Coding non-competition interests under Article 101 TFEU

A quantitative and qualitative study

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Most of the balancing tools reviewed in this dissertation are based on EU primary or secondary law and were largely developed in the Commission’s case law and policy papers. In contrast, the balancing tools of Article 101(1) TFEU are predominantly derived from CJEU case law. This chapter shows that the CJEU introduced those tools to counterbalance the Commission’s broad interpretation of what constitutes a restriction of competition that falls within the scope of Article 101(1) TFEU. As elaborated below, the CJEU was of the opinion that agreements restricting the commercial freedom of parties can escape the prohibition of Article 101(1) TFEU if they are necessary for the attainment of social or efficiency related goals.

The empirical findings demonstrate that despite the CJEU’s efforts, the Commission made only little use of those balancing tools in practice and interpreted them narrowly. Furthermore, the CJEU did not establish one overarching concept to guide the assessment of Article 101(1) TFEU. Instead, it created numerous sector-specific or restriction-specific exceptions, which are applied on a case-by-case basis. The CJEU’s ad hoc approach, combined with the Commission’s refusal to make use of Article 101(1) TFEU tools, creates significant uncertainty as to the scope of and method for Article 101(1) TFEU balancing. Faced with these uncertainties, the Commission, NCAs, and EU and national courts have adopted inconsistent and conflicting balancing approaches.

This chapter is structured as follows: Section 1 introduces the balancing function of Article 101(1) TFEU. It demonstrates that the Article contains two categories of balancing tools: those directed at balancing state and public interests, and those directed at the attainment of commercial interests. Sections 2-3 elaborate on each of those two categories, respectively. Each section presents the surrounding legal background and the empirical findings on the EU Courts’ and the Commission’s application of the relevant balancing tools. Next, it discusses the balancing methods of the various balancing tools, and critically analyses their implications. Section 4 details the
practices of the various national enforcers. It points to the significant variation in the manner in which the NCAs and national courts have applied and interpreted those exceptions. Section 5 concludes by assessing the degree to which the application of Article 101(1) TFEU balancing tools has met the normative benchmarks.

1.1. Between a jurisdictional and a substantive provision

The possibility to take non-competition interests into account under Article 101(1) TFEU has been a subject of debate from the outset of EU competition law and continues to this day. The wording of the Article does not explicitly refer to a balancing function. It stipulates that “the following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market”.

The Commission has typically understood the Article as a jurisdictional provision. According to this view, Article 101(1) TFEU is designed to determine whether EU or national competition law applies, i.e. if the agreement could affect trade between Member States. The substantive competitive analysis and balancing, according to the Commission, should be confined to Article 101(3) TFEU. Consequently, the Commission has held that the prohibition dictated by Article 101(1) TFEU applies to almost any restriction imposed on the undertakings’ freedom of commercial action, which could then only be justified by Article 101(3) TFEU. As early as Grundig-Consten (1966), it explained that “the decisive criterion for the coming into force of the prohibition [...] consists of the finding that the agreement interferes with the freedom of action of the parties or with the position of third parties on the market”. In particular, Article 101(1) TFEU “applies virtually automatically to [...] agreements which establish absolute territorial protection for exclusive distributors. This point is central to Commission policy.”

This approach had a significant impact prior to modernisation. Under the enforcement regime of Regulation 17/62, the fact that an agreement fell under the scope of Article 101(1) TFEU not only meant that EU law applied; it also implied that only the Commission, which had a monopoly on

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948 (Odudu 2006), 101; (Goyder 2009), 110-114. Arguably, classifying an agreement as purely national might also be a form of balancing, since some Member States have unique balancing tools under national law. This is discussed in Chapter 6 and Chapter 8, Section 5.4.

949 Emphasis added. The Commission’s position was presented in the Report for the Hearing in appeal, in C-56/64 C-58/64 Grundig-Consten (1966), 326.
granting Article 101(3) TFEU exemptions, could carry out balancing. By classifying Article 101(1) TFEU as a jurisdictional provision, the Commission in effect barred the NCAs and national courts from engaging in balancing. Hence, interpreting Article 101(1) TFEU as “catching” as many agreements as possible was linked to the need to ensure effective and uniform balancing throughout the EU.950

The Commission’s approach was instantly met with fierce criticism.951 Using Article 101(1) TFEU as a jurisdictional provision conveyed the notion that all agreements had to be notified to the Commission, even when they had an insignificant effect on competition. The Commission was flooded with applications for Article 101(3) TFEU exemptions, creating a serious administrative backlog.952

This chapter shows that over the years the CJEU gradually attributed a substantive balancing function to Article 101(1) TFEU. While the Court endorsed the Commission’s broad interpretation of the provision for the most part, it did introduce certain exceptions. In particular, the Court submitted that some forms of restriction of the rivalry between undertakings did not fall within the scope of Article 101(1) TFEU if they were necessary for attaining non-competition commercial or public interests.

Before presenting these types of exceptions, it should be emphasised that the differences between Article 101(1) and (3) TFEU balancing tools are still relevant today, post modernisation. It is true that, following modernisation, Article 101(1) TFEU no longer determines the actor applying EU competition law. The Commission, NCAs, and EU and national courts apply both Article 101(1) and (3) TFEU. However, two important differences remain.

First, from a substantive point of view, an agreement that benefits from an Article 101(1) TFEU exception does not necessarily fulfil the four conditions of Article 101(3) TFEU.953 This is particularly true when an exception is based on non-economic benefits. For example, cultural benefits that do not directly increase consumer welfare fail to meet the first condition of Article

950 Venit (2003), 577; Komninos (2005), 2-3. In addition, restrictions on the commercial freedom of undertakings were also seen as harmful to market integration. A broad interpretation of Article 101(1) TFEU allowed the Commission to control agreements that hindered market integration, irrespective of the actual impact on competition interests. See Odudu (2006), 89-99.


952 See Chapter 2, Section 3.2.

101(3) TFEU (at least according to the Commission’s more economic approach following modernisation\textsuperscript{954}) but might justify an Article 101(1) TFEU exception. Similarly, an agreement that promotes environmental benefits but eliminates competition in the market fails the fourth condition of Article 101(3) TFEU but could be accepted under Article 101(1) TFEU.\textsuperscript{955}

Second, from a procedural point of view, the two balancing tools entail different burdens of proof.\textsuperscript{956} The burden of proving an infringement of Article 101(1) TFEU rests with the competition enforcer alleging the infringement. The burden of proving the conditions of Article 101(3) TFEU, on the other hand, rests with the undertakings concerned and often requires robust economic evidence.\textsuperscript{957} Therefore, proving Article 101(1) TFEU exceptions may be preferable from the point of view of the undertakings. Those two differences, as detailed below, affect the types of benefit that can be taken into account under Articles 101(1) and (3) TFEU, the applicable balancing method, and the intensity of control.

1.2. **Two categories of Article 101(1) TFEU balancing tools**

This chapter reveals that the CJEU has not developed a single, overreaching principle to guide Article 101(1) TFEU balancing. Instead, it has created \textit{ad hoc}, sector-specific or restriction-specific balancing tools. Established on an incremental case-by-case basis, those balancing tools overlap and at times even contradict each other.

In fact, the differences between the various Article 101(1) TFEU balancing tools were not always very clear. The competition enforcers were not always explicit on which balancing tool was used, and consequently, various scholars have often disagreed on the classification of the types of balancing tool used in certain cases. Therefore, the empirical findings presented in this chapter should be understood as representing the author’s interpretation, which aims to highlight the inconsistencies and theoretical flaws embodied in those balancing tools rather than to provide a precise depiction of their application in practice.

Despite the above, Article 101(1) TFEU balancing tools can be roughly divided into two categories according to their balancing function. The first category includes tools aimed at

\textsuperscript{954} See Chapter 3, Section 3.4.
\textsuperscript{955} The GC recently confirmed that Article 101(1) TFEU exceptions are not subject to proving the elimination of competition condition of Article 101(3) TFEU. See T-712/14 Watch Repair (2017), para 46 and 56.
\textsuperscript{956} Regulation 1/2003, Article 2 and Preamble 5. Also see (GCLC Annual Conference 2010), 15-21, 36.
\textsuperscript{957} On the burden of proof for an Article 101(3) TFEU exception, see Chapter 3, Section 4.4.1.
balancing competition interests with *state or public interests*. These balancing tools are used for agreements that are designed to realise a social or national goal or are the expression of state sovereignty. The second category includes tools for balancing competition and *commercial interests*. These balancing tools weigh competition against efficiencies that directly benefit consumers. The balancing tools under each of these two categories are summarised in Table 5.1.

**Table 5.1: Article 101(1) TFEU balancing tools**

<table>
<thead>
<tr>
<th>Balancing tool</th>
<th>Non-competition interests balanced</th>
<th>Leading cases</th>
<th>Balancing includes a proportionality test?</th>
</tr>
</thead>
<tbody>
<tr>
<td>Balancing between</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>competition and state</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>and public interests</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>State action</td>
<td>Regulated and liberalised markets</td>
<td><em>INNO</em> (1998); <em>Van Eycke</em> (1988); <em>Suiker-Unie</em> (1975); <em>Leclerc</em> (1985)</td>
<td>No</td>
</tr>
<tr>
<td>Undertaking definition</td>
<td>Social security schemes;</td>
<td><em>Höfner</em> (1991)</td>
<td>No</td>
</tr>
<tr>
<td></td>
<td>Regulated entities</td>
<td></td>
<td></td>
</tr>
<tr>
<td>106(2) TFEU</td>
<td>Liberalised markets</td>
<td><em>Flugreisen</em> (1989); <em>Eurovision systems</em> (1993, 1996)</td>
<td>Yes, limited to what is necessary for</td>
</tr>
<tr>
<td>Nature and purpose</td>
<td>Collective bargaining between</td>
<td><em>Albany</em> (1999); <em>Pavlov</em> (2000)</td>
<td>providing SGEI</td>
</tr>
<tr>
<td></td>
<td>employers and employees</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>associations</td>
<td></td>
<td>the proper practice of a profession</td>
</tr>
<tr>
<td>Balancing between</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>competition and</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>commercial interests</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Rule of reason</td>
<td>Pro and anticompetitive effects</td>
<td><em>Polypropylene</em> (1992); <em>Night Services</em> (1998); <em>Métropole</em> (2001)</td>
<td>Yes, balance of pro and anticompetitive</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>effects</td>
</tr>
<tr>
<td>Objectively necessary</td>
<td>Purchasing association; entry into</td>
<td><em>Société Technique Minière</em> (1966); <em>Gøttrup-Klim</em> (1994)</td>
<td>Yes, necessary for the existence of an</td>
</tr>
<tr>
<td>agreement</td>
<td>a new market</td>
<td></td>
<td>agreement of that type or that nature</td>
</tr>
<tr>
<td>Ancillary restraints</td>
<td>Non-compete clauses; selective</td>
<td><em>Métropole</em> (2001); <em>MasterCard</em> (2014)</td>
<td>Yes, necessary and proportionate to</td>
</tr>
<tr>
<td></td>
<td>distribution; franchising; horizontal cooperation</td>
<td></td>
<td>secure the benefits of a pro-competitive agreement</td>
</tr>
<tr>
<td>IPRs</td>
<td>Licensing agreement; sale of</td>
<td><em>Grundig-Consten</em> (1966)</td>
<td>Yes, doctrine of exhaustion</td>
</tr>
<tr>
<td></td>
<td>business involving IPRs</td>
<td></td>
<td></td>
</tr>
<tr>
<td>De minimis</td>
<td>SMEs; market integration; pension</td>
<td><em>Volk</em> (1969); <em>Expedia</em> (2012)</td>
<td>Yes, in some cases</td>
</tr>
<tr>
<td></td>
<td>funds; financial institutions;</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>sport</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

In addition to the exceptions listed in this table, the Treaties explicitly excludes certain sectors from the scope of EU competition rules.\(^958\) This includes trade in nuclear materials, arms, ammunition, war materials, and prior to the expiration of the ECSC Treaty in July 2002,

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\(^{958}\) On these types of exclusions, also see (Goyder 2009), 126-137; (Bailey & Whish 2015), 1017-1021.
also coal and steel agreements. The Treaties also enact special rules for the transport and agriculture sectors.\textsuperscript{959} Those types of exception are not discussed in this dissertation.

2. **BALANCING COMPETITION AND STATE OR PUBLIC INTERESTS**

2.1. **Legal and empirical background**

The first category of Article 101(1) TFEU balancing tools relates to the issue of whether, and how, the prohibition of Article 101 TFEU applies to agreements linked to state and public interests. The conduct of a state, like the conduct of a private undertaking, can potentially distort competition on the market. For instance, a national law might sacrifice competition in favour of protecting employment conditions or the environment. A state might choose to delegate certain powers to undertakings, which might in turn act in a manner that limits competition. This poses the question of whether Article 101 TFEU applies to an agreement that is the direct result of a state measure (e.g. law, regulation or the administrative use of public power), is influenced by a state, or substitutes a task that was previously performed by the state.

The structure of the EU Treaties seems to give a definitive answer to this question. The competition law chapter in the TFEU is divided into two sections: First, “rules applying to undertakings” (Articles 101-106 TFEU), and second, rules governing “aid granted by states” (Articles 107-109 TFEU). This structure suggests that the use of state power is subject to state aid rules, while Article 101 TFEU only controls the conduct of private undertakings.

The practices of the Commission and CJEU up until the third enforcement period (i.e. the late 1980s) reflected this divide. As elaborated below, they applied Article 101 TFEU exclusively to the conduct of private undertakings engaged in economic activity. In parallel, it was assumed that Member States pursue the advancement of public interests, and should therefore not be subject to the Article. The Member States, consequently, were competent to advance genuine public policies at the expense of competition.\textsuperscript{960} The launch of the SEA, however, blurred this divide.\textsuperscript{961} The EU and Member States delegated former public tasks to private undertakings, assuming that competition forces would advance the general welfare. In particular, the regulation of new sectors (e.g. banking), in combination with delegation, self-regulation, and

\textsuperscript{959} Articles 38-44 and 90-100 TFEU. On transport in EU competition law, also see (Goyder 2009), 131-137; (Faull & Nikpay 2014), 1779-1867; (Bailey & Whish 2015), 1022-1031; and Chapter 4, Section 3.2.3.
\textsuperscript{960} (Ibrahim 2015), 226; (Sauter 2016), 78.
\textsuperscript{961} (D. J. Gerber 1994), 137-138.
privatisation (e.g. in the transport, telecommunications, and energy markets) introduced market principles to what was previously perceived as public sectors of the economy. Accordingly, safeguarding the public interest was no longer seen as a monopoly of the state.\footnote{Wilks 1993), 276; (Wesseling 2000), 42-44; (Baquero Cruz 2007), 552; (Ibrahim 2015), 226.}

Chapter 3 illustrated that the Commission responded to these changes by expanding the scope of Article 101(3) TFEU to facilitate the consideration of non-economic benefits. Until the end of the third enforcement period (i.e. May 2004), the Commission used Article 101(3) TFEU to exempt certain anti-competitive agreements that promoted state or public interests. This section reveals that the CJEU has taken a different path to tackle the clashes between competition and public and social interests. Contrary to the Commission’s position, the CJEU’s preliminary rulings introduced various new tools to account for such considerations already within the scope of Article 101(1) TFEU. Figure 5.1 outlines the development of those balancing tools in CJEU preliminary rulings. It indicates the number of proceedings in which such balancing tools were discussed (red, green, orange, turquoise, purple and yellow bars), with reference to the total number of preliminary rulings concerning Article 101 TFEU (grey line).

\textbf{Figure 5.1: Article 101(1) TFEU - State or public interests, preliminary rulings}

\begin{figure}[h]
\centering
\includegraphics[width=\textwidth]{figure51.png}
\caption{Article 101(1) TFEU - State or public interests, preliminary rulings}
\end{figure}

This figure illustrates that the balancing of competition with state and public interests was frequently discussed in the preliminary rulings handed down since the late 1970s. As detailed...
below, the early balancing tools developed by the CJEU focused on examining whether an agreement was a genuine state measure and not a cartel in disguise (Article 106(2) TFEU, green bars; state action defence, red bars; and since the mid-1980s the notion of undertakings, orange bars). Those tools centred on assessing whether the agreement could be attributed to a state. They did not evaluate whether the restriction of competition was actually justified and proportionate. Towards the fourth enforcement period, however, the CJEU introduced new balancing tools and interpreted the old tools in a way that gave more weight to substantive balancing. This is reflected by the “nature and purpose” and inherent restriction exceptions introduced in the late 1990s and early 2000s, respectively (turquoise and purple bars).

