Coding non-competition interests under Article 101 TFEU

A quantitative and qualitative study

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1. **INTRODUCTION**

Article 101(3) TFEU is the “classic” provision for accepting non-competition interests as a justification for an otherwise anti-competitive agreement that is prohibited by Article 101(1) TFEU. The wording and structure of Article 101 TFEU, as well as the EU Courts’ case law\(^\text{468}\) and the Commission’s guidelines\(^\text{469}\) suggest that an exclusion from the prohibition on anti-competitive agreements can only be granted to agreements that fulfil the four conditions of Article 101(3) TFEU. As such, Article 101(3) TFEU outlines the substantive scope of non-competition interests that can be taken into account under Article 101 TFEU.\(^\text{470}\)

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\(^{468}\) The Courts have stated that non-competition interests arising from an agreement should only be examined within the framework of Article 101(3) TFEU. See the CJEU in C-382/12P MasterCard (2014), para 181 upholding the GC’s judgment in T-111/08 MasterCard (2012), para 182. Also see C-243/83 Binon (1985), para 43-46; T-208/13 Telefónica/Portugal Telecom (2016), para 102-104; T-112/99 TPS (2001), para 106-107; T-360/09 E.ON/GDF (2012), para 64-65; T-470/13 Lundbeck (2016), para 307.

\(^{469}\) The Commission Article 101(3) Guidelines (2004), para 42 provide that “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)]”. Also see 38606 Cartes bancaires (2007), para 367-368; 39188 Bananas (2008), para 303; 39839 Telefónica/Portugal Telecom (2013), para 395-396.

\(^{470}\) See Chapter 2, Section 2.3.
Despite its great importance, the application of Article 101(3) TFEU to an individual case, and hence balancing, is far from unequivocal. Chapter 2 has shown that the wording of the four conditions of Article 101(3) TFEU created a great deal of uncertainty about balancing, leaving each competition enforcer a wide margin of discretion to decide if to take non-competition interests into account, what types of benefits to take into account, and how.471

Against this backdrop, this chapter takes an empirical approach to mapping out the competition enforcers’ interpretations of balancing under Article 101(3) TFEU. This reveals a great divergence in the frequency with which the Commission, NCAs, and EU and national courts have invoked and accepted Article 101(3) TFEU, the types of benefits they have been willing to examine under the Article, the balancing process, and the intensity of control.

The chapter begins by focusing on the Commission’s approach. Section 2 provides an empirical and legal overview of the Commission’s application of the Article. Next, Section 3 maps the development of the Commission’s approach as to the types of benefits that can be taken into account under the Article. It shows that while in the past the Commission has considered economic and non-economic benefits, following modernisation, it has re-interpreted the Article to cover only economic benefits. Section 4 reports a similar trend with respect to the balancing process and intensity of control, revealing that, following modernisation, the Commission has narrowed the scope of Article 101(3) TFEU by introducing a short-term narrow consumer welfare standard to guide balancing.

Section 5 goes on to analyse the practice of the EU Courts, showing that they have not fully embraced the Commission’s new approach. Section 6 then points out a similar divergence in the Member States’ approaches.

Section 7 concludes by assessing the degree to which the above practices have met the normative benchmarks, affirming that the modernisation of EU competition law has resulted in a trade-off between the increased effectiveness of Article 101(3) TFEU balancing on the one hand, to a hindrance of uniformity and legal certainty, on the other.

The differences in the competition enforcers’ approaches, which are elaborated throughout this chapter, are summarised in Table 3.1.

471 Ibid.
Table 3.1: Trends in Article 101(3) balancing

<table>
<thead>
<tr>
<th>Enforcement period/ jurisdiction</th>
<th>Types of benefits</th>
<th>Balancing method</th>
<th>Intensity of control</th>
<th>Frequency</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Invoking</td>
<td>Accepting</td>
</tr>
<tr>
<td>First enforcement period (1962-1977)</td>
<td>Industrial policy</td>
<td>Legal balancing process, impact on market integration</td>
<td>Focus on 1st condition, loose application</td>
<td>72%</td>
<td>31%</td>
</tr>
<tr>
<td>Second enforcement period (1978-1987)</td>
<td>Economic and non-economic benefits</td>
<td>Legal balancing process, workable competition standard</td>
<td>Focus on 1st and 3rd conditions, sectoral approach</td>
<td>76%</td>
<td>31%</td>
</tr>
<tr>
<td>Third enforcement period (1988-April 2004)</td>
<td>Economic and non-economic benefits</td>
<td>Legal balancing process, workable competition standard</td>
<td>Focus on 1st and 3rd conditions, sectoral approach</td>
<td>45%</td>
<td>26%</td>
</tr>
<tr>
<td>Fourth enforcement period (May 2004-2017)</td>
<td>Only narrow economic benefits</td>
<td>Economic balancing process, short-term narrow consumer welfare</td>
<td>Focus on 1st condition, strict application</td>
<td>25%</td>
<td>0%</td>
</tr>
<tr>
<td>EU Courts (following May 2004)</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>France</td>
<td>Economic and non-economic benefits</td>
<td>Until 2009, long-term broad consumer welfare. Since then, short-term narrow consumer welfare</td>
<td>Focus on 1st and 3rd conditions. Until 2009 loose, since then strict application</td>
<td>14%</td>
<td>1%</td>
</tr>
<tr>
<td>Germany</td>
<td>Competition interests, industrial policy or national law</td>
<td>Effect on competition process and structure</td>
<td>Focus on 1st and 3rd conditions. Very strict application</td>
<td>25%</td>
<td>1%</td>
</tr>
<tr>
<td>Hungary</td>
<td>Only narrow economic benefits</td>
<td>Until 2006, long-term broad consumer welfare. Since then, short-term narrow consumer welfare</td>
<td>Focus on 1st and 3rd conditions. Until 2006 loose, since then strict application</td>
<td>34%</td>
<td>6%</td>
</tr>
<tr>
<td>The Netherlands</td>
<td>Economic and non-economic benefits</td>
<td>Long-term broad consumer welfare</td>
<td>Varying control, sectoral approach</td>
<td>15%</td>
<td>2%</td>
</tr>
<tr>
<td>UK</td>
<td>Only narrow economic benefits</td>
<td>Short-term narrow consumer welfare</td>
<td>Focus on 1st and 3rd conditions. Strict application</td>
<td>27%</td>
<td>0%</td>
</tr>
</tbody>
</table>

Before presenting the legal and empirical background, a quick note on definitions: Under the old notification regime of Regulation 17/62, Article 101(3) TFEU was applied by way of issuing an exemption. Namely, at the request of an undertaking, the Commission would exempt an agreement ex-ante from the prohibition imposed by Article 101(1) TFEU. The shift to a self-assessment regime brought about by Regulation 1/2003 transformed Article 101(3) TFEU into a directly applicable exception. Therefore, this dissertation uses the terms Article 101(3) TFEU exemptions and exception according to the applicable enforcement period. For the sake of convenience, general references to the Article use the term exemption.
2. LEGAL AND EMPIRICAL BACKGROUND

Figure 3.1 outlines the application of Article 101(3) TFEU by the Commission. It presents the number of proceedings in which the Article was invoked by undertakings (blue line) in relation to the total number of Article 101 TFEU proceedings each year (grey line). In addition, the figure indicates the number of individual exemptions granted by the Commission. It differentiates three types of exemption. First, exemptions granted without any conditions or obligations attached (red bars). Second, exemptions - in which, initially, one or more of the four conditions of the Article had not been not fulfilled - granted only after the Commission attached specific conditions or obligations to bring the agreement within the scope of Article 101(3) TFEU ("specific conditions", green bars). Third, exemptions subject to other general conditions or obligations ("general conditions", purple bars).

**Figure 3.1: Article 101(3) TFEU, Commission**

<table>
<thead>
<tr>
<th>Enforcement period</th>
<th>Total 101 Proceedings</th>
<th>101(3) Argued</th>
<th>101(3) Accepted</th>
<th>% Argued from total</th>
<th>% Accepted from argued</th>
<th>% Accepted from total</th>
</tr>
</thead>
<tbody>
<tr>
<td>First period (1964-1977)</td>
<td>108</td>
<td>78</td>
<td>33</td>
<td>72%</td>
<td>42%</td>
<td>31%</td>
</tr>
<tr>
<td>Second period (1978-1987)</td>
<td>127</td>
<td>97</td>
<td>39</td>
<td>76%</td>
<td>40%</td>
<td>31%</td>
</tr>
<tr>
<td>Third period (1988- April 2004)</td>
<td>341</td>
<td>154</td>
<td>90</td>
<td>45%</td>
<td>58%</td>
<td>26%</td>
</tr>
<tr>
<td>Fourth period (May 2004-2017)</td>
<td>160</td>
<td>40</td>
<td>0</td>
<td>25%</td>
<td>0%</td>
<td>0%</td>
</tr>
</tbody>
</table>

All Article 101 TFEU proceedings rendered by the Commission, excluding unpublished comfort letters. In some proceedings, only certain restrictions were exempted

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472 The Commission was empowered to attach conditions or obligations to exemptions pursuant to Regulation 17/62, Article 8(1).
The figure highlights changes in the enforcement of Article 101 TFEU in general and Article 101(3) TFEU in particular across the four enforcement periods. During the first two enforcement periods (i.e. until 1987), the possibility of granting an Article 101(3) TFEU exemption was central to many Article 101 TFEU proceedings. Article 101(3) TFEU was invoked in more than 70% of the proceedings. Exemptions were granted in around 40% of those proceedings, of which approximately half were subject to general or specific conditions.

By comparison, the third enforcement period (1988 to April 2004) was characterised by three interrelated developments. First, the number of Article 101 TFEU proceedings had increased significantly. Second, the number of cases in which Article 101(3) TFEU was invoked had experienced a substantial drop (from 76% in the second enforcement period to only 45% in the third period). Despite that, third, the success rate when invoking Article 101(3) TFEU had risen (from 40% during the second enforcement period to 58% of the proceedings in which Article 101(3) TFEU had been invoked during the third enforcement period).

The first development, namely the increase in the total number of Article 101 TFEU proceedings, is explained by the geographical enlargement of the EU (i.e. the accession of new Member States) together with the expansion of the substantive scope of EU competition law (i.e. applying Article 101 TFEU to new sectors that had traditionally been considered to be part of the public realm).473 The latter two developments can be understood in light of the change in the types of infringement that the Commission examined during the third enforcement period. By the late-1990s, various agreements that had required individual assessment in the past were assessed by means of the new Vertical and Horizontal BERs474 or unpublished comfort letters.475 Those agreements are not fully reflected in the empirical database,476 which might explain the decline in the invocation rate of Article 101(3) TFEU. On the other side of the same coin, the increase in Article 101(3) TFEU exemptions could be linked to the growing substantive scope of EU competition law. As elaborated in Section 4.3.3 below, the enforcement of Article 101 TFEU to

473 See Chapter 2, Sections 3.2 and 5.3.1.
474 In some cases, the Commission exempted agreements that later served as a model for future BERs. In 31498 Delta ChemieDDD (1988), for example, it exempted an agreement by which a German firm had granted a know-how license to a British firm for the manufacture and packaging of stain-removal products. The Commission exempted the agreement since it encouraged the manufacturer to make the necessary investments to exploit the licensed know-how, thereby increasing the number of plants manufacturing the products in the EU. Following the adoption of Regulation 556/89 on Know-how Licensing Agreements, similar agreements no longer required an individual decision.
475 See Chapter 8, Section 6 and Figure 8.5.
476 See Chapter 1, Section 3.2.
newly liberalised and regulated markets had expanded the scope of application of Article 101(3) TFEU and required the development of tailored balancing to fit those types of agreement.

Finally, the figure reveals that the Commission has never accepted an Article 101(3) TFEU exception following the entry into force of Regulation 1/2003 in May 2004.477 Some scholars link this disappearance of Article 101(3) TFEU to the Commission’s more economic approach. As elaborated in Sections 3.4 and 4.4 below, they maintain that this change is explained by the Commission’s attempt to narrow the types of benefit that can be examined under the Article and to increase the evidentiary requirement. Yet, this explanation does not account for the other trend identified by Figure 3.1, that is, the significant decline in the percentage of proceedings in which Article 101(3) TFEU was discussed. During the fourth enforcement period (May 2004-2017) the undertakings invoked Article 101(3) TFEU in only 25% of all of Article 101 TFEU proceedings (compared to 45% and 76% of the proceedings in the third and second enforcement periods, respectively).

Chapter 8 argues that this trend is related to the new priority setting powers granted to the Commission and NCAs by virtue of Regulation 1/2003. Whereas under the old notification regime the Commission examined all notified agreements, under the new self-assessment regime the Commission and NCAs set their own enforcement priorities.478 That chapter shows that the Commission has decided to focus its enforcement efforts on clear-cut restrictions of competition, which are unlikely to raise balancing questions. By choosing to enforce against clear-cut restrictions of competition, the chapter submits, the Commission has circumvented the need to balance under Article 101(3) TFEU.

The following sections demonstrate that the above changes reflect a much more extensive development in Article 101(3) balancing approaches and practices.

3. Balancing Tool: Types of Benefits

The types of benefits that can be examined under Article 101(3) TFEU are one of the great mysteries of EU competition law.479 Article 101(3) TFEU, as described in Chapter 2 Section 2, does not clearly spell out the types of benefits that can be taken into account. The empirical

477 On the disappearance of Article 101(3) TFEU defence from the Commission’s practice following modernisation, also see (Brook 2016).
478 Regulation 1/2003, Preamble 18; Modernisation White Paper, para 45. Also see Chapter 2, Section 5.4.5.
479 On the relevant types of benefits under Article 101(3) TFEU, also see (Brook 2019).
findings presented in this section illustrate that in the absence of a clear balancing framework in EU primary or secondary law, the Commission has developed its own approach in its policy paper and decisional practice. This approach was adapted over the four enforcement periods to match the general political, economic and social advances of the EU.

### 3.1. Overview

Figure 3.2 describes the categories of benefits that were argued before (a) and accepted by (b) the Commission as the basis for an Article 101(3) TFEU exemption.\(^\text{480}\)

![Figure 3.2: Article 101(3) categories of benefits, Commission](image)

All Article 101 TFEU proceedings in which the Commission granted an Article 101(3) TFEU exemption, excluding unpublished comfort letters. In some proceedings, more than one benefit was accepted as a justification.

Next, Figure 3.3 takes a closer look at the proceedings described in Figure 3.2(b), by outlining the types of non-competition interests that justified exemptions. For sake of clarity, Figure 3.3(a) includes efficiency and industrial policy related benefits, while Figure 3.3(b) specifies other types of non-competition interests.

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\(^{480}\) The three categories of benefits are defined in Chapter 2, Section 2.3.1. Direct economic benefits are cost and qualitative improvements enjoyed by consumers in the relevant market. Indirect economic benefits are cost and qualitative improvements that do not occur on the market in which the agreement takes place or has a direct impact. Non-economic benefits are not directly related to the characteristics of the relevant product or service. They are non-pecuniary and are often more subjective than economic benefits.
The above figures reveal a transformation in the types of benefits assessed under Article 101(3) TFEU. During the first enforcement period (i.e. up to 1977), Article 101(3) TFEU was essentially used for balancing competition and industrial policy interests related to the efficiency of production, R&D, or rationalisation. Starting in the second enforcement period, the Commission gradually expanded the scope of the Article to cover broader types of benefits. Yet, following modernisation, the Commission has once again changed its approach, limiting Article 101(3) TFEU to efficiency related considerations. Those changes are elaborated below.
3.2. First enforcement period: industrial policy

During the first enforcement period (1962-1977), the Commission used Article 101(3) TFEU essentially as a tool to balance competition, market integration, and EU industrial policy.\textsuperscript{481} Accordingly, it exempted horizontal agreements that furthered the EU’s strategic development and growth efforts, such as specialisation agreements, joint research agreements, and joint ventures for the development, manufacture and marketing of products. It emphasised the economic benefits generated by the agreements, such as lower costs (i.e. setting up long production runs) and better utilisation of production capacities (i.e. specialisation).\textsuperscript{482} The Commission stressed the importance of promoting R&D, the international competitiveness of EU industry, penetration into new geographical markets, and overcoming the technical difficulties and financial risks linked with the development of advanced-technology products.\textsuperscript{483} Similarly, it exempted a line of agreements setting the rules for participation in specialised fairs and exhibitions at which companies present and sell similar products under one roof. The Commission underlined the rationalisation effects of such specialised fairs and exhibitions, affording an opportunity for a periodic comparison of benefits to both exhibitors and buyers.\textsuperscript{484}

This possibility of relying on industrial policy as the basis for an Article 101(3) TFEU exemption was established during the late 1960s. In Transocean Marine Paint Association (1967), the Commission reviewed agreements between manufacturers of marine paint that had agreed to produce and sell paint under a common trademark. The agreements included territorial protection provisions which prohibited each manufacturer from selling paint in the home territory of another manufacturer without the latter’s consent and payment of a fee. The Commission exempted the agreements despite their negative effects on both competition and market integration. It accepted the undertakings’ claim that buyers of marine paints would prefer to deal with firms offering paints of identical composition and quality in all large ports.

\textsuperscript{481} This is elaborated in Chapter 2, Section 5.1 and in Section 4.2 below.

\textsuperscript{482} See Annex 3.1. Also see Policy report 1969, 64; policy report 1971, 41; Policy report 1972, 43; policy report 1976, 38; policy report 1977, 115. As mentioned in Chapter 2, Section 5.1.2, during the first enforcement period the Commission mainly granted exemptions to horizontal agreements, which were less likely to hinder market integration in comparison to vertical restrictions.

\textsuperscript{483} See Annex 3.2.

Moreover, it pointed to broader non-economic benefits, noting that the agreements allowed European SME manufacturers to compete with major international companies. 485

The relevance of industrial policy considerations in the enforcement of Article 101 TFEU was explicitly formulated two years later in the CJEU’s preliminary ruling in Walt Wilhelm (1969). The CJEU declared that the main objective of the EU competition law provisions was to eliminate obstacles to free movement. 486 Thus, the EU institutions were competent to take negative measures aimed at increasing market integration by eliminating impediments to trade between Member States. Moreover, the Court added that the EU institutions could also take into account positive measures determining the policies for the operation of markets and aimed at promoting EU economic development. 487

The above illustrates that, during the first enforcement period, the Commission used Article 101(3) TFEU almost exclusively as a tool to promote market integration and EU industrial policy. As Figure 3.2 above revealed, during that period the undertakings did not even attempt to invoke other types of non-economic benefits as justification for an exemption.

3.3. Second and third enforcement periods: broadening the types of benefits

3.3.1. Metro I and the workable competition standard

The types of relevant benefits were considerably broadened following the CJEU landmark judgment in Metro I (1977). 488 That case examined the operation of Saba, a manufacturer of electronics consumer goods, which had established a selective distribution system in Germany. Saba appointed wholesalers who would purchase its products and resell them to approved specialised dealers. The Commission exempted the selective distribution system under Article

485 223 Transocean Marine Paint Association (1967), 4-6. This was not a vertical agreement like most of the other agreements assessed during the first enforcement period (see Chapter 2, Section 5.1.2). Yet, it raised competition concerns similar to those arising from exclusive distribution agreements. See (Chard 1980), 423.

486 On the market integration objective of EU competition law and policy, see Chapter 2, Section 2.1.

487 C-14/68 Walt Wilhelm (1969), para 5. On the differences between negative and positive measures, also see (Wesseling 2000), 37.

488 C-26/76 Metro I (1977). For a detailed analysis of the judgment, also see (Wesseling 2000), 34-36; (Odudu 2006), 160-161; (Goyder 2009), 231-232; (Van Rompuy 2012), 150-151.
101(3) TFEU. In line with its previous approach during that time, the exemption was based on an efficiency inducing argument.

The Commission’s decision was challenged by Metro, a wholesaler that had been denied accesses to Saba’s selective distribution system. In a ground-breaking judgment, the CJEU agreed with the Commission that the agreement had been correctly exempted, yet the Court gave a different justification. In particular, while the Commission had based its exemption on economic benefits, the Court resorted to a teleological interpretation of Article 101 TFEU. The Court held that Article 101 TFEU, read in conjunction with Article 3 EEC, entailed that the appropriate standard for an exemption was not necessarily one of perfect competition. Instead, it introduced the notion of workable competition, in which the degree of competition protected under Article 101 TFEU is that "necessary to ensure the observance of the basic requirements and the attainment of the objectives of the Treaty, in particular the creation of a single market achieving conditions similar to those of a domestic market." The nature and intensity of competition, according to the Court, would vary according to what was dictated by the product or service in question and according to the economic structure of the relevant market.

The Court further noted that the requirement of workable competition could be reconciled with the "safeguarding of objectives of a different nature” if they complied with the latter two conditions of Article 101(3) TFEU. Consequently, the Court concluded that non-economic benefits related to stabilizing the provisions of employment justified an exemption.

