Coding non-competition interests under Article 101 TFEU

A quantitative and qualitative study

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1. INTRODUCTION

1.1. With great balancing powers comes no (defined) responsibility

Setting enforcement priorities is an “inherent feature of administrative activity” of competition law enforcement authorities. It is not possible to enforce every potential infringement of Article 101 TFEU. Therefore, prioritisation is a necessary precondition that allows the Commission and NCAs to make effective use of their scarce resources to ensure the effective enforcement of Article 101 TFEU.

The modernisation of EU competition law aimed to utilise priority setting to “allow the Commission to refocus its activities on the most serious infringements of Community law in cases with a Community interest”. Under the old enforcement regime of Regulation 17/62, the Commission was obliged to assess all notified agreements by issuing either a formal decision or an informal comfort letter. This obligation consumed much of the Commission’s resources and left it only limited room to shape its enforcement strategy. The shift from a notification to a self-assessment regime enhanced the Commission’s priority setting powers and entrusted the NCAs with powers to fully enforce Article 101 TFEU and set their priorities. The Commission’s and NCAs’ ability to allocate their enforcement efforts was perceived as an essential means to increase the effectiveness of EU competition law.

This chapter submits that in addition to this original task, priority setting is a tool to balance competition and non-competition interests. It argues that the enforcement choices are not just about gaining compliance with Article 101 TFEU but are also about determining what the scope and boundaries of the Article are.

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1508 The quote “with great power comes great responsibility” is famously credited to Spider-Man in Amazing Fantasy of 1962. Earlier versions of this quote were also attributed to the likes of Voltaire, members of the French Revolution, Winston Churchill, and Franklin D. Roosevelt among others. See https://quoteinvestigator.com/2015/07/23/great-power/.
1509 T-24/90 Automec II (1992), para 77.
1511 Modernisation White Paper (1999), para 13
1512 This obligation was also criticised as ineffective. See Chapter 2, Section 3.2.
1514 Paraphrasing (Black 2001), 3. This was already hinted at by the empirical findings presented in the previous chapters.
More specifically, the chapter maintains that two contradicting effects of modernisation have incentivised competition enforcers to direct their efforts towards clear-cut infringements of Article 101 TFEU, which are unlikely to be justified by overriding non-competition interests: On the one hand, the more economic approach (substantive pillar of modernisation) has narrowed down the room for the consideration of non-competition interests under the substantive balancing tools of Article 101(1) and (3) TFEU. In parallel, on the other hand, the shift to the decentralised self-assessment enforcement regime (procedural and institutional pillars of modernisation) allows competition enforcers to refrain from pursuing anti-competitive agreements involving complex balancing questions. As a result, agreements raising balancing questions are likely to be resolved by alternative enforcement tools, such as by negotiated remedies, outside of Article 101 TFEU, or by closing the probe into the case altogether. This chapter shows that, in practice, many of those mechanisms have effects similar to granting exceptions under the substantive balancing tools.

Despite the great balancing powers embodied in the Commission’s and NCAs’ new priority setting tasks, EU law has not attached any responsibilities to their use. The Treaties and Regulation 1/2003 give the NCAs the power to co-enforce EU competition rules, but do not address the means and instruments for applying them. They do not direct or limit their discretion to select their enforcement priorities. At the Member State level, since the NCAs’ discretionary powers are bound by national laws alone, which vary considerably, the allocation of resources is generally left to the discretion of each Member State.

1.2. Structure and approach

Revealing the existence of balancing within priority setting is not an easy task. By its very nature, such a study requires an examination of not only the reasons that led a competition enforcer to take up a certain case but also – and perhaps chiefly – the reasons justifying disregarding a case. Most competition enforcers, however, do not fully reveal such motives in their policy papers or decisional practices. As mentioned in the opening of this dissertation, there is a large volume of “dark matter” Article 101 TFEU infringements that is difficult to identify.

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1516 As elaborated in Section 4.2 below, the ECN Recommendation on the Power to Set Priorities (2013) has issued general and non-binding recommendations in this regard.
1517 (Blanco & De Pablo 2012), 60.
1518 See Chapter 1, Section 3.1.
Nevertheless, the empirical methodology followed by this dissertation provides a solid basis to test several hypotheses on the existence and scope of balancing within this dark matter. This chapter uncovers areas that have remained untouched by competition enforcement following modernisation by mapping all the Article 101 TFEU proceedings rendered by the competition enforcers (when they enjoyed strong priority setting powers) and comparing them to the Commission’s practice prior to modernisation (when it had limited priority setting powers).

Accordingly, this chapter takes a four-step approach to examine the application of the Commission’s and NCAs’ priority setting powers. First, Section 2 explores the incentives that influence the setting of enforcement priorities. It poses the hypothesis that the three pillars of modernisation have reduced the competition enforcers’ incentives to pursue cases involving a clash between competition and non-competition interests.

Second, Sections 3 to 6 evaluate this hypothesis. They demonstrate that the substantive, procedural, and institutional setup of the EU leaves the Commission and NCAs a wide degree of discretion to set their enforcement priorities. As observed by Petit,\textsuperscript{1519} the competition enforcers have the discretion to devise the detection strategy of anti-competitive agreements ("detection discretion"), decide which investigations to pursue and which to neglect ("target discretion"), apply alternative legal mechanisms to examine a case ("instrument discretion") and design the remedies ("outcome discretion"). Figure 8.1 shows that each of these four discretionary powers offers an opportunity for balancing. They allow competition enforcers to select cases not only on the basis of competition merits (e.g. those having the most harmful effects on competition or consumer welfare) but also to choose not to enforce Article 101 TFEU for reasons unrelated to competition interests.

\textbf{Figure 8.1: Four types of priority setting discretions}

\begin{figure}[h]
\begin{center}
\begin{tikzpicture}
  \node[draw, rounded corners] (detection) at (0,0) {Detection discretion
  \begin{itemize}
  \item proactive and reactive strategies
  \end{itemize}};
  \node[draw, rounded corners] (target) at (3,0) {Target discretion
  \begin{itemize}
  \item Prioritisation powers and criteria
  \end{itemize}};
  \node[draw, rounded corners] (instrument) at (6,0) {Instrument discretion
  \begin{itemize}
  \item Sector regulation
  \item Markets work
  \item Informal ex-ante opinions
  \item Effect on trade test
  \end{itemize}};
  \node[draw, rounded corners] (outcome) at (9,0) {Outcome discretion
  \begin{itemize}
  \item Fines
  \item Commitments
  \item Inapplicability decisions
  \end{itemize}};
  \begin{scope}[every path/.style={->,>=latex}]
  \path (detection) -- (target);
  \path (target) -- (instrument);
  \path (instrument) -- (outcome);
  \end{scope}
\end{tikzpicture}
\end{center}
\end{figure}

\textsuperscript{1519} This classification is heavily based on the one offered by (Petit 2010), with some modifications.
Each of those sections is dedicated to exploring how one particular type of discretion has served as a balancing tool. Each section details the scope of the Commission’s and NCAs’ discretion, the possibility for judicial review, and presents empirical evidence suggesting that such discretion has been used to account for non-competition interests in practice.

Third, Section 7 critically assesses the Commission’s recent initiative to harmonise the rules governing priority setting powers as part of the ECN+ Directive. It argues that the Directive is ineffective and counterproductive since it fails to address the shortcomings of the current regime.

Finally, Section 8 discusses the degree by which balancing via priority setting meets the normative benchmarks. It submits that this balancing tool has significant shortcomings. Balancing by means of priority setting is less effective, uniform and certain compared to all the substantive balancing tools examined in this dissertation.

2. HYPOTHESIS: INCENTIVES GUIDING PRIORITY SETTING

Legal, economic, and social-science scholarship point to five factors that influence the application of the competition enforcers’ priority setting powers. 1520

First, the enforcement priorities are bound to the functions and powers of each competition enforcer as set by law, and to the environment in which it operates. 1521 As detailed below, some national laws limit the NCAs’ competence to fully set their enforcement priorities. For instance, some Member States restrict their NCAs’ powers to open ex-officio proceedings, decide whether or not to investigate a potential infringement or impose certain types of remedies. Moreover, some NCAs are susceptible to political influence. 1522 Laws or policy rules may directly prevent an NCA from fully applying Article 101 TFEU to certain types of agreements, sectors, or undertakings. Political influence can also take a more indirect form, for instance by expressing opposition towards certain enforcement priorities. As illustrated in the following sections, non-competition interests often direct such political influence.

Second, the manner in which each competition enforcer chooses to excise its priority setting powers is inherently connected to each competition enforcer’s view on the objectives of competition law and policy, and the manner in which competition and non-competition interests

1520 More generally, see (Galligan 1990), 113; (Biber 2008).
1522 (Petit 2010); UNCTAD Priority Setting and Discretionary Powers of Competition Authorities (2013), 9; (Guidi 2016). More generally, see (Gerse 2010), 339.
ought to be balanced.1523 As fittingly summarised by Ezrachi, “the way one understands competition law and its goals is naturally linked to one’s approach to selection of cases”.1524

As elaborated throughout this dissertation, the objectives of EU competition policy in general, and of Article 101 TFEU in particular, are topics of heated debate.1525 Some competition enforcers argue that it should safeguard short-term narrow consumer welfare (e.g. the Commission and the UK NCA). Others opt for a long-term consumer welfare standard that incorporates social and public policies within competition law enforcement (e.g. the French and Dutch NCAs). A third group of enforcers does not follow a consumer welfare standard at all but aspires to perfect the competitive structure and processes (e.g. the German NCA). Those different views affect the allocation of enforcement efforts. While the first group is likely to focus on agreements that generate the most economic harm for direct consumers, the second is also prone to examine anti-competitive agreements affecting the social sphere. The third group of competition enforcers is likely to pursue agreements having the most severe impact on competition, irrespective of their effects on consumer welfare.

Third, the enforcement efforts are constrained by practical institutional and procedural considerations, relating to the finite financial, technical, and human resources of the competition enforcer.1526 An enforcer must balance the objectives of Article 101 TFEU enforcement, as it understands them, with pragmatic concerns related to the risks and cost associated with the enforcement of a certain agreement, the expected length of the proceeding, and the institutional significance of the case (i.e. how the case relates to the enforcer’s portfolio of cases and the potential to establish legal precedent).1527 Those considerations encourage an enforcer to focus on cases that are likely to yield substantial results, namely clear-cut cases having either low risks and costs or high significance. On the other side of the coin, an enforcer is discouraged from allocating its efforts to more complicated and costly cases involving balancing issues.

This trend has been aggravated by the substantive modernisation. The introduction of the more economic approach has increased the costs for establishing an infringement.1528 Instead

1523 (Parret 2009), 34; More generally, see (Black 2001), 3-4; (Gerse 2010), 334; (Kovacic et al. 2011), 31; UNCTAD Priority Setting and Discretionary Powers of Competition Authorities (2013), 5.
1524 (Ezrachi 2016), 27.
1525 See Chapter 2, Section 2.1.
1526 (Petit 2010), 45; (Blanco & De Pablo 2012), 60; (Jennings 2015), 30.
of pigeonholing an agreement according to its form and predetermined rules of thumb, the more economic approach demands a case-specific complex economic analysis based on empirical evidence. The increased enforcement costs, in turn, have encouraged the competition enforcers to pursue by-object and hard-core restrictions that require only limited analysis. Yet, many of the balancing tools discussed in this dissertation do not apply categorically to hard-core restrictions,\textsuperscript{1529} or are less likely to justify an exception.\textsuperscript{1530} Thus, by choosing to avert cases that require sophisticated analysis, competition enforcers then rarely have the opportunity to balance competition and non-competition interests in their enforcement practices.

Fourth, the allocation of priorities is also linked to the political and judicial accountability of each competition enforcer to its national government, parliament, the ECN, the Commission, and the general public.\textsuperscript{1531} Competition enforcers are accountable for the use of their human and financial resources and for the impact of their priority setting choices on achieving effective protection of competition.\textsuperscript{1532} The accomplishments and prestige of a competition enforcer are often measured by statistics detailing the number of infringement decisions, level of fines imposed,\textsuperscript{1533} and the rate of success of judicial review applications.\textsuperscript{1534} This encourages enforcers to pursue clear-cut infringements that are unlikely to pose legal difficulties. On the other hand, they then tend to avoid, settle, or use informal or alternative measures to close more controversial cases.\textsuperscript{1535} This then runs the risk that the enforcement efforts will excessively centre on cases that draw short-term gains or that are high on the enforcer’s regulatory agenda\textsuperscript{1536} while ignoring cases that involve balancing.

\textsuperscript{1529} See, for example, the EU and some of the national de minimis rules (Chapter 5, Section 3.6 and Chapter 6, Section 3.1), and BERs (Chapter 4, Section 2).
\textsuperscript{1530} Article 101(3) TFEU (see Chapter 3, Section 4.4.2), ancillary restraints (see Chapter 5, Section 3.4), commitments (see Chapter 7, Section 2).
\textsuperscript{1531} Competition Commissioner Kroes in ICN Seminar on Competition Agency Effectiveness (2009), 6. More generally, see (Cseres & Outhuijse 2017), 97-113.
\textsuperscript{1532} UNCTAD Priority Setting and Discretionary Powers of Competition Authorities (2013), 10.
\textsuperscript{1533} This is especially true when an NCA’s budget is determined according to the level of fines it imposes. For instance, the Hungarian NCA is allowed to indirectly use 5% of its fines for the funding of conferences and external research projects. See OECD Reforms to Improve the Investment Climate in South East Europe (2006), 119; (Sabbatini 2008), 1.
\textsuperscript{1534} The focus on those indicators is made apparent by the statistics published in the Commission’s and NCAs’ annual policy reports. This was confirmed by the Hungarian NCA in its annual report 2016, 6, noting that “the total amount of the fines imposed in a competition authority’s competition supervision proceedings is an important measure of the effectiveness of its activities”. Also see (Wils 2004b), 217; (Sabbatini 2008), 5; (Kovacic et al. 2011), 27; (Geradin & Petit 2012), 38; (Kovacic 2015), 251.
\textsuperscript{1535} (Petit & Rato 2008), 212-213; (Gerse 2010), 335.
\textsuperscript{1536} (Forrester 2008), 649; (Wils 2011), 381.
This risk is especially prominent when the Commission’s soft law guidelines and notices govern an agreement. As elaborated in Chapters 3 to 5, the role of non-competition interests under Articles 101(1) and (3) TFEU remains unclear. The wording of the Article is vague and the CJEU has refrained from providing clear guidance. At the same time, the Commission has narrowed the scope of substantive balancing in its soft laws issued following modernisation. It has considerably limited the types of benefits that can be examined, introduced an economic balancing process, and required a high level of economic evidence to justify an exception. Although the soft law mechanisms do not bind NCAs and national courts, diverging cases may encounter legal or political criticism.

