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Coding non-competition interests under Article 101 TFEU

A quantitative and qualitative study

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Publication date

2019

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Citation for published version (APA):

Brook, O. (2019). *Coding non-competition interests under Article 101 TFEU: A quantitative and qualitative study*. [Thesis, fully internal, Universiteit van Amsterdam].

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1. INTRODUCTION

In 2004, the Commission declared that EU competition rules “have as their objective the protection of competition on the market and cannot be detached from this objective”.¹⁷⁸² Departing from its and the EU Courts’ previous policy, the Commission maintained that only objective economic efficiencies could be taken into account when applying Article 101 TFEU.¹⁷⁸³ Non-economic social and political interests could no longer be used to justify an otherwise anti-competitive agreement, at least when they could not be expressed in monetary terms. At the same time, the Commission has continued to insist that Article 101 TFEU incorporates non-competition interests. Only recently has Commissioner *Vestager* declared that “EU competition rules leave *ample room* for taking into account impact on society”.¹⁷⁸⁴

Against this backdrop, this dissertation has examined *how the balancing of competition and non-competition interests in the enforcement of Article 101 TFEU has evolved between 1958 and 2017? How has this evolution affected the objectives of enforcement, namely its effectiveness, uniformity, and legal certainty?*

¹⁷⁸² Commission Article 101(3) Guidelines (2004), para 43.

¹⁷⁸³ Commission Article 101(3) Guidelines (2004), para 59.

¹⁷⁸⁴ Emphasis added. Commission, Parliamentary Questions: Answer Given by Ms Vestager on Behalf of the Commission (1 June 2017).

The dissertation has proved wrong the commonly-held view that the modernisation of EU competition law in May 2004 removed non-competition interests from the enforcement of Article 101 TFEU. Based on a quantitative and qualitative analysis of all decisions rendered by the Commission, five representative NCAs, and EU and national courts (consisting of over 3100 cases), it has shown that non-competition interests have played and continue to play an important role in the enforcement of Article 101 TFEU.

Nevertheless, the empirical findings presented in this dissertation point to a remarkable three-fold shift in the manner in which non-competition interests are being taken into account in the post-modernisation era: First, the dissertation has revealed a shift in the types of balancing tools employed in practice, transitioning from substantive to procedural balancing tools; second, it has identified a shift in locus of the balancing tools, from EU-based to Member States-based balancing; third, it has demonstrated a change in the institutional dynamics governing balancing. It has shown that while the EU Courts, and especially the CJEU, had an active role in shaping the balancing principles in the past, following modernisation the courts have only played a passive-reactive role.

The dissertation has asserted that the three shifts in balancing have hindered the attainment of the very objectives of Regulation 1/2003, namely an effective, uniform, and legal certain enforcement. Consequently, as elaborated below and summarised in Table 9.1, while the modernisation of EU competition law might have been successful in general, its effect on the role of non-competition interests under Article 101 TFEU has been counterproductive.

Table 9.1: Shifts in balancing

Shift	Pre-modernisation	Post-modernisation	Effect on balancing
Types of balancing tools	Substantive tools: Articles 101(1) and (3) TFEU, BERs	Procedural tools: remedies, priority setting	Less effective
Locus of balancing tools	EU	Member States	Less uniformity
Role of EU Courts	Active	Passive	Less legal certainty

Those three shifts and their effect on the attainment of the normative benchmarks are described below.

2. SHIFTING BETWEEN THE TYPES OF BALANCING TOOLS

2.1. From substantive to procedural

The debate over the role of non-competition interests in the enforcement of Article 101 TFEU can be traced back to the establishment of the European Community when the Article was first included in the Rome Treaty. The vague wording of this provision facilitated a decades-long debate over the manner in which non-competition interests could and should be examined under this provision.

The empirical findings presented throughout this dissertation have shown that, prior to modernisation, the Commission accounted for non-competition interests by reference to the *substantive balancing tools* of Article 101(3) TFEU, in the form of individual exemptions and BERs. It interpreted Article 101(3) TFEU as a general balancing standard, leaving ample room for non-competition interests on a case-by-case basis analysis. When the Commission assessed the application of an individual exemption during the first three enforcement periods (i.e. 1962-April 2004), it did not limit the types of benefits that could justify an exemption and set a low evidential threshold for proving the existence of benefits for consumers. Moreover, the Commission interpreted Article 101(3) TFEU as entailing a legal balancing process. Accordingly, it followed the vague proportionality test of the workable competition standard to strike a balance between the competing interests.¹⁷⁸⁵ The same was true with respect to BERs, and especially sectoral BERs. Both the adoption process of the BERs, as well as their application, left significant room for incorporating broad non-economic benefits.¹⁷⁸⁶ Hence, the individual exemptions and BERs were rightly seen as a regulatory instrument, serving as a form of protectionism. Article 101(3) TFEU balancing tools have not only been an outlet to balance competition with benefits for specific consumers, but have also reflected political, regulatory, and social objectives.

