Coding non-competition interests under Article 101 TFEU
A quantitative and qualitative study
Brook, O.

Citation for published version (APA):
EUROPEAN UNION

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Regulation 1017/68 on Inland Transport

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- **Decision to Amend the EU/US Air Transport Agreement**: Decision of the Council and the Representatives of the Governments of the Member States of the European Union Meeting within the Council of 24 June 2010 on the signing and provisional application of the Protocol to Amend the Air Transport Agreement between the United States of America, of the one part, and the European Community and its Member States, of the other part (OJ L 223/3, 25.08.2010)

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The role of non-competition interests in the enforcement of Article 101 TFEU is subject to a decades-long debate. The vague wording of this provision suggests that there is room for consideration of non-competition interests, but it details neither the precise extent of such balancing nor the test guiding it.

Over the years, the Council, Commission, EU Courts, and European Parliament have repeatedly endorsed consideration of non-competition interests within the enforcement of Article 101 TFEU. They have emphasised that EU competition law is not an end unto itself, but rather an instrument for achieving the EU Treaty’s economic and social goals. Despite this, the rationale, method, and limits for considering non-competition interests remain persistently subject to legal and political discussion. Favouring consensus over clarity, the EU institutions and the Member States have never codified the Article’s goals or defined a comprehensive balancing framework in EU primary or secondary law.

The debate over the role of non-competition interests was revived around the turn of the millennium, upon the modernisation of EU competition law enforcement. Each of the three pillars of modernisation raised fundamental challenges as to the future role of non-competition interests:

Under the first substantive pillar of modernisation, the Commission adopted a set of guidelines and notices introducing more stringent economic thinking to EU competition law and policy. Those policy papers considerably reduced the role of non-competition interests under the Article. Subsequently, many non-competition interests that had previously been taken into account under Article 101 TFEU were no longer applicable in the Commission’s view.

In parallel, Regulation 1/2003, which entered into force in May 2004, swept away the old centralised notification regime in favour of radical institutional and procedural reform. The institutional pillar of modernisation, has decentralised the enforcement of Article 101 TFEU; national competition authorities and courts were entrusted with discretionary powers allowing them to fully apply Article 101 TFEU and to balance competition and non-competition interests. Since the Commission’s policy papers are binding on the Commission alone, NCAs may adopt diverging interpretations. They enjoy a wide margin of discretion to shape their national approaches to balancing on the basis of their respective legal, economic, and social traditions,
bearing the serious risk that Article 101 TFEU is not enforced in a uniform manner across the EU.

Finally, the procedural pillar of modernisation has switched from a notification to a self-assessment regime. Accordingly, the Commission does not longer evaluate the compatibility of an agreement with Article 101 TFEU prior to its implementation. Rather, undertakings must evaluate whether non-competition interests can justify their otherwise anti-competitive agreement.

The combined effects of the three pillars of modernisation bear the serious risk that non-competition interests are not being taken into account in an effective, uniform and legal certain manner across the EU. Indeed, an impressive array of legal scholarship has already explored the changing role of non-competition interests under Article 101 TFEU from historical, constitutional and economic perspectives. Yet, thus far only limited attention has been given to the manner in which the EU and national competition enforcers have actually administered this balancing.

Against this backdrop, the dissertation takes a novel combination of empirical, doctrinal, and normative approaches. It is based on a large quantitative and qualitative analysis of all Article 101 TFEU proceedings investigated by the Commission, EU Courts and the NCAs and courts of five representative Member States from the creation of the EEC in 1958 through 2017. Covering more than 3100 proceedings, the empirical insights offer a systematic overview of balancing as applied in practice. This empirical approach not only assists in identifying explicit forms of balancing in which the competition enforcers have overtly considered non-competition interests; it also sheds light on the so-called “dark matter” of balancing, namely the invisible forms of balancing triggered by the institutional setup and specific procedures of the competition enforcers.

