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### Coding non-competition interests under Article 101 TFEU

*A quantitative and qualitative study*

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# 6

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## UNIQUE NATIONAL EXCEPTIONS

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### 1. INTRODUCTION

The previous chapters discussed balancing tools that had their origins in EU primary or secondary law or were developed in the decisional practice of the Commission or EU Courts. This chapter focuses on balancing tools that originated in national rules. Although this chapter is limited in length, it is essential for highlighting the doubts about the compatibility of those national exceptions with EU competition law, a topic that has been largely overlooked in legal scholarship.

National exceptions bear a significant impact on balancing in the decentralised enforcement era. Since the entry into force of Regulation 1/2003, about 90% of Article 101 TFEU proceedings have taken place before NCAs.<sup>1237</sup> The Commission emphasised in its Modernisation White Paper that “decentralisation *must not be allowed* to result in inconsistent application of Community competition law. Competition policy will thus *continue to be determined at Community level*’.<sup>1238</sup>

To this end, Article 3(1) and (2) of Regulation 1/2003 expresses the principles of the primacy of and convergence with EU competition law. The two sub-articles provide that national competition laws may not prejudice the full and uniform application of EU competition law.<sup>1239</sup> Put differently, agreements that are prohibited by EU law cannot escape the prohibition of Article 101 TFEU by means of applying national competition rules.

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<sup>1237</sup> See Chapter 2, Section 5.4.1.

<sup>1238</sup> Emphasis added. Modernisation White Paper (1999), para 38.

<sup>1239</sup> Regulation 1/2003, Article 3 and Preamble 8; Commission Staff Working Paper accompanying the Report on the Functioning of Regulation 1/2003 (2009), para 139-142. Also see Chapter 2, Section 3.3.2.

Nevertheless, Article 3(3) of Regulation 1/2003 limits these principles in the event a national law “predominantly pursues” a different objective from the one of Articles 101 and 102 TFEU. Preamble 9 of Regulation 1/2003 clarifies that Member States may adopt national legislation against unfair trading practices “irrespective of the actual or presumed effects of such acts on competition on the market”. This entrusts the Member States with wide discretion to favour non-competition national interests over competition. Despite the wording of Preamble 9, Article 3(3) is not limited to unfair trading practices. Moreover, the Article prescribes neither a limit nor a method to balance competition and non-competition interests. Any type of national interest that “predominantly pursues” non-competition interests may override Article 101 TFEU irrespective of its actual or presumed effects on competition.<sup>1240</sup>

The compatibility of those national exceptions with EU competition law is debatable. On the one hand, Article 3(3) allows Member States to adopt national rules to pursue non-competition interests. It seems to endorse national rules that protect SMEs (*de minimis* rules) or even those that confer special regimes for specific sectors, such as media or agriculture.<sup>1241</sup> On the other hand, as detailed in Chapter 5 Section 2.2, the CJEU has consistently held that Member States are prohibited from adopting national legislation that conflicts with EU competition law.

In 2009, the Commission stated that “Article 3 can be characterised as one of the major successes of Regulation 1/2003”.<sup>1242</sup> This statement seemed to refer to the first two paragraphs of the Article while ignoring the difficulties emanating from Article 3(3). This chapter addresses these difficulties, arguing that the primacy of EU competition law has not been fully respected in practice. In fact, the five Member States adopted unique national exceptions diverging in scope and nature from the EU substantive balancing tools discussed in the previous chapters.

Accordingly, this chapter is structured as follows. Section 2 provides a legal and empirical background on national balancing tools. It classifies them into four categories, according to the level of discretion they entail and type of protected benefits. Section 3 explores the types of benefits, balancing method, and intensity of control of each category of national balancing tools. Finally, Section 4 reveals that each of those categories confers a different level of effectiveness, uniformity, and legal certainty of balancing.

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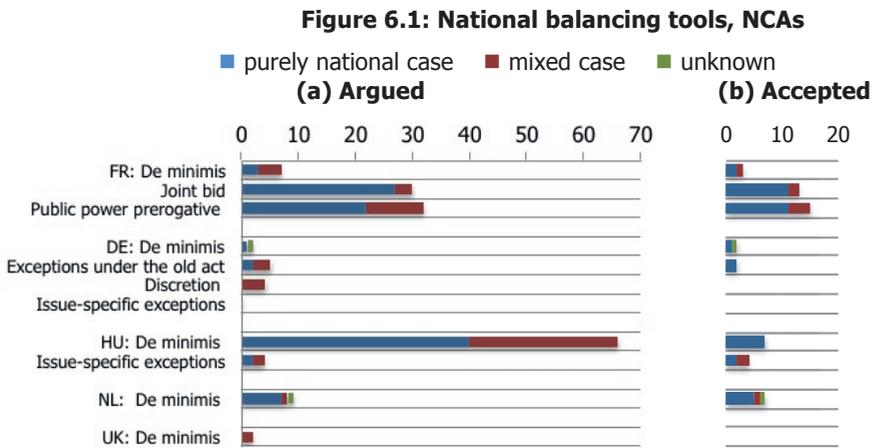
<sup>1240</sup> Also see (GCLC Annual Conference 2010), 149-154; CMA Guidance on Concurrent Application (2014), para 4.2-4.12.