With this somewhat vague statement, the Court had opened the door to the consideration of all types of non-competition interests and benefits under Article 101(3) TFEU. Indeed, the empirical findings presented in Figure 3.2 and Figure 3.3 above prove that while the Commission had refused to exempt agreements that did not provide genuine benefits, following Metro I it

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487 Saba (1975), para 38-50. The exemption was granted after certain modifications had been made to the criteria for the appointment of wholesalers. On the Commission’s and EU Courts approaches to selective distribution systems, see Chapter 5, Section 3.4.

490 The Commission had accepted Saba’s submission that the selective distribution system improved the quality of service and facilitated inter-brand competition. See 847 Saba (1975), para 38-42.

491 Article 3 EEC laid down a list of the Community “activities”. A comparable article was not included in the Lisbon Treaties. See Chapter 2, Section 2.1.

492 C-26/76 Metro I (1977), para 20. The notion of workable competition was derived from the work of the American scholar Clark (1961). See (Wesseling 2000), 35; (Van Rompuy 2012), 151.

493 C-26/76 Metro I (1977), para 21-22.

494 C-26/76 Metro I (1977), para 43.

495 26186 Central Stikstof Verkoopkantoor (1978); 29133 WANO Schwarzpulver (1978); 29869 Italian cast glass (1980). Also see policy report 1978, 77.
posed no restrictions on the types of relevant benefits. In addition to direct and indirect economic benefits, the Commission and EU Courts took non-economic benefits into account including public health, employment, the operation of sports, and public and financial services. Market integration, industrial policy, and efficiencies were no longer the sole justifications for exemption.

The impact of *Metro I* should be understood in combination with the CJEU’s previous statement in *Walt Wilhelm (1969)*. In that case, the Court held that EU institutions could take into account positive measures promoting the development of EU economic activity when enforcing EU competition law.\(^{496}\) *Wesseling* has explained that the application of Article 101(3) TFEU after *Metro I* was based on the combination of those two landmark judgments,\(^{497}\) namely, that when economic circumstances in certain markets (*Metro I* dicta) required the Commission to take certain positive indirect actions to promote the harmonious development of EU economic activity (*Walt Wilhelm* dicta), the Commission would apply Article 101(3) TFEU to take non-competition interests into account under Article 101 TFEU. The next section demonstrates the significant impact of the above judgments. It uses the example of environmental benefits to illustrate how those judgments transformed the scope of Article 101(3) TFEU.

3.3.2. The case of environmental agreements\(^{498}\)

The need to consider environmental interests within the enforcement of Article 101 TFEU came into vogue only in the 1990s.\(^{499}\) During the 1970s and 1980s, EU environmental policy was primarily shaped by direct EU regulations.\(^{500}\) As a result, there was little tension between Article 101 TFEU and EU or national environmental policies. This changed in the 1990s when the EU institutions started advocating the use of market-based mechanisms to govern environmental policy.\(^{501}\) The Council and Member States introduced state subsidies and taxes, tradable permits, and emission schemes, and encouraged voluntary environmental initiatives. Those mechanisms were decentralised to the Member State level, leaving the Member States a margin of appreciation.

\(^{496}\) C-14/68 Walt Wilhelm (1969). See Section 3.2 above.

\(^{497}\) (Wesseling 2000), 36. Also see (Van Rompuy 2012), 151.

\(^{498}\) For a detailed analysis of the development of EU environmental policy see (Kingston 2011), 41-96. For an analysis of Article 101(3) TFEU and environmental considerations see (Kingston 2011), 261-293.

\(^{499}\) Notably, the Commission exempted agreements promoting “greener” products and production methods even prior to the 1990s. For instance, agreements creating joint ventures (29428 GEC-Weir Sodium Circulators (1977); 29955 Carbon Gas Technologie (1983); 32368 BBC Brown Bover (1988)) and selective distribution systems (14650 Bayerische Motoren Werke (1974)). However, as described in Section 4.3.6 below, those environmental considerations were expressed as additional justifications for the exemptions.

\(^{500}\) See (Kingston 2011), 42-49.

\(^{501}\) Article 103r SEA and Articles 2 and 3 EC. The Fifth Environmental Action Programme (1993). Also see (Kingston 2011), 41-96.
for their implementation. The decentralised, market-based mechanisms subjected those new environmental agreements to the application of Article 101 TFEU. Accordingly, the Commission and EU Courts began to balance competition against environmental interests.

In 1992, the Commission first acknowledged that environmental considerations might justify, in principle, an Article 101(3) TFEU exemption. A year later, it clarified the terms of Article 101(3) TFEU, stating that they were “sufficiently broad” to allow the inclusion of environmental protection objectives. However, only as late as 1998 had the Commission first invoked environmental benefits as the main justification for an exemption. In EACEM (1998), the Commission cleared - by means of a comfort letter - a voluntary agreement between the European Association of Consumer Electronics Manufacturers and its members aimed at the reduction of the power consumption of electronic equipment. A year later, in CECED (1999), it exempted a similar agreement between an association of manufacturers of domestic appliances and national trade associations and their members. The undertakings agreed not to manufacture or import washing machines that did not meet certain energy efficiency criteria. In DSD (2001) and Austrian system for the disposal of packaging waste (2003), the Commission enunciated a similar positive approach to anti-competitive agreements concluded as part of an EU or national environmental initiative.

The exemptions granted in those proceedings were exceptional. First, they required a broad interpretation of Article 101(3) TFEU to be able to include non-economic benefits for society as a whole. In addition to the individual economic benefits stemming from the agreements (i.e. cost savings due to lower energy bills), the Commission took into account the collective environmental benefits resulting from a reduction in energy consumption. It stated that the agreement had significantly contributed to the management of energy resources, reduced CO2 emissions, and,

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505 36494 EACEM (1998). The decision is unpublished but is detailed in the Commission’s Policy report 1998, 56. In previous cases, the environmental considerations were a part of an array of other types of benefits (see 34252 Philips-Osram (1994); 33814 Ford/Volkswagen (1992); 33640 Exxon/Shell (1994)).
506 36718 CECED (1999). Two years later, in 37893 37894 CECED (2000), the Commission extended the exemption granted with respect to washing machines to other domestic electric appliances.
507 34493 37366 37299 37288 37287 37526 37254 37252 37250 37246 37245 37244 37243 37242 37267 DSD (2001). The exemption was granted following voluntary amendments and binding conditions intended to ensure that competition in the relevant markets was not restricted. 35470 35473 Austrian system for the disposal of packaging waste (2003).
accordingly, to the efforts to counter global warming. The Commission not only took short-term benefits into account but also benefits to “present and future generations”.

Second, the environmental exemptions required the Commission to balance the harm to competition inflicted on individual consumers with the environmental benefits generated for society as a whole. The Commission explained that environmental benefits “would adequately allow consumers a fair share of the benefits even if no benefits accrued to individual purchasers.” In other words, the Commission relied on the general assumption that consumers would receive a fair share of the environmental benefits without proving or calculating how the agreements actually benefited individual consumers.

Third, in the balance between environmental benefits and the harm to competition, the Commission gave preference to the former. To that end, the Commission exempted the environmental agreements while acknowledging that, in the short term, they were likely to lead to price increases.

The above illustrates that, up until modernisation, the Commission did not limit the types of benefits that could be examined under Article 101(3) TFEU. The Commission assessed both economic and non-economic benefits that benefitted either individual consumers or society as a whole. In fact, as the empirical findings presented in the next section show, the Commission took even broader types of benefits into account under the Article than those originally advocated by the CJEU in Metro I.

3.3.3. The irrelevance of the legal source

The CJEU defined the workable competition standard in Metro I (1977) as the degree of competition necessary for the “attainment of the objectives of the Treaty.” This wording suggests that non-competition interests can justify an Article 101(3) TFEU exemption only if

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509 Policy report 2000, 40. As elaborated in section 3.4 below, following modernisation, the Commission changed its approach, and was strongly opposed to the consideration of such cross-generational benefits.
510 36718 CECED (1999), para 56. In para 64 the Commission seems to have ruled out subjective benefits to consumers due to the use of “greener” washing machines, stating that “other factors like price, brand image, and technical performance may have more weight in purchase decisions than energy efficiency”.
511 Also see (Hauteclocque 2009), 105.
512 36718 CECED (1999), para 34.
513 C-26/76 Metro I (1977), para 20.
they constitute an EU objective. Indeed, scholars have often linked the consideration of non-economic benefits under Article 101(3) TFEU to the policy-linking clauses. As mentioned, policy-linking clauses require EU institutions to take certain public interests into account in the formulation or implementation of other policy areas. In this vein, they could be seen as a formalisation of the need for balancing under Article 101 TFEU.

However, the empirical findings presented in Figure 3.4 show that, despite this wording, the Commission did not attach importance to the legal source of the non-competition interests. The figure details the legal sources of the non-competition interests used to justify Article 101(3) TFEU exemptions, as presented by the Commission in each proceeding.

![Figure 3.4: Legal source of non-competition interest justifying exemptions, Commission (1958-2017)](image)

All Article 101(3) TFEU exemptions granted by the Commission, excluding unpublished comfort letters. In some proceedings, more than one interest was accepted as justification for the exemption. "National interest" (purple area) includes non-competition interests that are protected by an international treaty signed by a Member State. All of the proceedings in which the legal source of the non-competition interest was indicated were granted following Metro I

The figure demonstrates, first, that the Commission has almost never specified the legal source of the non-competition interest that justified granting an exemption (grey area). In particular, it has usually not invoked a policy-linking clause to justify an exemption.

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514 According to the Rome Treaty, which was in force when Metro I was rendered and throughout the second enforcement period, those objectives included market integration (Articles 3(a)-(c) and (h) EEC); common policy in the sphere of agriculture and transport (Articles 3(d)-(e) EEC); competition (Article 3(f) EEC); balanced payment methods (Article 3(g) EEC); the creation of the European Social Fund and European Investment Bank (Articles 3(i)-(j) EEC) and the association of overseas countries and territories to increase and promote joint economic and social development (Article 3(k) EEC).

515 On the policy-linking clauses see Chapter 2, Section 5.3.2.

516 Chapters 5 and 7 demonstrate that the policy-linking clauses were used more often as justification for an exemption under Article 101(1) TFEU balancing tools and when accepting commitments.
Second, deviating from the wording of *Metro I*, the Commission has invoked non-competition interests that are not, or were not at that time of the decision, listed as Treaty objectives. For example, it had implicitly accepted employment interests even before the Treaties protected such benefits.\(^{517}\) In other proceedings, the Commission referred to *national* non-competition interests to justify an exemption (purple area).\(^{518}\)

Third, even in the few proceedings in which the Commission identified a policy-linking clause as the legal source for an exemption (blue area), it did not clarify the applicable balancing method. In *Ford/Volkswagen (1992)*, for instance, the Commission exempted a joint venture for the development and manufacture of vehicles. The exemption was primarily based on direct economic benefits.\(^{519}\) Yet, the Commission also invoked non-economic benefits protected by policy-linking clauses, stating that, in the “exceptional circumstances” of the case, the joint venture had helped to create jobs and reduce regional disparities.\(^{520}\) The Commission ambiguously stated that “this would *not be enough* to make an exemption possible unless the conditions of Article [101(3) TFEU] were fulfilled, *but it is an element* which the Commission has taken into account”.\(^{521}\) On appeal, the GC, too, avoided taking a clear stand. It explained that the non-economic benefits "were taken into account only supererogatorily".\(^{522}\) The Commission and GC, therefore, did not clarify the role those non-economic benefits had had in granting the exemption and the significance of the policy-linking clause.\(^{523}\)

The CJEU has implicitly confirmed this broad reading of *Metro I* in its preliminary rulings. In *Binon (1985)* the Court reviewed selective distribution systems for press publications, which involved price fixing. The German government submitted that the freedom of the press, as a fundamental right protected by national constitutional law and the CJEU’s case law, entailed

\(^{517}\) For instance, in 29525 3000 SSI (1982), para 141 the Commission considered guaranteeing a steady income to tobacco wholesalers and retailers, and in 30299 Grohe’s distribution system (1984), para 25-27 and 30261 Ideal-Standard’s distribution system, (1984) 26-27 the survival of the traditional plumbing trade. Yet, in those cases the Commission did not grant exemptions since those restrictions were not limited to what was indispensable to achieve the employment benefits. Also see (Hornsby 1987), 93.

\(^{518}\) 30525 International Energy Agency (1983); 34493 37366 37299 37288 37287 37366 37299 37288 37287 37525 37254 37252 37250 37246 37245 37242 37244 37243 37242 37267 DSD (2001).

\(^{519}\) I.e. rationalisation of the product development and manufacturing. See 33814 Ford/Volkswagen (1992), para 25. On this case, also see Section 4.3.6 below.

\(^{520}\) 33814 Ford/Volkswagen (1992), para 28.

\(^{521}\) Emphasis added. 33814 Ford/Volkswagen (1992), para 36.

\(^{522}\) T-17/93 Ford/Volkswagen (1994), para 139, 163.

\(^{523}\) Also see (Sufrin 2006), 959-960. More recently, in T-451/08 CISAC (2013), para 103, the GC had once again refrained from clarifying the role of the policy-linking clauses. See Section 5.3.1 below.
that competition law could not apply to the press sector without modification.\(^\text{524}\) The Court reviewed the freedom of the press under Article 101(3) TFEU, although such an interest was not listed in the Treaty.\(^\text{525}\) The CJEU followed a similar approach with regard to employment interests even before they were protected by the policy-linking clauses.\(^\text{526}\)

The above demonstrates that both the Commission and the EU Courts have not confined Article 101(3) TFEU to the limited non-competition interests rooted in the Treaties. In fact, the workable competition standard has been applied without distinction, even to interests lacking a formal EU law basis. Consequently, prior to modernisation, there was no limitation on the types of non-competition interests or benefits that could be examined under the Article.

### 3.4. Fourth enforcement period: limiting the types of benefits

As part of its more economic approach, the Commission’s policy papers following modernisation have considerably limited the relevant types of benefits under Article 101(3) TFEU to include only “objective economic efficiencies”.\(^\text{527}\) According to the Commission Article 101(3) Guidelines (2004), non-economic benefits should only be taken into account if they are “goals pursued by other Treaty provisions” and only to the extent that they can be “subsumed” under the four conditions of Article 101(3) TFEU.\(^\text{528}\)

The Commission has declared, in other words, that benefits that were used to justify exemptions during the second and third enforcement periods could no longer be taken into account. At the same time, it has refrained from admitting to a change in its approach. Instead, the Commission Guidelines argue that this new approach was “implicitly” indicated in certain paragraphs of Metro I (1997) and Ford/Volkswagen (1994).\(^\text{529}\) Those judgments, however, do not support such a position.

First, the paragraphs referred to in those two judgments merely confirm that employment and the development of infrastructure are relevant benefits for applying the first condition of Article 101(3) TFEU.\(^\text{530}\) The judgments neither limit the types of benefits that can be taken into account, nor demand that non-competition interest must be “subsumed” under Article 101(3)

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\(^{524}\) C-243/83 Binon (1985), para 41-42.


\(^{527}\) Commission Article 101(3) Guidelines (2004), para 50, 59. See Chapter 2, Section 5.4.3.

\(^{528}\) Commission Article 101(3) Guidelines (2004), para 42.


\(^{530}\) C-26/76 Metro I (1977), para 43; T-17/93 Ford/Volkswagen (1994), para 139.
TFEU. Rather, as mentioned, the CJEU and GC have assumed that non-economic benefits are relevant subject to fulfilment of the other three conditions of the Article.

Second, the Commission’s new approach does not correspond with the essence of the two judgments. As shown in the previous section, the EU Courts have not limited the benefits under Article 101(3) TFEU to interests pursued by other provisions of the Treaties: At the time Metro I was rendered, employment considerations were not yet included in any policy-linking clause. Similarly, in Ford/Volkswagen, the GC did not refer to the policy-linking clause as a legal basis for an exemption.

Finally, the Commission Article 101(3) Guidelines have essentially added two new conditions for the consideration of non-economic benefits under Article 101(3) TFEU. They require that the benefits are (i) pursued by other Treaty provisions and are (ii) “subsumed” under the four conditions of the Article. Adding those new conditions is incompatible with the notion that the four conditions of Article 101(3) TFEU are cumulative and exhaustive. According to the CJEU and the Commission Article 101(3) Guidelines themselves, the granting of an exception cannot be made dependent on any other condition once the four conditions have been met.

It is difficult to assess whether and how the Commission’s new approach has actually been applied in practice. Since the Commission has not accepted an Article 101(3) TFEU defence since May 2004, it has not had the opportunity to accept non-economic benefits as the basis for an exception (see Figure 3.2(b) above). Moreover, following modernisation, the Commission has rarely discussed the relevance of those types of benefits (see Figure 3.2(a) above). During the fourth enforcement period, the Commission has mostly rejected outright the possibility of granting an Article 101(3) TFEU exception, arguing that no relevant benefit has been identified. In other proceedings, the Commission has simply mentioned that the claimed benefits were not sufficiently substantiated. It was not required, therefore, to clarify whether and how non-economic benefits could justify an exception.

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531 Also see (Petit 2009), 6-7; (Van Rompuy 2012), 256-257.
532 See Section 3.3.3 above. Remarkably, the Commission referred to para 96 of the Court’s decision in T-17/93 Ford/Volkswagen (1994), which summarised the Commission’s position. The Court did not confirm this statement in its findings. Also see (Wesseling 2000), 108-109.
534 See Annex 3.3.
535 39226 Lundbeck (2013), para 1221-1231; 39685 Fentanyl (2013), para 406-439; 39612 Perindopril (Servier) (2014), para 2074-2122. The Commission has also applied the second fair share condition rigidly. In 39595 Continental/United/Lufthansa/Air Canada (2013), para 62-79, for example, it examined the Star Alliance agreement introducing a revenue-sharing joint venture on transatlantic routes. The
3.5. Interim conclusion

This section has demonstrated that, prior to modernisation, no limitation was placed on the types of non-competition interests or benefits that could be examined under Article 101(3) TFEU. Influenced by the CJEU, the Commission took a broad range of benefits into account. In addition to direct and indirect economic benefits to individual consumers, it included non-economic benefits to society as a whole and to future generations. This approach reflected a regulatory balancing aim. Namely, Article 101(3) TFEU has not only been seen as a tool to balance the harm and benefits to specific undertakings and their customers. It has also taken regulatory and social objectives into account such as environmental, employment, and development policies.

As part of the substantive modernisation, however, the Commission has deviated from its previous practices. It has essentially restricted the types of relevant benefits under Article 101(3) TFEU to include only direct economic benefits that influence consumer welfare. This new approach reflects a corrective balancing aim directed at restoring the efficient operation of markets. It leaves no room for the consideration of any other types of benefits.

4. Balancing Tool: Method

4.1. Overview

The previous section discussed the changes in the types of benefits that could be assessed under Article 101(3) TFEU over the span of four enforcement periods. This section reveals a corresponding transformation in the method that guided balancing. More specifically, it demonstrates how the process of balancing, the intensity of control, and the relative weight given to the four conditions of the Article have developed over the years.

Before discussing those changes in detail, Figure 3.5 provides an overview of the reasons leading the Commission to reject applications for Article 101(3) TFEU exemptions. Figure 3.5(a) indicates the number of proceedings in which each of the four conditions of the Article was explicitly rejected (blue, red, green and orange bars), or in which Article 101(3) TFEU was rejected without discussion of the conditions (black bars). Figure 3.5(b) takes a different

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Commission provisionally accepted that the agreement fulfilled the first, third, and fourth conditions of the Article. However, the efficiencies were insufficient compensation for the negative effects the agreement had on premium passengers traveling the Frankfurt-New York route. While the agreement could not be exempted under Article 101(3) TFEU, the Commission did accept commitments.

On the difference between corrective and regulatory balancing aim see Chapter 1, Section 4.1.3.
perspective to the same question by outlining the number of proceedings in which an exemption was refused due to a failure to meet only a single condition (blue, red, green and orange bars) or a combination of conditions (purple, turquoise, white and dark grey bars).

Figure 3.5: Denying the application of Article 101(3) TFEU, Commission

The figure illustrates that failing to fulfil the first condition (blue, purple and turquoise bars) was the reason for rejecting most applications for exemption, excluding the proceedings in which the Article was rejected without discussion of the conditions. It also reveals that the third condition requiring that the restriction be indispensable has gained growing importance since the second and third enforcement periods (green and turquoise bars). Finally, the figure confirms that the fourth condition for the elimination of competition was rarely the sole reason for denying an exemption (orange bar). The above trends, as the next section shows, point to fundamental changes in the balancing method.
4.2. First enforcement period: market integration and the first benefit condition

During the first enforcement period (i.e. up until 1977), Article 101(3) TFEU, like EU competition policy in general, chiefly served as a mechanism for completing the internal market and developing the EU industrial policy.\(^{537}\) The empirical findings indicate that the application of Article 101(3) TFEU during that period did not involve a genuine balancing of competition and non-competition interests but rather centred around assessing the agreement’s impact on market integration.