More specifically, the empirical findings uncover six balancing tools that were used to account for non-competition interests. First, it examines substantive balancing tools, namely (i) Article 101(3) TFEU individual exemptions/exceptions; (ii) Block Exemption Regulations; and (iii) Article 101(1) TFEU exceptions. Second, the dissertation studies (iv) national balancing tools, originating from Member States’ rules. And third, procedural balancing tools, embedded in the (v) remedies imposed for an Article 101 TFEU infringement (accepting commitment or moderating fines) and (vi) priority setting choices of the various competition enforcers.
The dissertation is structured around those six balancing tools. Each chapter provides an empirical and legal overview of one balancing tool, mapping the quantitative and qualitative aspects of balancing as applied in practice. It highlights the frequency of invoking and accepting the balancing tool, and analyses the type of benefits that were taken into account, the balancing process, and the intensity of control. Moreover, each chapter examines the role of EU and national courts in scrutinising the application of the balancing tools. It illustrates that the courts have adopted diverse approaches to balancing, which have in turn left the Commission and NCAs with different levels of discretion to balance. Finally, each chapter evaluates the compatibility of a balancing tool with the objectives of Article 101 TFEU enforcement (i.e. effectiveness, uniformity and legal certainty).

The dissertation proves 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. It shows that non-competition interests have played and continue to play an important role in the enforcement of Article 101 TFEU. Nevertheless, the dissertation points 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 reveals a shift in the types of balancing tools employed in practice, transitioning from substantive to procedural balancing tools. It demonstrates that prior to the modernisation, substantive balancing tools embedded in Articles 101(1) and (3) TFEU have facilitated much of the balancing debate. Yet, following modernisation, they have rarely been invoked or accepted. Instead, the balancing has shifted to national and procedural balancing tools, that is, remedies and priority setting decisions.

Second, it identifies a shift in locus of the balancing tools, from EU-based to Member States-based balancing. The dissertation uncovers a mutually determinative connection between EU and national balancing principles. It shows 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 interpret and supplement the EU balancing framework.

Third, the dissertation reports a change in the institutional dynamics governing balancing. It shows that the EU Courts, and especially the CJEU, had an active role in shaping the balancing
principles in the past. Nevertheless, when the Commission embarked on the substantive modernisation in the early 2000s, it also took the reins on the development of the balancing principles. Although the EU Courts have not fully embraced the Commission’s new approach (i.e. with respect to the types of benefits that can be examined under the Article, the reference to the short-term narrow consumer welfare standard, the sole reliance on economic evidence, and the Commission’s new approach to by-object restrictions), they have not staked out a clear position on those matters. Instead, the EU Courts have only played a passive-reactive role with respect to balancing following modernisation.

The three shifts in balancing, the dissertation concludes, have hindered the attainment of the very objectives of Regulation 1/2003, namely an effective, uniform, and legal certain enforcement. Consequently, 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.
SAMENVATTING

De rol van niet-mededingingsbelangen bij de handhaving van Artikel 101 VWEU is al decennialang voer voor discussie. De vage verwoording van deze bepaling doet vermoeden dat er ruimte is voor de overweging van niet-mededingingsbelangen, maar beschrijft noch de precieze omvang van dergelijke afweging noch welke test deze afweging kan leiden.

De Raad, de Commissie, de EU-Gerechten en het Europees Parlement hebben in de loop der jaren meermaals bevestigd dat niet-mededingingsbelangen kunnen worden overwogen bij de handhaving van Artikel 101 VWEU. Zij hebben benadrukt dat het Europese mededingingsrecht geen doel is op zich, maar een instrument voor de verwezenlijking van de economische en sociale objectieven van de Verdragen van de Europese Unie. Desondanks blijven de ratio, methodes en grenzen van deze afweging onderworpen aan hardnekkige politieke en juridische discussie. De instellingen en lidstaten van de Europese Unie hebben, met het oog op consensus eerder dan op duidelijkheid, zich er steeds van weerhouden de doelstellingen van het Artikel te codificeren of een omvattend afwegingskader te definiëren in primair of secundair EU-recht.

Rond de millenniumwisseling onderging het debat over de rol van niet-mededingingsbelangen een heropleving, als gevolg van de modernisering van de uitvoering van het EU-mededingingsrecht. Elk van de drie pijlers van de modernisering vormde een fundamentele uitdaging voor de toekomst van niet-mededingingsbelangen:

Als deel van de eerste materiële pijler van de modernisering, bracht de Commissie een reeks richtsnoeren en mededelingen uit. Deze beleidsdocumenten strekten ertoe strikter economisch denken in te voeren in het EU-mededingingsrecht en –beleid en beperkten de rol van niet-mededingingsbelangen in Artikel 101 VWEU aanzienlijk. De Commissie oordeelde vervolgens dat vele niet-mededingingsbelangen niet meer van toepassing waren, hoewel ze voor de modernisering wel werden overwogen onder Artikel 101 VWEU.