<sup>1241</sup> (GCLC Annual Conference 2010), 150-151.

<sup>1242</sup> Commission Staff Working Paper accompanying the Report on the Functioning of Regulation 1/2003 (2009), para 142.

## 2. LEGAL AND EMPIRICAL BACKGROUND

The national balancing tools presented in this chapter were identified using a bottom-up approach. In other words, they were traced in the process of applying the systematic content analysis to Article 101 TFEU proceedings.<sup>1243</sup> Before detailing these national exceptions, Figure 6.1 provides an overview of the number of proceedings in which national tools were invoked (a) and accepted (b) before the NCAs. It illustrates that national tools were not only relevant in purely national cases (blue bars), but also in mixed-cases (red bars).<sup>1244</sup> Hence, national tools adopted by the legislative, executive, or judicial branches of a Member State have limited the enforcement of Article 101 TFEU in favour of non-competition interests.

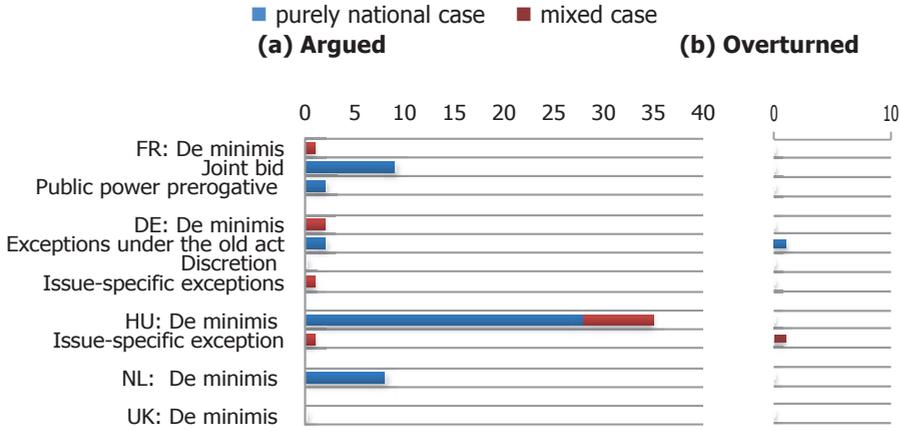


Next, Figure 6.2 summarises the number of appeals before national courts discussing the above national tools (a) and overturning the NCA's or the prior court's decisions in this regard (b).

<sup>1243</sup> See Chapter 1, Section 3.

<sup>1244</sup> On the difference between purely national and mixed-cases, see Chapter 1, Section 3.2.1.

**Figure 6.2: National balancing tools, national courts (May 2004-2017)**

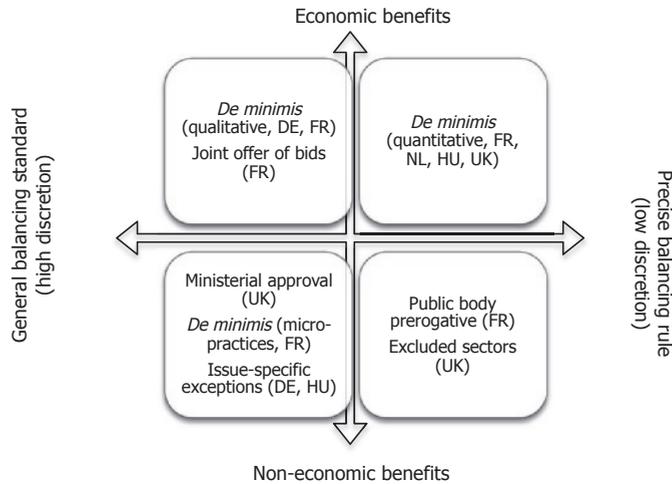


The empirical findings presented in this chapter highlight the diversity of national exceptions. To illustrate their different features, the national tools are classified according to two parameters.<sup>1245</sup> The first parameter is the level of *discretion* necessary to apply each balancing tool. As mentioned, a *precise balancing rule* applies equally and consistently to all agreements. Once it has been determined that a certain agreement falls within a relevant category, a predetermined-categorical rule applies, thus limiting the discretion of the competition enforcer. A *general balancing standard*, on the other hand, depends on the specific circumstances of each case. Such balancing is essentially subject to the discretion of the competition enforcer.

The second parameter is the *types of benefit* protected by balancing. A balancing tool that takes only *economic benefits* into account balances cost and qualitative efficiencies against the harm caused to competition. A tool that incorporates broader social and regulatory policies also takes *non-economic benefits* into account. The classification of the national tools detailed in this chapter is exemplified by Figure 6.3.