Accordingly, the Commission has refused to exempt agreements having a negative impact on the internal market, even when they promoted competition interests or had direct economic benefits.\(^{538}\) This policy can be traced back to the famous case of *Grundig-Consten (1964, 1966).*\(^{539}\) In its first decision refusing to grant an Article 101(3) TFEU exemption, the Commission had examined an exclusive distribution agreement between a German producer of radios and televisions and a French firm appointed as an exclusive distributor in France. As part of the agreement, the producer permitted the distributor to register the products’ trademark in France. Emphasising the importance of the single market, the Commission explained that trademarks must not be used to reinforce export prohibitions that result in the isolation of national markets.\(^{540}\)

The CJEU confirmed this approach. It rejected the undertakings’ argument that an increase in trade and inter-brand competition could offset the intra-brand restriction resulting from the exclusive distribution agreement. The Court explained that when assessing the relationship between competition and market integration in Article 101(3) TFEU, the latter prevails.\(^{541}\) It prioritised the potential risk to the internal market over the harm to competition.

On the other side of the coin, during the first enforcement period, the Commission was open to exempting agreements that did not hinder market integration.\(^{542}\) The empirical findings show

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537 See Chapter 2, Section 5.1.
538 See Annex 3.4.
539 4 and 3344 Grundig/Consten (1964), 5-6; Joined cases C-56/64 C-58/64 Grundig-Consten (1966). On the Commission’s and Courts’ approach to IPRs also see Chapter 5, Section 3.5.
540 A similar approach was adopted following IPRs cases, such as 28812 Theal/Watts (1976); 28374 Advocaat Zwarte Kip (1974); 28967 Bronbemaling V. Heidemaatschappij (1975); 26949 AOIP/Beyrard (1975); Policy report 1975, 52. Also see (Evans 1981), 426; (Gerber 1998), 352; (Wesseling 2000), 24. Joined cases C-56/64 C-58/64 Grundig-Consten (1966), 347-350. Also see (Hawk 1995), 981; (Sauter 1997), 119.
541 The fact that the agreements contained no territorial restrictions was a decisive factor in granting the exemptions. See Annex 3.5. Also see Policy report 1971, 54-65; Policy report 1975, 24, 54; Policy report 1977, 107.
that the analysis of those proceedings focused on the first benefit condition. The other three conditions of Article 101(3) TFEU were marginal to the analysis and interpreted loosely.\footnote{See Figure 3.5; Policy report 1971, 42; Policy report 1976, 40. While most of the decisions focused on the first benefit condition, the decisions on specialised exhibitions (see Section 3.2 above) centred on the third indispensability condition. The Commission assumed that the limitation on participation in competing exhibitions was beneficial, and merely required that the restriction be limited in time.} For instance, when applying the second condition, i.e. the fair share, the Commission exempted agreements that benefited society as a whole even when they did not advance the interests of the consumers of the product.\footnote{In 26940 KEWA (1975) and 26940 United Reprocesses GmbH (1975) the Commission exempted reprocessing agreements in the nuclear fuel sector aimed at recovering fissile materials that can be reused in nuclear fuel fabrication. It emphasised the particular characteristics of the reprocessing industry: It was a new industry at a critical stage of the nuclear fuel cycle regarded as economically vital by governments and related to the development and ecological problems arising from the storage of radioactive waste. Also see Policy report 1975, 42-43.} Similarly, the Commission exempted cooperation agreements while explicitly declaring that the restriction of competition might not have been indispensable.\footnote{In 26625 Clima Chappée-Buderus (1969), 3 and 27073 Bayer/Gist-Brocades (1975), 7 the Commission exempted cooperation agreements while declaring that the undertakings were part of a business group having sufficient financial resources and technical capabilities to develop their products independently.}

The degree of harm to competition played almost no role in assessing an exemption. Those decisions rarely contain information on the undertakings’ market share, economic power or even identify the relevant markets. They did not differentiate between theories of harm from horizontal and vertical restraints. Instead of indicating if, and how, an agreement has restricted competition, the decisions have centred on the form of the agreement and its effects on market integration.\footnote{Also see (Witt 2016b), 1114-17.} Hence, an agreement’s effect on market integration was the decisive criterion guiding Article 101(3) TFEU analysis during the early years of EU competition law.

\section*{4.3. Second and third enforcement periods: sectoral approach and the third indispensability condition}

\subsection*{4.3.1. The workable competition standard as a balancing method}

The workable competition standard, introduced by the CJEU in \textit{Walt Wilhelm (1969) and Metro I (1977)},\footnote{On the workable competition standard see Chapter 2, Section 5.2.1 and Section 3.3.1 above.} changed the Article 101(3) TFEU balancing method in three interrelated manners. First, it broadened the \textit{types of} benefits that could be examined under the Article. As described above, during the second and third enforcement periods (i.e. 1978-April 2004) the Commission interpreted the first condition of Article 101(3) TFEU to include all types of non-competition interests and
benefits. Widening the scope of the first condition had required the Commission to find other ways to balance competition and non-competition interests. The empirical findings indicate that this was done by adding more weight to the last two conditions of Article 101(3) TFEU, to the indispensable condition in particular. The Commission interpreted the indispensable condition as entailing a legal balancing process with regulatory aims, by which it loosely assessed whether the harm to competition was reasonable and proportionate in light of the potential benefits.

Second, the workable competition standard was used to apply Article 101(3) TFEU to new areas of the economy. Whilst during the first enforcement period Article 101 TFEU had only been enforced with regard to agreements in the private sector, from the early 1980s onward the Commission applied the Article to agreements in the public realm, in regulated and liberalised sectors in particular. In this context, the workable competition standard was used to introduce a sectoral approach as the new method for balancing. Rather than using a one-size-fits-all balancing tool, the Commission administered a case-by-case approach. It tailored the scope and intensity of the four conditions of Article 101(3) TFEU according to the "degree of competition necessary" in each sector.

Third, the Commission invoked the workable competition standard for the application of Article 101(3) TFEU as a regulatory, market-building tool. During the second and third enforcement periods, the Commission proclaimed that Article 101(3) TFEU was "more than just a means of lifting the ban on restrictive practices". Rather, it could also foster industrial policy and the rationalisation process. Accordingly, Article 101(3) TFEU was employed to regulate economic policy, shelter national industries from foreign competition, ensure an adequate level of services of general economic interest, protect SMEs, and promote social goals. The function of Article 101(3) TFEU as a market-building tool was also reflected by the Commission’s practice of attaching conditions or obligations to exemptions. As

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548 See Section 3.3 above.
549 On the definitions of the legal balancing process and regulatory balancing see Chapter 1, Sections 4.1.2 and 4.1.3, respectively.
550 In its 1981 annual report, the Commission held “the Community is essentially based on a market economy [...] However, this policy is not based on a laissez-faire model, but is designed to maintain and protect the principle of workable competition [...] decisive importance is attached to the interaction between competition policy and the policies which contribute to the attainment of a single market, where conditions are similar to those on national markets. The interaction between competition policy and the common commercial policy is equally important.” Emphasis added. Policy report 1981, 11. On the sectoral approach also see Chapter 2, Section 5.3.1.
demonstrated by Figure 3.1 above, about half the exemptions granted during the second and third enforcement periods were subject to general or specific conditions.553

The empirical findings presented in the next sections illustrates that the combination of the above effects has prompted an incoherent approach to Article 101(3) TFEU. The four conditions of the Article were applied strictly to agreements impairing market integration, and loosely to agreements in liberalised or regulated sectors, agreements in sectors affected by an economic crisis, and agreements promoting EU industrial policy.554

4.3.2. Market integration

The analysis of Article 101(3) TFEU continued to focus on market integration during the second and third enforcement periods. The Commission persisted in refusing to exempt most naked horizontal restrictions of competition, vertical agreements which involved elements of exclusive agreements, export or import bans, and arrangements having similar effects.555 Yet, the reasoning for granting exemptions gradually shifted from the establishment of the common market to the need to regulate economic policy and the competitive process.556

Accordingly, the Commission used the indispensability condition to preserve the prominence of market integration. It applied the condition strictly to agreements having a negative effect on market integration, and loosely to others. This is illustrated by comparing the Commission’s approach to two industrial standards agreements examined in the 1980s.557 In ANSEAU/NAVEWA (1981) it

553 The empirical findings reveal that most of the specific conditions attached related to the third indispensability condition. During the third enforcement period, conditions were also attached to safeguard the fulfilment of the fourth elimination of competition condition. This might reflect more effect-based balancing, which considers the effects of the agreement on competition rather than the agreement’s form. See Chapter 2, Section 5.3.3.

554 The Commission’s sectoral approach was also evident in certain “special” markets, such as selective distribution systems of luxury cosmetics and beer distribution agreements. See Annex 3.8. Also see Policy report 1991, 98-99; Policy report 1992, 114-115; policy report 2000, 39; (Sauter 2016), 41-42.


556 Also see (Wesseling 2000), 37; (Van Rompuy 2012), 154.

557 Similarly, in 29955 Carbon Gas Technologie (1985), 4 the Commission exempted horizontal agreements while acknowledging that the undertakings were likely to achieve the benefits without cooperation. With respect to distribution agreements, in 29420 Grundig’s EEC distribution system (1985), para B3 and 30846 Ivoclar (1985), para 20 the Commission held that it was not required to show that there must be no other feasible way of distributing the products. Instead, undertakings had to prove that the restriction of competition was necessary for the particular marketing strategy adopted by the manufacturer. Also see Annex 13.7 and policy report 1986, 74.
prohibited a system of vetting washing machines and dishwashers for compliance with Belgian pollution control standards since it restricted parallel imports (i.e. market integration). The alleged public health benefits could not justify an exemption. The Commission observed that although the Agreement may have guaranteed the quality of the water supply, the restriction was not indispensable to achieve this aim.\footnote{29995 ANSEAU-NAVEWA (1981), para 63.} On the other hand, in \textit{X/Open Group (1986)} the Commission exempted the creation of an European industrial standard for the interface of the Unix operating system. The standard significantly restricted competition by granting the undertakings involved early access to the interface definitions and an opportunity to implement them before they were made public. Nevertheless, in the absence of a negative effect on market integration, the Commission declared that the negative effects on competition were “easily outweighed” by the advantages resulting from the standard.\footnote{31458 \textit{X/Open Group (1986)}, para 42. A similar example is found in two proceedings in which undertakings had invoked culture and the promotion of knowledge of languages as a justification under 101(3). While in both decisions the Commission acknowledged that cultural aspects could be taken into account, it granted an exemption in only one. In 29972 Langenscheidt/Hachette (1981), it exempted the creation of a joint subsidiary for the publication and distribution of French language courses in Germany between the largest publishing house in France and a major publisher in Germany. Nevertheless, in 428 VBVB/VBBB (1981) it prohibited an agreement between Dutch and Flemish book associations requiring that the member publishers fix retail-selling prices and that the member dealers charge the prices and discounts fixed by the publishers. The Commission held that despite the cultural benefits produced by the agreement, it could potentially eliminate all possible price competition and that the RPM was not indispensable to the functioning of the distribution system (para 49-51). 27393 27394 Publishers Association - Net Book Agreements (1988) followed a similar reasoning.}

4.3.3. \textit{Liberalized and regulated markets}

As the European integration process gathered pace following the Single European Act of 1986 and the Treaty on European Union of 1992, the Commission expanded the substantive scope of EU competition law. It began to apply Article 101 TFEU to newly liberalized markets (insurance, financial services, postal services, energy, telecom, and transport) and to regulated sectors (regulated professions, sports, media and pharmaceutical products).\footnote{For liberalised markers see Annex 3.9, and for regulated markets Annex 3.10.} In those markets, Article 101(3) TFEU often served as a means to ensure the promotion of the single market and a sufficiently high quality of services, rather than the promotion of competition as such.\footnote{See Annex 3.11.} Along those lines, the Commission issued designated policy papers adapting the enforcement
of Article 101 TFEU to those sectors.\textsuperscript{562} It tailored the conditions of Article 101(3) TFEU to the relevant sector to facilitate a case-specific balance between social and political non-competition interests.\textsuperscript{563}

The Commission interpreted the conditions of the Article loosely to accommodate agreements that furthered liberalization of the respective markets. In \textit{Scottish Nuclear Energy Agreement (1991)}, for example, it exempted an exclusive import and export rights agreement, which formed part of a Scottish electricity privatisation scheme. It examined neither the particularities of the claimed benefits nor whether they were likely to be passed on to consumers.\textsuperscript{564} The Commission merely assumed that consumers would benefit from a liberalised market while acknowledging that the agreement would lead to higher prices in the short term.\textsuperscript{565} In other words, the liberalisation of the industry was regarded, in itself, as the fair share for consumers.

The application of Article 101(3) TFEU to the insurance and financial markets provides a good example of how the workable competition standard facilitated this balancing. Given their economic and social values, in many Member States, those sectors were traditionally heavily regulated or run by states’ monopolies. Consequently, they were not fully subject to competition law. The Commission first enforced Article 101 TFEU in those markets only in the mid-1980s.\textsuperscript{566} Even then, it followed a flexible approach, adapting the conditions of Article 101(3) TFEU to limit competition in favour of other policy objectives.

In the financial sector, the empirical findings reveal that the Commission exempted all of the notified agreements during the second enforcement period, of which two cases were subject to certain voluntary modifications.\textsuperscript{567} This was true even with respect to highly restrictive

\textsuperscript{562} With respect to energy: the internal energy market, Commission Working Document, Com(88) 238 1988; with respect to telecom: Guidelines on Competition Rules in the Telecommunications Sector (1991). With respect to transport: see Chapter 4, Section 3.2.3.
\textsuperscript{563} See Annex 3.12.
\textsuperscript{564} 33473 Scottish Nuclear Energy Agreement (1991), para 33. The undertakings had claimed that the agreement would contribute to the long-term planning required in the industry, the need to ensure the profitability of the nuclear power station to offset investment costs, and the reduction of overcapacity.
\textsuperscript{565} 33473 Scottish Nuclear Energy Agreement (1991), para 37. Similarly, see in 36748 REIMS II (1999), para 40, 78-85. However, at the Commission’s request, the undertakings reduced the term of the agreement - from the remaining 30-year lifespan of the nuclear power station down to 15 years.
\textsuperscript{566} The Commission affirmed the applicability of Article 101 TFEU to horizontal agreements in the insurance sector as early as 1972 (policy report 1972, 60-61). Yet, only towards the end of the second enforcement period did it apply this policy in practice in 30307 Fire insurance (1984). In C-172/80 Züchner (1981),\textsuperscript{566} the CJEU first refuted the argument that financial services are, or should be, left outside the scope of EU competition law. Following Züchner, the Commission started to scrutinize payment systems. Also see (Lista 2013), 17, 130-135.
\textsuperscript{567} The exemptions were justified due to the agreements’ contribution to improving payment facilities (261 Belgische Vereniging der Banken/Association Beige des Banques (1986)), rationalisation and
agreements with an effect similar to price fixing. In *Visa International’s multilateral interchange fee (2002)*, for example, the Commission exempted an agreement setting default multilateral interchange fees (MIF).\(^{568}\) The Commission acknowledged that the agreement limited the banks’ pricing policies, amounting to the *de facto* setting of a minimum fee.\(^{569}\) Yet, it exempted the agreement by emphasising its contribution to market integration (i.e. facilitating and encouraging cross-border purchases).\(^{570}\)

Similarly, in the insurance sector, while the Commission has prohibited agreements resulting in price fixing or recommendations,\(^{571}\) it has accepted significant restrictions of competition that would probably not have been accepted if they had been concluded in other markets. In *Nuovo Cegam (1984)*, for instance, it held that a standard tariff constitutes, in itself, a benefit in the meaning of the first condition of Article 101(3) TFEU. The Commission merely stated that the third indispensability condition applied, without explaining why such a tariff was necessary, or why a standards tariff could justify an exemption whereas the setting of an obligatory premium could not.\(^{572}\)

Moreover, the Commission frequently applied Article 101 TFEU via a negotiation process in which it eventually accepted voluntary commitments.\(^{573}\) In *P&I Clubs (1985)* it exempted an agreement between protection and indemnity clubs for marine mutual insurance. The agreement significantly restricted competition by limiting the attractiveness of transferring between clubs by setting up a mechanism relating to the premiums quoted for ships that were already insured. After three years of negotiations, the undertakings agreed to modify the mechanism. While the premiums were opened up to negotiation, their level, and the timing for transferring to a new club were still restricted. The Commission held that the modified system was “a fair compromise between the different interests.”\(^{574}\) It used industrial policy considerations to justify its loose application of the

\(^{568}\) MIF is an interbank payment made for each transaction carried out with a payment card. It is paid to the cardholder’s bank by the retailer’s bank, and is normally passed on by the retailer’s bank to retailers.

\(^{569}\) 29373 Visa International’s multilateral interchange fee (2002), para 66-68.

\(^{570}\) 29373 Visa International’s multilateral interchange fee (2002), para 89. Notably, as described in Section 4.4.1 below, in 2007 the Commission adopted a different approach to similar agreements. Similarly, in 2006, the UK NCA held that this Commission’s reliance on market integration deprived the use of the Commission’s findings in the UK national proceeding. See CA98/05/05 MasterCard (2005).

\(^{571}\) 30804 Nuovo Cegam (1984), para 22-23. Also see (Hornsby 1987), 83-84.


\(^{573}\) 30373 P&I Clubs (1985), para 56.
fourth condition by noting that there was a "strong likelihood" that prohibiting the agreement would have "harmful effects on the mutual insurance system" leading members of the clubs to "decide to leave the clubs and set up new P&I clubs outside the Community."  

The sectoral approach to Article 101(3) TFEU was also evident in the assessment of environmental agreements. The empirical findings show that during the second and third enforcement periods the Commission refused to exempt agreements on the basis of environmental considerations on only a single occasion. In *Ansae (1990)*, it was not convinced that there was a causal link between a market sharing agreement and the alleged benefit. All of the other environmental agreements were exempted. The Commission applied the four conditions of Article 101(3) TFEU loosely to favour environmental benefits over competition. It took into account broad non-economic benefits, including benefits for future generations, without requiring solid proof for substantiating the alleged benefits. When exempting the agreement in *CECED (1999)*, for instance, the Commission relied on the identification and quantification of the benefits presented by the undertakings. Similarly, when applying the third indispensability condition, it held that less restrictive alternatives compared to a total ban on high-energy consumption washing machines (e.g. industry-wide target, information campaigns and a greater focus on fulfilling EU eco-label criteria) would either jeopardise the attainment of the environmental benefits or be less effective. This statement seems debatable given the fact that the only 10% of the washing machines sold in the EU fell within the banned category.

4.3.4. *Sectors affected by economic crisis*

The sectoral approach was also evident in the assessment of agreements in sectors affected by the economic crisis of the mid-1970s. Per its declared policy, the Commission adopted a special method for applying Article 101(3) TFEU to those sectors. It differentiated between two types of restrictions of competition. On the one hand, it refused to exempt the so-called "crisis-

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575 30373 P&I Clubs (1985), para 56.
576 On the Commission’s approach to environmental agreements see Section 3.3.2 above.
577 33016 Ansae (1990), para 23.
578 For example, the decision states “According to CECED, [...] the energy consumption of washing machines was reduced by [...]” (para 14); “According to CECED, the agreement is likely to reduce electricity output by [...]” (para 36); “According to CECED, were models of phased-out machines to be replaced by an equivalent number of machines [...] TWh would be saved” (para 47); “CECED estimates the pollution avoided [...]” (para 51).
580 See Chapter 2, Section 5.2.2.
cartels” aimed at setting prices or quotes. On the other, it did exempt industrial-restructuring agreements directed at an orderly reduction of excess capacity. In fact, during the second enforcement period, the Commission exempted all the restructuring agreements it had under review. This required a loose application of the conditions of Article 101(3) TFEU.

For example, in Synthetic fibres (1984) the ten largest EU synthetic fibre manufacturers had agreed to close down 18% of their production capacity for the manufacture of synthetic textiles. The Commission exempted the agreement, noting that free market forces had failed to achieve the capacity reductions necessary to re-establish and maintain a long-term, effective, and competitive structure. This conclusion is questionable. In the first place, the restructuring agreement did not generate economic benefits from which consumers could receive a fair share. On the contrary, it clearly aimed to increase the undertakings’ profits by raising prices and limiting capacity. Nevertheless, the Commission submitted that the agreement strengthened long-term social cohesion and employment conditions in the region. This conclusion also raises doubts. While the agreement might possibly have benefited the overall economic and social conditions, it is difficult to explain how the consumers of the product received a fair share from such benefit. In the second place, the Commission did not oblige the undertakings to prove that restructuring was the least restrictive way to achieve these benefits. The agreement was classified as indispensable merely because it did not coordinate the use of the remaining capacity.

