Coding non-competition interests under Article 101 TFEU

A quantitative and qualitative study

Brook, O.

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1. INTRODUCTION

The previous chapters examined different types of balancing tools that have overtly limited the enforcement of EU competition law in favour of promoting non-competition interests. Chapters 3-5 discussed substantive balancing tools based on EU law sources, while Chapter 6 reviewed national balancing tools stemming from unique Member State exceptions. The next two chapters explore a different type of balancing tool embedded in the procedural administrative powers of the competition enforcers. They demonstrate that the duty to choose between various possible administrative measures, which is an inherent part of any administrative agency’s activity, gives rise to a distinct type of procedural balancing tool. For this purpose, this chapter discusses the often-overlooked balancing function embedded in the remedies imposed for infringements of Article 101 TFEU, and Chapter 8 examines balancing linked to the exercise of the competition enforcers’ detection, target, instrument, and outcome discretions.

Remedies\textsuperscript{1307} are usually perceived as having punitive, restorative or deterrence objectives, or a combination thereof.\textsuperscript{1308} However, this chapter reveals that the remedies imposed have at times gone beyond what was essential to effectively address these concerns, giving weight to non-competition interests.\textsuperscript{1309} In fact, the empirical findings presented in this chapter illustrate that following modernisation, the balancing of many non-competition interests that had previously taken place under the substantive balancing tools of Article 101(1) and (3) TFEU has now shifted to the procedural remedy stage.

There are two main ways in which remedies are used to account for non-competition interests: by accepting commitments and by moderating the fines for infringement. These two balancing tools are fundamentally different from the substantive balancing tools discussed in the previous chapters. First, the substantive balancing tools of Article 101(1) and (3) TFEU are bound by legal or economic tests. Competition enforcers must justify their balancing, taking the balancing methods and principles developed by the Commission and EU Courts as a point of

\textsuperscript{1306} Competition Commissioner Kroes in ICN Seminar on Competition Agency Effectiveness (2009), 6.

\textsuperscript{1307} Remedies, in the meaning of Article 101 TFEU, can be defined as the legal rules that provide for and impose the consequences of finding an infringement. See (Sauter 2016), 127.

\textsuperscript{1308} (Sauter 2016), 127. On the objectives of remedies in EU competition law see, OECD Fighting Hard-Core Cartels (2002); (Frese 2014); (Lianos et al. 2014), 20.

\textsuperscript{1309} (Van Rompuy 2012), 269.
reference. In comparison, balancing at the remedy stage is generally flexible. Competition enforcers do not need to explain how, or even whether, balancing took place.

Second, Article 101(1) and (3) TFEU balancing tools are founded on an EU legal framework. By comparison, the substantive and procedural rules governing the remedies have not been harmonised throughout the EU and are predominantly determined by national laws. Consequently, the Member States have considerable discretion to decide if, and how, to account for non-competition interests at the remedy stage. This is especially true since both EU and national courts have interpreted this discretion broadly, leaving the competition enforcers ample room for balancing.

This chapter maintains that these two characteristics have impeded the uniformity and legal certainty of balancing at the remedy stage. In particular, they have allowed competition enforcers to take account of non-competition interests beyond what is normally allowable under Article 101(1) and (3) TFEU substantive balancing tools. Accordingly, the chapter is structured as follows: Section 2 begins by examining balancing by means of the commitment decision procedure, and Section 3 focuses on the balancing embedded in calculating fines. Section 4 concludes by evaluating the extent to which those two balancing tools have met the normative benchmarks.

2. COMMITMENT DECISION PROCEDURE

Regulation 1/2003 granted the Commission and NCAs a novel enforcement instrument in the form of the commitment decision procedure. Originally, this procedure was directed at securing early closure of cases, thereby promoting administrative efficiency. This section reveals that despite this original aim, commitments have also served as an open-ended legal tool to account for non-competition interests. Balancing by means of commitments is especially significant given the frequent use of this procedure. While it was initially presumed that commitments would be used in "unusual and rare" circumstances, they quickly became the hallmark of the Commission’s

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enforcement regime. Before exploring the features of commitments as a balancing tool, the next section provides general legal and empirical background as to their use.

2.1. Legal and empirical background

2.1.1. Commission

The Commission’s power to accept commitments was first formalised by Regulation 1/2003. The Regulation authorises the Commission to close an Article 101 TFEU investigation by accepting behavioural or structural commitments offered by the undertakings (“formal commitments”). This provision codified a long-standing practice in which the Commission resolved investigations by accepting voluntary commitments (“informal commitments”).

The power to accept formal and informal commitments is not bound to any substantive test. Regulation 1/2003 merely prescribes that “commitment decisions should find that there are no longer grounds for action by the Commission without concluding whether or not there has been or still is an infringement”. It leaves open the questions of whether the agreement actually violated Article 101 TFEU in the first place, or whether the modified agreement is compatible with the exceptions of Article 101(1) or (3) TFEU. As a result, the Commission has an extraordinary broad discretion to accept commitments, which is not bound by the regular competition analysis of Article 101 TFEU.

This power was confirmed by the CJEU in Alrosa (2010). The Court held that when accepting commitments, the Commission is only subject to general EU principles, the principle of proportionality in particular. This principle, according to the Court, has a different meaning in the context of a regular infringement or a commitment decision. In the latter case, this simply entails that the offered commitment addresses the competition concerns expressed by the Commission in its preliminary assessment. The Commission is only required to verify that the proposed commitments do not manifestly go beyond what is necessary to address the competition concerns and that the undertakings have not offered less onerous commitments that could equally

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address those concerns. The Commission is not obliged to compare the commitments offered with measures that it could have used in the context of an infringement decision.

Despite the lack of a substantive test, the formalisation of commitments by Regulation 1/2003 introduced several procedural safeguards. It provides that when the Commission intends to accept a commitment it must publish a concise summary of the case and the proposed commitment, and invite interested third parties to submit their observations (the so-called "market test").1319

The Commission’s practice of accepting formal and informal commitments is summarised by Figure 7.1. The figure indicates the number of Article 101 TFEU proceedings in which the Commission accepted formal (red bars) and informal commitments (blue bars), in relation to the total number of Article 101 TFEU proceedings (grey line).

**Figure 7.1: Formal and informal commitments, Commission**

<table>
<thead>
<tr>
<th>Year</th>
<th>Formal Commitments</th>
<th>Informal Commitments</th>
<th>Total Article 101 TFEU proceedings</th>
</tr>
</thead>
<tbody>
<tr>
<td>1964</td>
<td>1</td>
<td>2</td>
<td>1</td>
</tr>
<tr>
<td>1965</td>
<td>1</td>
<td>2</td>
<td>1</td>
</tr>
<tr>
<td>1966</td>
<td>1</td>
<td>2</td>
<td>3</td>
</tr>
<tr>
<td>1967</td>
<td>1</td>
<td>2</td>
<td>3</td>
</tr>
<tr>
<td>1968</td>
<td>1</td>
<td>2</td>
<td>3</td>
</tr>
<tr>
<td>1969</td>
<td>1</td>
<td>2</td>
<td>3</td>
</tr>
</tbody>
</table>

The informal commitments category includes cases in which the Commission accepted commitments in relation to future behaviour while imposing fines with respect to past infringements.

The figure demonstrates that contrary to the Commission’s initial expectations, formal commitments were frequently used upon the entry into force of Regulation 1/2003 (red bars). In fact, Figure 9.1 reveals that the Commission used commitments to close many of the cases that were not resolved by means of leniency, settlements, or procedural decisions.

1319 Regulation 1/2003, Article 27(4). The empirical findings confirm that the Commission has often taken third parties’ observations into account, and ordered that the commitments be modified. See Annex 2.1.
Moreover, Figure 7.1 affirms that the Commission continued to accept informal commitments even once Regulation 1/2003 had come into force (blue bars).\textsuperscript{1320} As part of its priority-setting powers, the Commission is competent to close investigations by means of accepting informal commitments.\textsuperscript{1321} Because this procedure has not been formalised, the procedural safeguards of Regulation 1/2003 do not apply. By the same token, apart from the general principle of protection of legitimate expectations, there is no legal mechanism to force undertakings to comply with the informal commitments offered.\textsuperscript{1322}

2.1.2. NCAs

Regulation 1/2003 vested the NCAs with powers allowing them to accept commitments.\textsuperscript{1323} To make use of such powers, nevertheless, the Member States must adopt national laws that prescribe the applicable substantive and procedural rules. The five Member States examined in this dissertation,\textsuperscript{1324} like most other Member States,\textsuperscript{1325} have adopted such laws. Because such rules are not harmonised, national commitments are not identical to the Commission’s procedure.\textsuperscript{1326} There is considerable divergence, in particular, with respect to the legal and procedural frameworks, the application of the proportionality test, the requirement of a market test, and the rights of third parties.\textsuperscript{1327} The rules governing the judicial review of commitment decisions also differ considerably.\textsuperscript{1328} As elaborated below, these differences affect the scope for balancing under the commitment decisions procedure.

Figure 7.2 summarises the number of commitment decisions adopted by the five examined NCAs between May 2004 and 2017. It shows that all NCAs concluded Article 101 TFEU

\textsuperscript{1320} Also see discussion in (Wils 2006b), 364.
\textsuperscript{1321} See Chapter 8, Section 6.1.
\textsuperscript{1322} (Van Rompuy 2012), 270; (Lachnit 2016), 281.
\textsuperscript{1323} Regulation 1/2003, Article 5.
\textsuperscript{1324} French Commercial Code, Article L464-2(I) and French Notice on Competition Commitments (2009); German Competition Act, Section 32b; Dutch Competition Act, Article 49a; Hungarian Competition Act, Article 75; UK Competition Act, Sections 31A -31E.
\textsuperscript{1325} For a detailed analysis, see ECN Decision Making Powers Report (2012), 28-35. Also see ECN Recommendation on Commitment Procedures (2013), para 3.
\textsuperscript{1326} ECN Decision Making Powers Report (2012), para 9 recommends further convergence in national laws on commitments.
\textsuperscript{1327} For a detailed analysis, see ECN Decision Making Powers Report (2012), 28-35; (Schweitzer 2012). Notably, the Commission did not criticise this divergence in its ECN+ Directive Proposal (2017). The Directive merely pointed out in Article 12 that NCAs should have the power to adopt commitments to meet the concerns expressed by them.
\textsuperscript{1328} See Section 2.3 below.
proceedings by way of accepting formal (red bars) and informal (blue bars) commitments, yet for a smaller ratio of proceedings compared to the Commission’s practice during the same period.