<sup>1245</sup> Those parameters are part of the effectiveness and legal certainty normative benchmarks, as defined in Chapter 1, Sections 4.1 and 4.3, respectively.

**Figure 6.3: Classification of national balancing tools**



As the following sections show, each category of national balancing tools entails a different type of balancing, with different effects on the effectiveness, uniformity and legal certainty of balancing.

### 3. BALANCING TOOLS

#### 3.1. Precise balancing rules restricted to economic benefits

National *de minimis* rules are an example of precise balancing rules restricted to economic benefits. Chapter 5 Section 3.6 examined the EU *de minimis* rule developed by the EU Courts and the Commission. Cases taking place before NCAs and national courts, however, are subject to national *de minimis* rules. This means that national procedural law determines the NCA's jurisdiction to apply Article 101 TFEU and the national equivalent provision. Consequently, an NCA might not have jurisdiction to examine agreements that are subject to the Commission's jurisdiction, or *vice versa*. Table 6.1 summarises the various national *de minimis* rules. It shows that the national rules differ both from the EU rule and from each other.

**Table 6.1: National *de minimis* rules**

	Criteria	Applicable to by-object restriction?	Special protection of SMEs?
FR <sup>1246</sup>	Quantitative: 10% horizontal, 15% vertical And qualitative: improves the management of SMEs <sup>1247</sup>	A list of precluded practices	Excluding "micro-practices" <sup>1248</sup>
GR <sup>1249</sup>	Qualitative: rationalises economic activities of SMEs <sup>1250</sup> A quantitative presumption: 10% horizontal, 15% vertical	A list of precluded practices	Exception is limited to SMEs
HU <sup>1251</sup>	Quantitative: 10% horizontal, 15% vertical (until 2018, 10% for both)	A list of precluded practices	No <sup>1252</sup>
NL <sup>1253</sup>	Quantitative: Conduct of no more than 8 undertakings having a low turnover and market-share	Yes, only if the market share is lower than 5% when the agreement affects trade between Member States, and 10% otherwise	Exception is limited to SMEs
UK <sup>1254</sup>	Quantitative: 10% horizontal, 15% vertical	A list of precluded practices	No <sup>1255</sup>

The differences between the various national *de minimis* rules reflect different approaches to balancing. First, the table shows that most of the Member States have opted for a *de minimis* rule that is based on quantitative criteria, similar to the rule in the Commission's Notices (left column). This is a precise balancing rule, which does not require extensive discretion.

Second, as opposed to the EU rule, the national *de minimis* rules of France, Germany, Hungary, and the Netherlands are also aimed at the protection of SMEs (right column).<sup>1256</sup> The particularities of such protection differ between the Member States. In the Netherlands, the rule applies only to agreements between no more than 8 undertakings having a low turnover and

<sup>1246</sup> French Commercial Code, Articles L464-6-1 and L464-6-2. Also see (Vogel 2012), 171.

<sup>1247</sup> The French qualitative rule is an example of a general balancing standard that is restricted to economic benefits. Hence, it is discussed in Section 3.2 below.

<sup>1248</sup> "Micro practices" in France are an example of a general balancing standard that takes non-economic benefits into account. Thus, it is discussed in Section 3.4 below.

<sup>1249</sup> German Competition Act, Section 3.

<sup>1250</sup> The German qualitative rule is an example of a general balancing standard that is restricted to economic benefits. Hence, it is discussed in Section 3.2 below.

<sup>1251</sup> Hungarian Competition Act, Article 13.

<sup>1252</sup> Yet, as mentioned below, Article 78(8) of the Hungarian Competition Act allows a warning to be issued instead of a fine for first time infringements by SMEs.

<sup>1253</sup> Dutch Competition Act, Article 7.

<sup>1254</sup> A *de minimis* rule is not expressly mentioned in the UK Competition Act. It applies pursuant to Section 60, which brings the EU case law on this issue into play. The UK *de minimis* doctrine is also explained in OFT Understanding Competition Law Guidelines (2004), para 2.15-2.21.

<sup>1255</sup> Yet, Chapter 7, Section 3.2.4 illustrates that the UK competition Act provides immunity from fines for "small agreements", i.e. non-price-fixing agreements between undertakings having a low turnover or market share.

<sup>1256</sup> In comparison, the Commission's *de minimis notice* no longer protects SMEs, see Chapter 5, Section 3.6.

market-share.<sup>1257</sup> In 2010, the Dutch parliament revised the *de minimis* rule to provide SMEs more leeway to join forces against buyer power, by raising the market share threshold from 5% to 10%.<sup>1258</sup> The Commission, however, objected to this change, noting that it could remove hard-core restrictions from the ambit of Article 101 TFEU.<sup>1259</sup> Hence, the revision was amended to limit the higher threshold to purely national cases.<sup>1260</sup>

Hungary also provides special protection for SMEs. A 2015 amendment to the Hungarian Competition Act entrusted the NCA with replacing the fines imposed on SMEs for first-time infringements of the national cartel prohibition with a warning.<sup>1261</sup> Like the revised Dutch rule, this rule does not apply in mixed-cases.