581 29869 Italian cast glass (1980), 8; 30350 Zinc producer group (1984), 16.
582 In its policy report (1981), 13 the Commission explained “[w]here there is an irreversible disparity between production capacity and demand, agreements between undertakings aimed at achieving an orderly reduction of excess capacity may be exempted from the ban on restrictive practices, in so far as undertakings do not jointly fix production and delivery volumes and selling prices of the relevant products nor aim at barring imports. Nor can the Commission tolerate measures which use private or public protectionism to shield a national market from external competition”.
583 30810 Synthetic fibres (1984); 30863 BPCL/ICI (1984); 31055 ENI/Montedison (1986). Also see policy report 1984, 69-70.
584 30810 Synthetic fibres (1984), para 28. Also see (Hornsby 1987), 92.
586 In 30525 International Energy Agency (1983), para 30 the Commission took a similarly lenient approach towards an agreement aimed at ensuring a secure supply in times of crisis, due to its benefits for consumers as well as to the “general economy of the involved countries”. The exemption was granted although the agreement had significantly restricted competition. Also see Policy report 1984, 56.
587 Policy report 1982, 43-44. In 31055 ENI/Montedison (1986) although the restructuring agreement was classified as indispensable, the exemption was granted even though the agreement resulted in a substantial reduction of competition in the market. Also see policy report 1986, 76-77.
4.3.5. Industrial policy

Much like in the first enforcement period, the Commission seemed favourable towards agreements promoting EU industrial policy. In particular, it exempted joint ventures and horizontal cooperation agreements that failed to fulfil the conditions of the Horizontal BERs, given the undertakings high market shares. Despite the potential restriction of competition, the Commission maintained that such agreements were a necessary component in the economic strategy of the EU, essential for rationalisation, R&D, innovation, and the dissemination of technology.\textsuperscript{588}

Typically, the application of Article 101(3) TFEU to those agreements focused on the indispensability condition while assuming that they produced benefits and granted consumers a fair share.\textsuperscript{589} In other cases, the Commission simply stated, without any further reasoning, that the indispensability condition applied.\textsuperscript{590} The Commission essentially waived the requirements of the fourth condition when the other three conditions were fulfilled.\textsuperscript{591} This is illustrated by three decisions exempting the creation of transport services between the UK and continental Europe as part of the opening of the Channel Tunnel (1994).\textsuperscript{592} Each of the cooperation arrangements involved an agreement between the public rail companies owning the railway infrastructure in their respective countries. The Commission admitted that a joint entry into the emerging international transport market could reinforce the undertakings’ already dominant position, making access impossible or extremely difficult for competing providers. Yet, it observed that entry into that market required considerable investment in transport equipment and fixed installations, and that the economic viability of such new activities was highly uncertain. Therefore, the rapid promotion of these new services for the benefit of European industry justified the cooperation between the incumbent national rail companies.

\textsuperscript{588} See Annex 3.13. Also see policy report 1994, 23-26, 105. In some cases, the undertakings agreed to undertake voluntary commitments to meet these conditions, see 33640 Exxon/Shell (1994), para 66; 33863 Asahi-Saint-Gobain (1994), para 31; 35855 Scandairy (1997); IP/98/353 Photo-graphic manufacturers (1998); 32173 Continental/Michelin (1998); 34410 Olivetti/Digital (1994).

\textsuperscript{589} Also see policy report 1994, 24, 106.

\textsuperscript{590} For example, 32006 Alcatel Espace/ANT Nachrichtentechnik (1990); 34607 Banque Nationale de Paris - Dresdner Bank (1996); 36748 REIMS II (1999), para 86-89.

\textsuperscript{591} Also see Section 4.1 and Figure 3.5 above.

The Commission also emphasised the need to ensure the international competitiveness of EU firms, and the role of competition law in economic recovery, growth, and employment.\textsuperscript{593} For instance, it justified exempting a collective management and copyright licensing agreement by emphasising the need to respond to a changing marketplace driven by globalisation, rapid technological progress, and a dynamic nature.\textsuperscript{594} By the same token, it exempted restructuring agreements and cooperation agreements in the vehicle sector, pointing to the structural changes in the sector, and to the frequent link-ups between manufacturers.\textsuperscript{595}

4.3.6. \textit{Non-competition interests as an additional justification}

In addition to the exemptions that were detailed in Figure 3.1 and in the above sections, the Commission used non-competition interests as an additional justification to specify or add weight to Article 101(3) exemptions.\textsuperscript{596} Figure 3.6 summarises the use of non-competition interests as additional justification. It details the number of proceedings and categories of benefits that were used as additional justification.

\textbf{Figure 3.6: Non-competition interests as an additional justification, Commission}

The figure shows that the practice of using non-competition interests as additional justification was particularly prominent during the third enforcement period. It was especially used to take non-economic benefits into account (red bars). In fact, the empirical findings show that

\textsuperscript{594} 38014 IFPI 'Simulcasting' (2002), para 84.
\textsuperscript{596} (Monti 2007), 115; (Van Rompuy 2012), 263, 279.
environmental, employment and industrial policy considerations were the main non-competition interests invoked as additional justifications for exemptions. The reference to non-competition interests in those proceedings was made in a complementary fashion, making it hard to understand what weight, if any, was given to them. In Synthetic fibres (1984), for example, the Commission explained that the coordinated closure of plants “will also make it easier to cushion the social effects of the restructuring by making suitable arrangements for the retraining and redeployment of workers made redundant.” Similarly, in Ford/Volkswagen (1992), it referred to investment, employment and harmonised development of the EU as interests that were not sufficient for the justification of an exemption but should nevertheless be taken into account.

The role of non-competition interests as additional justifications, therefore, is ambiguous. Gyselen, the former head of DG COMP, has argued that the references to non-competition interests as additional justification were used as *obiter dicta*, suggesting they had no independent value. However, Monti maintains that the non-competition interests were decisive in such cases, tipping the balance in favour of granting an exemption. He maintained that the Commission had deliberately chosen to refer to non-competition interests, knowing that it provided guidance. Thus, Monti has noted “if ex post we are told that the Commission does not mean what it writes, this casts grave doubt about the entirety of the decisions.”

The reference to non-economic benefits as additional justification generates further doubts on their already uncertain role under Article 101(3) TFEU. As Van Rompuy has observed, if such benefits are relevant, the Commission should explain how they were taken into account. Against this background, the Commission’s choice to abandon the practice of using those additional justifications following modernisation seems like a suitable policy.

598 30810 Synthetic fibres (1984), para 37.
599 33814 Ford/Volkswagen (1992), para 36. See Section 3.3.3 above.
600 (Gyselen 2002), 185.
601 (Monti 2007), 115.
602 Emphasis added. (Monti 2007), 117. Also see (Van Rompuy 2012), 263.
603 (Van Rompuy 2012), 263. Also see (Townley 2009), 73-75.
4.4. Fourth enforcement period: consumer welfare and economic evidence

4.4.1. Modernising the balancing method

The modernisation has brought about three considerable changes to the method of Article 101(3) TFEU balancing.\textsuperscript{604}

First, at a substantive level, the Commission has introduced the \textit{short-term narrow consumer welfare} standard as the benchmark for applying Article 101(3) TFEU. Short-term consumer welfare focuses on measuring static efficiency, namely, the optimal distribution of resources among alternative production targets at a certain point in time. This entails that a competition enforcer only examines static efficiency that benefits direct or indirect consumers in the relevant markets.\textsuperscript{605} This new standard has marked a significant change. The Commission has replaced the workable competition standard that guided the application of Article 101(3) TFEU prior to modernisation with an economic-based balancing method. It has transposed the legal balancing process based on a proportionality analysis into an economic balancing process based on an economic welfare assessment.\textsuperscript{606} At the same time, the empirical findings reveal that the Commission has rarely referred to consumer welfare in its decisional practice.\textsuperscript{607} In contrast to many NCAs that have established theoretical and practice-based frameworks,\textsuperscript{608} the Commission’s decisional practice does not explain how the standard should be applied to a specific case.

Second, the Commission has increased the nature and level of evidence necessary for granting an Article 101(3) TFEU exception. The previous sections have already illustrated that, prior to modernisation, the Commission often settled for a low standard of proof, relying on speculative evidence or general policy arguments. Yet, following modernisation, the Commission has demanded strong economic evidence to prove the fulfilment of the four conditions. In its Article 101(3) Guidelines (2004), the Commission enacted a high threshold for proving the first benefit condition. Undertakings are expected to substantiate the nature of the claimed efficiencies, a causal link

\textsuperscript{604} On the effects of modernisation on balancing more generally, see Chapter 2, Section 5.4.
\textsuperscript{605} ICN Competition Enforcement and Consumer Welfare (2011), 33. Also see Chapter 2, Section 5.4.4.
\textsuperscript{606} On the definitions of legal and economic balancing processes see Chapter 1, Section 4.1.2.
\textsuperscript{607} In a few cases, the Commission merely mentioned the notion of consumer welfare without explaining its scope or how it applies to Article 101(3) TFEU. See for example, 34579 36518 38580 MasterCard I (2007), para 690, 733; 39188 Bananas (2008), para 341-342; 39230 Rio Tinto Alcan (2012), para 94; 39612 Perindopril (Servier) (2014), para 1206-1209.
\textsuperscript{608} See Section 6.2 below.
between the agreement and the efficiencies, the likelihood and magnitude of the claimed efficiency, and how and when each claimed efficiency would be achieved. In addition, they are required to calculate, as accurately as possible, the value of such efficiencies. 609

Similarly, the Commission has restricted the application of the second fair share condition. Its Article 101(3) Guidelines have inverted the order of the second and third conditions, ordering an examination of the indispensability condition before calculating the fair share passed on to consumers. Accordingly, the Guidelines have excluded from the calculation of fair share benefits that are the result of a restriction that was not indispensable. 610 In International Skating Union’s eligibility rules (2017), for example, it found that benefits resulting from the Skating Union’s so-called eligibility rules could not be taken into account for the purpose of calculating the benefits and fair share since such rules go beyond what is necessary to protect legitimate sport-related interests. 611 This was not the Commission’s practice in the past. Prior to modernisation, the Commission would examine the indispensability of an agreement only after identifying the relevant benefits and the share passed on to consumers. Hence, the fair share included benefits resulting from restrictions that were not indispensable.

Moreover, the modernisation has had the effect of shifting the burden of proof. According to Regulation 1/2003, the competition enforcer only bears the burden of proving an Article 101(1) TFEU infringement. The undertakings bear the burden of proving that the four conditions of Article 101(3) TFEU have been fulfilled. 612 In other words, the Regulation builds on the bifurcated structure of Article 101 TFEU to introduce a new allocation of the burden of proof. This has created an asymmetry: the standard for proving a justification under Article 101(3) TFEU has become significantly higher than the standard for proving an infringement of Article 101(1) TFEU. This asymmetry makes it more difficult to successfully invoke Article 101(3) TFEU. 613 Indeed, as mentioned, the empirical findings point out that the Commission has

609 Commission Article 101(3) Guidelines (2004), para 51-58. Similar details are required for applying the other three conditions of Article 101(3) TFEU, in para 76, 78, 94, 109-115. This approach was repeated in the new versions of the Vertical Guidelines (2010), para 6, 19, 60, 96, 122-127, Horizontal Guidelines (2011), para 29, 49, 95-100, 141, 183, 217, 246, and in the BERs adopted after 2004, as detailed in Chapter 4, Section 4.


612 Regulation 1/2003, Preamble 5 and Article 2.

613 (GCLC Annual Conference 2010), 19-20.
rejected most Article 101(3) TFEU claims outright following modernisation, noting that no relevant benefit had been identified or substantiated.\textsuperscript{614}

Third, the changes to the evidentiary requirements have also affected the relative weight given to the four conditions of Article 101(3) TFEU. In the post-modernisation era, the focus of Article 101(3) TFEU has shifted away from the indispensability condition to the quantification and calculation of benefits, and to a lesser extent to the fair share condition.\textsuperscript{615} Since undertakings have almost never managed to produce such evidence, the other conditions imposed by the Article have become less significant. One could argue that although the provisions of Article 101(3) TFEU contain four conditions, in practice only the first is a substantive condition, whereas the other three are limitations on, or requirements of, the first.\textsuperscript{616}

\textit{Kjolbye,\textsuperscript{617} Faull and Nikpay,\textsuperscript{618}} three Commission officials writing in a private capacity, have linked the above changes to the procedural modernisation. The notification regime of Regulation 17/62 entailed a reactive enforcement culture in which the Commission devoted most of its enforcement efforts to assessing notified agreements. The indispensability condition was, in their opinion, well suited for this purpose. It served as a type of proportionality test. When the first condition was satisfied and there was a sufficiently competitive market, the Commission would often assume that consumers would receive a fair share of the benefits.\textsuperscript{619} On the other hand, Regulation 1/2003 is based on self-assessment. This, in combination with the more economic approach, means that fewer cases will be found to fall within the scope of Article 101(1) TFEU in the first place. The rest of the cases will merit a more careful analysis of all four conditions, which requires greater emphasis on the first two conditions.\textsuperscript{620}

The modernisation of Article 101(3) TFEU can be demonstrated by reviewing the Commission’s payment card decisions. As described above, in Visa II (2002) the Commission exempted an MIF system despite its price-fixing effects,\textsuperscript{621} assuming that the MIF furthered economic and technical progress by contributing to “the existence of a large-scale international

\textsuperscript{614} See Section 3.4 above.
\textsuperscript{615} (Kjolbye 2004), 573; (Faull & Nikpay 2014), 317.
\textsuperscript{616} Also see (Kjolbye 2004), 573; (Sufrin 2006), 933; (Faull & Nikpay 2014), 317.
\textsuperscript{617} (Kjolbye 2004), 573.
\textsuperscript{618} (Faull & Nikpay 2014), 317.
\textsuperscript{619} Also see (Sufrin 2006), 936.
\textsuperscript{620} Kjolbye (2004), 573.
\textsuperscript{621} Subject to placing a cap on the amount of the MIF that related to the audited costs of services that the banks would be rendering to the retailers and customers. See Section 4.3.3 above.
payment system”. Merely five years later, following modernisation, the Commission established a much higher threshold for fulfilling the first condition of Article 101(3) TFEU. Departing from its previous approach, it held that “there is no presumption” that MIFs enhance the efficiency of card schemes. Rather, it required robust theoretical and empirical evidence. Although it held that the payment systems generated efficiencies, it did not identify a causal link between the efficiencies and the specific restrictions.

4.4.2. Hard-core and by-object restrictions

The modernisation has also altered the Commission’s approach to the application of Article 101(3) TFEU to by-object restrictions. The Commission’s Article 101(3) Guidelines (2004) declare that although Article 101(3) TFEU does not a priori exclude certain types of agreements, “practice shows” that hard-core restrictions are “unlikely” to fulfil the conditions of the Article. The Commission’s decisions use even stronger language, holding that by-object restrictions are “in principle” ineligible for an exception.

The empirical findings, however, support the opposite conclusion. Figure 3.7 describes the types of restrictions in which Article 101(3) TFEU has been accepted. It differentiates between by-object restrictions (red bars), by-effect restrictions (blue bars), and proceedings that did not indicate the type of the restriction (grey bars).

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622 29373 Visa International’s multilateral interchange fee (2002), para 91. Also see (Gerard 2012), 30.
623 37860 Morgan Stanley Dean Witter/Visa (2007); 34579 36518 38580 MasterCard I (2007); 38606 Cartes bancaires (2007). The Decision was confirmed by the GC in T-491/07 Cartes Bancaires (2012). However, the CJEU annulled the decision due to insufficient examination of whether there was a by-object restriction (C-67/13P Cartes Bancaires (2012)).
624 34579 36518 38580 MasterCard (2007), para 730. Also see (Gerard 2012), 30.
625 34579 36518 38580 MasterCard (2007), para 690.
626 37860 Morgan Stanley Dean Witter/Visa (2007), para 312-320; 38606 Cartes bancaires (2007), para 380-477; 34579 36518 38580 MasterCard I (2007), para 679-733. The change in the Commission’s approach was scrutinized by the GC. In T-111/08 MasterCard (2012), para 224-226 and 235 and T-491/07 Cartes bancaires (2012), para 95-96, the GC rejected the claim that the Commission departed from its previous position without sufficient explanation. The Court justified the decisions with reference to the lack of a causal link.
628 36957 36997 37121 37138 37380 Glaxo Wellcome (2001), para 124 (repealed by the GC and CJEU); 39401 E. ON/GDF (2009), para 265; 39510 Ordre National des Pharmaciens (2010), para 705. Also see (Gerard 2012), 40. The BERs adopted during the fourth enforcement period and described in Chapter 4 follow a similar approach, and do not apply to agreements containing hard-core infringements.
The figure demonstrates that, prior to modernisation, the Commission exempted a number of by-object restrictions. For example, in *Société Air France/Alitalia Linee (2004)*, rendered only three weeks before the entry into force of Regulation 1/2003, the Commission exempted a cooperation agreement that had been classified as a by-object restriction.\(^{629}\) The number of exemptions granted to by-object restrictions is likely to be even higher than indicated by the graph, as some of the proceedings in which the Commission did not indicate the type of the restriction (grey bars) involved hard-core restrictions.

The change in the Commission’s approach could be linked to a transformation in the classification of a restriction as by-object. The switch to an effects-based approach and the introduction of the ancillary restraints doctrine has narrowed the scope of Article 101(1) TFEU.\(^{630}\) Therefore, some of the by-object restrictions that were exempted in the past may no longer fall within the scope of the prohibition of Article 101(1) TFEU. At the same time, this explanation cannot fully account for the Commission’s new approach. As shown above, prior to modernisation, the Commission also exempted “classic” horizontal hard-core restrictions, such as quotes or prices fixing, which are still classified as hard-core restriction today.\(^{631}\)

Against this backdrop, the Commission’s new approach to by-object is another limitation of the type of restrictive agreement that could benefit from an Article 101(3) TFEU exception. The

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\(^{629}\) 38284 Société Air France/Alitalia Linee (2004).

\(^{630}\) See Chapter 5, Section 3.4. Also see (Jones 2010), 791; (Rousseva 2013), 251; Commission Guidance on restrictions of competition "by object" (2014), 4.

\(^{631}\) See Annex 3.15.
Commission created a unique balancing framework for by-object restrictions, which is based on neither primary nor secondary EU law, nor on the case law of the EU Courts. In fact, Section 5.3 below reveals that this new approach to the balancing of by-object restrictions has not been accepted by the EU Courts. This has created tension between the Commission’s and EU Courts’ approaches to Article 101(3) TFEU balancing following modernisation.

### 4.5. Interim conclusion

Over the years, the Commission has altered its Article 101(3) TFEU balancing methods. It has changed the balancing process, the evidentiary burden for exemptions, and the interpretations and relative weight given to the four conditions of Article 101(3) TFEU.

Prior to modernisation, balancing was guided by the workable competition standard. This facilitated a legal balancing process that left the Commission a significant margin of discretion to decide whether to exempt an agreement. The Commission’s application of Article 101(3) TFEU, in turn, was incoherent. The empirical findings show that the Commission applied the conditions of the Article strictly to agreements impairing market integration, and loosely to agreements in liberalised or regulated sectors, agreements in sectors affected by an economic crisis, and agreements promoting EU industrial policy.

As part of its substantive modernisation, the Commission has changed the balancing method. It has transformed Article 101(3) TFEU into an economic balancing process with the introduction of the short-term narrow consumer welfare standard. According to the Commission, balancing is limited to measuring the economic, quantifiable benefits of an agreement against its harm to competition. This balancing method is based on an economic and factual cost-benefit analysis and limits the Commission’s discretion.

Nevertheless, the Commission’s new approach remains unclear because the Commission has had only limited opportunity to apply Article 101(3) TFEU following modernisation and has mostly rejected outright the possibility of granting an exception. This uncertainty has been reinforced because, as the next section reveals, the EU Courts have not fully accepted the changes advocated by the Commission. They have not fully accepted either the limitations placed by the Commission on the relevant types of benefit or the balancing method and the new framework for by-object restrictions.
5. EU COURTS

5.1. Overview

Article 101(3) TFEU balancing has been rightly described as the foremost area of inconsistency between the Commission’s and EU Courts’ approaches following modernisation. The empirical findings presented below show that prior to modernisation, the EU Courts had a leading role in shaping Article 101(3) TFEU balancing. They had a decisive influence in determining the types of benefits that could be examined under the Article and with the balancing method. This changed subsequent to modernisation. At the turn of the millennium, the Commission took up the reins on interpreting Article 101(3) TFEU. This section shows that although the EU Courts had not fully endorsed the Commission’s new approach to Article 101(3) TFEU, neither did they take a clear stand on how balancing should be applied. Their judgments have often used vague and ambiguous wording and did not directly address questions as to the scope of the Article. This has created much uncertainty as to the current role of non-competition interests under the Article. Moreover, as Section 6 later illustrates, the lack of guidance from the EU Courts has facilitated conflicting national balancing practices, which have hampered the uniformity of balancing throughout the EU.