Figure 5.2 depicts the application of those exceptions by the Commission and EU Courts in appeals. The figure highlights the number of proceedings in which one or more of those exceptions were discussed (blue line) and accepted (red, green, orange, turquoise, purple and yellow bars). With respect to the Courts, it also indicates the number of proceedings in which the previous instance’s decision accepting or rejecting an exception was overturned (red, green, orange, turquoise, purple and yellow crosses, corresponding to the colour of the relevant exception).

**Figure 5.2: Article 101(1) TFEU - State or public interests**

(a) Commission

![Graph showing the application of exceptions by the Commission and EU Courts](image-url)
The figure demonstrates that the Commission made limited use of the state or public interest balancing tools (a). Consequently, the EU Courts had only a few opportunities to review such tools (b and c). One clear exception is the state action defence. As the next section shows, the Commission interpreted this defence narrowly, accepting it only in a few cases (red bars). The EU Courts, on the other hand, accorded greater weight to the state’s influence and overturned some Commission decisions (red crosses).

The following sections examine in detail the development of the balancing principles guiding each of the state or public interests exceptions. Each section first explores the extent to which such an exception serves as a balancing tool, before discussing the balancing method.
2.2. State action defence (effet utile)963

2.2.1. Balancing tool

The first state and public interests exception is the state action defence. This legal doctrine originated in the US. The US Supreme Court held that states are shielded from federal antitrust laws when they engage in a bona fide exercise of their sovereign regulatory powers and that private entities are immune from antitrust liability when they act in furtherance of an articulated state policy and under active supervision.964

Unlike the US, there is no clear state action defence under EU law.965 On the contrary, as detailed in this section, the principle of primacy of EU law requires that the Member States not introduce or maintain in force legislative or regulatory measures that could render Article 101 TFEU ineffective. Nevertheless, in certain cases, the CJEU has approved national measures that limited the full application of the Article. This case law reflects a search for balancing.966 On the one hand, the CJEU has recognised that a state must be allowed to exercise its sovereign power to adopt measures that it deems justified for economic or social reasons, even if they conflict with EU competition law. On the other hand, the Court has also acknowledged that a state restraint might be as harmful to competition as a private restraint. Moreover, it has highlighted that such restrictions can only be tolerated if they are genuine state measures and not weakly regulated private agreements.967 This case law is complex and unclear, giving rise to much controversy on the limits of this exception under EU law.968

The first seeds of an EU state action defence were planted in the late 1970s. INNO (1977) concerned a Belgian law that required tobacco manufacturers and importers to fix their selling price. In answer to a request for a preliminary ruling, the CJEU held that Article 4(3) TEU, which prescribes that Member States shall “abstain from any measure which could jeopardise the

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963 The notion of "state action defence" is a US term. The comparable EU exception is often labelled as effet utile or the duty of sincere cooperation. Nevertheless, this dissertation uses the term state action defence since it encompasses a broad range of situations of state involvement, going beyond the legal source of Article 4(3) TEU. Moreover, some of the Member States’ rules are similar to the US version. As elaborated in Section 4.1.1 below, those national rules are not based on the legal sources that have guided the CJEU’s reasoning.

964 (Muris 2003), 546; (Gerard 2010), 203.
966 (Bailey & Whish 2015), 228.
968 On the EU defence see (Temple Lang 1989); (Gyselen 1989); (Castillo de la Torre 2005) (Baquero Cruz 2007); (Blomme 2007); (Gerard 2010), 203; (Bailey & Whish 2015), 227-233.
attainment of the objectives of the Treaty”, applies to the Treaty’s provisions on competition.\(^{969}\)

It explained that while it is true that the competition rules (in that case, Article 102 TFEU) are directed at undertakings, “the Treaty imposes a duty on Member States not to adopt or maintain in force any measure which could deprive that provision of its effectiveness”.\(^{970}\)

As Figure 5.1 and Figure 5.2 demonstrate, the EU state action defence gained importance only during the mid-1980s. Following a long line of cases in which Article 4(3) TEU was invoked to claim that a particular national law was unenforceable, the defence was restated at the beginning of the third enforcement period in *Van Eycke (1988)*. The CJEU stipulated that the *effet utile* of Article 101 TFEU could be compromised if a Member State either: (i) required or favoured the adoption of an anti-competitive agreement (ii) reinforced the effects thereof, or (iii) deprived its own regulation of its official character by delegating to private undertakings responsibility for taking decisions affecting the economic sphere.\(^{971}\) As the following sections show, those situations developed into three strands of exceptions, each subject to distinctive balancing methods and intensity of control. The CJEU did not establish an overriding principle to guide such exceptions. Conversely, the three strands were split into even smaller issue-specific-exceptions, overlapping and at times inconsistent with one another.

Before discussing those three strands, however, it should be noted that the empirical findings reveal that the EU Courts and the Commission often avoided applying the state action doctrine by dint of interpretation. They regularly solved tensions between Article 101 TFEU and state measures by holding that specific anti-competitive conduct went beyond what the state measure demanded.\(^{972}\) This approach was taken especially to settle politically sensitive issues such as restrictions of competition originating from national constitutions; international agreements; clashes between Article 101 TFEU and other provisions of the EU Treaties, the Charter of Fundamental Rights, or secondary law; and restrictions imposed by statutes governing the conduct of professional associations.\(^{973}\)

\(^{969}\) Case 13/77 INNO (1977), para 30.
\(^{970}\) Case 13/77 INNO (1977), para 31.
\(^{972}\) See Annex 5.1.
\(^{973}\) See Annex 5.2.
2.2.2. **Balancing method (1): state requiring or favouring anti-competitive agreements**

The first strand of cases in which the state action defence was examined dealt with similar situations as *INNO*, where an anti-competitive agreement was required or favoured by a national measure. The empirical findings illustrate that the EU Courts and Commission distinguished between three sub-types of such measures.\(^{974}\)

First, situations in which a binding state measure *required* undertakings to engage in anti-competitive conduct (state compulsion cases). The Commission and EU Courts interpreted this exception narrowly. They demanded a causal link between the state measure and the anti-competitive agreement, showing that the state measure left the undertakings no other choice but to engage in anti-competitive conduct. An exception could be granted only if the agreement was required, rather than merely permitted, by national legislation.\(^{975}\) Unsurprisingly, the empirical findings show that in light of this strict intensity of control, such a causal link could almost never be established.\(^{976}\)

Second, the Commission and EU Courts were more open to accepting agreements in situations in which a state measure left *no room for competitive autonomous conduct* on the part of undertakings (lack of autonomy cases).\(^{977}\) In those situations, the undertakings’ freedom of action was so restricted that the anti-competitive conduct could not be perceived as a meeting of the minds of the contracting undertakings.\(^{978}\) Thus, the exception did not apply when the undertakings’ autonomy was considerably restricted, but not limited.\(^{979}\)

The lack of autonomy principle was first formulated by the CJEU in *Suiker-Unie (1973, 1975)*. The Commission declared that sugar producers had agreed to share markets and rejected the claim that a tendering system introduced by the Italian authorities and the EU quotes system required such conduct.\(^{980}\) The CJEU, however, annulled the Commission’s decision. Rather than

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analysing the case on the basis of the state compulsion principle (i.e. examining whether the anti-competitive conduct was required by the state), it noted that the agreement escaped the prohibition of Article 101(1) TFEU since the regulatory framework left the undertakings almost no room to compete.\(^981\) Later, in *Ladbroke (1993, 1995, 1997)*, the CJEU clarified that the lack of autonomy exception is independent of the question of the compatibility of the state measure with Article 4(3) TEU. Overturning the GC’s decision, it maintained that state compulsion and lack of autonomy situations were two different types of exceptions.\(^982\)

The empirical findings summarised by Figure 5.2(b) reveal that the GC was active in scrutinising the Commission’s substantive evaluation of the undertakings’ autonomy. It applied a full merit review, finding on two occasions that the Commission had been wrong not to grant exceptions.\(^983\)

Third, in *Van Eycke (1988)* the CJEU stated that the *effet utile* of Article 101 TFEU could also be compromised in cases in which a state had merely favoured an anti-competitive agreement (non-legislative measures cases).\(^984\) The application of the state action defence to such conduct was first examined in *Asia Motor (1994, 1996, 1998)*, in which the Commission rejected a complaint alleging that importers of Japanese cars had fixed import quotes in France.\(^985\) On the basis of the lack of autonomy justification, it explained that the aforesaid conduct was an integral part of the French authorities’ policy, which set the total quantity of vehicles allowed into France each year and determined the rules for the allocation of that quantity. The importers thus had no commercial freedom of action. Yet, on appeal, the GC accepted the French authorities’ submission that the anti-competitive conduct was not imposed by a national *legislative* measure. It affirmed that in the absence of binding legislation, the Commission was entitled to reject the complaint “only if it appears on the basis of objective,

\(^981\) Cases 40 to 48, 50, 54 to 56, 111, 113-114/73 Suiker Unie (1975), para 65-73.
relevant and consistent evidence that that conduct was unilaterally imposed upon them by the national authorities through the exercise of *irresistible pressures*\(^\text{986}\).

It is unclear whether the CJEU accepted the GC’s reasoning. Although the CJEU upheld the GC’s judgment, it was not required to address the question of non-legislative measures.\(^\text{987}\) A year later, in *Polypropylene* (1999), the CJEU rejected on factual grounds a claim alleging “irresistible” pressure, noting that the decision was reached “without ascertaining whether irresistible pressure exerted by the authorities of a Member State can exclude an undertaking’s liability”.\(^\text{988}\) Since the CJEU did not directly address the matter, it is doubtful whether undertakings can escape liability where a state has favoured an anti-competitive agreement by means of a non-legislative measure. In any event, subsequent GC decisions have clarified that this exception is limited to exceptional circumstances. It noted that the fact that anti-competitive conduct was known or even fostered by a national authority had no bearing on the applicability of Article 101 TFEU and overturned the Commission’s decisions on this ground.\(^\text{989}\)

This strict control makes it extremely difficult to benefit from such an exception.

2.2.3. *Balancing method (2): state reinforcing an anti-competitive agreement*

The second strand of state action cases involved situations in which a state had merely reinforced the effects of a pre-existing agreement. The state involvement in those situations was weaker in comparison with the cases discussed in the previous section. A state does not *require* an anti-competitive agreement, but merely reinforces the effects of an existing agreement.

Paradoxically, despite the lesser state involvement, the CJEU had taken a more favourable approach towards state measures that reinforced a private agreement.\(^\text{990}\) In particular, it accepted a weaker causal link between the state measure and the anti-competitive agreement as compared to the causal link it required in state compulsion cases. In *Vlaamse Reisbureaus* (1987),\(^\text{991}\) for example, an ethics code of the national association of travel agents precluded agents from giving discounts by renouncing their commissions. The Belgium government transformed the code into a Royal Decree. The CJEU held that the decree reinforced a pre-existing agreement concluded in the

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989 See Annex 5.5.
990 The CJEU accepted the reinforcement defence in a small number of cases during the 1980s; see C-209/84 C-210/84 C-211/84 C-212/84 C-213/84 Asjes (1986), para 72; C-311/85 Vlaamse Reisbureaus (1987), para 9-17, 23; C-136/86 BNIC (1987), para 24-25; C-66/86 Flugreisen (1989), para 47-49.
sector, although it had not been established that the agreement was still in force at the time of the proceedings. In other words, it was sufficient that an agreement of that sort was the origin of the state measure in question, even if it was no longer operative.992

The different balancing tests applicable to the reinforcement cases are not supported by any theoretical justification. The CJEU applied different balancing tests and different levels of intensity of control to similar situations. This is an example of the inconsistency of state action exceptions, which will be further elaborated in the next section.

2.2.4. *Balancing method (3): delegation of state powers*

The third strand of state action defence cases expanded the *effet utile* doctrine to situations in which anti-competitive behaviour resulted from a delegation of public powers to private undertakings. This describes a scenario in which a state allows undertakings, such as regulated professional associations, to assume the state’s responsibility to interfere in markets.

This strand of delegation cases emerged from the CJEU’s preliminary ruling in *Leclerc (1985)*. A French distributor had challenged a French law that obliged national publishers and importers to fix retail prices for books. Applying the first two strands of the state action defence would have probably resulted in a finding that France had infringed Article 4(3) TEU by either requiring or reinforcing a price-fixing arrangement. That finding would have had the dramatic consequence of limiting the Member States’ law-making powers.

In light of the above, the Commission argued that Article 4(3) TEU could not be interpreted “as to deprive Member States of all power in the economic sphere by prohibiting them from interfering with free competition”. Rather, Article 101 TFEU should apply to Member States only in the exceptional circumstances of compulsion and reinforcement cases or when a state has “pursued the specific aim of enabling undertakings to circumvent the Community competition rules”.993 Thus, the Commission maintained that the French law should be considered solely in the light of the free movement rules that prohibit quantitative restrictions on imports.

The CJEU used different reasoning to achieve essentially the same outcome. It noted that the French law did not require concluding an agreement, but rather imposed a statutory obligation on the undertakings to fix prices unilaterally. Accordingly, “the question arises as to

992 As observed by Advocate General Tesauro in his opinion in C-2/91 Meng (1993), para 14. Also see (Bacon 1997), 284.
whether national legislation which renders corporate behaviour of the type prohibited by Article [101(1) TFEU] superfluous, by making the book publisher or importer responsible for freely fixing binding retail prices, detracts from the effectiveness of Article [101 TFEU].

The Court did not answer this question in Leclerc. Instead, it noted that the purely national systems and practices of the French law had not yet been made subject to EU competition policy. The Member State obligation under Article 4(3) TEU would thus not be “specific enough to preclude them from enacting legislation of the type at issue on competition in the retail prices of books”. Similarly, the Court circumvented comparable questions in a line of cases during the 1980s, in which a state had delegated its power to a body of experts operating on the basis of public interest criteria. The Court found that because those bodies were not undertakings or association of undertakings, the prohibition of Article 101(1) TFEU was inapplicable, irrespective of the state action defence.

From the 1990s onwards, the CJEU was confronted with more complicated cases in which it scrutinised the conduct of regulated professional associations in situations in which state powers had been delegated to so-called mixed bodies. Such mixed bodies were comprised of both representatives of the state and private undertakings and did not always adhere to public interest criteria. In those complex situations, the EU Courts and the Commission based their decisions on the nature of the state approval and the residual control exercised by the state. Accordingly, they found that conveying an opinion or a draft decision on the basis of public interest criteria did not constitute a delegation of powers. States were, however, prohibited from simply rubber-stamping anti-competitive agreements. They could not waive review or decisional powers and had to genuinely supervise the anti-competitive measure. Strikingly, the Court assessed neither the essence of the measure nor whether the act of delegation could actually help realise a public interest. Once it had been held that a state maintained some degree of control, the act of

997 See Annex 5.6. On the public interest criteria, see (Wendt 2012), 216-220.
delegation was almost automatically classified as compatible with Article 101 TFEU.999 This formalistic approach, the next section argues, is perhaps starting to change.

The above discussion illustrated that the EU state action defence had been developed on a case-by-case basis. Lacking a clear legal basis or rationale, this resulted in a set of inconsistent and ambiguous rules.1000 In particular, the first two strands of the state action defence, granting exceptions for agreements required or reinforced by a state measure, are based on a flawed conceptual premise. A state measure requiring or reinforcing an anti-competitive agreement purports to permit conduct that is prohibited by Article 101 TFEU. However, according to Article 101(2) TFEU, an agreement that infringes Article 101(1) TFEU is automatically void. Hence, from a conceptual basis, Article 101 TFEU should prohibit an anti-competitive agreement irrespective of state involvement in its adoption.

Moreover, the third delegation strand of the state action defence undermines the conceptual basis of the second reinforcement strand. The delegation strand prohibits a state from merely rubberstamping a private anti-competitive agreement. By analogy, this rationale implies that a private agreement that has only been reinforced by a state measure should be prohibited, too. Yet, the reinforcement strand removes such agreements from the scope of Article 101(1) TFEU. Consequently, agreements accepted under the reinforcement strand would have been prohibited if they had been examined under the delegation strand.

