely advisory powers; at a second stage, the decisions were adopted by the Ministry of Economic Affairs.³⁷⁰ In 1977, as part of the general trend towards a more market-based economy, the system transformed into a single-stage examination, which no longer involved the Ministry. The *Conseil de la concurrence* was established, a quasi-judicial independent body having powers to initiate proceedings, issue orders, and impose fines.³⁷¹ This enforcement system is less susceptible to political influence.

In 2004, the *Conseil* was endowed with additional powers, bringing it into line with other NCAs.³⁷² In 2008, those powers were extended to include self-referral and investigation powers, and the *Conseil* was renamed *Autorité de la concurrence*.³⁷³ Yet, the Ministry still holds some powers. It may review certain anti-competitive practices considered to be less significant,³⁷⁴ and has the right to appeal the decisions of the *Autorité de la concurrence*.³⁷⁵

Decisions of the French NCA can be appealed to civil law courts. The Paris Court of Appeal examines the factual and legal grounds of the decision. If it declares that the NCA's decision is void, it may replace it with its own decision. A second appeal on points of law may be submitted to the Supreme Court (the Court of Cassation).³⁷⁶

³⁷⁰ French Ordinance No. 54-97 of 1954, Article 59 quater.

³⁷¹ French Competition Law of 1977; Also see (Souam 1998), 207.

³⁷² French Ordinance no 2004-1173 adapting French Competition Law to EU Competition Law; French NCA annual report, 2004.

³⁷³ French Ordinance no 2008-1161 on Modernisation of Competition Regulation.

³⁷⁴ French NCA annual report (2012), 2-7.

³⁷⁵ French Commercial Code, Article L 464-8.

³⁷⁶ French Code of Civil Procedure, Article 561. Also see (Petit & Rabeux 2009),109-110.

6.2. Germany

6.2.1. *Origins of national competition law*

Germany was the European pioneer in terms of introducing legislation specifically intended to protect the competitive process itself, and not merely to control prices. Its Regulation Against Abuse of Economic Power Position of 1923, was part of the emergency measures adopted by the Weimar Republic following the First World War. It aimed to ensure market freedom, increase production, and reduce inflation.³⁷⁷ Yet, during the years of Nazi control (1933-1945), Germany transformed into a fully planned, state-controlled economy.³⁷⁸

Following the Second World War, the occupying forces adopted the Decartelisation Laws of 1947. The Laws represented the belief that excessive concentration of economic power was one of the causes of German military aggression and the Nazis' rise to power. Suppression of economic power was seen as a precondition for social justice.³⁷⁹ The competition provisions in those laws were heavily influenced by the American occupation and the American Sherman Act.³⁸⁰ The laws in the American and British Zones were similar, including a detailed prohibition against horizontal and vertical practices. The law in the French Zone was less comprehensive, reflecting France's more lenient approach towards cartels, as discussed above.

When occupation ended, the adoption of a new competition regime was subject to rigorous debate: On the one hand, representatives of the German industry supported an abuse-based self-assessment regime, similar to the French system. They argued that a strict prohibition on cartels would impede the reconstruction of national industry.³⁸¹ On the other, supporters of Ordoliberalism, including the German Minister of the Economy, advocated for a *principle of prohibition and control*. Namely, that anti-competitive agreements should have no legal force unless notified and approved by a regulatory body. They aimed to establish an order-based

³⁷⁷ (Kuhn 1997), 116-117; OECD Regulatory Reform in Germany (2004), 8; (Motta 2004), 9-10.

³⁷⁸ (Motta 2004), 9-10; (Pace 2007), 17.

³⁷⁹ (Gerber 1994a), 25; (Kuhn 1997), 117-118; (Pace 2007), 65; (Kuenzler & Warlouzet, 2013), 94. Also see Article 12 of the Law, which declares that "the German economy shall be decentralised for the purpose of eliminating the present excessive concentrations of economic powers as exemplified in particular by cartels, syndicates, trusts and other monopolistic arrangements"

³⁸⁰ In the American Zone, Law No. 56, Military Government Gazette, Germany, United States Area of Control, issue C, at z (1947); In the British Zone, Ordinance No. 78, 16 Military Government Gazette, Germany, British Zone of Control 412 (1947); In the French Zone, Military Government Ordinance No. 96, June 9, 1947, 2 Journal officiel du Commandement en chef français en Allemagne 784 (1947). Also see (Kuenzler & Warlouzet, 2013), 94.

³⁸¹ OECD Regulatory Reform in Germany (2004), 10; (Motta 2004), 10-11; (Pace 2007), 66; (Kuenzler & Warlouzet, 2013), 98.

competition policy as the cornerstone for a democratic order protecting citizens against an authoritarian threat.³⁸² As the next section shows, the German Competition Act of 1957 represented a compromise between those two approaches.