Before exploring the above in detail, this section shall provide an overview of the proceedings in which the EU Courts have discussed the application of Article 101(3) TFEU. First, Figure 3.8 presents the number of preliminary rulings in which the Article has been discussed.

Figure 3.8: Article 101(3) TFEU, preliminary rulings

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632 (Petit 2009), 6; (GCLC Annual Conference 2010), 82-83.
The figure discloses that national courts have referred only a limited number of questions on the interpretation of Article 101(3) TFEU to the CJEU. This can perhaps be explained by the fact that until May 2004, the Commission had the sole power to grant Article 101(3) TFEU exemptions in public enforcement proceedings. National courts, therefore, only reviewed the application of the Article in a number of private enforcement cases. Moreover, scholars have noted that, since modernisation, national courts have not made any preliminary references concerning matters covered by the Commission’s guidelines. Accordingly, although the guidelines are non-binding soft law, they de facto have limited the CJEU’s opportunities to enunciate its balancing approach.

Interestingly, the empirical findings reveal that the preliminary rulings have focused on the same types of infringements as the ones examined by the Commission during each enforcement period. Correspondingly, up until the third enforcement period (i.e. April 2004), the preliminary rulings have centred on the application of Article 101(3) TFEU to distribution systems. Following modernisation, they have mostly dealt with the application of the Article in regulated sectors.

Next, Figure 3.9 examines appeals involving the application of Article 101(3) TFEU. It specifies the number of appeals against the Commission’s decisions (grey line), appeals in which an individual exemption was discussed (blue line), appeals in which the Courts ratified the exemption granted by the Commission (blue bars), and appeals in which the Courts overturned a Commission’s decision granting or denying an individual exemption (red crosses).

![Figure 3.9: Article 101(3) TFEU, appeals](a) CJEU

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<th>Year</th>
<th>Article 101(3)-Accepted</th>
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\[633\] (Colomo 2013), 370; (Blockx 2018), 99.
\[634\] See Annex 3.16.
\[635\] See Annex 3.17.
The seven proceedings heard by the GC in 2012 in which Article 101(3) TFEU was examined appealed only two Commission decisions. Therefore, it does not represent a substantive peak.

The figure demonstrates that the EU Courts have had limited opportunities to review the Commission’s application of Article 101(3) TFEU, and have rarely overturned the Commission’s analysis. Despite that, as the next sections reveal, the EU Courts had an important role in shaping Article 101(3) TFEU balancing principles prior to modernisation.

5.2. Active role prior to modernisation

From the early days of EU competition law, the CJEU introduced a standard of marginal review to scrutinise the Commission’s application of Article 101(3) TFEU. It has consistently emphasised that the Commission has a wide margin of discretion when applying the Article. Indeed, the empirical findings confirm that the CJEU and GC have mostly confined their appraisal to procedural elements of the Commission’s decisions or undertaken a very general appraisal of its analysis. In most cases, they did not question the Commission’s substantive assessment of the four conditions of the Article.

This, however, does not mean that the EU Courts have not influenced the balancing principles. As demonstrated in Sections 3 and 4 above, the Courts, and the CJEU in particular have had an immense impact on the development of Article 101(3) TFEU. They have shaped

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636 See Annex 3.18. Also see (Bailey 2004), 1327, 1347; (Cseres 2007), 160-161; (Kalintiri 2016), 1288-1289. Yet, in some proceedings the GC evaluated also the Commission’s substantive analysis. See, for instance, T-17/93 Ford/Volkswagen (1994); T-29/92 Building and Construction Industry in the Netherlands (1995); T-131/99 Whitbread (2002).
the types of benefits that could be examined under the Article by interpreting Article 101(3) TFEU to include broad economic and non-economic benefits. Moreover, they have introduced the workable competition balancing method, based on a legal balancing process and with a relatively low level of evidence needed.

In many of the Article 101(3) TFEU landmark cases, the Court did not overturn the outcome of the Commission’s decisions. It merely introduced new balancing methods and principles. In parallel, despite the narrow marginal review standard, the Courts have overturned the Commission’s balancing in some instances. In fact, four out of the five Court judgments overturning Commission decisions on the application of Article 101(3) TFEU were based on an appraisal of the substantive balancing elements. In those judgments, the Courts actively engaged in complex balancing issues. In particular, the Courts criticised the manner in which the Commission had calculated the benefit condition and applied the indispensability and elimination of competition conditions.

The above findings disclose that despite the marginal review standard, in the past, the EU Courts played a leading role in the development of Article 101(3) TFEU balancing. The next section affirms that this changed in parallel with modernisation. While the EU Courts did not accept the Commission’s new interpretation of Article 101(3) TFEU, they refrained from clarifying the scope of balancing under the Article.

5.3. Rejecting the Commission’s new approach

The first part of this chapter demonstrated that from the outset of the modernisation plans, the Commission has advocated for substantive reform to Article 101(3) TFEU balancing. Under the

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639 See, for example, the Courts’ judgments in Joined cases C-56/64 C-58/64 Grundig-Consten (1966), as described in Section 4.2 above; C-26/76 Metro I (1977), as described in Section 3.3.1 above; and T-17/93 Ford/Volkswagen (1994), as described in Section 3.3.3 above.

640 In the fifth case, C-8/66 C-9/66 C-10/66 C-11/66 Noordwijk’s Cement Accoord (1967), para 94, the CJEU annulled the Commission’s decision with respect to Article 101(3) TFEU due to insufficient reasoning.


643 T-185/00 T-216/00 T-299/00 T-300/00 Eurovision (2002), para 83-86, annulling the Commission’s decision in 32150 Eurovision (2000).
heading of the more economic approach, it has attempted to alter the EU Courts’ previous case law on the types of relevant benefits and balancing method.644

In terms of legal hierarchy, however, the Commission does not have the legal competence to ignore the EU Courts’ case law. The Commission is bound by the principles developed in the case law and cannot limit the scope of Article 101(3) TFEU by means of soft law or as a hidden result of Regulation 1/2003.645 While the Commission is entitled to adopt guidelines indicating its policy on how to exercise its discretion, it may not depart from the rules of the Treaty or previous judgments.646

Against this background, the uniform enforcement and consistent development of EU competition law would have been well served by clarification from the EU Courts as to the limits of balancing, the scope of Article 101(3) TFEU, and the validity of the Commission’s new approach. The empirical findings presented below show that the EU Courts did not answer these questions directly. Nevertheless, there are various indications that they never fully embraced the Commission’s limitation on the types of benefits that could be examined under Article 101(3) TFEU and the reference to the short-term narrow consumer welfare standard as a balancing method.647

5.3.1. Types of benefits

There are several indications that the EU Courts have not followed the Commission’s new narrow reading of the first condition of Article 101(3) TFEU.648 First, the CJEU’s preliminary rulings following May 2004 still recognise that the protection of non-economic benefits – such as those relating to financial services, regulated professions, IPRs, and sport - could justify an Article 101(3) TFEU exception.649 The pertinence of non-economic benefits is also supported by the parallel the CJEU drew between Article 101(3) TFEU and free movement exceptions, in which broad non-economic benefits justify an exemption. In Football Association Premier League (2011), for example, the Court examined an exclusive broadcasting license agreement. The CJEU first affirmed that the agreement restricted the freedom to provide services and could

644 See Sections 3.4 and 4.4 above.
645 Also see (Schweitzer 2007), 9; (Stefan 2008), 763-764; (Townley 2009), 70, 178-181; (Gerard 2012), 36-38; (Witt 2016b), 261-295.
646 C-189/02P C-202/02P C-205/02P C-206/02P C-207/02P C-208/02P C-213/02P Dansk (2005), para 261; C-439/11P Ziegler (2013), para 59; C-226/11 Expedia (2013), para 29. On the relationship between the Commission’s soft law mechanisms and the judgements of the EU Courts see (Stefan 2008), and national Courts see (Kovacs et al. 2016).
647 Also see (Townley 2009), 47; (Van Rompuy 2012), 208; (Witt 2012), 444; (Gerbrandy 2015), 771.
648 For an empirical overview of the types of benefits examined by the EU Courts, see (Brook 2019).
not be justified by IPRs or promotion of sport considerations since it went beyond what is necessary to achieve those aims.\textsuperscript{650} The Court also referred to this free movement analysis to explain why the agreement did not fulfil the conditions of Article 101(3) TFEU.\textsuperscript{651}

Second, the GC has declared that policy-linking clauses created an obligation to consider non-economic benefits under Article 101(3) TFEU. In \textit{CISAC (2013)}, it noted that the policy-linking clause on the protection of culture entails the obligation “to bear in mind the requirements relating to the respect for and promotion of cultural diversity” when applying the four conditions of the Article.\textsuperscript{652} Although the Court did not specify how culture should be taken into account, it emphasised that such non-economic benefit was relevant.

Third, following modernisation, the EU Courts upheld a number of Commission decisions that had been adopted prior to May 2004, which exempted agreements on the basis of non-economic benefits. The Courts confirmed that non-economic benefits relating to sports, the environment, and financial services justified Article 101(3) TFEU exceptions. Moreover, the EU Courts held that fighting free riding, promoting R&D, and culture were interests that could, in theory, justify an exception.\textsuperscript{653} Those Court decisions did not recognise any change in the rules of identifying the relevant benefits under Article 101(3) TFEU.

Finally, the EU courts have also not accepted the Commission’s position limiting the beneficiaries under Article 101(3) TFEU to direct consumers. In \textit{GlaxoSmithKline (2009)}, they affirmed that the promotion of innovation in the pharmaceutical industry should be taken into account.\textsuperscript{654} In other words, future benefits to society as a whole could justify a restriction of competition. In \textit{MasterCard (2014)}, the CJEU seemed to take a more restrictive approach, requiring that benefits to direct consumers as well as benefits to indirect consumers in “separate but connected” markets be taken

\begin{flushleft}
\textsuperscript{650} C-403/08 C-429/08 Football Association Premier League (2011), para 105-124. \\
\textsuperscript{651} C-403/08 C-429/08 Football Association Premier League (2011), para 145-146. \\
\textsuperscript{652} T-451/08 CISAC (2013), para 103. Yet, the GC upheld the Commission’s decision findings that the burden of proof under Article 101(3) TFEU was not reversed merely by the fact that a non-competition interest was protected by the cultural policy-linking clause. \\
\textsuperscript{653} See Annex 3.19. \\
\textsuperscript{654} Case T-168/01 GlaxoSmithKline (2009), para 248. The CJEU accepted the GC analysis, however, it did not go into details on this point. See C-501/06P C-513/06P C-515/06P C-519/06P GlaxoSmithKline (2009), para 95.
\end{flushleft}
into account. In any event, the courts clearly did not accept the Commission’s reading that limited the Article to direct economic benefits.

5.3.2. Balancing method

Similarly, there are indications that the EU Courts did not embrace the consumer welfare standard for applying Article 101(3) TFEU in general and the narrow short-term consumer welfare in particular. At first, the GC actually appeared to support the Commission’s new approach. In *GlaxoSmithKline (2006)* the GC asserted that Article 101(1) TFEU aims “to prevent undertakings, by restricting competition between themselves or with third parties, from reducing the welfare of the final consumer”. Yet, this statement referred to Article 101(1) TFEU, hinting that Article 101(3) TFEU or Article 101 TFEU as a whole might pursue other objectives. Moreover, the GC’s positive approach towards consumer welfare was short-lived. In *T-Mobile (2009)* and *GlaxoSmithKline (2009)*, the CJEU rejected, at least in part, the consumer welfare standard as the sole aim of Article 101 TFEU. It declared that Article 101 TFEU “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”.

Notably, the CJEU opted for a vague formulation compared to the one suggested by the Advocated General. AG Kokott submitted that Article 101 TFEU was not designed “only or primarily” to protect competitors or consumers, but mainly to “protect the structure of the market and thus competition as such”. The advancement of consumer welfare, according to her, is only a secondary and indirect effect of competition policy. The CJEU, however, did not repeat this clear statement. Instead, it abstained from taking a clear stand on the goals and method for applying the Article.

655 Case C-382/12P MasterCard (2014), para 240. The CJEU pronounced a similar position in C-238/05 AsnefEquifax (2006), para 70.
657 (Townley 2009), 178-181.
658 Emphasis added. C-08/08 T-Mobile (2009), para 38. Also see C-501/06P C-513/06P C-515/06P C-519/06P GlaxoSmithKline (2009), para 62. This definition was repeated by the GC in T-461/07 Visa (2011), para 126 and T-357/06 Bitumen (2012), para 11.
659 Opinion of AG Kokott in C-08/08 T-Mobile (2009), para 58.
In a similar vein, the EU Courts did not clearly embrace the Commission’s call to rely on economic evidence. The empirical findings demonstrate that the Courts based their decisions on a legal rather than economic balancing process when applying Article 101(3) TFEU.660

Finally, the empirical findings reveal that the EU Courts did not adopt the Commission’s new approach to the balancing of by-object restrictions. They continued to order a full analysis of Article 101(3) TFEU conditions, also with respect to by-object restrictions. They have neither required a different analysis nor indicated a lower likelihood of success in such cases.661

5.4. Interim conclusion

The empirical findings affirm that prior to modernisation, the EU Courts were active in shaping Article 101(3) TFEU balancing. They had an important role in developing the principles guiding the types of benefits examined under the Article and the balancing method. This changed following modernisation. On the one hand, the EU Courts did not embrace the Commission’s new interpretation of Article 101(3) TFEU, at least in part. They continued to follow the balancing principles established in their case law prior to May 2004, leaving significant room for the consideration of non-competition interests. On the other hand, regrettably, the EU Courts rejected the Commission’s new interpretation in an indeterminate manner. They were not clear on what types of benefits could be taken into account, the role of the consumer welfare standard, and the balancing method.

The Courts’ practice generated great uncertainty on the limits of Article 101(3) TFEU balancing. Because the Commission and the EU Courts have not reached coherent decisions, it is difficult to predict the applicable balancing framework. As the next section demonstrates, it also opened the door for the national enforcers to adopt diverging approaches to balancing in the era of decentralised enforcement.

660 See for example C-238/05 Asnef/Equifax (2006) and C-67/13P Cartes bancaires (2014). The Commission, on the other hand, required solid economic evidence in similar cases, as was presented in Section 4.4.1 above.

661 See, for example, C-501/06P C-513/06P C-515/06P C-519/06P GlaxoSmithKline (2009), para 68-167; T-168/01 GlaxoSmithKline (2006), para 214-315. This was also the Court’s approach in the past in T-17/93 Ford/Volkswagen (1994) and C-243/83 Binon (1985). Also see (GCLC Annual Conference 2010), 89. The Commission’s approach was detailed in Section 4.4.2 above.
6. NCAS AND NATIONAL COURTS

6.1. Overview

The previous sections have exhibited how the substantive and procedural pillars of modernisation have altered Article 101(3) TFEU balancing. This section discusses an additional, less explored effect of Regulation 1/2003 relating to the institutional pillar of modernisation. The decentralisation of enforcement has empowered the NCAs, for the first time, to apply Article 101(3) TFEU, and as such to engage in the balancing of competition and non-competition interests. At the same time, the Regulation has not provided a clear and binding framework to guide such balancing. As a consequence, when EU primary and secondary law or the case law of the EU Courts do not prescribe otherwise, the NCAs enjoy a wide margin of discretion to shape their national approaches on the basis of their legal, economic, and social traditions. Although the Commission’s guidelines and policy papers have stimulated a process of voluntary convergence to the Commission’s practices, they are not binding on the Member States.

In fact, this section illustrates that the NCAs have developed unique balancing approaches. A first group of NCAs (i.e. UK and Hungary) has generally conformed to the Commission’s approach. A second group (i.e. Netherlands and Germany) has openly deviated from such an approach. A third group (i.e. France) had also done so, but with more subtlety. Before exploring those national differences in detail, Figure 3.10 first presents an empirical overview of the application of Article 101(3) TFEU by the Five NCAs.

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662 (Lianos & Geradin 2013), 578-583; (Cseres & Mendes 2014), 486.
Figure 3.10: Article 101(3) TFEU, NCAs

(a) France
(b) Germany
(c) Hungary
(d) Netherlands
(e) UK

![Graphs showing the number of proceedings under Article 101(3) TFEU for different countries over the years 2004 to 2017. The graphs illustrate the trend of accepted cases, argued cases, and total cases for France, Germany, Hungary, the Netherlands, and the UK. Each graph is labeled with the respective country's name.]
The figure records three types of cases. First, it presents the aggregated number of Article 101 TFEU proceedings in the EU, mixed and purely national cases (grey lines). Second, it indicates the number of EU and mixed-cases in which Article 101(3) TFEU was invoked (green lines). From those cases, it specifies the number of proceedings in which the exception was accepted by a formal (green triangular) or informal (green triangular with black border) measure. Third, the figure presents the number of purely national cases in which only the national exception equivalent to Article 101(3) TFEU was examined (blue lines). From those cases, it details the number of proceedings in which the national provision was accepted by a formal (blue square) or informal (blue square with black border) measure.

The figure reveals that, similarly to the Commission’s practice, the NCAs, too, have made little use of Article 101(3) TFEU following modernisation. Moreover, like the Commission, they have mostly rejected Article 101(3) TFEU outright without providing detailed reasoning for the application of the four conditions of the Article.

The remainder of this section is dedicated to a discussion of the national balancing approaches. It shows that the NCAs have adopted different positions on the types of relevant benefits, balancing method, and intensity of control for applying the Article’s four conditions. Balancing was also affected by the national equivalent provision, which in some cases differed from the wording of Article 101(3) TFEU.

6.2. Types of benefits and consumer welfare

Figure 3.11 summarises the categories of benefits argued by the undertakings and accepted by the NCAs as justification for an Article 101(3) TFEU exception.

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663 The figure reveals that Article 101(3) TFEU was often discussed and accepted by means of informal ex-ante opinions. While the enforcement regime of Regulation 1/2003 typically entails an ex-post assessment, some NCAs render such opinions. The impact of those proceedings on balancing is detailed in Chapter 8, Section 6.
The empirical findings show that the NCAs’ approaches in this regard can be roughly divided into three groups: NCAs that have restricted Article 101(3) TFEU to economic benefits and followed a short-term narrow consumer welfare standard (UK and Hungary); those that have also taken non-economic benefits into account and followed a long-term broad consumer welfare standard (Netherlands and France); and those that have rejected a consumer welfare standard altogether (Germany).

6.2.1. Economic benefits and short-term narrow consumer welfare (UK and Hungary)

The first group of NCAs followed a short-term narrow consumer welfare standard and limited the scope of Article 101(3) TFEU to economic benefits, similar to the position advocated by the Commission’s subsequent modernisation.

The UK NCA provides a prominent example. The UK NCA declared that it does not consider non-competition interests beyond narrow consumer welfare when applying Article 101(3) TFEU. It only takes quality efficiencies and those detailed in the Commission Article 101(3) Guidelines (2004) into account. Even when the UK NCA examined an agreement that might have an

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664 CE/2596-03 Tobacco (2010), para 7.58. The decision was quashed by the CAT in 1160/1/1/10 1161/1/1/10 1162/1/1/10 1163/1/1/10 1164/1/1/10 1165/1/1/10 Tobacco (2011); Rural broadband wayleave rates (2012), para 8.12. The role of narrow consumer welfare in the enforcement of Article 101 TFEU and the national equivalent exception was confirmed by UK NCA officials (in their private capacities) as well as by academics. See (Townley 2010), 311 and the reference there. Remarkably,
impact on non-economic benefits, it has focused on narrow efficiencies. In its informal opinion on *Rural broadband wayleave rates* (2012), for example, it assessed the rate recommendations proposed to their members by the National Farmers’ Union and the Country Land and Business Association for the grant of wayleaves for broadband in rural areas. The analysis centred exclusively on quality and cost-saving efficiencies and did not examine the potential social benefits emanating from improving the service in rural areas.\(^{665}\) Similarly, in *Modelling Sector* (2016), the UK NCA examined collusion between model agencies and their trade association involving modelling service pricing.\(^{666}\) The NCA rejected outright the claim that price fixing was justified due to its effect on improving the working conditions of models. While it acknowledged that trade associations could increase the efficiency of markets, e.g. by clearly expressing standard terms and conditions that are transparent to customers, such benefits could only be taken into account if they affected consumers, such as by reducing the consumer price.