2.2.5. Modernising the state action defence

Commentators have criticised the three strands of the state action defence, as developed in CJEU case law, as being overly form-based.1001 On the one hand, the case law indicates that an otherwise anti-competitive agreement is automatically lawful if the undertakings have acted upon a state measure. This is true even when the state has accorded a private agreement the full force of law (reinforcement and delegation strands). On the other hand, an agreement is inevitably unlawful, regardless of its merits and possible benefits, when undertakings have not acted exclusively on the basis of a state measure. Therefore, some scholars have advocated for


1000 Also see (Joliet 1988), 187-188; (Bacon 1997), 284; (Baquero Cruz 2007), 587.

1001 (Baquero Cruz 2007), 587; (Gerard 2010), 204-205; (Sauter 2016), 78.
an effects-based test for the state action defence that focuses on whether a state measure actually contributes to attaining a public policy objective and is proportionate.\textsuperscript{1002}

The Commission embraced a similar approach following modernisation, at least in the delegation strand of cases. In its Report on Competition in Professional Services (2004), the Commission held that rules adopted by professional associations by an act of delegation are ultimately bound to a proportionality test. The rules must be objectively necessary to attain a clearly articulated and legitimate public interest objective and the least restrictive measure able to achieve such an objective.\textsuperscript{1003}

A relatively recent decision suggests that the CJEU has come around to such an approach. In \textit{API (2014)}, the Court examined an Italian decree entrusting a number of road transport activities to a mixed advisory body. The body was composed of the representatives of state authorities, associations of road transport operators and consumer associations, undertakings, and bodies in which the state held a majority stake. A committee comprised of ten members of the advisory body could fix minimum charges payable by consumers in order to ensure road safety.\textsuperscript{1004} The CJEU declared that the price-fixing arrangement was incompatible with Article 101 TFEU. Based on a formalistic delegation test, it observed that the committee was largely composed of representatives of private undertakings and that the state did not supervise the charge fixing. However, the Court also went on to examine whether the objective of the legislation, namely road safety, was likely to be achieved by the delegation of powers. It observed that the national legislation did not contain any procedural or substantive requirements to ensure that the committee would act as an arm of the state pursuing the public interest.\textsuperscript{1005} In other words, the Court not only examined the form of delegation but also scrutinised the substance of the rules adopted.\textsuperscript{1006}

Adding a proportionality test to the state action defence brings this exception closer to the inherent restriction exception, which will be discussed in Section 2.6 below. It shifts the focus away from measuring the degree of state influence over the adoption of an agreement to assessing its actual effect on competition and non-competition interests. This shifts the balancing process away from a formalistic, exclusion-based approval balancing process to a

\textsuperscript{1002} (Gerard 2010), 204-205; (Sauter 2016), 78.
\textsuperscript{1006} Also see (Lanza 2015), 195; (Sauter 2015), 4.
legal balancing process. It requires the competition enforcers to assess whether an anti-competitive agreement went beyond what was required to attain a non-competition interest and whether the claimed benefits exceeded the harm to competition.

While this development might have rendered the state action defence more effective in the protection of competition interests, the Court seemed to retreat to a formalistic approach in the two following preliminary rulings in which it examined the state action defence. In *Salumificio* (2016), the Court held that an Italian law setting minimum prices for road haulage services on the basis of operating costs fixed by the national administration after hearing the position of relevant trade associations had not infringed Article 101 TFEU. The decision focused on the act of delegation. The Court emphasised that the national administration had only heard the professional associations rather than delegated its public powers to the trade association.

Similarly, in *CHEZ* (2017), the CJEU examined a Bulgarian law setting minimum prices for legal services and prohibiting courts from ordering the reimbursement of fees at an amount lower than the minimum fee. The fees had been fixed by a professional body of lawyers. The Court held that the act of setting a minimum fee should not be regarded as state action since the law did not contain a specific criterion ensuring that the minimum fee was fair and justified in accordance with the public interest. Adhering to a form-based approach, the Court did not examine the actual criteria that had guided the price-setting by the professional body.

In sum, this section has shown that the state action defence is based on a complicated and often inconsistent balancing method. As such, it is an unpredictable balancing tool, leaving the competition enforcer ample discretion to strike a highly regulatory balance between competition interests and the level of state involvement in the economy.

### 2.3. **Article 106(2) TFEU**

#### 2.3.1. **Balancing tool**

Like the state action defence, Article 106(2) TFEU addresses the relationship between competition rules and a state measure, providing that undertakings entrusted with the operation of services of general economic interest ("SGEI") are subject to Article 101 TFEU only "insofar as the application of such rules does not obstruct the performance, in law or in fact, of

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1. On the types of balancing processes, see Chapter 1, Section 4.1.2.
the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Union”.

Article 106(2) TFEU was drafted as a political compromise between Member States advocating a more trade-oriented economy and those calling for various forms of state involvement. By allowing certain derogations from the competition rules, the Article seeks to reconcile the Member States’ interest in using undertakings as an instrument of economic or fiscal policy with the EU’s interest in ensuring compliance with competition rules and preservation of the unity of the common market. The political controversy surrounding SGEI also became evident during the discussions in the run-up to the Amsterdam Treaty. A proposal to amend Article 106(2) TFEU was rejected in favour of introducing a new policy-linking clause that expressly preserved Article 106 TFEU in light of the “place occupied by services of general economic interest in the shared values of the Union as well as their role in promoting social and territorial cohesion”.

Despite its political importance, Article 106(2) TFEU had an only limited function in conjunction with Article 101 TFEU cases. Figure 5.1 shows that Article 106(2) TFEU was seldom used before the mid-1980s, and was discussed in only a small number of CJEU preliminary rulings. Figure 5.2 further illustrates that the Commission and EU Courts on appeal never used this provision to justify an Article 101(1) TFEU exception.

2.3.2. Balancing method

In its early case law, the CJEU maintained that Article 106(2) TFEU was a specific application of the general principle of Article 4(3) TEU. This led commentators to argue that Article 106(2) TFEU was merely an expression of the principle of proportionality. Measures entrusting undertakings with

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1010 (Bailey & Whish 2015), 247-253; (Sauter 2016), 218-219.
1012 Article 14 TFEU provides that “given the place occupied by services of general economic interest in the shared values of the Union as well as their role in promoting social and territorial cohesion, the Union and the Member States, each within their respective powers and within the scope of application of the Treaties, shall take care that such services operate on the basis of principles and conditions, particularly economic and financial conditions, which enable them to fulfil their missions”. Also see Policy report 1997, 10; Commission Services of General Interest in Europe (2001), para 2; (Ross 2000), 22-38; (Bailey & Whish 2015), 249.
1013 Article 106(2) TFEU was accepted as a defence in a number of Article 102 TFEU cases. See (Bailey & Whish 2015), 252-253.
1014 The Commission and EU Courts mentioned the Article during the 1970s and at the beginning of the 1980s without a full analysis. See C-94/74 IGAV (1975), para 33-37; C-172/80 Züchner (1981), para 7-8; 28980 Pabst & Richarz/BNIA (1976), 5.
1015 Case 13/77 INNO (1977), para 42.
the operation of an SGEI were simply stated in lieu of granting a separate exception.\textsuperscript{1016} Notwithstanding this early interpretation, the empirical findings illustrate that the EU Courts later classified Article 106(2) TFEU and the state action defence as two different ways to escape the application of Article 101 TFEU. In fact, the EU Courts sometimes applied both exceptions separately. In 
\textit{Flugreisen (1989)}, for instance, the CJEU stated that a state measure that could not be accepted under Article 4(3) TEU might be justified under Article 106(2) TFEU.\textsuperscript{1017}

Accordingly, over the years the Commission and EU Courts have developed a separate set of Article 106(2) TFEU balancing tests based on the four cumulative conditions listed in the Article. First, the Article provides that an undertaking must be \textit{entrusted} with the operation of an SGEI.\textsuperscript{1018} The CJEU has clarified that the entrustment must take place by an act of a public authority.\textsuperscript{1019} The Commission has interpreted this condition particularly narrowly. The mere approval of an anti-competitive agreement by a Member State,\textsuperscript{1020} a legal act favouring such an agreement,\textsuperscript{1021} or a general regulation that does not refer to the specific task,\textsuperscript{1022} would not qualify as an act of entrustment.

Second, Article 106(2) TFEU is limited to the \textit{operation of a SGEI}. The notion of "service of general economic interest" is not defined by the EU Treaties. Member States enjoy a wide margin of discretion to decide what they regard as an SGEI, on the basis of their political and national preferences.\textsuperscript{1023} That notion can cover any service of an economic nature that is essential to the general public in a manner that justifies a degree of intervention by the public authorities to control the conditions under which it is provided.\textsuperscript{1024}

Third, the Article 106(2) TFEU exception applies \textit{only insofar} as the application of competition rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to the undertakings. This entails a proportionality test. According to the CJEU, Article 106(2) TFEU

\begin{footnotes}
\textsuperscript{1016} (Temple Lang 1989), 124-125, 130; (Chung 1995), 91.
\textsuperscript{1017} C-66/86 Flugreisen (1989), para 49, 54.
\textsuperscript{1018} The notion of an undertaking under both Articles 101 and 106(2) TFEU is identical. See C-475/99 Ambulanz Glöckner (2001), para 18-19; C-327/12 Ministero dello Sviluppo economico (2013), para 35.
\textsuperscript{1019} C-66/86 Flugreisen (1989), para 55.
\textsuperscript{1020} 30717 Uniform Eurocheques (1984), para 29-30. Also see Commission Services of General Interest in Europe (2001), para 22.
\textsuperscript{1022} 30979 31394 Decca Navigator System (1988), para 128-129.
\textsuperscript{1024} (Faull & Nikpay 2014), 847.
\end{footnotes}
applies only if the restriction is necessary to enable the undertaking to perform its task of general interest under economically acceptable conditions. The empirical findings show that failing this proportionality test has been the cause for rejecting many Article 106(2) TFEU claims. The EU Courts, and especially the Commission, were sceptical of claims that an anti-competitive agreement was necessary to enable an undertaking to carry out the task assigned to it.

Fourth, Article 106(2) TFEU provides that "[t]he development of trade must not be affected to such an extent as would be contrary to the interests of the Union". This condition is rather unclear in conjunction with Article 101 TFEU. Irrespective of Article 106(2) TFEU, Article 101 TFEU does not apply to an agreement that does not affect trade between Member States. Thus, this condition could be understood as demanding a more significant impact on inter-state trade compared to the level required for the enforcement of Article 101 TFEU. Alternatively, it could be regarded as a clarification of how the third proportionality condition should apply. In VIK-GVSt (1992), for instance, the Commission maintained that the proportionality of an anti-competitive agreement must be measured against the further development of the internal market, balancing the national and EU interests.

Moreover, it remains unclear which institution can apply the fourth condition. Although the CJEU has confirmed the direct effect of the first sentence of Article 106(2) TFEU, some scholars have argued that the application of the fourth condition of Article 106(2) TFEU lays within the exclusive competence of the Commission. This brings the Article 106(2) TFEU exception closer to the institutional enforcement setting of Article 101(3) TFEU under the old enforcement regime. Given the political sensitivity of the fourth condition, it is unsurprising that it has received so little attention in decisional practice. In fact, the empirical findings reveal that the competition enforcers have never rejected the application of Article 106(2) TFEU on that ground alone. Thus, the question of which institution can apply this fourth condition remains open.

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1026 See Annex 5.7.
1027 (Bailey & Whish 2015), 253.
1028 33151 33997 Jahrhundertvertrag VIK-GVSt (1992), para 29-30. Also see (Faull & Nikpay 2014), 864.
1030 (Faull & Nikpay 2014), 864; (Bailey & Whish 2015), 253.
1031 Yet, in 32732 Ijsselcentrale (1991), para 47 the Commission noted that even if the other conditions of Article 106(2) TFEU were fulfilled, an obstruction of imports and exports would not be acceptable in light of the EU’s efforts to achieve a single energy market.
In sum, Article 106(2) TFEU represents a Treaty-based exception on the basis of a legal proportionality test for balancing the harm to competition interests with state involvement in economic life. While this provision has been subject to heated political debate, it has hardly ever been used in practice to guide the balancing in Article 101 TFEU cases.

2.4. **Notion of undertakings**

2.4.1. *Balancing tool*

The interpretation of the notion of undertaking, in its meaning under Article 101(1) TFEU, is as another tool to balance state and public interests against the protection of competition. The CJEU has held that Article 101(1) TFEU only governs agreements and concerted practices between *undertakings or association of undertakings engaged in economic activity*. It does not apply to the conduct of public bodies exercising their public body prerogative.\(^{1032}\) This divide is based on the assumption that private economic actors normally pursue their own self-interest, while states aim to advance the public interest.\(^ {1033}\) Consequently, Article 101 TFEU does not apply to activities connected with the exercise of public powers.\(^ {1034}\)

As elaborated below, since the beginning of the 1990s, the CJEU has used the notion of undertakings as a balancing tool not only to exclude state measures from the scope of Article 101(1) TFEU but also to exclude the conduct of *private entities acting in the public interest*.\(^ {1035}\) In particular, it has been used to permit anti-competitive agreements between undertakings in regulated and liberalised markets carrying out activities that were previously performed by a state or that had a solidarity aspect or a redistribution function.\(^ {1036}\) Unlike the state action defence and Article 106(2) TFEU exceptions, the notion of undertakings is not exclusively dependent on an act of entrustment or derogation of state powers. Rather, the assessment centres on the function the entity performs. Accordingly, this exception has opened the door to accepting voluntary anti-competitive agreements between private entities aimed at pursuing non-competition interests.

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\(^{1032}\) Case 107/84 Commission v Germany (1985), para 14-15; C-30/87 Bodson (1988), para 18; C-364/92 SAT Fluggesellschaft (1994), para 30; C-343/95 Calì (1997), para 23; C-138/11 Compass-Datenbank (2012), para 36-38; Also see (Bailey & Whish 2015), 145-146.


\(^ {1034}\) C-30/87 Bodson (1988), para 18; C-343/95 Calì (1997), 23.


\(^ {1036}\) (Boeger 2007), 326-328; (Ibrahim 2015), 267; (Bradshaw 2016), 334.
In contrast to the CJEU’s approach, Figure 5.2(a) demonstrates that the Commission has almost never used the notion of undertakings for the purpose of balancing. A closer look at the Commission’s decisions from the 1970s up until the end of the 1990s shows that the Commission has categorically rejected the use of the balancing method relying on the notion of undertakings. On the contrary, it has emphasised that commercial activities of trade and professional associations are activities of an association of undertakings regardless of their statutes under national law.\textsuperscript{1037}

Nevertheless, the Commission has been more open to the use of the notion of undertakings as a balancing tool for sport-related agreements. In fact, the empirical findings show that \textit{Mouscron (1999)} and \textit{AMA (2009)}, both sport-related, were the only two cases in which the Commission has used this exception.\textsuperscript{1038} In other sport-related cases, the Commission referred to CJEU decisions in the field of free movement to explain that “purely sporting interest” (e.g. rules of matches and proper conduct; disciplinary actions; and anti-doping) are not economic in nature, while related economic activities (e.g. the sale of tickets for events and competitions, advertising and broadcasting contracts, the commercial exploitation of trademarks and merchandise) do involve the conduct of undertakings.\textsuperscript{1039} The Commission has held that if a sport association engages in some economic activity, even if secondary to its primary objectives, it could be considered an undertaking within the meaning of Article 101(1) TFEU.\textsuperscript{1040}

\textbf{2.4.2. Balancing method}

The notion of undertakings is not defined by the EU Treaties.\textsuperscript{1041} In \textit{Höfner (1991)}, the CJEU established the well-known formula according to which “the concept of an undertaking encompasses every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed”.\textsuperscript{1042} The CJEU used three criteria to differentiate

\begin{itemize}
\item \textsuperscript{1037} See Annex 5.8.
\item \textsuperscript{1038} 36851 Mouscron (1999); 39471 Certain joueur de tennis professionnel/Agence mondiale antidopage (2009), para 19-27. In other cases, the Commission accepted sport-related agreements by finding that they did not restrict competition. See Section 2.6.2 below.
\item \textsuperscript{1039} See Annex 5.9.
\item \textsuperscript{1040} 40208 International Skating Union’s Eligibility rules (2017), para 147.
\item \textsuperscript{1041} The notion of undertaking is defined in Article 1 of Protocol 22 EEA as “any entity carrying out activities of a commercial or economic nature”.
\item \textsuperscript{1042} C-41/90 Höfner (1991), para 21. The definition was originally given with respect to Article 102 TFEU, but was repeated also in the Article 101 TFEU context, see Annex 5.10.
\end{itemize}
economic from non-economic activities. As elaborated below, in some cases the criteria were used cumulatively, and in others as alternatives for an exception.\textsuperscript{1043}