Finally, when accountability mechanisms fail, the priority setting choices of the competition enforcers may also be affected by regulatory capture of personnel, such as revolving doors or political and populism-driven motives.\textsuperscript{1537} This describes situations in which a regulated industry achieves disproportionate influence over the enforcer’s decision making and moves the enforcement away from the broader public interest and toward its own private interests.\textsuperscript{1538} In particular, the head of a competition enforcer might be motivated to focus on uncontested headline-grabbing cases, even if such infringements have only a modest impact on competition, and to avoid politically charged issues,\textsuperscript{1539} such as those involving balancing.

Against this backdrop, priority setting offers an attractive balancing tool from the standpoint of the competition enforcers. Balancing by priority setting is not subject to the rigid legal or economic tests that characterise the substantive balancing tools. Moreover, as detailed below, in many instances the enforcers are not even required to produce a reasoned decision explaining the exercise of their discretion. Balancing by priority setting is also subject to no or limited judicial review. It is not always notified to the Commission and ECN. Hence, priority setting powers leave the enforcers ample room to consider non-competition interests, going well beyond what they could take into account under the substantive balancing tools. In light of the above, this chapter poses the following hypothesis:

\textbf{Hypothesis: The modernisation of EU competition law has incentivised competition enforcers to direct their enforcement efforts towards clear-cut infringements of Article 101 TFEU. Cases raising balancing questions are likely to be resolved by other balancing tools, such as negotiated remedies, regulatory mechanisms alternative to Article 101 TFEU, or by closing the probe into the case.}

\textsuperscript{1537} (Petit 2010), 45; (Gerse 2010), 334-336; (Kovacic et al. 2011), 29.
\textsuperscript{1538} (Carpenter & Moss 2013), 1.
\textsuperscript{1539} (Kovacic et al. 2011), 38.
The remainder of this chapter is devoted to testing this hypothesis. It presents empirical
evidence indicating that competition enforcers have embedded non-competition interests while
exercising their discretionary priority setting powers. They developed unique prioritisation policies
for Article 101 TFEU, reflecting their own understanding of the role of non-competition interests.

3. DETECTION DISCRETION

3.1. Balancing tool

A competition enforcer exercises detection discretion when selecting a strategy for identifying
anti-competitive behaviour. In this regard, a distinction can be made between two categories of
detection strategies:\textsuperscript{1540} In a proactive strategy, a competition enforcer autonomously seeks to
reveal anti-competitive agreements by means of ex-officio proceedings. Under a reactive strategy,
on the other hand, the competition enforcer relies on information gathered and submitted by
undertakings or third parties by means of a notification, complaint, whistleblowing,\textsuperscript{1541} or leniency
application. In addition, some national laws compel NCAs to open an investigation upon a
referral from other national authorities such as a court, sector regulator, or the executive. The
detection strategies are not mutually exclusive. Most enforcers use a combination of detection
methods, and are not obliged to favour one method over the other.

This section submits that the choice of detection method implicitly comprises balancing. This
argument is based on the premise that proactive strategies and certain reactive strategies such
as whistleblowing and leniency applications are expected to expose clear-cut infringements of
Article 101 TFEU, which are unlikely to be justified by overriding non-competition interests.
Other types of reactive strategies are more likely to reveal anti-competitive agreements that
raise balancing questions. Therefore, the selection of detection methods informs the likelihood
that an enforcer will face balancing questions. This premise is based on the following grounds:

\begin{itemize}
\item \textsuperscript{1540}Petit 2010), 46; ICN Anti-cartel Enforcement Manual (2010), 6-20; (Blanco & De Pablo 2012), 60-61;
\item \textsuperscript{1541}Whistleblowing programmes grant a monetary award to a private person who provides information
that contributes to exposing a cartel. Whistleblowing programmes are not as common as leniency
programmes. They were first introduced to proceedings taking place before the Commission in 2017
(see policy report 2017, 4-5). They are also offered by some NCAs, e.g. in the UK since 2008 (UK
Whistleblowing Guidelines (2014)) in Hungary since 2010 (Hungarian Competition Act, Article
79A(3)), and in Germany since 2012 (German NCA annual report 2012, 41). On whistleblowing
programmes, also see (Stucke 2015); (Polaiski 2014).
\end{itemize}
First, a competition enforcer is unlikely to use *ex-officio* proceedings to detect agreements involving balancing questions. *Ex-officio* proceedings are complex and costly. They track suspicious market behaviour based on expensive economic and statistical data on prices, costs, and market shares.\(^{1542}\) Moreover, this information is just a starting point for the investigation. An infringement can only be established upon proving the existence of an actual agreement or a concerted practice, typically on the basis of correspondence and documents retrieved during an inspection of the undertakings’ premises.\(^ {1543}\) However, in many Member States, an NCA can only carry out such an inspection if it can prove a high likelihood of establishing a *serious infringement* of competition rules.\(^ {1544}\) Therefore, a competition enforcer will be more inclined to allocate its scarce resources to investigating clear-cut infringements of Article 101 TFEU.\(^ {1545}\) Agreements involving balancing questions, in which the legal situation is less clear, are less likely to be assessed by means of a proactive detection strategy.

Second, similarly, leniency and whistleblowing programmes are also unlikely to expose balancing questions. The Commission’s leniency programme, as well as those of most Member States, is restricted to revealing *secret cartels* and *by-object restrictions*.\(^ {1546}\) The same is true of national whistleblowing programmes.\(^ {1547}\) It is unlikely that an agreement that genuinely intends to advance non-competition interests will be kept secret. If undertakings believe that an agreement creates benefits that justify an exception, they have no legitimate reason to hide it.\(^ {1548}\)

Third, other reactive detection policies are more prone to disclose balancing questions because they limit the competition enforcer’s detection discretion. Since the enforcer must act upon information received from an external source, it is less affected by practical considerations related to

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\(^{1542}\) Friederiszick & Maier-Rigaud 2008), 90-93; (Petit 2010), 46; OECD *Ex officio* Cartel Investigations Report (2013), 18.


\(^{1544}\) On the Commission’s inspection powers, see Regulation 1/2003, Article 20. Also see (Friederiszick & Maier-Rigaud 2008), 93-94.

\(^{1545}\) Friederiszick & Maier-Rigaud 2008), 101; OECD *Ex officio* Cartel Investigations Report (2013), 41-42.

\(^{1546}\) The Commission’s Leniency Notice (2006), Preamble 1 states that it aims to reveal ”secret cartels”, in which undertakings agree to fix-prices or share markets. National leniency programs are often subject to similar conditions, see (Wils 2007), 13-14.

\(^{1547}\) Hungarian Competition Act, Article 79A(3); UK Whistleblowing Guidelines (2014), 1-2.

\(^{1548}\) Similarly, under the old notification regime of Regulation 17/62, Article 101(3) TFEU exemption was granted only if the agreement was notified to the Commission. A secret agreement could not have benefited from an exemption.
the enforcement costs, the complexity of the legal questions, or political sensitivity of the case.\textsuperscript{1549} Moreover, agreements referred by public authorities are likely to reveal balancing questions because they typically take place in markets that are subject to governmental involvement or regulation.\textsuperscript{1550}

Finally, the mere availability of a certain detection method may affect the types of agreements detected. An obligation to respond to all complaints and referrals, for instance, consumes the competition enforcer’s resources and reduces the prospects of opening \textit{ex-officio} proceedings.\textsuperscript{1551} Similarly, the availability of leniency applications, which provide quality evidence and low adjudication costs, reduces the enforcer’s incentive to pursue risky and expensive investigations of its own accord.\textsuperscript{1552}

To conclude, the focus on proactive strategies and on reactive strategies such as whistleblowing and leniency applications limits the feasibility of detecting agreements involving balancing questions. Consistently overlooking those agreements means that undertakings will not be deterred from concluding anti-competitive agreements that promote non-competition interests, even if such agreements are incompatible with Article 101 TFEU. The next section shows that those very detection policies have guided the practice of many competition enforcers.

\subsection{Scope of detection discretion}

EU and national rules do not directly dictate the detection strategies of most competition enforcers.\textsuperscript{1553} At the same time, the applicable substantive, procedural, and institutional frameworks often prompt the use of certain detection methods.\textsuperscript{1554}

The Commission’s practice provides an illustrative example of how a \textit{substantive framework} informs the detection strategy. Prior to modernisation, the Commission’s detection strategy was largely reactive. Empirical studies have already confirmed that the obligation to examine all notified agreements has left the Commission only limited capacity to engage in proactive enforcement efforts.\textsuperscript{1555} This was reinforced by the introduction of the Commission’s leniency

\begin{thebibliography}
\bibitem{1549} On the incentives guiding priority setting, see Section 2 above.
\bibitem{1550} See Chapter 3, Section 4.3.3; Chapter 4, Section 3.2.3; Chapter 5, Section 2; Chapter 7, Sections 2.2.2 and 3.2.1.
\bibitem{1551} See Chapter 2, Section 3.2.
\bibitem{1552} (Petit 2010), 48; (Idot 2015), 53; (Kovacic 2015), 128-130; (Wils 2016), 350.
\bibitem{1553} However, some Member States have enacted a voluntary or compulsory notification regime for purely national cases. See ECN Questionnaire on Regulation 1/2003 (2013), 2.
\bibitem{1554} (Petit 2010), 48; (Idot 2015), 53.
\bibitem{1555} The source of all the Commission’s formal decisions between 1964-2004 is presented in (Carree et al. 2010), 107-108. Also see (Wils 2016), 351-352.
\end{thebibliography}
programme in 1996. The procedural modernisation aimed to initiate, among others, a more proactive detection strategy. Releasing the Commission from the burden of administrative notifications was expected to prompt *ex-officio* investigations.

Nevertheless, in practice, the Commission’s strategy remained largely reactive. In fact, the vast majority of the Commission’s formal Article 101 TFEU proceedings following modernisation originated from leniency applications. While a small number of proceedings were based on complaints, only a few stemmed from *ex-officio* investigations. The sparing use of *ex-officio* investigations is often explained by reference to the substantive modernisation. As mentioned, the more economic approach increased the enforcement costs by demanding a case-specific analysis on the basis of complex economic evidence. Those increased costs incentivise the Commission to make greater use of its less costly leniency programme. The substantive modernisation has, in other words, advanced the use of detection policies that are unlikely to reveal agreements involving balancing questions.

The French enforcement regime is an example of how the *procedural and institutional setup* of an authority affects its detection policy and, thus, balancing. In the past, the French NCA had only limited investigation powers. While it was theoretically competent to carry out *ex-officio* investigations, the investigation itself had to be executed by the services of the Ministry of Economy. Consequently, the NCA rarely made use of *ex-officio* investigations. Between 1992 and 2008, only an average of 6% of the investigations per year were initiated of the NCA’s own accord. This changed once the 2009 procedural reform granted the French NCA the power to open and conclude investigations. The number of *ex-officio* investigations initiated between 2009-2013 increased to an average of 19% of all proceedings annually. The French procedural and institutional framework, therefore, indirectly shaped the detection methods.

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1556 See Chapter 2, Section 5.3.3.
1557 See Section 1.1 above.
1558 (Monti 2003).
1559 OECD *Ex officio* Cartel Investigations Report (2013), 104-105; (Massadeh 2015), 72-74; (Wils 2016), 351-352. Also see (Blanco & De Pablo 2012), 60-61.
1560 See Section 2 above.
1561 French Commercial Code, Article L 462-5.
1562 Based on the statistics presented in (Idot 2015), 53. Also see (Massadeh 2015), 228-237.
1564 Based on the statistics presented in (Idot 2015), 53. (Massadeh 2015), argues that budget constraints have kept the French NCA from initiating an even greater number of *ex-officio* investigations.
Finally, the prospect for judicial review also informs the limits of an enforcer’s detection policy. Since neither EU nor national law stipulates the detection strategy, the Commission and NCAs have wide discretion to design their strategies. EU and national courts have not interfered in devising those strategies.

3.3. Empirical indications

The empirical findings support the hypothesis that a focus on proactive strategies and on whistleblowing and leniency applications generates a portfolio of cases less likely to raise balancing questions. Figure 8.2 summarises the number of Commission proceedings in which the substantive balancing tools of Article 101(1) and (3) TFEU were discussed, according to the type of procedure (e.g. leniency, commitment decision, settlement). It specifies the number of proceedings in which each of the balancing tools was discussed (red bars), compared to the number of proceedings in which it was not mentioned (blue bars).

Figure 8.2: Balancing tools invoked according to procedure type, Commission (May 2004-2017)

(a) Article 101(1) TFEU
The figure illustrates that substantive balancing tools were rarely discussed in proceedings initiated by leniency applications or resolved by a settlement. They were also seldom examined when the Commission accepted informal commitments. The substantive balancing tools were mostly applied in regular decisions and cases in which the Commission accepted formal commitments. This confirms the hypothesis that a frequent use of leniency applications produces a portfolio of cases that do not require balancing.

This conclusion is also affirmed by comparing the Commission’s portfolio of cases to those of the five NCAs examined in this dissertation. Figure 8.3 presents the frequency of use of various procedure types by each competition enforcer.
The figure, together with the empirical findings presented in previous chapters, reveals a correlation between the types of procedures used and the frequency of examining balancing questions. Enforcers that devoted much of their effort to leniency and settlements (e.g. the Commission, German, and UK NCAs) rarely applied or accepted the balancing tools of Article 101(1) and (3) TFEU, fines or unique national exceptions. On the other hand, enforcers that made frequent use of the regular enforcement procedure (e.g. French and Hungarian NCAs) engaged in balancing more often. By the same token, enforcers that dedicated their efforts to issuing informal opinions (e.g. French and Dutch NCAs) and inapplicability decisions (e.g. French, Hungarian, and Dutch NCAs) applied the balancing tools more regularly. This last point will be further elaborated in Sections 5.3 and 6.1 below.
3.4. **Interim conclusion**

This section has proved that following modernisation, the Commission, German, and UK NCAs opted for detection strategies that were less likely to uncover agreements that merited balancing. The French, Hungarian, and Dutch NCAs, on the other hand, followed strategies that were more likely to detect agreement raising balancing questions.

The practice of the first group of competition enforcers poses a threat to the effectiveness of balancing. The reliance on detection strategies that are prone to expose only clear-cut infringements implies that other types of infringements are *de facto* not enforced. As a result, undertakings may assume that anti-competitive agreements that raise balancing questions will not be detected, even when those agreements could not benefit from the substantive balancing tools of Article 101(1) and (3) TFEU.\(^{1565}\) Therefore, these detection strategies fail to protect competition in agreements or sectors that are not high on the competition enforcers’ list of priorities.