Third, Table 6.1 indicates that the Member States have deviated from the Commission's and EU Courts' position that the *de minimis* exception does not apply to by-object restrictions (middle column). In all five Member States, the national *de minimis* rule does not apply to a closed list of practices, rather than to all forms of by-object restrictions.<sup>1262</sup> Moreover, as mentioned, a by-object restriction may benefit from the Dutch *de minimis* rule in cases where the undertakings command a low market share.

The above demonstrates that national *de minimis* rules are broader in comparison with the EU rule. As a result, certain infringements of Article 101 TFEU that could have been reviewed by the Commission could not be scrutinised by NCAs.<sup>1263</sup> At the same time, as precise balancing rules restricted to economic benefits, national *de minimis* rules that are based on quantitative criteria do not raise serious balancing concerns. Despite a certain divergence in their application, they only apply to agreements with limited to no impact on competition. Moreover, each national rule applies in a uniform manner to all agreements on the basis of consistent and unequivocal criteria.

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<sup>1257</sup> I.e. if the undertakings are not potential or actual competitors, the turnover of the undertakings is not more than EUR 5.5 million when the core activity is the supply of goods, or EUR 1.1 million in all other cases. If the undertakings are potential or actual competitors, their combined market share shall not exceed 5%, and their combined turnover is not higher than EUR 40 million.

<sup>1258</sup> Second Chamber, 2007-2008 session, 31 531.

<sup>1259</sup> Second Chamber, 2010-2011 session, 32 664.

<sup>1260</sup> (De Brauw 2011); (Pree & Molin 2013), 203.

<sup>1261</sup> Hungarian Competition Act, Article 78(8).

<sup>1262</sup> French Commercial Code, Article L464-6-2; German *de minimis* Notice (2007), para 14-15; Hungarian Competition Act, Article 13; UK OFT Understanding Competition Law Guidelines (2004), para 2.15-2.21.

<sup>1263</sup> For example, in Vj-141/2004 Plant protection products (2005), para 44-45 the Hungarian NCA found that an RPM agreement between undertakings having a low market share benefited from the national *de minimis* exception. The NCA noted that although RPM is considered a hard-core restriction by the Commission (and therefore cannot benefit from the Commission's *de minimis* exception), this did not preclude the application of the national *de minimis* exception.

### 3.2. General balancing standards restricted to economic benefits

The second type of national balancing tool comprises general balancing standards that are restricted to economic benefits. Those tools order national enforcers to weigh competition and economic benefits on a case-by-case basis. Such balancing inherently depends on the enforcer's discretion.

For instance, the Paris Court of Appeal introduced a special rule for assessing the joint offering of bids in tenders. The Court submitted that a joint bid did not infringe Article 101(1) TFEU if it could be justified due to technical requirements or cost savings due to economies of scale.<sup>1264</sup> This rule guided the examination of a long line of cases before the French NCA,<sup>1265</sup> including mixed-cases that affected trade between Member States.<sup>1266</sup> By contrast, the Commission and other jurisdictions normally assess such efficiencies within the scope of Article 101(3) TFEU.

Another example of a general balancing standard that is restricted to economic benefits is the *de minimis* rule in Germany. While most *de minimis* rules are based on objective quantitative criteria (see Table 6.1 above), the German rule necessitates case-by-case assessment. It is founded on qualitative criteria, examining whether the agreement rationalises economic activities and serves to improve the competitiveness of SMEs.<sup>1267</sup> The EU Courts and Commission, in contrast, normally engage in this type of balancing by using Article 101(1) or (3) TFEU balancing tools.

The French competition act includes a similar provision. In addition to the national equivalent provision to Article 101(3) TFEU, it provides that certain agreements, in particular those which are "intended to improve the management of small or medium-sized undertakings", may be excluded from the scope of the national prohibition by a decree adopted following a

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<sup>1264</sup> 2000/11303 Somme (2000); BOCCRF 2004-06 FNTV (2004).

<sup>1265</sup> See Annex 2.1.

<sup>1266</sup> This exception was accepted in mixed-cases, such as 09-D-18 Marseille transportation (2009), para 94-102 and rejected in 09-D-25 Work on railway tracks (2009), para 149-176.