The first criterion for defining an undertaking is the \textit{comparative markets criterion}. In Höfner, the CJEU submitted that employment procurement is economic in nature since it “\textit{has not always been, and is not necessarily}, carried out by public entities”.\textsuperscript{1044} In later case law involving the activities of professional associations, the CJEU replaced this with a more flexible standard. In \textit{Wouters (2002)}, for example, the Dutch bar association was classified as an undertaking since it did not exercise powers which are “\textit{typically} those of public authority”.\textsuperscript{1045}

The comparative markets criterion does not offer clear guidance in the event there is no fully competitive market in which a number of undertakings compete. In \textit{AOK (2004)}, groups of sickness funds had fixed the prices of medicinal products on the basis of German legislation aimed at fighting cost increases in the national statutory health insurance scheme. Because of the German legislation, the CJEU could not examine if the price fixing was an activity that was “necessarily” or “typically” performed by a public authority. Instead, the CJEU seemed to accept AG Jacobs’ position,\textsuperscript{1046} submitting that in such circumstances the question is whether the activity \textit{could, at least in principle}, be carried by private undertakings in order to make profits.\textsuperscript{1047} However, since almost any activity with economic importance could be carried out by private entities, the criterion could potentially cause a broad range of purely public measures to be classified as the operation of undertakings. This interpretation would essentially nullify the general principle that Article 101 TFEU does not apply to state measures.\textsuperscript{1048}

In light of the over-exclusiveness of the comparative markets criterion, at times the CJEU has used a second \textit{participation criterion} to decide whether a conduct was an economic activity. According to this standard, “any activity consisting in offering goods and services on a given market is an economic activity”,\textsuperscript{1049} while bodies having “an exclusively social function” are not

\begin{footnotesize}
\textsuperscript{1043} Opinion of AG Poiares Maduro in C-205/03P FENIN (2005), para 10-14. Also see (Wendt 2012), 91-92.
\textsuperscript{1046} Opinion of AG Jacobs in C-264/01 C-306/01 C-354/01 C-355/01 AOK Bundesverband (2003), para 27.
\textsuperscript{1047} C-264/01 C-306/01 C-354/01 C-355/01 AOK Bundesverband (2004), para 8, 54-56.
\textsuperscript{1048} Also see (Wendt 2012), 91.
\textsuperscript{1049} See Annex 5.11.
\end{footnotesize}
engaged in an economic activity. The CJEU explained that since EU competition law does not detract from the powers of the Member States to organise their social security systems, Article 101(1) TFEU does not apply when the social objective pursued by the scheme embodies the principle of solidarity. Solidarity, according to the Court, entails the redistribution of income between those who are better off and those who, in view of their resources and state of health, would be deprived of the necessary social cover. This participation criterion has guided the CJEU’s assessment of social security schemes, pension funds, old-age insurance, workers’ health and accident insurance, and, since the 2010s, also the conduct of professional associations. Thus, whereas by the comparative markets criterion the economic nature of the activity is only implicitly linked to participation in the market, the participation criterion focuses on the fact that the activity is carried out under market conditions.

In recent years, the CJEU has introduced a third state influence criterion, taking into account the exercise of state control for the classification as undertakings. In Kattner Stahlbau (2009) and AGR2 (2011), state control over the management of social security schemes was an indicator that the entity should not be classified as an undertaking. In the first decision, the CJEU found that the state influence was sufficiently great to take the conduct outside of the scope of Article 101(1) TFEU, while in the second case the state’s limited control indicated that the entity was an undertaking. The state influence criterion was also extended to examine regulations adopted by a professional association regulated by national law. In Ordem dos Técnicos Oficiais de Contas (2013), API (2014), and CHEZ (2017), the Court emphasised that the regulatory power vested in associations was not subject to any conditions or criteria, finding that the associations had acted as undertakings when adopting the regulation. On the other side of the same coin, in Salumificio (2016), the Court held that because the relevant national law required

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1050 C-159/91 C-160/91 Poucet (1993), para 18; C-264/01 C-306/01 C-354/01 C-355/01 AOK Bundesverband (2004), para 51, 58-59; C-350/07 Kattner Stahlbau (2009), para 66.
1051 C-159/91 C-160/91 Poucet (1993), para 6; C-218/00 Cisal (2002), para 31; C-264/01 C-306/01 C-354/01 C-355/01 AOK Bundesverband (2004), para 64; C-350/07 Kattner Stahlbau (2009), para 37, 53.
1052 See Annex 5.12 for a list of cases in which the Court classified schemes as based on the solidarity or capitalisation principles.
1053 See Annex 5.13.
1054 Also see (Faull & Nikpay 2014), 815-816.
1056 C-1/12 Ordem dos Técnicos Oficiais de Contas (2013), para 48-56, as later repeated in C-136/12 Consiglio nazionale dei geologi (2013), para 42-44; C 184/13 to C 187/13, C 194/13, C 195/13; C 208/1 API (2014), para 41; C-427/16 C-428/16 CHEZ (2017), para 49.
hearing the opinion of the professional association, the association had not acted as an association of undertakings in this regard.\footnote{1057}

Notably, the Commission’s approach did not converge with the above CJEU case law, which gave deference to the exercise of state control. In \textit{International Skating Union (2017)}, the Commission rejected a claim that the International Skating Union (ISU) and its members were not acting as undertakings when adopting rules related to the regulatory function of the ISU since such conduct was an inherent restriction that did not fall within the scope of Article 101(1) TFEU. Ignoring the recent CJEU case law, the Commission pointed out that the question of whether a decision of an association falls outside the scope of Article 101 TFEU is independent of the classification of its conduct, i.e. a decision of an association of undertakings.\footnote{1058} This is yet another example of the difference between the CJEU and the Commission approaches when applying Article 101(1) TFEU balancing tools.

Like the aforementioned strands of the state action defence,\footnote{1059} the conditions for the notion of undertakings exception are not based on a consistent rationale. For instance, the theoretical basis of the state influence criterion runs counter to the rationale underlying the first two criteria. The comparative markets and participation criteria are distinctively functional in nature. The classification as undertakings depends on the nature of the particular activity rather than the nature or statues of the actor.\footnote{1060} Such a classification is unrelated to the level of influence exerted by the state.\footnote{1061} The CJEU vindicated this approach by pointing out the need to avoid having the various Member States treat the same situation differently simply because an activity was formally classified as a public service in one Member State and as private in another.\footnote{1062} In contrast, the state influence criterion focuses on the nature of the actor. It recognises the right of Member States to delegate certain decision-making competencies without falling afoul of the \textit{effet utile} rule of Article 4(3) TEU.\footnote{1063} Situations that would not be accepted under the state action defence might fall outside the scope of Article 101(1) TFEU by

\begin{footnotes}
\footnotetext[1057]{C-121/16 Salumificio (2016), para 25-26.}
\footnotetext[1058]{See Section 2.2.4 above.}
\footnotetext[1059]{40208 International Skating Union’s Eligibility rules (2017), para 153.}
\footnotetext[1061]{\textit{C-180/98 C-181/98 C-182/98 C-183/98 C-184/98 C-185/98 Pavlov} (2000), para 54-55, 67-69. Also see \textit{(Odudu 2006), 24; (Sauter 2016), 76; (Kloosterhuis 2017), 121-122.}}
\footnotetext[1062]{(Sauter 2016), 81.}
\end{footnotes}
dint of the state influence criterion. This leaves the competition enforcers a wide margin of
discretion and could result in conflicting balancing outcomes.1064

This section has presented the inconsistencies between the various tests of the notion of undertakings, and between this balancing tool and other Article 101(1) TFEU exceptions. It has shown that the lack of a consistent rationale guiding the notion of undertakings has created much uncertainty as to the applicable law, making it difficult to predict the outcome of balancing in a specific case.

2.5. “Nature and purpose”: collective bargaining agreements

The previous sections have discussed exceptions that were based on the form of the agreement, namely on the premise that the conduct is related to the exercise or delegation of public powers. Those balancing tools are exclusive in nature. Once an agreement has been classified a public measure, Article 101(1) TFEU is inapplicable. The next two sections deal with forms of legal balancing processes which were introduced by the CJEU towards the end of the third enforcement period (the late 1990s).1065 In those cases, the promotion of a non-competition interest, in itself, justified granting an agreement an exception from the prohibition imposed by Article 101(1) TFEU. This section is dedicated to the “nature and purpose” exception, which is uniquely applicable to collective bargaining agreements, while Section 2.6 below examines the broader inherent restriction exception.

2.5.1. Balancing tool

Social security systems, negotiated through collective bargaining between employers and employee associations, serve an important social objective. They aim to improve working and employment conditions for the public interest and are protected by the Treaties and EU Charter of Fundamental Rights.1066 At the same time, those agreements cannot benefit from the notion of undertaking exception described in the previous section. The CJEU found that despite embodying elements of solidarity, those schemes were based on the principle of capitalisation.1067

1064 Also see (Boeger 2007), 320; (Ibrahim 2015), 267-268; (Kloosterhuis 2017), 117-118.
1065 On the differences between exclusion and legal balancing, see Chapter 1, Section 4.1.2.
1066 Article 151 and 152 TFEU and EU Charter on Fundamental Rights, Article 28. Also see C-219/97 Maatschappij Drijvende Bokken BV (1999), para 56-57; C-115/97 C-116/97 C-117/97 Brentjens’ Handelsonderneming BV (1999), para 56-57; C-67/96 Albany (1999), para 59-60; (Bradshaw 2016), 333.
1067 On the notion of undertaking, see Section 2.4 above. For a critique of the Court’s analysis, see (Bradshaw 2016).
Against this background, the CJEU developed an issue-specific exception governing such agreements. This “nature and purpose” exception dates back to the *Drijvende Bokken, Brentjens’ and Albany (1999)* trilogy. The Court explained that certain restrictions of competition are inherent to agreements between organisations representing employers and workers. According to the Court, the social objectives pursued by such agreements would be “seriously undermined” if they were subject to Article 101(1) TFEU. Therefore, it concluded that such agreements ought to be regarded “by virtue of their nature and purpose” as falling outside the scope of the Article.\\(^{1068}\)

### 2.5.2. Balancing method

The CJEU set two cumulative conditions for granting the “nature and purpose” exception.\\(^{1069}\) First, the agreement must be the result of collective bargaining between employers and employee organisations. Those types of agreements are protected by the policy-linking clause of Article 153 TFEU, which states that the Commission must promote close cooperation between Member States in the social field, particularly in matters relating to the right of association and collective bargaining between employers and workers (the “nature”). Second, the agreement must contribute to improving the working conditions of the employees (the “purpose”).

The scope and limits of this exception were assessed in *FNV (2014)*, in which the CJEU examined a collective labour agreement of musicians who substituted for the members of an orchestra. The agreement was concluded pursuant to a Dutch law that allowed employer and employee associations to conclude collective labour agreements on behalf of employees as well as on behalf of independent service providers. The Court noted that although the substitute workers performed the same services as employees, they should nonetheless be classified as undertakings. This led the Court to determine that the employer and employee organisations had acted as associations of undertakings when negotiating the agreements for the substitute workers. Hence, the agreement failed the first “nature” condition.\\(^{1070}\) Notably, despite what could have been seen as a highly formalistic approach, the CJEU added that the exception

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**Notes:**


would apply if the substitute workers were “false self-employed”, i.e. functionally comparable to employees.\textsuperscript{1071}

To justify its position, the Court invoked the legal protections granted by the Treaties to collective bargaining between employers and employees. It emphasised that, on the contrary, the Treaties did not encourage self-employed service providers to open a dialogue with the employers to whom they provide their services.\textsuperscript{1072} Hence, the Court limited this exception to agreements promoting non-competition interests that are protected by the Treaty.\textsuperscript{1073} While there is no case law with respect to agreements pursuing non-competition interests outside the labour context, it might be possible to extend the “nature and purpose” exception to other non-competition interests covered by the policy-linking clauses.

\textit{FNV} reveals a theoretical inconsistency between the “nature and purpose” and notion of undertakings exceptions.\textsuperscript{1074} The judgment implies that the “nature and purpose” exception applies to collective bargaining between associations of employers and employees since they do not act as associations of undertakings for such purposes. However, if such an agreement were not concluded between undertakings, it would be granted an exception from Article 101(1) TFEU by virtue of the notion of undertakings exception. This renders the “nature and purpose” exception meaningless.

\textbf{2.6. Inherent restriction}

\textit{2.6.1. Balancing tool}

Like the “nature and purpose” exception, the inherent restriction exception is also based on a legal balancing process that weighs an agreement’s contribution to achieving a specific public interest against its harm to competition. It provides that Article 101(1) TFEU does not prohibit an anti-competitive agreement that is inherent and proportionate to the pursuit of a legitimate aim.

\textsuperscript{1071} C-413/13 FNV Kunsten Informatie en Media (2014), para 31-42. The Court explained that the status of “worker” within the meaning of EU law is irrespective of classifying a person as self-employed under national law, for tax, administrative or organisational purposes. The concept of “worker” under EU law entails that the person acts under the direction of his employer as regards, in particular, his freedom to choose the time, place and content of his work, does not share in the employer’s commercial risks, and forms an integral part of that employer’s undertaking, so forming an economic unit with that undertaking.

\textsuperscript{1072} C-413/13 FNV Kunsten Informatie en Media (2014), para 29.

\textsuperscript{1073} Also see (Witt 2016b), 285.

\textsuperscript{1074} (Bradshaw 2016), 320-321.
The case law on the inherent restriction exception is puzzling. The EU Courts and Commission have insisted that the pursuit of a legitimate non-competition interest could not justify, as such, an otherwise anti-competitive agreement. In the absence of specific legislation or a derogation of public authority powers, a private undertaking cannot sacrifice competition in favour of attaining a public aim. The inadequacy of a public measure to address the problems of a particular sector does not empower an undertaking to assume a public task. 1075 In such situations, an exception is confined to the four conditions of Article 101(3) TFEU. 1076 Such statements have been made, in particular, with reference to measures aimed at the alleviation of financial or structural crisis and financial security, consumer protection, health and safety, fight against illegal practices, anti-dumping, functioning of sport associations, social aims, and even measures alleging the promotion of competition or correction of market failures. 1077 However, as the next section reveals, the inherent restriction exception seems to do just that.

2.6.2. Balancing method

The origin of the inherent restriction exception is typically ascribed to the CJEU in Wouters (2002), yet the exception was actually introduced three years earlier by the Commission. EPI code of conduct (1999, 2001) concerned the code of the association of representatives of the European Patent Office (EPO). The Commission held that some of the code’s provisions fell outside the scope of Article 101(1) TFEU as they were necessary to avert misleading advertising, protect professional secrecy, and avoid conflicts of interest. It explained that even if the code could constitute a restriction of competition under other circumstances it was "necessary in the economic and legal context specific to the profession in question" to guarantee the representatives’ impartiality and to ensure the proper functioning of the EPO. 1078

The GC partly accepted and partially annulled the Commission’s findings, implicitly approving the exception. It highlighted the importance of the necessity test, pointing out that the applicant had not demonstrated that the provision of the code was “objectively necessary” to preserve the dignity and rules of conduct of the profession concerned. 1079

1075 T-217/03 T-245/03 French beef (2006), para 87.
1076 See Annex 5.14. Also see Figure 5.1, yellow bars.
1077 See Annex 5.15.
1078 36147 EPI code of conduct (1999), para 35.
1079 T-144/99 EPI code of conduct (2001), para 78.
The inherent restriction exception was first formalised by the CJEU preliminary ruling in *Wouters (2002)*, a case similar to *EPI code of conduct*. The CJEU reviewed a rule of the Dutch Bar association prohibiting a partnership between members of the Bar and other professions. The rule was adopted pursuant to a Dutch law that entrusted the Bar with the responsibility for adopting professional rules designed to ensure the proper practice of the legal profession.\(^{1080}\) The CJEU began by declaring that the Bar was an association of undertakings and that the rule could not be classified as a state measure. This statement was particularly important since the rule had not been notified to the Commission for the purpose of receiving an Article 101(3) TFEU exemption. According to the old enforcement regime of Regulation 17/62 in force at the time, this meant that the rule could not be exempted under Article 101(3) TFEU and should have automatically been deemed void pursuant to Article 101(2) TFEU if it had been found to be in breach of Article 101(1) TFEU.

