Coding non-competition interests under Article 101 TFEU

A quantitative and qualitative study

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BLOCK EXEMPTION REGULATIONS

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1. INTRODUCTION

Block exemption regulations (BERs) are traditionally perceived as having the administrative function of reducing the Commission's workload. This chapter, however, submits that BERs have an additional role. BERs, like Article 101(3) TFEU individual exemptions, are also a tool that can be used to balance competition and non-competition interests.

BERs were initially introduced to EU competition law to accommodate the enormous number of notifications that resulted from the enforcement setup of Regulation 17/62. When the Commission adopted the first BER on Distribution Agreements in 1967, it was already faced with a backlog of 37,450 notifications. The BER successfully reduced the Commission's workload: of the 40,000 notifications received by the Commission during the first years of application of Articles 101 and 102 TFEU, 29,500 were covered by the BER.

However, this workload-reducing function perished following the entry into force of Regulation 1/2003. Under the self-assessment regime, undertakings, rather than the Commission, are required to examine whether an agreement could benefit from the terms of a BER. Although the workload motivation had lost its value, the Commission decided to keep the special BER instrument. It did not, for example, abolish all BERs, issuing corresponding substitute guidelines for the application of Article 101(3) TFEU instead.

Scholars have already noted that the BER instrument does not fit in with the new enforcement regime. Marcos and Sánchez Graells, for example, have described BERs as a "fossilised" administrative device which enacts a specific competition analysis for certain sectors or types of agreements without any economic justification. As such, BERs cannot be squared with the more economic and effects-based approach of EU competition law. Thus, they have maintained, following modernisation there is no longer any (proper) function for BERs, which distort consistent enforcement across all markets and sectors.

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801 See Chapter 2, Section 3.2.
802 This was previously identified by (Monti 2007), 113-123; (Van Rompuy 2012), 278-279.
804 Modernisation did not affect the validity or legal nature of the BERs. See Commission Article 101(3) Guidelines (2004), para 2.
805 (Marcos & Sanchez-Graells 2010), 190. Also see (Ehlermann 2000), 566; (Riley 2003a), 605.
This chapter, nonetheless, advocates a different approach. It concludes that BERs play, and have played in the past, an important role beside their administrative function. BERs, like Article 101(3) TFEU individual exemptions, reflect a form of balancing between competition and non-competition interests. They offer a pre-determined, explicit balancing tool, which promotes the uniformity and legal certainty of balancing.

The chapter shows that balancing under BERs takes place on two levels: First, the adoption of each BER is the result of a lengthy political process involving the Member States and the EU institutions. It entails ex-ante balancing between the protection of competition interests on the one hand and the promotion of other industrial and political interests on the other. Second, the application of a BER to an individual agreement also involves balancing. Some BERs prescribe precise balancing rules which are confined to objective factual criteria. Others enact only general balancing standards, requiring the competition enforcer to engage in a full analysis weighing the harm and benefits produced by an agreement, as in the assessment of an individual exemption.806

The effectiveness, uniformity, and legal certainty of balancing depend on the characteristics of the BERs, which have undergone a transformation over the enforcement periods. Up until the end of the third enforcement period (i.e. the late 1990s), BERs were based on a formalistic analysis. Yet, most of the BERs adopted since reflect an effects-based approach, rendering them more effective in protecting competition. In fact, this shift represented the first wave of substantive and procedural modernisation in other fields of EU competition law.

Moreover, this chapter distinguishes between general BERs that apply to certain categories of business practice, and sectoral BERs that apply to specific sectors and industries. It shows that sectoral BERs are often more political in nature and directed at regulatory balancing aims that protect a broad range of non-economic benefits. Thus, sectoral BERs are generally less effective at protecting competition interests. Accordingly, this chapter reveals that, parallel to the modernisation of the BERs, the Commission has gradually abolished most sectoral BERs. The development of the various BERs and their categorisation (form or effects based; general or sectoral) are also summarised in Annex C.

The modernisation of BERs, combined with the abolishment of most sectoral BERs, has represented a trade-off between increased effectiveness of balancing on the one hand, and

806 On the differences between general balancing standards and precise balancing rules see Chapter 1, Section 4.3.3. Also see Section 3.1.2 below.
reduced uniformity and legal certainty on the other. The old formalistic and sectoral BERs were highly transparent but less effective at protecting competition. The new effect-based BERs require a higher level of discretion in applying the economic balancing process, a typical downside of the more economic approach that jeopardises the legal certainty and consistent application of balancing across the EU.\textsuperscript{807}

Before discussing the balancing embedded in BERs in detail, it should be noted that theoretical and empirical scholarship on BERs is scarce. Because BERs are often seen as an administrative tool, there are only a few studies on the rationale and function of BERs as a substantive legal instrument. Moreover, there is a limited number of Article 101 TFEU proceedings that have detailed the application of BERs. Even under the old notification regime, agreements falling within the scope of certain BERs were not notified to the Commission.\textsuperscript{808} Other agreements that required notification were mostly assessed by means of informal settlements or comfort letters when they were protected by a BER.\textsuperscript{809}

The comprehensive quantitative and qualitative coding presented in this dissertation can help fill this gap. Aiming to map the balancing function of BERs, this chapter is constructed as follows: Section 2 presents an overview of the empirical findings on the application of BERs by the Commission and EU Courts. Section 3 details the balancing function of BERs. It points to the different balancing characteristics of the general and sectoral BERs. Section 4 analyses the modernisation of the BERs towards the end of the third enforcement period, and the manner in which this increased the effectiveness of balancing. Section 5 discusses the application of BERs by national enforcers while pointing out the legal certainty and uniformity challenges. Section 6 reveals similar fragmentation in the competition enforcers’ approaches to the relationship between Article 101(3) TFEU individual exemptions and BERs. Finally, Section 7 concludes by assessing the degree to which balancing by BERs meets the normative benchmarks. It emphasises that even following the modernisation of the BER, they still rely on formalistic categories of agreements and sectors rather than on a detailed case-specific economic analysis. As such, while BERs generally promote legal certainty and uniformity, they inherently run counter to an effects-based approach.

\textsuperscript{807} (Bishop 2001), 57, 60; Also See Chapters 3, Section 7.1.
\textsuperscript{808} See Section 4.1 below.
\textsuperscript{809} For statistics on the application of BERs in comfort letter see Figure 8.5.
2. LEGAL AND EMPIRICAL BACKGROUND

The BER is a legal tool that automatically discharges certain categories of agreements from the prohibition imposed by Article 101 TFEU, without the need to undertake a detailed competition analysis.\(^{810}\) When an agreement is covered by the terms of a BER, undertakings are protected by a safe haven and are relieved from the burden to prove that the agreement fulfils the conditions of Article 101(3) TFEU. As such, each BER is based on the presumption that the protected categories of agreements satisfy “with sufficient certainty” all four conditions of the Article.\(^{811}\) It offers a rule of thumb by establishing a presumption of legality for relatively unproblematic cases.\(^{812}\)

Figure 4.1 indicates the number of Article 101 TFEU proceedings in which the Commission has examined the application of BERs. It details the total number of Article 101 proceedings (grey line), proceedings in which the benefits of a BER were investigated (blue line) and proceedings in which a BER was found to apply (red bars). In addition, it specifies the number of proceedings in which the withdrawal of a BER was investigated (green crosses); this will be discussed in Section 6.2 below.

Figure 4.1: BERs, Commission

All Article 101 TFEU proceedings rendered by the Commission, excluding comfort letters. In some proceedings, more than one BER was invoked, or only certain restrictions exempted

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\(^{810}\) The legal source for issuing BERs is found in Articles 101(3) and 103 TFEU.

\(^{811}\) See, for example, Regulation 330/2010 on Vertical Restraints, Preamble 5; Regulation 2790/99 on Vertical Restraints, Preamble 5; Regulation 1217/2010 on Research and Development, Preamble 7; Regulation 1218/2010 on Specialisation Agreements, Preamble 5; Regulation 772/2004 on Technology Transfer, Preamble 9; Regulation 267/2010 on Insurance, Preamble 8; Regulation 461/2010 on Motor Vehicles, Preamble 14. Also see Commission Article 101(3) Guidelines (2004), para 35.

\(^{812}\) (Witt 2016b), 202.
The figure highlights two interesting findings. First, it points to the limited availability of empirical data on the application of BERs. This illustrates that BERs have been invoked infrequently (blue line). This was especially true during the fourth enforcement period, post-modernisation. After May 2004, there was a significant drop in the number of proceedings in which the benefit of a BER was examined. This could be explained by reference to the Commission’s enforcement priorities. As elaborated in Chapter 8, the Commission has focused its enforcement efforts on hard-core infringements of competition, in which BERs do not apply. The decline in the invocation rate of BERs could also be linked to the modernisation of BERs in the late 1990s. The modernisation of the BER released undertakings from the duty to give notification of agreements that benefited from a BER.\textsuperscript{813} Since notification of those agreements was no longer given, they are not reflected in the figure.