**Figure 7.2: Formal and informal commitments, NCAs**

<table>
<thead>
<tr>
<th>Country</th>
<th>Total Article 101 TFEU proceedings</th>
<th>Commitment (formal)</th>
<th>Commitment (informal)</th>
</tr>
</thead>
<tbody>
<tr>
<td>FR</td>
<td>400</td>
<td>50</td>
<td>50</td>
</tr>
<tr>
<td>GR</td>
<td>350</td>
<td>50</td>
<td>50</td>
</tr>
<tr>
<td>NL</td>
<td>300</td>
<td>50</td>
<td>50</td>
</tr>
<tr>
<td>HU</td>
<td>250</td>
<td>50</td>
<td>50</td>
</tr>
<tr>
<td>UK</td>
<td>200</td>
<td>50</td>
<td>50</td>
</tr>
</tbody>
</table>

17 of the formal commitments in Germany were related to a mere 2 agreements (with each undertaking offering commitments in a separate decision)

### 2.2. Balancing tool

#### 2.2.1. Implicit balancing method

The lack of a substantive test for accepting commitments gave the competition enforcers a “blank check” to use commitments as a form of balancing. Consequently, the balancing method guiding the acceptance of commitments can take various forms:

First, commitments may follow the same balancing method as the Article 101(3) TFEU balancing tool. A commitment might for instance aim to amend an anti-competitive agreement to bring it into compliance with the four conditions of Article 101(3) TFEU. In such cases, competition enforcers might have several reasons to prefer accepting a commitment rather than declaring that Article 101(3) TFEU is applicable. Commitments provide a flexible, relatively fast, and informal measure for balancing. Since there is no substantive test for accepting commitments, a competition enforcer does not need to explain how and why the four conditions of the provision have been fulfilled. Thus, NCAs, or the Commission itself, could depart from the Commission’s narrow interpretation of Article 101(3) TFEU without declaring so openly.

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1329 The Commission declares that commitments can be used to settle a case in which Article 101(3) TFEU is likely to apply. See Commission Staff Working Paper accompanying the Report on the Functioning of Regulation 1/2003 (2009), 26, 34.

1330 On positive decisions see Chapter 8, Section 6.

1331 On the Commission’s narrow interpretation of Article 101(3) TFEU, see Chapter 3, Sections 3.4 and 4.4.
this vein, commitments allow competition enforcers to apply Article 101(3) TFEU balancing implicitly and flexibly. An enforcer can take broader types of benefits into account, give preference to non-competition interests, or accept a low threshold of evidence.

Second, a competition enforcer may accept a commitment as a means of balancing that stays outside the Article 101(1) and (3) TFEU balancing tools framework altogether. A competition enforcer may accept a commitment even if the original agreement is not prohibited by Article 101 TFEU, i.e. if the agreement does not infringe Article 101(1) TFEU or fulfil the conditions of Article 101(3) TFEU. By the same token, an enforcer may also accept a commitment that does not remedy all competition concerns. To this end, commitments can be used to protect non-competition interests that could not have been considered otherwise or to impose conditions that could not have been attached in the context of a regular infringement decision.

Third, commitments may serve as a regulatory balancing tool. Whereas following May 2004, the substantive balancing tools have typically been applied in an ex-post manner, competition enforcers can use commitments as a forward-looking tool aimed at shaping market structures and affecting business conduct. Rather than applying Article 101 TFEU reactively to preserve competition on the market, commitments can be used to proactively regulate an industry.

Balancing by means of commitments is particularly attractive from the standpoint of the competition enforcers following modernisation. In the face of the Commission’s attempts to limit the scope for balancing under Article 101(1) and (3) TFEU, commitments offer an indirect way to facilitate balancing. As Schweitzer has aptly summarised it: “there appears to be a real need, perceived both by the Commissions and the undertakings concerned, for a flexible procedural framework outside the normal infringement proceeding to negotiate conditions and obligations fine-tuned to the requirements of Art. [101(3) TFEU]. Commitment decisions here serve as a substitute for exemption decisions in application of Art. [101(3) TFEU] with conditions and obligations attached under Art. 8(1) of Reg. 17/62.”

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1332 Wils 2006b), 357; (Schweitzer 2008), 1; (Van Rompuy 2012), 274; CMA’s Roundtable on the Use of Commitments in Competition Enforcement (2015), para 11.
1333 Schweitzer 2012), 3. Also see (Forrester 2008), 646; (Cengiz 2010), 10; (Wathelet 2015), 553.
1334 For the definition of a regulatory balancing tool, see Chapter 1, Section 4.1.3.
Yet, balancing by way of commitments also carries serious risks. Although commitments do not have any formal precedential value, they could have that effect in practice. The Commission has already acknowledged that notwithstanding the limited legal effects of commitment decisions, they can serve as a model for addressing similar situations. More recently, in Gasorba (2017), the CJEU held that although national courts were not bound by a commitment decision adopted by the Commission “both the principle of sincere cooperation laid down in Article 4(3) TEU and the objective of applying EU competition law effectively and uniformly require the national court to take into account the preliminary assessment carried out by the Commission and regard it as an indication, if not prima facie evidence, of the anticompetitive nature of the agreement at issue in the light of Article 101(1) TFEU”. Under those circumstances, the opportunity to balance outside the substantive competition analysis could have serious implications that extend beyond the case at hand. Balancing by accepting commitments could also potentially hinder the future development of EU competition law.

2.2.2. Empirical indications

The possibility that commitments could be used for purposes that go beyond their original administrative efficiency aim to account for non-competition interests has already been observed by various commentators. They have emphasised that the lack of a substantive test for accepting commitments, in combination with their ex-ante nature, allows competition enforcers to regulate markets and to promote non-competition interests that are not directly related to the anti-competitive behaviour of the undertakings concerned.

Yet, while commentators have pointed to the balancing function of commitments, it is difficult to identify the existence and method of balancing in an individual case. In fact, most commitment decisions do not reveal whether non-competition interests have played a role, and if so, how. Instead, competition enforcers have often accepted commitments without explaining whether the original agreement violated Article 101 TFEU and if the proposed commitment could remedy such a violation.

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1338 C-547/16 Gasorba (2017), para 29.
1339 See, for example, (Schweitzer 2008), 11; (Forrester 2008), 646; (GCLC Annual Conference 2010), 65; (Van Rompuy 2012), 274; (Wagner-von Papp 2012), 961-966; (Blanco & De Pablo 2012), 76-78; (Wathelet 2015), 554; CMA’s Roundtable on the Use of Commitments in Competition Enforcement (2015), para 11; (Sauter 2016), 130, 286-287.
Nevertheless, this section argues that the empirical findings can assist in filling this gap. Although they cannot prove the existence of balancing by means of accepting commitments, they offer proxies indicating that balancing might have taken place.

The first proxy relates to the types of sectors in which commitments were accepted. The empirical findings reveal that almost all the commitments accepted by the Commission and NCAs following modernisation were related to agreements in the same sectors that had facilitated much of the Article 101(1) and (3) TFEU balancing prior to modernisation. This is summarised by Figure 7.3, demonstrating that, as suggested by Dunne, these sectors can be divided into three groups: (i) regulated and liberalised markets (blue areas); (ii) technology markets (green areas); and (iii) financial services (red areas). As the previous chapters have shown, those sectors inherently invite balancing questions. Hence, it is highly likely that commitments have functioned, at least in some of those cases, as a balancing tool to take non-competition interests into account.

Figure 7.3: Commitments by sector, Commission and NCAs (May 2004-2017)

- Media, telecom and IPRs
- Energy and transport
- Professional associations
- Public health and safety
- Other regulated and liberalised markets
- Technology markets
- Financial services
- Other markets

(dotted areas represent informal commitments)

(a) COMM  (b) DE  (c) HU

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1341 See Chapter 3, Section 4.3.3 and Chapter 5.

1342 For a list of cases in each category, see Annex 7.2.
All formal and informal commitments adopted by the competition enforcers. Commitments that do not fit into any of those three groups of sectors are classified as “other” (grey areas).

The first group, agreements in regulated and liberalised markets, represents the majority of commitments accepted (blue areas). As described in Chapter 3 Section 4.3.3, those markets typically require balancing between competition and the need to ensure affordable prices, quality, and equal access. The empirical findings reveal that commitments were accepted in relation to agreements having similar features to those exempted under Article 101(3) TFEU during the third enforcement period (i.e. 1988- April 2004). In fact, many of the agreements subject to the Commission’s first commitments decisions under Regulation 1/2003 had actually initially been notified to the Commission under the old notification regime for the purpose of receiving exemptions. Commitments were seen as an appropriate measure to deal with those transitional cases.

Similar balancing challenges characterise agreements governing the function of professional associations. As described in Chapter 5 Section 2, these agreements often necessitate striking a balance between the economic, social, and regulatory function of the associations. Indeed, the empirical findings show that the NCAs accepted commitments for agreements similar to those that had qualified for an Article 101(1) TFEU exception during the third enforcement period.

The second group of commitments relates to practices in technology markets, and especially to online platforms (green areas). This line of cases has typically involved novel legal and economic questions on the applicability of Article 101 TFEU, and the balance of competition, innovation, and IPRs. The use of commitments in technology markets was vindicated by the

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1343 During the third enforcement period, Article 101(3) TFEU exemptions were often granted as a result of accepting informal commitments. See Chapter 3, Section 4.3.1 and Figure 3.1.
1345 (Gippini-Fournier 2008), 43.
need to adopt timely solutions in fast-changing markets \(^{1346}\) where traditional enforcement mechanisms might have not been fast enough to reflect rapid changes in the industry. \(^{1347}\) In those cases, commitments served as a tool to overcome the so-called “regulatory disconnection” problem, i.e. when innovation on the market slows because the legal framework is unable to keep up with technological developments. \(^{1348}\)

The third group of commitments focused on practices in financial services markets (red areas). Commitments were used to impose price regulation on financial products. \(^{1349}\) In particular, such commitments not only aimed to resolve competition problems but also provided a means to regulate the future development of EU financial markets.