In *Wouters*, the Court famously added that not every agreement that restricts the freedom of action of undertakings necessarily falls within the prohibition of Article 101(1) TFEU. Instead, the overall context must be examined. In particular, “account must be taken of its objectives, which are here connected with the need to make rules relating to organisation, qualifications, professional ethics, supervision and liability, in order to ensure that the ultimate consumers of legal services and the sound administration of justice are provided with the necessary guarantees in relation to integrity and experience”.\(^{1081}\) The CJEU explained that this exception is based on a three-step examination: First, whether the potentially anti-competitive measure *pursued a legitimate aim*; second, whether the restriction of competition was *inherent* to the pursuit of this aim; and third, whether the restriction was *proportionate*.

The CJEU concluded that the rule aimed to ensure compliance with the Bar’s professional conduct rules in light of the prevailing perception of the profession in the Netherlands. The Bar was entitled to consider that its members would not have been able to advise and represent their clients independently and in observance of strict professional secrecy if they had concluded partnerships with other professions.\(^{1082}\) Based on the above, the Court held that the

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\(^{1080}\) *Dutch Law on the Bar of 23 June 1952*, adopted pursuant to Article 134 of the Constitution of the Kingdom of the Netherlands.

\(^{1081}\) C-309/99 Wouters (2002), para 97.

Bar could reasonably make that consideration despite its restrictive effects and that the rule was necessary for the proper practice of the legal profession in the Netherlands. ¹⁰⁸³

Shortly after the CJEU defined the inherent restriction in *Wouters*, the Commission applied the exception in *Meca-Medina (2002)*. The Commission examined a complaint filed by two swimmers against anti-doping rules adopted by the International Olympic Committee and implemented by the International Swimming Federation. The swimmers alleged that the definition of doping and the threshold set for doping infringed Article 101 TFEU. The Commission, nevertheless, rejected the complaint. It agreed with the swimmers that such measures could impact the athletes’ freedom of action. Yet, by reference to *Wouters*, it observed that the anti-doping rules were necessary to ensure the integrity of sporting events and thus fell outside the scope of Article 101(1) TFEU. ¹⁰⁸⁴

On appeal, the GC applied the notion of undertakings rather than the inherent restriction exception to justify the rules. It noted that the anti-doping rules were purely sporting rules, which did not pursue any economic objective. ¹⁰⁸⁵ The CJEU, however, endorsed the Commission’s analysis. It began by noting that purely sporting rules could fall within the scope of Article 101 TFEU if adopted by undertakings. ¹⁰⁸⁶ Moreover, it agreed with the Commission that the anti-doping rules were inherent to the organisation and proper functioning of competitive sport and necessary by their very purpose ensuring healthy rivalry between athletes. ¹⁰⁸⁷

Remarkably, the Commission and CJEU accepted the sporting rules in *Meca-Medina* by reference to *Wouters*. Both cases were based on the same balancing method and reasoning. Yet, the empirical findings reveal that in subsequent cases the Commission and EU Courts were more open to accepting sporting rules than rules for professional associations. While they accepted almost all of the sporting rules in cases in which the exception was invoked, they refused to accept all of the professional association’s rules examined. ¹⁰⁸⁸ This was linked to the balancing method and intensity of control applied:

¹⁰⁸⁵ T-313/02 Meca-Medina and Majcen/IOC (2004), para 50-69. On the notion of undertakings and sporting rules, see Section 2.4.1 above.
¹⁰⁸⁸ See Annex 5.16. A favourable approach to sporting rules was also evident in applying the notion of undertaking exception, see Section 2.4.1 above. Interestingly, in C-427/16 C-428/16 CHEZ (2017),
First, the Commission and EU Courts applied a strict proportionality test to the professional association cases, asserting that the professional rules were disproportionate to achieving the alleged public interests.\textsuperscript{1089} The GC was particularly strict, requiring that the measure be the \textit{sole} possible method for attaining the non-competition interest.\textsuperscript{1090}

Second, the Commission often used alternative balancing tools to examine comparable situations. For example, the Commission’s decision in \textit{Meca-Medina} was clearly based on the inherent restriction exception.\textsuperscript{1091} Yet, on appeal, it argued that the reference to \textit{Wouters} was used only “in the alternative” “for the sake of completeness”, whereas the decision was based on the notion of undertaking exception.\textsuperscript{1092} Such an approach has also been evident in the Commission’s policy papers since modernisation. The exception is absent from the Commission Article 101(3) Guidelines (2004) and received only a little attention in other relevant policy papers.\textsuperscript{1093}

Third, the Commission and EU Courts added an additional condition for applying the exception to professional associations cases. In addition to the three conditions mentioned above, they held that the agreement must be \textit{required by national legislation}. In \textit{ONP (2010, 2014)}, for example, the Commission refused to accept foreclosure and price-fixing practices implemented by the French pharmacist association. The refusal was tied, \textit{inter alia}, to the fact that the anti-competitive behaviour was not part of any national legislation.\textsuperscript{1094} This condition was affirmed by the CJEU in \textit{API (2014)}, where a body mostly composed of representatives of the economic operators had fixed the prices of haulage services for hire and reward. The prices were fixed on the basis of an Italian law stating that such prices should not be lower than the minimum operating costs. The Court held that although it could not be ruled out that the protection of road safety may constitute a legitimate objective, fixing the minimum operating costs by such a body was not an appropriate means of attaining that objective. The CJEU highlighted that the legislation merely referred, in a general manner, to the protection of road safety, without establishing any link between the minimum operating costs and the

\begin{thebibliography}{100}
\bibitem{1089} 38549 Barème d’honoraires de l’Ordre des Architectes belges (2004), para 97-99; T-451/08 CISAC (2013), para 92; C-1/12 Ordem dos Técnicos Oficiais de Contas (2013), para 93-100.
\bibitem{1090} T-451/08 CISAC (2013), para 92.
\bibitem{1091} As also clarified by the Commission in its Policy report 2002, 200.
\bibitem{1092} T-313/02 Meca-Medina and Majcen/IOC (2004), para 62.
\bibitem{1094} 39510 Ordre national des pharmaciens (ONP) (2010), para 684-691. The GC confirmed the Commission’s position in this regard in T-90/11 Labco/ONP (2014), para 44, 162.
\end{thebibliography}
improvement of road safety. Such legislation would only have been appropriate if it genuinely reflected a concern to attain it in a consistent and systematic manner. 1095

While Wouters did not refer to the regulatory function of the Bar as a decisive factor in granting an exception, subsequent case law has limited the exception to private acts which are based on regulatory powers. This has introduced a new causal link requirement for the inherent restriction exception, similar to the link required for the state action defence. 1096 In comparison, such a causal link was not needed to justify an exception for sporting rules. 1097

2.7. Interim conclusion

This section has examined the balancing tools developed by the CJEU to balance non-competition interests related to state or public interests. It has shown that those balancing tools are not clearly based on Treaty provisions (with the exception of Article 106(2) TFEU). Rather, they were introduced by the CJEU on a case-by-case basis in response to the expansion of Article 101(1) TFEU’s reach to include agreements subject to state influence and in markets that were previously subject to such influence. Those balancing tools are based on exclusion and legal balancing processes and take into account broad non-economic benefits. They are not tied to economic assessment or principles. Beyond their limited effectiveness in protecting competition, this has also resulted in a complicated array of inconsistent and contradictory exceptions, lacking an underlying common rationale. 1098 In light of the above, it is not surprising that many of the preliminary rulings referred to the CJEU by national courts were dedicated to clarifying the scope of the state and public interest balancing tools (as reflected by Figure 5.1).

The uncertainty surrounding those balancing tools has been reinforced by the fact that the EU Courts’ case law and Commission’s policy papers have provided only general guidance on how to apply them. Moreover, the Commission has rarely applied those exceptions in practice, and its policy papers have advocated a narrow interpretation that limits their scope. Lacking a definitive method for their application, they leave the competition enforcers an exceptionally large margin of discretion.

1096 See Section 2.2 above.
1097 The sports associations were not regulatory bodies. While it can be argued that the International Olympic Committee in Meca-Medina was a semi-regulatory body governed by public international law, it is clear that the Court did not focus on the idea that the measure was a regulated activity of a Member State. Also see (Townley 2009), 133-134.
1098 (Gyselen 1989), 54-60; (Chung 1995), 1-5; (Bacon 1997), 284; (Gyselen 2002), 2-3; (Schepel 2002), 38; (Baquero Cruz 2007), 587.
3. BALANCING COMPETITION AND COMMERCIAL INTERESTS

3.1. Legal and empirical background

The prior sections have examined cases in which competition interests clashed with state powers or public interests. This section moves to examine another category of Article 101(1) TFEU balancing tools. It covers situations in which the realisation of an efficient market outcome – such as facilitating certain types of commercial transactions, economies of scale and scope, or technological advancements – were taken into account to limit the application of the Article.

This category of balancing tools is tied to the notion of “restriction of competition” within the meaning of Article 101(1) TFEU. As mentioned in the opening of this chapter, it is unclear what kind of restrictions on undertakings’ commercial freedom fall within the scope of the Article. The Commission has traditionally taken the view that almost any restraint on commercial freedom infringes Article 101(1) TFEU. Yet, the CJEU and various scholars have argued that the Article should include a substantive balancing element, namely that Article 101(1) TFEU does not prohibit restrictions that are necessary and proportionate to the attainment of a commercial purpose.\(^\text{1099}\)

Ascribing this balancing function to Article 101(1) TFEU was heavily influenced by the US “rule of reason” concept.\(^\text{1100}\) The US Supreme Court has held that the notion of “restriction of trade” in the Sherman Act does not prohibit all restraints on trade - only undue or unreasonable ones.\(^\text{1101}\) The American case law has distinguished between two types of restriction: \(\textit{per se}\) restrictions, which are always prohibited irrespective of their effect on competition and cannot be justified; other restrictions are examined under the “rule of reason”. This merits a full effects analysis, including weighing the agreement’s pro- and anti-competitive effects.

This section shows that a fully-fledged rule of reason has not been accepted under Article 101(1) TFEU. At the same time, the CJEU has introduced weaker versions of the rule in the form of objectively necessary agreements, ancillary restraints, the doctrine of exhaustion for

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\(^{1099}\) See Section 1.1 above.

\(^{1100}\) For detailed analysis see (Whish & Sufrin 1987), 5-8; (Black 1997), 145-161; (Wesseling 1999), 422-424; (Manzini 2002), 392-394; (Bailey & Whish 2015), 143-145.

\(^{1101}\) Standard Oil Co. of New Jersey v. United States, 221 U.S. 1 (1911).
IPRs, and the *de minimis* exceptions. Figure 5.3 presents the application of those balancing tools in the CJEU’s preliminary rulings. It indicates the number of proceedings in which the exceptions have been discussed (red, green, orange, turquoise, purple, yellow and blue bars) and the total number of Article 101 preliminary rulings (grey line).

**Figure 5.3: Article 101(1) TFEU - Attainment of efficient market outcome, preliminary rulings**

Figure 5.3 highlights the CJEU’s remarkable influence in developing these categories of exceptions. As elaborated below, in a relatively small number of cases, the CJEU has shaped various exceptions that have guided the balancing applied by the Commission, NCAs, and national courts.

Figure 5.4 outlines the use of these exceptions by the Commission and EU Courts in appeals. It presents the number of proceedings in which one or more exceptions were discussed (blue line) and accepted (bars). It also indicates the number of proceedings in which the EU Courts overturned the previous instance’s decision accepting or denying such exceptions (red, green, orange, turquoise, purple, yellow and blue crosses, corresponding to the colour of the relevant exception).
Figure 5.4: Article 101(1) TFEU - Attainment of efficient market outcome
(a) Commission

(b) GC

(c) CJEU
Figure 5.4(a) demonstrates that the Commission made only little use of those exceptions. As detailed below, despite criticism from the EU Courts, the Commission insisted that Article 101(3) TFEU should be the only forum for such balancing. In Bananas (2008), for example, the Commission asserted that once the anti-competitive object of an agreement was established, any efficiency-related considerations would be limited to the scope of Article 101(3) TFEU.

Figure 5.3 and Figure 5.4 illustrate that those balancing tools appear to have lost their weight since modernisation. Like Article 101(3) TFEU, they have received limited attention from the EU Courts and the Commission since May 2004 and have almost never been used to justify limiting the scope of the Article 101(1) TFEU prohibition.

The following sections detail the development of the balancing tools, the types of benefits examined, the balancing methods, and the intensity of control. They affirm that the differences in the Commission’s and Courts’ approaches, together with the sparing use of those exceptions since May 2004, has hindered achieving a clear approach to balancing.

3.2. EU rule of reason

The debate over the existence of a rule of reason in EU competition law dates back to Grundig-Consten (1966). The CJEU rejected the undertakings’ and the German Government’s plea for applying the rule in Article 101(1) TFEU. The Court acknowledged that, like its US counterpart, Article 101(1) TFEU refers to two types of restrictions of competition, by object and by effect. Yet, as shown by Chapter 3 Section 4.4.2, both types of restrictions can be exempted under Article 101(3) TFEU. In other words, there are no per se prohibitions under Article 101 TFEU.

Despite its initial rejection, over the years the CJEU has expressed a growing flexibility in applying Article 101(1) TFEU. This implies that it may have accepted a rule of reason. In Breeders’ rights (1982), for instance, it overturned the Commission by finding that an open exclusive license was compatible with Article 101(1) TFEU given “the specific nature of the products in question”. A few years later, in Pronuptia (1986), it held that a system of franchises did not fall within the prohibition of Article 101(1) TFEU since it was necessary for the operation of that commercial

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1102 39188 Bananas (2008), para 278, 282, 300-303.  
1103 See Chapter 3, Sections 3.1 and 5.1.  
1104 C-56/64 C-58/64 Grundig-Consten (1966), 342.  
1105 Also see C-136/86 BNIC (1987), para 20-21.  
1106 258/78 Breeders’ rights - maize seed (1982), para 58.  
format. In *Gøttrup-Klim (1994)*, a restrictive membership condition in a purchasing cooperative was granted an exception since it was necessary for the functioning of the cooperative.

During the 1990s, the EU Courts began to explicitly invoke the rule of reason concept. This was especially evident in the GC’s decisions that imported the US notion of *per se* restrictions into Article 101 TFEU. In *Polypropylene (1992)*, the GC explained that the fact that a restriction is listed under Article 101(1)(a) to (e) TFEU “precludes the application of a rule of reason, assuming such a rule to be applicable in Community competition law, since in that case it must be regarded as an infringement *per se* of the competition rules.” Later, in *Night Services (1998)*, it clarified that when applying Article 101 TFEU, account should be taken of the actual conditions under which an agreement functions “unless it is an agreement containing obvious restrictions of competition such as price-fixing, market-sharing or the control of outlets”. Pro-competitive effects could only be taken into account under Article 101(3) TFEU when examining such obvious restrictions.* This distinction was confirmed by the CJEU in *Polypropylene (1999)*.

The modernisation of EU competition law, however, found itself at a turning point when confronted with that approach to an EU-type rule of reason. The Commission’s Modernisation White Paper (1999) advocated a narrow reading of the EU Courts’ past judgments. First, the Commission maintained that the EU Courts had not established a rule of reason, but rather a more limited concept of ancillary restraints (which will be discussed in Section 3.4 below). According to the Commission, the Courts had accepted a rule of reason “to a limited extent” in the past. Yet, the structure of Article 101 TFEU prevents any greater use of this approach. If Article 101(1) TFEU were regularly used to balance pro and anti-competitive effects, Article 101(3) TFEU would be cast aside. This outcome would be paradoxical, as the Commission believed that Article 101(3) TFEU already contained all the elements of a rule of reason.

Second, the Commission submitted that a rule of reason was undesirable in light of the decentralisation of the enforcement. It pointed out that a rule of reason could be used to limit the prohibition of Article 101(1) TFEU on the basis of political considerations. The Commission repeated this approach in *Glaxo (2001)*, which was rendered after the adoption of the White Paper.

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1111 C-235/92P Polypropylene (1999), para 133.
1113 36957 36997 37121 37138 37380 Glaxo Wellcome (2001), para 150-152.
The EU Courts’ approach converged with the Commission’s in this regard. In judgments handed down after the publication of the Modernisation White Paper, the Courts stressed that a rule of reason did not and had not existed in Article 101(1) TFEU. Moreover, in MasterCard (2014) the CJEU emphasised that Article 101(1) and (3) TFEU had two distinct objectives. The former relates to the question of whether a restriction of competition exists. Article 101(1) TFEU balancing is therefore confined to examining whether an agreement that overall does not impede competition is likely to be implemented without a subordinate restriction to competition. Article 101(3) TFEU, on the other hand, deals with cases in which agreements have an appreciable adverse impact on parameters of competition such as price, quantity, and quality of goods or services. Article 101(3) TFEU balancing thus examines whether the harm to competition is indispensable to the attainment of other non-competition interests. Nevertheless, the following sections illustrate that the EU Courts and the Commission have de facto accepted weaker versions of the rule of reason, introducing balancing to Article 101(1) TFEU.