Second, the figure shows that the Commission found that an agreement benefited from a BER in only a limited number of Article 101 TFEU proceedings (red bars). As Figure 8.5 demonstrates, the benefits of BERs were mostly acknowledged by means of comfort letters. On the one hand, this could indicate the success of the BER as an instrument; if BERs are clear and predictable legal tools, agreements that fall within the scope of a BER do not require the Commission’s analysis and can be exempted informally.\textsuperscript{814} This conclusion is reinforced by the observation that most cases in which the benefit of a BER was accepted were related to sectoral BERs (see Figure 4.3). As detailed in Section 3.2.3 below, those BERs require a more comprehensive competition analysis involving a wide margin of discretion for the competition enforcer. At the same time, since most exemptions were settled informally or by means of an unpublished comfort letter, the lack of detailed exemption decisions might lead to uncertainty about the scope of the BERs.\textsuperscript{815}

Next, Figure 4.2 summarises the number of Article 101 TFEU proceedings in which the EU Courts have reviewed the application of BERs. This includes cases in which the Courts have appraised (CJEU – blue line, GC - red line) and overturned (crosses) the Commission’s decisions. In addition, the figure details the number of proceedings in which BERs-related questions were referred for CJEU preliminary ruling (grey dotted line).

\textsuperscript{813} See Section 4.1 below.
\textsuperscript{814} (Greaves 1994), 9.
\textsuperscript{815} This touches upon the greater trend of the limited number of inapplicability decisions, as observed in Chapter 3, Section 2 and elaborated in Chapter 8, Section 6.
In some proceedings, more than one BER was invoked. The 6 proceedings before the GC in 2016 all related to appeals lodged against a single Commission decision. Thus, they do not represent a substantive increase in the number of appeals involving the application of BERs.

The figure reveals that the CJEU has regularly discussed questions relating to BERs in its preliminary rulings (grey dotted line). In fact, the Court has answered significantly more preliminary questions on BERs than questions related to Article 101(3) TFEU individual exemptions. Section 3.1.1 below affirms that those rulings were essential in shaping the substantive scope of the BER and hence of balancing.

In contrast, the Courts have had only limited involvement in reviewing challenges to the Commission’s application of BERs. The CJEU (blue lines) and GC (red lines) have reviewed few appeals on the matter. Moreover, until the beginning of the 1990s, the Courts had not examined any appeals on the application of BERs by the Commission, issuing the first ruling on this matter as late as 1993. Even when the Courts did appraise the application of a BER, they rarely intervened in the Commission’s decisions. The few judgments in which the GC did overturn a Commission decision involved procedural errors or insufficient evidence (red crosses). These findings are a testament to the Commission’s wide margin of discretion to balance under the BER regime, as further elaborated below.

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816 See Figure 3.8.
817 In T-14/93 Distribution of railway tickets by travel agents (1996), para 64, the GC annulled the Commission’s decision which reviewed the agreement under Regulation 17/62 and not the special mechanism established by Regulation 101/68 (confirmed by C-264/95P Distribution of railway tickets by travel agents (1997)). In T-7/93 Langnese-Iglo (1995), para 207, the GC held that the Commission...
3. BALANCING TOOL

BER balancing takes place at two levels: during the process of adopting a BER, and when applying a BER to a specific agreement. The characteristics of balancing at each of those two levels differ according to the type of BER, i.e. general or sectoral. Thus, the section first explores the two levels of balancing (Section 3.1), before examining how it has differed between the two types of BERs (Section 3.2).

3.1. Two levels of balancing

3.1.1. Adopting BERs

The adoption of a BER is the result of a lengthy political process involving the Member States, Council, Commission, EU Courts, Parliament, and members of interest groups. The legislative process is normally carried out at two stages.\(^{819}\)

First, the Council adopts an Enabling Regulation, which empowers the Commission to adopt a BER dealing with a specific category of agreements. This process ensures the involvement of the Member States in balancing. In fact, the Commission originally proposed a one-time delegation of powers, allowing it to issue all types of BERs. Such a general delegation would have allowed the Commission to independently shape the balancing embedded in BERs. Yet, the Council, consisting of representatives of the Member States, was unwilling to relinquish complete control. The Council restricted the delegation of powers of each Enabling Regulation to a specific category of agreements.\(^{820}\) To date, the Council has adopted only three Enabling Regulations: with respect to vertical agreements and the bilateral licencing of IPRs; standardisation, R&D, and specialisation; and insurance.\(^{821}\)

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\(^{818}\) In T-79/95 80/95 Eurotunnel (1996), para 60-65 the GC held that the Commission had misinterpreted the agreements as a matter of fact; in T-374/94 T-375/94 T-384/94 T-388/94 Night Services (1998), para 189, that the Commission did not take a sufficient account of the legal and economic context surrounding the agreement; and in T-427/08 Watch Repair (2010), para 130-142 that the Commission had granted an exemption without sufficiently establishing the market share.

\(^{819}\) BERs in the transport sector followed a different adoption process, as discussed in Section 3.2.3 below.

\(^{820}\) (Greaves 1994), 6, 20.

At the second stage, the Commission defines the terms and provisions of the BER. Since the commercial behaviour of undertakings is often shaped by the Commission’s views on balancing, this allows the Commission to regulate, and not only enforce EU competition policy. To this extent, by adopting BERs, the Commission encourages undertakings to conclude agreements that benefit from the terms of a BER and to avoid others.

This stage also involves the EU Courts. The terms of each BER must conform to the Courts’ case law. Hence, BERs have often been based on or modified to comply with the Courts’ approaches to balancing. Especially since the process of adopting a BER is commonly quite lengthy, the Courts have had a number of opportunities to influence the substance of a draft BER. In those cases, the Courts rather than the Commission have settled controversial balancing issues during the process of adopting that BER.

For example, the CJEU was highly influential in shaping the balancing principles embedded in the first BER on distribution agreements. Following the approval of the Enabling Regulation in 1965, the Commission began investigating what types of distribution agreements should be exempted by the prospective BER. Yet, the CJEU was the institution that finally resolved this issue. In STM (1966) and Consten & Grundig (1966), which were rendered before the Commission had finalised its position, the CJEU held that not all distribution agreements are prohibited by Article 101(1) TFEU. The CJEU also shaped the amendment of the same BER in 1976. The amendment aligned the text of the BER with the CJEU interpretation, which ran counter to the Commission’s previous interpretation. Similarly, the Court’s judgment in Maize seed (1982) clarified the content of the Patent Licensing BER, and its judgment in Pronuptia (1986) shaped the Franchising BER.

Also, the Member States and interest groups both play a role in the legislative process. Each BER is finalised following a consultation with all Member States through the Advisory Committee and with commercial and industrial interest groups. The consultation process takes interests into account, and the Terms and Provisions of the BER are finalised following a consultation with all Member States through the Advisory Committee.

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822 (Goyder 2009), 142. Also see Policy report 1971, 98-99.
823 (Wesseling 2000), 40; (Marcos & Sanchez-Graells 2010), 190; (Bailey 2016), 119.
824 (Greaves 1994), 5-7.
825 C-56/65 Société Technique Minière (1966), 250; C-56/64 C-58/64 Grundig/Consten (1966), 339-340, 344-346. Also see (Greaves 1994), 49; (Goyder 2009), 205-209.
represented by regional, national, and sectoral pressure groups into account. In various instances, those consultations led to substantial changes to earlier drafts of BERs. Finally, the Parliament also takes part in shaping balancing. The Commission is required to report to the Parliament on the application of BERs, to which the Parliament can recommend revisions.

Hence, both the Member States and the EU institutions are involved in shaping the balancing principles applicable under each BER. Their positions are not only based on pure competition interests but also take broader policy considerations into account.

3.1.2. Applying BERs

In addition to the ex-ante balancing embodied in the adoption of a BER, the application of a BER to a specific agreement also entails balancing. The characteristics of such balancing are dependent on the level of discretion provided by each BER. The wider the discretion, the greater the room for the consideration of non-competition interests. One can distinguish between three levels of discretion.

First, a BER that is based on precise balancing rules leaves the competition enforcer with only limited discretion. This necessitates that the method of balancing is comprehensively detailed in each BER. The competition enforcer cannot independently decide how to balance and is simply required to examine whether an agreement satisfies the objective factual criteria listed in the BER (e.g. the type of agreement and the undertakings’ market share). As detailed below, precise balancing rules often guide the application of the general BERs.