The EU Courts have adopted a similar case-by-case approach to balancing. In addition to Article 101(3) TFEU individual exemptions and BERs, the CJEU has introduced numerous sector-specific or restriction-specific Article 101(1) TFEU balancing tools. The Court has developed those balancing tools on an *ad hoc* basis to counterbalance the Commission's broad interpretation of what was considered a restriction of competition under Article 101(1) TFEU.

¹⁷⁸⁵ See Chapter 3, Sections 3.3 and 4.3.

¹⁷⁸⁶ See Chapter 4, Section 3.

According to the Court, agreements restricting the commercial freedom of parties may escape the prohibition of this provision if they are necessary for the attainment of social or efficiency related goals.¹⁷⁸⁷

The Commission's and EU Courts' case-by-case approaches have prevented the emergence of a well-defined and systematic framework to guide the substantive balancing tools. Indeed, the empirical findings point to the advent of a so-called sectoral approach, in which balancing practices have been incoherent. The balancing tools were applied strictly to agreements impairing market integration and loosely to agreements in liberalised or regulated sectors, sectors affected by an economic crisis, or agreements promoting the EU industrial policy.

Despite the lack of a solid theoretical basis, balancing has been applied in a relatively uniform and legally certain manner. Under the centralised notification regime of Regulation 17/62, all potential anti-competitive agreements needed to be notified to the Commission prior to implementation, and the Commission held the sole power to grant Article 101(3) TFEU exemptions. Consequently, although the substantive balancing tools were not effective in protecting competition, balancing was applied in a uniform manner across the EU and provided the undertakings with legal certainty. The Commission and undertakings negotiated the terms of the exemptions to strike what the Commission considered an appropriate balance between competition and non-competition interests.

This has changed since the turn of the millennium, upon the modernisation of EU competition law at the beginning of the fourth enforcement period (i.e. from May 2004 onwards). In the course of modernisation, the Commission has advocated a comprehensive three-pillared reform to the enforcement of Article 101 TFEU which, in turn, has transformed balancing.

The first substantive pillar of modernisation introduced greater economic thinking to EU competition policy, aiming to increase its effectiveness. Under the heading of a more economic approach, the Commission gradually deployed economic theory and tools to apply Article 101 TFEU. The Commission revised its BERs and policy papers to focus the competition analysis on the market power held by the undertakings and on the effect of agreements on consumer welfare. As part of the substantive modernisation, the Commission urged limiting the role of non-competition interests under Article 101 TFEU. Its policy papers restricted the types of benefits that could be taken into account under the substantive balancing tools to direct

¹⁷⁸⁷ See Chapter 5, Section 1.

economic benefits, which ought to be assessed by a narrow short-term consumer welfare standard. The policy papers advocated reliance on economic and empirical methodologies, and substantially increased the evidential requirements for exceptions. Subsequently, many non-competition interests that had previously justified Article 101(1) TFEU exceptions and Article 101(3) TFEU exemptions were no longer applicable in the Commission's view.¹⁷⁸⁸

Arguably, the Commission's new approach to balancing has not only been influenced by the substantive pillar of modernisation, but also by the institutional reform. Limiting the scope for balancing under Article 101 TFEU was also directed at safeguarding the effectiveness of EU competition law against undue political national interference in the context of decentralised enforcement of the Article. Moreover, narrowing the room for balancing aimed to ensure a consistent enforcement of the Article and the balancing principles as to warrant the uniformity and legal certainty of their enforcement across the EU.¹⁷⁸⁹

In line with the Commission's attempts to limit the scope of the substantive balancing tools, the empirical findings presented in this dissertation prove that those tools were seldom accepted, or even invoked, after May 2004. The limited use of the substantive balancing tools could initially be viewed as confirmation that non-competition interests no longer play a role in the enforcement of Article 101 TFEU. According to this view, the Commission's endeavours to narrow the room for non-competition interests in the substantive and institutional pillars of modernisation have changed the substantive scope of the Article.

However, the dissertation has also shown that this view fails to take into account the effects emanating from the procedural pillar of modernisation. The switch from a notification to a self-assessment regime has granted the Commission and NCAs new procedural balancing tools to account for non-competition interests. From the perspective of competition enforcers, those tools have significant advantages. In particular, instead of engaging in a complex balancing exercise of competition and non-competition interests under the substantive balancing tools of Articles 101(1) and (3) TFEU, competition enforcers can simply decide to refrain from pursuing a case against an anti-competitive agreement that promotes non-competition interests or to terminate the case by accepting commitments. The competition enforcers are often not required to provide reasoning for such balancing decisions, or even to acknowledge that any

¹⁷⁸⁸ See Chapter 3, Section 3.4; Chapter 4, Section 4; and Chapter 5, Section 5.1.