3.3. Objectively necessary agreement

The first tool introduced by the CJEU to balance competition and commercial interests was the so-called objectively necessary agreement exception. It provides that a restriction of the commercial freedom of undertakings does not infringe Article 101(1) TFEU if it creates competition that would not have existed without it (Figure 5.3 and Figure 5.4, purple bars).

This exception dates back to Société Technique Minière (1966), in which the CJEU asserted that an exclusive license did not infringe Article 101(1) TFEU, as the “agreement seems really necessary for the penetration of a new area by an undertaking”. It was first formalised only many years later by the Commission’s Article 101(3) Guidelines (2004). Therefore, it is not entirely clear how often it was used. In particular, some of the decisions described above as an expression of a rule of reason could alternatively be viewed as an application of the objectively necessary exception. In Gøttrup-Klim (1994), for instance, the CJEU examined the statutes

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1114 T-112/99 Métropole (2001), para 72; T-65/98 Van den Bergh Foods (2003), para 106. Notably, in T-49/02 T-50/02 T-51/02 Brasserie (2005), para 85, the GC seemed to go back to its earlier approach by holding that a rule of reason could not apply since it was a by-object restriction. Yet, a year later in T-328/03 O2 (2006), para 69, it once again rejected the existence of a rule of reason.

1115 C-382/12 MasterCard (2014), para 89-94.

1116 On the objectively necessary agreement exception, also see (Van Rompuy 2012), 236-238; (Faull & Nikpay 2014), 261-264; (Bailey & Whish 2015), 136-137.

1117 C-56/65 Société Technique Minière (1966), 250.

1118 Also see 33585 Distribution of railway tickets by travel agents (1992), para 73-74.
of a cooperative purchasing association forbidding its members from participating in other forms of organised cooperation for purposes of joint purchasing. According to the Court, the prohibition against dual membership did not restrict competition within the meaning of Article 101(1) TFEU, since dual membership might have jeopardised the proper functioning of the cooperative and its contractual power. The restriction fell outside the scope of Article 101(1) TFEU as far it was limited to what is necessary to ensure such aims.\textsuperscript{1119}

Similar reasoning also guided the assessment of cooperation agreements. \textit{Night Services (1994, 1998)} concerned a cooperation agreement for the rail carriage of passengers via the Channel Tunnel. The GC criticised the Commission for not taking into account the actual legal and economic context of the agreement. According to the GC, the Commission failed to determine whether the undertakings had "real concrete possibilities" to compete.\textsuperscript{1120} In a similar vein, in \textit{O2 (2003, 2006)} the GC held that the Commission should have assessed whether an infrastructure-sharing agreement was necessary and indispensable to enable O2 to function as a competitive operator capable of offering coverage and quality services on the 3G mobile telecommunications market. The Commission should have considered "whether, in the absence of the agreement, O2 would have been present on the 3G market work".\textsuperscript{1121} The GC stressed that a detailed economic analysis of the effects of the agreement was necessary not only for the purposes of granting an Article 101(3) TFEU exemption but also as part of the economic analysis to determine the applicability of Article 101(1) TFEU.\textsuperscript{1122}

The empirical findings show that despite the Courts’ case law, the Commission never accepted a claim for the objectively necessary exception (Figure 5.4(a)). Moreover, it construed the expression narrowly in its Article 101(3) Guidelines (2004).\textsuperscript{1123} The Guidelines emphasise that an exception can only be granted on the basis of objective factors external to the undertakings. The test is not whether the undertakings would not have agreed to conclude a less restrictive agreement, but whether a less restrictive agreement could have been concluded in light of the nature of the agreement and the characteristics of the market.

\textsuperscript{1121} 38369 O2 (2003); T-328/03 O2 (2006), para 77.
\textsuperscript{1122} T-328/03 O2 (2006), para 79.
\textsuperscript{1123} Commission Article 101(3) Guidelines (2004), para 18(2).
3.4. Ancillary restraints

The previous section has shown that certain restrictive agreements fall outside the scope of Article 101(1) TFEU if they are necessary for creating competition that would not have existed without them. This section deals with another type of exception, whereby a specific clause restricting rivalry between undertakings is considered necessary for the realisation of the overall legitimate commercial purposes of an agreement. According to this ancillary restraints exception, a provision that is directly related, necessary and proportionate for securing the benefits of an agreement that is not otherwise restrictive of competition does not fall under the prohibition of Article 101(1) TFEU.

Like the objectively necessary exception, there is no clear point in time at which the ancillary restraints exception was formally introduced into EU competition law. As elaborated below, the GC first formalised the exception only in Métropole (2001). However, the empirical findings show that up until 2001 the Commission and EU Courts applied it implicitly in various contexts (Figure 5.3 and Figure 5.4, red, orange and blue bars):

First, the exception was used to examine non-compete clauses attached to the sale of a business. In Reuter/BASF (1976), for example, a sales agreement had limited the future activities of Dr. Reuter after he sold his company to BASF. In particular, it included a non-compete clause for a period of eight years. The Commission held that the non-compete clause should be examined in consideration of its role in preserving the goodwill of the business sold. The non-compete clause infringed Article 101(1) TFEU since it went beyond what was necessary to secure the legitimate commercial purpose of the agreement.

Second, the ancillary restraints exception was applied to horizontal cooperation agreements and agreements aimed at achieving environmental benefits. The principle underlying these exceptions was later codified in the relevant horizontal BERs and guidelines.

1124 On the ancillary restraints exception, see (Faull & Nikpay 2014), 251-266; (Bailey & Whish 2015), 137; (Sauter 2016), 99-100.
1126 28996 Reuter-BASF (1976), 46-47. A similar approach was taken by the Commission in 30389 30408 Nutricia-de Rooij Nutricia-Zuid-Hollandse Conservenfabriek (1983), para 26-38 and the CJEU in C-42/84 Nutricia-de Rooij and Nutricia-Zuid-Hollandse Conservenfabriek (1985), para 20, finding that a non-compete clause should be shortened.
1127 See Annex 5.17.
1128 37231 ACEA (1998); 37634 JAMA (1999); 34493 37366 37299 37288 37287 37526 37254 37252 37250 37246 37245 37244 37243 37242 37267 DSD (2001), para 104-114.
Third, the exception was used to examine selective distribution systems. As demonstrated in Chapter 4, by the mid-1980s the balancing relating to the functioning of most distribution systems was governed by BERs. Yet, the application of balancing to selective distribution was more complex.\textsuperscript{1130} On the one hand, selective distribution systems inherently restricted the commercial freedom of undertakings. On the other, manufacturers often imposed those restrictions to guarantee adequate consumer support and pre and post-sales services. They were particularly essential to providing support for technically complex (e.g. electronic equipment and cars) or luxury products (e.g. perfumes and watches).\textsuperscript{1131} As a result, the rules governing selective distribution systems remained more obscure and were developed on a case-by-case basis.

In a line of cases extending from the 1970s through the 1990s, the Commission and EU Courts have taken the view that selective distribution systems are not caught by Article 101(1) TFEU when a supplier has merely set the qualitative objective criteria dealers are obliged to meet (Figure 5.3 and Figure 5.4, orange bars).\textsuperscript{1132} They introduced a substantive proportionality test to examine selective distribution systems, which is essentially identical to the ancillary restraints principle. In 1999 such principles were finally codified within the scope of the Vertical BERs.\textsuperscript{1133}

Despite its codification, the scope of the selective distribution systems exception has remained unclear and been the subject of heated debate.\textsuperscript{1134} This debate was stimulated by the CJEU preliminary ruling in \textit{Pierre Fabre} (2011). In what appeared to be a clear deviation from its prior case law, the CJEU declared that “the aim of maintaining a prestigious image is not a legitimate aim for restricting competition” and therefore could not justify a total prohibition on the sale of cosmetic and personal care products via the Internet.\textsuperscript{1135} Accordingly, in \textit{Watch Repair} (2017), the GC held, on the basis of \textit{Pierre Fabre}, that the aim of maintaining a prestigious image is not a legitimate aim for restricting competition. According to the GC, the

\begin{flushleft}
\textsuperscript{1129} See Chapter 4, Section 3.2.2.
\textsuperscript{1130} On the EU competition law approach to selective distribution systems, see (Goyder 2009), 230-232; (Monti 2013b); (Bailey & Whish 2015), 680-682.
\textsuperscript{1132} See Annex 5.18.
\textsuperscript{1133} See Chapter 4, Section 3.2.2. The Commission continued to apply the exception to systems not covered by the BER, such as in 39097 Watch Repair (2014), para 163-169.
\textsuperscript{1134} For example, see (Monti 2013b); (Ezrachi 2016); (Witt 2016a); (Waelbroeck & Davies 2018); (Wijckmans 2018).
\textsuperscript{1135} C-439/09 Pierre Fabre (2011), para 46. This case was also discussed in Chapter 4, Section 3.2.2.
\end{flushleft}
exception is confined to restrictions necessary for preserving the quality of the products and ensuring their proper use. 1136

Shortly after the GC’s decision in Watch Repair, the CJEU clarified in Coty (2017) that Pierre Fabre had not altered the rule established in its prior case law. It declared that a selective distribution system which is primarily designed to preserve the luxury image of goods is compatible with Article 101(1) TFEU insofar as it is uniform, not applied in a discriminatory fashion, and proportionate in light of the objective pursued. 1137 The CJEU explained that its statement in Pierre Fabre related to the specific situation in that case. 1138 Accordingly, it found that a specific prohibition on the use of third-party platforms for the online sale of the contract goods could be justified for the purpose of preserving the luxury image of those goods, as long as it met the conditions for the exception. 1139

Fourth, in Pronuptia (1986), the CJEU transposed the selective distribution rationale to franchising agreements. It explained that the franchising business model calls for communicating know-how and necessary assistance to franchisees, without running the risk that such communication would benefit competitors. The franchisor must also take the necessary measures for maintaining the identity and reputation of the network bearing its business name or symbol. Therefore, provisions necessary for such purposes do not infringe Article 101(1) TFEU. 1140 This approach has guided the examination of other franchising agreements (Figure 5.3 and Figure 5.4, blue bars), 1141 and has, since 1988, been included in BERs. 1142

Despite this impressive array of decisions, the ancillary restraints exception was only formalised towards the end of the third enforcement period. In Métropole (2001), the GC first defined the exception as “any restriction which is directly related and necessary to the

1137 C-230/16 Coty (2017), para 29. This case was also discussed in Chapter 4, Section 3.2.2.
1140 C-161/84 Pronuptia (1986), para 16. Also see the Commission’s decision in 31428 31429 31430 31431 31432 Yves Rocher (1986), para 36-55.
1142 See Chapter 4, Section 3.1.1.
implementation of a main operation”. This definition was incorporated into the Commission’s Article 101(3) Guidelines (2004) and confirmed by the CJEU in MasterCard (2014).

Remarkably, the formalisation of the ancillary restraints exception has narrowed its scope by setting three strict conditions for its application. First, the definition provides that an agreement must be directly related and subordinate to the implementation of the main operation. This requires a direct link between the restrictive clause and the main agreement. Second, the substantive and geographic scope of the restriction should be proportionate to the implementation of the main operation. Third, the restriction needs to be objectively necessary for the implementation of the main operation. In Métropole (2001), the GC explained that this entails a “relatively abstract” assessment, examining whether, in the absence of the restrictive clause, the main operation would be difficult. However, in MasterCard (2014), the CJEU imposed a higher standard of necessity. It declared that the fact that the operation is “simply more difficult to implement or even less profitable without the restriction” was not sufficient. Rather, the operation must be “impossible to carry out in the absence of the restriction in question”.

Possibly aiming to counter these strict conditions for granting an exception, recent decisions appear to have implicitly accepted a variation on the ancillary restraints exception, resembling the reasoning that guided the exception prior to its formalisation. In Cartes bancaires (2007, 2012, 2014), the Commission held that a co-operative joint venture between competing firms for the creation of a card payment system constituted a by-object restriction. The Commission rejected the undertakings’ allegation that the restriction was an ancillary restraint aimed at solving free-riding problems. Since the restriction was not necessary for the creation or existence of the card payment system, the Commission and later the GC, maintained that free-riding concerns are confined to Article 101(3) TFEU analysis. The CJEU, however, took a different view. It held that the legitimate objective of fighting free-riding prevented the agreement from being classified as a by-object restriction (Figure 5.4, black cross). The CJEU did not explicitly refer to the

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1147 C-382/12 MasterCard (2014), para 91.
1148 38606 Cartes bancaires (2007), para 365-368; T-491/07 Cartes bancaires (2012), para 139-140, 156-158.
1149 C-67/13P Cartes bancaires (2014), para 74-75.
ancillary restraints exception. Yet, its judgment was based on similar reasoning, namely that a legitimate objective informs the existence of an infringement of Article 101(1) TFEU.\textsuperscript{1150}

The Commission followed a similar line of analysis in a decision rendered two months prior to the CJEU’s decision in Cartes bancaires. In Refusal to provide payment services (2014)\textsuperscript{39921} the Commission rejected DataCell’s complaint claiming that MasterCard and Visa had prevented it from accepting payments by card. It explained that Visa and MasterCard membership rules prohibited the use of their systems for the processing of illegal transactions or transactions that may damage the scheme’s reputation or trademark. In light of those objectives, the Commission maintained that it was unlikely to establish a by-object restriction.\textsuperscript{1151}

In conclusion, the case law and the balancing principles guiding the ancillary restraints exception are highly unclear. While, following modernisation, the Commission and EU Courts have generally limited its application, there are still many inconsistencies.

3.5. Doctrine of exhaustion (IPRs)

The relationship between intellectual property rights (IPRs) and Article 101(1) TFEU has provoked debate for many years.\textsuperscript{1152} On one hand, IP laws grant owners of IPRs an exclusive right to prevent the unlicensed use of their creations. The owners have significant discretion to decide how, and if, to license or use their inventions. On the other hand, from a competition law perspective, the grant of such an exclusive right can significantly impede competition.

Since IPRs are generally protected by national laws, the principle of primacy of EU law suggests that IPRs could not limit competition.\textsuperscript{1153} As demonstrated by the first part of this chapter, in cases of conflict between national law and Article 101 TFEU, the latter normally prevails.\textsuperscript{1154} Nevertheless, the Commission and EU Courts have used a different tool to balance competition and IPRs. Instead of focusing on the scope of the national law, they have opted for a balancing method similar to the ancillary restraints exception that focuses on the substance of the agreements and the IPRs (Figure 5.3 and Figure 5.4, green bars).

\textsuperscript{1150} For a similar view, see (Colomo & Lamadrid 2017), 18-19.
\textsuperscript{1151} 39921 Refusal to provide payment services (2014), para 74. This type of reasoning also guided the reversal of two decisions of the French NCA by a French Court, as elaborated in Section 4.2 below.
\textsuperscript{1152} On the relationship between IPRs and competition law, see Policy Report 1971, para 58; (Korah 2001); (Peeperkorn 2003); (Drexl 2008); (Turner 2010); (Goyder 2009), 262-294; (Faull & Nikpay 2014), 1446-1509; (Bailey & Whish 2015), 811.
\textsuperscript{1153} See (Korah 2001), 803; (Bailey & Whish 2015), 811.
\textsuperscript{1154} See Section 2.2 above.
The IPRs exception is based on the *doctrine of exhaustion*, which was developed by the CJEU in *Grundig-Consten (1966)*.\(^{1155}\) The Court distinguished between the existence and exercise of IPRs. The *existence* of an IPR is governed by Article 345 TFEU, which limits the application of Treaty provisions that undermine national ownership systems. The *exercise* of an IPR, however, is subject to Article 101 TFEU. Hence, once the holder of an IPR puts the protected product on the market in one Member State, the IPR has been exhausted and cannot be invoked to prevent the importation of the product to another Member State. According to the CJEU, the prohibition of Article 101 TFEU would be rendered ineffective if undertakings could use IPRs to achieve the same purpose as anti-competitive agreements.\(^{1156}\)

In the past, the particulars of the exhaustion doctrine varied according to the type of IPR covered by an agreement. The competition enforcer first needed to identify the specific subject matter of the agreement, namely the IPR predominantly being exercised (e.g. mostly a patent, a trademark, or know-how). Next, the scope of (what was considered) the exercise of the IPR was determined according to the subject matter of that right. For example, the specific subject matter of a patent was defined as the exclusive right to utilise an invention and to decide on the first placing of a product on the market to recompense the creative efforts of the inventor.\(^{1157}\) The specific subject matter of the copyright entailed a right to decide on the first placing of a work on the market, the right to require compensation for its public performance, and the right to rent out the work.\(^{1158}\)

The selected form of IPR, therefore, informed the balance between competition IPRs. This formalistic approach was apparent in the CJEU’s and Commission’s practices until the end of the second enforcement period (i.e. the late 1980s).\(^{1159}\) However, since then, the CJEU has gradually adopted a more effects-based analysis. Rather than focusing on the *form* of the agreement, it assessed the *commercial and economic rationale* behind it.