In view of the above, the empirical findings presented in Figure 7.3 indicate that commitments were used to assess the same types of agreements that had been resolved using the balancing tools of Article 101(1) and (3) TFEU prior to modernisation. This significantly impeded the legal certainty of balancing. Since commitments were used as a substitute for the substantive balancing tools, the Commission and NCAs were not given any opportunities to clarify how such tools should be applied. \(^{1350}\)

This conclusion is further reinforced by the debate over the application of the substantive balancing tools prior to accepting commitments. This debate can serve as another proxy suggesting that balancing questions were relevant in such cases. Accordingly, Figure 7.4 specifies the number of cases in which the Commission accepted formal and informal commitments (grey bars) after discussing the balancing tools of Article 101(1) (red bars) and (3) (blue bars).

\(^{1348}\) On regulatory disconnection see, for example, (Brownsword & Somsen 2009), 26-31; (Moses 2013), 1; (Brownsword & Goodwin 2012), 369-420; (Butenko & Larouche 2015).
\(^{1349}\) (Dunne 2014a), 410.
\(^{1350}\) Also see (Wathelet 2015), 554.
The figure demonstrates that the Commission regularly accepted formal and informal commitments after the role of non-competition interests had been discussed under the substantive balancing tools of Article 101(1) and (3) TFEU. This was true both prior to modernisation when accepting informal commitments, and post-modernisation when accepting formal commitments. This supports the hypothesis that commitments were accepted to deal with cases that would otherwise have been examined using the substantive balancing tools.

In sum, there are strong theoretical and empirical indications that commitments are used to account for non-competition interests. Despite such indications, the balancing in a specific case is largely invisible. A competition enforcer is not required to explain whether balancing has taken place, which non-competition interests were taken into account, and which balancing method has been applied. This raises serious concerns as to the uniformity and legal certainty of such balancing tools.

2.2.3. Unclear boundaries

The legal uncertainty surrounding balancing by means of accepting commitments has been further aggravated by the Commission’s contradictory statements and practices. This section shows that the Commission has not always been consistent when defining the boundaries of the commitment tool.

The Commission’s policy on accepting commitments for by-object restrictions provides a good example. Regulation 1/2003 states that commitments are inappropriate when the Commission intends to impose a fine. By the Commission’s interpretation, this entails that it should not

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1351 The number of commitments decisions discussing Article 101(1) and (3) TFEU balancing tools is probably under-represented in Figure 7.4, because the Commission is not required to explain the application of those provisions when accepting commitments.

accept commitments to remedy hard-core restrictions. Nevertheless, the empirical findings presented in Figure 7.5 reveal that the Commission has accepted both formal (blue bars) and informal (red bars) commitments, also in such cases.

![Figure 7.5: Commitments for by-object restrictions, Commission](image)

For instance, in *Container Shipping (2016)*, the Commission examined a widespread practice of major global carriers for announcing general rate increases. Referring to its Horizontal Guidelines (2011), the Commission held that such public exchanges of pricing intentions, even if unilateral, might constitute a by-object restriction. At the same time, the Commission accepted commitments permitting “timely, transparent and committal price announcements”, as to allow consumers to make informed purchase decisions.

In a similar vein, the Commission has expressed inconsistent positions on the regulatory or corrective aim of commitments. In some cases, the Commission has overtly used commitments as a *regulatory balancing tool*. For example, in *Ship Classification (2009)*, it noted that the commitments offered were not only necessary to improve the competitive situation in the market, but also to promote the efficiency and quality of the classification society’s technical

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1353 Commission’s Commitments Decisions Press Release (2004). Also see (Cengiz 2010), 5. Most Member States have declared that they follow a similar approach. Others, such as the Czech Republic and Slovenia, accept commitments to remedy hard-core infringements; see OCED Commitments Report (2016), para 23.

1354 Commission Horizontal Guideline (2011), para 72-74; Also see (Rabinovici 2016), 152.


1356 On the definition of a regulatory balancing tool, see Chapter 1, Section 4.1.3.
work and standards.\textsuperscript{1357} In \textit{Virtual Print Fee agreements (2011)}, the commitments were also justified by cultural motives, i.e. providing access to independent films.\textsuperscript{1358}

Yet, in other cases, the Commission has claimed that commitments should be confined to \textit{corrective balancing} purposes.\textsuperscript{1359} According to this approach, non-competition interests can only be taken into account to the extent that they are required to safeguard rights of third parties within the market test. The Commission has maintained that it would not use commitments to promote non-competition interests on account of competition, but only to ensure that the steps taken to restore competition did not harm the non-competition interests of third parties.

This position was advocated, for instance, in \textit{eBooks (2012)}.\textsuperscript{1360} Third parties had claimed that the proposed commitments would negatively impact cultural diversity. By reference to the policy-linking clause on culture, the Commission noted that it is obliged to take cultural considerations into account when accepting commitments.\textsuperscript{1361} However, the Commission interpreted this obligation narrowly. It stated that the purpose of commitments is to restore the conditions of competition that existed prior to the anti-competitive practice. Since commitments are not intended to promote cultural interests, the Commission is only required to verify that the proposed commitments are not “adversely affecting cultural diversity”.\textsuperscript{1362} Hence, the Commission viewed the commitment decision procedure as confined to corrective balancing. The policy-linking clauses could not impose an obligation to actively promote non-competition interests.\textsuperscript{1363}

2.3. \textbf{Weak judicial review}

The competition enforcers’ broad margin of discretion to balance by accepting commitments was also affected by the very restricted judicial review applied by the EU and national courts. As the empirical findings summarised by Figure 7.6 show, this reflects the limited number of challenges on decisions accepting commitments in general, and on the merits of balancing in particular. The figure specifies the number of challenges submitted (blue bars) and accepted

\begin{itemize}
  \item \textsuperscript{1357} 39416 Ship Classification (2009), para 31-36.
  \item \textsuperscript{1358} 39673 Virtual Print Fee agreements (2011), 1. This resembles the use of non-competition interests as additional justification for Article 101(3) TFEU exemptions, as discussed in Chapter 3, Section 4.3.6.
  \item \textsuperscript{1359} On the definition of a corrective balancing tool see Chapter 1, Section 4.1.3.
  \item \textsuperscript{1360} 39847 Ebooks (2012), para 127.
  \item \textsuperscript{1361} 39847 Ebooks (2012), para 152. A similar approach was repeated in 40023 Cross-border access to pay-TV (2016), para 73-74.
  \item \textsuperscript{1362} 39847 Ebooks (2012), para 152.
  \item \textsuperscript{1363} A similar rationale guided the Commission’s decision in 39398 Visa MIF (2014), para 46. The Commission declared that it could not accept commitments that aimed to promote non-competition interests - in that case, market integration - if there was no anti-competitive harm.
\end{itemize}

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(red bars) on the Commission’s and NCAs decisions to accept commitments. It includes appeals on both formal (solid bars) and informal (transparent bars) commitments.

**Figure 7.6: Commitments, national (May 2004-2017) and EU (1958-2017) courts**

- Appealed (formal)
- Overturned (formal)
- Appealed (informal)
- Overturned (informal)

The limited number of challenges on decisions accepting commitments is not surprising. Commitments are (formally) proposed by undertakings and adopted subject to their consent. Therefore, they are only likely to be challenged by third parties.\(^\text{1364}\) Previous empirical studies have already pointed out the scarcity of third-party appeals on the grounds of Article 101 TFEU, and their low likelihood of success.\(^\text{1365}\) Moreover, since decisions accepting commitments do not always detail the justifications for accepting them, they are difficult to attack on appeal.

In addition to the small number of appeals in general, the empirical findings show that appeals rarely involved an examination of the merits of balancing. At the EU level, the only two appeals launched against Article 101 TFEU formal commitment decisions after modernisation were resolved without a decision on the merits.\(^\text{1366}\) Similarly, the two judgments that overturned the Commission’s decisions prior to May 2004 involved partial commitments in which the Commission accepted commitments with respect to future conduct and imposed fines for past behaviour.\(^\text{1367}\) In those cases, the undertakings challenged the fine but not the commitments.\(^\text{1368}\) Also at the Member State level, national court judgments overturning NCA decisions to accept

\(^{1364}\) (Schweitzer 2008), 10; (Wathelet 2015), 554; (Sauter 2016), 128.

\(^{1365}\) (Geradin & Petit 2012), 58.

\(^{1366}\) The appeal on T-447/12 Visa MIF (2010) was withdrawn by the appellant; the appeal in T-274/06 Repsol (2007) was rendered inadmissible since it was lodged out of time.


commitments did not involve substantive balancing grounds. In France, they were based on procedural grounds,\textsuperscript{1369} and in the UK, on a lack of consideration of third-party interests.\textsuperscript{1370} Hence, the empirical findings demonstrate that in practice, the EU and national courts did not engage with the substantive elements of balancing.

The limited appraisal by EU and national courts is often attributed to the judicial review standard adopted by the CJEU in \textit{Alrosa (2010)}.\textsuperscript{1371} As mentioned, the CJEU had declared that it would give more deference to the Commission’s commitment decisions than to its infringement decisions. It would only interfere with commitment decisions involving a \textit{manifest error of appreciation}.\textsuperscript{1372} Consequently, the CJEU vested the Commission with wide discretionary powers to accept commitments, which considerably limited the success of appeals.

Many commentators have strongly criticised this limited standard of judicial review, noting in particular that commitments often go virtually unsupervised by the courts.\textsuperscript{1373} They maintain that by expecting the Commission to exercise self-restraint with regard to the remedies it is prepared to accept, the CJEU has excessively restricted the scope of judicial control.\textsuperscript{1374} This critique was particularly directed at the balance of competition and non-competition interests, for which the law is still unclear.\textsuperscript{1375} Since commitments allow competition enforcers to take non-competition interests into account in an implicit manner, they may be tempted to use commitments as a substitute for taking a clear stand on the role of those interests under Article 101 TFEU. Subsequently, the competition enforcers’ balancing approaches remain unclear, and outside the control of the EU and national courts.