6.2.2. *National equivalent of Article 101 TFEU and consumer welfare standard*

The German Competition Act of 1957 was based on an authorisation system enacting an absolute cartel ban subject to many sectoral and individual exceptions. The Act is still in force today, although with subsequent significant revisions. The prohibition on anti-competitive agreements is laid down in Section 1. The original provision provided that an agreement is ineffective insofar as it is likely to influence production or market conditions by restraining competition. In 1998, the Sixth Amendment of the Act changed the wording to follow the formulation of Article 101(1) TFEU.³⁸³ At the same time, up until 2005, the prohibition did not generally apply to vertical restraints. Certain forms of vertical restraint were regulated, bound to different prohibition and exception rules.³⁸⁴

Over the years, the Act has included four types of exemptions: First, individual exemptions to certain business practices.³⁸⁵ Second, sectoral exceptions shielding various industries from the cartel prohibition.³⁸⁶ Since the late 1980s, the number of industries protected by the Act has been gradually reduced, yet some still exist today.³⁸⁷ Third, a political exemption granted by the Minister of the Economy, confined to narrowly defined circumstances where an agreement is "necessary for prevailing reasons concerning the economy as a whole and the public interest" or upon an "immediate danger to the existence of a majority of the undertakings in a sector".³⁸⁸

³⁸² (Pace 2007), 66; (Kuenzler & Warlouzet, 2013), 98. On the prohibition principle see Section 2.2 above.

³⁸³ The Sixth Amendment of the German Competition Act of 1988.

³⁸⁴ For instance, resale price maintenance, exclusive dealing, license agreements, and certain agreements concerning prices or terms of business.

³⁸⁵ The individual exemptions were set forth in Sections 2-6. These include: standardisation agreements; specialisation agreements; efficiency-promoting agreements between SMEs (added by the Second Amendment of the Act of 1973); rationalisation agreements (following the Second Amendment of the Act of 1973; this exemption applied only to agreements improving SMEs' competitiveness); structural crisis agreements; rebate cartels, export and import cartels (cancelled by the Sixth Amendment of the Act of 1988). Also see (Drahos 2001), 260.

³⁸⁶ For instance, transportation and postal (Section 99), agriculture and forestry (Section 100), banking and insurance (Sections 101-102), copyright associations (Section 102a), supply of public utilities including electricity, gas and water (Section 103).

³⁸⁷ The Fifth Amendment of the German Competition Act of 1989 cancelled most of the exceptions. The exceptions that remained in force following May 2004 are discussed in Chapter 6, Section 3.3.

³⁸⁸ German Competition Act, Section 8. This authorisation has almost never been used in practice. See (Drahos 2001), 96; (Wilks & Bartle 2002), 163.

Fourth, in 1998, the law first introduced an exemption based on the effects of an agreement, similar to Article 101(3) TFEU.³⁸⁹

The German exemptions drastically changed following the modernisation of EU competition law. A 2005 amendment aimed at harmonising the national law with EU competition law.³⁹⁰ The amendment was adopted at the end of a long and controversial debate, including a mediation procedure between the *Bundestag* (Lower House of the German Federal Parliament) and the *Bundesrat* (Upper House of the German Federal Parliament).³⁹¹ The amendment abolished both the specific and ministerial exemptions. Instead, Section 2(1) of the revised Act included a general exception, identical to Article 101(3) TFEU. Despite the abolishment of most specific exemptions, Section 3 of the Act still provides that the conditions for Section 2(1) exception have been fulfilled when an agreement rationalises an economic activity and serves to improve the competitiveness of SMEs. This only applies to purely national agreements that do not affect trade between Member States.³⁹²

In addition, the amendment provides that Regulations of the European Council and the Commission on the application of Article 101(3) TFEU apply *mutatis mutandis* to purely national cases. Remarkably, the draft of the amendment initially also referenced EU guidelines and principles as a source of interpretation. However, this was removed before the legislation was finalised, noting that such guidelines and principles were binding on neither the German administration nor the German judiciary.³⁹³

The German NCA has rejected consumer welfare as a standard for balancing. It has declared that it bases its exemption decisions solely on competition criteria: "it is undisputed that there are other important economic and socio-political goals than ensuring competition. However, it is not the Bundeskartellamt's responsibility to realise these interests".³⁹⁴

³⁸⁹ German Competition Act following the Sixth Amendment of 1998, Section 7.

³⁹⁰ Seventh Amendment of the German Competition Act of 2005.

³⁹¹ (Klees 2006), 399.

³⁹² Section 3(1) provides: "Agreements between competing undertakings and decisions by associations of undertakings, whose subject matter is the rationalisation of economic activities through cooperation among enterprises, fulfil the conditions of §2(1) if: 1. Competition on the market is not significantly affected thereby, and 2. The agreement or the decision serves to improve the competitiveness of small or medium-sized enterprises". Also see B1-25/04 Verta/Danzer (2004), 26.

³⁹³ (Ashurst 2005), 1.

³⁹⁴ http://www.bundeskartellamt.de/EN/AboutUs/Bundeskartellamt/bundeskartellamt_node.html. Also see German NCA annual report 2008, 5 and Chapter 3, Section 6.2.3.