Second, a BER that is based on teleological balancing allows the competition enforcer to go beyond the wording of a BER and apply the benefits of a BER to situations that are merely compatible with its “spirit”. The competition enforcer must identify the rationale behind the BER and exempt agreements in comparable situations. As detailed below, teleological balancing has sometimes been advocated by the EU Courts for applying the general BERs and guided the application of certain sectoral BERs. Furthermore, some national competition enforcers have referred to the “spirit” of BERs as a legal source for granting an individual exception to agreements that fail to fulfil one of the conditions of a BER.

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828 (Forrester & Norall 1984), 15; (Goyder 2009), 142.
829 (Greaves 1994), 131; (Whish 2000), 892.
830 On precise balancing rules versus general balancing standards, see Chapter 1, Section 4.3.3.
Finally, a BER that is based on *general balancing standards* entrusts the competition enforcer with broad discretion to account for non-competition interests. Such BERs only prescribe the general balancing method and oblige the competition enforcer to independently decide how to balance competition and non-competition interests. As detailed below, some sectoral BERs have been drafted by reference to general balancing standards. The next section explores the different levels of discretion involved in the application of the different types of BERs.

### 3.2. Two types of BERs: general and sectoral

#### 3.2.1. Overview

Examining the nature of balancing under a BER merits drawing a distinction between two types of BER: general and sectoral. As mentioned, Annex C provides a comprehensive overview of the BERs in each category. This section shows that the two types of BER vary in the types of benefits that they take into account and in their balancing methods. These differences have an impact on the margin of discretion required in their application.

*General BERs* exempt agreements that contain specific categories of *business practices* (e.g. vertical agreements, specialisation, or R&D). They are applicable without distinction to all sectors and industries. *Sectoral BERs* exempt a variety of business practices in a *specific sector* (e.g. maritime transport, motor vehicles). They exempt significant restrictions of competition in favour of promoting the functioning of the sector, even if there are no directly related efficiencies. Hence, sectoral BERs represent a form of regulatory balancing aimed at promoting EU industrial policy. They overtly require the consideration of non-economic benefits, going beyond the regular scope of Article 101(3) TFEU balancing.

Figure 4.3 summarises the number of Article 101 TFEU proceedings in which the Commission has discussed the application of general and sectoral BERs. It presents the number of BERs examined (general – blue bars, sectoral – red bars), and exempted (triangles and crosses).

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831 The classification of the two types of BER has previously been described by (Marcos & Sanchez-Graells 2010), 183; (Sauter 2016), 40.
832 (Sauter 2016), 40.
833 (Monti 2002), 1082-1083.
834 (Greaves 1994), 6, 115; (Wesseling 2000), 40. On the definitions of corrective and regulatory balancing aims, see Chapter 1, Section 4.1.3.
835 (Townley 2004), 113, 123.
Figure 4.3: General and sectoral BERs, Commission

The figure reveals that, since the third enforcement period (i.e. after 1988), most of the BERs invoked and accepted were sectoral (red bars and crosses). This can be explained by the Commission’s focus during that period on enforcement in regulated and liberalised markets. As the Commission noted in its Article 101(3) Guidelines (2004), para 35, not all agreements that fall within the terms of a BER restrict competition in the meaning of Article 101(1) TFEU.

Since the Commission directed its enforcement efforts to agreements in areas governed by sectoral BERs, those BERs were more likely to be discussed in Commission decisions.

The high rate of invocation and acceptance of sectoral BERs can also be linked to the discretion warranted in their application. As the next sections illustrate, sectoral BERs prescribe only general balancing standards and leave the competition enforcers broad discretion, which renders their application in a specific case less certain. This uncertainty might have motivated the Commission to examine those cases in reasoned and published decisions rather than by means of comfort letters or informal settlements. As a result, sectoral BERs are more visible in Article 101 TFEU proceedings in comparison with general BERs.

3.2.2. General BERs

General BERs remove two types of agreement from the scope of Article 101 TFEU. First, they exempt agreements that do not bear anti-competitive effects. Second, general BERs exempt agreements that have an anti-competitive effect, but which generate economic benefits that potentially outweigh the harm caused to competition interests. As such, they balance competition and efficiency-related interests. For example, BERs for horizontal agreements

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836 See Chapter 2, Section 5.3.1.
837 This is also supported by the empirical findings presented in Figure 8.2(c).
838 As the Commission noted in its Article 101(3) Guidelines (2004), para 35, not all agreements that fall within the terms of a BER restrict competition in the meaning of Article 101(1) TFEU.
balance competition interests with certain economic benefits such as risk sharing, cost saving, increased investments, pooling of know-how, and enhancement of product quality and variety.\textsuperscript{839} BERs for vertical agreements balance competition interests with economic efficiency within a chain of production or distribution by facilitating better coordination. They exempt agreements that are likely to reduce transaction and distribution costs or optimise sales and investment levels.\textsuperscript{840} Both horizontal and vertical BERs take R&D and innovation interests into account.\textsuperscript{841}

In the past, general BERs were also directed at promoting market integration.\textsuperscript{842} They did not exempt agreements capable of dividing the internal market even if they did not have a clear anticompetitive effect (i.e. if the parties held low market shares). Consequently, on balance, market integration prevailed over competition interests.\textsuperscript{843}

The empirical findings suggest that the application of general BERs to specific cases was, in general, straightforward. They prescribed precise balancing rules, leaving the competition enforcers limited discretion to balance. The EU Courts repeatedly confirmed that, as a legal exception to competition rules, BERs should be interpreted strictly.\textsuperscript{844} Accordingly, a competition enforcer is essentially required to identify the type of agreement (e.g. vertical, horizontal) and to calculate the market share of the undertakings involved. In addition, an enforcer has to verify that the agreement does not include any prohibited clauses (a hard-core restrictions). Consequently, while the adoption of BERs involves a degree of discretion to balance competition and non-competition interests, the application of a general BER mostly involved a limited degree of discretion.

Yet, the empirical findings also show that the competition enforcers were not entirely consistent in this approach. The competition enforcers occasionally deployed a higher margin of discretion, going beyond the strict wording of the BER. The Commission and EU Courts sometimes used \textit{teleological balancing}. In \textit{Fonderies Roubaix-W Atirelos (1976)}, for example,

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{839} Regulation 1218/2010 on Specialisation Agreements, Preamble 6; Commission’s Horizontal Guidelines (2011), para 2.
\item \textsuperscript{840} Regulation 330/2010 on Vertical Restraints, Preamble 6.
\item \textsuperscript{841} Regulation 330/2010 on Vertical Restraints, Preamble 5; Regulation 1217/2010 on Research and Development, Preamble 5.
\item \textsuperscript{842} (Wesseling 2000), 78-79; (Monti 2007), 357; (Van Rompuy 2012), 159.
\item \textsuperscript{843} This corresponds with a similar trend in the assessment of Article 101(3) TFEU individual exemptions. See Chapter 3, Section 4.3.2.
\end{itemize}
\end{footnotesize}
the CJEU examined the wording of the BER on Exclusive Distribution, stating that the exemption shall not apply to agreements in which “undertakings from one Member State only are party and which concern the resale of goods within that Member State”. 845 Despite this wording, and contrary to the Commission’s submission, 846 the Court interpreted the BER broadly. It held that “there is no reason based on the objectives of Regulation No 67/67 for failing to allow agreements of an identical nature concluded between two undertakings belonging to the same Member State to benefit from this general exemption.” 847 In BP Kemi (1979), the Commission engaged in similar teleological balancing. It held that, when interpreting a provision of a BER, “we cannot confine ourselves solely to the letter of the text; its spirit and purpose and its function within the general objectives of the Regulation have also to be considered.” 848 As a result, the Commission found that the purchasing agreement concluded by undertakings did not enjoy the exemption of Regulation 67/67 on Exclusive Distribution.

The CJEU also used teleological balancing to adapt BERs to changes in the technological environment. In Pierre Fabre (2011), for example, the Court examined whether a de facto prohibition on all forms of selling via the Internet could benefit from the terms of the Vertical BER. Article 4 of that BER, which specified a list of hard-core restrictions that remove the benefit of the BER from an agreement, did not explicitly mention such a restriction. Yet, Article 4(c) of the BER excluded the benefits of the BER from agreements that have as their object the restriction of sales to end users, including by way of prohibiting members of a distribution system from operating out of an unauthorised place of establishment. 849

The Court noted that, since undertakings can always benefit from Article 101(3) TFEU individual exceptions, it is not necessary to interpret the provisions of the BER broadly so as to bring the agreement within the scope of the BER. By employing teleological balancing, it held that the BER aims to exclude total prohibitions on passive sales. Thus, the Court interpreted the term “a place of establishment” as prohibiting a de facto ban on Internet sales. 850

845 Regulation 67/67 on Distribution Agreements, Article 1(2).
846 Also see Policy report 1976, 20-21.
848 Emphasis added. 29021 BP Kemi/DDSF (1979), para 95.
849 Regulation 2790/1999 on Vertical Restraints.
In *Coty (2017)*, the CJEU once again used teleological balancing for an even more nuanced interpretation of the Vertical BER. By reference to the objective of the BER, it held that a ban on the use of third-party platforms is not a hard-core restriction insofar as it does not prohibit the use of the internet as a means of marketing, and is part of a selective distribution contract for luxury products whereby customers remain able to find the online offer of authorised distributors.\(^{851}\)

The above demonstrates that even the application of the relatively inflexible legal tool of the general BER leaves substantial room for discretion when applied in a specific case. Section 5.1.1 below further shows that certain national enforcers have interpreted the general BERs as setting only a general balancing standard that leaves an even broader margin of discretion. These interpretations have rendered balancing less certain than what at first sight might be expected from general BERs, sometimes resulting in their inconsistent application.