Moreover, this practice threatens the legal certainty of the *substantive balancing tools*. Competition enforcers that select cases that do not entail balancing have little opportunity to discuss the application of Article 101(1) and (3) TFEU balancing tools in a specific case. This hampers the transparency and predictability of the substantive balancing approaches of those enforcers.

Finally, the variation in detection strategies hinders the uniformity of balancing across the EU. Undertakings may reasonably expect that certain agreements raising balancing questions will be detected and enforced by some enforcers, and ignored by others. Consequently, non-competition interests are not treated in an equivalent and consistent manner by all competition enforcers.

\(^{1565}\) Moreover, scholars have submitted that the effectiveness of leniency policies, and hence enforcement itself, requires a combination of proactive detection strategies. See (Kovacic 2015); (Wils 2016), 350.
4. TARGET DISCRETION

4.1. Balancing tool

Even after a potential anti-competitive agreement has been detected, a competition enforcer may still have the discretion to decide whether to open an investigation and pursue the case. In this context, target discretion refers to the ability of a competition enforcer to concentrate its efforts on a specific sector or practice and to avoid enforcing others.\textsuperscript{1566} Non-competition interests can influence the exercise of target discretion in three ways:

First, the protection of non-competition interests may \textit{directly} prompt a decision to refrain from pursuing an infringement of Article 101 TFEU. A competition enforcer may choose not to enforce the Article regardless of the agreement’s negative effects on competition. Consequently, an anti-competitive agreement will be ignored even if other balancing tools cannot justify it.\textsuperscript{1567}

The Dutch NCA’s policy on sustainability agreements provides an illustrative example of balancing by means of target discretion. In December 2016, the NCA declared that it would no longer exercise its enforcement powers “against sustainability arrangements that enjoy broad social support if all parties involved such as the government, citizen representatives, and businesses are positive about the arrangements”.\textsuperscript{1568} This statement has had a significant impact. The NCA will not enforce agreements that are incompatible with Article 101 TFEU on the basis of a political test (“broad social support”) that provides the NCA with ample discretion to favour the protection of the environment over competition interests. In fact, the NCA is unlikely to enforce agreements resembling those it had previously prohibited.\textsuperscript{1569}

Second, target discretion may also comprise an \textit{indirect} balancing function. As with the incentives guiding the exercise of detection discretion, a competition enforcer may prefer to focus its scarce resources on clear-cut infringements and avoid risky borderline cases.\textsuperscript{1570} Consequently, a competition enforcer is less likely to pursue cases involving balancing questions which may end in the granting of an exception, the imposition of no or little fine, or which might be overturned by the reviewing court.

\textsuperscript{1566} Lowe (2008), 2; ICN Anti-cartel Enforcement Manual (2010), 32; (Petit 2010), 47; ECN Recommendation on the Power to Set Priorities (2013), para 3.
\textsuperscript{1567} Parret (2009), 34; (Ezrachi 2016), 27.
\textsuperscript{1568} ACM, Basic Principles for Oversight of Sustainability Agreements (2016). Also see Chapter 3, Section 6.2.2.
\textsuperscript{1569} As described in Chapter 3, Section 6.2.2.
\textsuperscript{1570} ICN Anti-cartel Enforcement Manual (2010), 44. Also see Sections 2 and 3.1 above.
Third, the EU multi-level enforcement regime provides the Commission and NCAs with additional leeway for balancing. Article 13(2) of Regulation 1/2003 declares that when an NCA or the Commission receives a complaint against an agreement that “has already been dealt with” by another competition enforcer, it may reject it.\textsuperscript{1571} The GC has interpreted this provision broadly. In \textit{EasyJet (2015)} it submitted that the Commission is entitled to reject a complaint that was previously rejected by an NCA on priority setting grounds, even if the NCA had not examined the merits of the case.\textsuperscript{1572} This principle is applicable even if the NCA rejected the complaint in the course of an investigation conducted under a separate provision of \textit{national law} (e.g. Dutch aviation law, in the case at hand), as long as the review was concluded “in the light of the rules of EU competition law”.\textsuperscript{1573} The exercise of target discretion by one enforcer, even as part of applying a sector regulation, may thus preclude the examination of a complaint by another enforcer. In \textit{Agria Polska (2017)}, the GC further extended the competition enforcers’ discretion. The Court affirmed the Commission’s decision to reject a complaint that had previously been rejected by the Polish NCA for failure to meet the one-year limitation period specified under Polish law.\textsuperscript{1574} Hence, a national procedural law, detached from any substantive competitive analysis, had justified the rejection of a complaint by the Commission.

The GC’s judgments in \textit{EasyJet} and \textit{Agria Polska} mean that a competition enforcer can dispose of legally or politically sensitive agreements without weighing their bearing on competition and non-competition interests. The competition enforcers are motivated to “play hot potato” – i.e. reject a complaint on priority setting grounds or on the basis of other laws which are not related to competition.\textsuperscript{1575} Instead of applying the complex analysis of Article 101(1) or (3) TFEU exceptions, an enforcer can simply elect to close the case.

Target discretion, therefore, can serve as a balancing tool. A decision not to pursue an agreement due to non-competition interests carries an impact similar to an NCA’s no ground for action findings.\textsuperscript{1576} In both cases, competition enforcers elect not to enforce Article 101 TFEU because of certain benefits produced by the agreement. Nevertheless, unlike Article 101(3) TFEU, the conditions for balancing by means of target discretion are not bound by EU law.

\textsuperscript{1571} In T-201/11 Si.mobil (2015), granted a few months later, the GC adopted a similar interpretation with respect to an agreement that had been reviewed by two NCAs.
\textsuperscript{1572} T-355/13 EasyJet (2015), para 27.
\textsuperscript{1573} T-355/13 EasyJet (2015), para 46.
\textsuperscript{1574} T-480/15 Agria Polska (2017), para 5, 64, 77–78
\textsuperscript{1575} As aptly described by (Lamadrid 2015).
\textsuperscript{1576} On no ground for action decisions, see Section 6 below, and Chapter 2, Section 3.3.3.
Moreover, as the next section shows, the scope of such discretion varies between the various competition enforcers.

4.2. **Scope of target discretion**

EU law neither directs nor restricts the exercise of target discretion.\(^{1577}\) In fact, the ECN has acknowledged that the selection of cases may centre on non-competition interests, noting that the “prioritisation criteria used by the Authorities may include, among others, public interest, consumer welfare, market efficiencies, or other substantive, institutional or procedural considerations.”\(^{1578}\)

Since the rules governing the exercise of target discretion are subject to national laws, they differ across the EU.\(^{1579}\) This section begins by describing the varying degrees of target discretion. It illustrates that while some enforcers enjoy wide target discretion, others are subject to a specific prioritisation criterion or are required to examine every case brought to their attention (Sections 4.2.1-4.2.3). Moreover, the competition enforcers follow various processes for exercising their discretion. These differ in terms of the body entrusted with exercising target discretion, the form and publication of such decisions, and the scope of judicial review (Section 4.2.4). The degree and processes for target discretion inform the scope of balancing.

4.2.1. **Wide target discretion: Commission, German and UK NCAs**

The first group of competition enforcers has a wide margin of discretion to select and prioritise their enforcement targets.\(^{1580}\) The Commission is a good example of an authority having wide target discretion.\(^{1581}\) The EU Courts have regularly affirmed the Commission’s broad discretion to prioritise its enforcement efforts in matters that do not fall within its exclusive competence.\(^{1582}\)

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\(^{1577}\) Nevertheless, pursuant to Article 2 TEU, the enforcement of EU law in general, and priority setting in particular, is subject to the general requirements of the rule of law, which underpin the EU legal system. See (Cseres & Mendes 2014), 489.

\(^{1578}\) Emphasis added. ECN Recommendation on the Power to Set Priorities (2013), para 3. Also see (Gerard 2012), 21.

\(^{1579}\) Commission Impact Assessment accompanying the ECN+ Directive Proposal (2017), 17. Also see (Petit 2010), 6; (Blanco & De Pablo 2012), 62-63.

\(^{1580}\) ICN Anti-cartel Enforcement Manual (2010), 33, 43.

\(^{1581}\) EU law only binds the Commission’s priority setting powers when dealing with complaints, as elaborated in Section 4.2.3 below. This is reflected by Regulation 773/2004 relating to the Conduct of Proceedings (2004), Articles 2, 5 and 7. Also see (Blanco 2006), 194-206; ECN Decision Making Powers Report (2012), 51.

\(^{1582}\) T-24/90 Automec II (1992), para 75; Commission Notice on Handling Complaints (2004), para 41. Under the old enforcement regime of Regulation 17/62, the Commission examined all notifications for negative clearance and exemptions. Under Regulation 1/2003, this principle is only relevant in the context of the withdrawal of BERs in individual cases by virtue of Article 29 of the Regulation.
Masterfoods (2000), the CJEU linked this discretion to the Commission’s task of defining and implementing the orientation of EU competition policy. Performing this task effectively, according to the Court, requires the Commission to be able to decide whether to pursue a case. 1583

As the Commission, the German 1584 and UK 1585 NCAs enjoy wide target discretion. At times, the German NCA has explicitly used its target discretion to account for non-economic benefits that could not have been accepted under the substantive balancing tools. In Associations of ophthalmologists (2012), for example, it closed the investigation after finding that a joint-bid of several associations of ophthalmologists for a public health insurance fund tender had infringed the national provision equivalent to Article 101(1) TFEU. The NCA linked the termination of the proceedings to a German law providing that the association of health insurance physicians could lawfully submit such an offer. 1586 It explained that although the result of the case was “unsatisfactory”, as it hampers the goals of competition in terms of quality and price, the German law justified the termination of the proceedings. 1587

The UK NCA has constrained its target discretion powers by adopting designated prioritisation rules. 1588 It has declared that it targets cases that deter and influence anti-competitive behaviour that poses the greatest threat to consumer welfare. 1589 Indeed, the UK NCA has closed probes into serious restrictions of competition (i.e. hard-core restrictions) because they had little effect on consumer welfare. 1590 The NCA states that the impact on

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1583 C-344/98 Masterfoods (2000), para 46, as repeated in T-355/13 EasyJet (2015), para 17 and T-480/15 Agria Polska (2017), para 34; T-712/14 Watch Repair (2017), para 34. In the same vein, the EU Courts held that an undertaking could not escape a Commission’s investigation solely by claiming that the Commission had failed to investigate or prosecute other infringements. Prioritisation decisions would only be considered a misuse of power when it was evident that they had been taken with the exclusive or main purpose of achieving an end other than the enforcement of Articles 101 TFEU. See T-219/99, British Airways (2003), para 66-70; C-186/02P and C-188/02P Ramondín (2004) para 44; T-48/00 Corus (2004), para 212; T-271/03 Deutsche Telekom (2008), para 243, 270.


1585 1071/2/1/06 Cityhook (2007), para 148. Yet, the UK NCA is required to investigate “super-complaints” filed by a designated consumer body, as detailed in Section 4.2.3 below.

1586 Sozialgesetzbuch Fünftes Buch, Section 73c SGB V.

1587 B3-130/11 Associations of Ophthalmologists (2012), 2-3. Also see (Kleine & Rübel 2015), 69.

1588 CMA Prioritisation Principles (2017). This guidance is based on the earlier OFT Prioritisation Principles (2008). On target discretion in the UK, also see (Lester 2009).


1590 In CE/2471-03 Oakley (2008), the UK NCA closed an investigation into a price-fixing agreement after the parties agreed to terminate the agreement, noting that a further investigation would yield only “extremely limited” consumer benefit. In Visa sponsorship arrangements for Olympics 2012 (2011), the UK NCA closed an investigation into Visa’s arrangements with the London Organising Committee of the Olympic and Paralympic Games which conferred payment card exclusivity on Visa for the purchase of official
consumer welfare is balanced on a case-by-case basis against the strategic significance of the case (i.e. if the case establishes or tests a new legal or economic approach, or clarifies the law in areas of practical commercial importance). Moreover, political forces also influence the prioritisation. The NCA has proclaimed that when setting its priorities, it gives regard to the UK government’s non-binding ministerial statement of strategic priorities of the CMA.

Their wide target discretion entrusts the Commission and the German and UK NCAs with an implicit balancing tool. They may close an investigation due to non-competition interests without publishing or explaining their decisions.

4.2.2. Public interest criterion: Dutch and Hungarian NCAs

The second group of competition enforcers is required to consider a “public interests” criterion when deciding whether or not to take up a case. Accordingly, such enforcers are obliged to pursue all potential infringements of Article 101 TFEU that come to their attention, unless public interests justify otherwise. As detailed below, the substance of this obligation is reliant on national interpretation.

In the Netherlands, for example, the NCA has declared that it exercises its target discretion on the basis of the following two-fold criteria: First, as with the Commission and UK NCA, the Dutch NCA assesses the impact of an agreement on consumer welfare. Yet, the Dutch assessment is distinctive from the other enforcers. In line with the Dutch NCA’s broad definition of consumer welfare, the prioritisation focuses not only on short-term economic benefits. The Dutch NCA pursues cases leading to “sustainable welfare growth in the broadest sense of the word”. It takes into account “any potential harm and social harm that can be avoided or

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1591 Olympic merchandise and for the use of ATM machines at official Olympic Games venues. The NCA explained that the agreements were “unlikely to give rise to material consumer harm”.
1594 See Chapter 2, Section 6.3.2 and Chapter 3, Section 6.2.2.
1595 ACM Prioritisation of Enforcement Investigations (2016). In addition, the Dutch NCA takes into consideration how well it will be able to enforce the case effectively and efficiently.
1596 Conforming to its general practice, the UK NCA adheres to a narrow definition of consumer welfare in this regard, focusing essentially on static and dynamic efficiencies. See CMA Prioritisation Principles (2017), para 4.
limited by an enforcement action”. It balances the short and long-term harm to consumers, as well as indirect effects on innovation, quality, and other markets.  

Second, the Dutch NCA examines the social relevance of its actions, namely the magnitude of the public interest for an enforcement action. In particular, well-functioning markets, the optimal regulation of legal and natural monopolies, and consumer protection must be given priority.  

The combination of a broad consumer welfare standard with the public interest test explicitly requires the Dutch NCA to take non-competition interests into account when exercising its target discretion. This leaves room for the consideration of economic and non-economic benefits, affecting both current and future consumers.  

The Dutch NCA’s decision in VGT (2005, 2006) illustrates how target discretion can strike a balance between competition and labour interests. In that case, textile retailer trade unions had negotiated a new collective labour agreement with the Association for Wholesale Retailers in the Textile Business (VGT). After negotiation failed, VGT advised its members to unilaterally modify the employment conditions applicable to new personnel. Subsequently, the trade unions submitted a complaint to the NCA, arguing that the proposed employment conditions contained anti-competitive price arrangements. The NCA initially rejected the complaint on the basis of an Article 101(1) TFEU balancing tool. It asserted that VGT had not acted as an undertaking when negotiating the collective labour agreements.  