\textit{Forrester} has offered an interesting thought experiment to illustrate this point.\textsuperscript{1376} He posed the question of how established EU competition law principles might have turned out if the

\begin{itemize}
\item \textsuperscript{1370} 1226/2/12/14 Hotel online booking (2014).
\item \textsuperscript{1371} C-441/07P Alrosa (2010). See Section 2.1.1 above
\item \textsuperscript{1372} C-441/07P Alrosa (2010), para 44.
\item \textsuperscript{1373} See, for example, (Wagner-von Papp 2012), 178; (Schweitzer 2013), 40; (Gerard 2013), 27; (Jenny 2015), 762-765; OCED Commitments Report (2016), para 49-50.
\item \textsuperscript{1374} (Jenny 2015), 763.
\item \textsuperscript{1375} (Schweitzer 2008), 11; (Wagner-von Papp 2012), 961-966; (Watthelet 2015), 554. More generally, see (GCLC Annual Conference 2010), 65; (Van Rompuy 2012), 274; CMA’s Roundtable on the Use of Commitments in Competition Enforcement (2015), para 11; (Sauter 2016), 130, 286-287.
\item \textsuperscript{1376} (Forrester 2008), 646-649.
\end{itemize}
Commission had accepted commitments rather than issuing infringement decisions, meaning that those decisions could not have been discussed before the EU Court. Forrester shows that fundamental EU competition law doctrines would never have been established if such a practice had been followed. Applying this thought experiment to balancing yields similar results. The scope of Article 101(3) TFEU balancing would surely have taken a different turn if the CJEU had not had the opportunity to issue *Metro I (1977)*, in which it spelt out the types of benefits that could be examined under the Article and the workable competition standard.\(^{1377}\) The state action defence of Article 101(1) TFEU would not have been developed equally if the Commission had accepted commitments from the sugar producers instead of issuing its infringement decision in *Suiker-Unie (1975).*\(^{1378}\)

Indeed, the two Member States in which NCA decisions accepting commitments were overturned - France and the UK – followed a stricter standard of judicial review compared to *Alrosa.* In France, the Paris Court of Appeals granted broad standing to third parties affected by commitment decisions.\(^{1379}\) In the UK, the Enforcement Guidelines order national courts to review commitments under the same standard as regular infringement decisions – namely, a full merits appeal.\(^{1380}\) The CAT tied this standard to the balancing function embedded in commitments, “striking a balance” between intervention in a sector and competition.\(^{1381}\)

The limited judicial review of commitments in general and balancing in particular increases the attractiveness of using commitments as a balancing tool from the standpoint of the Commission and NCAs. Commitments are strategically desirable for competition enforcers because they moderate the administrative strain and reduce the risk of overturning the enforcer’s decisions on appeal.\(^{1382}\) Arguably, such incentives may lead competition enforcers to demonstrate a bias in favour of commitments. In particular, they may use such enforcement tools to deal with cases that are ill-suited to such procedures.\(^{1383}\)

\(\text{References:}\)

1377 See Chapter 3, Section 3.3.1.
1378 See Chapter 5, Section 2.2.2.
1381 1226/2/12/14 Hotel online booking (2014), para 126-154.
1382 (Blanco & De Pablo 2012), 76.
1383 (Forrester 2008), 646-654; (Petit 2010), 56; (Blanco & De Pablo 2012), 75-80.
2.4. **Interim conclusion**

The commitment decision procedure provides competition enforcers with an extraordinarily wide margin of discretion for balancing, without any need to explain if balancing took place, which non-competition interests were taken into account, and which balancing methods were applied. Consequently, although there are strong indications that commitments are used for balancing, the balancing in a specific case is largely invisible.

The invisibility and flexibility of such balancing might affect its effectiveness in protecting competition. Commitments hamper the effectiveness of balancing because they allow taking any type of benefit into account, in a manner that is not bound to a clear legal or economic balancing process. Commitments may utilise the enforcement of Article 101 TFEU for regulatory purposes, as a means to regulate markets and to promote non-competition interests that are not directly related to the anti-competitive behaviour of the undertakings concerned.\(^\text{1384}\) Moreover, the practice of accepting commitments could result in a backdoor reintroduction of the old notification regime. Namely, undertakings are induced to negotiate, with the Commission, the terms of any potentially controversial conduct prior to adoption.\(^\text{1385}\) Finally, this also hampers the effectiveness of substantive balancing tools since competition enforcers might be tempted to use commitments instead of applying the balancing principles of Article 101(1) and (3) TFEU.

Balancing by means of commitments also raises serious legal certainty concerns, thereby posing a risk to the development of EU competition policy. Commitments allow competition enforcers to circumvent the need to take a clear stand on the scope of balancing under Article 101(1) and (3) TFEU. This is particularly true with respect to informal commitments, which are often unpublished and do not allow third parties to voice their opinions on the proposed remedy. The recourse to commitments instead of balancing under Article 101(1) and (3) TFEU leads to a vicious circle: The legal uncertainty about the role of non-competition interests under Article 101 TFEU makes offering commitments attractive for undertakings. The resulting decrease in the number of infringement decisions creates further uncertainty about the scope of non-competition interests. This generates an even greater demand for commitment decisions, which accordingly results in fewer infringement decisions. In the absence of formal decisions stating the law, undertakings turn to previous commitment decisions and to non-binding...
guidelines. The reliance on soft law measures, in turn, increases the Commission’s margin of discretion in future commitments negotiations and broadens its ability to consider non-competition interests. The Commission is likely to resort to commitments especially in those cases in which a formal decision could be valuable, namely in cases involving novel legal issues. Consequently, as observed by Wagner-von Papp, “there is a danger that the struggle for law is abandoned in favour of discretionary case-to-case negotiations”.1386

This legal uncertainty is also likely to translate into a lack of uniformity. Since the possibility and the manner of accounting for non-competition interests under Article 101 TFEU are unclear, competition enforcers may adopt diverging views, leading to inconsistent and conflicting application.

Competition Commissioner Vestager recently acknowledged the risk that commitments might hamper the development of EU competition law. She recognised the importance of adopting formal infringement decisions having a precedential and guiding value, especially with respect to unanswered legal questions.1387 Indeed, the empirical findings presented in Figure 7.1 report a decline in the number of Article 101 TFEU commitment procedure decisions adopted during her term (i.e. since the end of 2014).

The next section describes an alternative way to account for non-competition interests in cases in which an infringement has been established – that is, in the calculation of fines.

3. FINES

3.1. Legal and empirical background

Fines are the main EU law instrument for deterring violations of Article 101 TFEU.1388 This section discusses situations in which achieving such deterrence by imposing high fines (indirectly aimed at safeguarding competition interests) results in adverse effects to the undertakings or to society. It demonstrates that in certain circumstances, the competition enforcers choose to moderate the fines in favour of protecting other non-competition interests.

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1386 (Wagner-von Papp 2012), 930-931. Also see (Forrester 2008), 646-649; (Schweitzer 2013), 40-41.
1387 See interview in (Rivas 2015), 183-184.
The rules governing the imposition of fines raise important questions of multi-levelled governance. As in the case of commitments, such rules have not been harmonised throughout the EU. At the EU level, up until the late 1990s, the Commission did not articulate the method guiding the calculation of fines. Nevertheless, its decisional practice reveals that the fines were based on neither the violator’s economic gain nor consumers’ economic loss. In contrast to the fines imposed in the US and in certain Member States, the EU fine represents an arbitrary administrative figure, reflecting the gravity of the offence and adjusted by a number of factors. The empirical findings confirm that in the past, the Commission’s decisions merely mentioned the relevant elements for assessing the gravity and the duration of the infringement, without detailing their weight. Prompted by several court judgments calling for greater transparency, in 1998 the Commission first adopted its Fining Guidelines, which were subsequently amended in 2006.

At the Member State level, NCAs differ in the nature of the fines they may impose (i.e. in administrative, civil, or criminal proceedings), the methodology for calculating those fines, and the entities that are liable to them. The five NCAs examined in this dissertation have all adopted policy papers governing the calculation of fines which, as described below, largely follow the Commission’s approach.

3.2. Balancing tool

Since the calculation of fines at the EU and national levels is not linked to a precise notion of harm caused to markets or consumers, competition enforcers enjoy a wide margin of discretion when setting them. In particular, as the next sections show, this margin of discretion has allowed the

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1389 (Veljanovski 2007), 79.
1390 Also see (Lianos et al. 2014), 136; (Geradin & Henry 2005), 401, 407.
1391 See, for example, T-148/89 Welded steel mesh (1995), para 142; In T-309/94 Cartonboard (1998), para 77–78, the GC even implied that the Commission was obliged to fully set out its calculation method in its decisions. Yet, this was reversed on appeal by CJEU in C-248/98P Cartonboard (2000), para 44-48. Also see (Torre 2010), 405.
1394 C-189/02P Dansk (2005), para 172; Commission Fining Guidelines (1998), para 1. Also see (Geradin & Henry 2005), 401, 404; (Sauter 2016), 138; (Dunne 2016), 458.
Commission and NCAs to take non-competition interests into account when setting fines, mainly state involvement in an infringement and situations of economic crisis. In fact, the empirical findings show that over the years the Commission has abandoned some of its substantive Article 101(1) and (3) TFEU balancing tools in favour of balancing by moderating the fines. Rather than balance state involvement under Article 101(1) TFEU and economic crisis under Article 101(3) TFEU, competition enforcers instead take those considerations into account when calculating fines. In addition, some competition enforcers have moderated fines when an agreement is related to the liberalisation of markets or protected SMEs, or is aimed at the furtherance of public policy goals.

3.2.1. State involvement

An anti-competitive conduct that is the result of a state action may fall outside the scope of Article 101(1) TFEU. This state action defence, as presented in Chapter 5, applies only when an undertaking’s conduct is the direct result of a state measure. Yet, at times, the Commission and NCAs have reduced the fines imposed on anti-competitive agreements that lie in the grey zone between private and state action. They have reduced fines in the very specific circumstance that a public authority has actively fostered an anti-competitive agreement, or when the regulatory environment has encouraged or tolerated such conduct.  

The reduction of fines in those cases reflects the balance struck between protecting competition interests by imposing high fines on the one hand, and the mitigating circumstances of state involvement in the anti-competitive conduct on the other. This is an indirect way to account for non-competition interests related to Member State sovereignty and the public interest pursued by state action. Because of the relatively moderate fines imposed on such agreements, undertakings (and states) might not be deterred from concluding or fostering such conduct.

While the need to engage in such balancing has been confirmed by the CJEU, the legal source and conditions for fine reduction have varied over time and between competition enforcers. At the EU level, although over the years the Commission has accepted state involvement as a justification for fine reduction, to date no clear legal rule exists. Figure 7.7 presents the number of cases in which such reductions were examined (blue line) and accepted.