6.2.3. *National enforcement system*

The Competition Act of 1957 established the Federal Cartel Office, the *Bundeskartellamt*. It is an independent higher federal authority assigned to the Federal Ministry of Economic Affairs and Energy.³⁹⁵ The procedural regime follows the EU practice. Originally it was based on a notification and authorisation system. Since the 2005 amendment, it has transformed into a self-assessment system.³⁹⁶

Decisions of the German NCA can be appealed to civil courts. At first instance, the Düsseldorf Higher Regional Court (OLG Düsseldorf) investigates both factual and legal aspects of the decisions and has full jurisdiction over fines. A second appeal on points of law can be submitted to the Federal Court of Justice.³⁹⁷

6.3. The Netherlands

6.3.1. *Origins of national competition law*

Dutch competition policy has been famously ineffective for many years.³⁹⁸ The Law Regulating Economic Competition of 1956 introduced a compulsory notification system with provisional validity, representing a mix of the German and French approaches: Similar to the German approach, it established a notification system, and similar to the French approach it was based on the abuse principle. Accordingly, the Dutch Minister of Economic Affairs would examine the effect of an agreement on the "public interest".

The term public interest remained undefined. It mandated a case-by-case evaluation and involved consultation with other ministries and the Economic Competition Commission.³⁹⁹ Following the assessment, the Minister could issue a declaration of general application, expanding the effect of an agreement that was deemed positive for the common good to a whole sector. Alternatively, it could grant a declaration of invalidity to an agreement with negative effects.⁴⁰⁰

³⁹⁵ See German Competition Act, Section 51(1). The Ministry was previously named the Federal Ministry of Economics and Technology, and before that the Ministry of Economy.

³⁹⁶ German Competition Act following the Seventh Amendment of 2005, Sections 9-10.

³⁹⁷ German Competition Act, Sections 63 and 70. Also see (Terhechte 2009); (Frese 2014), 143-144.

³⁹⁸ (Russe & Griffiths. 1998), 15; (Kuenzler & Warlouziet 2013), 91.

³⁹⁹ (OECD, 1998), 9.

⁴⁰⁰ (Kuenzler & Warlouziet 2013), 102-104.

Although it was frequently amended,⁴⁰¹ up until the mid-1990s the law had little use in practice, and the Netherlands remained a “cartel heaven”.⁴⁰² At the same time, Dutch firms were increasingly subject to Article 101 TFEU infringement procedures at the EU level. In fact, the Commission condemned some agreements even after the Dutch government approved them.⁴⁰³ This phenomenon reached its peak in the Commission’s *Dutch construction cartel (1992)* case.⁴⁰⁴ In addition to imposing fines on the undertakings, the Commission initiated an infringement procedure against the Dutch government, claiming that the Dutch law and enforcement practices had hindered the proper functioning of EU competition rules.

The Commission terminated the proceedings after the government agreed to enact a more modern domestic competition policy.⁴⁰⁵ Initially, the Dutch government only enforced its existing competition laws more rigorously. Yet, the adoption of the Dutch Competition Act of 1998, which is still in force today, modelled the national law closely after its EU counterpart.

6.3.2. *National equivalent of Article 101 TFEU and consumer welfare standard*

Since the late 1990s, two opposing forces have shaped the Dutch approach to balancing. On the one hand, subsequent to the adoption of Regulation 1/2003, the Dutch government called for the Europeanisation of the Dutch law, bringing it “as far as possible into line with the [EU] regime”.⁴⁰⁶ Hence, Article 6(1) and (3) of the Dutch Competition Act repeat the wording of Articles 101(1) and (3) TFEU, respectively.

On the other hand, the Dutch government has consistently pushed for the consideration of broad non-competition interests. In particular, in addition to Article 6(3), the Act includes a broad *de minimis* exception, exceptions for undertakings entrusted with the provision of services in the public economic interest, BERs, and sectoral exceptions for collective labour agreements and agreements on pensions.⁴⁰⁷ Those exceptions were criticised as being overly

⁴⁰¹ The Dutch Industrial Agreements Act of 1935; The Dutch Cartel Ordinance of 1941; Dutch Industrial Organisation Act of 1950; Dutch Business Regulation Act of 1951; Dutch Law Regulating Economic Competition of 1956; Also see (Drahos 2001), 342; (Kuenzler & Warlouzet 2013), 95.

⁴⁰² (Kuenzler & Warlouzet 2013), 115.

⁴⁰³ (Drahos 2001), 366.

⁴⁰⁴ 31572 and 32571 Building and construction industry in the Netherlands (1992).

⁴⁰⁵ (Drahos 2001), 214.

⁴⁰⁶ Dutch NCA Annual report 2003, 16.

⁴⁰⁷ Those exceptions are detailed in Chapter 6 Sections 3.1; Chapter 4, Section 5.1.3; and Chapter 5, Section 4.1, respectively.

broad, still encompassing most of the exemptions that could be considered under the old Dutch public interest test.⁴⁰⁸

In a similar vein, in 2003, the Social and Economic Council of the Netherlands (SER)⁴⁰⁹ critiqued the manner in which the Dutch NCA examined non-competition interests, noting that Dutch competition policy was a means to boost the prosperity of Dutch society, rather than an end unto itself. Such prosperity was defined broadly, including economic progress (income and productivity growth), social progress (well-being and social cohesion) and a good quality of life (in both a spatial and environmental sense).⁴¹⁰ The SER condemned the Dutch NCA for following the Commission's approach to balancing. It noted that the Commission had not provided a clear and transparent criterion, and confined balancing to benefits having economic effects.⁴¹¹ The SER thus recommended that the Commission and NCA take broader types of benefits into account.