Upon reassessment of the case, however, VGT’s recommendation was found to infringe Article 101(1) TFEU. Nevertheless, the Dutch NCA decided to reject the complaint with reference to its priority setting powers. It declared that the dispute merited striking a balance between competition and social interests. Although the NCA was formally competent to balance the competing interests, it believed that this task ought to be performed by the legislator, or at

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1598 Emphasis added. ACM Prioritisation of Enforcement Investigations (2016), 2. Also see ACM Strategy and Enforcement Priorities with regard to Vertical Agreements (2015), 11. In 6824 Health insurers (2010), for example, the NCA rejected a complaint from health care insurers, noting that there was little evidence that the alleged infringement would increase prices and thus harm consumers. Also see 7213 NPO (2012); 7377 SGR (2013).


1600 A similar rationale is reflected by the Dutch NCA policy on sustainability agreements, as detailed at the beginning of this section.


1602 On the reassessment procedure, see Chapter 2, Section 6.3.3.
least by a civil court. Consequently, an infringement of Article 101 TFEU that would not have been accepted under Article 101(1) or (3) TFEU balancing tools ended up not being enforced.

The Hungarian NCA, like its Dutch counterpart, is also obliged to consider public interest criteria when deciding whether to pursue an infringement. The NCA’s policy papers have interpreted this obligation along the lines of the UK NCA’s prioritisation approach, focusing on the degree of competitive harm, the number of affected consumers, and the significance of the case for the evolution of competition policy.

The decisional practice of the Hungarian NCA, nevertheless, had actually taken account of a broader range of non-competition interests. In Network of Pharmacists (2008), for example, the Hungarian Chamber of Pharmacists and other associations allegedly exchanged information on drug prices and attempted to hinder the distribution of drugs outside a network of pharmacies. The undertakings claimed that the practice, as a state action, was justified since a national law called for the price recommendations to be issued. Yet, the NCA rejected the claim, explaining that a national law could not trump Article 101 TFEU. At the same time, the NCA closed the investigation on the grounds of a lack of public interest. It noted, *inter-alia*, that imposing a fine for an infringement would be inappropriate in light of the national law. Consequently, while the national law could not justify an exception based on Article 101 TFEU, it did, however, vindicate a decision not to enforce it.

Competition enforcers that are bound by a public interest criterion are overtly required to examine non-competition interests when exercising their target discretion. As such, non-competition interests directly and openly play a role in exercising target discretion.

4.2.3. Legality principle: French NCA and complaints

The third group of competition enforcers enjoys no target discretion. They are bound by the so-called legality principle, entailing that they must commence an investigation into any potential

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1604 Hungarian Competition Act, Article 67(2). Also see (Hegymegi-Barakonyi 2009), 10; ECN Decision Making Powers Report (2012), 72-73.
infringement that comes to their attention. Such an obligation limits the possibility of using target discretion as a balancing tool.

The French NCA, for example, is obliged to open a formal investigation unless a case is deemed inadmissible (e.g. falls outside the NCA’s competence) or manifestly lacks supporting evidence. Closing an investigation requires a formally reasoned decision. Since 2009, however, this rule has not applied to *ex officio* investigations.

Similarly, certain competition enforcers that for the most part enjoy wide target discretion are bound by a more limited legality principle when assessing complaints. While those enforcers are not required to investigate each complaint, they do have a duty to examine all matters of fact and law brought to their attention and to provide reasoning for their decisions. Such a rule applies to the Commission, the Dutch NCA, and the UK NCA with respect to “super-complaints” lodged by designated consumer decisions.

### 4.2.4. Process of exercising target discretion

The previous sections have revealed that the competition enforcers enjoy varying degrees of target discretion. This section shows that the enforcers also vary in the processes required to exercise that discretion. As summarised by Table 8.1, they differ in terms of the body entrusted with target discretion, the form and publication of such decisions, and the possibility of judicial review of the NCA’s decisions.

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1608 (Idot 2015), 53-54; (Lachnit 2016), 46.


1616 Also see ICN Anti-cartel Enforcement Manual (2010), 34.

1617 In T-355/13 EasyJet (2015), para 20, the GC emphasised that the review of the exercise of the NCAs’ target discretion is a matter for national courts alone.
Table 8.1: Target discretion

<table>
<thead>
<tr>
<th>Body taking the decision</th>
<th>Form and publication</th>
<th>Liable to appeal?</th>
</tr>
</thead>
<tbody>
<tr>
<td>Commission</td>
<td>Decisions to open a case or reject a complaint are published but do not require that it be established that there was no infringement.</td>
<td>Yes</td>
</tr>
<tr>
<td>FR</td>
<td>Reasoned and published decision</td>
<td>Yes</td>
</tr>
<tr>
<td>DE</td>
<td>Not published. Parties are informed informally</td>
<td>No</td>
</tr>
<tr>
<td>NL</td>
<td>Only complaints are published</td>
<td>No</td>
</tr>
<tr>
<td>HU</td>
<td>A reasoned and published order after a formal investigation has been opened</td>
<td>Yes</td>
</tr>
<tr>
<td>UK</td>
<td>Generally unpublished. If the NCA closes a case due to an inapplicability decision, it publishes the decision</td>
<td>No, only &quot;judicial review&quot;</td>
</tr>
</tbody>
</table>

1619 Commission Best Practices Notice (2011), para 17. Such a decision includes provisional information on the relevant parties, markets, and the conduct to be investigated.
1620 Regulation 773/2004 relating to the Conduct of Proceedings (2004), Article 7. While a decision to reject a complaint must be reasoned, the Commission is not obliged to adopt a position on all arguments relied on by the complainant in support of its complaint or whether there is an infringement of Article 101 TFEU. See Commission’s Notice on Handling Complaints (2004), para 74-75, 79; T-114/92 BEMIM (1995), para 41; T-24/90 Automec II (1992), para 86-87; Policy report 2005, 26-27.
1621 Regulation 1/2003, Article 30.
1623 ECN Decision Making Powers Report (2012), 53. Nevertheless, judicial scrutiny was often quite lenient. For instance, in T-24/90 Automec II (1992), para 80 the GC declared that when the Commission rejects a complaint without carrying out an investigation the review of the Court must focus on whether or not the contested decision is based on materially incorrect facts or is vitiates by an error of law, a manifest error of appraisal or misuse of powers”. Also see (Blanco & De Pablo 2012), 64-65.
1624 (Lachnit 2016), 44-46.
1625 See Section 4.2.3 above.
1626 See Section 4.2.3 above.
1630 (Ottow 2015), 111.
1633 (Hegymegi-Barakonyi 2009), 14.
1634 (Hegymegi-Barakonyi 2009), 11.
1635 Hungarian Competition Act, Section 72(1)(a).
1636 (Lester 2009), 7.
1637 (Lester 2009), 8-9.
1638 A decision to close a case due to administrative priorities cannot be appealed, but can be challenged in “judicial review proceedings” in the High Court of England and Wales or the Court of Session in
The table demonstrates the considerable institutional and procedural differences in national processes for exercising target discretion. In some Member States, the allocation of enforcement efforts is decided pending the deliberations of high-level NCA officials; in others, the decision is taken by a mid-level employee. This has an influence on balancing. High-level officials who are entrusted with the task of shaping general competition policy are more likely to deviate from the NCA’s general policy and take broader policy considerations into account than lower-level officials in charge of perhaps one area of enforcement.

Moreover, some competition enforcers are not required to publish or justify their exercise of target discretion. Such enforcers can use target discretion as a flexible and implicit balancing tool, which is not bound by any substantive or procedural constraints. In comparison, an obligation to reason the selection of enforcement targets renders the balancing more transparent. In such cases, the balancing is more likely to conform to the NCA’s other policies and principles.

Finally, the table also reveals a noteworthy divergence in the possibility for judicial review of the Commission’s and NCAs’ exercise of target discretion. This has important implications for the competition enforcer’s ability to use target discretion as a balancing tool. The possibility for judicial review implies that an enforcer is aware that it might need to defend its position before a court.\textsuperscript{1639} Therefore, it is less likely to take non-competition interests into account that are incompatible with its general competition policy. Moreover, the possibility of judicial review, even if limited, strongly reduces the risk of political interference in balancing. The mere possibility of judicial review protects enforcers against external political pressure \textit{not} to investigate the infringements of politically-favoured undertakings.\textsuperscript{1640} Since a court might ultimately review the enforcer’s decision, it will tend to be more hesitant to succumb to such pressure.

\section*{4.3. Empirical indications}

The exercise of target discretion, as mentioned, is often not fully published or reasoned. Therefore, it is difficult to provide comprehensive empirical evidence on balancing by means of target discretion. Yet, there are some empirical indications supporting the conclusion that target discretion may have been used as a balancing tool.

Scotland. A person or body with sufficient standing can challenge any decision of a public body on administrative law principles. Yet, the High Court and CAT have affirmed that the prioritisation decision is a matter left to the NCA, see 1071/2/1/06 Cityhook (2007), para 238; CO/7886/2006 Cityhook (2009), para 88.\textsuperscript{1639} (Petit 2010), 53; (Geradin & Petit 2012), 29-30.\textsuperscript{1640} (Wils 2017), 39.
First, the empirical findings demonstrate that the Commission and NCAs closed a large number of investigations without adopting a formal decision. Figure 8.4 summarises the number of Articles 101 and 102 TFEU investigations notified to the ECN network between May 2004 and December 2017. It shows that while the competition enforcers opened 2361 investigations, only 1233 draft decisions were notified to the ECN pursuant to Article 11(4) of Regulation 1/2003. In other words, almost half the investigations were closed without a decision and thus were not notified.

**Figure 8.4: “Dark matter” (May 2004 – 2016)**

Data processed from the ECN website. See http://ec.europa.eu/competition/ecn/statistics.html. The number of investigations opened refers to formal investigation measures commenced by the NCAs and notified to the ECN pursuant to Article 11(3) of Regulation 1/2003. The number of investigations closed without a decision refers to open investigations for which the Member States adopted neither a decision requiring that an infringement be brought to an end nor a decision accepting commitments or withdrawing the benefits of a BER, or failed to make notification of any such decision.

*Svetlicinii et all* have submitted that this ratio points to “dark matter” in the decentralised enforcement of Regulation 1/2003. Namely, a significant number of decisions not subject to the scrutiny of the Commission and ECN. The existence of dark matter implies that the NCAs have the opportunity to balance when applying their target discretion. This, together with the competition enforcers’ incentive to use target discretion as a balancing tool, reinforces the hypothesis that such balancing is, in fact, taking place.

Second, the empirical findings reveal a shift in the nature of the agreements reviewed by the Commission. Under Regulation 1/2003, the Commission and some NCAs enforced almost exclusively clear-cut and hard-core restrictions of competition. For instance, while the Commission’s total number of Article 101 TFEU proceedings was reduced following

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1641 (Svetlicinii et al. 2018), 2. On dark matter, also see Chapter 1, Section 3.1.
modernisation, the number of prohibition decisions against hard-core cartels significantly increased. During the 1990s, the Commission issued an average of 2 prohibition decisions per year against cartels. From the beginning of the 2000s, however, it issued an average of around 6.5 prohibition decisions per year against cartels. As the number of proceedings against cartels tripled, the fines increased by more than tenfold, indicating that the Commission dealt with particularly serious violations.

The focus on clear-cut infringements explains the decreased invocation of Article 101(3) TFEU in Commission proceedings following modernisation. As mentioned, the Commission addressed many of the proceedings following modernisation by means of leniency applications and/or settlements in which undertakings usually did not even attempt to invoke Article 101(3) TFEU.

Furthermore, even when the Commission examined Article 101(3) TFEU, an exception was often promptly rejected. The empirical findings indicate that since May 2004, the Commission has applied Article 101(3) TFEU mainly to cases involving clear-cut infringements such as price fixing, market sharing, and restrictions having equivalent effects. While many of those agreements involved liberalised and regulated sectors, which provoked much of the debate on balancing prior to modernisation, the Commission often rejected the possibility of granting an exception outright. In other words, the focus on clear-cut infringements following modernisation entails that competition enforcers will rarely be required to balance competition and non-competition interests in a specific case.

Third, similarly, the empirical findings presented in Chapter 3 show that competition enforcers that have interpreted Article 101(3) TFEU as limited to the consideration of economic benefits have rarely taken on cases involving non-economic benefits. For instance, while the Commission and UK NCA pronounced a strict-narrow approach to the Article, they almost never rejected an Article 101(3) TFEU defence with respect to a specific anti-competitive agreement

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1642 See Figure 3.1.
1644 Ibid, table 1.2.
1645 This decrease was presented and discussed in Chapter 3, Section 2.
1646 See Section 3.3 above.
1647 See Annex 8.1.
1648 See Chapter 3, Section 4.3.
1649 See Annex 8.2.
1650 Also see (Witt 2016b), 168.
1651 See Figure 3.10 and Figure 3.11.
that produced non-economic benefits. In contrast, NCAs that were willing to accept certain non-economic benefits under Article 101(3) TFEU, such as the Netherlands and France, have taken up cases involving balancing questions.

Arguably, competition enforcers that have excluded the consideration of non-economic interest from the scope of Article 101(3) TFEU were bound to use their target discretion to avoid deviating from their declared substantive balancing approaches. To this extent, they used their target discretion to account for non-economic interests they were not willing to take into account under Article 101(3) TFEU. Invoking target discretion instead of applying Article 101(3) TFEU also circumvented scrutiny of their approach to balancing. By refraining from investigating such agreements in the first place, they averted the need to engage in contentious balancing issues, which are likely to encounter legal or political opposition.

Fourth, the empirical findings presented throughout this dissertation reveal that the NCAs rarely opened proceedings in the face of political or regulatory interference with the enforcement of Article 101 TFEU in a specific sector. Namely, when a Member State limited the application of the national equivalent prohibition, the NCAs also refrained from enforcing Article 101 TFEU. For instance, NCAs did not apply Article 101 TFEU to mixed-cases that would have qualified for an exception under a national BER.1652 Comparably, following the codification of the “nature and purpose” exception for purely national cases under Dutch law, the NCA did not bring actions against collective bargaining agreements affecting trade between Member States.1653 Finally, the competition enforcers were influenced by issue-specific laws. Accordingly, after a Hungarian law granted an exception from the national cartel prohibition to certain national agriculture agreements, the Hungarian NCA stopped investigating agriculture agreements altogether. After German law granted exceptions from the national cartel prohibition to forest-related services, the German court opposed opening a case on this matter on procedural grounds.1654

To conclude, there are various anecdotal and empirical indications that the Commission and NCAs have made use of their target discretion to refrain from enforcing Article 101 TFEU when an agreement rose balancing questions. While the competition enforcers would have been unable to accept some of those anti-competitive agreements by means of the substantive

1652 See Chapter 4, Section 5.1.3.
1653 See Chapter 5, Section 4.1.1.
1654 See Chapter 6, Section 3.4.
balancing tools of Article 101(1) or (3) TFEU, they could, however, invoke procedural balancing
tools to refrain from enforcing the Article altogether.