### 3.2.3. Sectoral BERs

The substantive scope of sectoral BERs, as well as their adoption process, reflects a form of regulatory balancing.\(^{852}\) The transport BERs provide a good illustration of this point. During the negotiation of the Rome Treaty, the economic, political, and legal conditions of the transport sector differed substantially across the Member States and were subject to both national and international legislation.\(^{853}\) Because the Member States considered transport to be a national interest, they decided not to regulate it in the same manner as other economic activities. Transport received a separate chapter in the Rome Treaty and was exempted from the general application of competition rules.\(^{854}\) The competition rules could apply only to certain means of transport, subject to the adoption of special regulations.\(^{855}\)

The adoption of such regulations was highly contentious. It took the Commission, Council, and Member States a full three years to agree on the rules governing inland transport, and the rules for maritime and air transport were adopted almost twenty-five years later in 1986 and 1987, respectively.\(^{856}\) Even then, the Member States refused to give up control, deciding that

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\(^{852}\) For the definition of regulatory balancing aim see Chapter 1, Section 4.1.3.


\(^{854}\) Regulation 141/62 Exempting Transport from Regulation 17/62, Article 1.

\(^{855}\) Regulation 141/62 Exempting Transport from Regulation 17/62, Articles 2-3.

\(^{856}\) Regulation 4056/86 on Maritime Transport repealed by Regulation 1419/2006 on Maritime Transport; Regulation 246/2009 on Liner Shipping; Regulation 3975/87 on Air Transport, replaced by Regulation 487/2009 on Air Transport.
the Council (which comprises representatives of the Member States) would directly adopt some of the transport BERs, rather than delegating this power to the Commission as was done with most other BERs.\textsuperscript{857} This provided the Member States with the power to strike a balance between transport and competition interests.

Indeed, the transport BERs justified exemptions by reference to a wide array of non-competition interests. For instance, Regulation 1017/68 on Inland Transport included an exemption for technical agreements promoting technical efficiencies,\textsuperscript{858} but also for non-economic benefits such as the grouping of SMEs into purchasing cartels, and crisis cartels.\textsuperscript{859} Comparable provisions requiring the consideration of non-competition interest were also included in future transport BERs.\textsuperscript{860} For instance, Regulation 4056/86 on Maritime Transport exempted agreements concluded by the members of a liner conference which had been designed to fix the rates and conditions of carriage, as well as other market-sharing agreements. While these are clearly anti-competitive agreements, the BER justified the exemption by noting the "the distinctive characteristics of maritime transport".\textsuperscript{861} This rather vague justification was often explained by the historically cartelised structure of the liner trade and the welcome stability it brought to the industry.\textsuperscript{862}

The Member States also insisted on reserving some degree of control in the application of the transport BERs to a specific agreement. Regulation 1017/68, for instance, obliged the Commission to consult the Council whenever an agreement raises questions of principle concerning the common transport policy and required the approval of crisis cartels by the Council.\textsuperscript{863} Similarly, the Regulation ordered that a designated Advisory Committee be consulted before adopting any individual decision.\textsuperscript{864}

In addition to the broad types of non-benefits and the distinctive adoption process, sectoral BERs differ from general BERs in terms of the margin of discretion they leave for balancing. Sectoral BERs typically provide only general balancing standards, which requires the enforcer to

\textsuperscript{857} Regulation 1017/68 on Inland Transport; Regulation 4056/86 on Maritime Transport. Also see (Greaves 1994), 131; (Goyder 2009), 141-142; (Bailey & Whish 2015), 178.
\textsuperscript{858} Regulation 1017/68 on Inland Transport, Articles 3 and 5.
\textsuperscript{859} Regulation 1017/68 on Inland Transport, Articles 4 and 6. On crisis cartels, see Chapter 3, Section 4.3.4.
\textsuperscript{860} For a detailed discussion, see (Greaves 1991), 129-142, 173-183.
\textsuperscript{861} Regulation 4056/86 on Maritime Transport, Preamble.
\textsuperscript{862} (Monti 2002), 1079.
\textsuperscript{863} Regulation 1017/68 on Inland Transport, Article 17.
\textsuperscript{864} Regulation 1017/68 on Inland Transport, Article 16.
engage in detailed assessment. In fact, some BERs warrant a full competition analysis comparable to the balancing method of Article 101(3) TFEU individual exemptions. For instance, Regulation 1017/68 on Inland Transport repeats the wording of Article 101(3) TFEU with only small modifications to adapt it to the sector.  

Some sectoral BERs prescribe an even more flexible balancing method, which is guided by a legal proportionality test. For example, Regulation 1400/2002 on Motor Vehicles states that the exemption does not apply “where the supplier of motor vehicles refuses to give independent operators access to any technical information, diagnostic and other equipment [...] required for the repair and maintenance of these motor vehicles or for the implementation of environmental protection measures.” According to the Commission, the technical information must be “proportionate to independent repairers’ needs”.  

Sectoral BERs, involving similar characteristics and broad room for consideration of non-economic benefits, are not limited to the transport sector. Since the mid-1980s, the Commission has gradually adopted additional sectoral BERs. In 1983 it adopted rules for beer supply and petroleum service-station agreements, in 1985 for the motor vehicle sector, and in 1991 on insurance. Notably, the Commission’s sectoral approach to BERs has mirrored the workable competition standard that guided Article 101(3) TFEU individual exemption balancing in that it prescribes that balancing methods be determined according to the relevant sector.

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865 Regulation 1017/68 on Inland Transport, Article 5 provides that the prohibition of anti-competitive agreements may be declared inapplicable to any agreement “which contributes towards improving the quality of transport services; or promoting greater continuity and stability in the satisfaction of transport needs on markets where supply and demand are subject to considerable temporal fluctuation; or increasing the productivity of undertakings; or furthering technical or economic progress; and at the same time takes fair account of the interests of transport users and neither: (a) imposes on the transport undertakings concerned any restriction not essential to the attainment of the above objectives; nor (b) makes it possible for such undertakings to eliminate competition in respect of a substantial part of the transport market concerned”.
866 Regulation 1400/2002 on Motor Vehicles, Article 4(3).
867 39140 DaimlerChrysler (2007), para 16.
868 Those sectors were governed by Regulation 1984/83 on Exclusive Purchasing, Articles 6-12. The Regulation was for the most part a general BER.
871 See Chapter 3, Section 4.3. Also see (Wesseling 2000), 40; (Lista 2013), 30.
3.3. Interim conclusion

This section has examined the balancing that has taken place in the process of adopting and applying BERs, highlighting that BERs involve considerable room for non-competition interests. This is especially true with respect to sectoral BERs. While general BERs mainly take economic, efficiency-related considerations into account, sectoral BERs incorporate broad non-economic benefits and often reserve greater political power to the Council and Member States. As a result, sectoral BERs are less effective at protecting competition in comparison with general BERs. Moreover, sectoral BERs prescribe only general balancing standards, leaving competition enforcers greater discretion to balance. General BERs, by comparison, often provide precise balancing rules that limit the discretion of competition enforcers. Consequently, sectoral BERs facilitate balancing that is less uniform and certain compared with the balancing embodied in general BERs.

In light of the above, the next section will show that the Commission’s policy of abolishing most sectoral BERs, which it began implementing during the fourth enforcement period (i.e. the late 1990s), contributed to the effectiveness, uniformity, and legal certainty of balancing.