<sup>1267</sup> Article 3(1) of the German Competition Act provides: "[a]greements between competing undertakings and decisions by associations of undertakings, whose subject matter is the rationalisation of economic activities through cooperation among enterprises, fulfill the conditions of §2 (1) if: 1. competition on the market is not significantly affected thereby, and 2. the agreement or the decision serves to improve the competitiveness of small or medium-sized enterprises". Also see (Klees 2006), 403; (Dreher & Korner 2014), 131-133; (Franck 2017). This provision was applied in B1-25/04 Verta/Danzer (2004); B3-06/05 OTC medicines - Land pharmacist associations (2007); B2-90/01-4 Timber (2008); B2-90/01-2 Timber (2009); B2-90/01-3 Timber (2009); B2-90/01-1 Timber (2009); Yomo (2016).

favourable opinion from the NCA.<sup>1268</sup> In practice, however, this provision has been used to exclude only very few agreements.<sup>1269</sup>

General balancing standards that are restricted to economic benefits are more problematic compared to precise balancing rules. Because they entrust NCAs with a wide margin of discretion, they are less predictable and coherent compared to precise balancing rules. Nevertheless, since those balancing tools are restricted to economic benefits, they normally reflect a more economic premise and are relatively effective at protecting competition.

### **3.3. Precise balancing rules taking non-economic benefits into account**

The third type of national balancing tool resembles the EU sectoral BERs; it is based on social and political considerations and applies to an entire sector or to all type of practices without engaging in case-by-case balancing.<sup>1270</sup> As precise balancing rules, those balancing tools leave competition enforcers limited discretion when applying the balancing to a specific case.

An illustrative example of a precise balancing rule that takes non-economic benefits into account is found in the UK Competition Act, which excludes the transfer of newspapers or newspapers assets from the national cartel prohibition. The UK Competition Act also excludes agreements that are subject to scrutiny by other acts, such as those related to financial services, company law, broadcasting, and the environment.<sup>1271</sup> Similarly, the German Competition Act excludes agreements related to agriculture, energy, newspapers, and magazines from its national cartel prohibition.<sup>1272</sup>

A precise balancing rule that takes non-economic benefits into account can also stem from a jurisdictional requirement. One example is the French jurisdictional rule applicable to agreements involving the use of public body prerogative. The French legal order is organised around two separate bodies of law: civil (private) law and administrative (public) law. Each body of laws is subject to the jurisdiction of a separate branch of courts. Accordingly, the assessment of the legality of an administrative decision, including those that concern the conclusion of public contracts, can only be carried out by the administrative court, the Council of State - *Conseil d'État*.<sup>1273</sup>

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<sup>1268</sup> French Competition Act, Article 420-4II.

<sup>1269</sup> For a discussion and a list of excluded agreements, see (Boudou et al. 2014), 109.

<sup>1270</sup> On the sectoral BERs, see Chapter 4, Section 3.2.3.

<sup>1271</sup> UK Competition Act, Section 3(1) and Schedules 1-3.

<sup>1272</sup> German Competition Act, Sections 28-30.

<sup>1273</sup> (Petit & Rabeux 2009), 106-109.

This rule affects the enforcement of both EU and national competition law. According to the division of competences under French law, only the *Conseil d'État* can examine the legality of agreements involving the expression of state powers. The French NCA and the civil courts, on the other hand, have no jurisdiction in those cases. For this purpose, the French NCA and the courts distinguish between: (i) conduct that involves the use of public body prerogatives, which can only be assessed under the administrative jurisdiction of the French *Conseil d'État*; and (ii) the conduct of public bodies acting in the economic sphere, independent of any public body prerogative, which can be examined by the NCA and national courts.<sup>1274</sup>

Cases taking place before the French NCA or the *Conseil d'État* are subject to different procedural and substantive rules.<sup>1275</sup> As such, agreements involving the use of the French State's prerogative enjoy a favourable standard of review. In practice, the NCA has mostly rejected claims of lack of jurisdiction, at least in part, while in a small number of cases it has found that it was not competent to examine the matter.<sup>1276</sup> The Courts have confirmed all challenges to this ground.

Precise balancing rules that take non-economic benefits into account may hinder the full effect of Article 101 TFEU in favour of broad types of non-competition interests. By favouring such policies over competition interests, they threaten the effectiveness of balancing. On the other hand, as precise balancing rules, they are transparent, relatively predictable, and merit only limited discretion when applied to a specific agreement. As such, they provide a relatively high degree of legal certainty and are generally applied quite consistently to agreements in the relevant Member State.

### **3.4. General balancing standards taking non-economic benefits into account**

The final type of national balancing tool relates to situations in which the national legislative or executive uses its powers to exclude the application of Article 101 TFEU from a specific agreement. Unlike the precise balancing rules that take non-economic benefits into account, in which an entire sector or type of practice are excluded, this section examines *issue-specific exceptions* benefiting certain agreements for essentially political reasons.

There are various examples of such issue-specific exceptions. The UK Competition Act, for example, provides for a ministerial public policy defence, allowing the Secretary of State to declare the Article 101 TFEU and the national cartel prohibition are inapplicable for "exceptional

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<sup>1274</sup> 03174 Aéroport de Paris (1999). Also see 09-D-18 Marseille transportation (2009), para 21-29; 10-D-13 Le Havre Port (2010), para 148-150; (Perroud 2013), 33-38.