4.4. Interim conclusion

Wide target discretion is often seen as enabling effective competition law enforcement.
Prioritisation allows competition enforcers to make more effective use of their limited resources,
focusing on deterring behaviour that poses the greatest threat to competition and
consumers. Therefore, both the Commission and the ECN have maintained that increased
target discretion helps enhance the effectiveness of EU competition law enforcement. At the
same time, this section submits that target discretion is ineffective when used as a balancing
tool. The Commission’s and NCAs’ choice to refrain from pursuing anti-competitive agreements
that could not be justified by substantive balancing tools imposes serious risks on the
effectiveness, uniformity, and legal certainty of balancing.

First, balancing by means of target discretion negatively affects cases the competition
enforcers have refrained from pursuing. This balancing is not effective, as the enforcers facilitate
broad types of economic and non-economic benefits, which are not based on legal or economic
balancing processes. Balancing by target discretion does not necessarily weigh the harm to
competition against possible overriding benefits. Target discretion may lead to fragmentation
because the Commission, as well as some NCAs, does not follow uniform prioritisation criteria.
Moreover, the fact that competition enforcers are not required to publish or reason the exercise of
their target discretion jeopardises legal certainty. Thus, neither the observation that balancing is
taking place nor the balancing method is transparent or fully liable to judicial review. This poses
the risk of arbitrary discrimination of undertakings on the basis of priority setting.

Second, balancing by means of target discretion also affects the development of EU
competition policy in general. Targeting only clear-cut infringements renders a paradoxical
outcome: While the more economic approach calls for balancing the positive and negative
impacts of an agreement on consumer welfare, enforcement has, in practice, come to revolve
around clear-cut infringements of competition that do not require such an exercise. The

4(5) and Preamble 23, as elaborated in Section 7 below.
1657 (Petit 2010), 50.
1658 (Gerard 2012), 38-40; (Witt 2016b), 212; (Witt 2018), 426.
selection of cases thus renders the enforcement form-based. This generates uncertainty about the role of non-competition interests in the grey-zone and the applicable balancing principles.

5. **INSTRUMENT DISCRETION**

Instrument discretion refers to the possibility of using alternative regulatory mechanisms to assess an anti-competitive agreement. For instance, certain competition enforcers may apply rules of sector regulation, undertake markets-work (i.e. sector inquiries or market studies), or issue informal *ex-ante* opinions instead of pursuing an Article 101 TFEU infringement proceeding. In addition, the NCAs have a wide margin of discretion to decide whether to classify an agreement as mixed or purely national (i.e. whether it has an effect on trade between Member States). Classifying an agreement as purely national may subject it to a different balancing regime.

Instrument discretion is an extension of the competition enforcers’ priority setting powers. Enforcers not only have the power to refrain from enforcing Article 101 TFEU but can also address anti-competitive agreements by employing alternative enforcement instruments. This section demonstrates how those regulatory mechanisms each strike a different balance between competition and non-competition interests.

5.1. **Sector regulation**

Certain anti-competitive agreements may fall under the scope of both Article 101 TFEU and specific rules of sector regulation. In such an event, the competition enforcer and/or the relevant sector regulator must decide whether to enforce Article 101 TFEU, the rules of sector regulation, or both.

The prospect of enforcing rules of sector regulation instead of Article 101 TFEU is embedded in Article 3 of Regulation 1/2003. Article 3(1) orders NCAs and national courts to apply Article 101 TFEU when they apply national competition law. Yet, the Article does not prohibit decisions *not to apply* EU or national competition law. On the contrary, as detailed in Chapter 6 Section 1, Article 3(3) provides that EU competition law does not preclude the application of a national law that predominantly pursues a different objective. Therefore, an NCA or a sector regulator may apply the rules of a sector-specific regulation instead of enforcing Article 101 TFEU.

Applying sector regulation instead of Article 101 TFEU has a significant impact on balancing. First, sector regulation often does not have the same aim as competition law. Sector regulation does not necessarily focus on either making markets more competitive or on enhancing short-term
narrow consumer welfare. It is often directed at securing a broad range of social objectives such as ensuring the security of supply, providing an essential but uneconomic service, protecting vulnerable consumers, and reaching environmental or redistributive goals. Consequently, sector regulation strikes a different balance between competition and non-competition interests.\(^{1659}\)

Second, the application of sector regulation is grounded on different substantive, procedural, and institutional enforcement settings, which in turn confers a different balancing method. Most noticeably, contrary to the enforcement of Article 101 TFEU following modernisation, sector regulation is typically applied \textit{ex-ante}, aiming to dictate the behaviour of undertakings. In this sense, such a balancing method resembles balancing by accepting commitments, as discussed in Chapter 7 Section 2.

Finally, rules of sector regulation are more prone to political influence in comparison with Article 101 TFEU. Sector regulation is based on national laws which are controlled by the national parliaments and governments.\(^{1660}\) Furthermore, their application is not subject to scrutiny on behalf of the Commission and ECN to assess their compatibility with EU competition law.\(^{1661}\)

The choice between Article 101 TFEU and rules of sector regulation is especially critical for NCAs that are mandated to enforce sector regulation in addition to competition law (e.g. the Dutch, French, UK, and recently also the German NCAs).\(^{1662}\) The UK enforcement regime provides an illustrative example. According to British law, the CMA and certain sector regulators are vested with concurrent powers to apply EU and national competition laws.\(^{1663}\) Each case is allocated to the authority that is “better or best placed to do so”.\(^{1664}\) When a case is allocated to a sector regulator, the regulator must decide whether to use its competition law or dedicated sectoral powers. At the same time, not all sector regulators primarily aim to ensure competition goals. The House of Lords Select Committee on Regulators, for instance, has noted that the promotion of competition is just one of the sector regulators’ objectives and that the manner of

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\(^{1659}\) (Freeman 2008), 3; (Monti 2008), 136; (Almunia 2010), 3; (Cseres 2013), 27-36; (Dunne 2014), 230; (Bailey & Whish 2015), 1031-1032. In the context of Article 102 TFEU, the Commission has noted that the setting of priorities would be based on the specific regulatory environment. See Commission Article 102 Guidance (2009), para 8.

\(^{1660}\) (Monti 2008), 128-129; (Sauter 2010), 6.

\(^{1661}\) See Chapter 2, Section 3.3.3.

\(^{1662}\) On the synergies and drawbacks of NCAs having an integrated or separate mandate to enforce competition and sector regulation, see (Cseres 2013); (Hyman & Kovacic 2013).

\(^{1663}\) See Chapter 2, Section 6.4.3. Similar concurrent models are in effect in Ireland, Greece, and Cyprus. See (Stern 2015), 896.

balancing between the objectives is not obvious. In particular, the UK health regulator does not have an active duty to promote competition. It is merely required to protect choices and prevent anti-competitive agreements.

NCAs have regularly refrained from enforcing Article 101 TFEU when sector-specific rules are available. In the UK, the provision was applied considerably less often than in other, even much smaller, jurisdictions. The sector regulators seldom used Article 101 TFEU and preferred to rely on their sector regulation powers. In Energy Trade Association (2013), for instance, the British Gas and Electricity Markets Authority (Ofgem) explained that it “considers that its resources would likely be better devoted to further work on the regulatory environment” rather than conducting an Article 101 TFEU proceeding. Moreover, the vast majority of the few Article 101 TFEU proceedings examined by the sector regulators have resulted either in commitments or non-infringement decisions. In fact, as a result of the sparing use of Article 101 TFEU, The Enterprise and Regulatory Reform Act of 2013 required all sector regulators, for the first time, to determine on a case-by-case basis whether the use of its competition law powers was “more appropriate” than using its special sectoral powers. Nevertheless, the empirical findings do not indicate an increase in the enforcement of Article 101 TFEU by sector regulators since the reform.

Moreover, balancing by opting for sector regulation was also evident in the Netherlands and Germany, where the NCAs abstained from pursuing anti-competitive agreements that were protected by sector regulation. In the Netherlands, the Healthcare Market Regulation Act of

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1667 See Figure 3.10. This is also reflected in the ECN statistics, available at: http://ec.europa.eu/competition/ecn/statistics.html.
1668 The empirical findings show that since May 2004, sector regulators have enforced Article 101 TFEU in seven cases. Five of those cases were closed without a finding of an infringement (Electric trackside lubricators (2005); 213479.02 Supply of grease for use in electric trackside lubricators (2005); CW/00842/06/05 BBC broadcast's provision (2007)), or closed on priority setting grounds (Energy trade association (2013); Price comparison websites (2016)). The other two cases were closed by accepting commitments (Provision of Deep Sea Container rail transport services between ports and key inland destinations in Great Britain (2015)) and a settlement (East Midlands International Airport (2017)). In all of those cases, no fine was imposed for the infringement of Article 101 TFEU.
1669 See footnote 1668 above. Also see UK National Audit, Report on the UK Competition Regime (2016), 31-32.
1670 UK Enterprise and Regulatory Reform Act 2013, Article 51 and Schedule 14; UK Guidance on Concurrent Application (2014), para 4.1. This obligation does not apply to the health regulator.
2006 introduced a system of sector-specific competition that enjoys primacy over general competition rules. The healthcare authority is entrusted with the application of ex-ante controls, including the power to impose general obligations on all market parties by intervening in contract terms. In NZA (2012), the Dutch NCA held that in light of such a regulation, it would not give priority to complaints alleging anti-competitive behaviour in the health insurance market. Similarly, the German NCA has declared the if an agreement falls under a sector-specific regulation beyond the NCA’s competence, it will generally refrain from investigating it, leaving the matter to the relevant sector regulator instead.

5.2. Markets-work (sector inquiries and market studies)

As with reliance on rules of sector regulation rather than Article 101 TFEU, a competition enforcer may circumvent the application of this provision by ordering a markets-work. Markets-work is defined as the powers vested with an enforcer to conduct an investigation into the functioning of a specific sector, market, or type of an agreement outside the scope of an infringement procedure. The name, scope, and methodology for carrying out such investigations vary considerably between competition enforcers. Yet, all of the investigations are characterised by the fact that they aim to understand competition concerns rather than correct a specific infringement. As with sector regulation, the enforcers have the discretion to decide whether to address the matter by using Article 101 TFEU, market works, or both. This choice dictates the role reserved to non-competition interests.

Former Competition Commissioner Kroes has asserted that the Commission’s power to conclude so-called sector inquiries provides it with a means to strike the right balance between

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1673 (Sauter 2010), 8, 11.
1674 7489 NZA (2012), 2.
1675 (Dreher 2009), para 4.2.
1676 (Lachnit 2016), 159-160.
1677 For a survey of NCAs having powers to issue markets work, see ECN Questionnaire on Regulation 1/2003 (2013), 6. The French and UK NCAs are good examples at two ends of the spectrum. The French NCA has the power to perform market scans as part of its powers to issue informal advice. Those scans are applied on an irregular basis and yield only informal recommendations. On the other hand, as elaborated below, the UK sector investigations, which are known as market studies, are highly formalised and subject to a strict procedure. Also see (Dunne 2014), 235-248; (Lachnit 2016), 162.
1678 See the Commission’s website: http://ec.europa.eu/competition/antitrust/sector_inquiries.html. Although the investigation is not targeted at any specific infringement, it may later serve as a basis for an Article 101 or 102 TFEU investigation. There are no strict rules guiding which tool to choose. The UK NCA, for example, is competent to use sector inquiry instead of Article 101 TFEU if the former is deemed “more appropriate”. See OFT Market Investigation Guidance (2006), 5.
competition policy and regulatory intervention.\textsuperscript{1679} Indeed, the Commission has mainly used sector inquiries to assess markets that raise balancing questions, such as telecommunications, healthcare, energy, and financial services.\textsuperscript{1680} The use of markets-work instead of Article 101 TFEU allows the Commission to recommend introducing \textit{ex-ante} sector-specific measures to regulate markets and to take non-competition interests into account beyond what it would be willing to consider under Article 101(3) TFEU.\textsuperscript{1681} Moreover, it has been suggested that political interests have influenced the Commission’s sector inquiries. Scholars have voiced concerns about the politicisation of the Commission’s sector inquiries, whereby the investigation is deployed to achieve political aims rather than merely as an information-gathering exercise.\textsuperscript{1682}

The UK practice provides another example of how non-competition interests may be assimilated into markets-work. The UK investigations, known as market studies,\textsuperscript{1683} demand consideration of the effect of the proposed remedy on consumer detriment and the conditions of regulated sectors.\textsuperscript{1684} This has been interpreted to include a variety of non-competition interests, including innovation, promoting well-informed consumers, and needs of regulated sectors.\textsuperscript{1685} Moreover, the balancing embodied in market studies is also supported by the power of the UK Secretary of State to intervene in cases that raise defined public interest issues.\textsuperscript{1686}

\textit{Freeman}, the former chairman of the UK Competition Commission, has explained that market investigations often involve the consideration of even broader non-economic benefits,

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\textsuperscript{1679} (Kroes 2007), 5.
\textsuperscript{1680} The Commission’s sector inquiry powers are subject to Article 17 of Regulation 1/2003, replacing Article 12 of Regulation 17/62. A list of the Commission’s sector inquiries can be found at \url{http://ec.europa.eu/competition/antitrust/sector_inquiries.html}. It illustrates that the Commission has made regular use of its sector inquiries powers only since the late 1990s. On balancing in liberalised and regulated markets, see Chapter 3, Section 4.3 and Chapter 7, Section 2.2.2.
\textsuperscript{1681} Also see (Kroes 2007), 5; (Almunia 2010), 3.
\textsuperscript{1682} (Olsen & Roy 2006), 83-84; (Dunne 2014), 246.
\textsuperscript{1683} The UK market studies are distinct from comparable tools in other jurisdictions since they are highly formalised and subject to strict procedure, and may result in imposing remedies to correct adverse effects on competition. See UK Enterprise Act, Sections 131-153 as amended by the Enterprise and Regulatory Reform Act (2013), Sections 33-38. Those sections provide that the UK NCA (i.e. the CMA and sector regulators) and the Secretary of State in some circumstances have the power to make a reference for a market investigation. Following such a reference, the CMA (prior to 2014, the Competition Commission), investigates and issues an extensive report. Also see OFT Market Investigation Guidance (2006); (Lachnit 2016), 170-182.
\textsuperscript{1684} The consideration of consumer detriment is required by the Enterprise Act, Section 134(4). The consideration of regulated sector is derived from sector regulation. See (Bailey & Whish 2015), 490-491 for a list of the UK market studies. Also see (Freeman 2008), 5-6.
\textsuperscript{1685} (Freeman 2008), 5-6.
\textsuperscript{1686} UK Enterprise and Regulatory Reform Act of 2013, Section 35. Also see UK Supplemental Guidance on Market Studies and Market Investigations (2014), para 2.18-2.19, 3.8-3.9.
\end{flushleft}
noting that the NCA balanced harm to competition against interests related to industrial policy, intellectual property, public health, social policy, the environment and defence. He also noted that “the resolution and synthesis - choosing which policy should prevail over others” was central to the process of the NCA’s administration. Markets-work, therefore, may take a broad range of non-competition interests into account.