4. Modernising BERs

4.1. From form-based to effects-based balancing

Balancing of competition and non-competition interests under BERs has changed over the enforcement periods. This section shows that until the end of the third enforcement period, BERs were based on a formalistic analysis. Yet, most of the BERs adopted since then reflect an effects-based approach. In fact, this shift planted the first seeds for the advent of an effects-based approach in all other areas of EU competition law.872

The application of the early BERs warranted a formalistic and relatively straightforward examination. The first BER on Distribution Agreements essentially centred on the form of an agreement. The exemption was dependent on whether an agreement contained certain provisions and omitted others.873 This approach also guided the BERs replacing and supplementing the first

872 (Whish 2000), 887; (Sufrin 2006), 932-933; (Monti 2007), 357; (Goyder 2009), 209-210; (Jones 2010), 787-788; (Gerard 2012), 25-29.
873 Regulation 67/67 on Distribution Agreements. Also see (Monti 2007), 357; (Goyder 2009), 209-210.
BER. Each BER included a detailed list of what could be included in an agreement without infringing Article 101(1) TFEU ("white provisions"), restrictions that could be exempted by the BER ("grey restrictions"), and restrictions that would cause the BER to lose its effect ("black restrictions").

This formalistic “pigeonholing” approach was well-suited to achieve the administrative motivation of the BERs. It allowed the Commission to quickly review a large number of agreements without overtaking an in-depth competition analysis. It also provided undertakings with legal certainty. Yet, this approach was also condemned as arbitrary. In a seminal 1995 article, Hawk argued that this approach forced undertakings to alter their agreements to comply with the forms permitted by the BERs in a manner that benefitted neither themselves nor their consumers. Pointing to what would later be described as the “straitjacket effect”, he argued that the BERs limited the structures of distribution in the EU while ignoring the changing commercial and technological realities. Hawk’s line of criticism was widely accepted by practitioners, scholars, and members of the industry alike. By the late 1990s, it was also accepted by the Commission itself. In its 1998 policy report, the Commission acknowledged the need to modernise the BERs.

A year later, the Commission introduced Regulation 2790/99 on Vertical Agreements, replacing a number of earlier BERs. The new BER covered all types of vertical agreements and followed an effects-based approach. Accordingly, an exemption became dependent on the market power held by the undertakings rather than on the form of the agreement. In the Commission’s words: “there should be a single and very broad block exemption regulation covering all vertical restrictions of competition in respect of all intermediate and finished goods and all services. A limited number of restrictions would be excluded, such as price-fixing agreements for example. These would form a ‘black list’ of clauses that were not exempted by the regulation. The regulation would not seek to list the clauses that were exempted, as is done in the block exemption regulations currently in force, and this would immediately remove the

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874 Regulation 1983/83 on Exclusive Distribution; Regulation 1984/84 on Exclusive Purchasing; Regulation 4087/88 on Franchising Agreements.
875 (Monti 2007), 357; (Goyder 2009), 209-210.
876 As described by (Hawk 1995), 984.
877 (Whish 2000), 887; (Sufrin 2006), 932-933; (Monti 2007), 357; (Goyder 2009), 209-210; (Gerard 2012), 25-29.
878 (Hawk 1995).
879 Policy report 1996, 31; Policy report 1999, 8; (Whish 2000), 887; (Sufrin 2006), 932-933; (Monti 2007), 357; (Goyder 2009), 209-210; (Gerard 2012), 25-29.
The straitjacket effect associated with the present white lists, which incite firms to force their agreements into a mould provided by the relevant block exemption regulation.881

The Commission’s new effects-based approach was an essential pillar in the overall modernisation of EU competition law. At the substantive level, it marked a shift from a form-based to an effects-based approach. At the procedural level, it was the first step towards diminishing the notification regime. The Vertical BER was the first to dispense with the obligation of prior notification in all vertical agreements covered by the BER.882 This model was followed by all subsequent general BERs. It was also extended to some, but not all, of the new sectoral BERs.883

The modernisation of the BERs is summarised in Figure 4.4. The figure indicates the number of form-based and effects-based BERs invoked (blue and red lines, respectively) and accepted (triangles and crosses, respectively).

![Figure 4.4: Form and effect-based BERs, Commission](image)

All Article 101 TFEU proceedings rendered by the Commission, excluding comfort letters. In some cases, more than one BER was invoked.

The figure highlights that formalistic BERs were invoked much more frequently compared to effects-based BERs and were also accepted more often. This could be partially explained by the findings in Figure 4.1 above, reporting a general decline in the number of BERs invoked and accepted following the entry into force of Regulation 1/2003. According to this reasoning, the lower invocation and acceptance rates of the effects-based BERs is connected to the change in the enforcement regime rather than the BERs characteristics.

882 See Policy report 1999, 8, 29.
883 See Annex C.
However, these findings could also indicate that the effects-based approach did not significantly impede the legal certainty of those BERs. The period between the adoption of the effects-based Vertical BER and the entry into force of Regulation 1/2003 (i.e. 1999 to April 2004) was characterised by an increase in the total number of Article 101 TFEU proceedings (see Figure 4.1) and a drop in the invocation rate of effects-based BERs (see Figure 4.4). In other words, it seems that undertakings were generally capable of self-assessing their conduct and complying with the requirements of the effects-based BERs.

It should be noted that, although the modernisation of BERs increased the effectiveness of the BERs as a balancing tool, it cannot be denied that BERs still run counter to an effects-based approach. BERs inherently rely on formalistic categories of agreements and sectors, rather than on detailed economic case-by-case analyses of their effects. Hence, BERs are generally less effective in the protection of competition compared to Article 101(3) TFEU individual exceptions.

### 4.2. Questioning the theoretical justification of sectoral BERs

The modernisation of the BER has also marked a change in attitude towards sectoral BERs. Sectoral BERs had been increasingly criticised as a form of protectionism sheltering inefficient industries and firms and impeding market efficiency. By the end of the 1990s, the Commission (partly) accepted this criticism. As part of its more economic approach, and similar to its approach to BERs on state aid, it voiced concerns about the economic justification for sectoral BERs. Aiming to prevent “unjustified differentiation” between sectors, in 1999 the Commission combined various BERs that dealt with specific forms of vertical restraint into a single wide-ranging BER. The Commission further noted that the sector-specific rules for beer and petrol should be withdrawn, as the continuation of a special regime for those sectors “is not justified on economic or legal grounds.”

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884 (Marcos & Sanchez-Graells 2010), 199 and the reference there.
885 (Wesseling 2000), 40; (Marcos & Sanchez-Graells 2010), 200.
886 Regulation 800/2008 on State Aid General Block Exemption Regulation replaced by Regulation 651/2014. Also see (Deiberova & Nyssens 2009), 27.
889 For example, Regulation 1/2003 repealed the special procedural rules for transport agreements and broadened the Commission’s enforcement powers in that sector. In the area of maritime transport, Regulation 1419/2006 repealed Regulation 4056/86 in its entirety; in the area of inland transport,
2013, it finally held that there was no longer any need to keep the sector-specific regulations for this sector, and subjected it to the regular competition rules.\textsuperscript{890} Similarly, in 2016, the Commission decided not to extend the Insurance BER when it expired in March 2017.\textsuperscript{891}

One exception to this trend is the motor vehicle sector, which still benefits from a sector-specific BER.\textsuperscript{892} The Commission decided to leave the special regime for the distribution of motor vehicles intact while consolidating all other types of vertical agreements into a single BER.\textsuperscript{893}

4.3. \textbf{Interim conclusion}

The modernisation of the BERs was aimed at increasing their effectiveness. The effects-based approach to BERs is designed to focus the analysis on the agreement's effects on competition and economic welfare. In particular, the modernisation of BERs has led the Commission to abolish most sectoral BERs. This combination of the shift to an effects-based BER and the abolishment of the sectoral BERs has marked a move away from using BERs as a regulatory tool towards using them as a measure to ensure the uniform enforcement of competition rules across all sectors and type of agreements. At the same time, it cannot be denied that BERs still inherently run counter to an effects-based approach. Because they rely on formalistic categories of agreements and sectors, BERs provide for less effective balancing compared to Article 101(3) TFEU individual exceptions.

5. \textbf{NCAs AND NATIONAL COURTS}

5.1. \textbf{NCAs}

As in the case of Article 101(3) TFEU individual exceptions, Regulation 1/2003 has empowered NCAs to examine the applicability of the terms of BERs to specific agreements.\textsuperscript{894} As such, the NCAs have been entrusted with new balancing powers. In this context, one can distinguish

\begin{flushleft}
\textsuperscript{890} Regulation 169/2009, which repealed Regulation 1017/68, retained some sector specific exemptions. Similarly, while the Council's Enabling Regulation 487/2009, which repealed Regulation 3976/87, allowed for the issuance of BERs for air transport, no such Regulation was adopted. See Policy report 2004, 26; (Bailey & Whish 2015), 1022-1031.
\textsuperscript{891} Commission Press Release IP/13/122 of 19 February 2013.
\textsuperscript{892} Regulation 267/2010 on Insurance replacing Regulation 358/2003 on Insurance. This decision was based on the Commission’s Impact Assessment on the Insurance BERs (2016). Also see (Stancke 2017).
\textsuperscript{893} Regulation 461/2010 on Motor Vehicles replacing Regulations 123/85, 1475/95 and 1400/2002 on Motor Vehicles.
\textsuperscript{894} Prior to May 2004, BERs could only be applied by national courts.
\end{flushleft}
between three types of proceedings in which NCAs apply BERs: (i) mixed-cases in which they apply the EU BERs; (ii) purely national cases in which they apply the EU BERs; and (iii) national and mixed-cases in which they apply national BERs. Those three types of proceedings are summarised by Figure 4.5 and elaborated below.