Remarkably, the consumer welfare standard followed by the UK NCA is narrower than the one promoted by the Commission. In *MasterCard* (2005) the UK NCA reviewed a MIF case, which resembled the Commission’s *Visa* (2002) decision.\(^{667}\) The UK NCA had rejected an Article 101(3) TFEU exception, contrary to the Commission’s decision. It explained that the Commission had exempted the agreement *inter-alia* on basis of market integration considerations, which are not considered by the NCA when applying Article 101(3) TFEU and the national equivalent provision.\(^{668}\)

The Hungarian NCA has stated in its policy papers that it follows a long-term broad consumer welfare standard.\(^{669}\) However, the decisional practice of the Hungarian NCA reveals that it has actually

\(^{665}\) Rural broadband wayleave rates (2012), para 8.12, 8.16-8.17. In comparison, the Dutch NCA examined social benefits in a similar case 14.1134.15 ATMs in rural areas (2014).


\(^{667}\) On Visa (2002), see Section 4.3.3 above.

\(^{668}\) CA98/05/05 MasterCard (2005), para 104-106. The appeals tribunal set the decision aside in 1054/1/1/05 1055/1/1/05 1056/1/1/05 MasterCard (2006) after it became apparent that the NCA’s defence in appeal was substantially different from the analysis in its decision.

\(^{669}\) GVH, Fundamental Principles of Competition Policy (2007), 7-8, 18. Although the NCA refers to the notion of long-term consumer welfare, it has overtly decided not to adopt an exact definition of its standard. Instead, it has affirmed that that notion provides general, underlying, conceptual guidance rather than a technical test for enforcement in practice, see ICN Competition Enforcement and Consumer Welfare (2011), 19.
interpreted the Article in line with the Commission’s short-term narrow consumer welfare standard. The Hungarian NCA and courts have held that Article 101(3) TFEU does not cover non-economic benefits - such as employment, price stability, diversity of literature, promotion of research and education, the fight against unlicensed software, and freedom of the press.  

6.2.2. Non-economic benefits and long-term broad consumer welfare (the Netherlands and France)

The second group of NCAs opted for a long-term broad consumer welfare standard for applying Article 101(3) TFEU. Long-term broad consumer welfare is based on dynamic efficiency, namely, the increase of welfare over time in light of the incentive to innovate and renew processes and products. Unlike short-term narrow consumer welfare, it also takes non-economic benefits into account. It includes both benefits to the specific consumer and society as a whole, as well as benefits to current and future generations.

The Dutch NCA has declared that it follows such a standard. Its approach to sustainability agreements demonstrates the implications of this policy choice. The role of sustainability benefits in Article 101(3) TFEU has been subject to a lengthy political process in the Netherlands. In November 2011, the Minister of Agriculture submitted a letter to the Dutch House of Representatives demanding the consideration of animal welfare and environmental interests in NCA proceedings related to agreements in the agricultural and nutrition sectors. In early 2013, the House of Representatives requested the Minister of Economic Affairs to instruct the NCA, by means of a policy rule, on how to assess such agreements. Following those requests, in May

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672 Vision Document on Competition and Sustainability (2014), para 2.6. Also see (Claassen & Gerbrandy 2016), 3. As demonstrated by Figure 3.10, the Dutch NCA expressed a positive view on granting exceptions only in ex-ante informal proceedings.

673 Letter from Henk Bleker (Minister of Agriculture) to the House of Representatives re sustainability initiatives and competition law (22.11.2011).

674 Dijkgraaf/Geurts motion of 24 January 2013, Parliamentary Documents II, 2012/2013, 33 400 XIII, nr. 99. According to Article 5 of the Dutch Competition Act, the Minister of Economic Affairs can lay down policy rules, in particular, to instruct the NCA on how to take other than economic interests into account in its assessment of competition restrictive agreements.
2014 the NCA adopted its Vision Document on Competition and Sustainability. Interpreting both Dutch and EU competition law, this policy paper maintains that sustainability considerations can play an important role in the enforcement of Article 101 TFEU.

The Vision Document pursues a long-term broad consumer welfare approach by interpreting the four conditions of Article 101(3) TFEU loosely. The benefit condition, in the NCA’s interpretation, entails that an agreement must have a positive welfare effect through the realisation of efficiencies. Despite the use of the term “efficiencies”, the NCA assesses the subjective value consumers attach to certain product features as well as the objective benefits resulting from a more efficient use of scarce natural resources. Similarly, the fair share condition is fulfilled if the consumers that have suffered anti-competitive harm would be no worse off as a result of the agreement. There is no obligation to demonstrate that consumers actually benefit from an agreement. This interpretation opens the door to accept an agreement that benefits society as a whole rather than produce benefits for specific consumers. In addition, the Dutch NCA has declared its willingness to offset disadvantages to current consumers with long-term benefits to future consumers.

The Dutch NCA has also adhered to a loose reading of the last two conditions of Article 101(3) TFEU, noting they were not applied strictly in practice. It explained that the indispensability condition does not mean that there is no less harmful measure available to achieve the sustainability aim. Rather, a “reasonably necessary” test applies, which considers only realistic and feasible, less far-reaching alternatives that could potentially bring about significantly greater efficiencies. Similarly, since the fourth condition is assessed in connection with the three other subtests, significant sustainability benefits are able to compensate the substantial anti-competitive restrictions of an agreement.

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675 Vision Document on Competition and Sustainability (2014). The vision document deliberately left the term “sustainability” undefined. It held that the term could include a wide range of policies, including environmental protection, public health, fair trade production, and animal welfare, see in page 6. The Vision Document also served as the basis for a shorter policy rule issued by the Minister of Economic Affairs and published the same day; see Dutch Government Gazette, Decision of the Minister of Economic Affairs of May 6, 2014, No. WJZ/14052830, Containing the Policy Rule Regarding the Application by the Netherlands Authority for Consumers and Markets of Section 6, Paragraph 3 of the Dutch Competition Act in Anticompetitive Arrangements that have been made for the Purpose of Sustainability (May 8, 2014).


677 Vision Document on Competition and Sustainability (2014), 14-16.

Although the Vision Document is lengthy and detailed, it does not propose a clear balancing method. It maintains that sustainability considerations are relevant but does not explain how they should be weighed against competition interests. Indeed, the empirical findings show that the Dutch NCA has used significantly different balancing methods when applying Article 101(3) TFEU to sustainability agreements in specific cases.

First, *Coal power plants (2013)* involved an agreement between energy producers, distributors, the government, and advisory bodies aimed at achieving more sustainable energy production in the Netherlands. As part of the agreement, the parties had planned to accelerate the closing down of five coal-fired power plants. Referring to (the then draft version of) the Vision Document, the Dutch NCA noted that non-economic benefits such as a reduction in emissions and more sustainable energy production could be taken into account under Article 101(3) TFEU.\(^{679}\) While the Dutch NCA agreed that closing down the plants would lead to emission reductions, it determined that the agreement did not produce environmental benefits. It explained that the EU emissions trading system would have allowed other parties to use the CO2 emissions that had been saved by shutting down the plants. The CO2 emission reduction would thus be cancelled out by an increase in emissions elsewhere.\(^{680}\) Next, the Dutch NCA used *shadow prices* to assess benefits resulting from reducing other types of emissions. It examined the benefits created for the Dutch society as a whole by calculating the estimated reduction in costs as a result of the agreement. Since the estimated increase in price was higher than the expected avoided costs, the Dutch NCA declared that the first two conditions of Article 101(3) TFEU had not been met.\(^{681}\)

Second, in *De Stroomversnelling (2013)* the Dutch NCA examined a proposed joint venture between construction companies and public-housing corporations to renovate and turn houses into energy-neutral buildings. The undertakings had planned to use the energy costs paid by lessees to finance the required renovations. In the first phase, the construction companies would experiment with 1,000 homes using different technologies and construction methods. In the next two phases, 110,000 homes would be made energy-neutral. Unlike *Coal power plants*, the Dutch NCA did not calculate the possible environmental or monetary benefits of the project. Instead, it assumed that the exchange of knowledge and experience would make the construction industry more sustainable. However, the Dutch NCA had doubts as to whether the restriction of competition was limited to

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\(^{679}\) *Coal power plants (2013)*, 3-4.

\(^{680}\) *Coal power plants (2013)*, 4.

\(^{681}\) *Coal power plants (2013)*, 4-6.
what was necessary. It noted that certainly after the first phase, other construction companies should be able to compete for contracts from these public-housing corporations as well. 682

Third, in the much-debated Chicken of tomorrow (2015), the Dutch NCA used a third method to account for sustainability benefits under Article 101(3) TFEU. It reviewed an agreement between provincial governments, farmers, animal-fodder producers, veterinarians, and supermarkets aimed at replacing regularly produced broiler chickens with a more sustainable product. The agreement had established a minimum standard for improving the living conditions of chickens and required the use of fewer antibiotics. The Dutch NCA used the willingness-to-pay test to apply Article 101(3) TFEU. It explained that animal welfare, environmental, and public health benefits could only be taken into account if consumers attached actual value to them. Based on a consumer survey, it held that consumers were willing to pay only a small amount for achieving those benefits, which could not compensate for the expected increase in price. 683

The willingness-to-pay test differs from other methods used by the Commission and other NCAs to account for non-competition interests under Article 101(3) TFEU. It quantifies non-economic benefits that cannot be measured using traditional economic tools. Rather than focus on the objective benefits arising from an agreement (e.g. the reduction in emissions in Coal power plant), it measures the subjective value consumers attach to such benefits. Moreover, while in Coal power plant the Dutch NCA had examined the environmental benefits to the entire population, in Chicken of tomorrow it only included benefits for chicken consumers (and not, for example, for vegetarians).

It should be noted that the Vision Document emphasises that sustainability considerations do not form a special category. Namely, other non-competition interests ought to be evaluated using the same analytical framework and balancing tools. 684 The empirical findings presented in Section 6.3.2 below, however, indicate that the NCA was more lenient when applying the conditions of Article 101(3) TFEU to sustainability agreements in comparison to other types of agreement.

To complete the picture, it must be noted that the Dutch executive was unsatisfied with the outcomes of the above proceedings. In July 2015, the Minister of Economic Affairs sent a letter

683 ACM/DM/2014/206028 Chicken for tomorrow (2015), 5-6. The consumers were willing to pay an additional 68 eurocents per kilo of chicken filet for the promotion of animal welfare, 15 eurocents for the environmental benefits, and 0 eurocents for the public health considerations. The total benefit of the agreements was 82 eurocents per kilo, while the increase in price was estimated to be EUR 1.46 euro per kilo. Thus, the NCA concluded that the agreement generated no net benefits for consumers.
to the House of Representatives declaring his intention to amend the policy rule to demand broader consideration of sustainability issues. A draft policy rule from December 2015 suggested that the NCA was required to take benefits to society as a whole outside the relevant market into account, and to assess a package of agreements in its totality (e.g. in the coal power plant scenario). Yet, the Minister withdrew his original proposal a year later after encountering opposition from the Commission and the Dutch NCA which raised questions on the compatibility of the proposed regime with EU competition law.

Instead, the Minister adopted three alternative measures. First, in September 2016 he published an amended policy rule. The new rule provided that the Dutch NCA had to take benefits occurring in the long-term as well as benefits to society as a whole into account. Second, the Minister declared that he would submit a new legislative proposal to facilitate sustainability initiatives which would exclude the applicability of competition rules. Third, the Minister would engage in talks with the Commission, advocating for more room for sustainability initiatives.

Finally, in December 2016, the Dutch NCA published “basic principles for oversight of sustainability agreements” which could potentially mark a change in approach. The document states that the NCA “will not take action against sustainability arrangements that enjoy broad social support if all parties involved such as the government, citizen representatives, and businesses are positive about the arrangements”. Consequently, agreements such as those in

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685 Letter from Mr Kamp, the Dutch Minister of Economic Affairs, Agricultural Affairs and Innovation to the House of Representatives re sustainability initiatives and competition law (15.07.2015).
687 Letter from DG COMP to the Dutch Minister of Economic Affairs (26.02.2016). Available at: https://www.rijksoverheid.nl/documenten/brieven/2016/02/26/brief-eu-over-medinging-enduurzaamheid. DG COMP noted with respect to this proposal that "EU Competition law, however, allows us to take into account sustainability concerns when and to the extent that these also are perceived as benefits in the eyes of the actual consumer in the relevant market (as compared to society as a whole)". It also explained that "while in certain circumstances it may be necessary to assess the package agreement in its entirety, it can certainly not be the rule".
689 Letter from Mr Kamp, the Dutch Minister of Economic Affairs, Agricultural Affairs and Innovation to the House of Representatives re sustainability initiatives and competition law (23.06.2016).
690 Dutch Government Gazette, Decision of the Minister of Economic Affairs of September 30, 2016, No. WIZ/16145098, Containing the Policy Rule Regarding the Application by the Netherlands Authority for Consumers and Markets of Section 6, Paragraph 3 of the Dutch Competition Act in Anticompetitive Arrangements that have been made for the Purpose of Sustainability (30.9. 2016).
691 ACM, Basic Principles for Oversight of Sustainability Agreements (2016).
Coal power plant and Chicken of tomorrow, which enjoyed the social support and involvement of interests groups, would no longer be enforced even when they failed to fulfil the four conditions of Article 101(3) TFEU. This could endanger the effectiveness of EU competition law and will be discussed in Chapter 8.

As in the Netherlands, the French NCA also asserted in its policy papers that it adheres to a long-term broad consumer welfare standard. The empirical findings affirm that the long-term broad consumer welfare standard was evident in French practice at least until around 2009-2010. It guided the three cases in which the French NCA found that the four conditions of Article 101(3) TFEU applied. One of them, Exchanges Check-Image Fee (2010), is particularly noteworthy. While it had a similar factual basis as the Commission’s and UK’s MIF, it resulted in a different outcome. The French NCA prohibited collusion between French banks for setting check exchange fees. At the same time, it held that fixing six other related services fees was justified. Using a long-term broad consumer welfare standard, the French NCA explained that such fees reflected a proper return for the new services that compensated the relevant costs. Moreover, unlike the Commission and UK decisions, the French NCA did not rely on economic evidence for granting an exception. This is a prominent example of how the consumer welfare standard affects the outcome of balancing.

Gradually, the French NCA’s policy papers moved closer to the narrow short-term standard advocated by the Commission. This substantive change had taken place in parallel to the procedural and institutional reform of French competition law. The first seed of this development is evident in a 2009 paper by Lasserre, the president of the French NCA. Lasserre called for convergence in the enforcement of competition law throughout the EU and expressed the NCA’s commitment to following an effects-based approach based on robust economics and strict rules.

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694 10-D-28 Exchanges Check-Image Fee (2010). The NCA decision was repealed by the Paris Court of Appeal in 2010/20555 Exchanges Check-Image Fee (2012), and cancelled by the Court de Cassation in 12/15971 Exchanges Check-Image Fee (2015) due to procedural issues.
695 See Section 4.4.1 above and Section 6.2.1 below.
696 10-D-28 Exchanges Check-Image Fee (2010), para 390-395, 532-599. In its answer to the questioner of the ICN Competition Enforcement and Consumer Welfare (2011), 32 The NCA referred to the case as an example of its unique approach to Article 101(3) TFEU based on long-term consumer welfare.
697 See Chapter 2, Section 6.1.3.
698 (Lasserre 2009), 16-17.
In the same vein, the NCA declared that it limited the categories of benefits that could justify an Article 101(3) TFEU exception. In the past, it had maintained that indirect economic and non-economic benefits – such as protection of jobs, living standards, fair trade rules, stabilisation of prices, increased barging power, culture, and protection of SMEs – were relevant under Article 101(3) TFEU. Since 2009, however, the NCA has seemed to restrict the categories of benefits that could justify an exception. In the *Digital books (2009)* informal opinion, it was hesitant to determine that a single price system for digital books could be justified by cultural interests. Departing from its previous approach, it held that culture was a general interest rather than a true economic justification. Along similar lines, in 2011 the NCA asserted that in the enforcement of competition rules, the notion of consumer welfare should be confined to an economic criterion. It explained that its mandate was limited to making markets work in the best interest of consumers. Promoting other public policies and, if need be, reconciling those with consumer welfare was a task best left to Government and Parliament.

Nevertheless, the empirical findings reveal that the French NCA has continued to examine non-economic benefits such as public health, environmental considerations, and the development of rural areas under Article 101(3) TFEU. However, it has refused to grant exceptions by demanding a high level of economic evidence or applying the indispensability condition strictly.

The Dutch and French interpretations of Article 101(3) TFEU are incompatible with the approach of the first group of competition enforcers. In a departure from the Commission’s new approach, they were willing to incorporate broad non-economic interests under the Article. While, admittedly, those NCAs have accepted Article 101(3) defences in a handful of cases (see Figure 3.10 above), their interpretations have clearly deviated from the first group of competition enforcers.

6.2.3. **Rejecting the consumer welfare standard (Germany)**

Finally, the third group of NCAs has altogether rejected the use of a consumer welfare standard. The German NCA, for instance, has done so openly. In 2008, a year before the CJEU

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699 See Annex 3.20.
700 09-A-56 Digital books (2009), para 128. However, in 09-A-50 Cinema code (2009), para 94, which was rendered only two months prior to Digital books, the French NCA held that the assurance of a wider diffusion of cinematographic works in the general interest could be considered economic progress in the meaning of Article 101(3) TFEU.
702 See Annex 3.20.
703 See Section 6.3.2 below.
questioned such a standard in *GlaxoSmithKline (2009)*, the president of the German NCA opted for a similar approach. He explained that German competition law focused primarily on the protection of the competitive process and not on consumer interests. In his opinion, the consumer welfare standard was not only contrary to the German approach but also conflicted with the “well-established approach of European jurisprudence.” He affirmed that a consumer welfare standard did not provide a theoretical toolkit for the purpose of applying competition law but was rather “an endeavor fraught with numerous uncertainties.”

Later, the German NCA explained that, although consumer welfare plays an important role in its work, it is not the primary goal of enforcement. Article 101(3) TFEU is seen as a mechanism for accepting restrictive agreements that have a positive impact on competition interests, namely, on the competitive structure and process. This was repeated in the NCA’s mission statement declaring that it “bases its decisions solely on competitive 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.”

Accordingly, the German NCA has limited the types of benefits that can be examined under the first condition. It has taken only cost and quality efficiencies (direct economic benefits) and industrial policy considerations related to security of supply, bargaining power, the functioning of online platforms, and elimination of “white spots” of Internet access into account (direct economic and non-economic benefits). Other benefits, such as facilitating highly risky investments, reducing costs that could indirectly improve R&D efforts, and reducing the deficit in health care providers, could not be taken into account. This was recently confirmed by the Dusseldorf Higher Regional Court.

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704 See Section 5.3.2 above.
705 (Heitzer 2008), 3. See Section 4.4.1 above.
706 (Heitzer 2008), 4.
708 Emphasis added. Available at [http://www.bundeskartellamt.de/EN/AboutUs/Bundeskartellamt/bundeskartellamt_node.html](http://www.bundeskartellamt.de/EN/AboutUs/Bundeskartellamt/bundeskartellamt_node.html).
709 See Annex 3.21.
710 See Annex 3.22. In B4-71/10 Online banking conditions (2016), para 420-421 the German NCA left open the question of whether benefits for the security of online banking qualify as a benefit in the sense of Article 101(3) TFEU, noting that in the case at hand such restrictions were not indispensable.
While the German NCA has largely limited the possibility of taking non-economic benefits into account under Article 101(3) TFEU, it has not utterly excluded the consideration of environmental benefits. In *Container glass (2007)*, for instance, the NCA reviewed the establishment by German container glass manufacturers of a glass recycling company to jointly purchase all the waste glass recovered from household rubbish collection. With reference to the policy-linking clause and an environmental study, the undertakings claimed that the agreement saved natural resources, reduced energy use, and lowered emissions. The NCA admitted that the possibility of taking such benefits into account under Article 101(3) TFEU depends on the broader question of whether the Article is limited to benefits to individual consumers or can also take benefits to society as a whole into account. Yet, the NCA decided to leave this question open, noting that, in any case, less restrictive measures could have achieved the same environmental aims. Recently, in *Round timber in Baden-Württemberg (2017)*, the Dusseldorf Higher Regional Court excluded the possibility of examining such benefits, holding that sustainability concerns related to the management of forests, climate, water balance or clean air could not be taken into account under Article 101(3) TFEU.