5.3. Informal ex-ante opinions

Informal ex-ante opinions were at the core of Article 101 TFEU enforcement prior to modernisation. From the early 1970s, the Commission used informal comfort letters to terminate proceedings without issuing a formal decision. As elaborated in Chapter 2 Section 3.2, the Commission declared that it used comfort letters to deal with notified agreements "which at first sight” did not raise competition concerns. While Regulation 1/2003 instigated the ex-post enforcement regime, the Commission and some of the NCAs are still competent to issue informal ex-ante opinions analysing the compatibility of specific agreements with the Article. Those informal opinions may provide a general analysis of the competition concerns, declare that an agreement is compatible or incompatible with Article 101 TFEU, or offer recommendations to address the competition concerns.

Informal ex-ante opinions provide competition enforcers with an attractive balancing tool. First, they offer enforcers an opportunity to clarify the law on the compatibility of an agreement with Article 101 TFEU. For instance, certain landmark balancing cases, such as EACEM (1998), were adopted in the form of comfort letters. Moreover, many NCA landmark cases that shaped their approach to balancing under Article 101(3) TFEU were issued in the form of informal opinions.

Second, informal ex-ante opinions allow competition enforcers to negotiate the terms of agreements with undertakings, entrusting them with market regulation tools similar to market-regulation schemes or commitments.

1687 (Freeman 2008), 6-10.
1688 (Freeman 2008), 9.
1690 On informal guidance generally, see (Petit & Rato 2008), 205-206 (Lachnit 2016), 199-230.
1691 36494 EACEM (1998), as detailed in Chapter 3, Section 3.3.2.
1692 See Figure 3.10.
1693 (Forrester 1994), 470-471; (Doren, G. & Wilks 1996), 25. On the use of commitments as a market regulation tool, see Chapter 7, Section 2.2.2.
Third, informal *ex-ante* opinions may bring infringements to an end without declaring so openly or imposing a fine. For example, in *Royal Dutch Society for Physical Therapy (2011)*, the Dutch NCA held that an advice given by the society to its members to coordinate their agreements with health insurers might be incompatible with competition law. Yet, it issued an “informal warning” instead of a prohibition decision.1694 Similarly, the UK NCA issued warning and advisory letters to undertakings to address possible infringements in areas that had not been prioritised by the authority.1695

Finally, informal measures are not binding. Thus, they are not liable to judicial review1696 or to notification and scrutiny by the ECN.1697 Accordingly, competition enforcers may examine sensitive balancing issues with a lower risk of facing legal or political challenges.

Although informal opinions are an attractive balancing tool from the point of view of the enforcers, they carry the same disadvantages as the application of Article 101(1) and (3) TFEU balancing tools prior to modernisation.1698 Hence, scholars have warned that the frequent use of informal *ex-ante* opinions would reintroduce the notification regime through the back door.1699 One of those concerns relates to the fact that *ex-ante* informal opinions are not binding. *Shrimp Fishery (2011, 2013, 2016)*, for example, shows that the Commission and EU Courts did not ascribe significant weight to such opinions. In 2011, the Dutch NCA examined an agreement between the members of shrimp-fishing trade associations aimed at sustainability-related interests. The NCA was generally supportive of the initiative. It held that mandatory sustainable fishing techniques could contribute to more sustainable fisheries and that such a benefit could be justified under Article 101(3) TFEU.1700 Yet, when the Commission re-examined some of the same restrictions of competition two years later, it rejected the undertakings’ claim that the Dutch NCA’s informal

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1694 *Royal Dutch Society for Physical Therapy (KNGF) (2010)*. Also see Dutch NCA annual report (2014), 30.
1695 *CMA Essential Information for Businesses: Warning and Advisory Letters (2016)*. A register of such letters is available on the CMA’s website.
1696 With respect to the Commission’s comfort letters, see Commission Notification Procedure Notice (1983). Also see (Van Bael 1986), 78. With respect to the judicial review of informal opinions in France, UK, and the Netherlands, see (Lachnit 2016), 206, 211, 216, respectively.
1697 Regulation 1/2003, Article 11(4). Also see Chapter 2, Section 3.3.3.
1698 See Chapter 2, Section 3.2.
1700 7011/23.827 MSC Shrimp Fishery (2011), 5-7. On the other hand, the NCA was hesitant with respect to the association’s plan to set catch limits. It held that such a measure would not be deemed indispensable if the shrimp population was not in danger.
opinion should be taken into account. The Commission maintained that the NCA’s assessment was informal, applied *ex-ante* to the relevant agreements, and without full knowledge of the facts. In fact, the NCA’s opinion did not even qualify as a mitigating factor for calculating the fines. Thus, although informal opinions are an important source for understanding the NCAs’ approaches to balancing, the Commission or the EU Courts might not respect them.

The empirical findings reveal that informal *ex-ante* opinions have played a significant balancing role. At the EU level, they were mainly used prior modernisation. Although most comfort letters issued prior to modernisation are unpublished, since 1990 the Commission has circulated general information specifying the reasons for closing a case by means of a comfort letter. This information, which is summarised in Figure 8.5, illustrates that comfort letters have regularly been used to conclude investigations into agreements that benefited from Article 101(3) TFEU individual exemptions or BERs. The empirical findings further reveal that following modernisation, the Commission has chosen not to issue informal guidance, although it is competent to do so.

**Figure 8.5: Comfort letters**

![Comfort letters chart](image)

At the Member State level, the empirical findings point to the great divergence in the forms and frequency of issuing informal *ex-ante* opinions. The process was formalised for some competition enforcers (Commission, France, Netherlands and the UK), but not for

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1702 39633 Shrimps (2013), para 439.
1703 An informal guidance letter can be issued at the request of undertakings in cases posing a novel legal question. See Modernisation White Paper (1999), para 89; Regulation 1/2003, Preamble 38; Commission Notice on Informal Guidance (2004). Also see Chapter 2, Section 5.4.5.

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others (Germany\textsuperscript{1707} and Hungary\textsuperscript{1708}). Table 8.2 examines the debate over substantive balancing tools that has taken place before the competition enforcers and that has formalised the process of issuing informal opinions. It indicates the percentage of informal opinions in which the balancing tools of Article 101(1) and (3) TFEU and BER were discussed, in comparison with the number of other types of proceedings in which those balancing tools were discussed (in brackets).

Table 8.2: Substantive balancing tools in informal \textit{ex-ante} opinions

<table>
<thead>
<tr>
<th></th>
<th>101(1) TFEU</th>
<th>101(3) TFEU</th>
<th>BER</th>
</tr>
</thead>
<tbody>
<tr>
<td>FR</td>
<td>78% (43%)\textsuperscript{1709}</td>
<td>34% (10%)</td>
<td>34% (10%)</td>
</tr>
<tr>
<td>NL</td>
<td>38% (32%)</td>
<td>34% (14%)</td>
<td>7% (8%)</td>
</tr>
<tr>
<td>UK\textsuperscript{1710}</td>
<td>100% (19%)</td>
<td>50% (28%)</td>
<td>0% (35%)</td>
</tr>
</tbody>
</table>

The table shows that informal opinions delivered by the French, Dutch, and UK NCAs were more likely to involve discussion about substantive balancing tools in comparison with other types of proceedings. This might imply that informal \textit{ex-ante} opinions offer a more attractive balancing venue from the standpoint of the NCAs.

\textsuperscript{1704} According to Article L. 462-4(1) of the French Commercial Code, the French NCA may issue advisory opinions on competition law questions and make recommendations for the improvement of the competitive situation. The advisory opinions are produced upon the request of Ministers, governmental bodies, a number of sectoral regulators, and professional and consumer organisations. As mentioned in Chapter 2 Section 6.1.3, since 2009, the NCA also has the power to issue an advisory opinion of its own accord. The NCA’s recommendations do not have the same legal value as formal decisions, and cannot be appealed before the courts. Yet, they contain detailed analysis and are published. Also see French NCA Report, 25 Years of Enforcement (2012), 24-25; (Lachnit 2016), 163-170.

\textsuperscript{1705} The procedure for adopting informal opinions by the Dutch NCA is less formalised in comparison with its French and UK counterparts. See (Lachnit 2016), 212-215.

\textsuperscript{1706} The UK NCA introduced the possibility of issuing so-called short-form opinions only in 2010, and on a trial basis only. The CMA has declared that it would issue such opinions on the basis of its prioritisation principles if the issue raises novel or unresolved questions. See UK Short-form Opinions Guidance (2014); (Lachnit 2016), 207-210.

\textsuperscript{1707} (Dreher 2009), 3.

\textsuperscript{1708} ECN Questionnaire on Regulation 1/2003 (2013), 6.

\textsuperscript{1709} This also includes unique national exceptions. See Chapter 6, Section 3.2.

\textsuperscript{1710} In the UK, the data in this table only refers to short-form opinions and not to advisory and warning letters that are not fully published. By the end of 2017, the UK NCA had issued only two short-form opinions examining Article 101 TFEU. Balancing under Article 101(3) TFEU was only discussed in Rural broadband wayleave rates (2012), as elaborated in Chapter 3, Section 6.2.1.
5.4. **Effect on trade test**

After commencing an investigation, an NCA must decide whether to apply Article 101 TFEU or to examine the case solely under national law. In other words, it must determine whether the agreement affects trade between Member States. This choice may have significant bearing on the applicable procedural and substantive rules.\(^{1711}\) In turn, it may also have a direct impact on balancing.

First, the classification determines the applicable law. As detailed in the previous chapters, some Member States have adopted unique balancing tools and interpretations that solely apply to purely national cases.\(^{1712}\) Hence, only an agreement that is classified as purely national could be granted an exception under such national rules.

Second, the classification defines the applicable procedural safeguards. In particular, Regulation 1/2003 demands that NCAs inform the Commission before taking certain enforcement actions with respect to mixed-cases.\(^{1713}\) This allows the Commission to intervene if there is a serious risk of incoherence, by taking up a case and relieving an NCA of its competence to apply Article 101 TFEU to such an agreement. Purely national cases are not subject to a similar scrutiny.

The various substantive laws and procedural safeguards may induce an NCA to classify a borderline case as purely national, especially when the case involves complex balancing questions. As Riley has maintained, “no public official will rationally choose a procedure that places additional evidential and procedural burdens upon his or her case, when another procedure, often word for word the same text, relying on the same case law, and with the same legal effect, is available”.\(^{1714}\)

This is especially true since NCAs enjoy a wide margin of discretion to determine whether an agreement affects trade between Member States.\(^{1715}\) Despite its great significance, there is no clear and harmonised test for measuring such an effect. It is not defined in EU primary or

\(^{1711}\) For an illuminating overview, see (Botta et al. 2015).

\(^{1712}\) See Chapter 3, Section 6; Chapter 4, Section 5.1; Chapter 5, Section 4; and Chapter 6.

\(^{1713}\) Regulation 1/2003, Articles 11(3), (4) and (6). See Chapter 2, Section 3.3.3.

\(^{1714}\) (Riley 2003b), 613, also see page 664. (Gerber 1998), 398 further suggests that NCA officials may favour national proceedings since they are primarily responsible for the development and enforcement of their own national competition laws, and it is the performance of this task for which they are likely to be primarily evaluated. He claims that these laws reflect national values and objectives, which the national officials are committed to professionally and often personally.

\(^{1715}\) (Botta et al. 2015), 1249, 1271.
secondary law, and the EU Courts have not provided a precise definition. The Commission’s Effect on Trade Notice (2004) offers non-binding guidance. Ironically, the effect on trade test, which aims to "define the boundary between the areas respectively covered by Community law and the law of the Member States", is defined by national law.

Indeed, empirical studies have already revealed that some NCAs have adopted a narrow interpretation of the test in comparison to the CJEU’s and Commission’s approaches. Moreover, some national courts have adopted different approaches than their respective NCAs. The German Verta/Danzer (2004, 2005) decisions provide an illustrative example. As described in Chapter 2 Section 6.2.2, German competition law provides for a special exception for purely national agreements aimed at rationalising economic activities and improving the competitiveness of SMEs. In Verta/Danzer, the NCA relied on the Commission’s Effect on Trade Notice to refuse to apply this exception. However, the appeals court overturned that finding. It held that the agreement was purely national since it did not affect trade by its very nature. The Court criticised the NCA for basing its assessment on the Commission’s Notice, which was not binding on the Member States.

For essentially the same reasons, it is difficult to use an empirical method to pinpoint cases that have been classified as purely national for the purpose of benefiting from a national exception. Since there is no single test for this classification, it is difficult to challenge the validity of an NCA’s decision in a specific case. Nevertheless, an aggregated overview of the NCAs’ classifications can provide some indication of the existence of a balancing by the effect on trade test. To this end, Figure 8.6 presents the ratio of proceedings that were classified by the NCAs as mixed-cases (blue areas) and purely national (red areas). In some cases, the NCAs did not indicate whether the case was mixed or purely national (green areas).

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1716 See (Burnley 2002); (Cleynenbreugel 2014), 1393-1400; (Botta et al. 2015).
1718 In the words of the CJEU in C-56/64 and 58/64 Consten and Grundig (1966), 341.
1719 (Botta et al. 2015), 1271.
The figure hints at the possibility of balancing under the effect on trade test, especially in certain Member States. For instance, it illustrates that Article 101(1) TFEU balancing tools were frequently accepted in purely national cases. Similarly, it shows that in the cases in which Article 101(3) TFEU was invoked in France and Hungary, it was slightly more likely to be accepted in purely national cases in comparison to mixed-cases. The figure also reveals that informal commitments were more frequently accepted in purely national cases (with the exception of Germany and France). While those examples are far from decisive, they could suggest that NCAs prefer to use their own national laws to balance instead of relying on Article 101 TFEU.