Figure 4.5: BERs, NCAs

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895 Mixed-cases are proceedings involving the enforcement of Article 101 TFEU and the national equivalent provision. See Chapter 1, Section 3.2.1.
896 Cases involving only the enforcement of the national provision equivalent to Article 101 TFEU. See Chapter 1, Section 3.2.1.
In some proceedings, more than one BER was invoked.

5.1.1. EU and mixed-cases

First, NCAs apply the EU BERs in mixed-cases, i.e. when an agreement affects trade between Member States (green lines). The figure shows that the NCAs, like the Commission, have accepted BERs in only a relatively small number of proceedings (green triangles). This confirms the conclusion that the application of the BERs is clear, and that undertakings manage to self-assess their conduct.897

According to Regulation 1/2003, the application of the EU BERs in mixed-cases is subject to the same substantive rules that apply to the Commission.898 The empirical findings, however, illustrate that the NCAs did not always follow the Commission’s and EU Courts’ interpretations of the BERs. This was even evident in the application of general BERs which, as mentioned, leave the competition enforcers a relatively small margin of discretion to determine the scope of balancing.

The tension between the EU and German approaches in interpreting the Vertical BERs provides an illustrative example. In ASICS (2015, 2017), the German NCA had to determine whether the prohibition - imposed on distributors in a selective distribution system - forbidding participation in online price comparison tools had excluded the benefits of the Vertical BER.899 As mentioned in Section 3.2.2 above, the CJEU had engaged in teleological balancing (i.e. examining the objective of the BER) when examining similar questions in Pierre Fabre (2011) and Coty (2017). Accordingly, the CJEU held that a de facto ban on any online sale was

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897 See Section 2 above.
898 Regulation 1/2003, Preamble 10.
excluded from the BER (*Pierre Fabre*), whereas certain restrictions on specific kinds of online sale may benefit from the safe harbour (*Coty*).

Yet, the German NCA went even further, interpreting the BERs as prescribing a general balancing standard. Accordingly, it maintained that the decision of whether an agreement contained a hard-core restriction for the purpose of applying a BER must follow the same principles as classifying a by-object restriction.\(^{900}\) This entails a full competition analysis of the legal and economic background, including an assessment of whether the agreement was objectively necessary for the functioning of the distribution system. Based on such an analysis, the German NCA found that the prohibition against participating in online price comparison tools was excluded from the benefit of the BER.

The German NCA’s analysis was confirmed by the German courts.\(^{901}\) The decision of the German High Court in the matter was particularly remarkable because it was rendered one week after the CJEU’s judgment in *Coty (2017)*. Admittedly, the precise scope of *Coty* is unclear from the judgment itself, for instance, whether its reasoning can be extended to non-luxury goods and other forms of online platform. Yet, the Commission and scholars had already pointed out that the reasoning in *Coty* did not appear to be limited to specific product categories or particular market conditions. They noted that because one of the main purposes of a BER is to secure legal certainty about the validity of Article 101 TFEU, the assessment of hard-core restrictions should not depend on the product concerned or an analysis of the market conditions.\(^{902}\) Nevertheless, the German High Court did not accept this position and prescribed a full case-by-case analysis.\(^{903}\)

The above shows that diverging interpretations by the competition enforcers might hamper the function of BERs in ensuring the uniform and certain application of Article 101(3) TFEU balancing. This is another testament to the power of national courts to facilitate conflicting interpretations of balancing across the EU, as was already discussed in the previous chapter.\(^{904}\)

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900 On by-object restrictions, see Chapter 3, Section 5.3.2.
901 In April 2017, the German first instance court confirmed this decision in VI-Kart 13/15(V) ASICS (2017), para 91-107. In fact, it even denied granting leave for a second appeal, noting that this question was indisputable. In December 2017, the German High Court rejected an appeal against this refusal in KVZ 41/17 ASICS (2017), para 12-35. It held that it was beyond doubt that the prohibition amounted to a hard-core restriction in the meaning of the BER.
903 KVZ 41/17 ASICS (2017), para 12-35.
904 See Chapter 3, Section 6.5.
general balancing standard), the NCAs and national courts have impaired the consistent application of the BERs across the EU, and the undertakings’ ability to predict in advance the compatibility of their agreements with Article 101 TFEU.

5.1.2. Purely national cases

Second, NCAs apply EU BERs to purely national cases (blue lines). The normative value of EU BERs in purely national cases is not a matter of EU law. Some Member States, such as Germany, the Netherlands and the UK, have formally transported EU BERs into national law, so they apply mutatis mutandis to purely national cases. In France, EU BERs do not have any formal value. Yet, the French NCA and courts have used them as an “analytical guide” for competition analysis. Consequently, in practice, EU BERs direct the analysis of purely national cases in France.

5.1.3. National BERs

Finally, some Member States adopted national BERs in addition to the EU BERs. In some cases, the national BERs exempt the same type of conduct governed by the EU BERs (e.g. in Hungary and the UK). In other cases, national BERs extend beyond the substantive scope of the EU BERs. The latter BERs are a clear example of national balancing. In France, for instance, a national BER exempts anti-competitive agreements related to signs of quality and crisis situations in the agriculture sector. In the Netherlands, a national BER exempts retail cooperation, retail exclusivity agreements in shopping centres, and joint-bidding in the field of procurement. In the UK, a national BER exempts public transport ticketing schemes.

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905 German Competition Act, Article 2(2); Dutch Competition Act, Articles 12 and 13; UK Competition Act, Section 10(2).
906 05-D-48 Taximeters (2005), para 55; 05-D-32 Dry dog food (2005), para 184; 06-D-37 Cycle and cycle products (2006), para 313; 07-D-04 Jeff de Bruges chocolates (2007), para 85. This was approved by the Appeals Court in 2007/00370 Cycle and cycle products (2008).
909 French Decree no. 96-499 on Signs of Quality in the Agricultural Sector, French Decree no 96-500 on Adaptation Measures for Crisis Situations, Decree no 2007-1884 on Motor Vehicles Subsidiaries. Also see (Vogel 2012), 171-172; (Boudou et al. 2014), 109.
910 Dutch Decree Exempting Cooperation Agreements in Retail Trade (2014); Dutch Decree Exempting New Shopping Centres (1997). Policy rules of the Minister of Economic Affairs on Combination
According to the principle of primacy of EU law, national BERs cannot exempt otherwise prohibited agreements when such agreements affect trade between Member States.\footnote{Regulation 1/2003, Article 3. See Chapter 2, Section 3.3.2.} However, the empirical findings illustrate that the NCAs did not always respect this principle. In a small number of proceedings, the Hungarian NCA applied national BERs to mixed-cases.\footnote{For example, Vj-195/2007/129 Newspaper distribution II (2010), para 150; Vj-68/2011 Alt Cash Kft (2013), para 22.} In Distribution of tobacco products (2005), for example, the Hungarian NCA exempted an agreement under a national BER, while admitting that the agreement might affect trade between Member States. It maintained that it did not have to decide on the issue or assess the compatibility of the agreement with the comparable EU BER, as the exemption was requested by the undertakings that invoked the national BER.\footnote{Vj-154/2004/16 Distribution of tobacco products (2005), para 28.}

Perhaps even more importantly, the empirical findings confirm that the Member States have generally refrained from taking action against agreements in mixed-cases that could otherwise have been protected by a national BER. To this extent, the empirical findings prove that the NCAs rarely pursued agreements in mixed-cases when they could also have been covered by a national BER were it not for the circumstance that the agreement affected trade between Member States. In Paroxetine - IVAX/GSK agreement (2016), the UK NCA seemed to admit such practices. After finding that the agreement could have benefited from the national vertical BER, the NCA closed the proceedings, also with respect to Article 101 TFEU infringement, noting that the agreement was unlikely to restrict competition.\footnote{CE/9531-11 Paroxetine - IVAX/GSK agreement (2016) (case closure summary), para 2.}

The above supports the conclusion that, while national BERs do not formally affect balancing in mixed-cases, they may indeed have such an effect. This is yet another example of balancing by means of priority setting, which is further detailed in Chapter 8.