Aangezien enkel de Commissie gehouden is tot navolging van haar beleidsdocumenten, kunnen nationale autoriteiten uiteenlopende interpretaties aannemen. Ze beschikken over een ruime beoordelingsbevoegdheid om hun aanpak tot belangenoverweging vorm te geven met oog op hun respectievelijke juridische, economische en sociale tradities. Dit draagt natuurlijk het risico dat Artikel 101 VWEU niet op een uniforme manier zou worden uitgevoerd doorheen de EU.

De laatste pijler introduceerde procedurele hervorming, door het notificatieregime te vervangen door een zelfbeoordelingsregime. Bijgevolg beoordeelt de Commissie de verenigbaarheid van een overeenkomst met Artikel 101 VWEU niet meer vóór diens uitvoering. Ondernemingen dienen zelf te evalueren of niet-mededingingsbelangen hun mogelijks concurrentiebeperkende overeenkomst kunnen rechtvaardigen.

Het gecombineerde effect van de drie moderniseringspijlers creëert het serieuze risico dat niet-mededingingsbelangen niet op een doeltreffende, uniforme en rechtszeker manier in aanmerking zouden worden genomen doorheen de EU. De veranderende rol van niet-mededingingsbelangen is al uiteengezet in een indrukwekkende reeks rechtsgeleerdheid, vanuit historisch, constitutioneel en economisch perspectief. Doch tot op heden is er slechts in beperkte mate aandacht besteed aan de daadwerkelijke manier waarop de EU en nationale autoriteiten deze afweging maken.

Bijgevolg past dit proefschrift een nieuwe en originele combinatie toe van empirische, doctrinaire en normatieve benaderingen. Dit onderzoekt baseert zich op een wijde kwantitatieve en kwalitatieve analyse van alle Artikel 101 VWEU-procedures die werden gevoerd door de Commissie, de EU-gerechten, de nationale mededingingsautoriteiten, en de rechtbanken van vijf representatieve Lidstaten, vanaf de creatie van de EEG in 1958 tot 2017. De empirische inzichten in dit proefschrift zijn gebaseerd op meer dan 3100 procedures, en bieden een overzicht van de manier waarop deze afweging gebeurt in de praktijk. Deze empirische benadering helpt niet alleen bij de identificatie van expliciete afwegingsvormen die door handhavers gebruikt worden wanneer ze openlijk niet-mededingingsbelangen overwegen; het werpt ook licht op de zogenaamde ‘donkere materie’ van belangenafweging, namelijk de onzichtbare afweging van belangen die wordt veroorzaakt door de institutionele opzet of specifieke procedures van de mededingingshandhavers.

De empirische bevindingen onthullen in het bijzonder zes afwegingsinstrumenten die werden gebruikt om rekening te houden met niet-mededingingsbelangen. Eerst onderzoekt het
proefschrift materiële afwegingsmiddelen, met name (i) de vrijstellingen/uitzonderingen onder Artikel 101(3) VWEU; (ii) groepsvrijstellingsverordeningen; en (iii) Artikel 101(1) uitzonderingen. Ten tweede bestudeert het proefschrift (iv) nationale afwegingsmiddelen, afkomstig uit de regels van de Lidstaten. En ten slotte bestudeert het procedurele afwegingsinstrumenten, ingebed in (v) de maatregelen opgelegd voor inbreuken van Artikel 101 VWEU (toezeggingen aanvaarden of boetes matigen) en in (vi) de prioriteitskeuzes van de verschillende handhavingsinstanties.

Dit proefschrift is georganiseerd rond deze zes afwegingsinstrumenten. Elk hoofdstuk biedt een empirisch en juridisch overzicht van één bepaald instrument en brengt de kwantitatieve en kwalitatieve kenmerken in kaart van het gebruik van dit afwegingsinstrument in de praktijk. Het benadrukt hoe vaak beroep wordt gedaan op dit instrument en hoe vaak het wordt aanvaard, en analyseert het type voordelen dat in aanmerking werd genomen, het afwegingsproces en de intensiteit van de controle. Bovendien onderzoekt elk hoofdstuk de rol die EU of nationale gerechten spelen in het controleren van de toepassing van het afwegingsinstrument. Het illustreert dat de verschillende gerechten belangenafweging op uiteenlopende manieren benaderen, en dat de discretionaire kracht die ze toevertrouwen aan de Commissie en nationale mededingingsautoriteiten bijgevolg ook uiteenloopt. Tot slot evalueert elk hoofdstuk ook de verenigbaarheid van het afwegingsinstrument met de doelstellingen van Artikel 101 VWEU-handhaving (i.e. doeltreffendheid, uniformiteit en rechtszekerheid).