5.5. Interim conclusion

This section has shown that competition enforcers enjoy significant instrument discretion to apply rules of sector regulation, conduct markets-work, adopt informal opinions, or apply national competition law instead of enforcing Article 101 TFEU. By using these alternative legal mechanisms, they can take account of non-competition interests outside the substantive scope of EU competition law, and often without declaring so explicitly. This opens the door to taking a wide range of non-economic benefits into account, and the use of exclusion and legal balancing processes instead of economic analysis. Those balancing tools often pursue regulatory balancing aims to shape markets, thus going beyond a mere correction of the anti-competitive behaviour of the undertakings concerned.\(^{1723}\) Hence, balancing by means of instrument discretion has seriously jeopardised the effectiveness of balancing.

Furthermore, because balancing by instrument discretion is not bound by the rules of EU competition law, such balancing raises uniformity and legal certainty concerns. Similar balancing questions may be addressed by divergent legal mechanisms in the various Member States, leading to fragmentation and hindering the predictability of the legal framework governing balancing.

6. Outcome discretion

6.1. Balancing tool

The competition enforcers have outcome discretion, namely the power to select from a wide array of remedies to bring an enforcement proceeding to an end:\(^{1724}\) First, a competition enforcer may adopt an infringement decision. In that is the case, the enforcer must decide whether to impose a

\(^{1723}\) On the differences between corrective and regulatory balancing aims see Chapter 1, Section 4.1.3.

\(^{1724}\) Also see (Van Bael 1993), 734-737; (Petit 2010), 56.
fine for the infringement and if so to set its level. Second, as an alternative, an enforcer can choose from a toolbox of negotiated remedies, such as formal and informal commitments or settlements.\footnote{On commitments as an extension of the competition enforcers’ outcome discretion, also see (Wathelet 2015), 553; (Sauter 2016), 129.} Third, if a competition enforcer finds that no infringement of Article 101 TFEU has taken place, it may bring the proceeding to an end ("inapplicability decision"). This can take the form of a reasoned formal or informal decision, a short summary of the competition analysis, or by terminating the proceedings with no further notice or reasoning.

The selection of remedies affects balancing. The balancing embedded in calculating a fine and adopting a commitment decision was discussed in Chapter 7. Therefore, this section is dedicated exclusively to the third type of outcome discretion, i.e. balancing by means of an inapplicability decision.

Inapplicability decisions are an important enforcement instrument, as they clarify the boundaries between lawful and unlawful conduct.\footnote{(Petit & Rato 2008), 206; (Wils 2009), 5-6; The National Audit Office, Review of the UK’s Competition Landscape (2010); The National Audit Office, The UK Competition Law Regime (2016), 31; (Bailey 2016), 121-132.} Since the wording of Article 101 TFEU is vague, the role of non-competition interests is defined by the decisions of the Commission and the judgments of the EU courts. Inapplicability decisions, therefore, afford the competition enforcers an opportunity to demonstrate how the balancing tools can be successfully applied in the context of a specific case. As such, they are crucial for the development of the law, policy, and practice on the balance between competition and non-competition interests.\footnote{(GCLC Annual Conference 2010), 64-65; (Bailey 2016), 112, 136-139.}

This is especially true under the enforcement regime of Regulation 1/2003. Under the self-assessment decentralised regime, the Commission’s inapplicability decisions are an important means of advising undertakings, NCAs, and national courts about the Commission’s approach to balancing. Similarly, the NCAs’ inapplicability decisions provide a critical source of information for understanding and evaluating the various NCA approaches to balancing. Nevertheless, as the next section shows, the Commission and many of the NCAs have made only little use of such instruments following modernisation.
6.2. Scope of outcome discretion

Prior to modernisation, the Commission regularly issued formal inapplicability decisions and informal comfort letters declaring that an agreement did not fall under Article 101(1) TFEU or could be exempted under Article 101(3) TFEU.\(^\text{1728}\) As part of the switch from a notification to a self-assessment regime, the enforcement of Article 101 TFEU now focuses on infringement decisions. The Commission has declared that when undertakings provide a valid justification for their conduct, i.e. if Article 101(3) TFEU is likely to be fulfilled, it will often not pursue a case any further.\(^\text{1729}\) Yet, Regulation 1/2003 still leaves room for issuing inapplicability decisions in the form of formal positive decisions\(^\text{1730}\) and informal guidance letters.\(^\text{1731}\) The Commission stated in its Modernisation White Paper that it would use such measures when “a transaction raises a question that is new”, thereby aiming to “provide the market with guidance regarding the Commission’s approach to certain restrictions”.\(^\text{1732}\)

Inapplicability decisions might have served as an information channel allowing the Commission to explain how Article 101(1) and (3) TFEU substantive balancing tools can be successfully applied in the circumstances of a specific case.\(^\text{1733}\) Yet, as illustrated below, the empirical findings confirm that the Commission did not adopt any inapplicability decisions following modernisation. By exercising its outcome discretion, it consciously chose not to engage in the debate on the role of non-competition interests under Article 101 TFEU. Instead, the Commission has declared that if it found that an anti-competitive agreement could be saved under Article 101(3) TFEU it would “simply not bring a case or close a case that had already been opened”, without reasoning.\(^\text{1734}\)

At the national level, the NCAs have just a limited power to adopt inapplicability decisions. Article 5 of Regulation 1/2003 provides that an NCA may merely decide that there are “no grounds for action” on its part.\(^\text{1735}\) In \emph{Tele2Polska (2011)} the CJEU clarified that Article 5 entails that an NCA does not have the power to \emph{formally} declare that Article 102 TFEU is inapplicable.

\(^{1728}\) See Figure 3.1 and Figure 8.5.
\(^{1730}\) Regulation 1/2003, Article 10. Also see Chapter 2, Section 3.3.3.
\(^{1731}\) See Section 5.3 above.
\(^{1733}\) See Section 5.3 above.
\(^{1734}\) The Commission in OECD The Role of Efficiency Claims in Antitrust Proceedings (2012), 90.
\(^{1735}\) On “no ground for action” decisions see Chapter 2, Section 3.3.3.
even if it is competent to do so under national procedural law. The same logic also applies to Article 101 TFEU. In other words, an NCA’s finding of inapplicability is not binding on the Commission or on other NCAs.

Commentators have contended that the CJEU’s interpretation of Article 5 discouraged NCAs from pursuing complex cases. They have argued that NCAs would avoid dedicating their scarce enforcement efforts to cases that might be concluded without generating any observable decision output. Accordingly, NCAs would be unlikely to pursue borderline cases (e.g. cases involving balancing) and more inclined to investigate clear-cut cases regardless of their impact on competition.

Nonetheless, some NCAs have, in practice, adopted inapplicability decisions. The form and frequency of such decisions are dependent on national law. For example, the German, Hungarian, and UK NCAs are competent to adopt formal inapplicability decisions. Although a finding of inapplicability is not binding in and of itself, those decisions often provide a detailed analysis of the NCAs’ interpretation of Article 101(1) and (3) TFEU balancing tools. They explain the NCAs’ approaches to the role of non-competing interests under Article 101 TFEU. The French, Dutch, and UK NCAs may adopt informal decisions of inapplicability.

Not all inapplicability decisions are subject to judicial review. As non-binding measures, informal inapplicability decisions are not liable to judicial review. On the other hand, the Commission’s positive decisions, as well as the formal decisions of most NCAs, are in principle subject to judicial review. Yet, in practice, they are unlikely to be appealed. Undertakings usually have no incentive to challenge a declaration that an agreement is not prohibited, and third-party appeals against inapplicability decisions are not available in all

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1737 (Petit 2011); (Sveticinii et al. 2018), 8.
1738 (Petit 2010), 58. In Germany, a positive decision can only be adopted if undertakings apply for one. See ECN Decision Making Powers Report (2012), 37.
1739 Hungarian Competition Act, Article 76(j). Also see (Hegymegi-Barakonyi 2009), 22-23.
1740 (Lester 2009), 14; (Petit 2010), 58.
1741 Those cases involved informal ex-ante opinions, as described in Section 5.3 above.
1742 See Section 5.3 above.
1743 There is neither a clear provision establishing judicial review of the Commission’s inapplicability decisions nor any precedent in case law. Yet, this is the prevalent view in the literature. See (Blanco 2006), 216-217; (Geradin & Petit 2006), 10-11; (Sufrin 2006), 975.
1744 For a survey of the right to judicial review of inapplicability decisions, see ECN Decision Making Powers Report (2012), 39.
jurisdictions (e.g. in Hungary).\footnote{ECN Decision Making Powers Report (2012), 39.} In light of the above, the balancing comprised in inapplicability decisions is unlikely to be reviewed by EU or national courts.

Detailed and reasoned inapplicability decisions can promote the legal certainty of balancing by communicating the competition enforcers’ approach.\footnote{See Chapter 3, Section 7.2; Chapter 5, Section 5.2; and Section 5.3 above.} This increases transparency and helps undertakings predict the competition enforcers’ future decisions. Such information can also indirectly promote uniformity by providing the basis for a discussion on the inconsistencies between the various enforcers. However, inapplicability decisions may have the opposite effect if they do not sufficiently clarify the analysis.

For example, in \textit{Animal Welfare Initiative (2017)}, the German NCA issued a press release declaring that it had “no objections” to the Tierwohl project aimed at promoting animal welfare in livestock production.\footnote{Animal Welfare Initiative (2017), press release of 28 September 2017. Also see German annual report 2017, 20-21.} The project involved an agreement between players in the agriculture, meat production, and food retail sectors, introducing labels indicating that the meat was produced subject to animal welfare criteria. It was mainly financed by the four largest food retailers, which paid a fixed amount for any poultry meat sold via the initiative. The German NCA explained that although the project involved the coordination of “factors relevant to competition”, it would be “tolerated” as far as “the consumer really benefits from such initiative”. Accordingly, the plan has been accepted for a transitional period of approximately two years, following which it must be modified to create greater consumer transparency regarding the source of the meat.

Notably, the press release does not specify the legal source that led the NCA to “tolerate” the agreement (e.g. Article 101(3) TFEU exception or one of the Article 101(1) TFEU balancing tools), the restrictions imposed and the competition concerns, the benefits justifying an exception, the balancing process and the evidence supporting it. Hence, it is very difficult to evaluate the NCA’s decision, to deduce the relevant balancing principles, and to compare it with similar decisions of other NCAs (e.g. Dutch \textit{Chicken of Tomorrow (2015)}, and French \textit{Fair Trade (2006)}).\footnote{Those cases were discussed in Chapter 3, Sections 6.2.2 and 6.3.2, respectively.} Consequently, the German press release has only created further uncertainty as to the German approach to non-competition interests under Article 101 TFEU.
6.3. Empirical indications

The empirical findings presented throughout this dissertation have outlined the use of inapplicability decisions by the various competition enforcers. They have illustrated that in the past, the Commission regularly issued formal and informal inapplicability decisions.\(^\text{1749}\) This changed, however, following modernisation. Since May 2004, the Commission has never adopted a formal positive decision or an informal individual guidance explaining why an agreement fulfilled the four conditions of Article 101(3) TFEU.\(^\text{1750}\) Consequently, the Commission has not grasped the opportunity to clarify many of the open questions about balancing in the realm of Regulation 1/2003 and the more economic approach.\(^\text{1751}\) At the same time, the Commission has issued a number of reasoned decisions rejecting complaints\(^\text{1752}\) inter-alia because an agreement could be justified by an Article 101(1) TFEU exception. Chapter 5 demonstrated that many of those clarifications are essential to understanding the Commission’s approach to balancing.

The importance of inapplicability decisions is also illustrated by the decisions adopted at the national level. As elaborated throughout this dissertation, many of those inapplicability decisions provide a rich source of information to understand, analyse, and evaluate the NCAs’ approaches to balancing.

6.4. Interim conclusion

In recent years, scholars have increasingly criticised the Commission’s policy choice to refrain from adopting inapplicability decisions,\(^\text{1753}\) pointing out that inapplicability decisions are an important tool to foster compliance with EU competition law, promote legal certainty, and avoid fragmentation in the interpretation of Article 101 TFEU. This section has shown that this was particularly crucial to the development of effective, certain, and uniform substantive balancing tools. By exercising its outcome discretion, the Commission avoided clarifying its position on many of the balancing questions presented throughout the dissertation. Agreements involving balancing questions went largely unreported, as they were closed without a reasoned decision

\(^{1749}\) See Chapter 3, Section 2; Chapter 4, Section 2; Chapter 5, Sections 2.1 and 3.1; and Section 5.3 above.

\(^{1750}\) See Figure 3.1.

\(^{1751}\) Commentators have suggested that the Commission’s choice to refrain from adopting inapplicability decisions could be the result of a too high standard for adopting those decisions, or alternatively a fear that such procedures would lead to the backdoor reintroduction of the notification regime. See footnote 1699 above.

\(^{1752}\) See footnote 1746 above.

\(^{1753}\) (Petit & Rato 2008), 206; (Wils 2009), 5-6; (GCLC Annual Conference 2010), 64-65; (Blanco & De Pablo 2012), 68-69; (Gerard 2012), 33; (Bailey 2016); (Witt 2016b), 296-297; (Mano & Jones 2018), 26-27.
being issued. The lack of inapplicability decisions also prevented the EU Courts from appraising
the Commission’s balancing approach. Since the Commission did not take up cases raising
balancing questions, the EU Courts had only limited opportunities to review them on appeal.
The role of non-competition interests in Article 101 TFEU following modernisation, as a result,
has remained unclear.

Some NCAs, in contrast, did make use of inapplicability decisions. Although the frequency
and form of those decisions varied considerably, they provided an important source of
information for understanding the national approaches to balancing. At the same time, since
national inapplicability decisions are not notified to the ECN,\textsuperscript{1754} they are not subject to
Commission or ECN scrutiny. Consequently, the national interpretations of the balancing tools of
Article 101 TFEU evolved in different directions, resulting in fragmented balancing.


As elaborated in the previous sections and summarised by Section 8 below, the priority setting
powers conferred to the Commission and NCAs by Regulation 1/2003 have a significant bearing
on the effectiveness, uniformity, and legal certainty of balancing. Nevertheless, the Modernisation
White Paper and Regulation 1/2003 attach few obligations to the application of those powers.