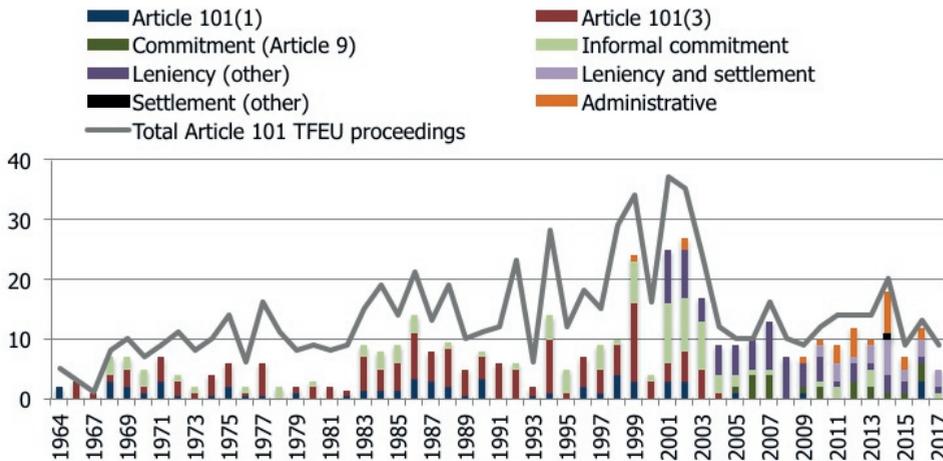
¹⁷⁸⁹ See Chapter 2, Section 5.4.1.

such balancing took place. Accordingly, the exercise of the procedural balancing tools is largely part of the “dark matter” of EU competition law.¹⁷⁹⁰

At the same time, the dissertation has offered theoretical and empirical evidence to support the hypothesis that, following the entry into force of Regulation 1/2003, the Commission and NCAs predominantly used *procedural balancing tools* to account for non-competition interests. It has shown that, in some instances, the competition enforcers *directly* invoked their priority setting powers to account for non-competition interests, while in others they had done so *implicitly* by devising their detection, target, instrument, and outcome discretion.¹⁷⁹¹

The shift from substantive to procedural balancing tools is summarised in Figure 9.1, which combines the empirical findings presented throughout the dissertation by specifying the number of proceedings that were handled or concluded by: (i) administrative considerations, e.g. a lack of evidence or an expired limitation period (orange bars); (ii) accepting formal and informal commitments (dark and light green bars, respectively); (iii) leniency applications (dark and light purple bars); (iv) settlements (black bars); (v) Article 101(3) TFEU exemptions (red bars); and (vi) Article 101(1) TFEU exceptions (blue bars).

Figure 9.1: From substantive to procedural balancing



The figure shows that prior to modernisation when the Commission held limited priority setting powers, it was compelled to balance competition and non-competition interests under

¹⁷⁹⁰ On dark matter, see Chapter 1, Section 3.1 and Chapter 8, Section 4.3.

¹⁷⁹¹ See Chapter 8 and Chapter 7, Section 2.

the substantive balancing tools. Consequently, it had the opportunity to issue inapplicability decisions, explaining the circumstances in which non-competition interests justified Article 101(1) TFEU exceptions or Article 101(3) TFEU exemptions (blue and red bars, respectively). Yet, once the Commission had been vested with enhanced priority-setting powers in the post-modernisation era, it dedicated much of its enforcement effort to cases that were unlikely to raise balancing questions, such as those handled by means of leniency applications and settlements (dark and light purple and black bars). In parallel, the Commission mostly disregarded cases that raised balancing questions or resolved them by accepting commitments (orange and light and dark green bars, respectively). As such, the modernisation of EU competition law not only *limited the scope of the substantive balancing tools* but also *eliminated the debate* over the role of non-competition interests from the Commission's practice.

A similar shift from substantive to procedural balancing tools is evident at the national level. The dissertation has demonstrated that this shift was especially prominent in NCAs that followed the Commission's new approach and limited the scope of the substantive balancing tools (e.g. the German, UK, and Hungarian NCAs). Those NCAs may have been implicitly bound to use the procedural balancing tools available to them to avoid deviating from their declared interpretations of the substantive balancing tools. To this extent, those NCAs used the procedural balancing tools to overcome the substantive restrictions on the role of non-competition interests in their respective competition regimes. NCAs that have explicitly chosen to reserve some room for non-competition interests following modernisation have engaged more frequently with substantive balancing questions (e.g. the Dutch and French NCAs). Accordingly, they have had the opportunity to discuss and clarify their views on the substantive balancing tools. As the next section shows, the shift from substantive to procedural balancing tools has had a detrimental effect on the effectiveness of balancing.