The SER proposal for an EU treaty amendment was not accepted. The Dutch Competition Act, however, was amended to order the Dutch NCA "to include *other interests besides economic interests* in its considerations for purposes of Article 6(3)".⁴¹² Following this amendment, the Dutch government demanded that the Dutch NCA consider a broad array of non-economic benefits in the application of Article 101 TFEU. In particular, a 2007 Dutch Court of Audit report concluded that the NCA should balance in a clearer manner, and include broader interests.⁴¹³ Following this critique, the Dutch NCA has regularly dedicated special attention to balancing in its annual reports.⁴¹⁴

In 2014, the Dutch NCA took a significant stand in favour of including non-economic benefits by adopting a Vision Document on Competition and Sustainability.⁴¹⁵ Interpreting both Dutch and EU competition policy, the Vision Document claimed that sustainability interests could play an important role in the enforcement of "agreements on sustainable initiatives".⁴¹⁶ The Vision Document is

⁴⁰⁸ (OECD, 1998), 10.

⁴⁰⁹ The SER advises the Dutch government and parliament on key points of social and economic policy.

⁴¹⁰ SER Report on the Review and Amendment of the Dutch Competition Act (2003), 2.

⁴¹¹ SER Report on the Review and Amendment of the Dutch Competition Act (2003), 9.

⁴¹² Emphasis added. Dutch Competition Act, Article 5d.

⁴¹³ Toezicht op mededinging door de NMa (Tweede Kamer, vergaderjaar 2006-2007, 31055, nrs 1-2), 65-68. The Netherlands Court of Audit is a central government body created to ensure the functioning of the democratic system. It monitors the central government's revenues and expenditures and whether the central government's policies are implemented as intended.

⁴¹⁴ Dutch NCA annual report 2008, 10; Dutch NCA annual report 2009, 42; Dutch NCA annual report 2010, 12; Dutch NCA annual report 2011, 4, 15; Dutch NCA annual report 2012, 4; Dutch NCA annual report 2013, 10; Dutch NCA annual report 2014, para 4.1.5.

⁴¹⁵ Vision Document on Competition and Sustainability (2014).

⁴¹⁶ Vision Document on Competition and Sustainability (2014), 6.

remarkable on account of offering a broad interpretation of the role of non-competition interests under both EU and Dutch law and is further elaborated in Chapter 3 Section 6.2.2.

6.3.3. *National enforcement system*

The Competition Law of 1998 established the *Nederlandse Mededingingsautoriteit* (NMa). At first, the NMa was part of the Ministry of Economic Affairs, which retained decision-making powers. In 2004, it was transformed into an autonomous administrative authority.⁴¹⁷ Yet, the Minister has remained responsible for competition policy and has the power to issue general directives.

The enforcement system underwent reform in 2013.⁴¹⁸ First, the NMa, consumer, and post and telecommunication authorities were consolidated into the *Authority for Consumers and Markets* (ACM). Second, the Minister of Economic Affairs and the Minister of Infrastructure and the Environment were vested with the power to overturn an "order of general application" issued by the Dutch NCA if the NCA was "not competent to take one".⁴¹⁹ While the wording of the provision is rather vague, it could be seen as allowing the Minister to annul a decision due to public policy considerations.

When the Dutch NCA decides to impose sanctions, the undertakings concerned may ask the NCA to reassess the case. This administrative review is based on the opinion of an advisory committee, which is independent of the NCA. Following review, the parties may appeal to the District Court of Rotterdam, and then to the Trade and Industry Appeals Tribunal. Both courts are competent to examine the legality of the decision, with a full review of sanctions.⁴²⁰

6.4. UK

UK competition law and policy are likely to undergo significant reform upon the departure of the UK from the EU (Brexit). At the time of writing of this dissertation there is still great uncertainty about the modalities of exiting the EU, and the impact it might have on EU and UK competition law. Scholars have already explored various alternatives, including their impact on balancing.⁴²¹ Nevertheless, Brexit has no direct bearing on this dissertation. Since the dissertation focuses on past practice, the UK is simply regarded as one of the EU Member States in this context.

⁴¹⁷ The Dutch Competition (Independent Administrative Authority) Amendment Act of 2005.

⁴¹⁸ Dutch Act Establishing the Authority for Consumers and Markets of 2013.

⁴¹⁹ Dutch Act Establishing the Authority for Consumers and Markets of 2013, Article 10.

⁴²⁰ Dutch Competition Act, Articles 92-93. On the standard of judicial review see (Lavrijssen 2009), 182. On the reassessment procedure see (Frese 2014), 146.

⁴²¹ See, for example, (Lianos et al. 2017); (Vickers 2017); (Jones 2017); (Fingleton et al. 2017); (Monti 2017). This matter was also mentioned in the Commission's policy report 2017, 24.

6.4.1. *Origins of national competition law*

The roots of UK competition policy are grounded in the private-law *restraints of trade* doctrine. Developed in the fifteen century and valid to the present day, the doctrine holds that an agreement that leads to unreasonable restraints on the freedom of economic activity is unenforceable by its parties. The doctrine is based on a two-stage assessment. The plaintiff must first prove the existence of a restraint on trade. If such restraint can be established, the burden of proof shifts to the defendant. The defendant must show that its behaviour was not unreasonable and that it gave due consideration to the interests of other parties.⁴²² This public interest test implies that courts will refuse to enforce a contract only if it impinges on both competition rules and the public interest.