<sup>1275</sup> (Petit & Rabeux 2009), 106-109; (Perroud 2013), 33-38.

<sup>1276</sup> See Annex 6.2.

and compelling reasons of public policy".<sup>1277</sup> This exception resembles the German ministerial exemption that was deleted shortly after the entry into force of Regulation 1/2003.<sup>1278</sup>

In practice, the UK Secretary of State has made a careful use of this power. Only four orders have been issued,<sup>1279</sup> three in relation to the defence industry<sup>1280</sup> (one of which was repealed<sup>1281</sup>), and one with respect to arrangements for the supply of oil and petroleum products in the event of significant disruption to the normal supply.<sup>1282</sup> The Secretary of State has interpreted the powers narrowly, i.e. limited to security concerns, noting that the orders were not incompatible with Article 101 TFEU as Article 346(1)(b) TFEU provides that provisions of the Treaty shall not preclude a Member State from taking "measures as it considers necessary for the protection of the essential interests of its security which are connected with the production of or trade in arms, munitions and war material". Accordingly, other public policy concerns unrelated to national security might be unable to justify an exception by the Secretary of State, at least when Article 101 TFEU applies.

A narrower general balancing standard that takes non-economic benefits into account is the French *de minimis* rule, which sets a separate appreciability threshold for less serious cases ("micro-practices").<sup>1283</sup> Those practices cannot be examined by the French NCA, but only by the Minister of the Economy, who can issue specific injunctions.

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<sup>1277</sup> Article 7(1) of Schedule 3 of the UK Competition Act provides: "[i]f the Secretary of State is satisfied that there are exceptional and compelling reasons of public policy why the Chapter I prohibition ought not to apply to (a) a particular agreement, or (b) any agreement of a particular description, he may by order exclude the agreement, or agreements of that description, from the Chapter I prohibition". Also see (Bailey & Whish 2015), 376.

<sup>1278</sup> See Chapter 2, Section 6.2.2.

<sup>1279</sup> Since the Secretary of State's orders do not fall within the coding selection criteria, they are not included in the database of this dissertation.

<sup>1280</sup> The Competition Act 1998 (Public Policy Exclusion) Order 2006 (2006 No. 605), excluding any agreement aimed at enabling the parties to provide or receive maintenance and repair services for surface warships; The Competition Act 1998 (Public Policy Exclusion) Order 2007 (2007 No. 1896), excluding agreements between members of Team Complex Weapons relating to complex weapons or supporting technology; The Competition Act 1998 (Public Policy Exclusion) Order 2008 (2006 No. 1820), excluding agreements relating to nuclear submarines developed or manufactured for the Secretary of State.

<sup>1281</sup> The Competition Act 1998 (Public Policy Exclusion) (Revocation) Order 2011 (2011 No.2886) with respect to Team Complex Weapons.

<sup>1282</sup> The Competition Act 1998 (Public Policy Exclusion) Order 2012 (2012 No. 710).

<sup>1283</sup> The French Commercial Code, Article L-464-9 provides that upon fulfilment of the following conditions, the Minister of the Economy can order the undertakings in question to cease the infringing behaviour and impose on them a fine of an amount not exceeding EUR 75,000 or 5% of the last known turnover in France, whichever is smaller: the agreement must only affect regional markets, and is not likely to affect trade between Member States; the individual turnover of the undertakings

While the above examples were limited in scope, Hungary made more significant use of issue-specific exceptions. This line of cases begins with the NCA's investigation in *Watermelon (2013)*.<sup>1284</sup> The case involved a price-fixing agreement concluded between supermarkets and national watermelons producers, which also included measures that hindered the distribution of imported watermelons. The agreement was supported by the Hungarian Minister for Rural Development, aiming to secure a fair income standard for farmers.

After the initiation of an NCA investigation, the Hungarian Parliament amended the Act on Inter-branch Organisations (the "amendment").<sup>1285</sup> The amendment entrusted the Minister for Rural Development with excluding from the national provision equivalent to Article 101 TFEU agreements in the agricultural sector that provide a fair income for producers, as far as they do not preclude all market actors from joining the agreement.<sup>1286</sup> In such cases, the amendment further stated, the Hungarian NCA could not impose fines for the infringement of EU law. Finally, the amendment provided for a special procedure for agriculture products that were not excluded.<sup>1287</sup> It obliges the Hungarian NCA to issue a warning to undertakings prior to establishing that an infringement of EU or national law has occurred, asking them to bring their conduct into conformity with the law within a set deadline. Only if the undertaking has failed to cease the infringement by the deadline can a fine be imposed.