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1395 See Chapter 5, Section 2.
1396 See Chapter 3, Section 4.3.4.
1397 Also see (Faull & Nikpay 2014), 1319.
1398 C-198/01 Consorzio Industrie Fiammiferi (CIF) (2003), para 57.
(red bars). The single reduction pursuant to Article 29 of the Commission Fining Guidelines (2006), which is elaborated below, is marked by the green bar.

**Figure 7.7: Fines - state involvement, Commission**

The figure illustrates that the possibility for fine reduction due to state involvement dates back to *AROW/BNIC (1982)*. In that case, the Commission examined industry agreements setting prices for cognac that had been concluded within the framework of the national cognac industry board (BNIC). The Commission held that those agreements had been concluded between undertakings, despite that fact that BNIC members were nominated by the French Minister of Agriculture.\(^\text{1399}\) While this finding had no bearing on Article 101(1) TFEU analysis, the Commission opaquely added that the fines imposed showed regard for the “specific legal context in which, in particular, the industry agreements were annually extended by a later Ministerial order. Therefore some of the restrictive effects flow from the compulsory application of the industry agreements by undertakings which are not members of professional organizations represented in the BNIC”.\(^\text{1400}\)

The Commission made similar statements up to the mid-1990s.\(^\text{1401}\) Although state involvement was mentioned when calculating fines, the Commission did not explain whether, and how, it had been taken into account. The effect of state influence became more transparent following the

\(^{1399}\) 29883 AROW/BNIC (1982), para 49-51. On the notion of undertakings as a balancing tool, see Chapter 5, Section 2.4.

\(^{1400}\) 29883 AROW/BNIC (1982), para 77.

entry into force of the Commission’s Fining Guidelines in 1998. The Guidelines still did not explicitly refer to state involvement. Yet, in *Greek Ferries (1998)*, the Commission first classified it as one of the mitigating circumstances referred to in the Guidelines and reduced the fine by 15%. Similarly, in *French Beef (2003)* it held that the “forceful intervention” of the French Minister for Agriculture that had pressured the undertakings to conclude the agreement merited a 30% fine reduction for the slaughterers’ federation. Interestingly, no similar reduction was granted to the farmers’ federations involved, since the Minister’s actions had been influenced by weeks of demonstrations by the farmers’ federations. A year later, in *Raw Tobacco Spain (2004)*, the Commission granted a 40% fine reduction as the conduct of the undertaking had been somewhat determined by the legal framework surrounding the agreement.

At other times, the Commission reduced fines when the legality of an agreement was unclear due to conduct of a national authority or because of the national legal context. In *Luxembourg Brewers (2001)*, for example, it reduced a 20% fine because of Luxembourgian case law that called the validity of the agreement into question. Yet, in parallel, in other cases, the Commission held that state involvement did not justify mitigating the fine.

The Commission’s new Fining Guidelines (2006) explicitly address state-involvement situations. The fifth indent of Article 29 of the Guidelines requires an active measure on behalf of the state to justify a fine reduction. It applies to cases in which the conduct of the undertaking “has been authorized or encouraged by public authorities or by legislation”. To date, the Commission applied the Article only once, in *Airfreight (2010, 2017)* granting a 15% fine reduction. All other pleas for a fine reduction on this ground were rejected.

Notably, the fifth indent of Article 29 of the Guidelines could be interpreted as limiting the situations in which state involvement justifies a fine reduction, i.e. only when the state has

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1403 38279 French beef (2003), para 176-177.
1404 38238 Raw Tobacco Spain (2004), para 438.
1405 37800 Luxembourg Brewers (2001), para 100; 31553 Welded steel mesh (1989), para 206-208. Also see (Faull & Nikpay 2014), 1322.
1406 37800 Luxembourg Brewers (2001), para 100.
1408 The Commission originally granted this fine reduction in 39258 Airfreight (2010), para 1241. The Commission’s new decision, rendered after the GC annealed this decision due to a defective statement, followed the same approach. See in 39258 Airfreight (2017), para 25.
1409 See Annex 7.3.
actively authorised or encouraged such behaviour. However, the Commission has interpreted Article 29 as a supplement to its previous rule. Hence, in Bananas (2008) and Exotic fruit (2010), it held that while the relevant regulatory regimes could not be regarded as having encouraged or condoned the infringement, they were mitigating circumstance justifying a 60% and 20% fine reduction, respectively.\textsuperscript{1410} This interpretation was confirmed by the GC.\textsuperscript{1411}

The multiple legal sources for fine reduction due to state involvement at the EU level, together with the lack of a clear balancing method, increased the legal uncertainty of this balancing tool. This was aggravated by the diverse national practices. Like the Commission’s Fining Guidelines (1998), most of the five NCAs examined in this dissertation have classified state involvement as a mitigating circumstance that could justify a fine reduction.\textsuperscript{1412} Figure 7.8 summarises the number of cases in which a plea for fine reduction due to state involvement was made (blue bars) and accepted (red bars):

\begin{figure}
\centering
\includegraphics[width=\textwidth]{figure7.8.png}
\caption{Fines - state involvement, NCAs}
\end{figure}

It is interesting to observe that the three NCAs that accepted such pleas – namely, France,\textsuperscript{1413} Hungary,\textsuperscript{1414} and the Netherlands\textsuperscript{1415} – have a more permissive rule for fine reduction in comparison to the fifth indent of Article 29 of the Commission Fining Guidelines (2006). The

\textsuperscript{1410} 39188 Bananas (2008), para 467, 472; 39482 Exotic fruit (Bananas) (2011).
\textsuperscript{1411} T-587/08 Bananas (2013), para 821-823; T-655/11 Exotic Fruit (Bananas) (2015), para 548-553.
\textsuperscript{1412} French Fining Guidelines (2011), para 45; German Fining Guidelines (2006), para 17; In Hungary, such reduction is not specified in the Fining Guidelines. Yet, it was mentioned as a mitigating circumstance in Hungary’s contribution to an OECD report (Hungary 2016), para 14. In the UK, this was specified in the old UK Fining Guidelines (2004), para 2.14, but not repeated in the amendments of 2012 and 2018.
\textsuperscript{1415} 3371 Branch Associations for Maritime Container Transportation (2005), para 103-105; 4014 Horticultural Services (2005), para 177-185; 4108-195 Nozema/ Broadcast NT (2005), para 135-139.
empirical findings prove that those three NCAs also reduced the fines when a public authority was aware of, rather than had merely encouraged, the anti-competitive behaviour, especially in markets that were in the process of liberalisation.\footnote{In France, a reduction was granted in 2005/15784 Dental surgeons in Puy-de-Dôme (2007), 9, and rejected in 08-D-32 Steel trading (2008), para 264, 335-338; In Hungary, a reduction was granted in Vj-18/2008 Uniform interchange fee levels (2009), para 223; Vj-3/2008 Rail freight transport services (2012), para 370; Vj-195/2007/129 Newspaper distribution II (2010), para 174-175. However, in a later proceeding such a possibility was rejected, see Vj-55/2013 Online distribution of contact lenses (2015), para 229.} This is a good example of how a national law leaves greater room for non-competition interests in comparison with the Commission’s approach.

3.2.2. Economic crisis

Fine reductions have also been used to account for crisis situations. Chapter 3 Section 4.3.4 revealed that during the second enforcement period (i.e. 1978-1987), the Commission considered economic crisis to be justification for an Article 101(3) TFEU exemption (the so-called “crisis cartels”). In the course of the 1980s and the 1990s, the Commission gradually stopped accepting economic crisis as a justification for an exemption. Nevertheless, this section shows that instead of considering economic crisis under the substantive balancing tool of Article 101(3) TFEU, the Commission took it into account when setting the fines.

A fine reduction in situations of economic crisis reflects the premise that achieving deterrence by imposing high fines could bring about harmful economic and social side effects. A high fine might bankrupt an undertaking, thereby indirectly increasing market concentration. Imposing a high fine on a strategically important undertaking might also deter economic activity and lead to unemployment in a region or a state.\footnote{(Wils 2006a), 197, 204; (Reynolds et al. 2009), 1670; (Torre 2010), 397-398.} Hence, at times, competition enforcers have balanced the protection of competition interests with other economic and social interests via deterrence.

The possibility to account for crisis situations when calculating fines was first expressed in Cast iron and steel rolls (1983). The Commission maintained that the undertakings’ financial situation and the task of aiding the recovery of the sector concerned vindicated refraining from the imposition of high fines, despite the existence of a long-term price-fixing agreement.\footnote{30064 Cast iron and steel rolls (1983), para 72-74.} As summarised by Figure 7.9, the Commission accepted similar claims from the 1980s to the late 1990s when a serious crisis led to difficult trading conditions;\footnote{30988 Agreements and concerted practices in the flat-glass sector in the Benelux countries (1984), para 55.} a hard economic situation,\footnote{30727 Economic crisis, Chapter 3, Section 4.3.4.} low
profitability, or losses. The figure specifies the number of cases in which undertakings pleaded for a fine reduction due to crisis cartels (blue line), and in which the Commission accepted them (red bars).

Figure 7.9: Fines - crisis cartels, Commission

Fine reductions for crisis cartels were formalised by the Commission Fining Guidelines (1998). Article 5(b) of the Guidelines states that the Commission will take “certain objective factors such as a specific economic context” into account. Curiously, Figure 7.9 demonstrates that formalisation actually led to the abandonment of this type of fine reduction. In fact, with the exception of a case in the late 1990s, following the adoption of the 1998 Guidelines, the Commission stopped accepting crisis situations as justification for a fine reduction. Rather, it repeatedly held that loss-making or economic difficulties within a sector did not warrant moderating the fines imposed. The change in the Commission’s approach became particularly apparent against the backdrop of the 2008 financial crisis. Departing from the
Commission’s practice until the late 1990s, Competition Commissioner Kroes declared that the financial crisis did not justify moderating fines.\textsuperscript{1427}

*French beef* (2003, 2006) was the one exceptional case in which the mitigating circumstances of Article 5(b) of the Guidelines prompted the Commission to reduce the fine by 60\%, which was further lowered by 70\% by the GC.\textsuperscript{1428} The reasons for this significant fine reduction are not completely clear from the wording of the decision itself. Yet, the GC in appeal and the Commission in later cases attributed it to the exceptional circumstances of the case.\textsuperscript{1429} Those circumstances included an infringement that was limited to the public behaviour of trade associations whereby the sector had experienced a dramatic decline in consumption, and after public measures had proved ineffective. In other words, the circumstances that vindicated the application of Article 5(b) went beyond a mere crisis in the sector.