*Maize seed (1982)* marked this change. That case involved an exclusive licence for plant breeders’ rights conferring absolute territorial protection. The Commission’s analysis followed a formalistic approach. Based on the selected form of the agreement, it determined that the

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\(^{1155}\) C-56/64 C-58/64 Grundig-Consten (1996), 345-346. Also see (Korah 2001), 806; (Faull & Nikpay 2014), 1447-1454; (Bailey & Whish 2015), 811.

\(^{1156}\) C-56/64 C-58/64 Grundig-Consten (1966), 45.


\(^{1159}\) See Annex 5.19.
agreement was prohibited by Article 101(1) TFEU and could not be exempted by Article 101(3) TFEU.\textsuperscript{1160} The CJEU, on the other hand, engaged in more nuanced balancing. It distinguished between an “open exclusive licence”, whereby the licensor agrees not to licence anyone else in the territory, to a “closed exclusive licence” that eliminates all competition from third parties.\textsuperscript{1161} The CJEU maintained that a closed exclusive licence conferred absolute territorial protection, and would always fall within Article 101(1) TFEU.\textsuperscript{1162} Yet, an open exclusive licence might be necessary to allow licensees to assume the risk of cultivating and marketing new products and therefore could fall outside the scope of Article 101(1) TFEU. A number of factors need to be examined, including the nature of the product, the novelty and importance of the technology, the investment risks assumed by the licensee, and the development of intra-brand competition.\textsuperscript{1163}

Hence, \textit{Maize seed} expanded the scope for Article 101(1) TFEU balancing. In later cases, the CJEU held that licensing agreements, including agreements involving territorial exclusivity, did not infringe Article 101(1) TFEU when they were necessary for the purpose of IPRs.\textsuperscript{1164} This introduced a legal balancing process, similar to the ancillary restraints exception, to the balance between IPRs and competition interests.\textsuperscript{1165} In other words, the balancing shifted from exclusion on the basis of the form of the IPR, to a legal balancing process assessing the necessity of the relevant restriction on competition.

The BERs adopted since the mid-1980s have reflected this new approach. A substantial part of the balancing between IPRs and competition interests has thus moved to the scope of the BERs.\textsuperscript{1166} IPRs agreements that do not benefit from a BER are still assessed under the exhaustion doctrine. The empirical findings show that the doctrine has guided the Commission’s and EU Courts’ analyses of collecting societies,\textsuperscript{1167} pay-for-delay settlements,\textsuperscript{1168} and broadcasting\textsuperscript{1169} agreements.

\begin{thebibliography}{99}
\bibitem{1160} 28824 Maize seed (1978), para 1.E.5, II.8.
\bibitem{1161} C-258/78 Maize seed (1982), para 53.
\bibitem{1162} C-258/78 Maize seed (1982), para 68-79.
\bibitem{1163} C-258/78 Maize seed (1982), para 53.
\bibitem{1164} See Annex 5.20.
\bibitem{1165} On ancillary restraints see Section 3.4 above.
\bibitem{1166} See Chapter 4 and Annex C.
\bibitem{1167} 38681 Cannes Agreement (2006); 38698 CISAC Agreement (2008), 159-160.
\bibitem{1169} 40023 Cross-border access to pay-TV (2016), para 35-36.
\end{thebibliography}
3.6. **De minimis**

The *de minimis* rule excludes from the scope of Article 101(1) TFEU agreements between undertakings with low market shares or agreements having a small impact, which are unlikely to have an appreciable effect on competition.\(^{1170}\) The *de minimis* rule was introduced by the CJEU in *Völk (1969)*.\(^{1171}\) It was followed by the Commission’s *de minimis* Notice that defined a safe harbour for agreements between undertakings with a market share that did not exceed a certain quantitative threshold.\(^{1172}\)

The *de minimis* rule is often perceived as serving a jurisdictional purpose. According to this view, the rule essentially proclaims that the Commission will not assert jurisdiction over agreements between undertakings having a low market share. Indeed, *Völk* and the Commission’s Notice dealt with cases in which restrictions were not appreciable in quantitative terms (i.e. the undertakings’ low market share). This does not entail balancing.\(^{1173}\) Yet, there are strong indications that the *de minimis* rule does also entail balancing between competition and non-competition interests.

First, the Commission and EU Courts applied the *de minimis* exception to situations in which the nature of the restriction itself was not appreciable (Figure 5.4, yellow bars).\(^{1174}\) Those cases involved a similar analysis to the ancillary restraints exception discussed above. In *Pavlov (2000)*, for instance, the CJEU held that the decision of medical specialists to create a pension fund entrusted with the management of a supplementary pension scheme did not restrict competition in an appreciable manner, since the cost of the scheme had a marginal and indirect influence on the cost of the services offered.\(^{1175}\)

Notably, such qualitative exceptions were granted in sectors prone to tension between public interest and competition law. In addition to the pension funds in *Pavlov*, it was applied to agreements related to financial institutions, sport, and R&D.\(^{1176}\) A similar qualitative *de minimis* exception is found in the Commission Horizontal Guidelines (2001).\(^{1177}\) The Guidelines state that

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\(^{1170}\) On the doctrine, also see (Goyder 2009), 104-107; (Bailey & Whish 2015), 148-152; (Wagner-von Papp 2015).


\(^{1173}\) (Odudu 2006), 100.

\(^{1174}\) Also see (Van Rompuy 2012), 238-240; (Bailey & Whish 2015), 151-152.


\(^{1176}\) See Annex 5.21.

an environmental agreement is unlikely to have an appreciable effect on competition irrespective of the undertakings’ market share if it contributes to the achievement of a sector-wide environmental target. Yet, the agreement is restrictive if it serves to disguise a cartel rather than achieving genuine environmental benefit.

Second, the *de minimis* rule was also tied to the market integration objective. Although the CJEU’s judgment in *Völk* concerned a by-object restriction (absolute territorial protection), the Commission’s Notice does not apply to price or territorial restrictions.\(^{1178}\) In *Expedia (2012)* the CJEU confirmed this approach by declaring that the *de minimis* exception did not apply to a by-object restriction.\(^{1179}\) Put differently, the rule does not accept agreements that hinder market integration even when the undertakings’ low market share suggests that it has marginal or no impact on competition. This implies that the EU *de minimis* rule is also aimed at safeguarding market integration.\(^{1180}\)

Finally, the *de minimis* rule also reflects the balance between competition and the protection of SMEs. In fact, until 1997 the Commission’s Notices applied the exception only to SMEs. In addition to a low market share, the exception had set a limit on the turnover of the undertakings.\(^{1181}\) The Commission justified this with reference to the importance of SMEs as a source of jobs at times of crisis.\(^{1182}\) Yet, in 1997 the Commission deleted the limitation on turnover, noting that it was unjust to reserve the exception for SMEs.\(^{1183}\) Nevertheless, the protection of SMEs still guides many of the Member States’ national *de minimis* rules.\(^{1184}\)

### 3.7. **Interim conclusion**

This section has shown that from the early days of EU competition law to the present, the Commission and EU Courts have accounted for commercial interests when defining the scope of

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\(^{1178}\) Horizontal agreements that fix prices, limit production or sales, share markets or sources of supply, and vertical agreements that fix resale prices or confer territorial protection. See Commission de minimis Notice (1997), para 11; Commission de minimis Notice (2001), para 11.

\(^{1179}\) C-226/11 *Expedia* (2012), para 35-37. This rule was later codified in Commission de minimis Notice (2014), para 2.

\(^{1180}\) For a similar view, also see (Lianos 2013), 14.


\(^{1182}\) Policy report 1981, 14.

\(^{1183}\) Press release IP/97/42, the Commission invites comments on the envisaged revision of the Notice on agreements of minor importance ("de minimis") (22.1.1997). Yet, the notices still refer to SMEs, holding that the exception is based on the assumption that agreements between SMEs are rarely capable of significantly affecting competition within the common market. Consequently, as a general rule, they are not caught by the prohibition of Article 101(1) TFEU. See Commission de minimis Notice (1997), para 19; Commission de minimis Notice (2014), footnote 5.

\(^{1184}\) See Chapter 6, Section 3.1.
Article 101(1) TFEU. Like the balancing of state and public interests, the commercial exceptions were chiefly developed by the CJEU on a case-by-case basis. Consequently, there are numerous form-specific or restriction-specific balancing tools, which do not always have a consolidating, overriding rationale. In fact, scholars have suggested different classifications and justifications for those commercial exceptions.\footnote{Bailey & Whish 2015, 136-138, for instance, differentiate between agreements and provisions that are necessary to achieve an objective purpose. (Faull & Nikpay 2014), 235-266 and (Van Rompuy 2012), 234-240 identify two different categories: specific clauses that fall outside the scope of Article 101(1) TFEU due to the market context surrounding the agreement and agreements in which goods or services would not have been supplied unless a degree of exclusivity had been assured. Also see Section 1.2 above.}

The scope and terms of those balancing tools remain vague. Until modernisation, the EU Courts hinted that a rule of reason might apply, despite the Commission’s fierce opposition. This section has shown that even after the rule of reason was finally rejected, the objectively necessary, ancillary restraints, IPRs, and \textit{de minimis} exceptions merited similar balancing. It is not surprising, therefore, that the Commission, GC, and CJEU have often reached conflicting decisions on the application of these exceptions.

Despite the legal certainty and uniformity weaknesses associated with the commercial exceptions, these exceptions are more effective than the state and public interests exception, since they are generally confined to economic benefits. Yet, they are less effective than the Article 101(3) TFEU exception as interpreted by the Commission following modernisation. Article 101(1) TFEU commercial exceptions are mostly based on a legal balancing process, leaving the competition enforcers ample discretion to balance and regulate business practices. As such, they are difficult to square with the effects-based approach advocated by the Commission following modernisation. Indeed, this section has shown that as part of the substantive modernisation, the EU Courts and Commission have sometimes attempted to narrow the scope of the exceptions to reflect a more economic balancing process. Yet, these efforts have drawn the assessment of Article 101(1) TFEU closer to the conditions for an Article 101(3) TFEU exception, creating further doubts on the scope of balancing under both provisions. The next section shows that the uncertainties surrounding both the state and public interests exception and the commercial exception have led to ambiguity and divergence in the practices of the national enforcers.
4. NCAS AND NATIONAL COURTS

The previous sections have shown that the CJEU developed Article 101(1) TFEU balancing tools on a case-by-case basis, without a clear underlying principle. The Commission often opposed these exceptions by advocating a limitation on the scope of balancing under Article 101(1) TFEU, especially after modernisation. The Commission and EU Courts have not always agreed on the relevant balancing tool applicable to a given case, or how it should be applied. This has created much uncertainty as to the scope and conditions of Article 101(1) TFEU balancing tools.

The national enforcers have acknowledged these uncertainties. In the UK, for example, the CAT concluded that the assessment of whether a particular arrangement constitutes an infringement of Article 101(1) TFEU “is a rather more flexible exercise than the CFI [in Métropole] was perhaps willing to appreciate.”1186 Similarly, the Dutch NCA noted with regard to the inherent restriction exception that it “believes this question has been insufficiently explored yet in the jurisprudence in order to be able to make statements on its application”.1187

The lack of a clear balancing regime has left the Member States considerable discretion to apply Article 101(1) TFEU balancing tools, which has resulted in varying interpretations. In general, as elaborated below, the German and UK NCAs took a similar approach to the Commission, favouring competition over non-competition interests. The French, Dutch, and to an extent the Hungarian NCAs, came closer to the CJEU’s approach, leaving greater room to account for non-competition interests within Article 101(1) TFEU.

4.1. NCAs

Figure 5.5 summarises the use of Article 101(1) TFEU balancing tools by the NCAs. It demonstrates that the NCAs discussed Article 101(1) TFEU exceptions considerably more frequently than the Commission (compare to Figure 5.3(a) and Figure 5.4(a) above).

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1186 1035/1/1/04 and 1041/2/1/04 Racecourse Association (2005), para 167.
1187 Vision Document Competition & Sustainability (2014), para 3.3.2.
The figure reveals that state and public interests exceptions were invoked more often than commercial exceptions. Ultimately, both categories of exceptions were accepted in a similar number of cases. Moreover, it indicates that not all NCAs have used Article 101(1) TFEU balancing tools equally. As in the Commission’s practice after May 2004, the German and UK NCAs have almost never accepted Article 101(1) TFEU exceptions. In particular, the German NCA was of the view that interests related to state influence ought to be examined under Article
The French, Dutch, and to a lesser degree the Hungarian NCAs, have made use of those exceptions, especially those related to state and public interest.

The following sections show that the uncertainties surrounding the conditions and scope of Article 101(1) TFEU exceptions have allowed the NCAs to adjust them to reflect their own balancing approaches. In particular, such differences have related to the relevant types of benefits and balancing method, as well as the intensity of control. These differences have seriously jeopardised the uniformity of balancing and given rise to legal certainty concerns.

4.1.1. Types of benefits and balancing method

The national enforcers varied in the types of benefits they accepted as justification for an Article 101(1) TFEU exception. An illustrative example is the national enforcers’ approach to qualitative selection criteria for selective distribution systems of luxury products. As mentioned, in Pierre Fabre (2011), the CJEU seemed to alter its previous case law by determining that the protection of a brand luxury image could not justify the restriction of competition.1189 Before the issue was settled in Coty (2017),1190 the national enforcers followed diverging interpretations. In fact, such inconstancies were present even within certain Member States. On the one hand, the German NCA in Asics (2015),1191 as well as the German and Luxembourg Governments,1192 claimed that a selective distribution system aimed at preserving the luxury image of goods could not be excluded from the scope of the prohibition laid down in Article 101(1) TFEU. This view also guided the GC in Watch Repair (2017).1193 On the other hand, the French, Italian, Dutch, Austrian, and Swedish Governments, as well as the Commission and AG Wahl,1194 disagreed. As in a number of German civil law decisions,1195 they maintained that the protection of luxury and prestige goods justified such qualitative selection criteria.

Remarkably, the national enforcers even disagreed on the definition of luxury products that merited the exception. While the German High Court in ASICS (2017) held that sport and

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1188 See Chapter 3, Section 6.2.3.
1189 C-439/09 Pierre Fabre (2011), see Section 3.4 above.
1190 C-230/16 Coty (2017), see Section 3.4 above.
1192 As summarised by Advocate General Wahl in his opinion in C-230/16 Coty (2017), para 61.
1193 T-712/14 Watch Repair (2017), see Section 3.4 above.
1194 As summarised by Advocate General Wahl in his opinion in C-230/16 Coty (2017), para 62.
1195 For instance, the German Higher Regional Court of Frankfurt in Case 11 U 84/14 Deuter Sport (2015). See (Cicala et al. 2018), 102-103.
running shoes were not luxury goods, a judgment rendered by the District Court of Amsterdam two months before found that those products did qualify as luxury goods.\footnote{1196}

Another example of different national approaches to the relevant types of benefits is found in the Dutch application of the ancillary restraints exception. Most NCAs, like the Commission and EU Courts, have limited the exception to commercial-economic benefits.\footnote{1197} Yet, the Dutch NCA also took into account non-economic benefits such as social interests related to health care and public safety.\footnote{1198}

In addition to differences in the types of relevant benefits, the NCAs used different balancing methods and tests to apply Article 101(1) TFEU exceptions. For instance, the NCAs did not adopt a uniform approach towards the existence of an EU rule of reason. The German\footnote{1199} and UK\footnote{1200} NCAs rejected a rule of reason under Article 101(1) TFEU, limiting this type of analysis to Article 101(3) TFEU. The French NCA followed a similar approach to the GC cases prior to modernisation, rejecting the rule of reason - at least for by-object restrictions.\footnote{1201} Yet, the Hungarian NCA seemed to accept a certain form of a rule of reason, noting that a restriction necessary for increasing consumer welfare generally did not fall under Article 101(1) TFEU.\footnote{1202}

The NCAs also have mixed views on whether the inherent restriction exception must be part of a state measure to justify the restrictive practices of professional associations.\footnote{1203} While the UK NCA tied the exception to regulatory powers,\footnote{1204} the French NCA maintained that it might also apply when the professional association is not vested with regulatory powers.\footnote{1205}

The differences in the scope and conditions for Article 101(1) TFEU exceptions became particularly obvious when the Member States codified the exceptions in their national laws.