\footnote{Agreements (2013). Also see (Felső et al. 2007); (Holmes & Davey 2007, p.617), 617; (Pree & Molin 2013), 203.}
5.2. National courts

Figure 4.6 summarises the judicial review of the application of BERs by NCAs. This includes cases in which the application of BERs was examined (blue bars) and overturned (red bars) by national courts.

![Figure 4.6: BERs, national courts (May 2004-2017)](image)

All Article 101 TFEU proceedings in which BERs were invoked (EU and national BERs)

Like the EU Courts, the national courts examined only a few challenges to the NCAs’ application of BERs, and almost never overturned an NCAs’ decision. The small number of successful national challenges is an additional indication that the application of BERs is relatively certain, and has not generally posed legal difficulties.

Yet, the application of the BERs has raised a few legal uncertainty challenges. The German courts exempted two agreements despite the NCA’s conclusion that such agreements did not benefit from a BER. Notably, those two judgments related to the manner in which the German NCA defined the relevant market and, accordingly, calculated the market shares in effects-based BERs. This illustrates that effects-based BERs, which are guided by economic balancing (and are hence relatively effective), give rise to legal uncertainty concerns.

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916 See Section 2 above.
5.3. **Interim conclusion**

The empirical findings reveal some divergence in the national application of BERs. In particular, they show that NCAs and national courts have sometimes interpreted the BERs as offering a higher degree of discretion compared to the approach of the Commission and EU Courts. In addition, national BERs have sometimes directly or indirectly influenced the application of Article 101 TFEU in mixed-cases.

The section has demonstrated that national interpretations that reserve greater room for the consideration of non-competition interests not only jeopardise the uniformity and legal certainty of balancing, but may also impede the effectiveness of balancing under BERs by reserving greater room for non-competition interests.

6. **RELATIONSHIP BETWEEN BERs AND INDIVIDUAL EXEMPTIONS**

The function of BERs as a balancing tool must be understood in the wider context of Article 101 TFEU enforcement, namely, in connection with Article 101(3) TFEU individual exemptions. As mentioned, each BER is based on the assumption that all protected agreements satisfy “with sufficient certainty” the four conditions of Article 101(3) TFEU.\(^{918}\) As observed by the GC in *Tetra Pak (1990)*,\(^{919}\) one of the main purposes of a BER is to secure legal certainty for the parties of an agreement as to the validity of an agreement under Article 101 TFEU. Thus, the legal certainty of BERs as a balancing tool is heavily dependent on the robustness of this assumption.

The following sections illustrate that legal certainty is hampered when an individual exemption is granted after the benefit of a BER has been refused by a competition enforcer, or when the benefit of a BER is withdrawn. The empirical findings reveal that the legal certainty of balancing was impaired mainly due to the first situation, i.e. by accepting an individual exemption after a BER had been refused. Moreover, they show that the competition enforcers had divergent approaches to the application of Article 101(3) TFEU in those situations. By comparison, the competition enforcers rarely withdrew the benefits of a BER from a specific agreement.

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\(^{918}\) See, for example, Regulation 330/2010 on Vertical Restraints, Preamble 5; Regulation 2790/99 on Vertical Restraints, preamble 5; Regulation 1217/2010 on Research and Development, Preamble 7; Regulation 1218/2010 on Specialisation Agreements, Preamble 5; Regulation 772/2004 on Technology Transfer, Preamble 9; Regulation 267/2010 on Insurance, Preamble 8; Regulation 461/2010 on Motor Vehicles, Preamble 14.

\(^{919}\) T-51/89 Tetra Pak (1990), para 37, as recently repeated in the Commission’s Policy Brief on EU Competition Rules and the Marketplace (2018), 4.
6.1. Individual exemption granted after BER refused

In a number of proceedings, the competition enforcers granted an individual exemption after the benefit of a BER had been considered yet refused (e.g. by classifying the agreement as a hard-core restriction or as exceeding the market share threshold prescribed by the BER). This was particularly common in the Commission’s practice prior to modernisation.

Figure 4.7 summarises the number of the Commission’s Article 101 TFEU proceedings in which an individual exemption was granted after a benefit of a BER had been explicitly refused. It shows that, prior to May 2004, individual exemptions were mostly granted to agreements failing the terms of the vertical BERs (blue shaded bars), BERs related to technology (green shaded bars), or sectoral BERs (orange shaded bars).

The empirical findings demonstrate that this practice became rare following the entry into force of Regulation 1/2003. At the EU level, this situation was irrelevant since the Commission never accepted an Article 101(3) TFEU individual exemption following modernisation.920 Similarly, at the Member States level, the five NCAs scarcely ever found that the conditions of Article 101(3) individual exceptions had been fulfilled.921 The empirical findings reveal that only the French922 and Hungarian923 NCAs accepted an Article 101(3) TFEU individual exception after

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920 See Chapter 3, Section 2.
921 See Chapter 3, Section 6.1.
922 In 13-A-08 Network sharing and roaming (2013), after failing to meet the conditions of Regulation 1218/2010 on Specialisation Agreements.
denying the benefit of a BER. The limited number of cases in which individual exceptions were granted after the benefit of a BER had been refused could be an indication of the relatively high legal certainty of balancing under BERs. As pointed out by Faull and Nikpay, if a significant number of agreements that fail to meet the conditions of a BER fulfil the four conditions of Article 101(3) TFEU, the BER in question probably needs to be reformulated.\textsuperscript{924}

At the same time, the empirical findings indicate that the legal certainty and uniformity of balancing have been compromised by the Commission’s and NCAs’ different approaches to applying the four conditions of Article 101(3) TFEU in cases where an agreement could not benefit from a BER. They show that the competition enforcers essentially diverged in their interpretations regarding the following two questions:

First, in situations where an agreement fulfils almost all of the terms of a BER, but fails to meet a term that is linked to \textit{one condition of Article 101}(3) TFEU, is it sufficient to examine only the condition that denied the benefit of the BER, or is it necessary to assess all four conditions of Article 101(3) TFEU separately? For example, when assessing a vertical agreement that does not contain a hard-core restriction but is concluded between undertakings with a high market share, is it sufficient to examine only whether the agreement eliminates competition (the fourth condition of Article 101(3) TFEU) before granting an individual exemption?

Second, in situations where an agreement fails to meet the conditions of a BER because of a \textit{single provision in the agreement}, is it sufficient to examine whether that single provision can fulfil the conditions of Article 101(3) TFEU while assuming that the rest of the agreement is eligible for an individual exemption? This question relates to the severability of the BER. For example, when assessing a vertical agreement that cannot benefit from the Vertical BER due only to a non-compete obligation exceeding five years in length (a hard-core restriction), is it sufficient to assess the eligibility of the non-compete obligation with Article 101(3) TFEU conditions or should the entire agreement be examined?

Some competition enforcers have answered both questions in the negative. For example, the Commission Vertical Guidelines demand a full Article 101(3) TFEU analysis of an agreement


\textsuperscript{924} (Faull & Nikpay 2014), 310.
that does not satisfy all of the BER conditions (the first question),

or if certain provisions of the agreement do not meet the conditions of the BER (the second question). Similarly, the German NCAs’ decision in Pecuniary loss liability risks for auditors and chartered accountants (2008) stated that an agreement that could not benefit from the insurance BER because of the undertakings’ high market share would necessitate a full analysis of all four conditions of Article 101(3) TFEU. According to the German NCA, it could not be assumed that the first three conditions of the Article were fulfilled with reference to the BER. This approach limits the effects of BERs to the agreements that are fully exempted by them.

Other competition enforcers chose a different path. In Motor oils and lubricants (2009), the Hungarian NCA examined a distribution agreement that included non-compete and RPM clauses. The RPM clause, which was a hard-core restriction under the vertical BER, prevented the agreement from benefiting from the BER’s safe harbour. Yet, the NCA maintained that non-compete clauses that did not exceed five years in length were compatible with Article 101(3) TFEU. The Hungarian NCA did not fully examine all four conditions of Article 101(3) TFEU. Rather, it briefly noted that such clauses could automatically benefit from the BER in the absence of an RPM (the first question). Similarly, in British American Tobacco group (2006) the Hungarian NCA explained that, since BERs are based on the assumption that they apply to cases that satisfy all four conditions of Article 101(3) TFEU, it is generally enough to examine only the parts of the agreement that fail to fulfil the conditions of the BER. If those “excess” restrictions are not restrictive in and of themselves, the agreement could be exempted without further analysis (the second question). The Hungarian approach broadens the substantive effect of BERs. The BER balancing tool is also applied indirectly to agreements that are not directly covered by it.