While economic crisis in a sector in and of itself no longer seems to justify a fine reduction, the Commission still takes notice of situations of economic crisis when calculating fines. The Commissions’ new Fining Guidelines (2006) replaced the crisis cartel principle with an “inability to pay” test. The new Guidelines provide that “in exceptional cases, the Commission may, upon request, take account of the undertaking’s inability to pay in a specific social and economic context. It will not base any reduction granted for this reason in the fine on the mere finding of an adverse or loss-making financial situation. A reduction could be granted solely on the basis of objective evidence that imposition of the fine as provided for in these Guidelines would irretrievably jeopardise the economic viability of the undertaking concerned and cause its assets to lose all their value”.\textsuperscript{1430}

The purpose of this provision, according to the Commission, is to avoid driving financially distressed but competitive undertakings out of the market, thus bearing adverse social and economic consequences.\textsuperscript{1431} The Commission has repeatedly emphasised that the mere risk of bankruptcy or liquidation was not sufficient. A fine reduction was only justified if the

\textsuperscript{1427} (Kroes 2009).
\textsuperscript{1428} 38279 French beef, para 182-185; T-217/03 T-245/03 French beef (2006), para 356-361.
\textsuperscript{1429} T-217/03 T-245/03 French beef (2006), para 356-361; 38281 Raw Tobacco Italy (2005), para 384.
\textsuperscript{1430} Commission Fining Guidelines (2006), para 35. The empirical findings reveal that the Commission also took those considerations into account prior to the 2006 Guidelines, but less regularly. See 32290 Newitt/Dunlop Slazenger International (1992), para 71; 38359 Electrical and mechanical carbon and graphite products (2003), para 360.
\textsuperscript{1431} Commission Inability to Pay Information Notice (2010), para 6.
undertakings’ assets stood to lose their value because of the fine, and only to the extent that it made a takeover by another undertaking or a separate sale of the assets unlikely.\footnote{1432} 1432

Once again, the 2006 Guidelines failed to define a clear methodology for assessing an undertaking’s inability to pay. In 2010, following an increase in inability to pay claims after the outbreak of the economic crisis of 2008 (as reflected by Figure 7.10 below), the Commission published an information notice to clarify its position.\footnote{1433} However, even after this clarification had been published, there was no single, unanimously accepted method for such an assessment.\footnote{1434}

It should be noted that the inability to pay test leaves less room for the consideration of non-competition interests in comparison to the crisis cartel principle. Crisis cartel situations had justified fine reductions for all the undertakings concerned on basis of the economic crisis in the relevant sector during the time of the infringement (e.g. \textit{French Beef}). Yet, inability to pay claims only justify reducing the fines imposed on a specific undertaking on basis of its inability to pay at the time the infringement decision is rendered.\footnote{1435} They take the economic context into account only to the extent that it directly affects an undertaking’s ability to pay the fine.\footnote{1436} Moreover, the inability to pay test is narrower in scope since it is subject to a cumulative requirement. This entails that the inability to pay is linked to both the specific social and economic context.\footnote{1437}

In practice, however, the empirical findings reveal that almost all inability to pay fine reductions were granted with reference to the specific \textit{economic context} alone, i.e. the poor financial situation of an undertaking. For this purpose, Figure 7.10 summarises the Commission’s practice in assessing and accepting the inability to pay claims. The figure presents the total number of cases in which undertakings raised inability to pay claims (blue line), and differentiates between three situations in which such claims were accepted: when the fine reduction was based only on the specific \textit{economic context} (green bars); when it was based on

\footnote{1432 T-71/03 T-74/03 T-87/03 T-91/03 Speciality Graphite (2005), para 332-333; T-406/09 Calcium carbide and magnesium based reagents for the steel and gas industries (2014), para 286.}
\footnote{1433 Commission Inability to Pay Information Notice (2010).}
\footnote{1434 (Torre 2010), 402.}
\footnote{1435 Commission Inability to Pay Information Notice (2010) explains that inability to pay may also be taken into account subsequent to the adoption of the decision. This was used in a small number of cases, for instance in 39168 PO/Hard Haberdashery (2011). Also see (Lianos et al. 2014), 225-228.}
\footnote{1436 (Torre 2010), 402.}
both the *economic and social contexts* (red bars); and when the reasoning for the fine reduction was not published, in particular, due to confidentiality concerns (black bars).

**Figure 7.10: Inability to pay, Commission**

![Graph showing inability to pay, Commission](image_url)

As becomes apparent from the figure, almost all inability to pay fine reductions were linked to the specific economic context alone (green bars).\(^{1438}\) Hence, the empirical findings indicate that the cumulative nature of the inability to pay test applied mainly to situations in which the main claim related to an adverse effect in the *social context*, for instance when the payment of the fine might stimulate unemployment or deteriorate upstream or downstream economic activity (red bars).\(^{1439}\) In other words, the Commission often accepts inability to pay claims when the undertakings can offer proof of their poor financial situation, without discussion of the social context. When, and only when, the main claim rested on its social context, evidence was also required on the financial context.\(^{1440}\)

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\(^{1438}\) See Annex 7.5.


\(^{1440}\) For example, in T-352/09 Calcium carbide and magnesium based reagents for the steel and gas industries (2012), para 180-181 and 201-209, the undertakings, supported by the Slovak Republic, argued that the effects of its bankruptcy would be detrimental in the social and regional contexts. As one of the major employers in Slovakia, having strategic importance for the economic life of the Slovak region of Upper Nitra, its closure would lead to job loss for 2000 employees and the closure or substantial reduction in operation of a number of other undertakings in the same region, including its suppliers. The Court, however, rejected the claim. It explained that while the applicant had proven the special social circumstances, it had failed to prove the economic circumstances. Also see T-406/09 Calcium carbide and magnesium based reagents for the steel and gas industries (2014), para 282-314.
At the national level, in line with the Commission’s practice since the 2000s, the five NCAs, too, did not regard difficulties in a sector (crisis cartels) as a stand-alone justification for fine reduction.\textsuperscript{1441} In France, the NCA and court explicitly rejected this possibility, referring to both EU and national case law.\textsuperscript{1442}

Yet, some NCAs accounted for crisis situations when they were combined with other special circumstances, such as those in \textit{French Beef}. In \textit{Bell peppers} (2012), for example, the Dutch NCA held that the combination of the role of a growing cooperative, together with the financial crisis in the sector, justified a fine reduction.\textsuperscript{1443} In \textit{Bid rigging in the construction industry in England} (2009), the UK NCA noted that it would not be appropriate to reduce fines across the board due to the worldwide economic climate, but granted all undertakings a more extended period in which to pay.\textsuperscript{1444} In \textit{Dairy retail price initiatives} (2011)\textsuperscript{1445} the UK NCA observed farmgate prices for raw milk that were not high enough to cover the dairy farmers’ costs, the significant number of dairy farmers leaving the industry, and the resulting pressure to take action to help farmers. It noted that while none of these factors justified the infringements, those exceptional circumstances moderated the seriousness of the infringements and, therefore, the fine.

Like the Commission, all five NCA fining guidelines include inability to pay provisions.\textsuperscript{1446} Contrary to the Commission, in all five NCA guidelines, this fine reduction depends solely on the financial circumstance of the undertakings, without reference to the social context. The national provisions, therefore, leave greater room for consideration of the financial position of

\textsuperscript{1441} Referring to B12-14/10 Household porcelain in Germany (2013), the President of the German NCA noted "economic difficulties in a particular sector cannot justify the consumer having to pay more for a product than he would if effective competition were in place. We have borne in mind the difficult economic situation in the porcelain sector in the current proceedings. We have therefore imposed relatively moderate fines, which take account of the financial situation of the individual companies involved". However, this comment seems to relate to consideration of the inability to pay, rather than directly to the economic crisis.


\textsuperscript{1443} 7036_1/386 Bell peppers (2012), para 381-386.

\textsuperscript{1444} CE/4327-04 Bid rigging in the construction industry in England (2009), para VI.289-290.

\textsuperscript{1445} CE/3094-03 Dairy retail price initiatives (2011), para 7.46-7.47.

undertakings. Figure 7.11 outlines the inability to pay claims argued (lines) and accepted (bars) before the five NCAs.

Figure 7.11: Inability to pay, NCAs

Most of the Dutch NCA decisions do not indicate whether the plea was accepted on account of confidentiality considerations.

The figure shows that following the financial crisis of 2008, undertakings in almost all the five Member States increased their invocation of inability to pay claims. The figure also reveals that the NCAs were more likely to accept inability to pay claims compared to the Commission. This might perhaps be the result of their more relaxed approach to such claims. The empirical findings demonstrate that the exact degree of financial hardship that justifies a fine reduction varies between the Member States. For example, in the Netherlands, unlike the Commission and UK, a risk of bankruptcy justifies a fine reduction. Moreover, in a number of cases, the UK NCA, outside the regular financial hardship test, moderated the fines imposed on undertakings noting that they would be disproportionate to the financial position of the undertakings. In some cases, this fine reduction was given after noting that the undertaking did not meet the inability to pay test.

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1447 Also see the CAT in 1067/1/1/06 Price fixing and market sharing in stock check pads (2006), para 43.
1448 See Annex 7.6.
1449 See Annex 7.7.
1450 1067/1/1/06 Price fixing and market sharing in stock check pads (2006), para 55.
1451 Dutch Fining Guidelines, para 16.
1452 CE/7691-06 Airline passenger fuel surcharges for long-haul flights (2012), para 443; CE/9857-14 Refrigeration (2016), para 7.47; CE/9691/12
The Commission’s and NCAs’ practices and policy papers, as demonstrated above, have predominantly focused on moderating fines in situations of state involvement and economic crisis. The next sections explore less discussed principles in which other non-competition interests were taken into account in setting the fines.