2.2. Impeding effectiveness

The modernisation of EU competition law in May 2004 was aimed at increasing its effectiveness.¹⁷⁹² In line with the more economic approach, the Commission modernised the substantive balancing tools, rebranding Articles 101(1) and (3) TFEU as market-driven balancing tools that take into account only *direct economic benefits*. The balancing process was transformed from *exclusion and legal balancing processes* to an *economic balancing process*, on

¹⁷⁹² See Chapter 1, Section 4.1 and Chapter 2, Section 3.3.1.

the basis of a short-term narrow consumer welfare standard. Moreover, the substantive balancing tools were no longer seen as instruments to further EU industrial and regulatory aims. The Commission called for *corrective balancing* which can be applied uniformly across all sectors and types of agreements and is directed at restoring the situation that would have occurred in the absence of the anti-competitive agreement. As a result, the substantive balancing tools became more effective at protecting competition.

The modernisation of the substantive balancing tools did not, however, increase the effectiveness of balancing in practice. The empirical findings reveal that the Commission and NCAs had made only limited use of those substantive balancing tools following modernisation. Instead, investigations into agreements that raised balancing questions were often settled with negotiated remedies or terminated by closing the probe into the case altogether. Consequently, undertakings could reasonably assume that restrictions of competition that produced certain non-competition benefits would not be subject to Article 101 TFEU enforcement, even if they do not meet the conditions for an exception under Article 101(1) or (3) TFEU.

The shift from substantive to procedural balancing tools has jeopardised the effectiveness of balancing. As was elaborated in the normative benchmarks section concluding each of Chapters 3-8, and summarised in Table 9.2, procedural balancing tools are generally less effective in protecting competition interests compared to substantive balancing tools.

Table 9.2: Effectiveness of balancing tools (post-modernisation)

Level of effectiveness ¹⁷⁹³	Balancing tool
High ($x > 2$)	Substantive balancing tools: Article 101(3) TFEU, Article 101(1) TFEU commercial exceptions
Medium ($2 \geq x > 1,5$)	Substantive balancing tools: BERs, Article 101(1) TFEU state and public interest exceptions Procedural balancing tools: fines
Low ($x \leq 1,5$)	Procedural balancing tools: commitments, priority setting

The negative impact of the procedural balancing tools on the effectiveness of balancing is two-fold. First, with the exception of fines,¹⁷⁹⁴ *procedural balancing tools are less effective*. Competition enforcers have *carte blanche* when balancing by means of accepting commitments or setting priorities. There is no limit to the *types of benefits* they can take into account, *the process of balancing, intensity of control, or the types of remedies* pursued by balancing (i.e. corrective or regulatory). Hence, procedural balancing tools allow the competition enforcers to balance non-

¹⁷⁹³ The level of effectiveness of the balancing tools is defined in Chapter 1, Section 4.1. For the level of effectiveness of each balancing tool see the normative benchmarks section in each of Chapters 3-8.

¹⁷⁹⁴ See Chapter 7, Section 4.1.2.

competition interests in an ineffective manner. Enforcers can account for non-competition interests beyond what would be deemed permissible under the substantive balancing tools of Articles 101(1) and (3) TFEU, even in their broad interpretation prior to modernisation.

Second, procedural balancing tools also hamper the *effectives of the substantive balancing tools*. The competition enforcers' prioritisation choices are not merely focused on achieving compliance with Article 101 TFEU but are also about determining the scope and boundaries of the Article.¹⁷⁹⁵ Selecting cases that do not involve balancing questions has prevented the emergence of a body of case law in which the Commission and NCAs could have clarified if and how non-competition interests should be taken into account under the substantive assessment of Article 101 TFEU. This has resulted in a paradox: while the *substantive* balancing tools have been considerably limited by modernisation, the modernisation itself has introduced new *procedural* balancing tools which allow the inclusion of broader non-competition interests than ever before.

Accordingly, this dissertation has questioned the Commission's contention that the modernisation has contributed to effective enforcement by promoting more effective use of the enforcers' limited resources.¹⁷⁹⁶ Rather, it has maintained that the overall success of competition enforcement is also dependent on key aspects of the enforcers' prioritisation choices. It is not only determined by the content and scope of the substantive competition rules themselves but also the application of the competition enforcers' priority-setting powers. Using procedural balancing tools instead of issuing inapplicability or prohibition decisions which are bound to the legal and economic framework of the substantive balancing tools results in excessive favouring of non-competition interests over the protection of the competitive process and structure. This hinders, by definition, the effectiveness of balancing.