The amendment had an immediate effect. The Hungarian NCA terminated its proceedings in *Watermelon* after the Minister declared that the conditions for the exception had been met.<sup>1288</sup> For the same reason, it terminated the proceedings in *Sugar cartel (2012)*, in which it suspected that the sugar producers had regularly coordinated their prices, divided industrial and retail purchasers, and shared information on the quantities sold.<sup>1289</sup> The amendment was also applied retroactively to

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does not exceed EUR 50 million; and the cumulative turnover of the undertakings is less than EUR 100 million. Also see (Vogel 2012), 171; (Boudou et al. 2014), 109.

<sup>1284</sup> Vj-62/2012 *Watermelon (2013)*.

<sup>1285</sup> Hungarian Act No. CLXXVI of 2012 on inter-branch organisations and on certain issues of the regulation of agricultural markets.

<sup>1286</sup> Article 93/A(1) states: "[t]he infringement of §11 of the Competition Act cannot be established in case of agricultural products if the distortion, restriction or prevention of competition resulting from an agreement according to §11 of the Competition Act does not exceed what is necessary for an economically justified, fair income, provided that the actors of the market affected by the agreement are not debarred from benefiting from such income and that Article 101 TFEU was not applied". English translation from (Toth 2013), 364.

<sup>1287</sup> Hungarian Act No. CLXXVI of 2012 on Inter-branch Organisations and on Certain issues of the Regulation of Agricultural Markets, Article 18/A(4).

<sup>1288</sup> Vj-62/2012 *Watermelon (2013)*, para 13-15; 42-46; 56-57.

<sup>1289</sup> Vj-50/2009 *Sugar cartel (2012)*, para 132.

*Wheat mill products I (2010, 2012, 2014)*.<sup>1290</sup> Prior to the adoption of the amendment, the NCA imposed a fine on a market-sharing and price-fixing agreement concerning wheat mill products. Yet, the Hungarian courts that examined the case following the adoption of the amendment held that the NCA should reconsider its decision in light of the new amendment.<sup>1291</sup>

The Hungarian issue-specific, political exception for the agriculture sector was heavily criticised by commentators,<sup>1292</sup> as well as by the NCA itself. The latter had warned that the amendment could “lead [...] to a situation in which *the public interest* that the legislator wishes to protect *is no longer clear*”<sup>1293</sup> and give rise to serious concerns over the evaluation of cartel activities concerning agricultural products.<sup>1294</sup>

The Commission, too, voiced concerns. Yet, the Commission did not question the exception itself. It only focused on the provisions that did not allow the Hungarian NCA to impose fines for infringements of Article 101 TFEU.<sup>1295</sup> Under threat of the possible initiation of an infringement procedure against Hungary, the exception was amended. The agriculture exception included in the Hungarian Competition Act itself clarified that the NCA could impose sanctions, including fines, when an infringement of Article 101 TFEU affects trade between Member States.<sup>1296</sup>

The empirical findings, however, suggest that this clarification has had no impact in practice. They show that, prior to amendment, Article 101 TFEU was actively enforced in the agriculture sector.<sup>1297</sup> However, following amendment, the NCA did open investigations into this sector (or, at least, an investigation that ended with a published notice). This will be further elaborated in Chapter 8 Section 4.3 as an example of balancing by means of priority setting.

Despite the criticism, the Hungarian legislator adopted other issue-specific exceptions. In *Waste materials (2015)*, the Hungarian NCA examined the conduct of a group of Hungarian

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<sup>1290</sup> Vj-69/2008 *Wheat mill products I (2010)*, para 194-197.

<sup>1291</sup> 2.K.31.793/2011/90 *Wheat mill products I (2012)*; 2.Kf.649.964/2013/20 *Wheat mill products I (2014)*.

<sup>1292</sup> (Szilágyi 2012), 3-4; (Szilágyi 2013), 6-8; (Toth 2013), 364-366; (Pina 2014), 16; (Csépai 2015), 404-405.

<sup>1293</sup> Emphasis added. Vj-62/2012 *Watermelon (2013)*, para 70-72.

<sup>1294</sup> GVH, *Enforceable Ethical Rules to the Agriculture Sector (2009)*.

<sup>1295</sup> (Csépai 2015), 404.

<sup>1296</sup> Article 39/A of the Hungarian Competition Act provides that the special exception for agriculture shall only apply “if the necessity of the application of Article 101 of the TFEU does not arise. The necessity of the application of Article 101 of the TFEU shall be established by the Hungarian Competition Authority in its competition supervision proceeding pursuant to Article 3(1) of Council Regulation (EC) No 1/2003, before making the final resolution”.