3.2.3. Liberalisation of markets

The fact that an infringement took place in a market undergoing liberalisation justified a fine reduction in a number of proceedings. In European sugar industry (1973, 1975), the Commission took into account the fact that the infringement had occurred in a previously regulated market. This, according to the Commission, “explains a tendency for old practices to become a habit and a slowness to adapt and take advantage of the opportunities that the Community organisation of the sugar market has opened up for free intra-Community trade”.1454 The Commission did not explain the role this factor had played in setting the fine, yet the CJEU held that it merited a further reduction of the fine.1455

The Dutch NCA and courts have taken similar considerations into account. In 2004, the liberalisation of markets had justified the non-imposition of fines for anti-competitive practices in the gas market.1456 Since then, on multiple occasions they have also moderated the fines imposed in the context of the Dutch healthcare market, noting that the market was in a state of transition.1457

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1454 26918 European sugar industry (1973), para V(2).
1455 C-40/73 C-41/73 to 48/73 C-50/73 C-54/73 to 56/73 C-111/73 C-113/73 C-114/73 European sugar industry (1975), para 613-624.
3.2.4. SMEs

Infringements by SMEs have also sometimes warranted a fine reduction. The Commission has been inconsistent in this regard. In the past, it accepted that claim in some cases but rejected it in others. In Pre-Insulated Pipe Cartel (2002), however, the GC held that the fact that the applicant was a medium-sized family undertaking did not constitute a mitigating circumstance.

Some NCAs continue to take this consideration into account. The UK Competition Act, for example, provides immunity from fines for "small agreements", i.e. non-price-fixing agreements between undertakings with a low turnover or market share. In Hungary, a 2015 amendment to the Competition Act provides that the Hungarian NCA may issue a warning instead of a fine for a first-time infringement of SMEs in purely national cases. In fact, SMEs received fine reductions in Hungary even prior to the said amendment. This was also considered a mitigating factor in Germany and sometimes in the Netherlands.

3.2.5. Public policy aims

A legitimate public policy aim of an anti-competitive agreement has sometimes played a role in setting the fine. In the past, for instance, the Commission reduced the fines imposed on anti-competitive agreements aimed at solving market fluctuations and remedying past tariff discrimination. Although since the beginning of the 2000s the Commission has mostly rejected

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1458 Chapter 6, Section 3.1, shows that SMEs are also protected by certain national de minimis rules.
1462 UK Competition Act, Section 39. This is limited to purely national cases. Immunity was granted, for example, in CE/9578-12 Mobility scooters (2014), 4.5-4.6. Also see (Bailey 2014), 237-238.
1463 Hungarian Competition Act, Article 78(8). See GVH Press Release of 29.9.2016, “the GVH impels small and medium sized enterprises towards law-abiding behaviour by issuing warnings for the first time”. In 1.Kf.650.154/2016/10 Mosquito control (2017), the Hungarian Court applied this amendment retroactively, revoking a fine imposed by the Hungarian NCA prior to the amendment of the Act.
1465 Sanitary sector (2016); B3-144/08 Colistin antibiotics (2009).
1466 A fine reduction was granted in 6425 Window cleaners (2011), para 328, but rejected in 4814-31 Installation (2005), para 27-28; 6431_1/172 Kazerne II (2009), para 171-173; 6429_1/176 Kazerne I (2009), para 164-166; 6430_1/131 Meiveld (2009), para 187-188; 6492_1/146 De Tongelreep (2009), para 195-197; 6091_1/204 Distributors of sodium hypochlorite (2009), para 224-225; 6601_1/141 Meerhoven (2009), para 136-137.
1467 30350 Zinc producer group (1984), para 99; 33941 HOV SVZ/MCN (1994), para 108-112. In 33384 33378 Distribution of package tours during the 1990 World Cup (1992), para 125 the Commission accepted the claim indirectly, noting that while safety concerns were not a justification for the anti-competitive conduct, they nevertheless complicated the case.
similar claims,\textsuperscript{1468} in \textit{International Skating Union (2017)}, the Commission invoked the Skating Union’s function in promoting worldwide sports as one of the cumulative reasons leading it not to impose a fine.\textsuperscript{1469}

The possibility of invoking a public policy goal as a justification for a fine reduction is less clear at the national level. In Hungary, structural transformation in the market warranted a reduction,\textsuperscript{1470} and in the Netherlands, the public role of an agriculture association.\textsuperscript{1471} However, the Dutch NCA did not reduce the fine imposed on agreements purporting to fight tax fraud or protect consumers.\textsuperscript{1472}

There are some indications that competition enforcers have implicitly accounted for public policy goals when calculating fines. As part of their broad margin of discretion in setting fines, they may elect to depart from their fining principles, and not impose a fine at all. The empirical findings reveal that prior to the adoption of the Commission Fining Guidelines (1998), the Commission regularly made use of such power. Admittedly, as mentioned above, the Commission did not disclose the considerations behind the calculation of fines prior to 1998, and, accordingly, why a fine had not been imposed. Yet, the empirical findings demonstrate that the Commission did not almost exclusively impose fines in cases in which balancing under Articles 101(1) and/or (3) TFEU balancing tools had been discussed.\textsuperscript{1473} The same holds true in the practice of the German\textsuperscript{1474} and Hungarian\textsuperscript{1475} NCAs after modernisation. This suggests that

\textsuperscript{1468} The Commission rejected such claims in 37027 Zinc Phosphate (2001), para 333-334 with respect to an agreement promoting safety; in 37370 Sorbates (2003), para 316-320 with respect to agreement aimed at avoiding anti-dumping; and 39612 Perindopril (Servier) (2014), para 3081 with respect to an agreement aimed at encouraging settlements in litigation with respect to pay for delay cases. The CJEU rejected similar claims in C-100/80 C-101/80 C-102/80 C-103/80 Pioneer Hi-fi equipment (1983), para 88-90 with respect to an agreement aimed at solving unfair conditions of competition. In T-456/10 Animal feed phosphates (2015), para 212, the GC clarified that the changes brought about by the Lisbon Treaties in 2009, including the introduction of the objectives of Article 3 TEU and Protocol 27, did not alter the manner in which fines should be calculated in this regard.

\textsuperscript{1469}\textsuperscript{\textsuperscript{\textsuperscript{40208 International Skating Union’s Eligibility rules (2017), para 348. In addition to the Skating Union’s role in promoting sports, the Commission justified imposing no fine by the fact that this was the first infringement decision adopted against rules of sports governing bodies, and the fact that the rules were in place and publicly known for a long period of time.}}}

\textsuperscript{1471} 7036_1/386 Bell peppers (2012), para 381-386.
\textsuperscript{1472} 3031 Temporary employment bureau (2004), para 83-84; 7244-597 Magazine packs (2013), para 601.
\textsuperscript{1473} See Annex 7.8.
\textsuperscript{1474} See Annex 7.9.
the Commission and some NCAs used their power not to impose fines to account for non-

competition interests at the remedy stage.

3.2.6. Damage to the economy (France)

This section has thus far described situations in which a fine was mitigated to account for non-

competition interests. The French NCA, however, has also been prone to aggravate fines when an infringement not only harmed competition but also other public policies. The French Commercial Code provides that the fine imposed for an infringement must be proportionate, inter-alia, to the resulting “scale of the damage caused to the economy”. The French NCA has explained that this is not limited to illegal profits that undertakings have reaped due to an infringement (i.e. due to the harm to competition interests), but also to other direct or indirect disturbances to the market. In particular, the fine must reflect the adverse effect on the incentives of other market players and is not limited to precisely measurable loss (i.e. economic and non-economic benefits).

Accordingly, in Temporary employment sector (2009), the French NCA aggravated the fine imposed on France’s largest staffing firms. It observed that the firms employing temporary workers, as well as the temporary workers themselves, were harmed by the anti-competitive practice, hindering national employment and economic growth policies. In Football rights (2009), the French NCA aggravated the fine imposed on the French Football Federation and Sportfive for collusion in the awarding of the Federation’s marketing rights. It maintained that the anti-competitive practice limited the available resources of the Federation, and therefore indirectly hindered the development of amateur football in France. Remarkably, those two decisions were given in mixed-cases, in which the French NCA had applied both Article 101 TFEU and the national equivalent provision. Hence, it provides an example of how national fining provisions incorporate national policies in the enforcement of EU law.

3.3. Weak judicial review

As in the case of commitments, the EU and national courts have exercised limited judicial review of decisions to moderate fines due to non-competition interests. This is somewhat surprising. Unlike the case of commitments, Article 261 TFEU and Article 31 of Regulation

1478 09-D-05 Temporary employment sector (2009), para 116.
1/2003 grant the EU Courts unlimited jurisdiction to review the Commission’s decisions on fines. The Courts not only control the lawfulness of the fine but also its merits. They may substitute their own appraisal for the Commission’s.\textsuperscript{1480} In this regard, the Commission’s Fining Guidelines, as a mechanism of soft law, are not binding on EU Courts.\textsuperscript{1481}

However, the empirical findings reveal that the EU Courts have hardly ever used those powers to appraise balancing issues. While the EU Courts, and especially the GC, have often intervened in the calculation of fines,\textsuperscript{1482} they have mostly refrained from assessing factors linked to duration and gravity, leniency, and the methodology of calculating the fine.\textsuperscript{1483} Figure 7.12 demonstrates that, as with the other balancing tools, the EU Courts have almost always respected the Commission’s balancing embedded in the imposition of fines.

\textbf{Figure 7.12: Fines, national (May 2004-2017) and EU (1958-2017) courts}

\begin{figure}[h]
\centering
\includegraphics[width=\textwidth]{figure7_12.png}
\caption{Fines, national (May 2004-2017) and EU (1958-2017) courts}
\end{figure}

In some cases, more than one claim for balancing by imposition of fine was made.

The EU Courts have consistently held that factors like state involvement (red bars), a crisis in a sector (blue bars), and inability to pay (green bars) are mitigating circumstances which the Commission may, but is not obliged, to take into account.\textsuperscript{1484} Moreover, they stated that the mere fact that the Commission may have taken a factor into account in earlier cases does not mean that

\textsuperscript{1480} (Forrester 2011), 153-156; (Paz 2014), 218-219.
\textsuperscript{1481} C-338/00P VW (2003), para 147; T-101/05 T-111/05 BASF UCB (2007), para 213; T-49/02 T-50/02 T-51/02 Brasserie (2005), para 169. Also see (Torre 2010), 406.
\textsuperscript{1482} (Geradin & Petit 2012), 62 show that 45% of the applications to the GC for reduction of fine for infringement of Article 101 TFEU between 2000 and 2010 were successful. Also see (Geradin & Henry 2005), 458; (Veljanovski 2007), 76.
\textsuperscript{1483} (Geradin & Henry 2005), 457-458; (Forrester 2011), 161.
\textsuperscript{1484} See Annex 7.8.
it must continue to observe such practices in future cases. Specifically, they have confirmed the change in the Commission’s approach to crisis situations in which the conditions of a sector can no longer be taken into account but rather only the ability of specific undertakings to pay.