To such effect, the dissertation has emphasised the importance of compiling a balanced portfolio of cases for the effective balancing and enforcement of EU competition law. When competition enforcers systematically ignore certain anti-competitive practices or sectors, undertakings will not be deterred from concluding such agreements. Such practices might, in the long run, even end up being deemed compatible with Article 101 TFEU.¹⁷⁹⁷

¹⁷⁹⁵ See Chapter 8, Section 1.

¹⁷⁹⁶ Report on the Functioning of Regulation 1/2003 (2009), para 18; Report on the Functioning of Regulation 1/2003 (2014), para 43-44. See *ibid*.

¹⁷⁹⁷ See Chapter 8, Section 8.1.

3. SHIFTING THE LOCUS OF BALANCING

3.1. From the EU to the Member States

The institutional pillar of modernisation, as mentioned, entrusted the NCAs with the power to fully apply Article 101 TFEU and to engage in balancing. Hence, the decentralised enforcement regime has brought about a second shift, transitioning from EU-based to national-based balancing. To this extent the dissertation has revealed two legal sources that have guided the balancing practices of the national enforcers:

First, national enforcers *interpret Article 101 substantive balancing tools*. The dissertation has demonstrated that the NCAs and national courts were certainly influenced by the Commission's guidance on Article 101(1) and (3) TFEU balancing tools. The Commission clearly kept to its decisive role in shaping EU competition policy in the realm of decentralised enforcement. Nevertheless, given the lack of a clear and binding EU framework directing national balancing practices, the national enforcers devised unique approaches to the application of the substantive and procedural balancing tools. Such unique approaches are related to the (i) objectives of Article 101 TFEU; (ii) types of relevant economic or non-economic benefits; (iii) balancing method; and (iv) intensity of control. Moreover, the national enforcers have applied the balancing tools with differing frequency.¹⁷⁹⁸

Overall, the dissertation has identified three groups of national enforcers. The first group, which includes the UK and Hungarian NCAs and courts, has generally followed the Commission's interpretation of the balancing tools. A second group, including the Netherlands and Germany, has sometimes openly deviated from that approach. A third group of Member States, including France, has also done so, but with more subtlety.

Second, the national balancing practices have also been influenced by *national balancing tools*. The dissertation has illustrated that some Member States shield certain agreements from the prohibition of Article 101 TFEU by adopting *substantive rules* that explicitly or implicitly limit the enforcement of EU competition law in favour of promoting non-competition interests.¹⁷⁹⁹ For instance, some Member States have adopted public policy defence clauses or issue-specific rules by which the national government or parliament has limited the enforcement of a specific

¹⁷⁹⁸ See Chapter 3, Section 6.1 and Chapter 5, Section 4.

¹⁷⁹⁹ See Chapter 6.

agreement or type of restriction. Member States have also implemented sector regulation or alternative enforcement mechanisms that subject certain anti-competitive agreements to alternative balancing instruments. Furthermore, balancing has been embedded in national *jurisdictional* rules (e.g. national *de minimis* rules, France public body prerogative) and *procedural* rules (e.g. fines, priority setting).

Accordingly, the dissertation has uncovered the mutually determinative connection between EU and national balancing principles. It has shown that Member States were not only *affected* by EU balancing rules when they enforced Article 101 TFEU; they also *affected* the scope of the prohibition of Article 101 TFEU by *interpreting* the EU balancing tools and *adopting unique national rules*. Consequently, decentralisation has afforded the Member States a new opportunity to introduce national balancing principles that interpret and supplement the EU balancing framework.

3.2. Impeding uniformity

The enforcement of Article 101 TFEU in the multi-level governance system of Regulation 1/2003 is generally thought of as a major success.¹⁸⁰⁰ The Commission has emphasised that the EU competition rules “have to a large extent become the ‘law of the land’ for the whole of the EU”.¹⁸⁰¹ The uniformity of enforcement is based on the provisions of Article 3 of Regulation 1/2003, which obliges the NCAs to apply EU competition law when an agreement affects trade between Member States.¹⁸⁰² Article 3 further declares that in such an event, EU competition law enjoys supremacy over conflicting national competition law provisions. While the Commission has admitted that a certain level of divergence persists, this has largely been ascribed to differences in the institutional position of NCAs, their national procedures, and sanctions.