Het proefschrift ontkracht de algemeen aanvaarde opvatting dat de modernisering van het EU-mededingingsrecht leidde tot de verwijdering van niet-mededingingsbelangen uit de handhaving van Artikel 101 VWEU. Het toont aan dat niet-mededingingsbelangen een belangrijke rol spelen in de handhaving van Artikel 101 VWEU, en dat ze dat zijn blijven doen. Desondanks valt er een opmerkelijke drievoudige verschuiving op te merken in de manier waarop niet-mededingingsbelangen worden benaderd in het post-moderniseringsstijdperek:

Allereerst toont het proefschrift aan dat het type afwegingsinstrument dat in de praktijk wordt gebruikt is veranderd, met een geleidelijk overstap van materiële naar procedurele instrumenten. Vóór de modernisering werd het afwegingsdebat voornamelijk gevoerd in de context van de materiële instrumenten ingebed in Artikel 101(1) en 101(3) VWEU, zo toont het aan. Echter, na de modernisering werden deze nog amper ingeroepen of aanvaard. Het debat
vindt nu plaats in de context van nationale en procedurele afwegingsinstrumenten, namelijk bij het beschikken over maatregelen of het maken van prioriteitskeuzes.

Ten tweede identificeert het proefschrift dat er een verschuiving in locus plaatsvond: van afwegingen gemaakt op het niveau van de EU naar afwegingen op het niveau van de Lidstaten. Het onthult een wederzijds bepalend verband tussen de afwegingsprincipes op EU-niveau en op nationaal niveau. Het is niet alleen zo dat de Lidstaten beïnvloed worden door EU-afwegingsregels wanneer ze Artikel 101 VWEU uitvoeren; zij oefenen ook een invloed uit op de draagwijdte van het verbod in Artikel 101 VWEU wanneer ze de EU-afwegingsinstrumenten interpreteren en unieke nationale regels vaststellen. Modernisering heeft, bijgevolg, een nieuwe opportuniteit gecreëerd voor de Lidstaten om het EU-kader voor de afweging van belangen te interpreteren en aan te vullen.

Ten derde meldt het proefschrift een verandering in de institutionele dynamiek waarbinnen deze afwegingen plaatsvinden. Het toont aan dat de EU-gerechten, en dan voornamelijk het Hof van Justitie van de Europese Unie, in het verleden een actieve rol speelden in de vormgeving van de afwegingsprincipes. Wanneer de Commissie echter de substantiëve modernisering op gang trok begin jaren 2000, nam het ook de leiding in de verdere ontwikkeling van deze principes. Hoewel de EU-gerechten zich niet volledig hebben verzoend met de nieuwe aanpak van de Commissie (bv. met betrekking tot het soort voordelen dat kan worden onderzocht onder het Artikel, de verwijzing naar de nauwe korte-termijn consumentenwelvaart standaard, het beroep enkel op economisch bewijs, de nieuwe aanpak van de Commissie met betrekking tot restricties die strekken tot beperking van de mededinging), hebben ze geen duidelijk standpunt ingenomen over deze kwestie. In plaats daarvan hebben de EU-gerechten slechts een passief-reactieve rol gespeeld in de kwestie van belangenafwegingen na de modernisering.

Het proefschrift concludeert dat deze drie verschuivingen, in de specifieke context van belangenafwegingen, de verwezenlijking hebben belemmerd van de uiteindelijke doelstellingen van Verordening 1/2003, namelijk een doeltreffende, uniforme en rechtszekerheid handhaving van de regels. Met moet bijgevolg concluderen dat, hoewel de modernisering van het EU-mededingingsrecht mogelijks een succes was in het algemeen, het een contraproductief effect heeft gehad op de afweging van niet-mededingingsbelangen onder Artikel 101.
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Destiny, as Carlos Ruiz Zafón once said, does not usually do home visits. You just have to go for it. The writing of this dissertation certainly involved a number of just-going-for-it moments. Beyond the obvious geographical move(s), it also entailed going back to academia, diving into the mysteries of EU law and culture, and away from my natural comfort zones. Just going for it has, undoubtedly, led me through some of the most exciting years of my life, largely due to the amazing community and environment accompanying it.

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