Nonetheless, the GC has intervened in a small number of cases taking, for instance, a more lenient approach to state involvement. In Far Eastern Freight Conference (2002) it held that an instance of anti-competitive conduct that was a matter of public knowledge, known to the Commission and various authorities in the Member States involved, warranted the non-imposition of a fine. In Labco/ONP (2014), the GC maintained that even public measures that influenced the position of a professional association that then led to the adoption of an anti-competitive practice should be taken into account. Finally, in Prestressing steel (2015), the GC rejected the Commission’s interpretation of the fifth indent of Article 29, arguing that it applied only to anti-competitive conduct that was expressly authorised by national law. The GC affirmed that a reduction in fines might take place even when such behaviour had merely been encouraged.

When examining crisis cartel claims, the GC has upheld most of the Commission’s decisions, with the exception of French Beef, as discussed above. Similarly, the GC has confirmed the vast majority of appeals against inability to pay claims. One prominent exception is Prestressing steel (2015, 2016), in which the GC and CJEU declared that the Commission had made several errors, in particular when assessing the impact of the fine on the undertakings viability. Although these flaws led to a finding of illegality, the fine was not reduced.

The above shows that while the EU Courts enjoy a wide margin of discretion to assess the merit of balancing by imposing fines, they have mostly refrained from using it. The same is mostly true at the Member State level. The figure demonstrates that national courts have rarely discussed or intervened in state involvement and crisis cartel claims but were more active when reviewing inability to pay claims.

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1486 See Annex 7.11.
1490 See Annex 7.12.
Interestingly, the national courts that intervened in balancing - France, Netherlands and the UK – were the same courts active in reviewing the acceptance of commitments (see Section 2.3 above). This validates the importance of the national substantive and procedural rules in determining the scope of balancing at the remedy stage.

3.4. Interim conclusion

This section has demonstrated how non-competition interests have influenced the setting of fines. The Commission and NCAs have taken a broad range of benefits into account, especially those related to state involvement and situations of economic crisis. This balancing, however, is not governed by a clear method and is often not transparent. Moreover, the EU and national courts have left the competition enforcers a considerable margin of discretion to account for non-competition interests. This has created uncertainty and led to a considerable divergence in the types of benefits examined, the balancing methods, and their significance in setting fines.

4. Normative benchmarks

This chapter has shown that the modernisation of EU competition law has shifted much of the balancing away from the Article 101(1) and (3) TFEU substantive balancing tools toward procedural decisions to accept commitments and moderate the fines. This type of procedural balancing, as summarised by Figure 7.13 and elaborated below, is characterised by low effectiveness, uniformity, and legal certainty. Those shortcomings are especially prominent in the case of commitments.

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Measuring the effectiveness of commitments is based on estimations (see below), and is therefore marked distinctly

### 4.1. Effectiveness

#### 4.1.1. Commitments

The main goal of commitments, according to the Commission, is the effective protection of competition.\(^{1495}\) Hence, commitments are only effective if they promote the competitive process and structure. This chapter, however, has argued that commitments have not always been directed at the promotion of competition. While the reasons for accepting commitments generally go unpublished, this chapter has offered indications that competition enforcers have also used commitments as a means of balancing.\(^{1496}\)

The Commission’s and NCAs’ practices of balancing by accepting commitments have followed various balancing methods and accommodated different types of benefits. Since there is no substantive test for accepting a commitment, competition enforcers do not need to explain whether a balancing has taken place, and if so, in which manner. Accordingly, commitments can be used as an alternative to Article 101(1) and (3) TFEU exceptions, to balance outside the scope of the legal tests of Article 101 TFEU altogether, or to regulate the future conduct of undertakings and markets.\(^{1497}\) Commitments allow competition enforcers to engage in implicit and flexible balancing, and to take broader types of benefits into account than those that can be examined

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1496 See Section 2.2.2 above.  
1497 See Section 2.2.1 above.
under Article 101(1) or (3) TFEU. This casts doubts on the effectiveness of such balancing tools. Competition enforcers have accepted commitments without undertaking either a full factual or economic analysis on the basis of market-criteria. As such, the shift to an effects-based approach has not been extended to include the practice of accepting commitments.

It should be emphasised that the above does not mean that commitments are not an effective enforcement tool in other regards. Although commitments can bring about problematic repercussions with regard to balancing, they do have a clear administrative advantage in that they can secure the fast and efficient closure of cases, thereby freeing competition enforcers to pursue other infringements.

4.1.2. Fines

Moderating fines is a relatively effective balancing tool although, admittedly, this chapter has shown examples of fines being set with reference to non-economic benefits and by using loose legal tests. Because fines are the main instruments for deterring violations of Article 101 TFEU, moderating them might harm deterrence and thus, indirectly, the effectiveness of EU competition law enforcement. 1498 If undertakings grow to expect low fines in certain circumstances, infringement might be considered an economically rational choice.

Yet, infringement decisions can serve to promote competition even when small, or even no fines are imposed. Such decisions order undertakings to cease the infringement. They take a clear stand on the law and clarify the boundaries of Article 101 TFEU. They also increase deterrence as they can be used as irrefutable evidence in a follow-up private action, 1499 or as an aggravating circumstance increasing the fine for a reoccurring infringement. 1500 Unlike other balancing tools, fines do not change the scope of Article 101 TFEU prohibitions. Non-competition interests do not alter the legal rules but only the consequences of the infringement in a particular case.

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1498 This chapter has not examined whether the level of fines imposed on Article 101 TFEU infringements was effective in ensuring deterrence. Some scholarship suggests that EU fining policy does not sufficiently deter infringements. See, for example, (Smuda 2013); (Heimler & Mehta 2015).
4.1. **Uniformity and legal certainty**

4.1.1. **Commitments**

Commitments suffer from uniformity and legal certainty weaknesses. First, the balancing within commitments is invisible and by definition highly case-specific. A competition enforcer is neither required to explain whether balancing has taken place nor to detail which substantive test has been applied. While commitments became somewhat more transparent at the EU-level after the formalisation of the procedure by Regulation 1/2003, not all NCAs are subject to the same procedural safeguards. Moreover, such procedural safeguards do not apply to informal commitments, which are often not even fully published.

Second, the lack of a substantive test allows competition enforcers to avoid taking a clear stand on the scope of Article 101(1) and (3) TFEU balancing. In addition to hampering the development of EU competition law, this practice impairs the predictability and uniformity of the role of non-competition interests under Article 101 TFEU. The imbalance between the simplicity of commitments accepted and the complexity of initial competition concerns may even create more uncertainty than legal certainty for other undertakings.\(^{1501}\) The lack of legal certainty is particularly striking since commitments have been used to address practices in only a limited number of sectors. Favouring commitments over infringement or inapplicability decisions in those sectors has resulted in a lack of clear guidance, especially in the sectors that face balancing challenges.\(^{1502}\)

Third, the lack of legal certainty is reinforced by the limited judicial review. The EU and national courts have not taken the opportunity to clarify the scope of balancing by accepting commitments and whether, and how, they could be squared with the more economic approach. In addition, the frequent use of commitments has limited the number of cases involving balancing questions reviewed by courts, thus hampering the development of future balancing principles.\(^{1503}\)

Finally, the abovementioned uncertainties have accommodated different interpretations of the scope and rules guiding both balancing by accepting commitments and by the substantive balancing tools under Article 101 TFEU. This has tended to create further fragmentation across the EU.

\(^{1501}\) See Section 2.4 above. Also see (Forrester 2008), 650; (Wathelet 2015), 554.

\(^{1502}\) See Section 2.2.2 above.

\(^{1503}\) See Section 2.3 above.
4.1.2. **Fines**

As with commitments, fines are also characterised by a high degree of legal uncertainty. Until the late 1990s, the methodology for setting fines was highly ambiguous. The Commission merely mentioned the relevant elements for assessing the gravity and duration of the infringement without detailing their impact on balancing. Balancing was unpredictable and not transparent, thus leaving the Commission a wide margin of discretion to moderate fines on account of non-competition interests.

This partially changed in parallel with the substantive modernisation of EU competition law. In 1998, the Commission adopted fining guidelines detailing the methodology for setting fines, which was further elaborated in its decisional practice. Yet, the methodology that guides the setting of fines is still uncertain due to the fact that it is not linked to any specific notion of harm. Since fines are not calculated using a mechanical process, they are not entirely predictable.\(^{1504}\) This uncertainty has been aggravated by the multiple legal sources for moderating fines, and their inconsistent application.

Legal certainty and inconsistent balancing also characterise practice at the national level. Although the Member States have adopted fining guidelines that largely follow the Commission’s approach, there is no uniform practice across the EU. The Member States differ in their substantive and procedural rules.\(^{1505}\) Moreover, as with the Commission, national guidelines leave NCAs a wide margin of discretion to set the fine in a specific case. Notably, the recent ECN+ Directive does not discuss the issue of balancing when calculating fines. While the Directive orders that NCAs to take the gravity and duration of the infringement into account, it has not limited the possibility to take other non-competition interests into account.\(^{1506}\)

Nevertheless, arguably, the importance of uniformity and legal certainty for balancing by moderating fines is not as self-evident as for other balancing tools. In fact, a certain degree of uncertainty is considered necessary to counter strategic behaviour by undertakings. Uncertainty prevents undertakings from making rational calculations on the expected chance of detection and potential fines. For essentially the same reasons, the need for a uniform fining policy across the EU is not as obvious as it is for other balancing tools.\(^{1507}\)

\(^{1504}\) (Dunne 2016), 461; also see the Opinion of AG Kokott in C-439/11P Ziegler (2012), para 120.

\(^{1505}\) The divergence of fines in general, and the lack of effective fines in particular, was recently discussed in the Commission’s ECN+ Directive Proposal (2017), Explanatory Memorandum, 5.


\(^{1507}\) (Lianos et al. 2014), 65-66; (Dunne 2016), 462-478.