However, this dissertation has illustrated that the mere obligation to apply Article 101 TFEU was not sufficient to ensure the uniform administration of EU competition policy. As observed by *Basedow*, the former chairman of the German Monopoly Commission,¹⁸⁰³ even if one were inclined to accept the assumption that an obligation to apply a single substantive standard relating to a technical private law provision would result in uniform practice, that assumption

¹⁸⁰⁰ Report on the functioning of Regulation 1/2003 (2009), para 7; Report on the functioning of Regulation 1/2003 (2014), para 6.

¹⁸⁰¹ Report on the functioning of Regulation 1/2003 (2009), para 23.

¹⁸⁰² See Chapter 2, Section 3.3.2 and Chapter 61.

¹⁸⁰³ (*Basedow* 2007), 430-431.

would not apply to competition law, where national interests and political involvement are more strongly felt. The far-reaching differences in the social, economic, and political traditions of the Member States cast serious doubt that a mere obligation to apply the same provision would secure uniform administration of the law.

Indeed, the dissertation has found that those national differences have impeded a consistent application of the *EU substantive balancing tools*. The Member States have followed conflicting interpretations of the objectives of Article 101 TFEU, the types of benefits that can be taken into account, the balancing method, and the intensity of control. The impact of those conflicting interpretations is demonstrated by the practices of the German NCA and courts. The empirical findings reveal that the German enforcers were stricter in terms of the intensity of control they applied to the Article 101(3) TFEU balancing tool, in their interpretations of BERs, and in enforcing the rules governing selective distribution systems and online platforms.¹⁸⁰⁴ Striking a differing balance between competition and non-competition interests, they gave more weight - compared to the Commission, other NCAs, and EU and national courts - to the protection of the competition process and structure. Consequently, certain practices that were allowed by most competition enforcers were prohibited in Germany. This goes against the essence of Article 3 of Regulation 1/2003, which calls for convergence in the application of EU competition law.

Against this background, the various national interpretations identified by the empirical findings indicate that the coordination and cooperation mechanisms enacted by Regulation 1/2003 were insufficient to ensure the uniformity of the substantive balancing tools.¹⁸⁰⁵ In particular, although Regulation 1/2003 relies on national courts to ensure the consistent application of Article 101 TFEU,¹⁸⁰⁶ the empirical findings show that they did not always ensure uniformity. As articulated by the Dusseldorf Higher Regional Court in *Booking.com (2016)*, in the absence of a detailed and binding EU balancing framework, NCAs and national courts are not barred from adopting diverging interpretations.¹⁸⁰⁷

¹⁸⁰⁴ See Chapter 3, Section 6.3.1; Chapter 4, Section 5.1.1; and Chapter 5, Section 3.4, respectively.

¹⁸⁰⁵ On the coordination and cooperation mechanisms of Regulation 1/2003 see Chapter 2, Section 3.3.3 and Chapter 8, Section 7.

¹⁸⁰⁶ See Chapter 3, Section 6.5.

¹⁸⁰⁷ VI-Kart 1/16 (V) *Booking.com* (2016), para 107-115, as presented in Chapter 3, Section 6.3.1.

While such national interpretations might comply with the black letter of the Treaties and Regulation 1/2003, they do not observe their spirit. Diverging interpretations, and especially conflicting decisions rendered on a single agreement, impede the pursuit of uniformity that lies at the heart of the decentralised enforcement regime. The varying national interpretations, coupled with the adoption of unique national balancing tools, have exposed undertakings to multiple procedural and substantive standards when applying the substantive balancing tools.

Moreover, the dissertation has revealed that the *procedural balancing tools* embedded in priority setting and commitments, which have facilitated much of the balancing carried out following modernisation, are characterised by an even lower degree of uniformity. Since those procedural balancing tools have not been harmonised and are not bound by any substantive balancing test, the competition enforcers have failed to apply consistent criteria to account for non-competition interests. In some cases, they have even delivered conflicting decisions with respect to a single agreement (e.g. the abovementioned *Booking.com* case).¹⁸⁰⁸

The uniformity of the various balancing tools has been detailed in the normative benchmarks section concluding each of Chapters 3-8 and is summarised in Table 9.3.

Table 9.3: Uniformity of balancing tools (post-modernisation)

Level of uniformity ¹⁸⁰⁹	Balancing tool
High ($x > 2$)	BER, fines
Medium ($2 \geq x > 1,5$)	Article 101(1) and (3) TFEU
Low ($x \leq 1,5$)	Commitments, priority setting

The dissertation has revealed that the Commission's guidance in soft law has proved to be insufficient to ensure the uniform application of both the substantive and procedural balancing tools. Therefore, it asserts that uniform balancing necessitates the implementation of substantially more detailed - and binding - measures. This could also be achieved by means of CJEU judgments that give substance to the open-textured provisions of the substantive balancing tools. Moreover, the dissertation recommends the adoption of EU secondary laws clarifying the objectives of Article 101 TFEU, types of benefits that can be taken into account, the balancing method, and the limits of the procedural and national balancing tools.