The UK's early public-law competition policy was adopted following the Second World War in pursuit of recovery of industries and full employment. Accordingly, it was not based on solid economic theory, but rather on the public interest test.⁴²³ Moreover, between the 1940s and 1960s the substantive, procedural, and institutional rules were regularly revised to respond to immediate concerns and developments.⁴²⁴

The Monopolies and Restrictive Practices (Inquiry and Control) Act of 1948 created an informal enforcement procedure. Any governmental department with an interest in an agreement could apply the public interest test to determine whether to take action. The Act also created the Monopolies and Restrictive Practices Commission (MRPC) - the first administrative European competition agency. While the MRPC had no decision-making capabilities, it investigated monopolies and restrictive practices following references from the Board of Trade.⁴²⁵ This informal procedure was criticised as being too vague, unpredictable, and political. As a response, the Restrictive Trade Practices Act of 1956 enacted a more formal notification system. It created the Registrar of Restrictive Trading Agreements and imposed the duty to give notification of all agreements involving the production or supply of goods that determined prices, supply terms, or quantities or imposed sale restrictions. The powers of investigation and decision were transferred to the Restrictive Practices Court (RPC), a newly

⁴²² (Kuenzler & Warlouzet, 2013), 93.

⁴²³ (Policy Studies Institute 1989), 154; (Kuenzler & Warlouzet, 2013), 93.

⁴²⁴ (Motta 2004), 11; (Kuenzler & Warlouzet, 2013), 93.

⁴²⁵ (Wilks & Bartle 2002), 158.

established judicial body.⁴²⁶ Unlike the MRPC, the RPC was independent of political and economic pressure.⁴²⁷ It examined all agreements of which it had been notified by using a rebuttable presumption that they had contradicted the public interest.⁴²⁸ Because the 1956 Act significantly reduced the MRPC's role, it was renamed the Monopolies Commission (MC). In 1965, The Monopolies and Mergers Act granted the MC a role in merger review and renamed it the Monopolies and Mergers Commission (MMC).

The novelty of the 1956 regime was significant, yet still unsatisfactory: although it prompted more rigid competition assessment, it did not specify *how* to apply the public interest test. In addition, it did not apply to agreements that were not subject to obligatory registration, which continued to be examined under the old regime of the 1948 Act.⁴²⁹ During the 1960s and 1970s, the registration requirements were expanded to include other types of agreements.⁴³⁰

The Fair Trading Act of 1973 was adopted in parallel to the UK's accession to the EU. It marked the first step away from the public interest test by referring for the first time to competition as a public aim unto itself.⁴³¹ Yet, it still recognised other aims such as the promotion of consumer interests, reduction of costs, efficiency, employment, and UK competitiveness. The 1973 Act once again changed the institutional structure of enforcement. It created the office of Director General of Fair Trading (DGFT). Agreements subject to registration were notified to the DGFT, which had inherited the Registrar's duties. Restrictive agreements not subject to registration could have been referred by the DGFT (subject to the veto power of the Secretary of State⁴³²), the Secretary of State, or by a Minister acting in concert with the Secretary of State.⁴³³ Referred agreements were investigated by the MMC, and

⁴²⁶ (Scott 2012), 196.

⁴²⁷ Restrictive Trade Practices Act of 1956. Also see (Kuenzler & Warlouzet 2013), 110.

⁴²⁸ According to Section 12 of the Restrictive Trade Practices Act of 1956, the Board of Trade could, upon the representation of the Registrar, remove from the Registrar and not refer to the RPC agreements having no substantial economic significance.

⁴²⁹ (Kuenzler & Warlouzet, 2013), 101, 105.

⁴³⁰ The UK Resale Price Act of 1964, UK Restrictive Trade Practices Act of 1968, and UK Fair Trading Act of 1973 which broaden the registration requirements to other forms of agreements, including collective resale price maintenance, information exchange and agreements in the services sector.

⁴³¹ The UK Fair Trading Act of 1973, Section 84. Also see (Motta 2004), 12.

⁴³² In 1969, the monopolies functions were transferred from the Board of Trade to the Secretary of State. See (Korah 1982), 20.

⁴³³ The UK Fair Trading Act of 1973, Sections 40, 50-51 and 94.

decided by the Minister. In practice those enforcement efforts were limited. The high inflation rates of the 1970s focused most of the enforcement on price control.⁴³⁴

The UK's economic governance underwent significant reform after the election of Margaret Thatcher in 1979. The Competition Act of 1980 was adopted as part of the new administration's neoliberal market-oriented philosophy. It abolished the price control regime and attempted to reduce prices and fight inflation by means of competition.⁴³⁵ It replaced the UK's former form-based approach (i.e. examining the type of the agreement) with an assessment of the agreement's effect on competition, like the EU regime. The 1980 Act extended the DGFT's powers, allowing it to initiate and conduct investigations. Yet, if the DGFT did find a restriction, it filed a reference with the MMC, which then examined whether there was a restriction, and if that was the case, assessed it using the public interest test.