\footnote{1196}{The German High Court decision in KVZ 41/17 ASICS (2017), para 12-35. The District Court of Amsterdam decision in C/13/615474/HA ZA 16-959 Nike (2017), para 4.9.3.}
\footnote{1197}{On the Commission’s and EU Courts’ strict application following modernisation see Section 3.4 above.}
\footnote{1198}{See Annex 5.24.}
\footnote{1199}{B9-121/13 Booking (2015), para 180; B4-9/11 B4-94/11 Electronic cash card payment system (2014), para 184.}
\footnote{1200}{CP/0090-00-S MasterCard (2005), para 446; CE/9859-14 Modelling (2016), para 4.118.}
\footnote{1201}{06-D-03 Heating, ceramic sanitary and plumbing equipment (2006), para 989.}
\footnote{1202}{Vj-18/2008 Uniform interchange fee levels (2009), para 183-186. However, the NCA considered that the agreement was not essential to the functioning of the card payment system.}
\footnote{1203}{On the debate over the conditions of the inherent restriction exception see Section 2.6.2 above.}
\footnote{1204}{CA98/05/05 MasterCard (2005), para 426-430; CE/9859-14 Modelling (2016), para 4.113. Also see footnote 480.}
While some NCAs have followed the rules developed by the Commission and EU Courts, others have adopted conflicting approaches. This can be illustrated by comparing the French and Hungarian rules codifying the state action defence. On the one hand, the Hungarian Competition Act provides that it applies "unless otherwise provided by law".\textsuperscript{1206} Despite this broad wording, which imposes no procedural or substantive conditions, the Hungarian NCA and courts aligned its application with the EU state action defence.\textsuperscript{1207} In France, on the other hand, the Commercial Code states that an agreement that is the result of the implementation of an act or regulation adopted in application thereof is not subject to the national cartel prohibition.\textsuperscript{1208} The French NCA explained that the restriction must also be proportionate to the aim pursued.\textsuperscript{1209} Hence, unlike the CJEU’s mostly formalistic approach, the French NCA maintains that the exception is limited to cases in which the restriction of competition is \emph{substantively} justified.\textsuperscript{1210}

Similarly, a version of the nature and purpose exception was codified in the Dutch Competition Act. The Act states that the national cartel prohibition does not apply to collective labour agreements, agreements within an industry or sector between one or more employers’ organisations and one or more unions that pertain exclusively to pensions, or agreements or decisions by organisations of professionals that pertain exclusively to participation in an occupational pension scheme subject to the approval of the Minister of Social Affairs and Employment.\textsuperscript{1211} Although the exception was construed broadly, the Dutch NCA and courts interpreted it as a codification of the CJEU’s nature and purpose exception.\textsuperscript{1212} Chapter 8 Section 4.3 shows that the differences between those national exceptions could also affect the balancing in mixed-cases by means of setting the enforcement priorities.

\begin{thebibliography}{1212}
\bibitem{1206} Hungarian Competition Law, Article 1(1).
\bibitem{1207} See Annex 5.22.
\bibitem{1208} French Commercial Code, Article 420-4-I-1. Also see (Holmes & Davey 2007), 279; OECD Regulated Conduct Defence Report (2011), 114. Notably, in 09-A-48 Dairy (2009), para 71-72 the NCA clarified that this exception would apply only to purely national cases.
\bibitem{1209} French NCA Annual Report 2012, 78.
\bibitem{1210} For instance, in the exceptions in 08-D-09 Funeral parlour in Lyon (2008), para 161-165, 180 and 08-D-34 funeral services in Marseille (2008), para 18-19, the NCA not only examined the existence of a national regulation; it also stated that the anti-competitive agreement was the most efficient way to render the burial services subject to the agreement.
\bibitem{1211} Dutch Competition Act, Article 16.
\end{thebibliography}
4.1.2. **Intensity of control**

In addition to the different types of benefits and balancing methods, the NCAs used different intensity of control when applying the conditions for exceptions. Given the lack of a clear EU balancing framework, the NCAs were free to apply those conditions vigorously or flexibly. This could explain why, as Figure 5.5 illustrates, the French, Dutch, and to a lesser extent the Hungarian NCAs, were considerably more likely to accept Article 101(1) TFEU exceptions than the Commission and the other NCAs.

The different intensity of control is also demonstrated by the application of the notion of undertaking exception. The French\(^{1213}\) and Hungarian\(^{1214}\) NCAs were lenient in accepting such an exception. They distinguished between different tasks of entities, holding that they were undertakings only with respect to some of them. The German NCA, by contrast, applied the exception particularly strictly. In *Lottery (2006)*, for example, it noted that even if the revenues of the operation were used to promote social purposes, the entity should be classified as an undertaking.\(^{1215}\) In *Fire detection systems in Düsseldorf (2013)*, it held that even if the payment was in kind and not in monetary terms, the entity was an undertaking.\(^{1216}\)

Different degrees of intensity of control can also explain the diverging decisions on prohibition of the use of third party platforms in selective distribution systems. For example, while the CJEU took a favourable approach to such platforms in *Coty (2017)*, the French and German NCAs decided to close their joint investigation into *Adidas (2014, 2015)* only after the sporting goods manufacturer had agreed to abolish the ban on third-party platforms.\(^{1217}\) In *ASICS (2015, 2017)*, the German NCA and courts were highly critical of a similar ban, while not declaring it prohibited.\(^{1218}\) Even following *Coty*, the President of the German NCA hinted that it would continue to take a stricter approach towards such bans. He stated "we are still assessing the [Coty] judgment. Prima facie we see however only limited impact on our decision practice".

\(^{1214}\) See Annex 5.23.
\(^{1216}\) B7-30/07-1 Fire detection systems in Düsseldorf (2013), 16.
He maintained that manufacturers of non-luxury goods "still do not have carte blanche for per se restrictions of their dealers with respect to the use of sales platforms". 1219

A lower intensity of control was also evident when the NCAs stated that an agreement did not fall within the scope of Article 101(1) TFEU without explicitly referring to a specific exception. This is illustrated by the French and Dutch application of the inherent restriction exception. While those NCAs often refused to formally accept this exception, 1220 they implicitly held that Article 101(1) TFEU was not applicable for essentially the same reason. In Transport to Saint Honorat (2005), for instance, the French NCA examined an agreement for transportation to Saint Honorat Island. The Cistercian Congregation of the Immaculate Conception owned most of the island, including its only landing stage. The NCA held that the grant of an exclusive right for use of the landing stage to a single undertaking did not infringe Article 101(1) TFEU. It explained that the agreement was necessary for protecting the site's peculiar geography, the private character of the island, and the need to control the flow of visitors. 1221

Similarly, in Boar Castration (2008), the Dutch NCA issued a positive informal opinion on an agreement concluded under the auspices of the Dutch Minister for Agriculture and the Dutch Animal Protection Agency, which was portrayed as improving animal welfare by putting an end to the castration of boars until 2015. The agreement introduced an interim measure, which effectively required supermarkets to sell fresh pork only from boars that had not been castrated without the use of anaesthesia. The NCA held that the agreement did not restrict competition despite its purchasing restrictions, inter-alia, in light of the animal welfare aim. 1222

1219 Andreas Mundt, as cited in (Cicala et al. 2018), 108.
1220 E.g. the French NCA in 08-D-06 Specialist Physicians Overcharging Fees (2008), para 94-96; the Dutch NCA in 6888/435 LHV pace of establishment (2011), para 141-142; 6888/435 LHV pace of establishment (2014), para 282; CA98/05/05 MasterCard (2005), para 426-430.
1221 05-D-60 Transport to Saint Honorat (2005), para 62-68. In that case the NCA used the Article 102 TFEU exception ("objectively necessary") as a basis for also granting an Article 101(1) exception. While not referring to the concept of inherent restriction directly, the NCA essentially followed the same legal test. It applied a similar analysis in 12-D-19 Tooth whitening (2012), para 102-126; 13-D-02 Towing light vehicles (2013), para 59-67.
1222 6455 Boars castration (2008). The NCA followed a similar analysis in 5194 Over-the-Counter Payment Services Covenant (2005), para 2.1.1; 12.0256.53 Veterinarian contracts (2013), as confirmed by the Court in ROT 15/1219 Veterinarian contracts (2016), para 9. Also see (Don 2010), 79; (Lavrijssen 2010), 650.
4.2. National courts

Figure 5.6 summarises the number of proceedings in which Article 101(1) TFEU exceptions were discussed by national courts (blue bars), and proceedings in which the courts overturned the previous instance’s decision in this regard (red bars).

The figure indicates that national courts have discussed and affirmed the state and public interests exceptions (a) more often than the commercial exceptions (b). It also shows that the French and Hungarian Courts have not always accepted the interpretation given by the NCAs to the state action and inherent restriction exceptions. This alludes to the uncertainty surrounding the application of the state and public interests exceptions.

The limited judicial review exercised over the commercial exceptions could perhaps be explained by the fact that those exceptions merit a complex economic analysis. In fact, the two successful appeals before the Paris Court of Appeals were based on legal rather than economic grounds. Exchanges Check-Image Fee (2012) concerned alleged collusion between banks to charge interbank fees on cheques. Flour mill (2014), examined price fixing and market sharing practices within a joint venture of flour producers and was based on a leniency application.

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Despite what would normally be classified as a by-object restriction (i.e. price fixing), and similar to the reasoning of the CJEU decision in *Cartes bancaires (2014)*, the French Court held that the NCA should not have classified the agreements as by-object restrictions given their positive impact on commercial interests.\(^\text{1227}\) This illustrates that exceptions based on legal balancing are more susceptible to judicial review than those based on economic balancing.\(^\text{1228}\)

## 5. NORMATIVE BENCHMARKS

This chapter has pointed out two significant weaknesses of the Article 101(1) TFEU balancing tools. First, the exceptions are characterised by a low degree of legal certainty, leading to a low degree of uniformity. It has also shown that the state and public interests exceptions suffer from limited effectiveness. Second, the empirical findings demonstrate that the Commission has rarely referred to those balancing tools in its decisional practice, policy papers or reports on the functioning of Regulation 1/2003. Therefore, while the shortcomings of Article 101(3) TFEU are regularly discussed, the limitations of Article 101(1) TFEU balancing tools have received only limited attention.

*Figure 5.7: Article 101(1) TFEU and the normative benchmarks*

(a) Prior to modernisation

<table>
<thead>
<tr>
<th>Transparency</th>
<th>Consistent application</th>
<th>Type of benefits</th>
<th>Corrective/regulatory decisions</th>
</tr>
</thead>
<tbody>
<tr>
<td>Predictability</td>
<td>Discretion</td>
<td>Type of process</td>
<td>Consistency</td>
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</tbody>
</table>

(b) Post modernisation

<table>
<thead>
<tr>
<th>Transparency</th>
<th>Consistent application</th>
<th>Type of benefits</th>
<th>Corrective/regulatory decisions</th>
</tr>
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<tbody>
<tr>
<td>Predictability</td>
<td>Discretion</td>
<td>Type of process</td>
<td>Consistency</td>
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### 5.1. Effectiveness

The two categories of Article 101(1) TFEU balancing tools differ in their degree of effectiveness. The state and public interests exceptions (blue marks) are highly ineffective. They entail that

\(^{\text{1227}}\) See Section 3.4 above. Also see (Berthol-Balladur & Anselin 2014), 1-2.

\(^{\text{1228}}\) Also see Chapter 2, Section 4.
the prohibition of Article 101(1) TFEU does not apply when an agreement is influenced by a state measure. They are based on broad non-economic benefits and political motives, allowing Member States to regulate and shape domestic markets. Moreover, most of those balancing tools dictate a complete exclusion. Namely, once it can be established that an agreement was the result of a state measure, the restriction is not subject to a proportionality test. The analysis focuses on whether an agreement was a genuine state measure rather than a cartel in disguise (e.g. state action, Article 106(2) TFEU and the notion of undertakings exceptions). The public interest guiding the state intervention is not balanced against the restriction to competition. Nevertheless, towards the beginning of the fourth enforcement period, the CJEU introduced new balancing tools and interpreted the old tools in a way that gave more weight to the legal balancing process. This was reflected by the “nature and purpose” and inherent restriction exceptions, and by the modernisation of the state action defence, which balance the harm to competition against the promotion of the public interest.

In comparison, the commercial interests exceptions (red marks) are more effective. They balance the promotion of competition against an array of market-oriented goals. Admittedly, prior to modernisation those exceptions were based on a legal balancing process, intuitively balancing the competition and non-competition interests. They were not grounded in robust economic evidence and principles. Yet, following modernisation, the EU Courts and Commission have formalised and narrowed down the exceptions to reflect a more economic premise (in particular, the objectively necessary, ancillary restraints and de minimis exceptions). As such, they have drawn the balancing closer to the conditions for an Article 101(3) TFEU exception.

Bringing the commercial interests exceptions closer to the conditions for an Article 101(3) TFEU exception is likely to increase the effectiveness of the Article 101(1) TFEU balancing tools. At the same time, this raises questions as to the aim and necessity of those exceptions in the self-assessment regime of Regulation 1/2003. As mentioned, while there are some differences between the Article 101(1) and (3) TFEU balancing tools in terms of burden of proof, if those exceptions are substantively similar, a coherent and simple administration of EU competition law might justify merging the commercial interests exceptions with the Article 101(3) TFEU analysis.

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1229 See Sections 2.2, 2.3 and 2.4 above, respectively.
1230 See Sections 2.5, 2.6 and 2.2.5 above, respectively.
1231 See Sections 3.3, 3.4 and 3.6 above, respectively.
1232 See Section 1.1 above.
5.2. **Uniformity and legal certainty**

This chapter has illustrated that Article 101(1) TFEU balancing tools were developed by the CJEU on a largely case-by-case basis. The Courts’ *ad hoc* approach provided only general guidance on how to apply these balancing tools. This resulted in an enormous array of form-specific and restriction-specific exceptions. Lacking an underlying conceptual basis, those balancing tools are often inconsistent, overlapping or contradicting each other.  

Moreover, the empirical findings show that despite the CJEU’s efforts, the Commission has made only little use of those balancing tools in practice and interpreted them narrowly. The CJEU’s *ad hoc* approach, combined with the Commission’s disregard of Article 101(1) TFEU tools, has created significant uncertainty on the scope of and method for balancing. Faced with this uncertainty, the Commission, NCAs, and EU and national courts have adopted inconsistent and conflicting balancing approaches. Indeed, the empirical findings point to serious differences in the manner in which the various competition enforcers have interpreted those balancing tools. Such divergence was apparent at the EU level (between the Commission, GC, and CJEU),  at the national level between the various Member States, and even within one Member State.  

Consequently, the scope of Article 101(1) TFEU balancing tools and the outcome when applying them to a specific case are highly uncertain. The balancing is not guided by transparent and predictable criteria. Because the balancing is guided by neither precise balancing rules nor clear general balancing standards, it is dependent on a case-specific application that leaves ample discretion to each competition enforcer.

This also raises serious uniformity concerns. On the one hand, this chapter has demonstrated that the Commission has made only little use of Article 101(1) TFEU balancing tools in practice and interpreted them in its policy papers narrowly. The German and UK NCAs took a similar approach, favouring competition over non-competition interests. On the other hand, the French, Dutch, and to an extent the Hungarian NCAs followed the CJEU’s approach, providing greater room for non-competition interests under Article 101(1) TFEU. Consequently, the lack of legal certainty has also led to the fragmentation of balancing throughout the EU.

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1233 See Sections 2.7 and 3.7 above.
1234 For interpretations of the state action defence, see Sections 2.2.2, 2.2.4 and 2.2.5 above; notion of undertaking, Section 2.4.2 above; inherent restrictions, Section 2.6.2 above; existence of a rule of reason, Section 3.2 above; and selective distribution systems, Section 3.4 above.
1235 See Section 4.1 above.
1236 For example, the German approach to selective distribution systems, as described in Section 4.1 above.