¹⁸⁰⁸ On the conflicting decisions in the *Booking.com* case, see *ibid.*

¹⁸⁰⁹ The level of uniformity of the balancing tools is defined in Chapter 1, Section 4.2. For the level of uniformity of each balancing tool see the normative benchmarks section in each of Chapters 3-8.

4. THE SHIFTING ROLE OF THE EU COURTS

4.1. From active to passive

The third shift in balancing following modernisation relates to the role of the EU Courts in guiding balancing. Prior to modernisation, the CJEU had a leading role in the development of balancing. In a line of landmark cases, the Court laid out the fundamental balancing principles. It shaped the *types of benefits* that can be recognised under Article 101 TFEU to include both economic and non-economic benefits.¹⁸¹⁰ It introduced the workable competition standard as the *balancing process* guiding Article 101(3) TFEU, by which balancing is based on a legal method and requires a relatively low level of evidence.¹⁸¹¹ Moreover, it devised *new balancing tools* to account for state involvement and commercial interests under Article 101(1) TFEU.¹⁸¹² The GC also influenced balancing, especially with respect to Article 101(1) TFEU balancing tools, albeit to a lower degree compared to the CJEU.¹⁸¹³ While the EU Courts did not produce a detailed balancing framework, their case law had an immense influence on shaping the balancing principles.

This all changed following modernisation. When the Commission embarked on the substantive modernisation in the early 2000s, it also took the reins on the development of the balancing principles. The Commission's new balancing approach, which was clearly incompatible with the CJEU's old case law, had created an urgent need for judgments clarifying the scope of balancing in the post-modernisation era. In particular, the EU Courts could have explained the boundaries and method for integrating non-competition interests under the Article and the limits of the substantive and procedural balancing tools. Moreover, CJEU preliminary rulings could have explored the compatibility of national balancing rules, interpretations, and practices.

Nevertheless, the EU Courts' judgments have merely created further uncertainty. On the one hand, the EU Courts did not embrace the Commission's new approach to the substantive balancing tools, at least in part. The empirical findings indicate that the courts have continued to follow the balancing principles established in their old case law, leaving significant room for consideration of non-competition interests. They have not fully endorsed the Commission's new approach to the types of benefits that can be examined under the Article, the reference to the

¹⁸¹⁰ See Chapter 3, Section 3.3.1 and Chapter 5, Section 1.

¹⁸¹¹ See Chapter 2, Section 5.2 and Chapter 3, Sections 3.3.1 and 4.3.

¹⁸¹² See Chapter 5, in particular Section 1.

¹⁸¹³ See Chapter 5, in particular Sections 2.1 and 3.1.

short-term narrow consumer welfare standard, the sole reliance on economic evidence, and the Commission's new approach to by-object restrictions.¹⁸¹⁴

On the other hand, the EU Courts have not staked out a clear position on those matters. Departing from their active role in the past, the Courts have missed the opportunity to shape the balancing framework following modernisation. They have issued vague and implicit judgments, generating much uncertainty as to the current role of non-competition interests. This trend has been aggravated by the shift from substantive to procedural balancing tools, as described above. The Commission's and NCAs' policy choice to focus the enforcement on clear-cut restrictions of competition, which are unlikely to raise balancing questions, has limited the EU Courts' prospects to scrutinise their balancing approaches. Since the Commission and NCAs have rarely enforced agreements raising balancing questions, the EU Courts have had limited opportunities to clarify the role of non-competition interests in appeals and preliminary rulings.¹⁸¹⁵

4.2. Impeding legal certainty

The dissertation has demonstrated that each of the three shifts in balancing following modernisation has impeded the legal certainty of balancing. First, the shift from substantive to procedural balancing tools has rendered balancing less *transparent*. As mentioned, procedural balancing tools are largely invisible. The competition enforcers are often not required to indicate if, and how, non-competition interests have been taken into account when imposing remedies or setting priorities.

Second, the shift from EU to Member States-based balancing has rendered balancing less uniform, and as such also less *predictable*. The role of non-competition interests cannot be predicted in advance - only *ex post* according to the enforcer that takes on the case.