A more fundamental modernisation of UK competition policy took place only two decades later with the Competition Act of 1998 and the Enterprise Act of 2002, which are still in effect today. The reform aimed to align the UK regime as closely as possible with its EU equivalent.⁴³⁶ The Enterprise Act of 2002 replaced the DGFT with the *Office of Fair Trade* (OFT). While decisions of the DGFT were executed in the name of the individual appointed to that position by the Secretary of State, OFT decisions were actually taken by a Board appointed by the Secretary of State.⁴³⁷ The reform revised that institutional structure. The DGFT's powers were significantly increased at the expense of powers previously reserved to the judiciary and the executive. The DGFT was assigned the tasks of assessing infringements, granting exemptions, issuing directions, and imposing remedies. The MMC was renamed the Competition Commission (CC). Its powers were reduced and are bound to a DGFT referral but still include investigation of markets, mergers, and economic regulation.

The Enterprise and Regulatory Reform Act of 2013 merged the CC and the OFT to create the *Competition and Markets Authority* (CMA).⁴³⁸

⁴³⁴ (Kuenzler & Warlouzet, 2013), 120.

⁴³⁵ The UK Competition Act of 1980, Section 1. Also see (Merkin & Williams 1980), 429.

⁴³⁶ (Scott 2012), 195.

⁴³⁷ (Bailey & Whish 2015), 63-64.

⁴³⁸ The 2013 the Enterprise and Regulatory Reform Act, Section 25(3).

6.4.2. *National equivalent of Article 101 TFEU and consumer welfare standard*

Modelled on the design of EU competition law, Chapter I of the UK Competition Act of 1998 includes a cartel prohibition similar to Article 101(1) TFEU. The Chapter I prohibition is subject to three types of exception: an exception similar to Article 101(3) TFEU, BERs, and a regulated conduct defence.⁴³⁹ The first exception imposes conditions almost identical to those of Article 101(3) TFEU and abolished the public interest test. The Other Enactments (Amendment) Regulations of 2004 accommodated the UK regime to changes introduced by Regulation 1/2003. Most importantly, it abandoned the notification regime in favour of legal exceptions.

The UK did not explicitly adopt a consumer welfare standard. Yet, Chapter 3 Section 6.2.1 shows that, in practice, it had opted for a short-term, narrow consumer welfare standard similar to the one advocated by the Commission following modernisation.

6.4.3. *National enforcement system*

In addition to the OFT and the CMA described above, UK *sector* regulators are also empowered to apply Article 101 TFEU and the national equivalent provision. Sector regulators were created in the UK starting in the 1980s in conjunction with the national privatisation initiatives. The regulators were gradually required to promote competition, and sometimes also had to make references to the competition authorities (the MC/MMC).⁴⁴⁰

The powers of the sector regulators were reinforced by the Competition Act of 1998, which introduced a formal concurrent enforcement model.⁴⁴¹ It entrusted 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 healthcare sector regulator for England (NHS Improvement, formerly Monitor) with reference powers to the CC. Later, following the entry into force of Regulation 1/2003, these powers were extended to the enforcement of EU competition rules.

The empirical findings presented in this dissertation demonstrate that, in practice, only a very few competition decisions were adopted by means of the concurrency model. Sector regulators have mostly chosen to rely on their specific sector regulation rather than enforce EU

⁴³⁹ Those exceptions are detailed in Chapter 3, Section 6.2.1; Chapter 4, Section 5.1.3; and Chapter 5, Section 4.1, respectively.

⁴⁴⁰ (Dunne 2014b), 258.

⁴⁴¹ The UK competition Act, Section 54 and Schedule 10; CMA Guidance on Concurrent Application (2014).

or national competition rules.⁴⁴² The Enterprise and Regulatory Reform Act of 2013 was designed to remedy this shortcoming. The Act obliges sector regulators to consider using their competition powers in appropriate cases and supports their efforts through greater coordination with the UK NCA.⁴⁴³ Failing to apply concurrent competition powers in a sufficiently rigorous manner might elicit losing jurisdiction to the UK NCA.

The Enterprise Act of 2002 established the Competition Appeal Tribunals (CAT). This is a specialised administrative body serving as an appellate instance for NCA and sector regulator decisions. Unlike many other appeal instances, the CAT can reopen cases, hear new evidence, and is not bound by the NCA's prior decisions. A second appeal on matters of law or fines is submitted to the appropriate court, according to a geographic criterion.⁴⁴⁴

6.5. Hungary

6.5.1. Origins of the national competition law

Hungary applied some competition rules as early as the 1920s. It had private-law remedies for unfair marketing and practices contrary to morals or business fairness. From the early 1930s, it required notification of large cartels that were potentially subject to private or public enforcement. However, these rules were rarely enforced in practice.⁴⁴⁵

Following the Second World War, Soviet occupation transformed Hungary into a communist state. Consequently, as pronounced by Hungary's Supreme Court in 1952, "under the socialist economic order the regulation of competition lost its substance".⁴⁴⁶ Yet, Hungary still adhered to certain market-based principles. Subsequent to the Hungarian Revolution and withdrawal from the Warsaw Pact in 1956, the Hungarian Civil Code of 1959 enacted provisions encouraging efficiency and reliance on price mechanisms to improve firms' performance in the planned economy. It prohibited price fixing, foreclosing customers from suppliers, and business activities that gave an unfair advantage to undertakings or harmed consumers. Next, in 1968 the government put an end to the National Planning Office that had

⁴⁴² See Chapter 8, Section 5.1. Also see (Dunne 2014b), 262.