<sup>1297</sup> See Annex 6.3.

undertakings that had won the bid for operating the national waste management scheme.<sup>1298</sup> The tender was part of the re-structuring and re-nationalisation of the national waste management market. The government had excluded the incumbents, largely foreign-owned undertakings, from the bidding by restricting the issuance of operating licenses to undertakings that were controlled by the State or local councils.<sup>1299</sup> The NCA suspected that the group of undertakings had colluded to fix prices, coordinated the actual bids, and bid-rigged the public procurement procedures. Faced with those serious allegations, the Hungarian parliament adopted an issue-specific law. It maintained that no infringement of the national prohibition on cartels could be established with respect to actions carried out in the execution of public procurements procedures published in 2012-2013 for the implementation of the National Waste Plan.<sup>1300</sup> The NCA closed the investigation noting that there was no public interest in continuing the case in light of the new law.<sup>1301</sup>

An issue-specific exception for EU and mixed-cases was also adopted by the German legislator. In *Round timber in Baden-Württemberg (2015, 2017, 2018)*, the German NCA examined the conduct of the federal state of Baden-Württemberg, which had sold and invoiced wood on behalf of other forest owners and carried out several services related to the marketing of round timber via its company Forst BW. In July 2015, the German NCA held that because the agreements between the federal state and other forest owners fixed prices and restricted sales, they amounted to by-object restrictions of competition.<sup>1302</sup> In early 2017, *after* the federal state of Baden-Württemberg had appealed this decision, the German legislator amended the national Federal Forests Act. The amendment excluded these types of agreements from the scope of national competition law, and effectively also from the scope of EU competition law by setting a presumption that they were justified under Article 101(3) TFEU.<sup>1303</sup>

The full force of the amendment was not accepted by the Dusseldorf Higher Regional Court. The Court upheld the NCA's decision, noting that the amendment could entail no more than that the federal state's activity no longer violated German competition law. According to the Court, the German legislator did not have the competence to limit the full application of Article

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<sup>1298</sup> Vj-67/2014/59 Waste materials (2015).

<sup>1299</sup> Hungarian Act CL XXXV of 2012 Waste Disposal Act, Article 81. Also see (Varju & Papp 2016), 1661.

<sup>1300</sup> Hungarian Act XCIX of 2014 on the Financial Grounding of the Central Budget.

<sup>1301</sup> Vj-67/2014/59 Waste materials (2015), 2-3.

<sup>1302</sup> B1-72/12 Round timber in Baden-Württemberg (2015).

<sup>1303</sup> German Federal Forest Act, Section 46(2).

101 TFEU.<sup>1304</sup> Nevertheless, in the end, the conduct of the federal state was not prohibited. In June 2018, the Federal Court of Justice overturned the NCA's decision to open the case in the first place without discussing the compatibility of the amendment with EU competition law.<sup>1305</sup>

Issue-specific exceptions are the most harmful type of unique national exception. As general balancing standards that take non-economic benefits into account, they allow NCAs, the national parliament or the executive to limit the application of Article 101 TFEU for essentially political reasons. In addition to being ineffective, this type of balancing tool is also uncertain and not uniform. The high level of discretion and the *ex-ante* nature of many such exceptions do not make for transparent and predictable balancing tools that can be applied consistently.

#### 4. NORMATIVE BENCHMARKS

This chapter has illustrated that NCAs, national courts, governments, and parliaments have introduced unique national exceptions to the enforcement of Article 101 TFEU. Those exceptions differ considerably from the substantive balancing tools developed by the EU Courts and the Commission. Because the national exceptions are not applied in a uniform manner across the EU, they may lead to fragmentation in terms of enforcement.

The unique national exceptions have also raised concerns as to their effectiveness. This is especially true with respect to the balancing tools that are not restricted to economic benefits. This type of exception takes broad non-economic benefits into account under Article 101 TFEU, beyond what is normally considered under the balancing tools of Article 101(1) and (3) TFEU.

Finally, the unique national exceptions jeopardise the legal certainty of balancing. The national exceptions, and especially those that follow only a general balancing standard, are applied on a case-specific basis and prescribe a high level of discretion. Moreover, they are often neither transparent nor predictable.

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<sup>1304</sup> Kart 10/15 (V) Round timber in Baden-Württemberg (2017), para 349-369.

<sup>1305</sup> The full Federal Court of Justice decision was not published prior to the cut-off date of this dissertation (see Chapter 1, Section 3.2.4). According to the Court's press release of 12 June 2018, the decision was based on the finding that the German NCA should not have re-opened its investigation after it had accepted commitments on this matter in 2008. The Court rejected the NCA claim that the reopening of the proceedings was justified by new information obtained after the commitment decision had been adopted.

Notably, concerns relating to the effectiveness, uniformity, and legal certainty of the national exceptions arise even when the exceptions are limited to purely national cases. As demonstrated by Chapter 8 Section 5.4, the effect on trade criterion is an indefinite standard that is open to interpretation. It leaves the NCAs leeway to apply unique national exceptions by classifying borderline cases as purely national. In addition, in practice, national competition enforcers have often chosen not to enforce Article 101 TFEU when a national rule excludes the application of a national cartel prohibition (e.g. the Hungarian and German issue-specific laws). As such, national competition enforcers have made use of their priority setting powers to extend the application of unique national exceptions to mixed-cases, as well.

Since this chapter has examined various types of national exception, they cannot be summarised in a radar graph.