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927 B4-31/05 Pecuniary loss liability risks for auditors and chartered accountants (2007), para 146. The decision was annulled (for various reasons) by the Düsseldorf Court of Appeals. See Section 5.2 above.
928 Vj-7/2008/178 Motor oils and lubricants (2009). This case was purely national. However, since the Hungarian vertical BER is based on its EU counterpart, the interpretation of the Hungarian BER could affect also the interpretation of the Hungarian NCA of the EU BER. Also see (Boronkay & Molnár 2009), 874.
931 (Boronkay & Molnár 2009), 873.
The differences between the Commission and the German NCA approach on the one hand and the Hungarian NCA approach on the other demonstrate how national interpretations can lead to different balancing practices. This could compromise the uniformity and legal certainty of balancing under Article 101(3) TFEU individual exemptions and BERs.

6.2. **Withdrawal of BERs**

Questions of uniformity and legal certainty can also arise when the Commission or NCAs decide to withdraw the benefits of a BER from a specific agreement.\(^{932}\) Such a withdrawal is appropriate when an agreement that fulfills the terms of a BER does not produce objective advantages that compensate for its negative effects on competition (i.e. an agreement between undertakings having a low market share but holding cumulative effect in parallel networks of similar agreements by competing suppliers or cases of buying power).\(^{933}\)

The empirical findings presented in Figure 4.1 above show that the Commission considered the withdrawal of BERs in only three proceedings. In *Langnese-Iglo (1992)*,\(^{934}\) it withdrew the benefit conferred by the Exclusive Purchasing Agreement BER from agreements requiring the German retailers Langnese and Scholler to purchase single-item ice cream for resale exclusively from the latter. The withdrawal was justified given the cumulative effects of the agreements.\(^{935}\) In the other two cases, the threat of withdrawal was sufficient to bring the infringement to an end.\(^{936}\)

Moreover, the empirical findings indicate that five NCAs did not use their powers to withdraw the benefits of BERs.\(^{937}\) This also reflects the practices of other NCAs.\(^{938}\) The German

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932 Regulation 1/2003, Article 29. Also see Commission Article 101(3) Guidelines (2004), para 2 and 36. Prior modernisation, the possibility to withdraw the application of BERs was set in the Council’s Enabling Regulations. Regulation 1/2003 and the BERs adopted after Regulation 2790/99 on Vertical Restraints entrusted also the NCAs to withdraw the benefit of a BER in its Member State’s territory if they believe that an exemption is no longer appropriate. See Regulation 1/2003, Article 29(2); Modernisation White Paper (1999), para 95.

933 Ibid. Also see Policy report 1999, 25.


935 The withdrawal was upheld by the GC in T-7/93 Langnese-Iglo (1995), para 133-196 and the CJEU in C-279/95P Langnese-Iglo (1998), para 43-49. Yet the GC noted that the Commission had no legal basis to withdraw the benefit of the BER from future agreements (para 205-210).

936 In 33157 Eco System/Peugeot (1991), para 25 the Commission threatened to withdraw the benefit of the motor-vehicle BER from Peugeot's Belgian and Luxembourg dealer networks; In 31043 Tetra Pak I (1988), para 53, the Commission considered withdrawing the benefits of the patent licensing BER from the exclusive license agreement between Tetra Pak and the BTG. The decision was upheld by the GC in T-51/89 Tetra Pak I (1990).

937 Regulation 1/2003, Article 29(2). In 06-D-11 Turbo Europe (2006), the French NCA refused to withdraw a BER.
NCA considered withdrawing the benefits of the Vertical BER from the MFN clause in *HRS (2013)* but found this to be unnecessary because the market share of the undertakings was above 30% and could have not benefited from the BER. 939 This statement could be seen as a warning to other undertakings that such types of clauses will not be protected by the safe haven of the BER, at least not in Germany. 940

The very limited use of the competition enforcers’ power to withdraw the benefits of the BERs fosters the legal certainty of balancing by BERs, and, indirectly, also the uniformity between enforcers. Accordingly, undertakings can be assured that they are protected by the safe haven of a BER if their agreements fulfil its conditions. Yet, the legal certainty and uniformity of the BERs should not be overestimated. As mentioned, in some cases, the competition enforcers used their discretion to interpret and apply BERs to change the substantive scope of balancing under the BERs.

7. **Normative Benchmarks**

BERs, by their very nature, are directed at promoting the uniformity and legal certainty of enforcement. 941 At the same time, this chapter has submitted that they have also served as a means to account for non-competition interests. In this context, the chapter has pointed to a trade-off, following modernisation, between the increased effectiveness of BERs in the protection of competition interests, and reduced uniformity and legal certainty.

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938 According to the national reports presented at the XXIII FIDE Congress in 2008, none of the NCAs withdrew the benefit of a BER, either on the basis of Regulation 1/2003 or the equivalent domestic provisions (see in Marcos & Sanchez-Graells, 2010), 197). Also see (Bailey & Whish 2015), 711.


940 On MFN clauses, see Chapter 3, Section 6.3.1.

941 Article 103(2)(b) TFEU provides that the BER shall be designed in particular to “to lay down detailed rules for the application of Article 101(3), taking into account the need to ensure effective supervision on the one hand, and to simplify administration to the greatest possible extent on the other”. Also see White Paper on Modernisation, para 9, 29; (Marcos & Sanchez-Graells 2010), 187.
7.1. Effectiveness

In the past, BERs were heavily criticised as policy-driven, regulatory balancing tools that did not effectively protect competition interests. This line of criticism was particularly prominent prior to the modernisation of BERs in the late 1990s. Older BERs and especially sectoral BERs were considered highly political. Both their adoption process, as well as their application, left significant room for the consideration of broad non-economic benefits. BERs could exclude the application of Article 101 TFEU from certain agreements on the basis of non-competition interests, in a manner that was not subject to a case-specific analysis. As such, BERs were rightly seen as a form of protectionism serving as an instrument with a regulatory character.\textsuperscript{942}

BERs are still criticised as a “fossilised” administrative device. The use of exclusions of certain categories of agreements and sectors, rather than a detailed economic case-by-case balancing process, inherently runs counter to an effects-based approach. It endangers the consistent enforcement of EU competition law across all sectors of the economy.\textsuperscript{943}

The switch to an effects-based approach and the abolishment of most of the sectoral BERs was aimed at increasing their effectiveness. This refocused the BERs to emphasise the protection of agreements that have little or no effect on competition or which generate economic benefits.\textsuperscript{944}

While BERs are still based on a balancing process involving exclusion, the economics-based analysis entails a case-specific examination of the effects of an agreement. This has been especially true when the competition enforcers have interpreted BERs as prescribing only general

\textsuperscript{942} See Sections 3.1, 3.2.3, 4 above.
\textsuperscript{943} See Chapter 3, Section 7.1.
\textsuperscript{944} See Section 4.1 above.
balancing standards, which require a detailed, economic balancing process. For example, the interpretation of BERs by the CJEU in Pierre Fabre (2011) and Coty (2017) and the German NCA and courts, draws the balancing process under BERs closer to the analysis of Article 101(3) individual exemptions. The next section shows that, while this interpretation increases the effectiveness of balancing, it reduces its uniformity and legal certainty.

7.2. Uniformity and legal certainty

BERs provide a pre-determined, explicit balancing tool that is intended to promote legal certainty and uniformity. They outline transparent and predictable balancing rules, which require relatively limited discretion. As such, BERs allow for consistent balancing across the EU. Nevertheless, BERs raise two sets of questions with respect to the uniformity and legal certainty of balancing.

The first set of questions relates to the application of BERs. The empirical findings have demonstrated that BERs have been discussed in a relatively small number of proceedings and challenges before EU and national courts, suggesting that undertakings have managed to self-assess their behaviour correctly. At the same time, the transformation from form-based to effects-based BERs has granted the competition enforcers greater discretion to balance. This chapter has shown that, in certain cases, the competition enforcers have interpreted the BERs as setting general balancing standards rather than precise balancing tools. This has also opened the door to national influence on balancing. Consequently, the understanding of BERs as general balancing standards has rendered their application less predictable and facilitated inconsistent interpretations.

The second set of questions relates to the relationship between BERs and individual exceptions. Namely, has the possibility to withdraw the application of a BER, or to grant an individual exemption to an agreement that has failed to meet the conditions of a BER, hampered legal certainty or uniformity. The empirical findings imply that this aspect has had only little effect in practice. Section 6 above has shown that the benefits of BERs have almost never been withdrawn. Similarly, only in a limited number of cases have individual exceptions been granted after the benefit of a BER was refused. Thus, the reliance on BERs has mostly served as a good indicator of the compatibility of an agreement with Article 101 TFEU. Altogether, therefore, it seems that BERs have been largely successful at ensuring uniformity and legal certainty.

945 See Section 3.2.2 above.
946 See Sections 5.1.1 and 5.2 above, respectively.
947 See Sections 2 and 5.1.1 above.