⁴⁴³ Enterprise and Regulatory Reform Act 2013, Schedule 14.

⁴⁴⁴ Tribunal proceedings in England and Wales are appealed to the Court of Appeal; in Scotland to the Inner House of the Court of Session; and in Northern Ireland to the Court of Appeal of Northern Ireland. On the UK appeals system also see (Graham 2009); (Frese 2014), 152-153.

⁴⁴⁵ Hungarian Act No. V on Against Unfair Competition of 1923; Hungarian Act No. XX on Agreements Regulating Economic Competition of 1931. Also see (Várady 1999), 231; OECD Regulatory Reform in Hungary (2000), 6; (Cseres 2005), 348.

⁴⁴⁶ (Várady 1999), 231.

previously fixed the types and quantities of goods and products to be produced in the country.⁴⁴⁷ Ordinances in opposition to price cartels, certain types of market sharing, and vertical restraints were passed in 1967 and 1975.⁴⁴⁸

The Act on the Prohibition of Unfair Economic Activities of 1984 prohibited unfair market practices, cartels, and abuse of dominance. Since the Act did not include an enforcement mechanism it, too, had little use in practice.⁴⁴⁹ Nevertheless, it had significant symbolic value. Together with similar Yugoslavian and Polish legislation, it was one of the first economic reforms to be passed in the East and Central European socialist countries. Hungarian Justice *Salomon* described the Act as guided "not by the actually existing market, but by the desire aimed at it".⁴⁵⁰ A decade later, during the 1990s, most of the other (former) socialist countries adopted similar rules.⁴⁵¹

Following the fall of communism, Hungary gradually opened up its markets to competition. Article 9 of the 1989 amendment to Hungary's constitution acknowledged a market-based economy and the freedom of competition. Simultaneously, the government introduced vast privatisation, particularly in the industry, services, and agricultural sectors.⁴⁵² A designated competition policy was adopted quickly after the election of the first post-communist government in 1990.⁴⁵³ Inspired by the EU and German models, it adopted a general cartel prohibition and a set of exemptions.⁴⁵⁴ Those included agreements intended to prevent abuse of economic superiority, *de minimis*, and a defence similar to Article 101(3) TFEU.

Hungary began negotiating EU accession shortly thereafter. It applied for EU membership in 1994, started formal negotiations in 1998, and acceded the EU in May 2004. Consequently, the new Competition Act adopted in 1996 was closely modelled on the EU regime.⁴⁵⁵

⁴⁴⁷ (Wessman 1991), 17.

⁴⁴⁸ Hungarian Ordinance on Price Regulation of 1967 and Hungarian Ordinance on Exchange of Products of 1975.

⁴⁴⁹ (Várady 1999), 231.

⁴⁵⁰ English translation from (Várady 1999), 238.

⁴⁵¹ (Várady 1999), 246; (Cseres 2005), 351.

⁴⁵² OECD Regulatory Reform in Hungary (2000), 9.

⁴⁵³ Hungarian Act LXXXVI of 1990 on the Prohibition of Unfair Market Practice.

⁴⁵⁴ Hungarian Act LXXXVI of 1990 on the Prohibition of Unfair Market Practice, Articles 14-17.

⁴⁵⁵ Hungarian Act LVII of 1996 on the Prohibition of Unfair and Restrictive Market Practices.

6.5.2. *National equivalent of Article 101 TFEU and consumer welfare standard*

The wording of the Hungarian law is similar to Article 101 TFEU. Article 11 is almost identical to Article 101(1) TFEU. Article 17 resembles Article 101(3) TFEU. Chapter 3 Section 6.2.1 shows that, despite certain differences, the Hungarian NCA has interpreted it as essentially identical to the provision of Article 101(3) TFEU.

The preamble of the Competition Act declares that the Act is not confined to the promotion of competition as such, but rather to the promotion of “the public interest attached to the maintenance of competition on the market ensuring economic efficiency and social progress, the interests of undertakings complying with the requirements of business fairness and the interests of consumers require the state to protect by law fairness and freedom of economic competition”. By the same token, the Hungarian NCA pronounces that it enforces competition rules for the public interest in a manner that enhances long-term consumer welfare and efficiency. It states that competition should stimulate economic growth and employment, resulting in an increase in the standard of living. In cases of market failure, however, competition does not provide the best result.⁴⁵⁶

6.5.3. *National enforcement system*

The 1990 competition Act established the Hungarian competition authority, the *Gazdasági Versenyhivatal* (GVH). The GVH is an administrative authority reporting only to parliament. It was vested with investigation and enforcement powers. In the past, enforcement was based on a notification system. Yet, following accession to the EU and the modernisation of EU competition law, it has shifted to a self-assessment system.⁴⁵⁷

Appeals on decisions of the Hungarian NCA take place at three levels. There are two instances of ordinary review, which examine the legality of the decision on points of law and fact. In exceptional cases, the Supreme Court (Curia) reviews cases on legal matters.⁴⁵⁸ In the past, the ordinary instances were the Budapest Metropolitan Court followed by a second appeal to the Budapest Appeal Court. Since 2013, the Metropolitan Administrative and Labour Court of Budapest is the court of first instance, and the Metropolitan Court of Budapest the court of second instance.