Despite this narrow reading, the German NCA has used Article 101(3) TFEU to examine agreements that formed an *inherent part of the implementation of a national law*. In those cases, the NCA gave deference to the legal source of the restriction of competition. For example, in *Coordination of tenders for sales packaging waste collection services by compliance schemes (2011)*, the NCA found, with reference to the German Packaging Ordinance, that the conditions of Article 101(3) TFEU had been fulfilled. An amendment to the Ordinance had obliged compliance schemes for sales packaging waste to coordinate their tenders via a newly established joint body. Yet, the amendment did not make any stipulations as to the form of the coordination. The NCA affirmed that, while the form of coordination chosen by the undertakings fell within Article 101(1) TFEU, it was justified by Article 101(3) TFEU as a

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713 B4-1006/06 Container glass (2007), para 146, 151,155.
714 B4-1006/06 Container glass (2007), para 187-188, 193. Also see B1-72/12 Round timber in Baden-Württemberg (2015), para 450-458, 482-485. In its 2010 comments to the OECD Roundtable on Horizontal Agreements in the Environmental Context, the German delegation stated that *Container glass* had illustrated that there was hardly ever any substance to the alleged conflict between competition law and environmental law. See OECD Horizontal Agreements in the Environmental Context, Note by Germany (2010), para 18-19.
716 Article 6(7) of the German Packaging Ordinance (*VerpackV*).
necessary element of the scheme. 717 Notably, the NCA chose to label environmental benefits as cost savings stemming from the collaboration rather than as non-economic environmental benefits. In comparison, when the Commission examined a similar system in *DSD (2001)*, it tied the exemption to environmental benefits. 718

More recently, in *Construction of corvettes (2017)*, the German NCA decided not to initiate proceedings against the planned participation of a German undertaking in a consortium for the construction and supply of corvette class ships that had been commissioned by the German armed forces. The Public Procurement Tribunal at the Bundeskartellamt held that the planned award of the tender to the consortium did not comply with public procurement provisions, as the consortium was the only undertaking that had been invited to participate in the bidding procedure. 719 However, the German NCA found that the tender could nonetheless meet the legal requirements for an exemption under Article 101(3) TFEU. 720

The above examples show that, although the German NCA had not declared that Article 101 TFEU was inapplicable to situations of state involvement, it has accepted broader types of non-economic benefits, which would otherwise probably not justify an Article 101(3) exception. This approach was also recently enunciated by the German legislator and is elaborated in Chapter 6. 721 As described in Chapter 5, the Commission and most other NCAs have accepted similar agreements by applying Article 101(1) TFEU balancing tools rather than Article 101(3) TFEU.

To conclude, the five NCAs have adopted very different approaches to the types of benefits that can be examined under Article 101(3) TFEU and by using the balancing method. While some have followed a lenient approach similar to the Commission’s and EU Courts’ prior to modernisation, others have narrowed the scope of the Article by following the Commissions’ new approach.

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717 B4-152/07 Coordination of tenders for sales packaging waste collection services by compliance schemes (2011), 6.
718 34493 37366 37299 37288 37287 37526 37254 37252 37250 37246 37244 37243 37242 37267 *DSD (2001)*, para 142-146. In its 2010 comments to the OECD roundtable on horizontal agreements in an environmental context, the German delegation explained that the decision proved that environmental objectives could be achieved just as well in a competitive environment. See OECD Horizontal Agreements in the Environmental Context, Note by Germany (2010), para 13.
719 See press release from 18.5.2017, available at: https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Pressemittelungen/18_05_2017.VK%20Korvetten.pdf?blob=publicationFile&v=2. This decision was appealed before the Düsseldorf Higher Regional Court.
720 Construction of corvettes (2017) (press release of 19 July 2017). The reasoning in this case was not revealed on account of the confidentiality requirements in the affected security sector.
721 Chapter 6, Section 3.4 presents a German law stating that it can be presumed that Article 101(3) TFEU applies to agreements pooling activities relating to state, municipal and private forests.
6.3. **Intensity of control**

In addition to variations in the methods guiding balancing and the types of relevant benefits, the NCAs have applied different levels of intensity of control when assessing the four conditions of Article 101(3) TFEU. The UK, German, and Hungarian NCAs have generally applied the conditions strictly. The Dutch NCA, and to a lesser degree the French NCA, have taken a sectoral approach in which the intensity of control has varied according to the type of agreement or sector concerned.

6.3.1. **Strict control (UK, Germany, and Hungary)**

The empirical findings reveal a strict application of the four conditions of Article by the UK, German, and Hungarian NCAs.

The UK NCA has mostly rejected outright the possibility of an exception, noting that the undertakings had not invoked Article 101(3) TFEU or had done so in an undetailed manner.\(^722\) In the remaining proceedings, however, the NCA provided an exhaustive analysis of Article 101(3) TFEU. It rejected all claims for exceptions, highlighting that they should be based on robust evidence proving appreciable and objective economic benefits.\(^723\) Like the Commission’s approach following modernisation, the UK NCA has inverted the examination of the second and third conditions, and taken only benefits resulting from indispensable restrictions into account.\(^724\)

The Hungarian NCA has adopted a similar approach. Until 2005, the NCA accepted almost all claims invoking an Article 101(3) defence as long as the agreements had not set prices directly. Those exceptions were mostly justified with reference to the agreements’ contribution to rationalising national markets. They merited a flexible interpretation of the conditions of Article 101(3) TFEU, which was not based on quantification of the alleged benefits.\(^725\) However, since 2006, the NCA has adopted a stricter approach, leading it to deny exceptions in most cases.\(^726\) This strict approach was especially prominent since the NCA generally chose to enforce agreements in sectors that were prone to balancing, such as regulated professions, liberalised

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\(^722\) See Annex 3.23.


\(^724\) 50283 Cleanroom laundry services (2017), para 5.177. The Commission’s approach is detailed in Section 4.4.1 above.

\(^725\) Most of those agreements were notified to the NCA under the old national notification regime. See Annex 3.25.

markets, and, especially, financial services. Moreover, the NCA has refused claims for an Article 101(3) TFEU defence even when national law protected the relevant non-competition interest. In Online distribution of contact lenses (2015), for instance, the NCA declared that a rebate system for contact lenses that discriminated against online distributors could not be justified for public health reasons. It held that a national regulation requiring all distributors to have a physical shop did not change this analysis, since it was not the duty of manufacturers to ensure distributor compliance with relevant sector-specific regulations.

At the same time, the Hungarian NCA adopted a more lenient standard to review agreements that could “almost” benefit from a provision of a BER or the Commission’s guidelines. In British American Tobacco group (2006), for instance, the NCA examined an exclusive distribution agreement between undertakings having a higher market share than the one prescribed by the Vertical BER. The NCA nevertheless granted an exception for the agreement without engaging in a full analysis of Article 101(3) TFEU. It explained that since the BER was denied due only to the high market share, it was sufficient to examine the fulfilment of the fourth elimination of competition condition. The only other two exceptions granted by the NCA following 2006 involved similar circumstances. The NCA relied on the presumptions set

727 In most of those proceedings, the NCA accepted commitments to rectify the infringement; in those involving price fixing, fines were also imposed. See Annex 3.27.
729 Vj-55/2013 Online distribution of contact lenses (2015), para 211-214. This conclusion was perhaps reinforced by the CJEU's decision in C-108/09 Online distribution of contact lenses (2010), holding that the national regulation was incompatible with EU free movement rules.
731 Vj-7/2008/178 Motor oils and lubricants (2009) and Vj-191/2006/10 Euronics (2007). In Motor oils and lubricants (2010), para 26, 29, 61-66 the NCA accepted an Article 101(3) TFEU defence with respect to clauses in distribution agreements including non-compete clauses and RPM. The NCA held that the conditions of the provisions were not meet with respect to the RPM and non-compete clauses exceeding five years in length, holding that the alleged benefits - relating to the elimination of free riding, high quality of service that could reduce pollution and promote the safety of cars – were not proven. Yet, the NCA accepted non-compete clauses of up to five years. It did not analyse the conditions of Article 101(3) TFEU, but briefly noted that such clauses could automatically benefit from the BER. In Euronics (2007), para 20-2, 42-461 the NCA accepted an Article 101(3) TFEU defence with respect to the creation of a joint venture by three commercial and service providers for joining the international supermarket chain Euronics and building up Euronics's Hungarian network. This case came close to being excluded from the application of Article 101 TFEU as a fully functional joint venture. However, it was found to fall within Article 101(1) TFEU since the joint venture developed
in BERs and the Commission’s guidelines and only assessed the parts of the agreements that failed the BER or guidelines. The Commission and German NCA, by comparison, adopted a different approach to such matters, which will be detailed in Chapter 4 Section 6.1.

The German NCA took an even stricter approach. It mostly refused to grant exceptions due to failing to fulfil the benefit and indispensability conditions of Article 101(3) TFEU,732 and in a few proceedings due to failure to fulfil the fair share condition.733 Moreover, even when a non-competition interest was regarded as relevant, the balancing of competition and non-competition interests often tilted in favour of the former. In fact, the empirical findings show that in several instances the NCA was unwilling to accept practices that were approved by other competition enforcers. This demonstrates how a strict intensity of control affects the balancing under Article 101(3) TFEU:

First, in Long-term gas supply (2007, 2009), the German NCA and courts refused to grant an exception for long-term gas supply contracts because of their long duration and high purchasing obligations.734 The non-compete obligations in those contracts were shorter than those prescribed by the Commission’s Vertical BERs and restrictions that had been accepted by the Commission.735

Second, in Pecuniary loss liability risks for auditors and chartered accountants (2008), the NCA prohibited insurance companies from jointly insuring the pecuniary loss liability risks run by auditors and chartered accountants in an insurance pool. The undertakings referred to the Commission’s decision in P&I Club (1985) and the insurance BER, arguing that an exception was warranted due to coinsurance benefits.736 They claimed that although the BER was inapplicable due to the undertakings’ high market share, the BER should be understood as the EU legislator’s

734 B8-113/03 Long-term gas supply (2006); VI2-Kart 1/06 (V) Long-term gas supply (2007), page 23-26; KVR 67/07 Long-term gas supply (2009). The NCA was willing to accept a maximum duration of four years for resellers who accounted for more than 50% of the overall demand, but only two years above 80%. Also see (Hautecloque 2009), 101-102.
735 Regulation 2790/1999, Article 5(a). In 38348 Repsol (2006), the Commission accepted a five-year duration for contracts with established resellers when the market shares of the dominant firm did not exceed 30% to 50%. In IP/00/297 Gas Natural/Endesa (2006), which involved an Article 102 TFEU infringement, the Commission accepted a duration of twelve years.
736 30373 P&I Clubs (1985), as described in Section 4.3.3 above.
acknowledgment that the three first conditions of Article 101(3) TFEU applied. The NCA rejected the argument, noting the agreement did not create benefits and was not indispensable.

Third, the German NCA developed a unique approach to the so-called price parity or most favoured nation (“MFN”) clauses used in online platforms. According to those clauses, a supplier agrees to grant a platform the best terms and conditions it makes available to any third party. There are two types of MFN clauses: Those that ensure that the price and terms quoted through the platform are not higher than those available on the upstream supplier’s website (“narrow MFN”), and those which also apply to other platforms and channels (“wide MFN”).

Although many NCAs objected to a wide MFN, the German NCA also opposed narrow MFN clauses. The NCA first prohibited a wide MFN clause in Amazon (2013) and HRS-Hotel Reservation Service (2013). In Booking.com (2015), it extended the prohibition to narrow MFN clauses. It rejected the claim that a narrow MFN was justified by general benefits related to online hotel platforms, such as generating traffic, bundling demand, better utilisation rate for hotels, improved access to foreign customers, economies of scale, reduction of search costs for end-consumers, and transparent pricing. It concluded that such benefits were irrelevant under Article 101(3) TFEU and that only direct benefits stemming from a narrow MFN clause could be examined.

The German prohibition of narrow MFNs clearly deviated from the approaches of other NCAs that had accepted the very same clause. In fact, in July 2015, following investigations by several NCAs and with the help of the Commission, Booking.com implemented a narrow MFN clause throughout the

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737 B4-31/05 Pecuniary loss liability risks for auditors and chartered accountants (2007), para 146.
738 B4-31/05 Pecuniary loss liability risks for auditors and chartered accountants (2007), para 159. The Düsseldorf Court of Appeals annulled the decision in VI-Kart 11/07(V) Pecuniary loss liability risks for auditors and chartered accountants (2008). It held that the NCA had defined the market too narrowly. Under the appropriate market definition, the pool could benefit from the BER. The NCA’s appeal against the decision was rendered inadmissible in KVR 34/08 Pecuniary loss liability risks for auditors and chartered accountants (2009).
739 Also see (Hunold 2016; Heinz 2016; Israel & Jakobs 2015); (Ezrachi 2015); (Colangelo 2016).
740 In both proceedings, the German NCA rejected claims that wide MFN clauses generated benefits in the form of elimination of free riding, improvement of the quality of the services, enhancement of competition on quality, or the "searchability" of products. It held that, even if such benefits persisted, a wide MFN would result in increased prices. Hence, the clause failed to provide consumers with a fair share and went beyond what was necessary to achieve the aim. See B6-46/12 Amazon (2013), 2-3. The case was informally closed after Amazon removed the clauses from their contracts with its dealers; B9-66/10 HRS-Hotel Reservation Service (2013), para 223-234. The Düsseldorf Court of Appeals upheld the HRS Article 101(3) TFEU analysis on the merits in VI-Kart 1/14 (V) HRS (2015), para 127-138.
EU. A total of 25 NCAs publicly accepted or tacitly endorsed Booking’s commitment, some by means of commitments. Mundt, the president of the German NCA, explained that the divergent German approach was conceivable since the decision concerned the German market. This explanation, however, is unconvincing. The German NCA applied Article 101 TFEU in a case that affected trade between Member States. Therefore, it was bound to the limits of Article 101(3) TFEU.

Interestingly, the conflict between the German NCA and the other NCAs’ interpretations of Article 101(3) TFEU was subject to judicial review by the Dusseldorf Higher Regional Court. The undertakings claimed that by adopting a view divergent from the majority of NCAs, the German NCA had breached its obligation to apply Article 101 TFEU in a uniform manner as required under Regulation 1/2003 and derived from the duty of sincere cooperation in the sense of Article 4(3) TEU. The Court, nevertheless, rejected those claims. It maintained that the fact that various NCAs had adhered to interpretations of issues that were not settled by law did not hinder an NCA from issuing a decision. According to the Court, the correct application of the law was the sole decisive factor in the duty of an NCA to enforce EU competition law effectively. Therefore, simply counting the number of NCAs advocating for one or another interpretation of the law was not required.

While the Dusseldorf Higher Regional Court’s judgment may comply with the black letter of the Treaties, it does not observe the spirit of Regulation 1/2003. Accommodating conflicting decisions of NCAs with respect to a single agreement has detrimental effects on the uniformity and legal certainty of balancing, which lies at the heart of the decentralized enforcement regime.

Varying control (the Netherlands and France)

The Dutch NCA was less consistent and more flexible in applying the four conditions of Article 101(3) TFEU in comparison to the UK, Hungarian, and German NCAs. The empirical findings

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742 In contrast to wide MFNs, narrow MFNs constitute a less intrusive restriction on pricing or terms, and do not involve many of the competition concerns of wide MFN. See (Ezrachi 2015), 506-507.
743 Commitments were adopted in Italy, Sweden, France, Denmark, Ireland and Austria. See European Commission Daily News 21/04/2015; (Ezrachi 2015), 512; (Heinz 2016), 531. Since other NCAs have accepted narrow MFN by way of commitments, they have not discussed in depth how, and if, they complied with the four conditions of Article 101(3) TFEU. One exception is the Swedish NCA decision, which submitted that a narrow MFN reduced the risk of free riding on investments made by Booking.com. See Swedish Competition Authority, Bookingdotcom Sverige AB and Booking.com (15 April 2015) Ref: 596/2013, para 30. A similar positive position to narrow MFN clauses was adopted by the UK NCA in CMA - Private Motor Insurance Market Investigation: Final Report of September 2014, para 8.56.
744 See in (Ezrachi 2015), 513.
746 The German NCA and courts have also adopted diverging interpretations of the balancing principles embedded in BERs, as elaborated in Chapter 4, Section 5.
show that the Dutch NCA adapted the application of Article 101(3) TFEU to the relevant sector. In general, Article 101(3) TFEU was only discussed in a very small number of proceedings. In most instances, the possibility of granting an exception was promptly rejected without in-depth analysis.747 Yet, as examined above, the NCA interpreted the conditions of the Article loosely when it assessed sustainability agreements.748

Similarly, the French NCA used a loose and flexible legal test to justify Article 101(3) TFEU exceptions, especially prior to 2009. This is demonstrated in Fair Trade (2006), in which the French Minister of the Economy asked the NCA to examine the operating conditions of a fair trade trademark system. The system set higher prices for fair trade products; this aimed to improve the living conditions of producers and the means of production in developing countries. The NCA held that such price setting might be justified given its positive effects on both the environment and the social conditions in developing countries.

The French NCA applied a loose legal analysis to evaluate environmental benefits. It held that the agreement could be justified due to its “general” contribution to the protection of the environment, an interest that is protected by both EU and national policy papers.749 Referring to the Commission’s Horizontal Guidelines (2001) and Carbon Gas Technologie (1983) decision,750 the NCA maintained that when an agreement produces a positive rate of return for consumers in reasonable payback periods, there is no need to calculate the environmental benefits.751 The NCA overlooked the Commission Article 101(3) Guidelines (2004), which instigated a stricter standard for the calculation of benefits.752

Similarly, the assessment of social benefits entailed a broad interpretation of Article 101(3) TFEU. The NCA admitted that improving social conditions in developing countries was a benefit that fell outside the regular scope of Article 101(3) TFEU. It could not be considered to constitute economic progress in the meaning of the first condition of the Article. Rather, other instruments such as taxation, social legislation, and public services were better suited to help achieve such aims.753 The NCA also acknowledged that it was unclear whether benefits to farmers from non-EU countries (“extra-territorial benefits”) could be taken into account.754 Yet, it decided to leave this

747 See Annex 3.28.
748 See Section 6.2.2 above.
750 29955 Carbon Gas Technologie (1983), as described in footnotes 499 and 557 above.
752 See Section 4.4.1 above.
question open, noting that such benefits could, in any case, be included insofar as they produced effects in EU markets. By interpreting the first benefit condition of Article 101(3) TFEU broadly, the NCA had invoked indirect economic and non-economic benefits such as the establishment of a reference price system, the creation of employment opportunities, and a boost to the competitiveness of EU markets. Those benefits do not seem to align with the standard set by the Commission’s Article 101(3) Guidelines (2004), which requires a direct causal link between the agreement and the benefits and considerably limits the use of non-economic benefits.

The application of the second fair share condition also demanded a flexible interpretation of Article 101(3) TFEU. The French NCA noted that the fair trade system was likely to increase the price of fair trade products. However, the fair share could be realised by means of the improved quality of the product. Alternatively, the fair trade products could be perceived as introducing a new “service” of solidarity. This assures consumers that the premium paid for the fair trade product is used for the benefit of the third-country workers and population (e.g. improved wages, education, health or technology), and is not pocketed by EU producers. At first sight, this argument resembles the CJEU’s Article 101(1) TFEU case law declaring that agreements operating on solidarity principles are not prohibited by the Article. However, unlike the Article 101(1) TFEU case law, Fair trade examined an agreement between economic operators having a commercial purpose. The French NCA's argument thus shifts the classification of solidarity - from a social interest to a commodity.

The loose application of Article 101(3) TFEU was also reflected in other cases heard by the French NCA. For instance, the NCA used the protection of non-economic benefits enshrined in national legislation as a benchmark for assessing whether there was a benefit under Article 101(3) TFEU, instead of requiring economic evidence. In Cycle and cycle products (2006), it found that safety concerns regulated by national legislation could justify an exception as long as the restriction was limited to what was necessary. On the other side of the same coin, in Heating, ceramic sanitary and plumbing equipment (2006), manufacturers and sellers concluded a series of agreements limiting the resale of heating products to professional fitters. The French NCA rejected the claim that the restriction was warranted due to safety requirements related to the insulation of

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760 See Chapter 5, Section 2.5.
heating equipment using fuel and gas. It noted that even if the insulation of such products was unsafe, the applicable national regulations did not restrict their sale to professional installers.762

Gradually, however, the French NCA tightened the standard for an Article 101(3) TFEU defence. In addition to the shift from a long-term broad to a short-term narrow consumer welfare standard,763 the NCA demanded economic evidence to substantiate the alleged benefit and fair share, and carefully applied the indispensability condition.764 Indeed, the empirical findings reveal that, since 2010, Article 101(3) TFEU has not been successfully invoked in France.765

6.4. National equivalent provisions

The national approaches to balancing have also been affected by the wording of national provisions equivalent to Article 101(3) TFEU. This section shows that this has not only affected the balance of purely national cases but has also sometimes had spillover effects on the interpretation of Article 101(3) TFEU in mixed-case scenarios in which the EU provision applied.