Finally, the shift in the role of the EU Courts has also increased legal uncertainty. The EU Courts' silence on the objectives of Article 101 TFEU, the relevant types of benefits, the balancing method, the intensity of control, and the room for divergence in national interpretations, has given the Commission and NCAs additional leeway to shape their own interpretations regarding the particularities of balancing. Because the EU Courts have not given meaning to the open-textured Treaty provisions on competition, they have entrusted the competition enforcers with additional *discretion* to determine the role of non-competition interests on a case-by-case basis. The vague general balancing standards guiding the substantive balancing tools, and the non-

¹⁸¹⁴ See Chapter 3, Section 5.3 and Chapter 5, Section 5.2.

¹⁸¹⁵ See Chapter 8, Section 8.3.

existent guidance on the procedural balancing tools, has enabled the competition enforcers to strike their own balance between competition and non-competition interests.

The silence of the EU Courts following modernisation, together with the shifts from substantive to procedural balancing and from EU to national-based balancing, has generated much uncertainty about the current role of non-competition interests. This has been elaborated in the normative benchmarks sections concluding each of Chapters 3-8 and is summarised in Table 9.4.

Table 9.4: Legal certainty of the balancing tools (post-modernisation)

Level of legal certainty ¹⁸¹⁶	Balancing tool
High ($x > 2$)	BER
Medium ($2 \geq x > 1,5$)	Article 101(3) TFEU, fines
Low ($x \leq 1,5$)	Article 101(1) TFEU, commitments, priority setting

The uncertainty surrounding balancing prevents undertakings from self-assessing whether non-competition interests could possibly justify an otherwise anti-competitive agreement. As such, this uncertainty undermines the functioning of the self-assessment regime of Regulation 1/2003. Therefore, the dissertation calls for EU Court judgments to fill the gaps in the EU balancing framework and to assess the compatibility of national rules and practices.

5. MODERNISATION AS A DOUBLE-EDGED SWORD

The three shifts in balancing brought about by modernisation act as a *double-edged sword*. On one metaphoric edge, the substantive and institutional pillars of modernisation have increased the *effectiveness of the substantive balancing tools*. The Commission has used modernisation like a sword to protect the integrity of EU competition law against undue non-competition interests. As a result, the competition enforcers have rarely accepted, or even discussed, the possibility of justifying an agreement with overriding non-competition interests.

However, reducing the scope of the substantive balancing tools and the debate over the role of non-competition interests has not eliminated the role of such interests. On the other edge of the sword, the procedural pillar of modernisation has granted competition enforcers new *implicit* balancing tools in the form of negotiated remedies and priority setting. These *new procedural balancing tools* are generally less effective at protecting competition and suffer from serious uniformity and legal certainty weaknesses. In other words, although the modernisation

¹⁸¹⁶ The level of legal certainty of the balancing tools is defined in Chapter 1, Section 4.3. For the level of legal certainty of each balancing tool see the normative benchmarks section in each of Chapters 3-8.

of EU competition law may have enhanced the enforcement of EU competition law in general, it has been counterproductive when it comes to balancing. Instead of improving the manner in which non-competition interests are considered under Article 101 TFEU, it has aggravated the already questionable balancing practices.

On the basis of the above, the dissertation offers three general recommendations to increase the effectiveness, uniformity, and legal certainty of the assessment of non-competition interests under Article 101 TFEU:

First, the dissertation calls for re-shifting the balancing toward the ambit of the substantive balancing tools prescribed by the EU Treaties. The competition enforcers should use those substantive balancing tools to account for non-competition interests. The Member States have deliberately left room for the consideration of non-competition interests under the Treaties in the form of Article 101(3) TFEU individual exceptions, BERs, and Article 106(2) TFEU. Hence, the principles and procedures embedded in those tools should guide balancing.

Second, the Commission and NCAs should set their priorities to establish a diverse and balanced portfolio of cases. While they might focus most of their detection and target efforts on serious and clear-cut infringements, some resources should also be allocated for discussing and clarifying the role of non-competition interests under the substantive balancing tools. Cases involving balancing questions should not only be investigated by means of informal procedures or negotiated remedies; balancing questions should be openly subject to prohibition and inapplicability decisions, which are notified to the ECN network and are liable for judicial review.

Third, the scope, principles, and methods of the substantive and procedural balancing tools should be clarified by means of binding secondary EU law measures. In parallel, the EU Courts should render judgments filling the gaps in the balancing framework. The EU Courts should take a clear stand on the objectives of Article 101 TFEU, the precise role of non-competition interests under Article 101 TFEU, and the validity of the Commission's more economic approach. To this end, further attention should also be given to the scope and impact of national rules, interpretations, and practices. The Commission and EU Courts should assess the compatibility of the unique national exceptions and the national interpretations of the EU balancing tools with the principle of primacy of EU competition law, as enshrined in Article 4(3) TEU and Article 3 of Regulation 1/2003.