⁴⁵⁶ GVH, *Fundamental Principles of Competition Policy* (2007), 8.

⁴⁵⁷ Hungarian Act LXVIII of November 2005.

⁴⁵⁸ Hungarian NCA annual report 2008, 5; Hungarian NCA annual report, 2012, 15. Also see (Papp 2017), 257-258.

7. OBJECTIVES OF ARTICLE 101 TFEU: AN OPEN QUESTION

This chapter has shown that, over the years, the Member States and the EU institutions have not taken a clear stand on the objectives of Article 101 TFEU. The procedural and substantive elements defining balancing were the outcome of heated negotiation and compromises among Member States with substantially different economic policies and traditions, that were often influenced by social and historical factors, and in response to entirely different objectives.⁴⁵⁹ Nevertheless, at present, there are two main approaches vis-à-vis the objectives of Article 101 TFEU.⁴⁶⁰

The first approach sees Article 101 TFEU as directed at the *maximisation of (consumer or total) welfare*.⁴⁶¹ The advocates of this position have focused on the outcomes of competition. They have submitted that the Article is designed to ensure the efficient allocation of resources throughout the EU for the benefits of consumers. This view has gained in influence since the introduction of the Commission's more economic approach in the early 2000s. Nevertheless, as mentioned, it does have certain weaknesses. From a legal perspective, this approach is not encoered in EU primary or secondary law and has not been fully embraced by the CJEU. From a practical perspective, despite the importance of the notion of consumer welfare, it has no single, unambiguous meaning.⁴⁶² The Commission has left the notion undefined, while national enforcers have developed different interpretations in accordance with their national systems and values. As a result, competition enforcers rely on varying standards when taking account of non-competition interests.

The second approach perceives Article 101 TFEU as protecting competition interests, in the sense of the narrow definition used in this dissertation.⁴⁶³ According to this view, the objective of the Article is not related to the outcomes or effects of competition (e.g. consumer welfare), but rather to the *process and structure of competition as such*. This approach is supported by indications found in primary and secondary EU sources: The wording of Article 101 prohibits

⁴⁵⁹ (Motta 2004), 17; (Seidel & Federico Pace 2013), 55; (Kuenzler & Warlouzet 2013), 103-109.

⁴⁶⁰ See a detailed discussion in (Monti 2013a), 44-49 and (Peeperkorn 2016), 390-393. Some scholars combine the two, arguing that Article 101(1) TFEU aims to protect competition, while Article 101(3) TFEU protects consumer welfare. See (Nicolaidis 2005), 124.

⁴⁶¹ See, for example, (Kjolbye 2004), 566; (Nazzini 2006), 504; (Gerber 2008), 1247; (Witt 2016b), 80-83.

⁴⁶² (Motta 2004), 19-22; (Geradin 2006), 313; ICN Competition Enforcement and Consumer Welfare (2011), 7-9.

⁴⁶³ See, for example, (Monti 2013a), 44-49; (Bellamy & Child 2013), 7-8; (Cseres & Mendes 2014), 483. This is also the position of the German NCA, as described in Section 6.2.2 above.

conduct that endangers the competitive process and structure thereof. Harm to competition is the basic precondition for initiating any competition enforcement procedure.⁴⁶⁴ Regulation 1/2003 states that Article 101 TFEU has as its objective “the protection of competition on the market.”⁴⁶⁵ A similar rationale is reflected in the CJEU’s decision in *T-Mobile (2009)* and *GlaxoSmithKline (2009)*⁴⁶⁶ and in several of the Commission’s policy papers.⁴⁶⁷

As explained in Chapter 1 Section 2, this dissertation adheres to the second approach for defining the term non-competition interests and assessing the effectiveness of balancing. This approach provides a solid theoretical framework for identifying and assessing balancing and fits the systematic content analysis methodology that guides this dissertation. Nevertheless, this dissertation does not claim to make a normative determination of which approach does indeed, or should, prevail. The following chapters move away from focusing on the *declared* objectives of Article 101 TFEU, or of EU competition policy in general. Instead, they examine balancing *as applied in practice*. They show that the consideration of non-competition interests has shifted away from the use of the substantive balancing tools of Articles 101(1) and (3) TFEU in favour of procedural balancing tools, and from EU to national-based balancing tools, which do not fully reflect either of the two approaches to the objectives of Article 101 TFEU.

⁴⁶⁴ Also see C-8/08 *T-mobile (2009)*, para 38.

⁴⁶⁵ Regulation 1/2003, Preamble 9, as repeated in the Commission Article 101(3) Guidelines (2004), para 47.

⁴⁶⁶ See Section 5.4.3 above.

⁴⁶⁷ For instance, Commission Article 101(3) Guidelines (2004), para 105 declare that the protection of the competitive process is the “ultimate” role of Article 101 TFEU. Also see (Gerard 2012), 29-30.