Regulation 1/2003 obliges the Member States to apply Article 101 TFEU in parallel to national competition law when an agreement affects trade between the Member States.766 Yet, EU law does not affect the scope of the national provisions equivalent to Article 101(3) TFEU. Consequently, whereas the laws of some Member States closely mirror the wording of Article 101(3) TFEU, others have opted for different formulations. Of the five Member States examined in this dissertation, the wording of the German, Dutch and UK national equivalent provisions is identical to the wording of Article 101(3) TFEU.767 The wording of the French and Hungarian exceptions, as elaborated below, differs from the EU counterpart.

In Hungary, this difference has had an only limited impact in practice. The Hungarian exception is worded similarly to Article 101(3) TFEU but adds that the first benefit condition is

763 See 6.3.2 above.
764 See Annex 3.29.
765 Chapter 8, Section 3.2 maintains that this could also be attributed to a change in the priority setting of the French NCA following the 2009 reform to the French enforcement regime.
766 Regulation 1/2003, Article 3. See Chapter 2, Section 3.3.2 and Chapter 6, Section 1.
767 Article 2(1) of the German Act; Article 6(3) of the Dutch competition Act; Sections 4 and 9 of the UK competition act.
fulfilled when an agreement contributes to “the protection of the environment”. The empirical findings, however, affirm that, in practice, the NCA has not accepted agreements on this basis.

Yet, in France, the different wording of the exception has had an impact in practice, even in mixed-cases. As such, it provides an illuminating example of how a national law can affect balancing in a decentralised regime. The French exception differs from Article 101(3) TFEU in two ways. First, it applies to agreements aimed at creating or maintaining jobs. This is a non-economic benefit for society as a whole. Second, the French provision grants exceptions for “practices which may consist of organizing, for agricultural products or products of agricultural origin, under the same brand or trade name, the production volumes and quality and the commercial policy, including by agreeing a common transfer price”.

The French NCA had long insisted that the national and EU exceptions were substantively identical. However, this statement was not always supported by its enforcement practices, especially prior to 2008. The NCA held that certain agreements could escape the prohibition of Article 101(1) TFEU due to their positive impact on the job and agriculture markets. In mixed-cases, such as Fair Trade (2006), the NCA used the wording of the national exception to apply Article 101(3) TFEU to an agreement having an effect on trade between Member States. Similarly, in a number of purely national cases, it used the national exception while maintaining that the result would have been the same even if the case had had an effect on trade between Member States.

In later proceedings, however, the French NCA limited the scope of the national exception, bringing it closer to Article 101(3) TFEU. In Organisation of fruit and vegetable processing industry (2008) and Dairy (2009), the NCA took a favourable view of the creation of

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768 Article 17 of Act LVII of 1996 on the Prohibition of Unfair Trading Practices and Unfair Competition
769 Environmental considerations were involved and rejected in Vj-7/2008/178 Motor oils and lubricants (2009); Vj-66/2012 Geophysical measuring operations (2014).
770 Mixed-cases are defined as cases in which an NCA enforces both Article 101 TFEU and the national equivalent provision. See Chapter 1, Section 3.2.1.
771 Article L. 420-4(II) of Book IV of the French Commercial Code. Also see OECD Regulatory Reform in France (2003), 8, 11.
772 Emphasis added. Article L. 420-4(II) of Book IV of the French Commercial Code. This exception was introduced through Law no. 96-588 of 1 July 1996 concerning loyalty and balance in commercial relationships, aiming to allow SMEs to group and participate in the agriculture markets. Also see OECD Regulatory Reform in the Netherlands (1998), 3.
associations of producer organisations - as long as they did not have a dominant market position. To arrive at this conclusion, the NCA referred to the standards established by the Commission Article 101(3) Guidelines. It interpreted the agriculture exception as an example of one type of economic benefit that could be examined under the national exception. This line of reasoning was repeated in Endive (2012). The NCA held that, when assessing agriculture agreements, the concept of economic progress hinged mainly on two complementary objectives: consumer welfare via the improvement of product quality, and the production conditions. Consequently, the NCA analysed the national exception with reference to the Commission Article 101(3) Guidelines.

6.5. National courts

Regulation 1/2003 envisioned an essential role for national courts in ensuring the consistent and effective application of Article 101 TFEU. Yet, the influence of the national courts on the enforcement of Article 101 TFEU in general and 101(3) TFEU in particular has been greatly underappreciated by legal scholarship. This might be a result of the limited visibility of national court judgments in comparison with the practices of the Commission and NCAs, which operate within the ECN network of EU competition authorities. Unlike the NCAs, national courts are required to transmit judgments concerning the application of Article 101 TFEU to the Commission only after they have been notified to the parties. Although the Commission can submit its observations to the national courts, it cannot take over a case the way it can with respect to NCA investigations.

The practice of national courts, however, is a noteworthy subject of study. As clearly illustrated by the Dusseldorf Higher Regional Court’s judgment in Booking.com described above, national courts may create significant convergence when interpreting the national balancing principles. The national courts’ approaches to balancing thus have an important bearing on effectiveness, uniformity and legal certainty.

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776 08-A-07 Organisation of fruit and vegetable processing industry (2008), para 63-74; 09-A-18 Dairy (2009), para 83-89. This was part of a general trend in interpreting Article 101(3) TFEU in light of the Commission’s approach, as elaborated in Section 6.2.2 above.

777 12-D-08 Endive (2012), para 572. The Appeal Court of Paris in 2012/06498 Endive (2014) quashed the decision, finding that the conduct did not infringe Article 101(1) TFEU. In a second appeal, the Cour de cassation in 14/19589 Endive (2015) referred the question for preliminary ruling. The CJEU rendered its decision in C-671/15 Endive (2017).

778 Regulation 1/2003, Preamble 7-8, 21 and Articles 15-16.

779 Regulation 1/2003, Article 15.

780 See Section 6.3.1 above.
Against this backdrop, Figure 3.12 summarises the number of appeals appearing before national courts that have scrutinised the application of Article 101(3) TFEU by NCAs. It specifies the number of proceedings in which the application of Article 101(3) TFEU has been appealed (blue columns) and the number of cases in which the courts have overturned NCA decisions (red columns).

**Figure 3.12: Article 101(3) TFEU, national courts (May 2004-2017)**

![Bar chart showing the number of appeals appearing before national courts and the number of cases in which the courts have overturned NCA decisions.](image)

Each appeal instance at which a case was examined is counted as an independent appeal.

The figure yields two interesting observations. First, it shows that most national courts have examined the application of Article 101(3) TFEU in only a relatively small number of cases. This could be explained by the small invocation rate of Article 101(3) TFEU before NCAs and the use of informal measures to examine Article 101(3) TFEU issues, which are unlikely to be appealed (see Figure 3.10). As a result, national courts have had only a few opportunities to scrutinise Article 101(3) TFEU balancing. Hungary represents a clear exception to this rule. The Budapest Metropolitan has reviewed various appeals on the application of Article 101(3) TFEU, which were often re-examined by the Budapest Appeal Court as a second instance for appeal, or by the Curia in the third instance.

Second, the figure reveals that national courts have been exceptionally careful in interfering with NCA decisions. They have mostly affirmed the NCAs’ analyses and shown deference to their discretion. The UK courts, however, present a special case. The CAT has applied strict and intensive scrutiny to the application of Article 101(3) TFEU. In fact, the empirical findings show that the Court has set aside all appeals to NCA decisions refusing exceptions due to flaws in the assessment procedure.\(^{781}\) At the same time, the CAT has not explained how Article 101(3) TFEU ought to be applied in those cases. This practice is rather unfortunate. As an Article 101(3) TFEU

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\(^{781}\) 1054/1/1/05 1055/1/1/05 1056/1/1/05 MasterCard (2006); 1160/1/1/10 1161/1/1/10 1162/1/1/10 1163/1/1/10 1164/1/1/10 1165/1/1/10 Tobacco (2011); CE/9320-10 Hotel online booking (2014).
exception was examined in only 5 decisions of the UK NCA and was overturned in 3, there are
grounds for concern that the UK national interpretation of Article 101(3) TFEU remains unclear.

The empirical findings show that although national courts have full jurisdiction to engage in
Article 101(3) TFEU balancing, they have done so infrequently. This limited involvement raises
doubts as to the degree that national judiciaries have actually ensured the effectiveness,
uniformity and legal certainty of balancing in practice, as intended by the decentralised
enforcement regime of Regulation 1/2003.

6.6. **Interim conclusion**

Given the lack of a clear and binding EU balancing framework, the NCAs have developed very
different approaches to Article 101(3) TFEU balancing. While some NCAs have converged with the
balancing principles advocated by the Commission, others have explicitly or inexplicitly deviated from
that approach. This has created serious uniformity concerns. The NCAs have reached conflicting
decisions with respect to the same or similar agreements and adopted different balancing principles.
The fragmentation of Article 101(3) TFEU balancing impedes the level playing field and legal
certainty of economic actors across the EU, exposing undertakings to multiple balancing standards.

7. **NORMATIVE BENCHMARKS**

This chapter has pointed to changes in Article 101(3) TFEU balancing, both over time and
between competition enforcers. In particular, it has shown that modernisation has resulted in a
trade-off between a higher effectiveness of balancing on the one hand, and weaker uniformity
and legal certainty on the other. The old *ex-ante* centralised enforcement regime promoted
uniformity and legal certainty but was not fully effective in protecting competition. Non-
competition interests were given priority over competition interests, balancing was highly sectoral,
and was not based on a clear legal or economic balancing process. The modernisation aimed to
promote effectiveness by introducing economic tools to guide balancing. Yet, the new *ex-post*
decentralised enforcement inherently suffers from uniformity and legal certainty difficulties. The
compatibility of agreements with Article 101(3) TFEU is assessed *ex-post*, and the more economic
approach merits a case-specific evaluation of complex economic issues. Balancing is guided by
vague and general balancing standards, rather than by precise balancing rules.\(^{782}\)

\(^{782}\) (Bishop 2001), 58-59; (Hawk & Denaeier 2001), 130; (Blanco & De Pablo 2012), 83-85.
Before detailing the compatibility of Article 101(3) TFEU balancing with the normative benchmarks, it should be noted that the Commission’s attempts to increase the effectiveness of balancing as part of modernisation have had a limited impact in practice. The empirical findings presented in this chapter have demonstrated that the Article was seldom used after May 2004. Therefore, the assessment below only reflects situations in which the Article was applied. The impact of the choice to refrain from applying the Article is discussed in Chapter 8.

**Figure 3.13: Article 101(3) TFEU and the normative benchmarks**

### 7.1. Effectiveness

Prior to modernisation, Article 101(3) TFEU balancing had been condemned as ineffective. From a substantive point of view, Article 101(3) TFEU exemptions were not always, or at least not primarily, based on economic principles or corrective motives. They were not directed at the protection of competition as such. By invoking the workable competition standard, balancing could advance multiple non-competition interests. It was applied in a sectoral manner, thereby furthering market integration, industrial policy, and other non-economic benefits. 783 This, together with the Commission’s practice of subjecting the exemptions to modification, was criticised as a form of market regulation. Moreover, the process of balancing was based on a loose legal analysis in which non-economic benefits frequently overpowered the competitive harm. The method of balancing was heavily dependent on the form of the agreement and on the relevant sector. It was not based on coherent economic principles or an analysis of the

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783 See the empirical findings presented in Figure 3.3 and in Sections 3.3 and 4.3 above.
effects of the agreement. The Commission and EU Courts have set a low threshold for fulfilling the four conditions of Article 101(3) TFEU, especially in regulated and liberalised markets.\(^{784}\)

Admittedly, from a procedural point of view, the old notification regime had a certain positive effect on the effectiveness of balancing. It allowed the Commission to negotiate with the undertakings the terms for exemptions prior to the implementation of an agreement. The Commission could strike a precise balance in borderline cases.\(^{785}\) Yet, such effectiveness should not be overestimated. Only a limited number of the notified agreements were subject to a formal decision, while most agreements were assessed by means of an informal comfort letter without a detailed competition analysis.\(^{786}\)

The more economic approach was expected to increase the effectiveness of Article 101(3) TFEU balancing. The Commission’s new guidelines and policy papers called for balancing based on a short-term narrow consumer welfare standard and confined to economic benefits. The Commission rationalised balancing and attempted to limit the competition enforcers’ discretion to take account of non-competition interests. This market-driven balancing relied on effect-based, economic principles and corrective aims.

In practice, however, the empirical findings presented in this chapter indicate that the effectiveness was not fully achieved. First, not all competition enforcers adhered to the Commission’s new approach. The more economic approach was based on the Commission’s soft law and practice and thus was not binding. This chapter has shown that the NCAs had different standards for applying Article 101(3) TFEU (short-term narrow or long-term broad consumer welfare, or rejecting such standards) and took account of different types of benefits (direct and indirect economic and non-economic benefits) while applying various levels of intensity of control.\(^{787}\)

Second, the Commission’s guidelines, as such, were not entirely compatible with the more economic approach.\(^{788}\) An effects-based approach is premised on the need to tailor the competitive analysis on a case-by-case basis, according to the effects and the market factors of each agreement. The Commission’s guidelines, on the other hand, articulated presumptions based on categories of restrictions. Those presumptions were not dependent on market-specific

\(^{784}\) See Section 4.3 above.

\(^{785}\) See Figure 3.1 and Section 4.3.1 above. Also see (Korah 1981), 38; (Bishop 2001), 63; (Bailey 2016), 116.

\(^{786}\) As empirically demonstrated in Chapter 8, Section 5.3.

\(^{787}\) See empirically demonstrated in Chapter 8, Section 5.3.

\(^{788}\) See Section 6.2 and 6.3 above.

\(^{789}\) (Jones 2010), 792; (Gerard 2012), 36.
factors. For instance, the more economic approach did not modernise the analysis of hard-core restrictions, which are almost always treated as incompatible with Article 101 TFEU.

It should be noted that it is difficult to assess the effectiveness of Article 101(3) TFEU in light of the small number of cases discussing its application following modernisation and an almost complete lack of cases demonstrating its successful application. This, as elaborated in the following section, has also hampered the uniformity and legal certainty of balancing.

7.2. **Uniformity and legal certainty**

One key merit of the old centralised notification regime was that it provided a highly unified and certain application of Article 101(3) TFEU. The centralised regime was justified with reference to the considerable discretion involved in the application of Article 101(3) TFEU. Although the Commission did not develop a set of coherent balancing principles, undertakings learned of the compatibility of an agreement prior to its implementation (albeit more often than not by means of informal comfort letters). In addition, the Commission took a fairly transparent and predictable form-based approach which permitted certain types of restrictions and prohibited others according to formalistic rules of thumb.789

The modernisation brought with it the inherent risk of upsetting the uniformity and legal certainty of balancing. From a procedural point of view, the switch to a self-assessment regime had produced a certain degree of uncertainty. Because the Commission no longer reviewed each agreement ex-ante, certain grey areas involving novel questions were bound to emerge, in which self-assessment might be difficult to execute.790

From an institutional point of view, the modernisation was not complemented by the establishment of a single, binding EU balancing framework. Because most of the balancing principles were not part of EU primary or secondary law or enshrined in the case law of the EU Courts, national enforcers were allowed to adopt diverging approaches. The empirical findings presented in this chapter suggest that the procedural safeguards of Regulation 1/2003 were insufficient to ensure the uniformity and legal certainty of Article 101(3) TFEU balancing. The NCAs adopted considerably varied interpretations, even with respect to the same agreement (e.g. the Booking case). As pronounced by the German court in *Booking*, neither the duty of

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789 See Chapter 2, Section 5.3.3. The legal certainty was sometimes hindered by the Commission’s choice for informal measures. This will be discussed in Chapter 8.

790 Ulf Bode, the President of the German Cartel Office, in (Ehlermann & Atanasiu 2001), 19.
notification to the ECN network under Article 11 of Regulation 1/2003 nor the duty of sincere cooperation under Article 4(3) TEU, oblige the uniform and consistent interpretation of the Article.\textsuperscript{791} The possibility of divergent interpretations being adopted especially becomes a reality when it comes to national courts. As judiciaries, national courts are not required, formally or legally, to follow the non-binding interpretations of an administrative body such as the Commission. In addition to frustrating uniformity, this hinders legal certainty. The interpretation and application of Article 101(3) TFEU are dependent on the relevant competition enforcer.

From a substantive point of view, most competition enforcers did not established a set of consistent and durable balancing principles which were respected over a long period of time in each respective Member State. This created further uncertainty, which was aggravated by Article 5 of Regulation 1/2003 and the CJEU’s decision in \textit{Tele2Polska}, which allows NCAs to find, without reasoning or reporting the case to the ECN network, that there are no grounds for action on their part on the basis of Article 101(3) TFEU.\textsuperscript{792}

Moreover, balancing suffered from the legal uncertainty weakness even when the competition enforcers followed the Commission’s more economic approach. The more economic approach inherently entails balancing on a case-by-case basis, which is dependent on an agreement’s effects and other issue-specific factors.\textsuperscript{793} In particular, the calculation of an agreement’s effect on consumer welfare has been called a “notoriously daunting task”.\textsuperscript{794} Especially when the benefits are not easily quantifiable, balancing almost inevitably calls for a value judgment. As such, balancing does not follow precise balancing rules but is rather based on general balancing standards.

This chapter submits that the Commission’s and EU Court’s practices have increased the risks that balancing poses to uniformity and legal certainty across the EU. First, the empirical findings demonstrate that the Commission issued only a limited number of Article 101(3) TFEU decisions following modernisation. The shift to the self-assessment regime was based on the assumption that the old notification regime had “enabled the Commission to build up a coherent body of precedent cases”.\textsuperscript{795} Yet, in parallel, the more economic approach focused attention on the substantive context. The old case law, which adhered to a form-based analysis, could not

\textsuperscript{791} As detailed in Section 6.3.1 above.
\textsuperscript{792} See Chapter 2, Section 3.3.3.
\textsuperscript{793} (Bishop 2001), 55; Hawk in (Ehlermann & Atanasiu 2001), 25.
\textsuperscript{794} (Petit 2009), 4.
\textsuperscript{795} Modernisation White Paper (1999), para 76.
guide the new effects-based self-assessment.\textsuperscript{796} This was especially true considering that the very few proceedings in which the Commission applied Article 101(3) TFEU had focused on economic benefits. The Commission did not explain if and how non-economic benefits could fit into its short-term narrow consumer welfare analysis.\textsuperscript{797}

Second, the Commission refrained from issuing informal individual guidance or formal positive decisions. The Modernisation White Paper stressed that those two measures were essential for safeguarding legal certainty and uniformity in a self-assessment regime.\textsuperscript{798} The lack of such decisions prevented the emergence of a body of decisions that, despite being non-binding, could explain why the Commission believed that Article 101(3) TFEU could be successfully invoked, thus increasing the transparency and predictability of the Commission’s approach. This is further elaborated in Chapter 8 Section 6.

Third, the risk to uniformity and legal certainty was not offset by the Commission’s guidelines, which were inconsistent with the balancing principles prescribed by the EU Courts’ case law.\textsuperscript{799} As soft law, they could not alter the EU balancing principles. Moreover, practitioners and academics have repeatedly submitted that the guidelines only offered economic conceptualisation, using abstract economic standards and theory. They did not explain how balancing ought to be applied in practice.\textsuperscript{800}

Finally, the risk to uniformity and legal certainty was aggravated by the practices of the CJEU. The CJEU was reluctant to provide a clear ruling on balancing. It failed to grasp the opportunity presented in cases such as \textit{GlaxoSmithKline (2009)} and \textit{T-Mobile (2009)} to define the scope of the more economic approach and the consumer welfare standard. It did not scrutinise the Commission’s guidelines or reveal how they could be squared with the Court’s previous decisions.

The chapter has shown that in contrast to the prominence of Article 101(3) TFEU in the EU competition law scholarship on balancing, in practice, the Article was applied by competition enforcers in only a limited number of instances, post modernisation. Accordingly, one could say that the balancing tool of Article 101(3) TFEU has become a matter of legal and economic theory

\textsuperscript{796} As empirically demonstrated in Sections 3.4 and 4.4 above, and previously observed by (Jones 2010), 793; (Gerard 2012), 36; (Bellamy & Child 2013), 179-180; (Witt 2016b), 296-297.

\textsuperscript{797} See the empirical findings presented in Figure 3.2 and Section 3.4 above.

\textsuperscript{798} Modernisation White Paper (1999), para 14.

\textsuperscript{799} See Sections 3.4 and 4.4 above.

\textsuperscript{800} (Piergiovanni & D’Elia 2008), 5-9; (Petit 2009), 2-4; (GCLC Annual Conference 2010), 19-20, 58-76.
rather than of practical importance. Indeed, as the next chapters will show, following modernisation, much of the consideration given to non-competition interests under Article 101 TFEU has shifted away from Article 101(3) TFEU to other national and procedural balancing tools.