Over the years, the Commission has gradually acknowledged the impact of priority setting
under the decentralised enforcement regime.\textsuperscript{1755} In March 2017, as part of its ECN+ Directive
Proposal, it took the first steps to regulate the exercise of the NCAs’ priority setting powers.
After almost two years of deliberations, the Directive was finally adopted in December 2018.
Notably, the Directive does not regard the effectiveness of priority setting as a stand-alone
concern. Priority setting is seen as merely an instrument for safeguarding the NCAs’
independence from external intervention and political pressure from governments and other
private or public entities.\textsuperscript{1756} Therefore, the Directive harmonises only three aspects of the
NCAs’ target discretion in order to ensure their greater independence.\textsuperscript{1757}

\textsuperscript{1754} Regulation 1/2003, Article 11(4). Also see Chapter 2, Section 3.3.3.
\textsuperscript{1755} For instance, in its Report on the functioning of Regulation 1/2003 (2009), para 33, the Commission
referred to the NCAs priority setting powers as an important aspect of divergence that “may merit further
examination and reflection”. Also see Report on the functioning of Regulation 1/2003 (2014), para 34.
\textsuperscript{1757} This section will only examine the Directive’s provisions on prioritisation. For a general discussion of
the ECN+ Directive, see (Wils 2017), 38; (Sinclair 2017).
First, the Directive submits that NCAs should enjoy a degree of target discretion, namely the power to set their priorities for carrying out tasks related to enforcing Article 101 TFEU.\textsuperscript{1758} This obligation does not significantly alter the current legal framework, as all NCAs are already competent to open \textit{ex-officio} investigations.\textsuperscript{1759}

Second, the Directive states that NCAs should have the power to reject complaints on priority grounds.\textsuperscript{1760} Accordingly, a duty to investigate all complaints, such as the one stemming from the French legality principle,\textsuperscript{1761} would no longer be compatible with EU law. This obligation may affect the types of cases investigated by the NCAs. As elaborated in Section 4.1 above, a wide target discretion is prone to focus on clear-cut infringements of Article 101 TFEU and avoid borderline balancing cases.

Finally, the Directive declares that NCAs should set their enforcement priorities independently, i.e. without taking instructions from public or private entities.\textsuperscript{1762} Yet, it adds that this “is without prejudice to the right of a government of a Member State to issue to national administrative competition authorities general policy rules or priority guidelines” as long as they are not related to a specific Article 101 TFEU enforcement proceeding.\textsuperscript{1763} As illustrated throughout this dissertation, this wording is not sufficient to shield NCA staff and management decisions from political influence. For instance, the Dutch NCA’s priority setting rule on suitability agreements, described in Section 4.1 above, provides that the NCA will not enforce an agreement that receives governmental support. This policy is not prohibited by the Directive. While the government’s view with regard to a specific agreement is an influential factor in the Dutch NCA’s policy choice, in the end, the decision is taken by the NCA alone. Similarly, as presented in Chapter 6 Section 3.4, several Hungarian and German laws limited the NCAs’ competence or incentive to pursue infringements of Article 101 TFEU in politically sensitive areas (e.g. agriculture, waste management tender, and forest services). Those rules were not worded in such a way that they related to “a specific proceeding”, and therefore might not be prohibited by the Directive.

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{1758} ECN+ Directive (2019), Preamble 23 and Article 4(5).
\item \textsuperscript{1759} (Idot 2015), 51 (Wils 2017), 38.
\item \textsuperscript{1760} ECN+ Directive (2019), Preamble 23 and Article 4(5).
\item \textsuperscript{1761} See Section 4.2.3 above.
\item \textsuperscript{1763} ECN+ Directive (2019), Preamble 23.
\end{enumerate}
\end{footnotesize}
Against this background, the ECN+ Directive regulates merely the tip of the iceberg of priority setting. It simply aims to enhance the independence of NCAs when allocating their enforcement capabilities. The Directive does not deal with many of the core weaknesses of the current enforcement regime, which allows competition enforcers to directly or indirectly take non-competition interests into account when setting priorities. For instance, while it does not limit the types of benefits that can be taken into account, it does explain how they ought to be balanced against competition interests.

The ECN+ Directive is not only insufficient but also runs counter to the main findings of this chapter. As discussed above and summarised below, the competition enforcers' almost unrestricted priority setting powers have been used to account for non-competition interests in a manner that impedes the effectiveness, uniformity, and legal certainty of balancing. Yet, this section has revealed that instead of restricting or harmonising the use of such powers, the ECN+ Directive calls for enhancing the NCAs' priority setting discretion.

8. NORMATIVE BENCHMARKS

As part of modernisation, the Commission advocated narrowing the room for non-competition interests under the substantive balancing tools. The previous chapters have illustrated that it limited the types of benefits that could be taken into account, called for an effects-based approach aimed at enhancing short-term narrow consumer welfare, and increased the quality and strength of evidence required to justify an exception. Subsequently, the Commission, as well as the NCAs, rarely invoked or accepted those substantive balancing tools to justify anti-competitive agreements.\(^{1764}\)

This does not mean, however, that non-competition interests no longer play a role in the enforcement of Article 101 TFEU. Rather, this dissertation submits that the balancing has shifted from substantive to procedural balancing tools. In addition to balancing by means of negotiated commitments and moderating fines, as discussed in Chapter 7, implicit balancing is taking place by means of setting enforcement priorities. More specifically, this chapter has offered empirical, theoretical, and anecdotal evidence indicating that the competition enforcers have largely refrained from enforcing cases raising balancing questions. Consequently, undertakings can reasonably assume that restrictions of competition that to some extent

\(^{1764}\) In particular, see Chapter 3, Section 2; Chapter 4, Section 2; and Chapter 5, Sections 2.1 and 3.1.
produce non-competition benefits will not be subject to Article 101 TFEU enforcement, even if the conditions of Article 101(1) and (3) TFEU have not been fulfilled.

The shift from substantive to procedural balancing has significantly reduced the debate on the role of non-competition interests within the decisional practice. Yet, this chapter proposes that this has actually increased the role of non-competition interests under Article 101 TFEU. The competition enforcers’ priority setting powers are not confined to a legal or economic test and are largely implicit. Thus, they leave ample room for the consideration of non-competition interests. This has a direct negative impact on the effectiveness, uniformity, and legal certainty of balancing.

8.1. Effectiveness

The effectiveness of competition enforcement depends on key aspects of competition policy design. This includes not only the content and scope of the substantive competition rules themselves but also the application of the enforcement powers embedded in detection, target, instrument, and outcome discretion.\textsuperscript{1765} One can distinguish between two aspects of effectiveness of balancing by priority setting: (i) protecting competition by deterring undertakings from concluding anti-competitive agreements that are ineligible for exceptions under the substantive balancing tools of Article 101(1) and (3) TFEU; and (ii) protecting competition in the course of the allocation of enforcement efforts. Both aspects are elaborated below.

\textsuperscript{1765} On priority settings and resource allocations as a vital component of the effectiveness of competition enforcement, see Commission Impact Assessment accompanying the ECN+ Directive (2017), Preamble 16-18. Also see (Blanco & De Pablo 2012), 60; UNCTAD Priority Setting and Discretionary Powers of Competition Authorities (2013), 3; (Gerard 2013), 17; (Cseres & Mendes 2014), 491.
8.1.1. Deterrence

The primary goal of competition law enforcement is to deter anticompetitive behaviour.\textsuperscript{1766} Priority setting may impede the effectiveness of enforcement in general and balancing in particular when enforcement systematically ignores certain types of agreements or sectors.\textsuperscript{1767} In particular, the tendency of many competition enforcers to pursue only clear-cut restrictions of competition and to avoid balancing questions (e.g. as a result of their detection and target discretion) entails that undertakings may not be deterred from concluding other types of anti-competitive agreements. This is particularly true for the competition enforcers that announced in advance that they would focus their enforcement efforts on particular sectors or practices. Such announcements tend to reassure undertakings engaged in other anti-competitive practices that they will not be subject to infringement procedures, even if such agreements are ineligible for exceptions under Article 101(1) and (3) TFEU.

Moreover, this chapter has yielded several conclusions about the effectiveness of Article 101 TFEU enforcement as a whole. Deterrence requires that each competition enforcer ensure a sufficient level of enforcement of Article 101 TFEU, namely to enforce an adequate number of cases.\textsuperscript{1768} Yet, the empirical findings presented in this chapter demonstrate that the level of enforcement is spread unevenly across the EU.\textsuperscript{1769} Figure 8.4 pointed out the relatively high level of enforcement in Member States such as France, Germany, Netherlands, and Hungary, and a low level in the UK.\textsuperscript{1770} The UK NCA has often used its instrument discretion to apply alternative regulatory mechanisms such as specific rules of sector regulation or markets-work. Such practices hinder the full effectiveness of Article 101 TFEU and limit deterrence. This chapter has also questioned the effectiveness of the Commission’s enforcement. It has illustrated that while the Commission’s enhanced priority setting powers, which were expected to increase the number of infringement decisions by relieving the Commission of its duty to examine all notified agreements,\textsuperscript{1771} did not result in a significant increase in the number of

\begin{footnotesize}
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\item \textsuperscript{1766} Commission Impact Assessment accompanying the ECN+ Directive Proposal (2017), 10.
\item \textsuperscript{1767} ICN Anti-cartel Enforcement Manual (2010), 6, 17; (Wils 2011), 382.
\item \textsuperscript{1768} Commission Impact Assessment accompanying the ECN+ Directive Proposal (2017), 10.
\item \textsuperscript{1769} Also see Commission Impact Assessment accompanying the ECN+ Directive Proposal (2017), 13.
\item \textsuperscript{1770} Figure 8.4 shows that other jurisdictions, such as Malta, Estonia, Latvia and Luxemburg, had an even smaller number of Article 101 TFEU decisions.
\item \textsuperscript{1771} See Chapter 2, Section 3.2.
\end{itemize}
\end{footnotesize}
decisions. Rather, the Commission adopted a similar number of infringement decisions prior to and after modernisation, and almost no inapplicability decisions following modernisation. 1772

8.1.2. Protection of competition interests

A greater number of cases and stiffer sanctions do not necessarily lead to an increase in compliance with the law. 1773 The effective allocation of priorities is also dependent on the level of protection this provides for competition interests. The balancing embedded in the selection of enforcement priorities is effective when it is based on economic benefits and economic or legal balancing processes (i.e. a consumer welfare or legal proportionality test) and is aimed at correcting infringements. Setting priorities on the basis of political interests, irrespective of the agreement’s actual impact on competition interests, is ineffective. 1774

The empirical findings demonstrate that the allocation of enforcement efforts has not always been guided by the impact of an agreement on competition, or even on consumer welfare. Rather, it has also taken non-competition interests into account. For example, when applying their detection discretion, the Commission and the German and UK NCAs opted for detection methods that were unlikely to reveal agreements involving balancing questions. 1775 By applying their target discretion, the enforcers explicitly (France, Netherlands, and Hungary NCAs) or implicitly (Commission, Germany and UK NCAs) refrained from taking on cases involving balancing questions. 1776 Finally, under some circumstances, alternative regulatory mechanisms were used to favour non-competition interests over competition, in reflection of the competition enforcers’ instrument discretion. 1777 These results run counter to the more economic approach. The allocation of enforcement efforts was not based on a detailed analysis of each agreement’s effect on competition or consumer welfare. It took non-economic benefits into account that the Commission had declared could no longer be examined under Article 101 TFEU.

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1772 As empirically demonstrated in Section 4.3 above. This has also been observed by (Wils 2013).
1773 (Kovacic 2015), 130.
1774 See Chapter 1, Section 4.1.
1775 See Section 3.3 above.
1776 See Section 4.3 above.
1777 See Section 5 above.
8.2. Uniformity

The competition enforcers’ priority setting powers have not been harmonised throughout the EU. As with other balancing tools, the substantive, procedural, and institutional aspects of balancing by priority setting diverge considerably across the Member States. The risk of fragmentation and inconsistent application, however, is especially evident in balancing by priority settings.

As elaborated in the previous chapters, due to the open texture of the law and limited guidance from the EU Courts, competition enforcers enjoy a significant degree of discretion in shaping their interpretations of Article 101(1) and (3) TFEU balancing tools. They have some leeway to take account of non-competition interests in a manner that reflects their own understanding of their role under Article 101 TFEU. At the same time, competition enforcers are confined to the substantive limits of the law governing these balancing tools and are susceptible to judicial review.

In comparison, competition enforcers have a carte blanche to balance by priority setting. There is no limit to the types of benefits they can take into account, the methods guiding the balancing, or the intensity of control. While enforcers cannot change the content of Article 101 TFEU, priority setting allows them to overcome the substantive limits of the law and to take non-competition interests into account to a degree beyond what would have been possible otherwise. To this end, the diverging interpretations of the substantive balancing tools also inform the scope of balancing by means of priority setting. Indeed, “choices of priority are, to an important extent, a function of the competition law objectives and the country history, and its legal, political and economic culture”.\textsuperscript{1778} The de facto scope and interpretation of the prohibition of Article 101 TFEU, as a result, differ considerably across Member States, exposing undertakings to multiple balancing standards.

8.3. Legal certainty

The Commission has asserted that a decision on the priority stature of a case “is an internal decision of the Commission which does not create any legitimate expectation or any other legal rights”.\textsuperscript{1779} This chapter has challenged that statement. In particular, it has illustrated that priority setting decisions have hindered the legal certainty of balancing principles.

\textsuperscript{1778} UNCTAD Priority Setting and Discretionary Powers of Competition Authorities (2013), 17.
\textsuperscript{1779} 40208 International Skating Union’s Eligibility rules (2017), para 317.
Balancing by priority setting facilitates non-competition interests on an unsystematic case-by-case basis that is neither transparent nor predictable. Moreover, choosing cases that do not involve balancing questions has also prevented the emergence of a body of case law in which the Commission, NCAs and EU and national courts might have clarified if and how such interests could be taken into account under Article 101(1) and (3) TFEU or when shaping remedies. Especially following modernisation, such decisions and case law might have defined the limits and implications of the more economic approach to balancing.\textsuperscript{1780}

Paradoxically, while the substance of EU competition law expanded considerably following modernisation - by adopting abundant soft law mechanisms such as guidelines and notices - the enforcement of Article 101 TFEU in practice began to revolve around proving clear-cut infringements and the calculation of fines.\textsuperscript{1781} The assessment of an agreement’s effects, including weighing competition and non-competition interests, shifted to the almost unregulated realm of priority setting and negotiated remedies. Hence, the allocation of enforcement priorities not only hindered the effectiveness and uniformity of non-competition interests under Article 101 TFEU \textit{in general}, but also impeded the effectiveness, uniformity, and legal certainty of \textit{other balancing tools}.

\textsuperscript{1780} Also see (GCLC Annual Conference 2010), 58-76; (Bailey 2016), 131-132. More generally, see UNCTAD Relationship between Competition Authorities and Judiciaries (2016), 2.

\textsuperscript{1781} As proved empirically in this chapter. (Gerard 2011), 457 previously pointed to this paradox embedded in the Commission’s Article 101 TFEU enforcement following modernisation.